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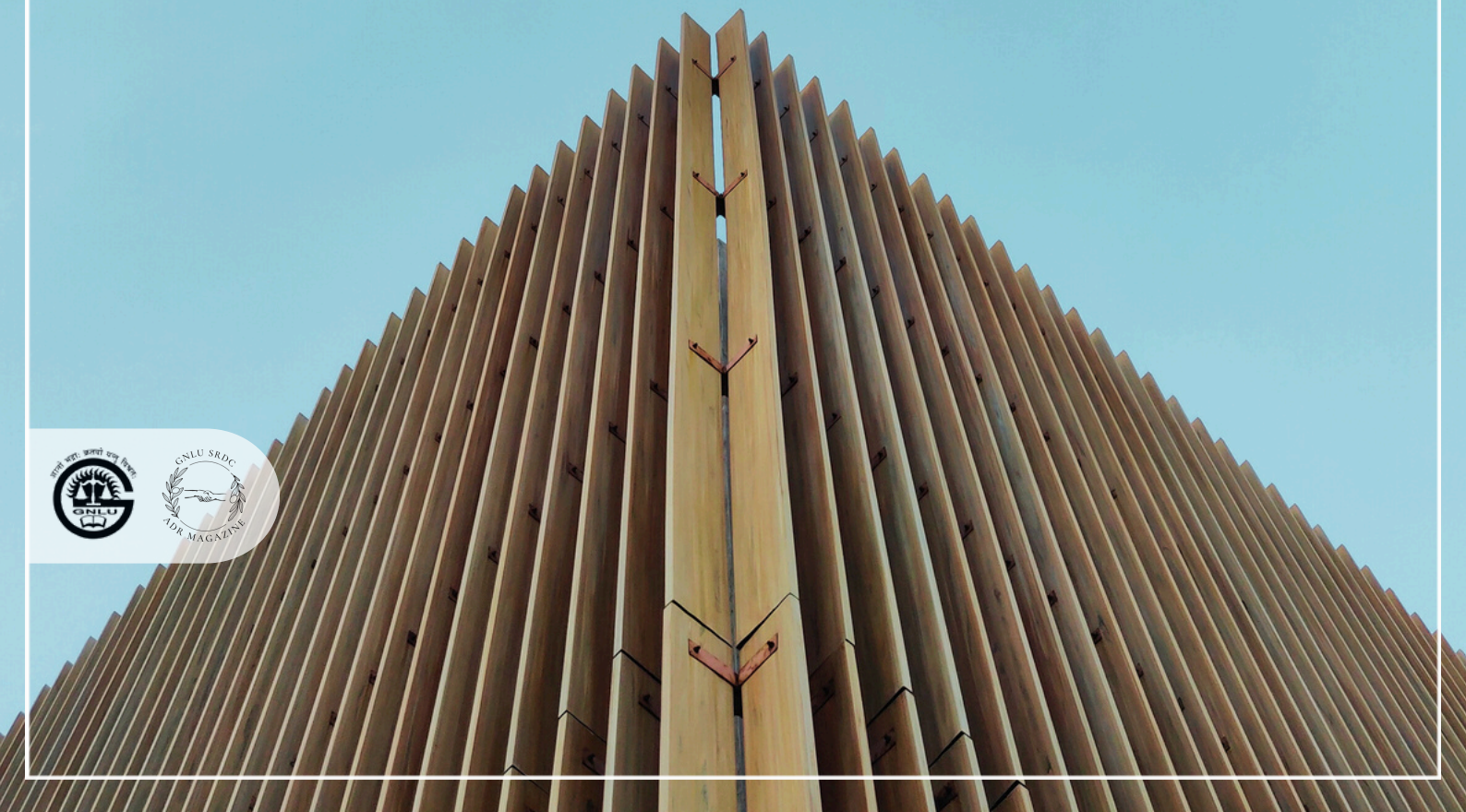

# FOREWORD

## Prof. (Dr.) S. Shanthakumar

*Director, Gujarat National Law University*

As Director of GNLU, it gives me profound satisfaction to present the GNLU SRDC ADR Magazine. Since its inception in 2020, the Magazine has established itself as a pioneering platform in India's Alternative Dispute Resolution (ADR) discourse, publishing four volumes and twelve issues that have consistently advanced the understanding and practice of ADR in our nation.

The significance of ADR in today's legal landscape cannot be overstated. India's journey toward building an effective and internationally aligned ADR framework has been marked by transformative changes. While this path has presented its challenges, these very challenges underscore the vital importance of academic debate and research in refining and strengthening our ADR systems.

The Magazine distinguishes itself through its innovative structure: scholarly articles examining contemporary issues, a Round Up section covering significant developments, and interviews with leading legal luminaries. This comprehensive approach ensures readers benefit from both academic insights and practical expertise from the field.

We are profoundly honoured to have the steadfast guidance of our esteemed advisory board, led by Justice Dipak Misra, Former Chief Justice of India. His profound insight and visionary perspective have been instrumental in shaping this publication's scholarly path, ensuring it remains a rigorous and dynamic forum for advancing ADR. The invaluable counsel of our advisory board members has maintained the highest standards of academic integrity, relevance, and depth.

At the core of this publication lies our remarkable student editorial board, whose dedication to advancing ADR knowledge is truly inspiring. Working closely with experienced external peer reviewers, they have consistently produced a publication that sets a benchmark for student-led academic initiatives and exemplifies the scholarly excellence that defines GNLU. Their commitment to each edition has been instrumental in the Magazine's growth and relevance in the ADR community.

As we release this issue, we remain confident that the Magazine will continue to enrich its readership and play a vital role in shaping the future of ADR in India. We hope these pages serve not only as an academic resource but as a catalyst for progressive thought, inspiring readers to engage deeply with contemporary ADR issues. We look forward to the Magazine's continued growth, sustained by the support of our readers, advisors, and contributors.

# ABOUT THE MAGAZINE

The ADR Magazine was launched in 2020 under the aegis of GNLU's Student Research Development Council. The Magazine, now in its fourth year of operations, is a tri-annual student-run publication that publishes articles pertaining to the field of Alternative Dispute Resolution. The Magazine aims to keep pace with the recent developments, judicial decisions, and practices being adopted in Indian and foreign jurisdictions and promote a comparative and interdisciplinary understanding of various dynamics shaping this domain of law. Throughout its stint, the Magazine has successfully published 5 Volumes and 13 Issues featuring articles from notable practitioners and interviews with industry leaders.

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# Contents

# NOTE FROM THE EDITORS

We extend our heartfelt gratitude to our readers, advisors, peer reviewers, contributors, and everyone involved with this magazine for their unwavering support and commitment. Your faith in our vision has been vital to the success and growth of this magazine, now proudly in its fifth edition. As the Magazine continues to make strides and build a respected presence in the field, we look forward to reaching an even broader audience. We hope this platform will catalyse the free exchange of ideas further and provide a valuable learning resource for students and professionals dedicated to Alternative Dispute Resolution.

We are elated to announce the publication of Volume V Issue III of the Magazine. This Issue features an exclusive interview with Mr. Karan Joseph, a partner with the Dispute Resolution Practice at Shardul Amarchand Mangaldas & Co.. He specialises in litigation, arbitration, and strategic advisory and has a diverse practice that spans commercial, civil, employment, and constitutional law. We take this opportunity to extend our gratitude to Mr. Joseph for engaging with us and sharing his valuable insights.

This Issue presents six meticulously curated articles, each exemplifying the highest standards of academic integrity and research quality that define the GNLU Academia. We are proud to uphold these standards within the pages of this Issue, which brings together insightful perspectives on pressing contemporary issues in the realm of Alternative Dispute Resolution. We trust that our readers and contributors will continue to recognize and support our commitment, helping us maintain the quality and standards of the Magazine.

We hope our readers will enjoy reading this Issue as much as we have in assembling it.

GNLU SRDC ADR MAGAZINE
VOLUME V | ISSUE III

# INJUNCTIONS AGAINST INVOCATION OF BANK GUARANTEES UNDER SECTION 17 OF THE ARBITRATION AND CONCILIATION ACT: SHOULD COURTS INTERFERE?

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## Introduction

Section 17 of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] deals with the interim measures that may be ordered by the arbitral tribunal.[1] Section 37(2)(b) of the Arbitration Act further provides that an appeal shall lie to the Court from an order of the arbitral tribunal granting or refusing to grant interim measures under Section 17 of the Arbitration Act.[2] While Section 37 mentions that an appeal shall be maintainable against such orders passed by the arbitral tribunal, it is silent on the grounds on which such an appeal may be filed. Different High Courts have elaborated on various grounds which an appellate Court may consider when faced with a challenge against an interim order of the arbitral tribunal. However, there are no fixed standards of review.

In commercial contracts, bank guarantees are often issued to ensure that in case the issuing party breaches the contract, the aggrieved party can encash the bank guarantee, and reimburse itself for any anticipated losses or losses that have already been incurred. Whenever disputes arise between such contracting parties, the issuing party often seeks an injunction against the encashment of such bank guarantees for various reasons. Over the years, the Courts have laid down certain criteria which are to be satisfied before such injunctions are granted.

Part I of this article explains the principles which are to be considered by Courts before issuing such injunctions. Part II discusses the ambit of Section 37(2)(b) of the Arbitration Act. Part III elaborates how Courts should be dealing with injunctions or interim orders granted under Section 17 of the Arbitration Act. Finally, Part IV emphasises on the need for Courts to avoid intervention

[1] The Arbitration and Conciliation Act 1996, s 17.
[2] The Arbitration and Conciliation Act 1996, s 37(2)(b).

with interim orders which are given by an arbitral tribunal unless such intervention becomes absolutely necessary.

**Invocation of Bank Guarantees: When can Injunctions be Granted?**

Bank guarantees are used as performance securities to ensure that the issuing party or the guarantor does not renege on his contractual obligations. Unconditional bank guarantees further simplify this process by enabling the beneficiary to encash the guarantees on demand.

Courts generally deal with the invocation of conditional and unconditional bank guarantees differently. While the invocation of conditional bank guarantees is often restrained when there are pending disputes between the parties to a contract, the general principle regarding unconditional bank guarantees is that they should not be interfered with when challenged. This is because unconditional bank guarantees are absolute in nature, and essentially form a separate contract between the concerned parties.[3] While considering injunctions against the encashment of unconditional bank guarantees, Courts typically do not intervene unless the party seeking an injunction demonstrates a clear and egregious case of fraud, irretrievable injuries or special equities in its favour.[4] Additionally, the bank guarantee must also have been invoked in consonance with the terms of the bank guarantee itself.[5]

Firstly, the fraud in question must be of an egregious nature which vitiates the entire transaction, i.e., the transaction between the lender(s) and the borrower(s) which led to the issuance of the guarantee. Further, the fraud must also be related with the actions of the parties before entering the contract.[6]

Secondly, irretrievable injuries have not been defined in any statute. Hence, what constitutes an irretrievable injury varies depending on the facts and circumstances of each case. One of the factors which is considered by Courts relates to whether the party seeking the injunction has a legal remedy which is adequate to compensate the party for any injuries caused by the invocation of the bank guarantee.[7] However, in *U. P. State Sugar Corp. v Sumac International Ltd.,* the Supreme Court also clarified that exceptional circumstances which make it impossible for the guarantor to reimburse

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[3] *Himadri Chemicals Industries Ltd. v Coal Tar Refining Co.* (2007) 8 SCC 110.
[4] *United Commercial Bank v Bank of India & Ors.* (1981) 2 SCC 766; *U.P. Coop. Federation Ltd. v Singh Consultants and Engineers Pvt. Ltd.* (1988) 1 SCC 174; *State of Maharashtra & Anr. v National Construction Co., Bombay & Anr.* (1996) 1 SCC 735; *BSES Ltd. (Now, Reliance Energy Ltd.) v Fenner India Ltd. & Anr.* (2006) 2 SCC 728.
[5] *Millenium Wires Pvt. Ltd. v State Trading Corporation of India Ltd. & Ors.* (2015) 14 SCC 375; *Andhra Pradesh Pollution Control Board v CCL Products (India) Ltd.* (2019) 20 SCC 669.
[6] *Reliance Salt Ltd. v Cosmos Enterprises & Anr.* (2006) 13 SC 599.
[7] *DLF Ltd. v Leighton India Contractors Pvt. Ltd. & Anr.* (2021) SCC OnLine Del 3772.

himself once he ultimately succeeds, have to be decisively established and a mere apprehension that the other party would not be able to pay is not enough to seek an injunction.[8]

Thirdly, the concept of special equities is extremely broad, and the varying interpretations by different Courts have given rise to a complex jurisprudence on the subject. Since special equities require the existence of exceptional conditions, the distinction between circumstances causing irretrievable injuries to the party seeking an injunction, and those leading to special equities in favour of such a party have become increasingly blurred. In many situations, the Courts have considered the existence of irretrievable injury and special equities as forming the similar criteria.[9] This also led to special equities being considered as a ground for granting an injunction only when irretrievable injury has been established by the party seeking the injunction.[10]

Interestingly, in *Standard Chartered Bank v Heavy Engineering Corp. Ltd.* ["**Standard Chartered Bank**"], the Supreme Court recognised special equities as a separate ground for seeking an injunction.[11] However, the Court did not clearly define the scope of special equities. Thereafter, special equities have often been evaluated after considering whether the party seeking an injunction would get unfairly prejudiced by the invocation of the bank guarantee even when no prima facie fault is attributable to it.[12] The main idea behind this is to ensure that the party seeking the encashment of the guarantee does not unjustly enrich himself by such invocation. Hence, post the judgement in *Standard Chartered Bank,* special equities are often established based on the prima-facie breach rule which involves a preliminary determination by Courts as to whether the reasons given for the invocation of the guarantee hold any merit or whether no fault can be attributed to the party seeking an injunction against the invocation of the guarantee.

**Interplay Between Section 17 and Section 37(2)(b): The Scope of Interference**

Section 17 of the Arbitration Act provides for interim measures that may be granted by the arbitral tribunal. Section 37(2)(b) of the Arbitration Act further provides for an appellate mechanism to challenge such interim orders. However, in the absence of legislative standards of review, different Courts have preferred different grounds of evaluation.

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[8] *U.P. State Sugar Corp. v Sumac International Ltd.* (1997) 1 SCC 568.
[9] *Vinitec Electronics Pvt. Ltd. v HCL Infosystems Ltd.* (2008) 1 SCC 544.
[10] *U.P. State Sugar Corp.* (n 8); *Indu Projects Ltd. v Union of India* (2013) SCC OnLine Del 4601.
[11] *Standard Chartered Bank v Heavy Engineering Corp. Ltd*. (2020) 13 SCC 574.
[12] *Svenska Handelsbanken v M/s Indian Charge Chrome & Ors.* (1994) 1 SCC 502.

Several decisions have emphasised that the scope for judicial interference with interim orders passed by arbitral tribunals is limited,[13] and since the relief under Section 17 of the Arbitration Act is discretionary in nature, Courts generally refrain from interfering with such interim orders as long as the decision is guided by sound and reasonable judicial principles.[14] However, these orders have often been examined on merits.[15] Notably, the Delhi High Court has reiterated multiple times that the grounds considered while setting aside an award under Section 34 of the Arbitration Act shall also be applicable while evaluating interim orders under Section 37(2)(b) of the Arbitration Act.[16] In addition to the aforementioned grounds of evaluating the interim orders, another prudent approach which may be considered by Courts while adjudicating an appeal under Section 37(2)(b) can be the procedure followed by appellate Courts while dealing with appeals against interim injunctions under Order XXXIX, Rules 1 and 2, or Order XXXVIII, Rule 5 of the Code of Civil Procedure, 1908 ["**CPC**"].[17]

In *ITI Ltd. v Siemens Public Communication Network Ltd.*, the Supreme Court observed that even though no provision of the Arbitration Act links it to the procedure given in the CPC, the principles underlying the exercise of power by Courts while considering interim injunctions should be kept in mind while giving orders under Section 9 of the Arbitration Act.[18] The same principles may be applied to the discretion exercised by the arbitral tribunals under Section 17 of the Arbitration Act.[19]

Additionally, in *Wander Ltd. v Antox India Pvt. Ltd.* ["**Wander Ltd**."], the Supreme Court interpreted the scope of intervention while exercising the Courts' discretion, and remarked that the appellate Court should ideally not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except in situations where the discretion has been

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[13] *Subhash Chander Chachra & Ors. v Ashwani Kumar Chachra & Anr.* (2007) SCC OnLine Del 149; *Gainwell Commosales Pvt. Ltd. v Minsol Ltd. (Formerly Cuprum Bagrodia Ltd.)* (2022) SCC OnLine Cal 3975; *Karan Kirti Thakkar & Anr. v Badri Narayan Baldawa & Ors.* (2024) SCC OnLine Bom 4209; *Elster Instromet B.V. v Mrunal Gandhi* (2024) SCC OnLine Bom 350; *Prashant Mohta v Manoj Kumar Bothra & Ors.* (2024) SCC OnLine Cal 6613.

[14] *Ajanta Ltd. & Anr. v Ajanta Transistor Clock Manufacturing Co. & Ors.* (2013) SCC OnLine Del 3765; *Dalmia Cement (Bharat) Ltd. v Jaiprakash Associates Ltd*. (2020) SCC OnLine Del 393; *Karan Kirti Thakkar & Anr. v Badri Narayan Baldawa* (2024) SCC OnLine Bom 4209.

[15] *Intertoll ICS Cecons O & M Co. Pvt. Ltd. v National Highways Authority of India* (2013) SCC OnLine Del 447; *Amar Nagar (SRA) Sah. Gruhanirman Sanstha & Ors. v Vikas Narayan Raikar & Ors.* [2014] SCC OnLine Bom 1649; *Sanjay Gambhir v BDR Builders and Developers Pvt. Ltd.* (2016) SCC OnLine Del 5366; *NTPC Ltd. v Jindal ITF Ltd. & Anr.* (2017) SCC OnLine Del 11219.

[16] *Dinesh Gupta & Ors. v Anand Gupta & Ors.* (2020) SCC OnLine Del 2099; *Augmont Gold Pvt. Ltd. v One97 Communication Ltd.* (2021) SCC OnLine Del 4484; *Sanjay Arora & Anr. v Rajan Chadha & Ors.* (2021) SCC OnLine Del 4619.

[17] Code of Civil Procedure 1908, Ord XXXIX, rr 1 and 2; Ord XXXVIII, r 5.

[18] *ITI Ltd. v Siemens Public Communications Network Ltd.* (2002) 5 SCC 510.

[19] *Ajay Singh & Anr. v Kal Airways Pvt. Ltd.* (2017) SCC OnLine Del 8934.

exercised arbitrarily, capriciously or perversely, or where the Court has ignored the settled principles of law regulating grant or refusal of injunctions.[20]

This principle was adopted by the Delhi High Court in the context of arbitration in the case of *Shiningkart Ecommerce Pvt. Ltd. v Jiayun Data Ltd.*, wherein it was held that the appellate Court should not interfere with the exercise of discretion by the arbitral tribunal if the view taken by such tribunal is a plausible one and does not suffer from any perversity.[21]

While the aforementioned two judgements can be said to have specifically introduced perversity as a ground for setting aside interim orders under the Arbitration Act, the scope of such interference has been expanded by subsequent judgements. For instance, in *Sanjay Arora v Rajan Chadha*, while dealing with the scope of interference under Section 37(2)(b) of the Arbitration Act, the Delhi High Court relied on the principles laid down in *Wander Ltd.*[22] to further mention that the considerations guiding the exercise of appellate jurisdiction under Section 37(2)(b) of the Arbitration Act are fundamentally not much different from those which govern the exercise of jurisdiction under Section 34 of the Arbitration Act.[23]

Further, in *World Window Infrastructure Pvt. Ltd. v Central Warehousing Corp*., the Delhi High Court again reiterated that the principles applicable under Section 34 of the Arbitration Act while setting aside an award would also apply to Section 37(2)(b) of the Arbitration Act.[24] This essentially implies that before interfering with an award under Section 37, it must be seen if the arbitral tribunal has adopted a judicial approach, and has upheld the principles of natural justice or given an egregious decision which is bad in law.[25]

It must also be noted that the Arbitrators' views while considering an application under Section 17 of the Arbitration Act are merely of an interim nature. These views are not a final expression of their opinion regarding the disputes between the contracting parties. Hence, they may be modified at the stage of the final award and do not permanently prejudice any of the parties to the arbitration. Section 17 of the Arbitration Act is simply intended to be a protective measure for preserving the sanctity of the arbitral process. Therefore, the interim orders under Section 17 of the Arbitration Act should only be interfered with when the exercise of the arbitral tribunal's jurisdiction is arbitrary or unconscionable.

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[20] *Wander Ltd. & Anr. v Antox India Pvt. Ltd*. (1990) Supp SCC 727.
[21] *Shiningkart Ecommerce Pvt. Ltd. v Jiayun Data Ltd.* (2019) SCC OnLine Del 11464.
[22] *Wander Ltd.* (n 20).
[23] *Sanjay Arora & Anr. v Rajan Chadha & Ors.* (2021) SCC OnLine Del 4619.
[24] *World Window Infrastructure Pvt. Ltd. v Central Warehousing Corp*. (2021) SCC OnLine Del 5099.
[25] *Shubham HP Security Force Pvt. Ltd. v Central Warehousing Corp*. (2023) SCC OnLine Del 3035.

The aforementioned judgements further indicate that the powers under Section 37(2)(b) of the Arbitration Act should be exercised with caution. An appellate Court would be exceeding its jurisdiction if it interferes with a discretionary order made by the arbitral tribunal simply because there could have been another possible view based on the facts of the case.[26] Hence, the interim orders of the arbitral tribunal should be substituted only on the grounds of perversity, arbitrariness or manifest illegality.

**Injunctions against Bank Guarantees: The Discretion under Section 17**

As mentioned above, injunctions against the encashment of unconditional bank guarantees can be granted only if the party seeking the injunction, i.e., the applicant, establishes egregious fraud related to the contract, irretrievable harm faced by the applicant or special equities in his favour. While establishing fraud is a straightforward concept, the question of whether irretrievable harm has been suffered by the applicant, or special equities exist in his favour largely depends on the arbitral tribunal's interpretation of the facts of the case.

Hence, the exercise of the arbitral tribunal's powers under Section 17 of the Arbitration Act in granting or refusing to grant an injunction against the invocation of an unconditional bank guarantee should not be interfered with by Courts unless such exercise of discretion by the arbitral tribunal is found to be vitiated by arbitrariness or perversity. This is also in line with various precedents in which Courts have held that the jurisdiction under Section 37(2)(b) of the Arbitration Act should be exercised only in limited circumstances.[27]

However, in *Director General, Project Varsha v Navayuga-Van OORD JV*, the Delhi High Court set aside the injunction granted by the arbitral tribunal against the encashment of the bank guarantee in question simply because the Court took an alternative view to that of the arbitral tribunal, which believed that special equities existed in favour of the applicant. The Court set aside the interim order by holding that the suit was not fit to be granted an injunction.[28] Even in *National Highways Authority of India v VIL Rohtak Jind Highway Pvt. Ltd.*, the Delhi High Court set aside an interim order in which the Court felt that the arbitral tribunal should have given a more conclusive finding related to the facts of the case before restraining the encashment of the performance guarantee.[29]

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[26] *Tahal Consulting Engineers India Pvt. Ltd. v Promax Power Ltd.* (2023) SCC OnLine Del 2069.
[27] *Managing Director, Army Welfare Housing Organisation v Sumangal Services Pvt. Ltd.* (2004) 9 SCC 619.
[28] *Director General, Project Varsha v Navayuga-Van OORD JV* (2024) SCC OnLine Del 6459.
[29] *National Highways Authority of India v VIL Rohtak Jind Highway Pvt. Ltd.* [2019] SCC OnLine Del 6545.

In both of the aforementioned cases, the Court did not make any observations as to how the decisions of the arbitral tribunals were bad in law but merely differed with the tribunals' interpretation of the facts of the case. In light of the above, it is imperative to understand what constitutes arbitrariness or perversity in terms of injunctions against unconditional bank guarantees. The grant of an injunction by the arbitral tribunal against the invocation of an unconditional bank guarantee merely because of the existence of a contractual dispute between the parties would certainly be erroneous since the bank guarantee constitutes a separate contract. Further, if the tribunal considers only the dispute between the parties, and fails to evaluate whether the applicant had made out a case of irretrievable injuries or special equities in its favour, such an order would also be against the established principles of law and indicate perversity.

However, it is only if the arbitral tribunal fails to consider the facts and evaluate if a case has been made for the grant of an injunction against a guarantee that the Courts must interfere with such interim orders. A mere difference of opinion or an alternative view on whether the facts indicate the existence of an irreparable injury or special equities in favour of the party seeking an injunction would not merit interference with the interim orders under Section 37(2)(b) of the Arbitration Act.

**Conclusion**

While bank guarantees are crucial for commerce and commercial transactions, certain circumstances often give rise to situations where conditions like egregious fraud, irretrievable injuries and special equities justify injunctions restraining the invocation of such guarantees. In any event, irretrievable injuries along with special equities are evolving concepts, and Courts are slowly becoming more liberal towards the same.

Based on an analysis of the aforementioned judgements related to the invocation of unconditional bank guarantees, the Author believes that since the Hon'ble Supreme Court itself has held that there should be minimal court intervention in arbitral proceedings,[30] interim orders dealing with injunctions against bank guarantees should not be interfered with unless the order in question is prima facie perverse and the arbitral tribunal has not considered the relevant factors necessary to grant such an injunction. A mere difference of opinion regarding certain facts related to the existence of irretrievable harm or special equities in favour of the applicant should not merit any interference with the interim orders under Section 37(2)(b) of the Arbitration Act.

[30] *National Highways Authority of India v Gwalior-Jhansi Expressway Ltd.* (2018) 8 SCC 243.

Further, the scope of interference with interim orders under Section 17 of the Arbitration Act should be even more restricted than the scope of interreference under Section 34 of the Arbitration Act. This is because the principle of restraint is even more stringent at the interim stage than at the final stage since any interference with the interim orders may adversely affect the arbitral proceedings.[31]

The primary reason behind the 2015 amendment to the Arbitration Act, which clarified that arbitral tribunals exercised the same powers as those wielded by Courts under Section 9 of the Arbitration Act had been to discourage the contracting parties from approaching Courts for interim relief regarding matters which ultimately fell in the domain of the arbitral tribunals. Hence, in the absence of prima facie perversity in such decisions, Courts should refrain from interfering with the interim orders granted under Section 17 of the Arbitration Act.

[31] *Lava International Ltd. v Mintellectuals LLP* (2024) SCC OnLine Del 6908.

GNLU SRDC ADR MAGAZINE
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# COURT VS. CODE: WHY INDIA NEEDS BLOCKCHAIN ARBITRATION TO SURVIVE THE DECENTRALISED ERA

**AUTHOR**

Ms. Tamanna Jindal

Advocate

*"In the DeFi world, trust is algorithmic, until it breaks. Arbitration is the human patch that keeps the system fair."*

*~Federico Ast, Co-Founder, Kleros*

## Introduction

Can you imagine a world where contracts execute themselves? Where money moves without banks, and disputes are settled without courts? That is the promise of blockchain. A decentralized system where transactions are undisputable and transparent. But what happens when things go wrong? When a Bangalore startup's smart contract bug freezes an Estonian freelancer's Bitcoin payment, and the startup claims that "Code is Law"? Who will resolve this? Not your local civil court. This is the reality of blockchain disputes. Smart contracts fail, Decentralized Autonomous Organisations ["**DAOs**"] face a deadlock in governance disputes, cryptocurrency exchanges freeze funds, traditional courts struggle with pseudonymous parties, cross-border enforcement, and technical complexities of code-based agreements. With India's crypto adoption surging, arbitration seems to be the only way to survive the decentralised era. But there is a catch. India's Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"][1] was not built for machines arguing with machines. This article unpacks why blockchain arbitration is not just an option but a necessity for India's decentralised future.

## Why Traditional Courts Cannot Handle Blockchain Disputes

Using traditional courts for blockchain disputes is like forcing a Tesla to run on diesel. The systems are fundamentally incompatible due to the clash between "Code is Law" and "Law is Code." Blockchain operates on a foundational principle that "Code is Law." Smart contracts execute

[1] The Arbitration and Conciliation Act 1996.

automatically based on a predefined logic, with no human intervention. But when disputes arise, such as bugs, exploits, or unintended outcomes, traditional legal systems hit a wall. This is because smart contracts are written in programming languages, and judges who are trained in contract law, lack the technical expertise to audit code or determine if a bug constitutes a "breach." In the 2020 Singapore case of *Quoine v B2C2,* a crypto exchange smart contract erroneously executed trades at 250 times the market price.[2] The court had to rely on expert witnesses to interpret the code, which is a slow and expensive process.

Blockchain transactions are irreversible. If a smart contract drains a user's wallet due to a coding error, courts cannot undo it. The Indian Contract Act, 1872, allows contracts to be voided for "mistake" or "fraud",[3] but can a judge void a smart contract that performed exactly as coded? In 2016, a hacker exploited a flaw in the DOA, a decentralized fund, and stole over 50 million dollars in Ethereum ["**ETH**"]. The ETH community controversially reversed the hack via a hard-fork.[4] What this tells us is that when code fails, communities, and not courts, decide the outcomes. Traditional litigation is slow for crypto markets.

Blockchain is borderless by design, but courts are territorial. This creates three nightmares. Firstly, pseudonymous parties. Transactions occur between wallet addresses, not named entities. Under the Code of Civil Procedure, 1908, lawsuits require identifiable defendants.[5] How do you serve summons to a wallet address? This cripples traditional litigation, but arbitration could mitigate this through Know Your Customer ["**KYC**"] linked smart contracts or escrow smart contracts that freeze funds until disputes are resolved. However, enforcement remains the ultimate challenge. Even if you win, how do you get paid? Imagine winning a judgement against a pseudonymous crypto scammer, now what? Courts can order asset freezes, but how do you attach funds in a cold wallet controlled by an anonymous party? The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 allows banks to seize assets,[6] but crypto wallets are not "assets" under Indian law yet. Most enforcement relies on centralized exchanges for freezing funds. But scammers can bridge funds to privacy coins or decentralized exchanges and vanish forever. In 2018, in the case of *Gao Zheyu v Shenzhen Yunsilu Development Fund*, a Chinese court refused to enforce a crypto arbitral award, calling Bitcoin "illegal property".[7] In India, after

[2] *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 2.
[3] Indian Contract Act 1872, ss 17 and 19-22.
[4] Muhammad Mehar et. al., 'Understanding a Revolutionary and Flawed Grand Experiment in Blockchain: The DAO Attack' (2017) 21(1) Journal of Cases on Information Technology 19 <https://ssrn.com/abstract=3014782> accessed 30 May 2025.
[5] Code of Civil Procedure 1908, O I rr 3 and 10, O V and VII.
[6] Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002, s 13(4).
[7] *Gao Zheyu v Shenzhen Yunsilu Innovation Development Fund (L.P.) and Li Bin* (2018) (2018) Yue 03 Min Te No 719, Shenzhen Intermediate People's Court (China).

the case of *Internet and Mobile Association of India v Reserve Bank of India*, Crypto is not illegal, but its legal status is still ambiguous.[8]

Secondly, decentralized platforms mean no headquarters. Most DeFi protocols are run by DAOs with no physical headquarters. The 2021 Binance's Outage led to a class-action arbitration in Hong Kong. But Binance's terms listed no physical seat, forcing claimants to target shell entities in Malta and the Caymans.[9] Thirdly, conflicting laws. A smart contract could interact with users in India (where crypto is taxable), China (where it is banned), and El Salvador (where it is a legal tender).

**How Arbitration Fits the Crypto Puzzle**

Blockchain disputes demand a system that aligns with their decentralized, borderless, and automated nature. Traditional litigation struggles here, but arbitration, because of its flexibility, neutrality, and enforceability, offers a tailored solution through Smart Legal Contracts ["**SLCs**"], that act as a bridge between code and law. Pure smart contracts lack dispute resolution mechanisms. They execute rigidly, even if outcomes are unfair due to bugs or unintended interpretations.

Question arises whether arbitrators should override code. This question usually has two arguments. The equity argument, that says "Yes." That arbitrators should apply principles of fairness, such as UNIDROIT Principles, to modify outcomes. As seen in the 2016 DAO hack, communities sometimes prioritise fairness over immutability, a precedent that complicates arbitration's role. However, the predictability argument says "No," because if arbitrators frequently override code, the certainty in smart contracts would erode, and businesses may avoid blockchain if rulings are unpredictable. Therefore, a middle ground hybrid approach is best suited, where technical correctness is determined first, as to whether the code executed as designed, and equity review is done only for clear injustice. SLCs merge the code with natural language arbitration clauses and create a hybrid that is enforceable under existing laws. For example, adding a clause "*Any dispute arising from this contract shall be resolved by binding arbitration under UNCITRAL Rules, seated in Singapore, with English law governing. The arbitral award may be enforced via smart contract execution*."

This works for India for three reasons. Firstly, it becomes enforceable because it satisfies the "written agreement" requirement of the Convention on the Recognition and Enforcement of

[8] *Internet and Mobile Association of India v Reserve Bank of India* (2020) 10 SCC 1.
[9] Cayetana Santaolalla, 'Resolving Crypto Disputes through Arbitration: the Binance Case Before the Hong Kong International Arbitration Center (HKIAC)' (2024) 18 The Law. Mediación y arbitraje 9 <https://ssrn.com/abstract=4826015> accessed 30 May 2025.

Foreign Arbitral Awards, also known as the New York Convention, which is recognized by India.[10] And it complies with Arbitration Act under Section 7 which accepts electronic agreements.[11] Secondly, it facilitates technical expertise as parties can select arbitrators who are fluent in blockchain, unlike overburdened judges who are unfamiliar with the technical aspects of blockchain, such as "oracle manipulation" and "re-entrancy attacks." Thirdly, the enforcement can be automated. Awards can be programmed into escrow smart contracts that release funds only after arbitration concludes. The 2013 Amendment to the Arbitration Act[12] embraced electronic communications, which paved the way for SLCs. The Internet and Mobiles Association verdict implicitly validated blockchain based agreements as legally recognizable.[13]

Hybrid arbitration can help in blending human judgment with blockchain efficiency. In the 2020 Kleros case, a Mexican civil court upheld and enforced an arbitration award that was substantively governed by the Kleros blockchain arbitration protocol. In this case a rental dispute was resolved via a hybrid process, where a human arbitrator drafted the legal framework and evidence standards, Kleros' Blockchain Jury (token holding jurors) voted on the outcome, and the award was formalized under Mexican law.[14] This model can be adapted to India. The Mumbai Centre for International Arbitration ["**MCIA**"] or Delhi International Arbitration Centre ["**DIAC**"] could pilot a hybrid division, combining a technical panel with blockchain savvy arbitrators, and tokenized voting where use of decentralized juries is limited to factual determinations. Indian courts could treat hybrid awards like foreign awards under Part II of the Arbitration Act. However, Indian courts may hesitate at delegating decision-making to pseudonymous jurors. A phased approach could ease the adoption.

Adopting this model with decentralized juries offers India many advantages. It could increase the speed in the dispute resolution process. Disputes can be resolved in days instead of years in Indian courts, where the average case pendency is more than three years.[15] It will promote transparency as all votes and evidences are on-chain, which reduces corruption risks. It will also facilitate global neutrality as it eliminates home-court advantage in cross border disputes. But every coin has two sides, therefore there are some drawbacks as well, such as wealth bias. Users with more tokens

[10] The Arbitration and Conciliation Act 1996, s 44.
[11] Ibid s 7.
[12] The Arbitration and Conciliation (Amendment) Act 2013
[13] Ibid.
[14] Mauricio Virues Carrera, 'How to Enforce Blockchain Dispute Resolution in Court: The Kleros Case in Mexico' (*Kleros Blog*, 22 July 2020) <https://blog.kleros.io/how-to-enforce-blockchain-dispute-resolution-in-court-the-kleros-case-in-mexico/> accessed 30 May 2025.
[15] National Judicial Data Grid, 'Dashboard' (*National Judicial Data Grid*) <https://njdg.ecourts.gov.in/njdg_v3/> accessed 30 May 2025.

wield greater influence. This will lead to the rich getting richer justice. Another drawback is the legal uncertainty. Indian law lacks clarity on whether token-holder decisions qualify as arbitration.

**India's Path Forward**

India's Arbitration Act was designed for traditional commercial disputes, not for smart contracts, DAOs, or cross border crypto transactions. Before adopting blockchain arbitration and to make it more viable, India must stabilise and modernise its regulatory framework. Legal uncertainty and regulatory whiplash are the biggest roadblocks in the effective adoption of blockchain in India. In 2018, Reserve Bank of India ["**RBI**"] banned banks from serving crypto firms, resulting in exclusion of crypto businesses from traditional arbitration.[16] In 2020, the Supreme Court overturned the RBI ban and arbitration clauses regained relevance.[17] In 2022, a 30 percent crypto tax and 1 percent TDS was imposed, which resulted in increased compliance burden, and arbitration was needed for tax disputes.[18] Back in 2021, Indian government drafted the Cryptocurrency and Regulation of Official Digital Currency Bill ["**the Bill**"] to bring more clarity to digital asset regulations.[19] But the bill stalled in Parliament, leaving crypto's legal status uncertain. Later in 2023, the finance minister brought Virtual Digital Assets under the Prevention of Money Laundering Act.[20] This forced crypto businesses to follow stricter anti-money laundering ruled and enforce KYC checks. In 2024, Securities Exchange Board of India ["**SEBI**"] suggested a multi-regulator system to oversee crypto activities, signalling a push for more organised oversight, while RBI maintains its wary stance, warning of potential economic risks associated with digital currencies.[21] If India suddenly bans DeFi, arbitration awards will be invalidated and it will become uncertain whether courts will enforce awards involving illegal activities. This uncertainty can be strategically mitigated by explicit legal recognition.

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[16] Reserve Bank of India, 'Prohibition on dealing in Virtual Currencies (VCs)' (*Reserve Bank of India*, 6 April 2018) <https://www.rbi.org.in/Commonman/English/Scripts/Notification.aspx?Id=2632> accessed 31 May 2025.

[17] ibid.

[18] Sneha Kulkarni, 'Cryptocurrency Tax News: Budget 2022 levies 30% tax and TDS on crypto assets' (*The Economic Times*, 3 February 2022) <https://economictimes.indiatimes.com/wealth/tax/budget-2022-levies-30-tax-and-tds-on-crypto-assets/articleshow/89267756.cms?from=mdr> accessed 31 May 2025.

[19] Resmi C S, 'Analysis of The Crypto-Currency Bill 2021: A Regulatory Framework for Digital Currencies in India' (2022) 9(3) Journal of Emerging Technologies and Innovative Research e141 <https://www.jetir.org/papers/JETIR2203419.pdf> accessed 1 June 2025.

[20] Government of India, Ministry of Finance, Department of Economic Affairs, Virtual Digital Assets (VDA) Regulation (*Lok Sabha Unstarred Question No. 3418*, 16 December 2024) <https://sansad.in/getFile/loksabhaquestions/annex/183/AU3418_RjYPEN.pdf?source=pqals#:~:text=Notwithstanding%20that%2C%20government%20vide%20notification,within%20the%20ambit%20of%20PMLA.> accessed 1 June 2025.

[21] Dipannita Saha, 'The New Age of Crypto: India's 2024 Regulatory Framework Unveiled' (*IMPRI*, 9 September 2024) <https://www.impriindia.com/insights/crypto-india-regulatory-framework/> accessed 2 June 2025.

Before amending the Arbitration Act, the RBI and SEBI could pilot blockchain arbitration models in sandboxes. For example, an on-chain enforcement, where when a dispute arises, parties can trigger arbitration via a smart contract function. Then an arbitrator or tokenized jury decides the case, and award is automatically enforced through oracle-triggered release.[22] This process holds significant potential as it eliminated enforcement delays and there would be no need for court intervention. In case of DAO dispute resolution, problem arises because DAOs operate through token holder votes, and what if a minority faction claims unfair governance? For this, a sandbox test can be created where a hybrid arbitration model is allowed, wherein a human arbitrator reviews procedural fairness and token holders vote on remedies and outcomes are enforced via DAO treasury smart contracts.

A very important step would be to recognize virtual arbitration seats. Under the current law, Section 2(2) of the Arbitration Act requires a physical seat of arbitration to determine jurisdiction and enforcement.[23] Blockchain disputes often lack a clear geographic centre. The parties could be in India, Singapore, and Estonia, interacting via a smart contract deployed on ETH. The Arbitration Act can be amended to recognize "virtual seats" when patties designate arbitration as "blockchain based" or "decentralized." This could provide legal certainty for blockchain businesses and prevent jurisdictional conflicts.

The next step would be to accept cryptographic signatures and smart contract records. Section 31 of the Arbitration Act requires arbitral awards to be "signed" by the arbitrator, and Section 34 allows challenges to awards based on procedural irregularities.[24] Blockchain arbitrations rely on wallet signatures rather than handwritten or electronic signatures under Information Technology Act, 2000.[25] The definition of "signature" can be expanded to include cryptographic wallet signatures.

Another troubling hurdle is the lack of technical expertise in legal systems. Judges and lawyers do not speak blockchain. Most Indian judges struggle with basic tech, let alone blockchain related knowledge. This results in poorly reasoned awards that misapply crypto concepts. Creating a roster of blockchain savvy arbitrators under MCIA or DIAC is critical, with a criterion for panellists such as legal and technical expertise, and certification programs. Similar global precedents already exist, such as Singapore International Arbitration Centre which has a tech list of arbitrators for digital

[22] Alexander Grishchenkov, 'Arbitrating Disputes Arising out of Smart Contracts' (2022) Russian Arbitration Association Journal 181 <https://journal.arbitration.ru/analytics/arbitrating-disputes-arising-out-of-smart-contracts/> accessed 31 May 2025.
[23] Arbitration and Conciliation Act 1996, s 2(2).
[24] ibid, ss 31 and 34.
[25] Information Technology Act 2000, ss 3A and 5.

disputes, and United Kingdom's ["**UK**"] Digital Dispute Resolution Rules, 2021 ["**DDDR**"] which allows tribunals to appoint tech experts.[26]

India could also benefit from learning from global precedents, such as Dubai's Virtual Assets Regulatory Authority ["**VARA**"]. VARA 2022 Regulations recognize arbitration for crypto disputes. It requires licensed Virtual Asset Service Providers to integrate dispute resolution clauses.[27] SEBI could mandate arbitration clauses for Indian crypto exchanges. UK's DDDR allows tribunals to freeze NFTs or crypto assets during disputes and permits AI-assisted decision-making.[28] India's Civil Procedure Code can be amended to allow interim crypto freezes, similar to asset injunctions. Wyoming's DAO Law, 2021 marked a breakthrough as it recognizes DAO as a legal entity that can sue and be sued. It mandates internal dispute resolution mechanisms.

In conclusion, blockchain arbitration is inevitable for India's crypto future, but only if regulators, courts, and businesses collaborate to address these roadblocks. India stands at a crossroads. Will it cling to outdated resolution mechanisms, or pioneer a blockchain arbitration framework that sets a global standard? The time to act is now. Policymakers should create a Blockchain Dispute Resolution Task Force, lawyers should start upskilling in crypto law and smart contract auditing, and businesses should embed arbitration clauses in all blockchain agreements. The decentralised future is not going to wait, and neither should we.

[26] Dr Sumeet Kumar, Swaroop George and Tanya Puri, 'India: The Arbitration And Conciliation (Amendment) Act, 2019: A Critical Analysis' (*Lexology*, 27 May 2021) <https://www.lexology.com/library/detail.aspx?g=8b298474-fd42-408d-bf84-0907b5632001> accessed 31 May 2025.

[27] Soham Jethani et. al., 'Scanning VASPs: Guidelines for Regulation of Virtual Assets and Virtual Asset Service Providers' (*Mondaq*, 27 January 2025) <https://www.mondaq.com/fin-tech/1574498/scanning-vasps-guidelines-for-regulation-of-virtual-assets-and-virtual-asset-service-providers> accessed 1 June 2025.

[28] UK Jurisdiction Taskforce, Digital Dispute Resolution Rules (April 2021) cl 2.

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# THE ARBITRATOR DECIDES, BUT THE JUDGE CORRECTS: THE RISE OF 'MANIFEST ERRORS' AND THE REFORM OF ARBITRAL REVIEW

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## Introduction

The promise of arbitration was intended to remedy the persistent delays, procedural weariness and startling case pendency that plague traditional litigation in India's legal system where the adage "*justice delayed is justice denied*" enviously reverberates through courtroom hallways.[1] Arbitration is a type of Alternative Dispute Resolution ["**ADR**"] that has become a valuable instrument for efficiency and re-establishing trust in prompt justice, as there are currently over four crore cases pending before Indian Courts.[2] It has been promoted as a symbol of contemporary justice that is easier to achieve, more flexible and less contentious. Nevertheless, there have been challenges along the way from promise to reality. What occurs when an arbitral ruling that is supposed to be final is abuzz with errors, be they computational anomalies, factual contradictions or glaring legal oversights, mistakes so obvious and unfair that a judge's silence might be seen as complicity? Can the Courts intervene in their limited review under Section 34 of the Arbitration and Conciliation Act, 1996 ["**Arbitration and Conciliation Act**"][3] to correct what is incorrect rather than reevaluate the merits?

In order to minimise the amount of judicial interference in arbitral judgements, Sections 34 and 37 of the Arbitration and Conciliation Act were created. Only specific grounds may be used to set aside an award under Section 34 and appeals from such rulings are governed by Section 37. Neither clause specifically addresses the authority to "modify" an award, this is because Section 34 is designed solely to enable setting aside an award on limited grounds such as illegality or conflict with public policy, and not to allow Courts to reassess or rewrite portions of the award. Thus, the

[1] Pratyaksh Garg, 'Role of ADR in Speedy Justice System in India' (2025) 5(6) IJLR 648 <https://ijlr.iledu.in/wp-content/uploads/2025/04/V5I663.pdf> accessed 7 June 2025.
[2] ibid.
[3] The Arbitration and Conciliation Act 1996, s 34.

Supreme Court's recent judgement in *Gayatri Balasamy v ISG Novasoft Technologies Ltd.* [4] ["**Gayatri Balasamy**"], has sought to address the statutory silence in the Arbitration and Conciliation Act regarding whether Courts possess the authority to 'modify' arbitral awards.

Despite being presented as a technical debate over legislative authorities, this case invites a more thorough investigation of the essence of arbitral finality. The majority ruling in states that the Court can identify and solve "manifest errors"[5] without re-examining the case's main arguments. On the other hand, acknowledging this makes us think about a manifest error. Are Courts able to handle such complex cases with care? In addition, does it have an impact on the finality of arbitration? Instead of applauding the growth of judicial discretion, this research effort aims to challenge its limits and examine remedies that protect justice and arbitral autonomy.

**The Grammar of Justice and the Syntax of Arbitration**

The issue started as a conflict between Ms. Gayatri Balasamy and ISG Novasoft Technologies Ltd, her previous employer. The arbitrator rendered a decision after the case proceeded to arbitration. Ms. Balasamy was unconvinced with the award and sought the Court to overturn the award under Section 34 of the Arbitration and Conciliation Act.[6] The Madras High Court took things further when it heard the case. It altered several aspects of the award rather than merely overturning it. This raised a legal question: Can a Court under Section 34 change an arbitral award or can it just reject the challenge or set it aside entirely? In pointing this out, the authors implicitly take a view that "overturning" may be permissible, but "alteration" ventures into a territory far beyond the scope of the statute.

Due to divergent opinions in several Court rulings regarding this problem[7], the case went to the Supreme Court which established a constitutional bench to resolve the issue. This case developed into much more than a private job conflict. It brought up significant legal issues about the finality of arbitral decisions, the function of Courts in arbitration and the boundaries of judicial authority. The Supreme Court had to determine how much authority Courts should have when examining arbitration results particularly when the award contains glaring errors. However, the law is unclear on what to do.

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[4] *Gayatri Balasamy v ISG Novasoft Technologies Ltd.* (2025) 7 SCC 1.
[5] ibid [49].
[6] The Arbitration and Conciliation Act 1996, s 34.
[7] *Project Director, National Highways No. 45 E and 220 National Highways Authority of India v M Hakeem* (2021) 6 SCC 150; *Tata Hydro-Electric Power Supply Co Ltd v Union of India* (2003) 4 SCC 172; *Larsen Air Conditioning and Refrigeration Company v Union of India* (2023) 15 SCC 472; *J C Budhraja v Chairman, Orissa Mining Corporation Ltd.* (2008) 2 SCC 444; *Vedanta Ltd. v Shenzden Shandong Nuclear Power Construction Company Ltd.* (2019) 11 SCC 465.

**The Modification–Setting Aside Distinction**

In ¶¶38 and 39 of the *Gayatri Balasamy* judgement, the Supreme Court subtly yet remarkably broadens the scope of judicial intervention in arbitration. It draws a theoretical line between "setting aside" and "modifying" an award, but while the distinction is acknowledged in words, the Court's approach seems to blur that line in practice.

The judgement begins by addressing an important concern that modifying an arbitral award is not the same as setting it aside. Under Section 34 of the Arbitration and Conciliation Act,[8] setting aside an award wipes it out entirely, while modification involves tweaking specific parts without disturbing the whole. This seems like a clear legal distinction at first glance. But when the Court tries to introduce a "limited power" of modification, it muddies the very lines it was trying to draw.

Although the Court describes this power as a balanced middle ground, it steps into a territory that the Act does not clearly define. The judgement does not grant Courts unchecked authority, but it does create a vague space where some changes to an award, which can be computational or typographical, even sometimes factual or legal, might be allowed without revisiting the actual merits of the case. However, the judgement fails to specify what kinds of errors fall within this 'limited' power. Can Courts fix arithmetic errors but not legal misjudgements? The absence of definitional clarity makes the scope of this power ambiguous and opens the door to inconsistent applications by different courts. The judgement does not specify, and this lack of clarity, makes the scope of this new power confusing and uncertain.

In stark contrast, a clearer legislative framework, like Section 68 of the UK Arbitration Act, 1996[9] which allows for Court intervention only in cases of serious procedural irregularities, may offer useful comparative guidance. As the *Gayatri Balasamy* Judgement[10] does not clearly explain what the new power covers, its meaning is not clear at all. This new statement by the Court means it will no longer strictly follow the words of the law but will seek better results in cases.[11] While that might seem appealing from an ethical standpoint, it disregards one of the arbitration's foundational principles i.e. finality, and Arbitration is designed to deliver closure, not perfection. Besides, this evolving practice is not only bad in doctrinal terms, as it defeats the legal certainty that parties depend upon, but also practically, since it can be something that either exposes such mechanisms to enforceability risks or creates a situation that promotes inordinate judicial scrutiny. Doctrinally,

[8] ibid.
[9] Arbitration Act, 1996, s 68.
[10] *Gayatri Balasamy* (n 4).
[11] *Gayatri Balasamy* (n 4), [39].

it undermines the predictability and uniformity of legal interpretation; practically, it introduces the possibility of more challenges and delays in enforcement, to vitiate the efficiency that arbitration is supposed to provide. Even minimal involvement of the Court risks blurring the line between appropriate oversight and undue interference.[12]

There is a delicate balance here: correcting blatant mistakes versus turning arbitral review into a backdoor appeal process. By introducing this idea of judicial correction without clear statutory support or procedural rules, the Court may have done more to complicate than clarify. The central concern is whether the Court's evolving criteria for intervention can genuinely be located within Section 34 or whether they represent a judicial expansion beyond its intended scope. If these powers are not rooted in Section 34, they may call for a new legal framework, but if they are then the worry is that Section 34 is being stretched beyond its intended limits. Put differently: If this new power is not grounded in Section 34, does it need a new legal framework? And if it is part of Section 34, does that stretch the section beyond what it was meant to do?

Ultimately, the Court's decision goes beyond interpretation by subtly redefining how arbitral awards might be reviewed in the future. If there are not enough clear guidelines or safety measures, courts can give different versions of the law, recreating the issues that arbitration was intended to solve.

**'Manifest Error': A New Judicial Construct?**

Arbitration is important mainly because it brings about finality.[13] This is what sets arbitration apart from traditional Court proceedings. Parties choose arbitration precisely because they want a binding outcome, free from prolonged litigation and with minimal court involvement. Reflecting this, the Arbitration and Conciliation Act was carefully designed to keep judicial interference to a bare minimum.

While Section 34 of the Arbitration and Conciliation Act lays down a specific and limited set of grounds on which an arbitral award can be set aside.[14] Section 37 permits only a narrow scope for appeal.[15] Nonetheless, neither part of the Arbitration and Conciliation Act allows for any

[12] Sukhman Kapoor, 'The Evolution and Effectiveness of Judicial Intervention in Indian Arbitration: Analyzing the Balance between Autonomy and Oversight' (*Jus Scriptum*, 30 August 2024) <https://www.jusscriptumlaw.com/post/the-evolution-and-effectiveness-of-judicial-intervention-in-indian-arbitration-analyzing-the-balanc> accessed 7 June 2025.
[13] Udechukwu Ojiako, 'The Finality Principle in Arbitration: A Theoretical Exploration' (2023) 15 Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 04522038.
[14] The Arbitration and Conciliation Act 1996, s 34.
[15] The Arbitration and Conciliation Act 1996, s 37.

adjustments or corrections to an award. It is clear from this section that the legislators intended to keep the arbitration process clear and uninterrupted by the involvement of the Courts.

However, the term "manifest error" risks becoming a judicially invented gateway to undermine the very foundation of arbitral finality.[16] Although it gained significant attention through the Supreme Court's ruling in *Gayatri Balasamy* judgement,[17] the concept remains vague. It raises serious questions about its scope and implications. The Court's recognition of a limited power to correct "manifest errors" without a corresponding legislative basis in Section 34 creates a grey area with potentially far-reaching consequences.[18]

By not clearly defining what counts as a "manifest error," the judgement ends up opening a backdoor that Courts could walk through far too easily. What is being framed as a narrow, harmless exception for correction might actually become a wide-open opportunity for deeper judicial involvement. In ¶49, the Court says that it can fix manifest errors without re-examining the merits but this restraint may be more illusion than reality. Once Courts are allowed to "correct" what they consider obvious mistakes, it becomes hard to tell where correction ends and re-evaluation begins. The risk is that this could gradually turn into a subtle form of merit-based review, undermining the very finality arbitration is supposed to guarantee.[19]

The real concern lies in the lack of clear interpretation surrounding the term. What one judge considers "manifest" may appear merely "arguable" to another.[20] Unlike the well-defined statutory grounds for setting aside arbitral awards under Section 34, such as public policy or incapacity, this new category lacks both legal basis and doctrinal clarity. Disappointed parties may now try a new approach: label the issue a "manifest error," argue that the mistake is too obvious to overlook and ask the Court to modify the award under the guise of correction.

Even more concerning is the absence of procedural safeguards. Unlike appeals or Section 34 proceedings which set procedures and timelines, the concept of correcting manifest errors

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[16] Sudha Sampath, 'Supreme Court Clarifies Limits of Judicial Intervention in Arbitration: Insights from Gayatri Balasamy v. ISG Novasoft Technologies Ltd.' (*ATB Legal*, 12 May 2025) <https://atblegal.com/blog/supreme-court-judicial-intervention-gayatri-balasamy/> accessed 27 May 2025.

[17] *Gayatri Balasamy* (n 4).

[18] Abhinav Sahrma, Ayush Srivastava, Mayank Bansal, 'Supreme Court on Modification of Arbitral Awards: A Landmark Ruling with Loose Ends' (*Chambers and Partners*, 2 May 2025) <https://chambers.com/articles/supreme-court-on-modification-of-arbitral-awards-a-landmark-ruling-with-loose-ends> accessed 27 May 2025.

[19] Srashti Talreja, Tanya Khanijow, 'When Final Isn't Final: Supreme Court Interprets Power to Modify Awards' (*The Arbitration Digest*, 22 May 2025) <https://thearbitrationdigest.com/when-final-isnt-final-supreme-court-interprets-power-to-modify-awards/> accessed 27 May 2025.

[20] Sukhman Kapoor (n 12).

provides no clear process.[21] Should the correction process occur under Section 34 or use a different, undetermined course of law? Do Courts have the authority to take action without being told to do so? Is it possible for errors of law to happen? All these unanswered questions make the idea suspect of misuse.

The *Gayatri Balasamy* judgement provides some legal leeway through its judgement. The Court's aim to stop injustice makes much sense and is worthy of praise. Nevertheless, the way it goes about it, by introducing a vague, judge-made review power, is problematic. Without clear limits, this idea of "manifest error" could end up being a Trojan horse, quietly weakening the very principle of finality that makes arbitration effective in the first place.

**Justice K.V. Viswanathan's Principled Dissent**

In this above-mentioned case, the majority judgement stirred debate by suggesting that Courts could "modify" arbitral awards under Section 34 of the Arbitration and Conciliation Act,[22] without reassessing the merits of the case. In contrast, Justice K.V. Viswanathan, in his dissent, takes a more cautious and principled stance. He firmly rejects the idea that Section 34 gives Courts any implied power to modify awards. His reasoning, rooted in a careful reading of the law and a strong respect for the autonomy of contracts, provides a compelling counterpoint, especially as discussions around "manifest error" continues to evolve.

He highlights that an arbitral award stems from party autonomy, a conscious choice by the parties to stay out of regular courts. This choice amounts to a 'contractual ouster',[23] meaning the parties have agreed to resolve their disputes privately, which is perfectly valid under Section 28 of the Indian Contract Act of 1872.[24] So, if Courts begin to interpret Section 34 as giving them the power to modify or correct awards without any clear wording in the law, it would effectively bring back the very judicial involvement the parties had chosen to avoid.

The dissenting opinion zeroes in on what courts are actually allowed to do under Section 34. Justice K.V. Viswanathan makes it clear that Section 34 is not meant to function like an appeal. Courts can only interfere with an arbitral award on particular and limited grounds like when there is a blatant legal error or if the award goes against public policy.

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[21] Manav Pamnani, 'The Boundaries of Judicial Intervention in Arbitration: Navigating Section 34' (*The HNLU CCLS Blog*, 1 August 2024) <https://hnluccls.in/2024/08/01/the-boundaries-of-judicial-intervention-in-arbitration-navigating-section-34/> accessed 27 May 2025.
[22] The Arbitration and Conciliation Act 1996.
[23] *Gayatri Balasamy* (n 4), [82].
[24] The Indian Contract Act, 1872, s 28.

He disagrees with the majority's use of the legal maxim *omne majus continet in se minus* (the greater includes the lesser)[25] to argue that if a Court can set aside an award, it should also be able to modify it. In his view, that logic does not hold. Setting aside an award means wiping it out completely, while modification involves reviewing and changing parts of it, which amounts to reassessing the merits. According to Justice K.V. Viswanathan, that kind of review is not allowed under Section 34.[26]

The dissenting opinion further highlights how other countries, like the UK and Singapore, allow Courts to modify or send back arbitral awards, but only when their laws explicitly permit it.[27] As argued earlier, Section 68 of the UK Arbitration Act 1996[28] enables a party to seek redress of an arbitral award in court due to what considered as *"serious irregularity"* which may do or already has done substantial injustice to the applicant. In like manner, Section 24 of Singapore's International Arbitration Act ["**IAA**"],[29] which mirrors Article 34 of the UNCITRAL Model Law,[30] allows annulment of an arbitral award upon satisfaction of some conditions, including violation of natural justice that prejudice a party. But in contrast, the Arbitration and Conciliation Act has chosen not to follow that route even after several rounds of amendments. This silence shows a deliberate choice by the legislature to keep the courts at arm's length when it comes to interfering with arbitral awards. As a result, in ¶20 of the *Gayatri Balasamy* judgement,[31] the Solicitor General had stressed that modification powers in other jurisdictions are specially bestowed by statute, which is not the case with Section 34 of the Arbitration and Conciliation Act[32] as it only permits setting aside, rather than modification. If courts start stepping in to modify awards without clear legal backing, it means rewriting the law from the bench. This view is further supported by the 2015 T.K. Viswanathan Committee ["**Committee**"], which recommended reforms to the Arbitration Act. The Committee took a deep dive into various issues, including delays, institutional arbitration and court involvement but it never suggested giving courts the power to modify awards.[33] That silence speaks volumes. If such a change was necessary or even desirable, the Committee had every chance to propose it. The fact that it did not and that the amendments passed in 2015, 2019, and 2021 did

[25] 'Omne Majus Continet in Se Minus' (*Academic Dictionaries and Encyclopedias*) <https://blacks_law.en-academic.com/36654/omne_majus_continet_in_se_minus> accessed 7 June 2025.
[26] *Gayatri Balasamy* (n 4), [91].
[27] *Gayatri Balasamy* (n 4), [93].
[28] *See* (n 8).
[29] International Arbitration Act 1994, s 24.
[30] UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006), UNGA Res 61/33 (adopted 4 December 2006), art 34.
[31] *Gayatri Balasamy* (n 4).
[32] The Arbitration and Conciliation Act 1996, s 34.
[33] *Gayatri Balasamy* (n 4), [94].

not include any such power reinforces the idea that modification lies outside what the statute allows.[34]

Justice K.V. Viswanathan also addresses the issue of severability in his dissent. He highlights that in many cases; arbitral awards reflect a composite reasoning process where claims and counterclaims are intertwined. Courts attempting to sever and modify one part of the award risk disturbing the internal logic of the tribunal's decision.[35] This exercise cannot be done without re-entering the merits, and doing so would require stepping back into the merits of the case, something that is impermissible under the current legal framework.

Justice K.V. Viswanathan clarifies that correcting errors, manifest or not, is not a matter for the Courts to decide unless the law allows it expressly. Letting a power like this into arbitration would lead to unpredictable results and cause the key objectives of efficiency and a final result to be lessened. It is necessary to give Section 34 a narrow scope to ensure that arbitration remains autonomous and uncompromised.

Justice K.V. Viswanathan's point shows that arbitration is an independent way to solve disputes, so any Court involvement should only be according to existing laws. In his view, there is a clear boundary against using the flexible 'manifest error' idea to increase judicial review. The dissent moreover, highlights that arbitration is meant to remain an independent dispute-resolution mechanism and therefore Court intervention must strictly follow the statutory framework. Justice K.V. Viswanathan's rejection of the broad and uncertain idea of a "manifest error" test, reinforces the view that any modification of an arbitral award, if at all permissible, must be tightly circumscribed and grounded in clear legislative limits.

**Conclusion**

The *Gayatri Balasamy* judgement takes a new direction from the rules of the Arbitration and Conciliation Act. Because the majority believes that a judge has the right to change an award if they see "manifest errors," the ruling brings in a discretionary judicial power that lacks legislative support and proper protection. While the judgement claims to preserve arbitral autonomy, it risks opening the door to broader judicial intervention.

However, what is particularly striking is that the concluding paragraph of the majority's opinion restricts correction only to "clerical, computational or typographical errors which appear erroneous on the face of the record." The absence of the term "manifest error" from this operative portion

[34] *Gayatri Balasamy* (n 4), [96].
[35] *Gayatri Balasamy* (n 4), [146].

raises serious questions; whether it was a typographical error or a deliberate exclusion remains unclear.[36] Either way, it exposes the conceptual fragility of the majority's reasoning.

This paper leans into Justice K.V. Viswanathan's dissent and rightly restores doctrinal clarity. He points out that Section 34 does not allow a Court to alter a decision, only to reject it. He adds that any attempt to expand this rule might erode the parties' autonomy. His view fits what the legislators and international groups meant and clears up the problems created by other Court-made guidelines.

Ultimately, finality in arbitration is not just a procedural preference but a foundational principle. Any departure from it must come through clear legislative reform and not judicial improvisation. Until such reform occurs, the concept of "manifest error" remains vague and potentially disruptive, threatening the very goals arbitration seeks to uphold i.e. efficiency, certainty and minimal judicial interference.

In case of introducing correction mechanism, it would be most logical to implement them through statutory amendments while specifying the extent of permissible corrections (e.g., restricted corrections caused by computing error or by mistake of clerical work). Instead, the judicial guidelines may offer an interpretive clarity, but it will be inconsistent unless legislature offers intention. Another alternative road could be through development of procedural safeguards where individuals have a time-bound motion of correction or rectification by the tribunal which has to be approved or endorsed at the Court. Although the gap is presently addressed through judicial articulation, and exemplified in Gayatri Balasamy, it can be perceived as an interim measure rather than a substitute for structured legislative reform.

[36] *Gayatri Balasamy* (n 4), [85].

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# WHOSE KNOWLEDGE COUNTS? EPISTEMIC JUSTICE AND COMMUNITY EXCLUSION IN AFRICAN HYBRID ARBITRATION

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*"In a Just Society, Law should be a Shield for the Weak, not a Weapon for the Strong."*

— Justice Sheel Nagu

## Introduction

Hybrid arbitration forums in Africa and the Global South often exclude the most affected communities while resolving disputes around extractives and infrastructure.[1] From *Barry Gondo v Republic of Zimbabwe* ["**Barry Gondo**"],[2] where the victims of government brutality were denied access to enforcement of their remedies, and *Mike Campbell Pvt. Ltd. v Republic of Zimbabwe* ["**Mike Campbell**"],[3] in which the defective acquisition of land occurred in the absence of genuine consultation, the stark evidence of the gap appears: forums meant to adjudicate harm often perpetuate epistemic injustice.

Building on Miranda Fricker's categories of testimonial and hermeneutical injustice, this article argues that hybrid arbitration structurally marginalises local knowledge.[4] Testimonies from communities are undervalued as being non-expert while their cultural frameworks are made unintelligible by rigid legal protocols.[5] Such erasures are not incidental; they are encoded in procedural norms: high evidentiary thresholds, linguistic filters and exclusionary standing rules that

[1] African Commission on Human and Peoples' Rights, Report of the African Commission's Working Group on Indigenous Populations/Communities: Report on Extractive Industries, Land Rights and Indigenous Populations/Communities' Rights (ACHPR 2009) 8–9; Columbia Center on Sustainable Investment and UN Working Group on Business and Human Rights, Impacts of the International Investment Regime on Access to Justice: Roundtable Outcome Document (September 2018) 10.
[2] *Barry Gondo & Ors. v Republic of Zimbabwe,* SADC Tribunal, Case No. 05/2008.
[3] *Mike Campbell Pvt. Ltd. & Ors. v Republic of Zimbabwe,* SADC Tribunal, Case No. 02/2007.
[4] Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007) 1–10.
[5] Leïla Choukroune and Lorenzo Cotula, "'Local Communities" and the Development Conundrum: Where International Investment Law Meets Human Rights and Businesses' (2024) 9 BHRJ 270, 280–283.

privilege western technocratic knowledge systems.[6] Drawing also from Third World Approaches to International Law ["**TWAIL**"] critiques, this Article demonstrates how arbitration mechanisms reproduce colonial asymmetries under the guise of neutrality.[7]

We examine these themes through procedural critique, doctrinal case analysis, and comparative interventions, before proposing reforms to embed epistemic justice into the architecture of arbitration. Without such change, hybrid arbitration risks becoming a tool of exclusion and not adjudication.

## Locating Epistemic Injustice in Hybrid Arbitration Practice

### i. *Defining the Concepts*

Epistemic injustice refers to unfair treatment that people suffer specifically in their role as knowers, i.e., individuals who are capable of contributing valid knowledge. Miranda Fricker developed two forms: testimonial injustice and hermeneutical injustice.[8] The first arises when a speaker's credibility is unfairly diminished due to identity-based prejudice or when someone is believed to be less trustworthy or capable simply because they are poor, rural, indigenous or otherwise marginalised.[9] In arbitration environments, it appears in the form of local populations lacking technical expertise to speak to matters of land use, environmental degradation or cultural loss.

Hermeneutical injustice, on the other hand, occurs when a community lacks access to the shared conceptual tools; legal language, procedural standing or institutional recognition needed to make their experiences intelligible within dominant decision-making forums. When traditional epistemologies do not align with the expectations of arbitral procedure, they risk being treated as legally irrelevant. Dotson argues that marginalised groups often face epistemic violence when their testimonies are not credible within dominant epistemic frameworks, thus resulting in their experiences being rendered invisible in formal discourse.[10]

### ii. *Why Arbitration is Vulnerable*

Arbitration, especially investor-state or hybrid models, is particularly prone to creating epistemic injustice. These proceedings are often private, technical and controlled by parties with substantial

[6] Kristie Dotson, 'Tracking Epistemic Violence, Tracking Practices of Silencing' (2011) 26 Hypatia 243.
[7] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 Int'l Community L. Rev. 371.
[8] Fricker (n 4) 1–10.
[9] ibid 28.
[10] Dotson (n 6) 243–250.

legal power.[11] Arbitrators typically prioritise formal legal arguments, economic assessments and expert testimony, all of which are steeped in western technical and legal epistemologies. This environment systematically sidelines indigenous knowledge systems, oral traditions and lived community experiences.[12] Structural features such as high thresholds for admissible evidence, rigid procedural rules and narrowly-drawn standing requirements further restrict participation by those most directly impacted by infrastructure or extractive projects. Even when harms are deeply felt, the pathways to express them are institutionally foreclosed. As Dotson notes, silencing in such settings can be so deep-rooted that local speakers self-censor or are never even heard.[13] Arbitration is therefore not only silencing marginalised voices but also structurally failing to even register their epistemic input.

**Manifestations of Silencing: Mechanisms in Hybrid Infrastructure Arbitration**

i. *Procedural Architecture as Barrier*

The procedural architecture of hybrid arbitration is not neutral. It acts as a gatekeeping mechanism that silences community knowledge. Its formalistic design embeds evidentiary and participatory hierarchies that systematically exclude local knowledge. One such hierarchy is the preference for documentary over testimonial evidence. Procedural rules elevate written submissions which are often inaccessible to low-literacy or tradition-based communities, over oral testimony or collective ritual. Local narratives which are transmitted through culturally embedded forms are thereby rendered epistemically inferior.

For instance, while the International Centre for Settlement of Investment Disputes ["**ICSID**"] Arbitration Rules allow for third-party submissions, Rule 37(2) leaves their admission entirely to the discretion of the Tribunal[14] while offering no guarantee that community knowledge,[15] however relevant, will be admitted or weighed appropriately.[16] Although Rule 37(2) is formally neutral, Tribunals have tended to privilege written, expert submissions, thereby leaving amicus

[11] Choukroune (n 5) 280–283.
[12] Choukroune (n 5) 270, 272–273.
[13] Dotson (n 6) 241–242.
[14] ICSID, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)* (April 2006), r 37(2).
[15] Luca G Radicati di Brozolo, 'Amicus Curiae in ICSID Arbitration: The Right to Participate and the Tribunal's Discretion' (*Kluwer Arbitration Blog*, 2021) <https://arbitrationblog.kluwerarbitration.com/2021/04/08/transparency-rules-in-investment-arbitration-institutional-differences-and-prospects-of-standardisation/> accessed 29 May 2025.
[16] Emilia Onyema, 'African Participation in the ICSID System: Appointment and Disqualification of Arbitrators' (2018) *ICSID Rev – Foreign Investment LJ* 2–4.

participation minimal and Tribunal-dependent.[17] This dynamic is evident in *Philip Morris v Uruguay* ["**Philip Morris**"],[18] where submissions from the World Health Organisation ["**WHO**"] and Framework Convention on Tobacco Control ["**FCTC**"] Secretariat were admitted for technical expertise while other non-disputing voices were excluded.

Language further compounds this exclusion. Arbitral proceedings are predominantly conducted in English or French with little provision for translation into local dialects. Even when translated, indigenous expressions are remoulded into legalist frames, stripping them of spiritual or ecological gravity.[19] Terms like "customary title" or "ancestral right" often lose meaning when filtered through contract-oriented procedures.

Equally exclusionary are the rules of standing. Communities are rarely signatories to Bilateral Investment Treaties ["**BITs**"] or investment contracts, and thus, have no procedural rights within investor-state arbitration frameworks. At best, they may appear as *amici curiae*, a role that offers no right to submit evidence, cross-examine witnesses, or appeal a decision.[20] This is worsened by hearing formats which are tailored for lawyers and experts, thus sidelining indigenous modes of dialogue and collective restitution.

These architecture-level exclusions give rise to what Dotson terms "testimonial smothering": a condition where speakers, anticipating that their epistemic contributions will be disbelieved or discarded, pre-emptively silence or flatten their knowledge.[21] This is not simply a matter of representation; it is the institutional design of arbitration that disables the epistemic agency of those most affected. In *Elisabeth Regina von Pezold v Republic of Zimbabwe* ["**Von Pezold**"], Courts in the United States had affirmed the enforcement of an ICSID arbitral award rooted in colonial-era land claims without ever addressing the epistemic or social justice implications of land redistribution for local Zimbabwean communities.[22]

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[17] Nicolette Butler, 'Non-Disputing Party Participation in ICSID Disputes: Faux Amici?' (2019) 66 Neth. Int'l L. Rev. 143, 144.

[18] *Philip Morris Brands Sàrl v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Procedural Order No. 3 (8 July 2016).
[19] Choukroune (n 5) 273–274.
[20] Ibironke T. Odumosu-Ayanu, 'Local Communities and the Reform of International Investment Law' (2023) 24 J. World Invest. Trade 792.
[21] Dotson (n 6) 236, 242.
[22] *Elisabeth Regina Maria Gabriele von Pezold & Ors. v Republic of Zimbabwe* D.C. Cir. No. 23-7109 (2024); Ntina Tzouvala, 'Invested in Whiteness: Zimbabwe, the von Pezold Arbitration, and the Question of Race in International Law' (2022) 2 J. L. Pol. Econ. 226.

ii. *How Procedural Norms and Hybrid Structures Discredit Local Testimony*

Hybrid arbitration systematically privileges "technical" expertise, thereby sidelining local knowledge through epistemic hierarchies embedded in its procedures.

Tribunals give decisive weight to economic models, engineering assessments, and financial forecasts; often authored by consultants aligned with investors or states. These are framed as objective, while local views are dismissed as anecdotal or unscientific.[23]

In land valuation disputes, tribunals apply metrics like "market value" or "highest and best use", ignoring non-market attachments; spiritual, ancestral, or communal.[24] In *Mike Campbell*, the Southern African Development Community ["**SADC**"] Tribunal failing to recognise the cultural significance of dispossession instead reinforced the primacy of legal formalism over indigenous cosmologies.[25]

The same asymmetry appears in Environmental and Social Impact Assessments, where quantitative matrices overshadow qualitative narratives of environmental or spiritual loss.[26] Global North experts are often preferred over local scholars, thus reinforcing epistemic dependency.[27] This marginalisation is not due to overt bias but is institutionalised through procedural norms that code western technicity as the only credible epistemology.

Hybrid arbitration, which straddles public international law and commercial dispute resolution, exacerbates epistemic injustice through jurisdictional and normative ambiguities.[28] On one hand, the State presents itself as sovereign protector of public interest while on the other, it acts in contractual form to induce and protect investor rights.[29] This duality disempowers communities who are excluded from treaties yet affected by projects.[30]

This dynamic is evident in *Orissa Mining Corp. Ltd. v Ministry of Environment & Forest* ["**Orissa Mining Corp**"],[31] where the Supreme Court of India upheld tribal rights under the Forest Rights

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[23] Nicolás M. Perrone, 'The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?' (2017) 7(3) Transnational Leg. Theory 383.
[24] Lorenzo Cotula and Mika Schröder, *Community Perspectives in Investor-State Arbitration* (IIED 2017) 13.
[25] *Mike Campbell Pvt. Ltd.* (n 3).
[26] Choukroune (n 5) 279–280.
[27] Boaventura de Sousa Santos, *Epistemologies of the South: Justice against Epistemicide* (Routledge 2016) 19.
[28] Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55 Harvard Int'l L. J. 1.
[29] Alessandra Arcuri and Francesco Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties' (2018) 59 Boston Coll. L. Rev. 2791, 2791–92, 2795, 2798.
[30] Drossos Stamboulakis, 'Legal Transfer and "Hybrid" International Commercial Dispute Resolution Procedures: Lessons from the Singapore International Commercial Court' in Vito Breda (ed), *Legal Transplants in East Asia and Oceania* (Cambridge University Press 2019).
[31] *Orissa Mining Corp. Ltd. v Ministry of Environment & Forest & Ors.* (2013) 6 SCC 476.

Act, mandating local consent for mining in Niyamgiri Hills. Similarly, the POSCO project in Odisha faced prolonged resistance due to inadequate recognition of community rights, leading to its eventual withdrawal.[32]

## Case Analyses: Epistemic Injustice in Action

i. *Mike Campbell Pvt. Ltd v Republic of Zimbabwe*

The now-suspended SADC Tribunal's decision in *Mike Campbell* is a telling example of how procedural norms in arbitration can marginalise community knowledge. The case involved white Zimbabwean farmers challenging Amendment 17 which allowed for compulsory land acquisition without compensation and barred judicial review. The Tribunal held this to be racial discrimination as under Articles 4(c) and 6(1) of the SADC Treaty.[33]

However, while the Applicants succeeded, the ruling revealed deeper structural exclusions. Local communities, particularly black farm workers and indigenous custodians of the land, were not heard as parties or witnesses.[34] This silencing amounted to hermeneutical injustice; the silenced communities were not able to make their situated experiences intelligible in the investor rights-State sovereignty dualistic legal paradigm.[35]

Their non-commercial ties to the land, environmental stewardship practices, and traditional understandings of land tenure were procedurally bypassed due to the Tribunal's reliance on formal written pleadings and legal representation.[36] The State's postcolonial framing of justification for expropriation elided its epistemic failure to consult those with lived expertise on the social value of the land.[37] The result was a procedurally valid award that nonetheless failed to accommodate the hermeneutical value of local knowledge. Arbitration's preference for formalism over context thus translated into a testimonial and procedural erasure of those most affected.[38]

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[32] 'India: Amid resistance from communities, POSCO offers to surrender land acquired for $12 billion steel project' (*Business & Human Rights Resource Centre,* 27 March 2017) <https://www.business-humanrights.org/en/latest-news/india-amid-resistance-from-communities-posco-offers-to-surrender-land-acquired-for-12-billion-steel-project/> accessed 1 June 2025.
[33] *Mike Campbell Pvt. Ltd.* (n 3) [52].
[34] Dotson (n 6) 236.
[35] Choukroune (n 5).
[36] Tawanda Hondora, 'Off the Beaten Track into the Savannah: The Mike Campbell Pvt. Ltd. v. the Republic of Zimbabwe Ruling Imperils SADC Investment Law' (2012) SSRN Paper No. 2117318.
[37] Mwangi S Kimenyi and Josephine Kibe, 'A House of Justice for Africa: Resurrecting the SADC Tribunal' (2018) Brookings Institution.
[38] Odumosu-Ayanu (n 20).

ii. *Barry Gondo v Republic of Zimbabwe*

In *Barry Gondo*, victims of police and military violence had successfully obtained domestic judgments against the State but were denied enforcement due to Section 5(2) of Zimbabwe's State Liability Act,[39] which barred execution against State assets.[40] The Petitioners sought remedy under the same SADC Treaty provisions as was in *Mike Campbell*.

This is the classic example of testimonial injustice. While the Tribunal acknowledged the discriminatory nature of Section 5(2), its limited enforcement mandate made it incapable of securing a material remedy. Here, procedural injustice lay not in the hearing itself, but in the inability of the arbitral system to translate adjudication into enforcement.[41] In Fricker's terms, their testimony was heard but not believed in a legally actionable sense; their suffering was acknowledged but rendered structurally irrelevant. The victims' stories, though judicially admitted in form, were withheld from gaining traction in international law forums since enforcement was conceptualized as an intra-state matter and thus de-politicising the structural harm they endured. The Tribunal noted that this framework elevated the state above the law, breaching the principle of the rule of law and the Article 2(3) of International Covenant on Civil and Political Rights[42] on effective remedies.[43]

The ruling in *Barry Gondo* held that Section 5(2) was in violation of norms of human rights and that it discriminated in its application between victims of abuse by the state and private claimants.[44] The result was testimonial injustice: victims' experiences were recognised, yet rendered legally irrelevant. The Tribunal's institutional design, dependent on State consent, made it structurally incapable of correcting the asymmetry of power and knowledge.

## Comparative Failures in Procedural Design: India's ADR Context and Community Silencing

Epistemic injustice in hybrid arbitration is not unique to Africa. India's land and environmental disputes reveal a similar disregard for community epistemologies in formal mechanisms.

[39] State Liability Act [Chapter 8:14] (Zimbabwe), as amended by Act No 22 of 2004, s 5(2).
[40] *Barry Gondo* (n 2).
[41] ibid 204–05.
[42] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 2(3).
[43] *Barry Gondo* (n 2) [5] and [6].
[44] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 3; *Barry Gondo* (n 2) [6].

In *Samatha v State of Andhra Pradesh*,[45] the Supreme Court categorically held that leasing tribal lands to private mining companies violates the rights of Scheduled Tribes under the Fifth Schedule of the Constitution, and the Andhra Pradesh Land Transfer Regulation Act, 1959. Yet this landmark ruling, which recognised tribal epistemologies of land as community custodianship rather than alienable property, has faced consistent circumvention. Private and State actors have, in practice, engineered legal workarounds through lease transfers and third-party management arrangements, thereby diluting the force of participatory consent and procedural inclusion envisaged by the ruling. The consequence: tribal knowledge continues to be treated as legally irrelevant.

A sharper procedural failure is evident in the Muthanga incident of 2003, where the Kerala Government violently evicted Adivasi protestors reclaiming forest land promised under a rehabilitation scheme.[46] Despite documented assurances, the community's claims were dismissed as lacking "legal authority". This reflects "testimonial smothering": the procedural setting did not merely reject their speech; it rendered it institutionally unintelligible.[47]

Similar themes of marginalisation echo in the *Orissa Mining Corp*. However, as subsequent implementation revealed, procedural justice faltered in the Gram Sabha consultations, with opaque processes and expert capture undermining substantive participation. Therefore, across hybrid and domestic tribunals, epistemic exclusion stems not from overt rejection but from procedures that silence alternative ways of knowing.

## Towards Procedural Reform: Embedding Epistemic Justice in Arbitration Design

i. *Enhancing Procedural Access and Recognition*

Hybrid arbitration must reform not just to appear inclusive, but to reconfigure how knowledge is valued and admitted. The silencing of subaltern epistemologies is not incidental; it is architectural. First, appointing legal representatives from affected regions, advocates fluent in both law and local idioms of harm, can mediate between community worldviews and juridical expectations. This model, echoed in African Continental Free Trade Area ["**AfCFTA**"] investment consultations,[48] helps translate testimonial and hermeneutical injustice into legal legibility. While such dual-fluent advocates remain limited, initiatives like Timap for Justice in Sierra Leone and the Uganda

[45] *Samatha v State of Andhra Pradesh* AIR 1997 SC 3297.
[46] C R Bijoy and K Raman, 'Muthanga: The Real Story: Adivasi Movement to Recover Land' (2003) 38 EPW 1975–77.
[47] Manoj Viswanathan, 'Muthanga: Pain, Agony of a Lost Struggle' (*The New Indian Express*, 13 February 2023) <https://www.newindianexpress.com/states/kerala/2023/Feb/13/muthanga-pain-agony-of-a-lost-struggle-2546927.html> accessed 28 May 2025.
[48] African Continental Free Trade Area, *Protocol on Investment* (2023) arts 2(b), 35(1).

Association of Women Lawyers show local capacity for community mediation, while also facilitating amicus participation in ICSID to expand community representation.[49]

Second, Tribunals must structurally mandate the inclusion of local experts, anthropologists, ecologists, historians, whose interpretive registers illuminate non-quantifiable harm. Major arbitral frameworks already provide for such appointments: article 27 of the United Nations Commission on International Trade Law ["**UNCITRAL**"] Arbitration Rules, article 25(3) of the International Chamber of Commerce Arbitration Rules, and article 39 of the ICSID Arbitration Rules, all of which empowers Tribunals to appoint experts, who are independent of the parties.[50] The International Institute for Environment and Development [51] and African legal scholars[52] warn against privileging "certified" technocrats detached from vernacular systems, gatekeeping that reproduces epistemic hierarchies.

Third, evidentiary norms must evolve. Arbitration must admit oral traditions, sacred geographies, and visual testimonies as legitimate forms of knowing.[53] As Inter-American jurisprudence demonstrates, expert ethnographic testimony can bridge the chasm between lived experience and procedural admissibility.[54] Such experts help translate community worldviews into legally readable formats.

Standing must also shift. Communities cannot remain procedural ghosts; present yet unheard. Enhanced *amicus curiae* status or *sui generis* party roles must afford them rights to submit evidence, interrogate narratives, and challenge dominant framings. *Barry Gondo* taught us that remedy without recognition is a jurisprudence of erasure.[55] This must be embedded in Multilateral Investment Court and AfCFTA frameworks.[56]

ii. *Shifting Epistemic Practices*

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[49] Vivek Maru, *Between Law and Society: Paralegals and the Provision of Primary Justice Services in Sierra Leone* (Open Society Institute 2010); Ursula Grant, Ingie Hovland and Zaza Curran, *Bringing Community-learnt Knowledge into the Policy Debate: The Case of Legal Aid Centres* (Overseas Development Institute Working Paper 277, October 2006).

[50] UNCITRAL Arbitration Rules, art 27; ICC Arbitration Rules (2021), art 25(3); ICSID Arbitration Rules, art 39.

[51] Cotula (n 24) 31.

[52] Ibironke T. Odumosu-Ayanu, 'Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework' (2014) 15 Melb. J. Int'l L. 1.

[53] Cotula (n 24) 18–19.

[54] Elisabeth Cunin, 'Anthropological Expertise in Court: Appropriation, Transformation and Instrumentalization of Anthropological Knowledge by the Inter-American Court of Human Rights' (2024) 5 Appartenances & Altérités.

[55] *Barry Gondo* (n 2) [4] and [5].

[56] Rimdolmsom Jonathan Kabré, 'Inclusivity in the Settlement of Investment Disputes: Making a Case for Local Communities' (2023) 48 S. Afr. Y. Int'l. L. 15.

Finally, Arbitrators must be trained not only in law, but in epistemic humility.[57] Certification modules rooted in Fricker's theory, TWAIL critiques, and instruments, like the African Commission Resolution 489,[58] can equip neutrals to see beyond technocratic filters. Procedural design is not neutral terrain; it either amplifies or smothers marginal knowledge.[59] Such training aids legal interpretation and sensitises arbitrators to epistemic asymmetries.[60]

iii. *Institutional and Rule Reform*

Institutions like ICSID, Organisation for the Harmonisation of Business Law in Africa, and UNCITRAL must codify these imperatives.[61] Soft-law preferences must harden into enforceable reforms: model BITs must carry community-context clauses; arbitrator appointments must undergo equity audits; procedural handbooks must enshrine standing for affected groups.[62] This is not utopian idealism; it is a structural correction. Arbitration cannot continue to adjudicate lives without hearing them. Reforms grounded in epistemic justice are not aspirational embellishments; they are conditions for legitimacy.

## Conclusion

Hybrid arbitration, though framed as efficient and neutral, often excludes community knowledge and silences subaltern voices.[63] Epistemic injustice is not incidental; it is structural, rooted in testimonial disregard, hermeneutical exclusion and standing asymmetries.[64]

These silencing mechanisms, like exclusionary standing rules and marginalisation of cultural knowledge, undermine arbitration's legitimacy as a forum for equitable resolution.[65] These failures

[57] Fricker (n 4) 1–10.
[58] African Commission on Human and Peoples' Rights, 'Resolution on the Recognition and Protection of the Right of Participation, Governance and Use of Natural Resources by Indigenous and Local Populations in Africa' (ACHPR/Res. 489 (LXIX) 2021).
[59] David Schneiderman, *Investment Law's Alibis: Colonialism, Imperialism, Debt and Development* (Cambridge University Press 2022) 17–23; Olabisi D Akinkugbe, 'Race & International Investment Law: On the Possibility of Reform and Non-Retrenchment' (2023) 117 Am. J. Int'l. L. 535, 538–541.
[60] Olabisi D. Akinkugbe, 'Africanization and the Reform of International Investment Law' (2021) 53 Case Western Res. J. Int'l. L. 7, 14–17.
[61] ibid.
[62] African Charter on Human and Peoples' Rights (1981) art 21(5).
[63] Fricker (n 4); Dotson (n 6) 236.
[64] Okafor (n 7); Wanli Ma, *Reforming Investor-State Dispute Resolution: Focusing on the Roles of Domestic Courts* (PhD thesis, Erasmus University Rotterdam 2022) <https://pure.eur.nl/files/70956292/wanli_ma_phd_thesis_reforming_investor_state_dispute_resolution_focusing_on_636e34d9d4374.pdf> accessed 1 June 2025.
[65] Ma (n 64); Gabrielle Kaufmann-Kohler and Michele Potestà, *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Springer 2020).

reflect power asymmetries that hybrid arbitration replicates rather than resolves.[66] Correcting them demands more than ethics; it requires binding procedural reforms. The reform agenda must embed epistemic justice through new evidentiary norms, inclusive standing, and mandated cultural competence.

Ultimately, arbitration must reimagine itself; not as a technocratic space for investor-state bargaining, but as a forum accountable to affected communities.[67] Only then can it transition from a tool of exclusion to one of participatory legitimacy.

[66] Esma Yağmur Sönmez, *The Legitimacy Crisis of the Investor-State Dispute Settlement System* (PhD thesis, Middle East Technical University 2024) <https://open.metu.edu.tr/bitstream/handle/11511/112934/10689718.pdf> accessed 1 June 2025.

[67] Public Citizen, 'The Scramble for Africa Continues: Impacts of Investor-State Dispute Settlement on African Countries' (2024) <https://www.citizen.org/article/the-scramble-for-africa-continues-impacts-of-investor-state-dispute-settlement-on-african-countries/> accessed 2 June 2025.

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# FROM STOP-GAP TO SOLUTION: THE MPIA AND THE FUTURE OF ARTICLE 25

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## Introduction

The World Trade Organisation's ["**WTO**"] Appellate Body ["**AB**"], once central to the multilateral trading system, is now defunct because of a highly organised offensive launched by the United States of America ["**U.S.A**"]. This was primarily because U.S.A believed that the AB had failed to operate within the limits set by the Dispute Settlement Understanding ["**DSU**"] and had grossly overstepped its mandate. Without an appellate body, decisions which are made in relation to trade-restrictive measures risk becoming non-enforceable because countries are free to "*appeal into the void*", thereby indefinitely delaying finality in a dispute. To fill this void, multiple countries came together to form the Multi-Party Interim Appeal Arbitration Arrangement ["**MPIA**"], under Article 25 of the DSU to help preserve the functioning, and more importantly, the binding character of the dispute settlement system. It represented a political commitment to not appeal into the void.

While Article 25 is presently being utilised in a limited capacity through the MPIA, a bare reading of the provision indicates that it encompasses a significantly broader scope within which arbitration may be operationalised. Accordingly, arbitration under Article 25 has the potential to function as a lawful and effective alternative to the conventional process of dispute settlement employed by countries.

This paper accordingly seeks to demonstrate that Article 25 can serve as a viable and comprehensive substitute for the standard dispute resolution process. To that end, it will first analyse the procedural structure of the MPIA and the ways in which it represents an improvement upon the now defunct AB; second, it will assess the extent to which the MPIA replicates the AB's features and the criticisms associated therewith; and third, it will explore the potential of Article

25 to operate as a full-fledged dispute resolution mechanism, i.e., whether through an institutionalised framework or on an ad hoc basis.

**MPIA—How does it Work?**

Once a WTO member joins the MPIA, it must enter into a dispute-specific appeal arbitration agreement within 60 days of the establishment of a panel. Once a dispute arises between two MPIA participants, the appeal agreement defines procedures, timelines, and rules tailored to that case.[1] The procedural roadmap is clear: once a panel is established and proceedings begin, they follow the standard DSU timeline, including written submissions, hearings, and the issuance of an interim report. Before the final panel report is circulated to all WTO members, either party may request a suspension of the panel proceedings, a request the panel must grant under the terms of the appeal arbitration agreement. This triggers the MPIA appellate mechanism. The requesting party must then file a notice of appeal within 20 days, concurrently submitting its written appeal. This marks the start of a tightly managed 90-day appeal arbitration process.[2]

Arbitrators are selected from a standing pool of ten individuals, nominated and agreed upon by all MPIA participants. For each dispute, three arbitrators are randomly drawn from this pool, ensuring neutrality and procedural fairness; two nationals of the same member may not sit on the same case. Once the arbitration is underway, strict word and time limits govern the parties' submissions to streamline the process and avoid unnecessary procedural delays. The arbitration culminates in a binding award, which, under DSU Article 25(3),[3] must be respected by the parties and does not require formal adoption by the Dispute Settlement Body ["**DSB**"], thereby expediting finality and enforcement.[4]

The MPIA introduces several procedural and structural innovations intended to address the dysfunctions associated with the AB. Most notably, MPIA appeals are strictly limited to 90 days, an improvement over the Appellate Body's average of 360 days in its final years.[5] In the first MPIA dispute, *EU–Colombia: Frozen Fries*, the process concluded within 74 days, thereby demonstrating effective time management.[6] The support structure of the MPIA also ensures independence.

[1] Mohamed Salah Adawi Ahmed et al., 'MPIA as Solution to the WTO Appellate Body Dilemma: An Examination of the WTO Innovative Dispute Settlement Mechanism' (2024) 12 IJSRM 473.
[2] Joost Pauwelyn, 'The The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?' (2023) World Trade Rev. 693.
[3] Dispute Settlement Understanding 1994, art 25.
[4] Pauwelyn (n 2).
[5] ibid.
[6] Pauwelyn (n 2).

Arbitrators are assisted by WTO Secretariat staff who are not affiliated with divisions supporting first-instance panels. This unique arrangement, unlike the former AB Secretariat, maintains neutrality and distance from the WTO legal divisions.[7]

Though only one MPIA appeal has been concluded so far, the mechanism's broader influence is already evident. The mere existence of the MPIA appears to have a deterrent effect on protectionist behaviour among members.[8] Krzysztof Pelc shows that since 2020, MPIA members have imposed fewer harmful trade barriers and more liberalising measures against each other.[9] This behavioural shift suggests that the MPIA's function as a de facto enforcement mechanism, promoting discipline without the need for formal proceedings in every case, is working. This deterrent effect is tied to the MPIA's preservation of a binding two-tier dispute settlement structure, thereby offering members confidence in the system's enforceability. For instance, even in disputes where the MPIA was not ultimately used, such as *Canada–Wine* and *Costa Rica–Avocados*, the framework encouraged parties to settle or adopt panel reports without appealing into the void.[10] By ensuring access to an appeal process, discouraging protectionist retaliation, and preserving legal certainty, the MPIA not only fills the AB vacuum but also strengthens confidence in the multilateral trading system.

**Gaps within the Stop-Gap Measure**

However, the MPIA is not without its criticisms. There remain several procedural and substantive concerns.

i. *Voids in the Membership of the MPIA, A Potential Lack of Universal Applicability and Inclusivity.*

One of the essential features of MPIA is that it is a voluntary multilateral agreement, contingent upon the countries' willingness to undertake the arbitration appeal process. Several countries, including the U.S, India and Japan, are staunchly against the MPIA process and are non-members of the Agreement, and conversely the European Union ["**EU**"] and China are primary proponents of this system.[11] While China and the EU are keen on maintaining a multilateral trading system,

[7] Pauwelyn (n 2).
[8] Krzysztof Pelc, 'Have WTO Members Successfully Circumvented the US' Blockade of the Appellate Body? (and How Would We Know?)' (*EJIL:Talk!*, 13 February 2024) <https://www.ejiltalk.org/have-wto-members-successfully-circumvented-the-us-blockade-of-the-appellate-body-and-how-would-we-know/> accessed 8 June 2025.
[9] ibid.
[10] Pauwelyn (n 2).
[11] Al-Sadoon Fahad, 'The European Multi-Party Interim Appeal Arbitration Arrangement: A Convincing Solution to the Multilateralism Crisis at the WTO?' (*CILJ Blog,* 6 September 2020) < https://cilj.co.uk/2020/09/06/the-european-multi-party-interim-appeal-arbitration-arrangement-a-convincing-solution-to-the-multilateralism-crisis-at-the-wto/>.

and U.S.A favours bilateral trade, all countries are primarily concerned about protecting their economic nationalism.[12] This creates tensions which stem from geopolitical and trade policy differences between the countries. This lack of participation from major trade countries in MPIA prevents universal applicability as well as enforceability and risks fragmentation of WTO dispute resolution.

ii. *Legitimacy Concerns*

The MPIA arbitration process, involving the selection of a limited group of arbitrators by WTO MPIA members, proves to be comparatively opaque to the scrutiny of the DSB as the appellate body, which hinders its democratic accountability.[13] Given the limited number of participating members, the MPIA's operational scope remains narrower than what would be desirable for a mechanism seeking broader legitimacy within the multilateral trading system. Many WTO members have refrained from joining for precisely this reason, instead adopting a cautious wait-and-see approach to assess whether the mechanism proves effective and sustainable in practice.[14]

Although the MPIA Secretariat is vested with the authority to extend enhanced assistance to developing countries, thereby broadening access beyond what the original framework permitted,[15] the reliance on a fixed pool of arbitrators is likely to generate systemic challenges as participation among states increases. Such issues affect the legitimacy of the MPIA as an effective dispute resolution process.

iii. *An Alternative or Replication of the AB?*

The MPIA was, in essence, created as a replacement for the defunct appellate body, and the Agreement explicitly aims to retain the principles, functioning and procedure of the appellate body within the WTO framework while narrowly attempting to rectify the criticisms put forth by the U.S.[16] MPIA members have affirmed that the process of MPIA remains a temporary stop-gap measure, and they are still hopeful for the reinstatement of an appellate body.[17] Such a replacement risks the MPIA turning into a duplication of the erstwhile appellate body and facing identical issues. For instance, while the MPIA was expected to adopt a more restrained approach, its first award in *EU–Colombia: Frozen Fries* cited ten prior AB reports, a modest number compared to the AB's own

[12] Adarsh Sambhav, 'A Critical Review of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA)' (2025) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5243724>.
[13] ibid.
[14] Al-Sadoon (n 11).
15 Sambhav (n 12).
[16] Ahmed (n 1).
[17] 'Multi-Party Interim Appeal Arbitration Arrangement (MPIA)' (*Geneva Trade Platform*) <https://wtoplurilaterals.info/plural_initiative/the-mpia/> accessed 1 June 2025.

practice but nonetheless reflective of a continued reliance on AB jurisprudence.[18] This has raised concerns that the MPIA may gradually re-entrench a de facto doctrine of stare decisis, thereby replicating one of the very criticisms levelled against the appellate body itself.[19] This can be substantially interpreted from the U.S's continued and vehement opposition to the MPIA.

**Moving Forward**

The issue arises, therefore, when the MPIA is attempting to stick to the WTO framework of the appellate body. The process of arbitration under Article 25 of the DSU is the closest to the process of a traditional arbitration and can be used to resolve any issue that the panels face as well. This provision presents the potential of using arbitration as an alternative to the existing judicial settlement system[20] by inculcating essential facets of arbitration, such as party autonomy, efficiency and neutrality, mutual consent, and enforcement measures. Article 25, therefore, must be interpreted as a true arbitration provision to realise its potential as an independent dispute settlement avenue. Initially, arbitration under Article 25 did not include a two-step process, and there was no room for further negotiation. The arbitrators provided a legitimate and objective ruling, which was enforced, and there was no scope for appeal.[21] However, this reinterpretation transforms arbitration into an auxiliary appeal step, rather than a standalone method of dispute resolution.

While the MPIA has proven beneficial in light of the appellate body crisis, it must evolve into an alternative to the current procedures and actually attempt to resolve the integral issues with the current procedure. By merely replicating the function of the appellate body, it risks repeating the same mistakes. Therefore, it is suggested that Article 25 must take a form of its own by augmenting its tenets of arbitration, separate from existing procedure, to ensure that it does not repeat old mistakes.

Alternatively, where it proves difficult for WTO members to agree on an institutionalised system of arbitration, they may instead opt for an ad hoc arbitration mechanism between themselves when trade-related disputes arise. This approach would require mutual cooperation and the conclusion of dispute-specific arbitration agreements at the time the issue arises. Such a mechanism could take

[18] *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands,* WT/DS591/ARB25, Award (21 December 2022).
[19] Ahmed (n 1); Pauwelyn (n 2).
[20] David Jacyk, 'The Integration of Article 25 Arbitration in WTO Dispute Settlement: The Past, Present and Future' (2008) 15 Aust. Int'l. L. J 235.
[21] ibid.

the form of either a single-tier process or a two-tier structure with the possibility of appeal. Importantly, this arrangement would fall squarely within the scope of Article 25 of the DSU. Ad hoc arbitration offers greater procedural flexibility, allowing countries like U.S.A to tailor dispute settlement processes in a manner that aligns more closely with their preferences and perceived sovereign interests. Since each arbitration can be uniquely designed, it avoids the rigidity of institutionalised frameworks, which may be viewed by some members, particularly the U.S, as encroachments on their autonomy. This flexibility could incentivise broader participation in WTO dispute settlement and encourage re-engagement with rules-based adjudication.

The features of an ad-hoc arbitration are also included within the MPIA framework under Article 25. This can be seen in the first finalised dispute by the MPIA, i.e. the *EU–Turkey pharmaceuticals* dispute,[22] wherein Turkey was not an MPIA member and thereby initiated the arbitration agreement based on an ad-hoc arrangement under Article 25 DSU, within the MPIA framework.

While it remains to be seen if countries are willing to resolve disputes through ad hoc arbitration opting to do so would reflect a renewed openness to cooperative dispute resolution, a commitment to reducing trade barriers, and an alignment with the liberalising objectives of the multilateral trading system. Such a development could help restore trust in the WTO framework and provide momentum toward a more functional and inclusive global trade regime.

**Conclusion**

While the MPIA has made significant improvements to fill the void created by the AB crisis, to fulfil the promise of Article 25, countries must break out of pre-existing WTO frameworks of dispute resolution. The arbitration procedure under Article 25 of the Dispute Settlement Understanding is expansive in its scope and represents the tenets of arbitration procedures. It, therefore, provides a proficient stand-alone alternative to traditional judicial settlement methods in the WTO. Instead of considering arbitration as a mere appendage to a broken appellate process, Article 25 must be employed to function as a distinct and standalone mechanism, either through institutionalised frameworks or ad hoc agreements.

[22] *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products,* WT/DS583/ARB25, Award (25 July 2022).

GNLU SRDC ADR MAGAZINE
VOLUME V | ISSUE III

# THE ROLE OF ARBITRATION IN RESOLVING TAX TREATY CONFLICTS: LESSONS FROM THE LONE STAR AWARD

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## Introduction

In an era of rapidly growing cross-border investments, an emerging concern over the adjudication of international tax treaty disputes is apparent. In this regard, arbitration as a remedy has proved to be a consistent and cost-effective method of dispute resolution. However, the efficacy and the merit of such arbitral awards have been frequently subject to critique.

Tax treaty disputes often arise under Bilateral Investment Treaties ["**BITs**"] and Double Tax Treaties ["**DTTs**"] both of which aim to prevent double taxation and ensure protection for investors. Although, the objective of such treaties is to benefit the interests of investors of the contracting States, investors from third countries sometimes benefit from them through treaty shopping. For instance, if India and South Korea have a DTT, then Indian companies can avoid double taxation while investing in South Korea. At the same time, an Australian company could, in turn, set up a shell or a conduit company in India and channel its investment through it to gain the same benefit even though Australia is not a party to the India-South Korea DTT.

To counter such strategies, host States have come up with anti-tax avoidance doctrines such as the Substance Over Form Doctrine ["**SOFD**"], which allow them to pierce through formal legal structures and assess the real beneficiary of a transaction. While such doctrines aim to protect the tax base, they also introduce uncertainties in the interpretation of such doctrines by the Courts and Tribunals, thus undermining the goals of BITs and DTTs – protection of investors.

Against this backdrop, this article begins by examining the nature and reasons for such conflicts in Part II. It then evaluates the interpretative framework for investment treaties under Part III while further examining how tribunals have approached the issue, with the *Lone Star v Korea* ["**Lone Star**"][1] award serving as a key illustration in Part IV. In Part V, it critiques the interpretative

[1] *LSF-KEB Holdings SCA & Ors. v Republic of Korea*, ICSID Case No. ARB/12/37, Award (30 August 2022).

overreach in such cases elucidating the risks associated, and then proposes a way forward which is treaty consistent and strict in nature under Part VI.

**Understanding the Origin and Reasons for such Conflicts**

Over time, an increasing overlap has emerged between international tax enforcement and investment treaty protection in investor-state arbitration. As countries adopt aggressive anti-avoidance rules to preserve their tax base, foreign investors increasingly find themselves caught in disputes where their treaty-based rights clash with evolving domestic tax enforcement tools.

*i. The Rise of Anti-Tax Avoidance Doctrines in Arbitration*

An anti-tax avoidance doctrine is a tool used by the Government to target the system of using shell companies to avoid taxes arising out of a DTT or a BIT. Prominent methods of identifying such avoidances have been achieved by identifying substantial owners of the income. In international commercial arbitration, SOFD is one such 'economic substance' doctrine used by Courts and Tribunals to identify the real ownership of an entity.[2] As the literal meaning suggests, it looks at the substance (real control of the company) over form (the nominal owner of the company). It is grounded in a legitimate public interest, and States have a right to curb tax avoidance that exploits treaty networks. However, this doctrine is inherently vague. The United States of America ["**USA**"] 9th Circuit Court in *Mazzei v Commissioner* limited the use of this doctrine.[3] In this case, the Congress had clearly written tax benefits into law, as it had done for Foreign Sales Corporations. The Court explained that the Internal Revenue Service cannot rely on SOFD to deny the tax benefits just because the arrangement looks artificial. Further, in the words of Philip Baker, such an approach was considered to be far-fetched and subjective.[4]

The origin of this doctrine can be traced back to the U.S Supreme Court judgment in *Gregory v Helvering,*[5] where the Court held that the change in taxpayers' economic position in a 'meaningful way' establishes 'economic presence'. In contrast, in the European Union ["**EU**"], the focus is on physical presence, substance, and business activity. The Court of Justice of the EU often looks for genuine connection between the companies and activity within the State. In India, the Supreme Court in *McDowell & Co. Ltd v CTO*,[6] has held that an increased tax was imposed on the substantive

[2] Błażej Kuźniacki, 'The Compatibility of the Substance over Form Doctrine with Tax and Investment Treaties: A Case Study of *Lone Star v the Republic of Korea*' (2024) 39 ICSID Rev 139.
[3] *Mazzei v Commissioner of Internal Revenue* No. 18-72451 (9th Cir., 2 June 2021).
[4] Philip Baker, 'Beneficial Ownership: After *Indofood*' (2007) 6 GITC Rev 15.
[5] *Gregory v Helvering* 293 U.S. 465 (1935).
[6] *McDowell & Co. Ltd. v CTO* (1985) 3 SCC 230.

owner of assets and not on the nominal owner. Similarly, in *Aditya Birla Nuvo Ltd. v Director of Income Tax*,[7] the Court held the parent company liable to pay tax under the Indian law rather than the conduit company which was just acting as a channel.

This lack of uniformity creates unpredictability for investors.[8] A transaction that qualifies for DTT protection in one country may be taxed aggressively in another. Investors structure their transactions based on treaty protections, often using intermediary companies in jurisdictions with favourable tax treaties. These structures, while seen as avoidance by some States, are often perfectly legal and transparent. This position warrants questioning on the need for such doctrines, and the difference between tax avoidance and tax evasion.

Further, the States' constant attempts to preserve their taxing rights has given birth to major international policy developments, such as Base Erosion and Profit Shifting ["**BEPS**"].[9] This framework aims to combat tax avoiding methods which exploit loopholes in tax rules of a State. To strengthen the ground, the Organisation for Economic Co-operation and Development ["**OECD**"] introduced the Principal Purpose Test ["**PPT**"],[10] and Limitation on Benefits ["**LOB**"], clauses in BITs and DTTs to legitimately hold parties accountable for tax avoidance. However, the legitimacy of such doctrines can be realized by States only if the same are codified as clauses, and included in the treaties. The inclusion of such doctrines, especially when the treaties do not explicitly allow for such inclusive interpretations, under the garb of purposive interpretation during adjudication will only result in inconsistency, and blurs the line between tax avoidance and tax evasion.

*ii. The Doctrinal Misconception surrounding Tax Avoidance and Tax Evasion*

The terms tax avoidance and tax evasion sound similar but have different meanings. Lord Tomlin, while reinstating the form over substance doctrine, enunciated the difference between tax avoidance and tax evasion. He noted, "*every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers maybe of his ingenuity, he cannot be compelled to pay an increased tax*" [emphasis added].[11]

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[7] *Aditya Birla Nuvo Ltd. v Director of Income Tax* [2011] SCC OnLine Bom 899.
[8] Sanskriti Mohanty and Satyajeet Panigrahi, 'Substance-Over-Form Doctrine: Reshaping India's Corporate Tax Regime' (2018) 7 GNLU JL Dev & Pol 36.
[9] 'Base Erosion and Profit Shifting (BEPS)' (*OECD*) <https://www.oecd.org/en/topics/policy-issues/base-erosion-and-profit-shifting-beps.html> accessed 24 July 2025.
[10] OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report* (OECD Publishing 2015).
[11] Mohanty (n 8).

This principle came to be known as the Westminster principle which suggested that tax planning with an objective of legally obviating tax liability is a legitimate right of the taxpayers and anything otherwise is illegal tax evasion. Thus, tax avoidance doctrines do not lack an objective or aim per se but lack consistent interpretation, which results in the abuse of investor rights. Therefore, doctrinal vagueness concerning tax avoidance allows States and Tribunals to treat lawful avoidance as illicit conduct, thus resulting in a disproportionate curtailment of investor rights resulting in increased conflict.

**The Interpretative Framework for Investment Treaties**

There exists mainly two ways of interpreting an investment treaty; the strict word-to-word interpretation,[12] and the liberal interpretation, which involves expansion of the wording of the treaty to give it a wider connotation. In our opinion, the latter interpretation will lead to uncertainties and further undermine the object of protecting investors from unfair treatment by the governments of host countries.

Under a strict interpretive approach, doctrines or obligations not explicitly stated in the treaty cannot be read in. For instance, unless SOFD has been expressly incorporated into BIT or DTT, it cannot be presumed to apply. Such an approach upholds treaty stability, reinforces the principle of *pacta sunt servanda* illustrated under Article 26 of Vienna Convention on the Law of Treaties ["**VCLT**"], and protects against the arbitrary insertion of domestic legal standards into the international legal framework.[13]

Further, Article 31 of VCLT emphasizes that treaties should be interpreted in good faith according to the ordinary meaning of their terms, in their context and in light of their object and purpose.[14] Article 32 of VCLT,[15] permits supplementary means only when the interpretation under Article 31 of VCLT leaves ambiguity or leads to absurd results. The nature of SOFD is such that it affects how DTTs are interpreted and applied, which should be done in accordance with the principles of interpretation of the VCLT.[16]

**How Tribunals have Approached Interpretation of Treaties**

[12] Alfred Verdross, Stephan Verosta and Karl Zemanek, 'Publications of the Permanent Court of International Justice' (1968) Springer.
[13] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 189, 191.
[14] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331, art 31 ("**VCLT**").
[15] VCLT, art 32.
[16] OECD, *Model Tax Convention on Income and on Capital: Condensed Version* (OECD Publishing 2017) 55-90.

Investment Tribunals are not tax courts. Their core function is not to validate or invalidate national taxation measures per se but to assess whether a State's actions are consistent with its obligations under international treaties, particularly BITs and DTTs.[17]

In the *Lone Star*, one of the latest awards in tax-related investment treaty disputes, the Tribunal addressed SOFD for the first time in an investment treaty context. A brief overview of the facts of the case is necessary to delve into the depths of the Tribunal's reasoning pursuant to the application of SOFD. Following the 1997–98 Asian financial crisis, South Korea encouraged foreign investment through DTTs, and Special Purpose Entities ["**SPEs**"].[18] Lone Star, a USA-based private equity firm, structured its investments in Korea using Belgian entities to benefit from the Korea–Belgium DTT. However, Korean tax authorities applied SOFD by arguing that the real control rested with Lone Star's USA parent company and not the Belgian entities. Subsequently, Lone Star initiated arbitration under the 2011 BLEU–Korea BIT,[19] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"], [20] alleging violations of investment protections. The Tribunal upheld the application of SOFD despite even though the SOFD doctrine had not been contemplated in the treaty.[21] It relied on an oversimplified 2003 commentary of the OECD on SOFD which only briefly addressed domestic anti-tax avoidance rules.[22] In fact, the 2017 OECD commentary,[23] an updated documentation which discussed the application of SOFD, was blatantly overlooked by the Tribunal.[24]

To provide an alternative perspective, in regards to India, cases like *Cairn PLC v India* ["**Cairn**"],[25] and *Vodafone International Holdings BV v India* ["**Vodafone**"],[26] show Tribunals pushing back against overreach. In *Vodafone*, the PCA ruled that retrospective application of India's tax legislation violated the fair and equitable treatment ["**FET**"] standard, by emphasizing on stability and legitimate expectations. Similarly, in *Cairn*, the Tribunal criticised India's retrospective taxation as being a breach of its BIT obligations.

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[17] Dolzer (n 13) 23–25.
[18] ibid.
[19] Agreement between the Belgium-Luxembourg Economic Union and the Government of the Republic of Korea for the Reciprocal Promotion and Protection of Investments (signed 12 December 2006, entered into force 27 March 2011) 2779 UNTS 141.
[20] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.
[21] *LSF-KEB Holdings* (n 1) [471].
[22] ibid [758].
[23]OECD, *Model Tax Convention on Income and on Capital: Condensed Version* (n 15).
[24] Kuźniacki (n 2).
[25] *Cairn Energy PLC and Cairn UK Holdings Ltd. v Republic of India,* PCA Case No. 2016-07, Award (21 December 2020).
[26] *Vodafone International Holdings BV v Republic of India,* PCA Case No. 2016-35, Award (25 September 2020).

Further, in a ruling under the India–Mauritius Double Taxation Agreement, India's Tax Tribunal held that beneficial ownership cannot be read into Article 13, regarding capital gains, of the DTA unless explicitly stated.[27] The Tribunal grounded its view in the VCLT and the *pacta sunt servanda* principle, stating that if the contracting States deliberately chose not to include this kind of requirement, then a treaty should be interpreted to reflect that intention.[28] This principle, applied to investment arbitration, further supports the argument that doctrines like SOFD must only be used when textually anchored in the treaty.

**The Risks of Expansive Treaty Interpretation**

In practice, liberal interpretations of BITs or DTTs can erode their value and intended purpose. The method of interpretation under VCLT is not synonymous with an expansive and liberal interpretation. The inclusion of the term 'good faith' does not license Tribunals to expand the treaty meaning beyond what the partis intended, rather calls for the meaning being in line with the intention of the parties.[29]

BITs and DTTs include investor protection clauses such as FET, national treatment, and most-favoured-nation ["**MFN**"] status. These ensure stability, non-discrimination, and due process. While some treaties carve-out these provisions for taxation, most do not authorise the use of domestic doctrines like SOFD.

For instance, as previously discussed, in the *Lone Star* award, the Tribunal applied SOFD even though neither the BLEU-Korea BIT nor the Korea-Belgium DTT,[30] explicitly mentioned SOFD. This opens the door to ambiguous doctrines being used to override the core principles of investor protections. Such reasoning weakens the credibility of arbitration, and makes treaty protections unreliable.

When Tribunals adopt expansive readings, they create systemic uncertainty. Investors, often described as "*guests in an alien country*", rely on the predictability and legal protection guaranteed by investment treaties.[31] If core protections, such as FET and legitimate expectations, can be overridden by vague and discretionary doctrines, the credibility of the international investment

[27] *Blackstone FP Capital Partners Mauritius V Ltd. v Deputy Commissioner of Income Tax* [2022] SCC OnLine ITAT 1520.
[28] *Canada v Alta Energy Luxembourg S.A.R.L.* (2021) 3 SCR 590.
[29] VCLT, art 31.
[30] *LSF-KEB Holdings* (n 1).
[31] United Nations Conference on Trade and Development, *World Investment Report 2012: Towards a New Generation of Investment Policies* (United Nations 2012) 96–98.

protection regime becomes fundamentally compromised. These are the risks the investment arbitration carries with an expansive form of treaty interpretation.

**The Way Forward**

Tribunals must strike a careful balance between respecting a State's efforts to prevent tax abuse and upholding the legal certainty. Their role should focus strictly on whether a State's action aligns with its international obligations, not its domestic tax policy goals. If a BIT or DTT expressly includes provisions relating to anti-avoidance rules, such as a SOFD or PPT, then Tribunals can legitimately apply them.[32] However, in the absence of such provisions, the Tribunals must refrain from reading these doctrines into the treaty.

This does not mean States cannot fight tax avoidance. They can and should. However, they must do so through clearly worded treaty provisions, legislative amendments, or renegotiated treaties. Tribunals must assess whether the State's actions are consistent with its international obligations, not whether they are justifiable under domestic law. Tribunals must, in appropriate cases, invoke principles such as abuse of rights, fraud or denial of benefits, provided that the treaty includes such clauses.[33] What Tribunals must not do, is to fill gaps in the treaty' language by using domestic tax doctrines that were never negotiated or consented to. That path leads not to balanced adjudication but to judicial overreach and legal unpredictability.

**Conclusion**

The role of arbitration in international tax treaty disputes is crucial and warrants a pragmatic approach. As such disputes grow, the responsibility of Tribunals grows requiring them to decide between stable interpretation of tax treaties and accommodating evolving tax avoidance doctrines. The mode of interpretation must align with international policies and conventions such as the OECD and VCLT, which influence international trade realm as a whole. Arbitral awards, closely followed and scrutinised by all the stakeholders, tend to hold high persuasive value, and one inconsistent award could compromise the principles of investor protections, subsequently denting the confidence of such investors to approach the dispute settlement system contemplated under International Centre for Settlement of Investment Disputes ["**ICSID**"]. The risk is not just to investors but to the credibility of arbitration itself. In this context, the *Lone Star* award should not

[32] Multilateral Convention to Implement Tax Treaty related Measures to Prevent Base Erosion and Profit Shifting (signed 7 June 2017, entered into force 1 July 2018) arts 6,7.
[33] *Plama Consortium Ltd. v Republic of Bulgaria,* ICSID Case No. ARB/03/24, Award (27 August 2008) [140]; *Phoenix Action Ltd. v Czech Republic,* ICSID Case No. ARB/06/5, Award (15 April 2009) [144].

be treated as a model. This is specifically important to note that none of parties have initiated a motion to annul the award, and negate its effect under Article 52 of the ICSID Convention. In other words, the award should not be treated as the 'lone' star.

GNLU SRDC ADR
MAGAZINE
VOLUME IV | ISSUE III

# QUARTERLY ALTERNATE DISPUTE RESOLUTION ROUND-UP (MAY 2025 – AUGUST 2025)

## MAY

1. **The Supreme Court criticized the Arbitration Bill 2024 for not recognizing the power to implead non-signatories and urged the union to make changes:**

   In the case of *ASF Buildtech Private Limited v Shapoorji Pallonji & Company Pvt. Ltd.*,[1] the Supreme Court expressed its dissatisfaction with the absence of explicit statutory recognition of the power of arbitral tribunals to implead or join non-signatory parties. The court noted that despite the earlier omissions in the Arbitration and Conciliation Act, 1996, ["**Arbitration Act**"], the newly proposed Arbitration and Conciliation Bill, 2024, failed to address the issue.

2. **The High Court may grant Article 227 interim relief in arbitration proceedings in exceptional cases:**

   In the case of *M/S Jindal Steel and Power Ltd. & Anr. v M/S Bansal Infra Projects Pvt. Ltd. & Ors.*,[2] the Supreme Court refused to interfere with the High Court's order that granted interim protection and held that while the Arbitration Act mandates minimal judicial interference, a High Court may, in exceptional cases exercise its supervisory jurisdiction under Article 227[3] to grant the interim relief where denial of such protection would result in irreparable harm.

3. **Interim Relief under Section 9 of the Arbitration Act must be sought with "reasonable expedition":**

   Bombay High Court in the case of *Ashoka Buildcon Ltd. v Maha Active Engineers India Pvt. Ltd. & Anr.*[4] observed that relief under section 9[5] of the Arbitration Act is discretionary and must be guided by the settled principles of interim relief, i.e., existence of a prima facie case, balance of convenience, and irreparable harm. An appellate court can interfere with the discretionary

[1] *ASF Buildtech (P) Ltd. v Shapoorji Pallonji & Co. (P) Ltd.*, 2025 SCC OnLine SC 1016.
[2] *M/S Jindal Steel and Power Ltd. & Anr. v M/S Bansal Infra Projects Pvt. Ltd.*, 2025 SC 544.
[3] Constitution of India, 1950, art 227.
[4] *Ashoka Buildcon Ltd. v Maha Active Engineers India Pvt. Ltd. & Anr.*, 2024 BHC 8120.
[5] The Arbitration and Conciliation Act 1996, s 9.

order of the trial court only when it is exercised arbitrarily and in ignorance of the settled principles.

4. **Objections under section 37 of Code of Civil Procedure** ["**CPC**"] **cannot be moved by the judgment debtor against the execution of the award under section 36 of the Arbitration Act:**

   The Delhi High Court in the case of *Anglo-American Metallurgical Coal Pvt. Ltd. v MMTC Ltd.*[6] clarified that the provisions of CPC are only applicable to the extent of enforcement of an award, and the judgment debtor cannot move the objections under section 37 of CPC[7] in an application for execution of award under section 36 of the Arbitration Act[8] as it would undermine the provision of section 34[9] i.e., challenge the award on limited grounds and go against the intent of the Arbitration Act as it would effectively amount to opening a second round for challenging the award.

5. **While deciding the application for the appointment of an arbitrator, the court cannot examine whether the claim is barred by res judicata:**

   The Delhi High Court in the case of *Hindustan Construction Company Ltd v Indian Strategic Petroleum Reserves Ltd.*,[10] the court held that under section 11 of the Arbitration Act,[11] it is not open for the referral court to examine the issue whether the claim is barred by res judicata and such examination falls with the arbitral tribunal.

6. **Waiver to Section 12(5) of the Arbitration Act has to be given after the constitution of the tribunal:**

   The Delhi High Court in the case of *M.V. Omni Projects (India) Ltd. v Union of India through Chief Engineer Northern Railways & Anr.*,[12] while referring to the judgment by the Supreme Court of India in the case of *Bharat Broadband v United Telecom*[13] observed that a party giving no objection to the application under Section 12(5) of the Arbitration Act[14] has to give no objection after the constitution of the arbitral tribunal. The waiver of applicability has to be done after the

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[6] *Anglo-American Metallurgical Coal Pty. Ltd. v MMTC Ltd.*, 2021 SCC OnLine Del 5610.
[7] The Code of Civil Procedure 1908, s 37.
[8] The Arbitration and Conciliation Act 1996, s 36.
[9] The Arbitration and Conciliation Act 1996, s 34.
[10] *Hindustan Construction Company Ltd. v Indian Strategic Petroleum Reserves Ltd.*, 2017 SCC OnLine Del 9309.
[11] The Arbitration and Conciliation Act 1996, s 11.
[12] *M.V. Omni Projects (India) Ltd. v Union of India through Chief Engineer Northern Railways & Anr.*, 2024 DHC 7874.
[13] *Bharat Broadband Network Ltd. v United Telecoms Ltd.*, (2019) 5 SCC 755.
[14] The Arbitration and Conciliation Act 1996, s 12(5).

arbitrators are appointed, with the names and details, and a waiver before the constitution of the arbitral tribunal is no waiver.

7. **Plea of waiving the arbitration clause falls within the domain of the tribunal and cannot be examined by the referral court under section 8 of the Arbitration Act:**

   The Delhi High Court in the case of *Porto Emporios Shipping Inc. v Indian Oil Corporation Ltd.*[15] allowed an application under Section 8 of the Arbitration Act[16] and observed that the plea of waiver of the arbitration clause is a plea concerning rights *in personam* and does not render the dispute non-arbitrable. Furthermore, the determination of the plea falls within the jurisdiction domain of the arbitral tribunal.

8. **Arbitration clause prevails over the exclusive jurisdiction clause, and the court at the designated seat will retain jurisdiction:**

   The Delhi High Court in the case of *M/S KLA Const Technologies Pvt. Ltd. v M/S Gulshan Homz Pvt. Ltd.*[17] held that where an exclusive jurisdiction clause is made "subject to" the arbitration clause and the arbitration clause designate a different territorial jurisdiction, the arbitration clause will prevail. In the case of conflict, the jurisdiction of the court will be decided by the seat designated in the arbitration agreement, which will override the exclusive jurisdiction clause in the agreement.

9. **Court, while referring parties to arbitration, cannot direct that the arbitral award cannot be filed before it:**

   The Jammu & Kashmir and Ladakh High Court in the case of *Ghulam Rasool Bhat v Shafeeq Fruit Co.*[18] held that the court cannot direct the award, passed after the conclusion of the arbitral proceedings. The court further referred the case *K. K. Modi v K. N. Modi*,[19] where the Supreme Court held that for an agreement to be considered an arbitration agreement, it must fulfill the essential criteria that the decision of the arbitral tribunal will be binding on the parties and the tribunal's jurisdiction must arise from the consent of the parties, a court order or the statute.

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[15] *Porto Emporios Shipping Inc. v Indian Oil Corpn. Ltd.*, 2025 SCC OnLine Del 3288.
[16] The Arbitration and Conciliation Act 1996, s 8.
[17] *KLA Const. Technologies (P) Ltd. v Gulshan Homz (P) Ltd.*, 2025 SCC OnLine Del 3998.
[18] *Ghulam Rasool Bhat v Shafeeq Fruit Co.*, 2025 SCC OnLine J&K 389.
[19] *K.K. Modi v K.N. Modi*, (1998) 3 SCC 573.

# JUNE

**1. Unilateral appointment does not preclude challenge to arbitrator's eligibility under section 12(5):**

The Delhi High Court[1] held that a party who had unilaterally appointed an arbitrator cannot be estopped from later objecting to the qualification of the arbitrator under Section 12(5)[2] of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"]. The bench consisting of Justices Vibhu Bakhru and Tejas Karia made it clear that mere fact of appointment is not waiver under the proviso to Section 12(5), which is an express written waiver.

The Court held that an arbitrator whose association with parties comes under the disqualifications enumerated in the Seventh Schedule is de jure ineligible, and an award passed by such arbitrator is not legally enforceable. Post the Supreme Court judgment in *Bharat Broadband Network Ltd. v United Telecoms Ltd.*, the Court reasserted that ineligibility under Section 12(5) necessarily terminates the mandate of the arbitrator under Section 14(1)(a).[3]

Notably, the Court also made it clear that consent to extend the term of an arbitrator under Section 29-A (3)[4] cannot be construed as a written waiver of ineligibility. Appearance in arbitral proceedings or conduct acquiescence is not enough.

The judgment reinforces that Section 12(5) overrides the general waiver provision under Section 4 of the Arbitration Act[5] and mandates strict compliance to uphold the principles of independence and impartiality in arbitration. A waiver of disqualification must be explicit, unequivocal, and in writing, without which, even the party who made the unilateral appointment retains the right to challenge it.

**2. Arbitral jurisdiction not barred by PMLA attachment or criminal proceedings:**

[1] *M/s Mahavir Prasad Gupta and Sons v Govt. of NCT of Delhi*, (Del) CM(M) 64/2023.
[2] Arbitration and Conciliation Act 1996, s 12(5).
[3] Arbitration and Conciliation Act 1996, s 14(1)(a).
[4] Arbitration and Conciliation Act 1996, s 29A (3).
[5] Arbitration and Conciliation Act 1996, s 4.

The Delhi High Court[6] has ruled that jurisdiction of the arbitral tribunal is not affected by provisional attachment of assets under the PMLA or parallel investigations by the CBI or ED. Justice Amit Mahajan ruled that such proceedings do not exclude arbitration unless the dispute is one touching the bone of serious fraud vitiating the arbitration agreement itself.

Referring to the case of *A. Ayyasamy v A. Paramasivam*, the Court once again enunciated that fraud of a sophisticated kind is the sole requirement where fraud affecting the validity of the agreement renders a dispute non-arbitrable. Fraud or criminality by themselves are not enough to stay the arbitral proceedings. And *Deep Industries Ltd. v ONGC*, the Court once again enunciated that interference under Article 227[7] must be exercised with caution and only where there is clear illegality, reaffirming limited judicial intervention in arbitral proceedings.

**3. Mere professional association with law firm does not disqualify advocate from acting as arbitrator:**

The Calcutta High Court[8] has clarified that a previous professional connection of an advocate with a law firm, for example, receiving briefs on non-related cases, does not necessarily disqualify them from serving as an arbitrator in proceedings in which such a law firm is involved. Justice Shampa Sarkar ruled that the association is not under the disqualifications enumerated under Section 12(5)[9] read with the Seventh Schedule of the Arbitration Act.

The Court emphasized the point that Seventh Schedule Category 3 disqualification only arises when the arbitrator himself has appeared on the law firm's side in a hearing in the court and not where the firm has instructed the arbitrator on behalf of other parties. No such direct representation or link between the arbitrator and parties to the dispute was established in this case.

Again, it was stressed that Section 12(5) calls for disqualification only if there exists a specified relationship with the representative or party. Without a direct relationship that can raise reasonable doubts about impartiality, prior professional association of a representative with the firm is neither a conflict of interest nor invalidates the appointment.

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[6] *Lata Yadav v Shivakriti Agro Pvt. Ltd. & Ors.,* (Del) CM(M) 53/2025.
[7] The Constitution of India 1950, art 227.
[8] *Damodar Valley Corporation v AKA Logistics Pvt. Ltd.*, AP-COM/178/2025.
[9] Arbitration and Conciliation Act 1996, s 12(5).

4. **Writ Court cannot entertain reliefs already pursued before Arbitrator and Commercial Court:**

   Chhattisgarh High Court[10] held that parties cannot turn to the court of writ to pray for the same reliefs where the same issues have already been brought before an arbitrator and then decided by a commercial court. The Chief Justice Ramesh Sinha and Justice Bibhu Datta Guru led bench observed that the jurisdiction of the writ under Article 226[11] cannot be invoked where efficacious and effectual alternative remedies are available.

   Refusing the writ petition, the Court asserted that litigants cannot circumvent the statutory process of resolution of disputes by simply approaching the writ jurisdiction. After the dispute has been settled by way of arbitration as well as commercial litigation, seeking the same reliefs through a writ petition would constitute abuse of process and impairs the doctrine of finality of judicial proceedings.

5. **Arbitrator to decide applicability of arbitration clause; court's role limited at Section 11 stage:**

   The Delhi High Court[12] has ruled that questions of applicability or jurisdiction of an arbitration clause are within the domain of the arbitrator and cannot be decided at the stage of the Section 11[13] petition under the Arbitration Act. Justice Sachin Datta ruled that after it is not disputed that there exists an arbitration agreement, any issue of its applicability or relevance must be decided by the arbitral tribunal itself.

   The Court also decided on the legitimacy of the appointment process defined under the agreement, where the petitioner could choose one of the three nominees as an arbitrator. Following the Supreme Court's judgment in *Central Organization for Railway Electrification v ECI-SPIC-SMO-MCML (JV)* (2024), the Court decided that such a process, which gives unilateral appointment authority to one party, is not valid anymore. It is thus the court's responsibility to appoint an independent, sole arbitrator.

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[10] *Angelique International Ltd. v Union of India (Ministry of Railways) & Ors.,* WPC No. 2946 of 2025.
[11] The Constitution of India 1950, art 226.
[12] *Indraprastha Gas Ltd. v M/s Chintamani Food and Snacks*, ARB.P. 355/2024.
[13] Arbitration and Conciliation Act 1996, s 11.

The judgment reiterates the doctrine of equality of parties in the appointment of arbitrators and limits judicial review at the pre-arbitral stage to determining the existence of the agreement and not deciding disputes of interpretation under it.

**6. Relying on external correspondence despite clear contractual terms constitutes patent illegality:**

The Delhi High Court[14] has held that where the language of the contract is clear and not ambiguous, reliance on extraneous documents such as pre-contract negotiations or letters is not allowed and a case of patent illegality. The division bench of Justice Vibhu Bakhru and Justice Tejas Karia observed that arbitral tribunals are under an obligation to interpret contracts strictly in terms of their express words, especially where the agreement specifically excludes reference to external documents.

The Court objected to the use by the arbitral tribunal of negotiations and communications between parties to interpret Clause (3.4.1.5) of the General Conditions of Contract (GCC), although the clause was clearly worded. It reaffirmed that deviation from clear contractual language not only undermines party autonomy but also violates the requirement of public policy under Section 34 of the Arbitration Act.[15]

Repeating once again that an award made for disobedience of express terms of contract is vitiated by patent illegality, the Court set aside the award insofar as it had been made on the basis of inadmissible interpretive aids and materials outside the contractual context.

**7. Plea of duress not maintainable after accepting full and final settlement under court order:**

The Kerala High Court[16] has ruled that a party may not thereafter say that there was duress or coercion after it had agreed to a final and complete settlement under the aegis of a court order and had expressly admitted the same in writing. The bench of Justices Syam Kumar V.M. and Sushrut Arvind Dharmadhikari ruled that such an acceptance excluded any subsequent claim that the settlement was not voluntary.

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[14] *Oil and Natural Gas Corporation Ltd. v JSIW Infrastructure Pvt. Ltd.*, FAO (OS) (COMM) 59/2024.
[15] Arbitration and Conciliation Act 1996, s 34.
[16] *State of Kerala v S. Ajayakumar & Ors.*, WA NO. 550/2014.

The controversy concerning claims under five building contracts under which the petitioner had made allegations of non-payment by the State. Previous writ petitions for payment had been dismissed by the High Court on the basis that the controversy concerned facts in dispute not amenable to being adjudicated under Article 226.[17]

Thereafter, the Respondent-State paid the amount in accordance with the directions of the Court. It expressed in unequivocal terms that payment was the final and full settlement of all the payables. The petitioner also dispatched a settlement acceptance letter. The Court held that where a party clearly accepts such terms and has accepted satisfaction of claims, any later claim of coercion or necessity is meritless and cannot be legally sustained.

**8. Section 21 notice not mandatory if dispute is known to opposite party:**

The Rajasthan High Court[18] held that failure to issue a notice under Section 21[19] The Arbitration Act does not render a Section 11[20] application unsustainable where the respondent was already on notice regarding the dispute and enforcement of the arbitration clause. Justice Annoop Kumar Dhand observed that the object of a Section 21 notice is to prevent surprise and not to give priority to form over substance where the dispute is already on the surface.

The Court was hearing a Section 11 application made by the borrowers whose property had been mortgaged under the loan agreement with an arbitration clause included in it. In default, their account fell in the category of an NPA and SARFAESI proceedings were commenced by the respondent.

Overriding the objection on the basis of maintainability, the Court emphasized that the prior notice of invocation of arbitration by the lender ensured that the lack of formal notice cannot be made the reason to oppose the proceedings. It also reaffirmed the doctrine stated in *M.D. Frozen Foods Exports Pvt. Ltd. v Hero Fincorp Ltd.*, which clarified that SARFAESI proceedings, being enforcement in nature, can also coexist with arbitration, which is adjudicatory in nature.

[17] The Constitution of India 1950, art 226.
[18] *Shekharchand Sacheti & Anr. v S.M.F.G. India Home Finance Co. Ltd. & Anr.*, S.B. Arbitration Application No.81/2024.
[19] Arbitration and Conciliation Act 1996, s 21.
[20] Arbitration and Conciliation Act 1996, s 11.

# JULY

**1. Issues of misjoinder of parties and incorporation by reference fall within the purview of the arbitral tribunal:**

In *Bimla Devi Jaiswal v M/s Indus Towers Ltd.,*[1] the Calcutta High Court held that issues of misjoinder or non-joinder of parties, and incorporation of an arbitration clause by reference are matters to be decided by the Arbitral Tribunal. The dispute stemmed from a roof licence agreement containing an arbitration clause, followed by a supplementary agreement dated executed between successors of the original parties. The Petitioner sought appointment of an Arbitrator for non-payment of rent, while the Respondent argued that the arbitration clause had expired with the principal agreement and was not incorporated into the supplementary contract.

The Court found that the supplementary agreement was expressly co-extensive and co-terminus with the principal agreement and had adopted all its terms. Since the Respondent admitted acting under the principal agreement and stepping into the shoes of the licensee, incorporation was established. Relying on *Ajay Madhusudan Patel v Jyotrindra S. Patel,*[2] and *Cox and Kings Ltd. v SAP (India) Pvt. Ltd.,*[3] the Court reiterated the competence-competence principle that jurisdictional questions are for the Tribunal. It thus confined its inquiry to a prima facie examination of the arbitration agreement and appointed a Tribunal to resolve the dispute.

**2. Exclusive jurisdiction clause prevails over arbitrator's procedural order in determining seat of arbitration:**

In *Viva Infraventure Pvt. Ltd. v New Okhla Industrial Development Authority,*[4] the Delhi High Court has clarified that when parties agree on an exclusive jurisdiction clause in their arbitration agreement, the Courts named therein will be treated as the seat under Section 20(1) of the Arbitration Act.[5] The Court held that an Arbitrator has no authority to declare a different seat through a procedural order since such discretion is confined only to fixing a venue for

[1] *Bimla Devi Jaiswal v Indus Towers Ltd.* (2025) SCC OnLine Cal 5405.
[2] *Ajay Madhusudan Patel & Ors. v Jyotrindra S. Patel & Ors.* (2025) 2 SCC 147.
[3] *Cox & Kings Ltd. v SAP (India) Pvt. Ltd.* (2025) 1 SCC 611.
[4] *Viva Infraventure Pvt. Ltd. v New Okhla Industrial Development Authority* (2025) SCC OnLine Del 4684.
[5] Arbitration and Conciliation Act 1996, s 20(1).

hearings under Section 20(3).[6] The Court emphasized that the foundation of arbitral proceedings lies in the agreement between the parties, and any departure from that bargain cannot be made without their express consent.

In doing so, the Court highlighted that an exclusive jurisdiction clause reflects a deliberate intention to confer supervisory powers on a specific court, and this must be respected without dilution. The judgment further distinguished between "seat" and "venue", noting that the juridical seat stems directly from the contract, while the venue serves only as a matter of convenience. By dismissing the Section 29-A (5) petition for lack of territorial jurisdiction,[7] the Court reinforced the binding nature of party-agreed clauses and restricted the possibility of arbitrators extending their role into matters that affect supervisory control.

**3. Parties cannot be restrained from performing contractual obligations under a final partial award when both the award and the contract remain in force:**

In *Union of India v Vedanta Ltd.,*[8] the Delhi High Court considered whether parties could be restrained from acting under a Final Partial Award ["**FPA**"] when the Award and the Production Sharing Contract ["**PSC**"] remained in force. The dispute arose from a PSC governing oil and gas operations in Rajasthan. The Arbitral Tribunal had issued a declaratory award, later reclassified as an FPA, which clarified interpretational issues. The Appellant sought to prevent the Respondents from relying on the FPA until final quantification of amounts was made.

The Court rejected this contention, holding that non-compliance would render the FPA a "paper award." Since the Award was declaratory and not stayed, it remained binding and guided performance under the PSC. The Court clarified that the Respondents' recovery of post-exploration costs was not unilateral enforcement but fulfilment of contractual obligations as interpreted by the FPA. It further noted that unrecovered costs could be carried forward under Articles 14 and 15 of the PSC. Concluding that the appeal lacked merit, the Court dismissed it under Section 37 of the Arbitration Act.[9]

[6] Arbitration and Conciliation Act 1996, s 20(3).
[7] Arbitration and Conciliation Act 1996, s 29-A (5).
[8] *Union of India v Vedanta Ltd. & Anr.* [2025] SCC OnLine Del 4808.
[9] Arbitration and Conciliation Act 1996, s 37.

**4. Impleading a non-signatory without independent cause of action cannot defeat a section 8 application under the arbitration act:**

In *Murshidabad Zilla Parishad v Asian Care Development Pvt. Ltd.*,[10] the Calcutta High Court examined whether impleading a non-signatory without any independent cause of action could defeat a Section 8 application under the Arbitration Act.[11] The dispute arose from a lease agreement containing an arbitration clause, with the suit seeking injunctions and declarations based on the contract. The trial court, relying on *Sukanya Holdings v Jayesh H. Pandya,*[12] ["**Sukanya Holdings**"] had refused to refer the matter to arbitration.

The High Court reversed this decision finding that Respondent had been impleaded only to obstruct arbitration. It emphasized that the 2015 amendment to Section 8 extends the benefit of reference to those "claiming through or under" signatories, and modern precedents, particularly *Cox and Kings Ltd. v SAP (India) Pvt. Ltd.*,[13] have diluted the restrictive approach of *Sukanya Holdings*. Since the disputes arose entirely from the lease agreement, the Court allowed the appeal, set aside the trial court's order and referred the parties to arbitration.

**5. In absence of contrary indicia, "venue" mentioned in the arbitration agreement is construed as the "seat" of arbitration:**

In *Devi Prasad Mishra v M/s Nayara Energy Ltd.,*[14] the Allahabad High Court held that where an Arbitration Agreement mentions only one place as the "venue" of arbitration, such place shall also be treated as the "seat" of arbitration unless the agreement indicates otherwise.

In this case, the Applicant filed an application under Section 11(6) of the Arbitration Act[15] before the Allahabad High Court seeking appointment of an Arbitrator. The Respondent objected to the jurisdiction of the Court, arguing that Mumbai was the agreed seat of arbitration and exclusive jurisdiction was vested with the Courts at Mumbai. The Applicant contended that Mumbai was only recorded as the "venue" and not the "seat", and that the exclusive jurisdiction clause applied only to non-arbitrable disputes. The Court, relying on

[10] *Murshidabad Zilla Parishad v Asian Health Care Development Pvt. Ltd. & Ors.* [2025] SCC OnLine Cal 5829.
[11] Arbitration and Conciliation Act 1996, s 8.
[12] *Sukanya Holdings Pvt. Ltd. v Jayesh H. Pandya & Anr.* (2003) 5 SCC 531.
[13] *Cox & Kings Ltd. v SAP (India) Pvt. Ltd.* (2024) 4 SCC 1.
[14] *Devi Prasad Mishra v Nayara Energy Ltd.* [2025] SCC OnLine All 4514.
[15] Arbitration and Conciliation Act 1996, s 11(6).

*Indus Mobile Distribution Pvt. Ltd. v Datawind Innovations Pvt. Ltd.,*[16] and *B.G.S. S.G.S. Soma JV v NHPC Ltd.,*[17] observed that in the absence of contrary indications, the "venue" is to be treated as the "seat". It further held that Clause 21 of the Agreement fixed Mumbai as the place of arbitration and Clause 22 conferred exclusive jurisdiction on the Courts at Mumbai. Accordingly, the application before the Allahabad High Court was held to be not maintainable.

**6. Section 34 applications under the arbitration act are of commercial nature and must be heard by the commercial division:**

In *Garden Reach Shipbuilders & Engineers Ltd. v Marine Craft Engineers Pvt. Ltd.,*[18] the Calcutta High Court held that pleas under Section 34 of the Arbitration Act pertaining to commercial disputes are exclusively within the jurisdiction of the Commercial Division under the Commercial Courts Act, 2015. In this case, the Respondent challenged an arbitral award by filing an application under Section 34 of the Arbitration Act.[19] The application was allowed setting aside the award. The Appellant appealed under Section 37 on the ground that the judge who had passed the order lacked jurisdiction since the matter was of a commercial nature and ought to have been heard by the Commercial Division.[20]

The Court observed that on the relevant dates, the concerned judge had determination only over non-commercial arbitration applications, while matters under Section 34 of the Arbitration Act relating to commercial disputes were assigned to another judge in terms of the roster. Holding that the defect of jurisdiction was incurable, the Court set aside the impugned order and directed that the Section 34 application be placed before the appropriate bench of the Commercial Division for fresh hearing.

**7. Section court under section 34 cannot remit without section 34(4) and absence of section 21 notice voids tribunal's jurisdiction:**

In *Harkisandas Tulsidas Pabari v Rajendra Anandrao Acharya,*[21] the Bombay High Court held that arbitral proceedings cannot be remitted to the same Arbitrator after setting aside an

[16] *Indus Mobile Distribution Pvt. Ltd. v Datawind Innovations Pvt. Ltd. & Ors,* (2017) 7 SCC 678.
[17] *BGS SGS SOMA JV v NHPC Ltd.* (2020) 4 SCC 234.
[18] *Garden Reach Shipbuilders & Engineers Ltd. v Marine Craft Engineers Pvt. Ltd.* [2025] SCC OnLine Cal 6072.
[19] Arbitration and Conciliation Act 1996, s 34.
[20] Arbitration and Conciliation Act 1996, s 37.
[21] *Harkisandas Tulsidas Pabari & Anr v Rajendra Anandrao Acharya & Ors.* [2025] SCC OnLine Bom 2697.

award under Section 34 unless specifically directed under Section 34(4).[22] Moreover, the absence of a notice under Section 21 of the Arbitration Act deprives the Tribunal of jurisdiction.[23]

Disputes had arisen under a 1994 Memorandum of Understanding ["**MoU**"] for the transfer of property rights. An initial award was set aside for procedural irregularity, but the Appellant re-approached the same arbitrator without issuing a fresh Section 21 notice. The Tribunal nevertheless issued another award, which was later set aside. The Court affirmed that the Tribunal lacked jurisdiction since proceedings were not remitted under Section 34(4), and that the failure to issue a Section 21 notice was fatal. It also upheld findings that the MoU was not a concluded contract and specific performance could not be ordered.

[22] Arbitration and Conciliation Act 1996, s 34.
[23] Arbitration and Conciliation Act 1996, s 21.

# AUGUST

**1. Order of extension of arbitrator's mandate validates the arbitrator's jurisdiction between the expiry and extension of the mandate:**

In *Glen Industries Pvt. Ltd. v Oriental Insurance Company Ltd.,*[1] the Calcutta High Court held that the order of the Court for the extension of the Arbitrator's mandate has the effect of retrospectively validating the arbitration proceedings which took place between the date of expiry of the mandate and date of filing an application for extension. By clarifying that the extension of the mandate relates back to the date of termination, irrespective as to whether the application for extension had been filed prior to or after the expiry of the extended period, the Court opined that the Arbitrator's mandate could be revived even if it had already expired on the date of making the application. The Court also relied on *Rohan Builders (India) Pvt. Ltd. v Berger Paints India Ltd.*[2] to state that the application for extension could be filed even after the expiry of the Arbitrator's mandate which then revives upon extension by the Court.

In the application for the extension of the Arbitrator's mandate which was filed after the expiry of the mandate of 18 months, the Court ruled that the parties to the dispute had waived their right to object to the continuation of the proceedings under Section 4 of the Arbitration Act,[3] by willingly participating in the arbitration proceedings after the mandate's termination. It was held that the active participation of the parties in arbitration proceedings post the termination of the Arbitrator's mandate amounted to an agreement for the extension of the mandate under Section 29-A of the Arbitration Act.[4]

**2. Writ courts have limited scope of interference in orders of the arbitral tribunal:**

The Delhi High Court in *Aneja Constructions (India) Ltd. v Doosan Power Systems India Pvt. Ltd.,*[5] reiterated that writ Courts could interfere under Articles 226 or 227 of the Constitution,[6] in challenges to orders passed by an Arbitral Tribunal only in exceptionally rare circumstances, or

[1] *Glen Industries Pvt. Ltd. v Oriental Insurance Company Ltd.* (AP-COM/540/2025, Cal. HC).
[2] *Rohan Builders (India) Pvt. Ltd. v Berger Paints India Ltd.* [2024] SCC OnLine SC 2494.
[3] Arbitration and Conciliation Act 1996, s 4.
[4] Arbitration and Conciliation Act 1996, s 29-A.
[5] *Aneja Constructions (India) Ltd. v Doosan Power Systems India Pvt. Ltd. & Anr.* [2025] DHC 6590.
[6] Constitution of India 1950, arts 226 and 227.

when the orders made in bad faith or are patently perverse so as to lack inherent jurisdiction of the Tribunal.[7] The Court upheld the Tribunal's decision to extend the time for completion of pleading in the interest of justice and upon sufficient cause, by holding that the procedural rules of the Arbitral Institution were merely to guide the proceedings and did not have a binding effect of the conduct of arbitration proceedings.

In the arbitration proceedings between the parties, the Arbitrator had dismissed the Petitioner's request seeking closure of the Respondent's right to file counter-claim as per Rule 18 of the Rules of Domestic Commercial Arbitration of the Indian Council of Arbitration.[8] It had been contended by the Petitioner that the period for filing the defence statement could not extended by the Arbitrator beyond the timeline prescribed under Rule 18 read with Sections 2(8) and 25 of the Arbitration Act,[9] neither was the Arbitrator empowered to condone the delay beyond the scope of Rule 18.

**3. The Court cannot permit a non-signatory to remain present in the arbitration proceedings:**

In *Kamal Gupta v M/s L.R. Builders Pvt. Ltd.,*[10] the Supreme Court held that the permission given to a non-signatory to attend all proceedings before the sole Arbitrator ran contrary to the legislative intent behind maintaining confidentiality of arbitral proceedings under Sect 42-A of the Arbitration Act.[11] The Court further clarified that there would be no legal basis to permit a non-signatory to the Deed to remain present in the proceedings before a sole Arbitrator since the arbitral award would not be binding on the non-signatories to the Deed.[12] It was also held that Court could not issue any ancillary directions regarding the arbitration proceedings which have commenced pursuant to the appointment of the sole Arbitrator since the Court had become *functus officio* on the conclusion of Section 11(6) proceedings.

An application under Section 11(6) of the Arbitration Act had been filed for the appointment of a sole Arbitrator for adjudicating the disputes between members of the Gupta family under the terms of an oral family settlement between the parties which was later reduced in a Memorandum of Understanding or Family Settlement Deed ["**Deed**"].[13] During the Section 11(6) proceedings

[7] *Kelvin Air Conditioning and Ventilation System Pvt. Ltd. v Triumph Reality Pvt. Ltd.,* [2024] SCC OnLine Del 7137.
[8] Indian Council of Arbitration, 'Rules of Domestic Commercial Arbitration' (2024) r 18.
[9] Arbitration and Conciliation Act 1996, ss 2(8) and 25.
[10] *Kamal Gupta & Anr. v M/s L.R. Builders Pvt. Ltd. & Ors.* [2025] INSC 975.
[11] Arbitration and Conciliation Act 1996, s 42-A.
[12] Arbitration and Conciliation Act 1996, ss 5 and 35.
[13] Arbitration and Conciliation Act 1996, s 11(6).

the Court rejected the prayer for intervention made by the Respondents on the grounds that the intervention had been sought by non-signatories to the Deed whose presence were non-essential for the adjudication of the disputes between the parties to the Deed. Against this disposed Section 11(6) application, interim applications were filed to permit the non-signatory intervenors to be present during the course of arbitration proceedings before the sole Arbitrator, and the same were permitted by the Court. This order of the Court permitting non-signatories to be present during the arbitration proceedings, was challenged by the parties to the arbitration before the Supreme Court by arguing that the Court had no jurisdiction to entertain the interim applications moved by non-signatories to the Deed after the disposal of the Section 11(6) proceedings.

**4. Conduct of a party in furtherance of terms of an unsigned contact demonstrates the manifestation of acceptance of the contract, including the arbitration agreement:**

The Supreme Court in *Glencore International AG v M/s Ganesh Metals*,[14] reiterated that an arbitration agreement can be inferred even from an exchange of letters or communication through electronic means provided that there exists a record of the agreement irrespective of whether the contract had been signed by one of the parties to the dispute. So long as the conduct of the parties has been in furtherance of the impugned contract, there exists a manifestation of the party's due and complete acceptance of the terms and conditions contained in the contract, including the arbitration agreement. The Court further held that only prima facie proof of the existence of an arbitration agreement is requires to be adduced before the referral Court under Section 45 of the Arbitration Act.[15]

The Appellant and Respondent No. 1 had entered into four contracts for the purchase of zinc metal. These contracts contained arbitration clauses which stated that disputes arising out of the contracts would be referred to arbitration as per the Rules of the London Court of Internation Arbitration, with the seat of arbitration being London. A fifth contract was sought to be entered into for the purchase of zinc metal from the Appellant with the terms and conditions of the contract being similar to that under the fourth contract. Though the Respondent No. 1 had not signed the fifth contract, it had accepted a supply of zinc metal from the Appellant following which eight invoices had been raised in pursuance to the contractual obligations arising from the fifth contract. The Respondent No. 1 had moved a civil suit before the Delhi High Court so as to

[14] *Glencore International AG v M/s Shree Ganesh Metals & Anr.* [2025] INSC 1036.
[15] *Shin-Etsu Chemical Co. Ltd. v Aksh Optifibre Ltd. & Anr.* (2005) 7 SCC 234.

declare that the Appellant's action in invoking of the Letters of Credit for the fulfilment of the outstanding payable amount, as being null and void. The Appellant sought for a reference to arbitration as per the contract which was opposed by the Respondent No. 1 by claiming that the parties had never concluded the contract and that the Section 45 application should be dismissed. It has been held by a Single Judge of the Delhi High Court, and later affirmed by a Division Bench of the High Court, that there did not exist any binding arbitration agreement between the parties to the dispute since the contract did not bear the signature of Respondent No. 1.

**5. Existence of a live and proximate connection with the arbitration agreement is necessary to make the agreement binding on non-signatories:**

The Telangana High Court in *K. Bala Vishnu Raju v Emaar Hills Township Pvt. Ltd.*,[16] held that a non-signatory would be bound by an arbitration agreement upon satisfying the test of existence of a live and proximate connection to the arbitration agreement such that the requirement of actually being a signatory to the agreement becomes irrelevant. The Court clarified that non-signatories who are vitally-connected to the subject matter of the dispute can be considered as being indivisibly-connected to the arbitration agreement so as to be subject to the reliefs claimed by the party under Section 9 of the Arbitration Act. It was found that both Respondent Nos. 1 and 3 have an undeniable interest in the subject matter of the dispute between the Petitioner and Respondent No. 2 because Respondent Nos. 1 and 3 were the recipients of the consideration paid by the Petitioner on behalf of Respondent No. 2 following the terms of the Memorandum of Understanding between them. The Court held that the power to grant interim relief under Section 9 of the Arbitration Act is subject to a party-applicant but is party-indifferent with regards to the target-respondent of the reliefs.

The instant appeals arose from two applications which were filed by Respondent Nos. 1 and 3 before the Commercial Court for the deletion of their names from the array of parties in the petition filed by the Petitioner under Section 9 of the Arbitration Act. It had been held by the Commercial Court that Respondent Nos. 1 and 3 were not signatories to the Memorandum of Understanding which had been entered between the Petitioner and Respondent No. 2, and hence, were not bound by the arbitration agreement contained in the Memorandum of Understanding.

[16] *K. Bala Vishnu Raju v Emaar Hills Township Pvt. Ltd. & Ors.* (C.R.P. Nos. 1014 and 1184 of 2024, Tel. HC).

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# IN CONVERSATION WITH MR. KARAN JOSEPH

MR. KARAN JOSEPH
PARTNER, SHARDUL AMARCHAND MANGALDAS CO.

**Editor's Note:** Mr. Karan Joseph is a Partner with the Dispute Resolution Practice at Shardul Amarchand Mangaldas & Co.. He specialises in litigation, arbitration, and strategic advisory and has a diverse practice that spans commercial, civil, employment, and constitutional law.

Mr. Joseph regularly appears before the High Court of Karnataka, Trial Courts, and Tribunals in Bengaluru. Besides representing private clients, he appears on behalf of Central and State Government Undertakings before the High Court of Karnataka, Trial Courts and in Arbitrations. His contribution to commercial litigation and arbitration has been recognised by the *Benchmark Litigation Awards,* 2025, in the 'Top 40 Under 40' category.

Additionally, Mr. Joseph's scholarly inputs in reputed journals, blogs, and our Magazine have played an essential role in the development of the field. In the following interview, he shares his valuable insights on topics such as practising arbitration and litigation both as a partner at a law firm and as an independent lawyer, as well as recent key developments in arbitration and commercial litigation.

**Disclaimer**: The views expressed are personal opinions and do not reflect those of Shardul Amarchand Mangaldas & Co., or any other organisation.

**Editorial Board** ["**EB**"]**: Before joining Shardul Amarchand Mangaldas & Co.** ["**SAM**"]**, you had run your own chambers. From your experience, how does practising in a law chamber compare with that in a law firm? What unique opportunities and challenges does each environment present, professionally and personally?**

**Mr. Karan Joseph** ["**KJ**"]: The general perception is that a chamber practice tends to be more hands-on in the sense that you know your way around a Court better (and I don't mean that in the geographical sense), have more appearances and do more drafting. These opportunities were thought to make you a better lawyer and give you a slight advantage over your peers at a traditional law firm, where drafting and appearances were not prioritised.

That said, in recent years, the landscape has evolved. Many firms that previously focused on corporate practice are investing heavily in their litigation teams. Most now have very competent litigation teams, with more opportunities for handling matters in-house rather than outsourcing or depending on outside counsel.

In my own experience, my team and I have been fortunate. We have retained much of the same freedom and hands-on involvement. We continue to handle appearances and drafting just as actively as before.

In terms of opportunities, both settings offer valuable experiences. While I wouldn't say that the quality of work in a Chamber is lower, being at a firm does give you access to larger, more complex and sometimes more high-profile matters. I've been fortunate to act for clients and work on unique regulatory issues that I might not have been exposed to in an independent setting. In that sense, the move has validated my decision—I feel vindicated.

The common challenge in both environments is that you must work extremely hard and consistently bring in work. It's a competitive field regardless of where you practice. Most practices go through lean periods, and that's something every practitioner needs to navigate, irrespective of the setting you find yourself in.

**EB: Having pursued your LL.M. at Columbia Law School, how did that experience shape your perspective on dispute resolution, and in what ways do you find the international exposure influencing your day-to-day practice in India?**

**KJ:** Honestly, my decision to pursue the LL.M. stemmed from a misplaced sense of boredom. Fortunately, I had a steady flow of good work during the COVID period. However, after about 11 or 12 years of practice, I felt the need to do something different. You could say I was a bit jaded, or maybe just looking for a new perspective. A quarter-life crisis, assuming that I live long enough to call it that!

I cannot say that the experience directly transformed my perspective on dispute resolution. What it gave me was something intangible. It was a superb experience overall, and it helped in no small measure by the fact that my cohort was filled with a bunch of mid-career lawyers who were

incredibly accomplished. The exposure, apart from being cultural, was also intellectual. The teaching style at Columbia was very different from what I was used to in that it was far more engaging and analytical. The LL.M. broadened the way I think and analyse problems, and has made me a well-rounded lawyer overall.

**EB: The Karnataka government had recently passed a State amendment to the Code of Civil Procedure, 1908, to introduce case management hearings in civil trials. Based on your experience before the Karnataka High Court, how practical are such reforms, and what more can be done to ensure timely resolution?**

**KJ:** The recent amendment is similar to the Commercial Courts Act regarding case management hearings. It is not something of which the members of the Bar are unaware. Several lawyers in Bengaluru have matters before the commercial courts and therefore have experience dealing with the timelines and procedure prescribed by the recent State amendment.

I think this amendment is both timely and a move in the right direction. As for its practicality, that depends on the Bar, myself included. Its effectiveness hinges on how seriously we, as lawyers, commit to them. The provisions themselves are in place, but it's up to us to ensure that cases aren't dragged out unnecessarily.

While it's still early to judge the long-term impact, studying the Commercial Courts context would be insightful. To my knowledge, the system has worked quite efficiently, particularly in Bengaluru, where you can now reasonably expect commercial cases to be resolved within 18 to 24 months, which is a significant improvement. Extending that efficiency to regular civil cases through these reforms is a welcome move. If implemented in the right spirit, it could go a long way toward improving the pace of civil litigation.

**EB: Beyond courts, arbitration also faces questions of accessibility and efficiency. Justice Sudhanshu Dhulia recently remarked, "*arbitration is a rich man's litigation; the poor don't opt for it*". This trend seems paradoxical to the Arbitration Act's stated objective of cost-effective and timely adjudication. Why do you think small claims and non-business disputes rarely come to arbitration, and how might this perception be changed?**

**KJ:** I firmly believe that arbitration is for all, or at least that was its stated objective. Perhaps the reason that small claims and non-business disputes do not make it to arbitration is fundamentally an access to justice problem. Part of the problem, of course, is exposure and awareness.

Arbitration is almost always contractual, and such clauses are rare in non-commercial matters. Even where they exist, issues like arbitrability, particularly *in rem* versus *in personam* rights, arise as challenges. For example, a land dispute often cannot be referred to arbitration because of its *in rem* implications.

Further, there are cost implications. One of the advantages of arbitration was that one didn't have to pay ad valorem court fees. Parties, however, have to pay arbitrators' fees, which can be significant. Of course, the recent amendments and the Supreme Court's push for standardisation of fees have helped. Another appeal of arbitration was the limited scope of challenge to an award when contrasted with that to a court's decree. Courts are increasingly reluctant to interfere with arbitral awards. Although most awards are challenged, not many are set aside because the grounds of challenge are limited in scope. The strict timelines are another advantage. All of these should naturally mean that all disputes capable of being referred to arbitration should be resolved through arbitration.

Despite these advantages, you are correct that arbitration hasn't percolated to low-value disputes. There appears to be a misconception that arbitration is not suited for disputes of this nature, but this could not be further from the truth. Having disputes resolved through neutral third parties (who are not judges in any formal setting) based on the parties' merits is a concept as old as time itself.

Arbitrations are popular mainly in urban centres for various reasons, including education, awareness and overall exposure to the process. And I think it's important that we acknowledge these challenges. If I'm not mistaken, this is one of the stated goals of the Bengaluru Arbitration Week. They want to spread awareness, make arbitration a viable option for everyone, and ensure that arbitration isn't restricted to big firms, lawyers or clients with deep pockets.

I feel that younger counsels will make phenomenal arbitrators for small-ticket arbitrations where the claim value is below a certain threshold. And because they are young and hungrier, they will be quicker and more efficient, which will, perhaps, lead to arbitration being more cost-effective. It will take time, but with consistent efforts toward decentralisation, education and institutional support, arbitration can move closer to fulfilling its original promise of being an accessible and efficient alternative to litigation.

**EB: From a practitioner's viewpoint, how difficult is it to balance a client's preference for familiar arbitrators with the growing emphasis on equality, independence, and disclosure under Sections 18 and 12(5) of the Arbitration Act?**

**KJ:** This is an excellent question, as this is one of, if not the most frequent and challenging questions that come up during an arbitration. Who should we appoint?

Seasoned clients who have been involved in multiple disputes in the past may prefer for who they would like appointed as arbitrators, but most clients rely on their counsels for suggestions. For me, the focus has never been familiarity, but has always been about competence. And all of a sudden, the pool gets limited. By competence, I don't just mean subject-matter expertise; it also includes emotional intelligence. Arbitration is meant to be an alternative to the court system, so it doesn't make sense to bring the trappings of a court into it. An arbitrator with the correct EQ can make the process more efficient, respectful, and ultimately more effective. So, when you say familiar arbitrators, this is the familiarity I would look for.

**EB: The Supreme Court recently expressed concern over the ubiquity of pathological arbitration clauses and even suggested that courts might consider holding drafters liable for intentional ill-drafting. Do you think such a proposal is viable, and how might it affect commercial drafting practices in India?**

**KJ:** Pathological arbitration clauses are not uniquely an Indian problem. It is a problem worldwide, and I certainly don't think someone deliberately drafts a pathological arbitration clause. For instance, Korea faced something similar recently. The phrase "midnight clause" gets thrown around at every arbitration conference. Fortunately, courts across jurisdictions look at these pathological arbitration clauses and say, "let's see how we can make this workable". These clauses delay things a fair bit, but more often than not, end up in arbitration.

In terms of holding drafters liable, I think that will be a bit difficult, because first, you have to prove that there was ill intent. Second, the relationship between lawyers and clients is essentially that of personal service. The Supreme Court in *Bar of Indian Lawyers v D.K. Gandhi* clarified that the legal profession is unique and cannot be compared to any other profession. Of course, this was in the context of consumer protection, but I still think it would be difficult to do, particularly where a determination of ill intent is required.

**EB: In a recent Constitution Bench ruling, the Supreme Court clarified that Section 34 of the Arbitration Act, traditionally seen as a provision only for setting aside awards, confers a limited power on courts to modify arbitral awards in specific instances. How significant do you think this development is for the finality of arbitral awards, and does it risk opening the door to greater judicial intervention in arbitral proceedings?**

**KJ:** Yes, the judgment opens the door by giving courts the discretion to modify awards. It appears that the Supreme Court felt that the earlier position resulted in awards being set aside and arbitration having to be restarted. It would be important to consider statistics in support of the quantum of arbitral proceedings which had to be re-commenced due to the awards being incapable of modification. I think the arbitration ecosystem in India has taken great pains to showcase the limited scope of challenge in Sections 34 and 37. This judgment essentially sets those efforts at nought. While the judgment does lay down certain safeguards in terms of when courts may modify awards, it does allow for a greater degree of discretion than ever before.

**EB: In our previous issue, you wrote about sports dispute resolution. With the recently passed National Sports Governance Bill, 2025, proposing the establishment of a National Sports Tribunal** ["**Tribunal**"]**, what role do you see arbitration playing in strengthening sports dispute resolution under this new regime?**

**KJ:** One of the key points of the article was that sports disputes should not go to court but must go before a more specialised forum. The new regime does that by establishing a Tribunal. The Tribunal is composed of a Supreme Court judge, but crucially, the other two members are to have some specialised knowledge in sports and public administration. This combination ensures that the judge will bring in some semblance of procedure and fairness to the entire process while also allowing for subject matter expertise through the other members of the Tribunal. Qualities and experience that a court, for obvious reasons, would not have.

To me, this is the most compelling factor. If sports disputes are resolved by a specialised body, the outcome may not necessarily be better in a broad sense, but it will almost certainly be better informed. Decisions made by individuals who have been in similar situations or have firsthand exposure to the sport's unique challenges bring a level of invaluable practical insight. Such an understanding is key and will be essential to strengthening sports dispute resolution.

I'm not here to argue that sports disputes should be resolved through arbitration. Many, including myself, have already made that case elsewhere. But what stands out here is the quality of decision-making. It's likely to be more nuanced and grounded in real-world experience. At the end of the day, the sportsperson involved is also likely to feel a greater sense of comfort and confidence knowing that their case is being heard by someone who has truly walked in their shoes.

**EB: Artificial Intelligence** ["**AI**"] **is rapidly transforming the legal profession. SAM recently partnered with Harvey AI to integrate generative AI into its workflows. How do you**

**foresee AI changing legal research, evidence gathering, analysis, and presentation in arbitration and litigation?**

**KJ:** As someone who uses AI extensively, I think it's not only here to stay but will also improve. To quote people worldwide who say this all the time, the only people who would be left behind by AI are those who don't know how to use AI.

I am often asked, especially by non-lawyers, about who is going to be most affected. And the conversation invariably leads to whether young lawyers are going to be the most affected. The answer is both yes and no. If I were to receive a 700-page pleading from the other side, it's far quicker for me to use AI to summarise it than to ask a junior colleague to read and brief me. So in that sense, yes, it does pose a challenge for younger lawyers.

However, if those same young lawyers are adept at using AI, and use it either to deliver insights or efficiency, it then becomes a strength rather than a threat. For me, the key is not the seniority of the lawyer, but their ability to leverage AI. I believe that if you know how to use AI well, you can add value at any stage of your career.

**EB: Given your experience across commercial, constitutional, and pro bono practice, what advice would you offer to young lawyers who are just beginning their careers? Should they chart a clear specialisation early on, or embrace diverse opportunities before settling into a practice area?**

**KJ:** As a young lawyer, I don't think that you should chart a course towards a specialisation. I feel like it would be pigeonholing yourself. I would rather you try a whole bunch of things, and then decide what you are interested in or good at. Another reason is that if you pigeonhole yourself to a specific area of law, you are then restricting yourself from a wide variety of work, which has a trickle-down effect on what your practice is going to be. As a young lawyer, you cannot afford to say no to any work. Of course, as you progress through your career, you can specialise because by then, there will be a volume of work that you can get in that particular area of law.

My advice to young lawyers would be to realise that once you graduate from law school, you do not have much practical experience. You must be a sponge that absorbs everything, and honestly, how good you are as a lawyer depends entirely on how eager you are to learn and your humility. Dispute resolution, for instance, is a great leveller, both in court and in arbitration. Beyond a point, it doesn't matter which law school you're from or with whom you interned. Quite often, it doesn't even matter with whom you work. What really matters is the substance that you bring, which is

why, as long as you're willing to be a sponge, you can be a really good lawyer. You can be a topper in class or towards the bottom of your class, but if you put in the effort and time, you will be a good lawyer. How good or bad you were in law school doesn't reflect how good a lawyer you can be.

I'd like to say a little bit about pro bono work. I am conscious that it may not be possible to do pro bono work at the beginning of your career, but I think it's something all lawyers must do. It is deeply satisfying, especially when you are representing people who cannot otherwise to participate in the system. In my experience, these matters throw up socio-economic complexities that one would not have imagined. It grounds you and makes you a better lawyer because it gives you the most important quality a lawyer should develop, i.e., empathy.

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