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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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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 VI Issue I of the Magazine. This Issue features an exclusive interview with Mr. Timothy Nelson, a partner with Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates in New York, and his primary focus is on international arbitration and cross-border litigation. We take this opportunity to extend our gratitude to Mr. Joseph for engaging with us and sharing his valuable insights.

This Issue presents five 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.

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VOLUME VI | ISSUE I

THE TWO-TIERED INTERNATIONAL COMMERCIAL ARBITRATION REGIME: ANALYSING THE POLICY FAILURE TO ENFORCE FOREIGN-SEATED EMERGENCY AWARDS AND ITS IMPACT ON INDIA'S INTERNATIONAL COMMERCIAL TRUST

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Introduction

The foundation of arbitral efficiency in the complex web of global trade and commerce is provided by interim measures of protection. In circumstances involving perishable products, fluctuating currency values, asset dissipation, or the possible frustration of contractual commitments, they protect a party's interests throughout the tumultuous time between the start of arbitration and the final verdict. The urgency and transnational nature of such disputes make emergency and interim reliefs indispensable tools for ensuring that the eventual arbitral award is not rendered illusory. In line with this recognition, India formally acknowledges emergency arbitration, allowing tribunals constituted under institutional rules to grant urgent interim measures even before the main tribunal is established.

The effectiveness of interim measures depends not merely on their issuance but on their enforceability, especially in jurisdictions outside the seat of arbitration, where enforcement mechanisms may be uncertain or inconsistently applied. Over the last decade, India's arbitral jurisprudence has sought to project a pro-arbitration orientation. Judicial efforts to align domestic practice with international arbitral standards are evident in selective areas, including the recognition of party autonomy and the reinforcement of the enforcement of foreign-seated final awards.[1] In addition, India has strengthened its statutory framework through the 2015 and 2019 Amendments to the Arbitration and Conciliation Act, 1996 ["**ACA**"], accession to the Singapore Convention on Mediation, and the adoption of a

[1] *Swiss Timing v Organising Committee of Commonwealth Games* (2012) 8 SCC 547.

revised Model Bilateral Investment Treaty that favors arbitration as the preferred dispute resolution mechanism.[2] The proviso to Section 2(2) of the Act, which expands the authority of Indian courts to grant interim relief in support of foreign-seated arbitrations, as affirmed by the Supreme Court in *PASL Wind Solutions Pvt. Ltd. v GE Power Conversion India Pvt. Ltd.* ["**PASL Wind**"],[3] further evidences this reform trajectory. By enacting this, the legislation recognized the practical requirement for temporary solutions in global trade, where parties may require immediate safeguarding of assets, proof, or contractual rights located in India.

However, a doctrinal discrepancy in implementation weakens this progressive legislative attitude. Parties may enter into a contract outside of the protection provided by Section 2(2) of the Act.[4] Courts utilize the principle of implied exclusion when there is no express clause, assuming that the parties' intention to exclude the application of Part I is indicated by the selection of a foreign seat or particular institutional standards. Even in cases where the dispute has a significant relationship to the jurisdiction, this approach frequently denies parties access to emergency or temporary relief in India. India's arbitration system has thus developed into a two-tiered system.[5] Section 17(2),[6] which was added by the 2015 amendment to the ACA,[7] makes India-seated emergency awards enforceable. However, because Part I of the Arbitration Act does not apply to foreign-seated arbitrations, an award made by an arbitral tribunal with a foreign seat cannot be enforced under this section.[8]

In *Amazon.com NV Investment Holdings LLC v Future Retail Ltd.* (2021),[9] the Supreme Court affirmed the enforceability of India-seated emergency awards, but deliberately limited its ruling to domestic arbitrations, leaving foreign-seated emergency awards outside the statutory framework. This exclusion compels parties to seek duplicative interim reliefs under Section 9, which is distinct from enforcement of an emergency award as the former allows courts to grant temporary relief in support of arbitration proceedings, but it does not automatically render a foreign-seated emergency award enforceable. On the other hand, regardless of the arbitral seat, countries like Singapore,

[2] Aparna Singh, 'The Quagmire of Enforcing Foreign Arbitral Awards in India: Have the Challenges Eased or Deepened in the New Legal Regime Established by the Indian Arbitration & Conciliation (Amendment) Act, 2015?' (2017) 3(6) The Law Brigade (Publishing) Group 10.
[3] *PASL Wind Solutions Pvt Ltd v GE Power Conversion India Pvt Ltd* (2021) 7 SCC 1.
[4] Arbitration and Conciliation Act 1996, s 2(2).
[5] Abhijeet Sadikale, 'The Arbitration & Conciliation (Amendment) Act 2019: Good Intentions, Bad Outcomes' (2020) 5 The Law Brigade (Publishing) Group 25.
[6] Arbitration and Conciliation Act 1996, s 17(2).
[7] Arbitration and Conciliation (Amendment) Act 2015.
[8] *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552.
[9] *Amazon.com NV Investment Holdings LLC v Future Retail Ltd.* AIR 2021 SC 3723.

England, and Hong Kong have developed logical procedures for implementing emergency awards. This essay contends that such selective recognition weakens the very international commercial trust that the Indian arbitration regime aims to foster, deters investors from selecting India as a trusted seat or enforcement forum, and prolongs uncertainty in cross-border enforcement.

For clarity, this analysis is limited to international commercial arbitration and does not extend to investment treaty arbitration, where the enforcement mechanisms and policy implications operate under a distinct legal framework

Legal Analysis

The execution of international arbitral awards in India is governed under Part II of the ACA, 1996. India is a signatory to the New York[10] and the Geneva[11] Conventions. Therefore, as long as the requirements outlined in Sections 44 to 52 of the ACA are met, Indian courts are required to accept and uphold foreign awards. The enforcement of emergency awards made by an arbitral tribunal in a foreign-seated arbitration, however, was not statutory before the ACA, 2015. The definition of 'arbitral tribunal' in the ACA, 2015 did not include emergency arbitrators, and courts, such as in *Raffles Design v Educomp* ["**Raffles Design**"],[12] declined to treat such awards as enforceable under the Act, leaving only the option of a fresh suit or relief under Section 9.[13] This flaw established a strict division between domestic and foreign arbitral procedures, which still exists today and serves as the basis for India's two-tiered arbitration system.

Through the ACA, 2015, the Indian legislature adopted a proviso to Section 2(2) that permitted Section 9 to be used to enforce the foreign-seated arbitrations. The goal of the amendment was also stated in the Law Commission of India's 246th Report, which recommended changing Section 2(2). It is said that if a party's assets are in India and the arbitration's seat is overseas, the party may take such assets elsewhere. There would be no "efficacious remedy" in these situations since the other party obtaining an interim order from a foreign court would not be able to have it enforced by filing an execution petition.[14] Therefore, if a foreign court's "judgment" placing the other party in contempt of court is implemented under the Code of Civil Procedure ["**CPC**"], that is the only

[10] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.
[11] Convention on the Execution of Foreign Arbitral Awards 1927.
[12] *Raffles Design v Educomp,* 2016 SCC OnLine Del 5521.
[13] Rahul Mahajan and Bhumika Khandelwal, *India's Quandary Over Recognition of Emergency Arbitration: An Ongoing Saga* (2022) 2(4) IJALR <https://ijalr.in/wp-content/uploads/2022/09/INDIA_S-QUANDARY-OVER-RECOGNITION-OF-EMERGENCY-ARBITRATION-AN-ONGOING-SAGA.pdf> accessed 29 November 2025.
[14] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Com No 246, 2014).

way the opposing party can have an emergency award enforced. Since it won't be available until the other party defaults on the international order, this remedy isn't totally effective.[15]

Therefore, the modifications made to Section 2(2) support parties to a foreign-seated arbitration seeking interim relief in India and are consistent with the goal of the 2015 Amendment. However, even though the amendment's legislative goal was corrective, its efficacy was compromised by the way the proviso was written. The Law Commission in its 246th Report had expressly recommended that parties should be able to "expressly exclude" the applicability of Section 9. Yet, the legislature omitted the word "express" in the final text. This omission revived the regressive doctrine of implied exclusion, a remnant of the pre-*BALCO* jurisprudence, under which courts inferred the exclusion of Part I provisions from the terms of the arbitration clause itself. Because of this interpretive ambiguity, judicial discretion was once again used in a situation when precision was crucial.

The doctrine of implied exclusion traces its origin to the (in)famous judgment in *Bhatia International v Bulk Trading SA*.[16] The court ruled that parties to a foreign-seated arbitration could be governed by Part I of the ACA, 1996, unless they had explicitly or implicitly excluded its operation through their agreement, because the legislature had not "specifically" stated that its provisions would only apply to arbitrations seated in India. However, this interpretation was essentially at odds with the Act's territorial structure, which was based on the UNCITRAL Model Law and called for a distinct division between arbitrations with domestic and foreign seats.[17] This judgment was thus overruled in the BALCO case in 2010.[18]

Judicial interpretation of the proviso to Section 2(2) demonstrates how the courts' continued reliance on the theory of exclusion by necessary implication, anchored in an illogical understanding of the objectives of the ACA, has perpetuated inconsistency in India's arbitration jurisprudence. Courts have frequently resorted to the regressive pre-BALCO approach, treating foreign seat and choice of foreign law as indicative of an implied exclusion of Part I provisions, rather than adopting a purposive interpretation in line with the 2015 Amendment's intent to facilitate interim reliefs in support of arbitrations with foreign seats.[19]

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[15] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Com No 246, 2014).
[16] *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105.
[17] Vidhu Gupta, 'Stretching the Limits of Statutory Interpretation: Critical Review of Bhatia International v Bulk Trading' (2010) 5(9) NALSAR Student Law Review 140.
[18] *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552.
[19] Muskan Agarwal and Amitanshu Saxena, 'Interim Measures of Protection in Aid of Foreign-Seated Arbitrations: Judicial Misadventures and Legal Uncertainty' (2021) 7(2) NLSIU Review 73.

In *Raffles Design,*[20] the parties had chosen a Singapore seat under the Singapore Court of International Arbitration ["**SIAC**"] Rules. The petitioner filed a Section 9 protection request with the Delhi High Court after the defendant breached the emergency award given. The Court ruled that the simple selection of a foreign seat or foreign controlling law did not imply exclusion of Section 9, rightly acknowledging that the proviso to Section 2(2) was inserted to give interim judicial aid even to arbitrations with foreign seats. However, it also found that no specific clause in the ACA allowed for the direct implementation of interim measures issued by an arbitral tribunal with a foreign seat. Thus, in a practical but disjointed resolution that highlights the statutory gap, the Court permitted the petitioner to submit a new Section 9 application to seek equivalent relief on merits.[21]

In contrast, the Delhi High Court took a restrictive stance in *Ashwani Minda v U-Shin Ltd.* ['**Ashwani**'],[22] concluding that the parties had implicitly rejected the applicability of Part I and, thus, Section 9 by selecting Japan as the seat and Japan Commercial Arbitration Association ["**JCAA**"] regulations as the curial law. However, this line of thinking misinterprets the 2015 Amendment's legislative aim. The proviso was included to Section 2(2) specifically to enable parties to a foreign-seated arbitration, irrespective of the institutional architecture or controlling law, to seek temporary protection in India, where the subject matter or assets are located. This remedial objective falls apart when implied exclusion is inferred based only on a foreign seat, which restores the uncertainty that the amendment was intended to eliminate. This interpretation is also consistent with the Supreme Court's reasoning in *Sundaram Finance Ltd v NEPC India Ltd.*,[23] where the Court emphasized that the arbitral framework must be construed to ensure effective relief and prevent parties from frustrating enforcement by exploiting procedural gaps. The Court reasoned that interim protection is intrinsically linked to the location of assets and that arbitration law cannot be interpreted in a manner that enables parties to evade their obligations by shifting for a or capitalizing on statutory silence.

In *Actis Consumer Grooming Products Ltd. v Tigaksha Metallics (P) Ltd.*, ["**Actis**"][24] the Himachal Pradesh High Court considered a Section 9 petition in support of an arbitration that was to be held in Geneva under the London Court of International Arbitration ["**LCIA**"] Rules, reflecting a more purposeful approach. Without delving into a speculative analysis of any implied exclusion,

[20] *Raffles Design International India Pvt. Ltd. v Educomp Professional Education Ltd* 2016 SCC OnLine Del 5521.
[21] Sushmita Gandhi, 'The Conundrum in Seeking Interim Reliefs for Foreign Seated Arbitrations in India' (*SCC Online*, 1 Jan 2021) <https://www.scconline.com/blog/post/2021/01/01/the-conundrum-in-seeking-interim-reliefs-for-foreign-seated-arbitrations-in-india/> accessed 29 November 2025.
[22] *Ashwani Minda v U-Shin Ltd* 2020 SCC OnLine Del 1648.
[23] *Sundaram Finance Ltd. v NEPC India Ltd.* (1999) 2 SCC 479.
[24] *Actis Consumer Grooming Products Ltd. v Tigaksha Metallics (P) Ltd.* 2020 SCC OnLine HP 2234.

the Court highlighted that it was entitled to award interim relief because the dispute's subject matter was located within its geographical jurisdiction. Similarly, the Bombay High Court in *Heligo Charters Pvt. Ltd. v Aircon Beibars FZE* ["**Heligo**"][25] refused to infer exclusion of Section 9 solely because the seat was foreign and the curial law was not Indian. It held that in the absence of a specific agreement to the contrary, the availability of interim relief under Section 9 remained intact.

According to the author, the reasoning used in *Actis* and *Heligo* effectively furthers the goal and objective of the 2015 Amendment by avoiding a remediless situation and prioritizing the preservation of the subject matter situated in India. Despite its procedural limitations, the Delhi High Court's reasoning in Raffles Design was also motivated by a similar dedication to upholding substantive fairness as opposed to a "cut-and-dry" technical exclusion. Decisions like *Ashwani*, on the other hand, represent a rigid and unduly formalistic interpretation of the proviso, which defeats the purpose of the amendment and maintains a two-tiered enforcement system that favors arbitrations with Indian seats while leaving parties with foreign seats dependent on judicial discretion and disjointed relief procedures. This formalism is only partially mitigated by the Supreme Court's ruling in PASL Wind Solutions, which, while affirming party autonomy and post-award enforceability, stops short of resolving the persistent uncertainty surrounding access to interim relief in aid of foreign-seated arbitrations.

Comparative Global Legal Framework

According to the explanatory note to the 2006 revisions to the UNCITRAL Model Law, parties are still free to request interim measures from the arbitral tribunal or the appropriate court, and the mere existence of an arbitration agreement does not bar national courts from doing so.[26] This structure gave rise to what has been called the "free-choice model," in which courts and arbitral tribunals have the simultaneous power to provide temporary remedies. However, several jurisdictions, such as England and Singapore have gradually shifted toward the "court-subsidiarity model" to protect party autonomy and avoid undue judicial intrusion after a tribunal has been established.[27] Courts only step in under this paradigm when the arbitral tribunal is either ineffective or has not yet been established.[28] This strategy is further refined by the "flexible court-subsidiarity model," which allows limited judicial aid even after the tribunal is established, but only in dire

[25] *Heligo Charters Pvt. Ltd. v Aircon Beibars FZE* (2018) SCC OnLine Bom 1388.
[26] UNCITRAL Model Law on International Commercial Arbitration 1985.
[27] Jan K Schaefer, 'New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared' (1998) Electronic Journal of Comparative Law (EJCL) 2.
[28] William Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' (2002) 28(3) Brooklyn Journal of International Law 1059.

situations where the tribunal's available redress would be ineffective.[29] Foreign courts have applied this approach in situations involving the imminent dissipation of assets, the need to bind third parties not subject to the arbitration agreement,[30] or where urgent coercive relief was required that exceeded the tribunal's enforcement powers.[31]

With the implementation of Section 9(3) of the ACA, 1996,[32] India's arbitration system, especially with the 2015 Amendment, represents an effort to move away from a free-choice paradigm and toward a flexible court-subsidiarity model. Once the arbitral tribunal has been established, this clause prohibits Indian courts from considering interim applications unless the tribunal's remedy is judged insufficient or unenforceable. In theory, this amendment puts India on par with established arbitration jurisdictions like Singapore and England, which both uphold a sophisticated version of the court-subsidiarity principle, but the practicality is different.[33]

Singapore's International Arbitration Act ["**IAA**"] explicitly empowers courts, under Section 12(6)[34] read with Section 12A,[35] to enforce emergency arbitrator orders as if they were orders of the court. This legislative clarity, reinforced by a consistently pro-enforcement judiciary, has positioned Singapore as a preferred arbitral seat in Asia, offering parties both procedural efficiency and certainty of outcome.[36] Similarly, in England, Section 44 of the ACA, 1996[37] authorizes courts to grant interim relief in support of arbitrations seated either within or outside the United Kingdom, provided the tribunal is unable to act effectively. English courts have interpreted this provision pragmatically, striking a balance between judicial support and arbitral autonomy, thereby ensuring seamless enforcement of emergency measures across borders.[38] The predictable application of these statutes has cultivated investor confidence and strengthened both jurisdictions' reputations as reliable arbitration hubs.

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[29] Rachael D Kent and Amanda Hollis, 'Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration' in *Interim and Emergency Relief in International Arbitration* (International Law Institute Series on International Law, Arbitration and Practice, Juris Legal Information, 2015).
[30] *Maldives Airports Co. Ltd. v GMR Male International Airport Pte. Ltd.* (2013) SGCA 16.
[31] Arbitration Act 1996, s 44.
[32] Arbitration and Conciliation Act 1996, s 9(3).
[33] Jan Schaefer, 'New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared' (1998) *Electronic Journal of Comparative Law (EJCL)* 2.
[34] Arbitration and Conciliation Act 1996, s 12(6).
[35] Arbitration and Conciliation Act 1996, s 12A.
[36] Ministry of Law (Singapore), 'Consultation Paper on the Draft International Arbitration (Amendment) Bill' (*Ministry of Law (Singapore*), 17 August 2009) <https://www.mlaw.gov.sg/files/linkclick967e.pdf> accessed on 29 November 2025.
[37] Arbitration and Conciliation Act 1996, s 44.
[38] Guy Pendell, 'England and Wales' in Lawrence W Newman and Colin Ong (eds), *Interim Measures in International Arbitration* (Juris Legal Information, 2014).

India, a common law nation, on the other hand, is still struggling with the "relic" of the implied exclusion theory and bases its rulings more on the ambiguity of the arbitration clause than the 2015 Amendment's obvious legislative goal. A structural obstacle that erodes the authority of the foreign Emergency Arbitrator and goes against the fundamental concept that a party should be able to depend on its contractual choice of procedure is India's workaround, which requires a party to apply de novo under Section 9. While Section 9(3) successfully delineates judicial restraint for India-seated arbitrations, the absence of a corresponding mechanism under Part II leaves parties to foreign-seated arbitrations in a procedural vacuum when seeking enforcement of emergency awards.[39] In order to ensure that its domestic law no longer dictates a competitive disadvantage in the global market for dispute resolution, India urgently needs to adopt a provision similar to UNCITRAL Model Law Article 17H[40] for both institutional and ad-hoc arbitrations. This is demonstrated by competitor jurisdictions' explicit statutory commitment to recognize and support foreign interim measures.

Conclusion and Recommendation

India's difficulty in enforcing foreign-seated emergency arbitrator awards is not merely a procedural lacuna but a manifestation of a deeper structural inconsistency within its arbitral framework. The differential treatment accorded to domestic and foreign-seated interim measures has resulted in an enforcement asymmetry that undermines legal certainty and investor confidence. India's reform trajectory must now shift from judicial improvisation to legislative coherence if it hopes to go from being a jurisdiction that supports arbitration to one that sets arbitration standards. The solution lies in constructing a unified enforcement framework that eliminates territorial discrimination between domestic and foreign-seated interim measures. Two specific reforms are needed to achieve this.

The first step is to change Part II to specifically acknowledge and uphold EA awards with foreign seats. India would comply with accepted international norms if it used a wording similar to Article 17H of the UNCITRAL Model Law (2006), which allows for the recognition and enforcement of interim measures "irrespective of the country in which they were issued." Such an amendment should allow execution of EA orders under Section 49, subject to the limited grounds for refusal in Section 48, ensuring due process without reopening merits.

[39] Yogendra Aldak, 'Interim Reliefs by Arbitral Tribunals in Foreign Seated Arbitrations: An Inefficacious Remedy?' (*Bar & Bench*, 29 August 2023), <https://www.barandbench.com/view-point/interim-reliefs-by-arbitral-tribunals-in-foreign-seated-arbitrations-an-inefficacious-remedy> accessed on 29 November 2025.
[40] UNCITRAL Model Law on International Commercial Arbitration 1985, art 17H.

Second, the Section 9 mechanism needs to change from being a judicial stand-in to becoming a tool for facilitation. Similar to Singapore's practical strategy, which strikes a balance between deference to arbitral authority and domestic judicial monitoring, courts should refrain from conducting de novo evaluations in cases where a foreign EA order already exists and limits their involvement to enforcement rather than review. There has to be a definitive resolution to the uncertainty surrounding arbitrations between Indian parties with foreign seats.

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THE LEGAL DICHOTOMY BETWEEN ARBITRAL AWARDS AND ORDERS IN INDIAN ARBITRATION

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Introduction

The distinction between arbitral award and order is essential,[1] since it determines the available recourse against it, enforceability and jurisdiction of courts, thereby upholding objectives of Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"].[2] The demarcation between the two is ambiguous, especially in cases involving cost awards, partial rulings, or preliminary decisions, leading to uncertainty about the appropriate legal remedy. For instance, if an award is treated as an order, it would affect parties' right to approach court, rendering unappealable until the conclusion of arbitration proceedings.

It raises pertinent questions: whether challenge to an arbitral ruling that is neither purely procedural nor fully determinative of the substantive rights lies under Section 34[3] or by a way of an appeal under Section 37[4] of Arbitration Act; whether the imposition of costs by a court or tribunal in an order or award leads to finality of the proceedings on the substantive matter; and whether the imposition of cost can be determining factor in deciding if a challenge lies under Section 34 or Section 37 of the Arbitration Act. Answering these questions becomes essential, considering arbitration gaining global recognition as the preferred mechanism for resolving disputes.[5]

The paper addresses these conundrums through existing legal framework in India and other jurisdictions. The paper further proposes plausible recommendations that could be adopted to

[1] *ZCCM Investment Holdings PLC v Kansanshi Holdings PLC & Anor* EWHC 1285 (Comm).
[2] Arbitration and Conciliation Act 1996.
[3] Arbitration and Conciliation Act 1996, s 34.
[4] Arbitration and Conciliation Act 1996, s 37.
[5] Khushi Jain, 'UK Arbitration Act 2025: Evolution or Missed Revolution' (*CCADR,* 23 July 2025) <https://ccadr.cnlu.ac.in/blog/arbitration/uk-arbitration-act-2025-evolution-revolution/> accessed 4 October 2025.

address them. Towards the end, it suggests amendments to strengthen and clarify the current legal structure.

Mapping the Legal Terrain of Awards, Orders and Interim Awards

The distinction between an order and an award primarily stems from two principles. The court accords the status of an award if the arbitral tribunal decides on substantive issue in arbitration and there is a final determination. The same principle has been affirmed[6] under Section 12 of English Arbitration Act[7] 1996 ["**English Arbitration Act**"] (legislation which has shaped the contours of India's Arbitration regime).[8]

A substantive issue could be derived if the matter is decided on question of substance and merit and not merely procedure. Finality on decision includes capacity to conclusively resolve the issues submitted to the tribunal, thereby rendering the tribunal *functus officio*,[9] whether in its entirety or with respect to the particular issue or claim determined.[10]

Any order that decides merely on procedural directions and '*does not finally settle a matter at which the parties are at issue*' is upheld as a procedural order rather than an award.[11] It includes termination of proceedings, whereas an award inculcates termination on merit.[12] In *Ssangyong Engineering & Construction Co. Ltd. v NHAI* ["**Ssangyong Engineering**"],[13] substantive finality of arbitral award was analysed. It held that finality is linked to adjudication of rights and not to ancillary consequences.

Section 2(1)(c) of the Arbitration Act includes an interim award within the ambit of arbitral award.[14] Section 31(6) of the Arbitration Act states that '*the arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.*'[15] Additionally, if the interim award is intended to finally determine the rights of the

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[6] *K v S* [2019] EWHC 2386 (Comm).
[7] Arbitration Act 1996, s 12.
[8] Ankit Konwar, Darshita Sethia and Nishi Kashyap, 'Charting the Course of Arbitration Reform in India: A comparative study of the existing provisions vis-à-vis the Dr. T.K. Vishwanathan Expert Committee Report' (*Hammurabi and Solomon,* 8 August 2024) <https://www.hammurabisolomon.in/post/charting-the-course-of-arbitration-reform-in-india-a-comparative-study-of-the-existing-provisions-v> accessed 4 October 2025.
[9] *Rhiti Sports Management Ltd v Power Play Sports & Events Limited* (2018) SCC OnLine Del 8678.
[10] *ZCCM Investment Holdings PLC v Kansanshi Holdings PLC & Anor* EWHC 1285 (Comm).
[11] Sanjeev Kapoor and Saman Ahsan, 'Challenging and Enforcing Arbitration Awards' (*Global Arbitration Review,* 16 June 2025) <https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/india> accessed 4 October 2025.
[12] *Anuptech Equipments Pvt Ltd v Ganpati Co-op group housing society Ltd* AIR 1999 Bom 219.
[13] *Ssangyong Engineering & Construction Co. Ltd. v NHAI* (2019) 15 SCC 131.
[14] Arbitration and Conciliation Act 1996, s 2(1)(c).
[15] Arbitration and Conciliation Act 1996, s 31(6).

parties, it will have the force of a complete award and will have effect even after the final award is delivered.[16] Several courts have thus opined that an interim award determines substantive rights[17] or substantive disputes between the parties[18] at interlocutory stage.

Interplay Between Sections 34 (Setting Aside of Awards) and Section 37 (Interlocutory Appeals)

A domestic award including an interim award, can be set aside by court only on grounds laid[19] under Section 34(2) of the Arbitration Act.[20] While adjudicating on setting aside an award under Section 34 of Arbitration Act,[21] court should refrain from appreciation or reappreciation of the factual and legal findings of the tribunal.[22] It reinforces the principle of minimal judicial intervention.[23] Thereby, role of courts is limited to ascertain whether the award and the conclusions it embodies are duly supported by the findings recorded.[24] A tribunal's procedural order does not qualify as an interim award and, thus, cannot be challenged under Section 34.[25]

An appeal lies from an order of the Arbitral Tribunal that falls within the statutory contours of Section 37 of the Arbitration Act.[26] An order that does not adjudicate the claim, any part of the claim, or any issue relating to liability cannot be characterised as an interim award.[27] Thus, no appeal is maintainable under Section 37 against such an order.

Furthermore, challenges related to jurisdiction[28] and arbitrability of dispute[29] should be raised before arbitral tribunal.[30] A court is not the correct authority to deal at the pre-award stage. It reflects *kompetenz-kompetenz* principle under Section 16 of Arbitration Act[31], rooted in Article 16 of

[16] *Satwant Singh Sodhi v State of Punjab* (1999) 3 SCC 487.
[17] *Shah Babulal Khimji v Jayaben D Kania* (1981) 4 SCC 8.
[18] *Goyal MG Gases Pvt Ltd v Panama Infrastructure Developers Pvt Ltd & Ors* 2023 SCC OnLine Del 1894.
[19] *MMTC Limited v Vedanta Limited* (2019) 4 SCC 163.
[20] Arbitration and Conciliation Act 1996, s 34(2).
[21] Arbitration and Conciliation Act 1996, s 34.
[22] *Delhi Airport Metro Express (P) Ltd v DMRC* (2022) 1 SCC 131.
[23] Arbitration and Conciliation Act 1996, s 5.
[24] *Kal Airways Pvt Ltd v Spicejet Ltd* 2025 INSC 885.
[25] Aditya Gupte and Manu Kumar, 'Order Determining Substantive Rights Of The Parties Can Be Challenged Under §34 of The Arbitration And Conciliation Act 1996' (*Mondaq*, 10 February 2025) <https://www.mondaq.com/india/arbitration-dispute-resolution/1582976/order-determining-substantive-rights-of-the-parties-can-be-challenged-under-34-of-the-arbitration-and-conciliation-act-1996> accessed 4 October 2025.
[26] Arbitration and Conciliation Act 1996, s 37.
[27] PC Markanda and ors, *Law Relating to Arbitration and Conciliation Act* (10th edn, Lexis Nexis 2022).
[28] *Indian Oil Corporation. Ltd v Shree Ganesh Petroleum* 2022 SCC OnLine SC 131.
[29] *Uttarakhand Purv Sainik Kalyan Nigam Ltd v Northern Coal Field* (2020) 2 SCC 455.
[30] *SN Malhotra v Airport Authority of India* (2008) SCC OnLine Del 442.
[31] Arbitration and Conciliation Act 1996, s 16(1).

United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law[32] and Article 21 of the UNCITRAL Model Rules.[33] In *Indian Farmers Fertilizers Cooperative Limited v Bhadra Products* ["**Farmers Fertilizers**"],[34] court held that judicial authorities must abstain from intervening in arbitral proceedings where the arbitral panel has been granted exclusive jurisdiction.[35] The Parliament has restricted judicial intervention pertaining to jurisdiction and arbitrability except as provided under Section 16(5)[36] and 16(6)[37] of the Arbitration Act, until rendering of final award or at interlocutory stage.[38] Any premature interference would negate the legislative intent of minimal intervention by courts.[39] Therefore, the aggrieved party has to wait for the award and no remedy is available till then.[40]

Doctrinal Inconsistencies in the Subsisting Legal Framework

i. Understanding Substantive Questions of Law

The term "substantive issue" has not been defined clearly. It has been devised by courts from time to time, largely depending on the facts and circumstances of each case. Supreme Court held that question of law determining rights of parties and affecting general public would constitute substantial.[41] Later, in *Hero Vinoth v Seshammal* ["**Hero**"], it was clarified that a substantial question of law must be debatable, materially impact the rights of parties, and not be covered by existing statutes or binding precedents.[42] In contrast, Supreme Court later determined that questions framed by the High Court were not substantial since they were covered by settled law, and thus, interference was unwarranted.[43] It has also recognised situations where substantial questions of law arise due to wrongful application or misinterpretation of legal principles, even when statutory provisions exist. It remarks divergent judicial opinions from restrictive interpretation to wider scope, resulting in inconsistency and uncertainty.

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[32] United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, art 16.
[33] United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, art 21.
[34] *Indian Farmers Fertilizers Cooperative Limited v Bhadra Products* 2018 SCC Online SC 38.
[35] *Secur Industries Ltd v Godrej & Boyce Mfg Co Ltd* (2004) 4 BOM CR 49.
[36] Arbitration and Conciliation Act 1996, s 16(5).
[37] Arbitration and Conciliation Act 1996, s 16(6).
[38] *BASF Styrenics Pvt Ltd v Offshore Industrial Construction Pvt Ltd* AIR 2002 BOM 289.
[39] *Babar Ali v Union of India* (2000) 2 SCC 178.
[40] *Nav Sansad Vihar Coop Group Housing Society Ltd (Regd) v Ram Sharma and Associates* 1999 SCC OnLine Del 741.
[41] *Sir Chunilal V. Mehta and Sons Ltd v Century Spinning and Manufacturing Co Ltd* AIR 1962 SC 1314.
[42] *Hero Vinoth v Seshammal* 2006 SCC OnLine 555.
[43] *Biswanath Ghosh v Gobinda Ghose* AIR 2014 SC 152.

ii. The Grey Zone: Burden of Determining Finality

A key challenge lies in determining the finality of arbitral rulings. While Section 34 provides remedies against awards and Section 37 permits appeals against certain orders, there is persistent ambiguity when a decision does not fit neatly into either category. Rulings that are neither purely procedural nor fully determinative of the dispute create uncertainty regarding the appropriate forum for challenge and the scope of judicial intervention. This grey zone raises critical questions about the consistency, predictability, and efficiency of the arbitration regime, highlighting the need for clearer doctrinal guidance on what constitutes a "final" arbitral determination.

iii. Section 31A and the Conundrum of Cost Orders

Section 31 of the Arbitration Act includes form and content of Arbitral Award.[44] Section 31A of Arbitration Act introduces a comprehensive regime on costs, empowering the arbitral tribunal to determine liability and quantum of costs, guided by principles of fairness and efficiency.[45]

In *ONGC Ltd. v Afcons Gunanusa JV* ["**ONGC**"], Supreme Court held that an award of costs forms part of final award.[46] Similarly, in certain cases where the award of costs accompanies a decision on merits and the parties accept and pay the costs, it signifies consent and finality. However, a tribunal has the power to issue cost orders relating to specific procedural steps. For example, it may impose costs on a party that sought an adjournment without sufficient cause.[47] In these instances, costs are merely ancillary or penal in nature and do not affect the final adjudication of substantive rights. The lack of uniformity demonstrates the need for a clear precedent on whether costs alone establish finality rendering it award, or whether such orders should be treated as ancillary and procedural, falling outside the scope of Section 34.

For instance, an arbitral tribunal may reject the claim due to limitation clause and directs the respondent to pay costs of the application. Although the order is reasoned and imposes financial liability, it decides a distinct legal issue. The issue, therefore, is whether the incidental imposition of costs converts a ruling into an award, making it contestable under Section 34, or whether the challengeability should depend solely on the tribunal's conclusive determination of the substantive legal issue.

Charting the Groundwork for Final and Enforceable Awards

[44] Arbitration and Conciliation Act 1996, s 31.
[45] Arbitration and Conciliation Act 1996, s 31A.
[46] *ONGC Ltd v Afcons Gunanusa JV* (2024) SCC 481.
[47] Mikhail Behl, 'A Requiem for Costs' (*SCC Online,* 6 February 2023) <https://www.scconline.com/blog/post/2023/02/06/a-requiem-for-costs/> accessed 4 October 2025.

There is need for clearer doctrinal guidance to establish what constitutes substantive. The definition should include reference to criteria including material impact on parties' rights, debatable legal points, and questions not conclusively settled by precedent. The issue must be a pure question of law, rather than a factual dispute or mixed question of law and fact. The question must materially affect the rights and liabilities of the parties involved. Additionally, it should have broader ramifications on the general public or legal system, justifying appellate scrutiny.

English Arbitration Act clearly lays down the distinction between arbitral award, provisional awards, partial award, cost awards and orders.[48] In *Emmott v Michael Wilson & Partners* ["**Emmott**"], it was held that partial awards are challengeable only to the extent of finality.[49]

In Singapore, under Section 38(2) of Arbitration Act, 2001 ["**AA**"], award must state the reasons on which it is based.[50] Section 2 of AA excludes procedural orders but accept partial awards.[51] It mirrors Article 2(c) of the UNCITRAL Model Law.[52] Procedural orders are non-final and non-challengeable, except where they amount to a *de facto determination of jurisdiction* or *denial of due process.*

Under French arbitration law, there exists a clear distinction between arbitral awards and procedural measures, with challenges permitted only against decisions that possess decisional finality.[53] Articles 1492[54] and 1520[55] of the French Code of Civil Procedure (domestic and international arbitration respectively) allow annulment only of an "award" (*sentence arbitrale*), defined jurisprudentially as a decision that involves the substantive dispute. French courts consistently laid down those procedural orders (*ordonnances de procédure*) including directions on conduct of proceedings or imposition of costs, are not independently challengeable, as costs are treated as accessory consequences of adjudication rather than determinants of rights. Even where a decision is reasoned or imposes financial liability, it does not attain the character of an award unless it conclusively determines a claim or defence. This functional and finality-based approach ensures minimal judicial interference.

Furthermore, in Hong Kong, the test of whether a decision constitutes an award often turns on how a reasonable recipient would perceive it. Such a recipient is understood to assess the objective attributes of the decision, including the tribunal's description of the ruling, the formality of its

[48] Arbitration Act 1996.
[49] *Emmott v Michael Wilson & Partners* [2008] EWCA Civ 184.
[50] Arbitration Act 2001, s 38(2).
[51] Arbitration Act 2001, s 2.
[52] United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, art 2(c).
[53] French Code of Civil Procedure 1975.
[54] French Code of Civil Procedure, art 1492.
[55] French Code of Civil Procedure, art 1520.

language, and the extent of reasoning provided.[56] Consideration is also given to whether the decision satisfies the formal requirements for an award under the applicable arbitral rules, and to the broader procedural context, such as whether the tribunal intended the decision to be final and binding.[57] This approach, grounded in practical assessment rather than rigid formalism, could provide useful guidance for India as it continues to refine its arbitration jurisprudence, particularly in delineating the boundary between interim orders and final awards.

Drawing lessons from these jurisdictions, India should adopt a three-tier functional model distinguishing between final awards, partial or interim awards, and procedural orders. Final Awards would encompass decisions that conclusively determine all issues submitted to arbitration, such as final determinations on liability and quantum. These would remain challengeable under Section 34 and enforceable under Section 36 of the Arbitration Act. Partial or interim awards would include determinations that finally resolve some substantive issues such as findings on liability, limitation, or jurisdiction but not the entire dispute. These too would be subject to challenge under Section 34 and enforceable to the extent of their finality. In contrast, *procedural orders* would comprise directions regulating the conduct of proceedings, including scheduling, document production, or evidentiary rulings. Such orders, which do not finally determine any substantive rights or liabilities, should not be open to challenge under Section 34, except where expressly permitted under Section 37 of the Arbitration Act. They would remain internal to the proceedings and could be revisited by the tribunal before the final award.

Simultaneously, India should adopt a functional distinction between cost awards and procedural cost orders. A cost decision should be deemed an award when it conclusively determines the party's liability or quantum of costs, thereby having substantive impact on their financial rights and obligations. In contrast, interim or procedural cost directions imposed to regulate conduct or sanction non-compliance should be classified as *procedural orders* not challengeable under Section 34 and revisitable by the tribunal prior to the final award. Through this approach, India can ensure that judicial scrutiny is reserved only for determinative cost awards while preserving tribunal autonomy over procedural cost management.

Trajectory Post 2024 Draft Bill

[56] *G v N* [2023] HKCFI 3366.
[57] *W v Contractor* [2024] HKCFI 1452.

Draft Arbitration and Conciliation (Amendment) Bill, 2024 ["**2024 Bill**"],[58] does not directly address the persisting dichotomy. However, the bill enhances the cost regime under proposed Section 31-A by expanding the imposition of adverse costs to frivolous claims[59] and bypassing the prior requirement of delay.[60] While this strengthens sanctions and may incentivise greater decisional finality, it does not expressly provide that a cost-imposition order in arbitration becomes an "award".

Similarly, in respect of interim relief and court interventions, the 2024 Bill limits the court's power under Section 9[61] during arbitration and introduces emergency arbitration under Section 9-A, empowering an emergency arbitrator to make orders that the tribunal may confirm, modify or vacate.[62] However, the bill remains silent on whether such interim decisions including cost orders or emergency arbitrator orders, are to be treated as final "awards" or as "orders" subject only to Section 37 appeals.

Therefore, while the amendment changes the landscape, they fall short of clarifying the key interpretive question of when a tribunal's decision attains the status of an award or order and likewise do not settle whether the imposition of costs converts a ruling into an award for challenge purposes.

Conclusion and Suggestions

Specific legislative clarifications are required to operationalise the model. Section 2(1) of Arbitration Act may include a new clause defining 'procedural order' as *any ruling concerning the conduct of proceedings that does not finally determine the parties' substantive rights or liabilities*, 'cost award' as a *final determination of costs affecting substantive rights* and 'procedural costs' as *a non-final direction incidental to the conduct of arbitration*. Section 31(6) may be amended to clarify that *an interim or partial award deciding any substantive issue shall be treated as an arbitral award for all purposes of the Act*.

Furthermore, an explanatory note under Section 34 should specify that *no application for setting aside an award shall lie against procedural orders or directions that do not constitute arbitral awards*. Collectively, these clarifications would establish a coherent and closed system of challenging instruments,

[58] Arbitration and Conciliation (Amendment) Bill 2024.
[59] Khushi Jain, 'Section 31-A and the Draft Arbitration Bill 2024: The New Costs Regime in Indian Arbitration' (*RFMLR*, 15 October 2025) <https://www.rfmlr.com/post/section-31-a-and-the-draft-arbitration-bill-2024-the-new-costs-regime-in-indian-arbitration> accessed 23 October 2025.
[60] Arbitration and Conciliation (Amendment) Bill 2024, p 52.
[61] Arbitration and Conciliation Act 1996, s 9.
[62] Arbitration and Conciliation (Amendment) Bill 2024, p 7.

ensuring that judicial interference is confined to awards that finally determine rights, while procedural management decisions of the tribunal remain insulated.

This approach, also strengthens India's compliance with the New York Convention, facilitating recognition and enforcement of both domestic and foreign awards. It thus aligns Indian arbitration law with the foundational philosophy of the UNCITRAL Model Law[63] and promoting finality, efficiency, and autonomy in arbitral proceedings.

[63] UNCITRAL Model Law on International Commercial Arbitration 1985.

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AMENDING INDIA'S ARBITRATION ACT TO ESTABLISH A CETA-STYLED PERMANENT ADJUDICATORY STRUCTURE

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Introduction

The first thing that comes to your mind when you hear about India is its glorious culture, growing economy and the wide range of opportunities. From the standpoint of an international investor who perceives India as a jurisdiction of substantial economic potential, becoming ensnared in a protracted and procedurally ambiguous arbitration process can be significantly disincentivising. Conversely, envision an arbitral framework in India wherein disputes are adjudicated within reasonable timeframes through transparent and coherent procedures that align with internationally recognised standards. Such a system would enhance legal certainty, promote investor confidence and reinforce India's credibility as an arbitration-friendly jurisdiction. This would not be a mere pipe dream, but rather a real prospect based on the Comprehensive Economic and Trade Agreement ["**CETA**"] between Canada and the European Union ["**EU**"]. By adopting an innovative model like the CETA, with its standing tribunals, transparent proceedings and standardisation of legal interpretations, India can re-evaluate its commercial arbitration regime.

So, how can India leverage these ideas to serve its interests and secure investor trust? This assessment investigates how India could modernize its arbitration regime with a model based on the CETA to build an effective, equitable and globally respected legal framework. The study investigates how India can incorporate CETA's institutional and procedural features to modernise its arbitration framework and enhance its credibility as an investor friendly jurisdiction.

Scope of the Study

- Examines CETA's investment dispute settlement mechanisms.
- Assesses India's current arbitration framework and its practical limitations.

- Identifies CETA based reforms that can be realistically adapted to India while preserving regulatory autonomy.

Key Elements of CETA

- Permanent standing tribunal established under Article 8.27.
- Appellate tribunal provided under Article 8.28.
- Transparency requirements for hearings and documents under Article 8.36.
- Unified interpretive framework under Article 8.31.
- National treatment and most favoured nation treatment under Articles 8.6 and 8.7.
- Independence and ethical standards for tribunal members under Article 8.30.
- Strengthened enforceability of awards under Article 8.41.
- Structured mediation process under Article 8.20.

Insights from CETA to Bolster Indian Arbitration Infrastructure

One of the central purposes of the negotiation process is to ensure the understanding and uniformity of judgements, the CETA provides for a permanent tribunal,[1] and an appellate tribunal.[2] However, given India's ad-hoc arbitration system under the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"],[3] parties are free to select their arbitrators' which raises questions of neutrality and bias, hence, a sitting permanent tribunal with fixed members could provide a more robust alternative.

India's lack of a permanent arbitral tribunal was evident in the *Cairn Energy PLC v India.*[4] The ad-hoc tribunal awarded Cairn Ltd. $1.2 billion under the investment treaty arbitration, but the Indian Government's delayed compliance sparked global criticism. If there had been an existing tribunal with established deadlines, the enforcement and resolution process could have been more efficient while reputational damage could have been minimised.

[1] Comprehensive Economic and Trade Agreement [2016] OJ L238, art 8.27 (CETA).
[2] ibid, art 8.28.
[3] Arbitration and Conciliation Act 1996 (Act 26 of 1996), s 10 (Arbitration Act).
[4] *Cairn Energy PLC & Cairn UK Holdings Ltd v Republic of India*, PCA Case No 2016-07, Final Award (21 December 2020).

But this is the procedure that will require holistic statutory changes, particularly to Sections 10[5] and 11[6] of the Arbitration Act and accordingly, implementing such a mechanism would necessitate comprehensive amendments to the relevant statutes and their provisions in order to ensure timely appointments and expedite the arbitral process. Stakeholders may devise an appellate mechanism that could avoid enforcement problems and achieve greater uniformity of judgements by settling contemporary issues under Sections 34[7] and 48[8] relating to the challenges and enforcement of awards akin to that under the CETA.

Transparency in Arbitration Proceedings

The CETA uses transparency as a central element to ensure public hearings and publish documents while protecting sensitive data.[9] In India, Section 42A of the Arbitration Act,[10] mandates confidentiality but lacks provisions for transparency, especially in high-profile cases involving public entities.

The *Amazon.com N.V. Investment Holdings LLC v Future Retail Ltd. & Ors.*[11] ["**Amazon.com**"] judgment brought transparency issues to the fore. The Singapore International Arbitration Centre ["**SIAC**"] proceedings garnered public interest due to the involvement of high-stakes public funds and the parties' prominence. However, the lack of transparent processes in domestic arbitration often leaves such disputes opaque and reduces public trust.

Harmonizing Applicable Law and Interpretation

Under the CETA, tribunals apply the agreement as interpreted under the Vienna Convention on the Law of Treaties and other international law principles.[12] While Indian arbitral tribunals follow Section 28 of the Arbitration Act [13] by applying Indian substantive law or the chosen governing law in international arbitrations, however, the lack of uniformity in interpreting international treaties can create confusion as seen in *Vodafone International Holdings B.V. v Union of India* arbitration.[14] While the Permanent Court of Arbitration had ruled in support of Vodafone under

[5] Arbitration Act, s 10.
[6] Arbitration Act, s 11.
[7] Arbitration Act, s 34.
[8] Arbitration Act, s 48.
[9] CETA, art 8.36.
[10] Arbitration Act, s 42A.
[11] *Amazon.com NV Investment Holdings LLC v Future Retail Ltd & Ors.* (2022) 1 SCC 209.
[12] CETA, art 8.31.
[13] Arbitration Act, s 28.
[14] *Vodafone International Holdings BV v Union of India* (2012) 6 SCC 613.

the India-Netherlands Bilateral Investment Treaty ["**BIT**"], the Indian Government's domestic tax laws clashed with international principles.

Incorporating the CETA's approach could align India's arbitration framework with global treaty obligations. This shift would facilitate better integration of domestic and international legal principles, thus strengthening India's position in cross-border disputes.

Ensuring Non-Discrimination against Investors

The CETA provides a balance and fairness for investors through both national treatment[15] and most-favourable-nation ["**MFN**"] treatment.[16] To avoid claims under the more favourable provisions of other treaties, India's Model BIT expressly removes MFN clauses even if such treaties contain the fair and equitable treatment ["**FET**"] and non-discrimination principles. During the process of negotiations, India's BIT policies should be harmonized while protecting domestic interests so as to bring about an inclusive framework similar to that of the CETA. Such a move would instil confidence among investors, hence transforming India into a more attractive destination for foreign capital to flow.

Encouraging Independence and Ethics in Arbitration

Drawing on the International Bar Association Guidelines on Conflicts of Interest, CETA's emphasis on the independence of tribunal members[17] demonstrates its dedication to impartiality. India's Arbitration Act, through Section 12[18] and the Seventh Schedule, already incorporates elements of these guidelines. In the *Perkins Eastman Architects DPC v. HSSC (India) Ltd.*[19] the Court invalidated an arbitrator's appointment because the managing director of one party was directly involved in the process. The Court emphasised how crucial independence and neutrality are in arbitration.

Although Indian jurisprudence already provides a substantial framework on the independence and impartiality of arbitrators, the adoption of more stringent CETA-inspired guidelines could further enhance neutrality in investor-state disputes. Such reforms may include mandatory comprehensive disclosures covering past professional, commercial and advisory relationships extending over a defined look-back period, stricter conflict-of-interest rules that bar appointments where any prior financial or managerial association exists, fixed cooling-off periods for individuals who have

[15] CETA, art 8.6.
[16] CETA, art 8.7.
[17] CETA, art 8.30.
[18] Arbitration Act, s 12.
[19] *Perkins Eastman Architects DPC v HSCC (India) Ltd.* (2020) 20 SCC 760.

previously acted for or against the parties, and enforceable codes of conduct modelled on CETA's Article 8.30. To further strengthen neutrality, India could adopt tighter disqualification standards to prevent appointments where an arbitrator has inappropriate ties to government or prior financial associations with the parties. Additionally, expanding the pool of arbitrators through partnerships with international bodies such as UNCITRAL or ICSID would contribute to a more diverse, professionally trained and globally aligned panel suited for investment disputes. Identifying and implementing these specific measures would clarify the precise changes required to strengthen the integrity of the arbitral process.

Strengthening Arbitration Award Enforcement

The CETA minimises procedural delays by guaranteeing the enforceability of awards under Article 8.41 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"]. While India is a signatory to the New York Convention, enforcement challenges remain due to delays as was seen in *Devas Multimedia Pvt. Ltd. v Antrix Corp. Ltd.*,[20] as well as judicial intervention. Strengthening enforcement mechanisms and aligning them with the CETA's provisions could improve India's credibility as a hub for arbitration by ensuring timely compliance with awards, and reducing uncertainty for foreign investors.

Strengthening Mediation and Amicable Resolutions

The CETA promotes mediation as an alternative to arbitration,[21] emphasizing codified timelines and sector-specific approaches. India's arbitration framework already encourages settlements through Section 30 of the Arbitration Act,[22] and mandates pre-institution mediation under the Commercial Courts Act, 2015.

The significance of mediation in settling high-stakes business disputes was illustrated by the *Amazon.com* case. Simultaneous mediation attempts could have produced a friendly resolution and prevented protracted litigation while the SIAC procedures went on.

However, implementing the structured mediation provisions contained in the CETA could significantly enhance the efficiency of dispute resolution in India, particularly in cross-border investment disputes. CETA's mediation mechanism, primarily set out in Article 8.20 and the accompanying Mediation Rules contains several specific features that provide structure and predictability. Article 8.20 requires parties to consider mediation as an initial step and mandates the submission of a written request identifying the issues in dispute. The Mediation Rules establish

[20] *Devas Multimedia Pvt. Ltd. v Antrix Corporation Ltd.* (2023) 1 SCC 1.
[21] CETA, art 8.20.
[22] Arbitration Act, s 30.

a defined timeline for the appointment of a mediator, usually within twenty days, and require the mediator to be selected from an approved roster with relevant subject matter expertise. They also prescribe fixed procedural timelines for the conduct of mediation sessions and impose a good faith obligation on both parties to participate meaningfully in the process.

Further, the mediator is expressly authorised to propose settlement terms, and the mediation may proceed concurrently with arbitration without affecting the parties' procedural rights. The Mediation Rules also encourage the publication of anonymised information regarding mediated outcomes, thereby promoting transparency and consistency in investment dispute resolution.

India-UK CETA

The India-United Kingdom Comprehensive Economic and Trade Agreement ["**India-UK CETA**"] presents a significant policy challenge to the institutional reforms inspired by the Canada-EU CETA model. Instead of embracing the Canada-EU CETA's vision of a permanent international Investment Court System, the India-UK CETA fundamentally rejects the core concept of private Investor-State Dispute Settlement ["**ISDS**"]. This deliberate exclusion signals India's firm, non-negotiable commitment to preserving regulatory sovereignty over the adoption of private international arbitration for sovereign actions. This policy stance, which stems from adverse rulings in previous BIT arbitrations, dictates that any proposed permanent adjudicatory structure for investment disputes must be a purely domestic or state-to-state mechanism, significantly limiting the scope of necessary amendments to the Arbitration Act.

Despite this rejection of private ISDS, the India-UK CETA strongly supports the procedural goals of efficiency and predictability. The Agreement establishes a robust state-to-state dispute settlement mechanism, such as that under Chapter 29, to resolve disputes between the governments over the Agreement's application. This mechanism is designed to be consistent, fair, transparent, and timely. Crucially, it includes detailed Rules of Procedure and a Code of Conduct under Annex 29B. This focus on codified timelines, ethical standards, and procedural certainty provides a non-ISDS template that India can adapt to internally strengthen its domestic arbitration framework. This procedural rigor could inform amendments to Sections 23(4)[23] and 29A[24] of the Arbitration Act, thus ensuring stricter enforcement of mandatory time limits for pleadings and awards, thus making domestic arbitration more predictable.

[23] Arbitration Act, s 23(4).
[24] Arbitration Act, s 29A.

Furthermore, the India-UK CETA validates the strategic direction of India's investment policy concerning the contentious MFN clauses. The agreement's structure, which excludes a comprehensive BIT/ISDS chapter, aligns with India's 2016 Model BIT, which expressly removes MFN clauses to prevent the incorporation of more favourable dispute settlement provisions from other treaties. This strongly supports the proposal for a "*calibrated reintroduction of the MFN clause limited through targeted carve-outs*". Therefore, any future legislative or policy changes must ensure MFN obligations are confined solely to substantive investor protections, like FET, and explicitly exclude dispute-resolution provisions, thereby safeguarding India's policy decisions and mitigating potential jurisdictional expansion under Section 48 of the Arbitration Act when foreign awards are challenged or enforced.

Proposed Reforms and Way Forward

A number of carefully designed reforms can help address the challenges involved in integrating CETA-inspired provisions into India's arbitration framework. One key reform is the establishment of a permanent adjudicatory structure for investment disputes, supported by an appellate mechanism. Articles 8.27[25] and 8.28[26] of CETA provide a useful model by creating a standing tribunal with fixed-term members and a dedicated appellate tribunal to ensure consistency and predictability in arbitral decision making. In the Indian context, this could be initiated by developing specialised investment arbitration divisions within existing institutions such as the Mumbai Centre for International Arbitration ["**MCIA**"] and the Delhi International Arbitration Centre ["**DIAC**"]. With clearly defined appointment procedures, fixed rosters of arbitrators and mandatory timelines for proceedings, these institutions could gradually evolve into a permanent tribunal system comparable to the CETA model.

In *BALCO v Kaiser Aluminium Technical Services Inc.* ["**BALCO**"],[27] the Court held that once parties choose a foreign seat, Indian courts cannot interfere under Part I of the Arbitration Act, thus aligning Indian law with the territorial principle followed internationally. This shift ensures that parties' choices of seat, rules, and procedures are respected mirroring the philosophy behind CETA's structured and self-contained tribunal framework. A permanent tribunal system in India, inspired by the CETA, would build on *BALCO*'s logic by providing a consistent panel of arbitrators, predictable processes and reduced reliance on courts, while still preserving party autonomy in selecting substantive and procedural rules. In the Indian context, this would address chronic issues such as delays, inconsistent tribunal constitution, and case-by-case court

[25] CETA, art 8.27.
[26] CETA, art 8.28.
[27] *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552.

intervention. By offering stability and uniformity, such a system would enhance investor confidence and position India as a more reliable and efficient arbitration jurisdiction.

Additionally, India could consider adopting the CETA's retainer-based funding model, where tribunal members receive a fixed retainer fee, irrespective of the number of cases handled. This would ensure that members are always available for arbitration proceedings, promoting efficiency and fairness. To make arbitration accessible to under-resourced parties, the costs of these tribunals could be shared between disputing parties and the government.

In order to promote the viability of implementing an appellate mechanism for investment disputes, *Centrotrade Minerals and Metal Inc. v Hindustan Copper Ltd.* ["**Centrotrade**"][28] is particularly significant because the Court expressly upheld the legality of a two-tier arbitration clause under Indian law. The contract in that case provided for a first arbitration in India, followed by a second, appellate arbitration under International Chamber of Commerce's Arbitration Rules in London. After a split verdict in 2006, a three-judge bench finally resolved the issue in 2017 by confirming that such a multi-tier/arbitral appeal structure is valid and not contrary to public policy, and by ultimately enforcing the foreign award in favour of Centrotrade Inc. This ruling goes beyond merely allowing two consecutive arbitrations: the Court grounded its conclusion in the principle of party autonomy, holding that the Arbitration Act does not forbid parties from agreeing to an appellate arbitral stage before courts are approached. As a result, *Centrotrade* provides doctrinal support for designing a CETA-style appellate mechanism for investment disputes in India, where an initial tribunal's award can be subjected to review by a standing appellate body while remaining consistent with India's pro-enforcement, limited-intervention arbitration policy.

CETA also addresses the crucial issue of arbitral transparency. India could solve this by amending Section 42A to permit the selective publication of proceedings in disputes with the public interest while maintaining the confidentiality of sensitive information.

India's need to offer foreign investors efficient dispute resolution procedures was emphasised in *White Industries Australia Ltd. v India*.[29] This notion is consistent with MFN and national treatment requirements.

Furthermore, adopting the UNCITRAL Transparency Rules for investment disputes involving public sector entities would strike a balance between openness and confidentiality. Capacity-building programs could also be introduced to train arbitrators and lawyers on handling

[28] *Centrotrade Minerals and Metal Inc. v Hindustan Copper Ltd.* (2017) 2 SCC 228.
[29] *White Industries Australia Ltd. v Republic of India* [2011] IIC 529 (UNCITRAL, Final Award).

transparency issues without compromising sensitive information, as stipulated by CETA's guidelines. A hybrid model designed to keep privacy in commercial arbitrations while allowing for increased scrutiny in public interest disputes could improve both accountability and trust in India's arbitration mechanism.

Moreover, adopting elements of the CETA framework could significantly strengthen India's foreign investment climate by streamlining dispute-resolution processes. A calibrated reintroduction of the MFN clause limited through targeted carve-outs would help enhance transparency while safeguarding India's regulatory autonomy. Such carve-outs may confine MFN obligations to substantive protections like FET, while excluding dispute-resolution provisions and sensitive sectors such as defence, public health, and environmental regulation.

To ensure consistency, India could also issue guidelines requiring states to align investment policies with national treatment principles, promoting non-discrimination, regulatory stability and clearer incentives for foreign investors. Harmonised policies of this kind reduce disparities across jurisdictions and support a predictable and investor-friendly environment.

In addition, court interference and enforcement delays remain major roadblocks to the arbitration process, undermining India's attractiveness as a regional arbitration hub. Carefully tailored amendments to the Arbitration Act, combined with procedural enhancements, can address these issues and align India with international best practices. Alongside statutory reforms, stricter enforcement of the timelines already prescribed under the Act is essential. Measures such as mandatory case-management schedules, fixed hearing calendars, and limits on adjournments can ensure that proceedings stay on track. Institutional monitoring by bodies such as MCIA or DIAC, as well as empowering courts to substitute arbitrators who consistently miss deadlines under Sections 23(4)[30] and 29A,[31] would further strengthen adherence to timelines. Collectively, these steps would help make arbitration in India more efficient, predictable, and investor-friendly.

Amending Sections 34 and 48 of the Arbitration Act to limit judicial interference is a crucial first step in this direction. The definition of public policy can be narrowed and clarified to refer to core values such as fraud, corruption or serious procedural defects under Section 34, which allows for the annulment of arbitral awards. Furthermore, Indian Courts have already begun moving toward this narrower interpretation. In *Shri Lal Mahal v Progetto Grano*,[32] the Court decisively rejected the earlier, expansive understanding from *ONGC v Saw Pipes Ltd.*[33] for foreign awards and limited the

[30] Arbitration Act, s 23(4).
[31] Arbitration Act, s 29A.
[32] *Shri Lal Mahal Ltd v Progetto Grano Spa* (2014) 2 SCC 433.
[33] *ONGC v Saw Pipes Ltd.* (2003) 5 SCC 705.

public-policy defence to exceptionally rare circumstances. In *Associate Builders v DDA*,[34] where the Court confined judicial interference to a small set of truly fundamental defects, and in *Vijay Karia v Prysmian Cavi e Sistemi SRL*[35] which held that enforcement of foreign awards should be refused only in extraordinary cases, and that public policy cannot be used to revisit factual findings or contractual interpretation. Similarly, we should also amend Section 48, which deals with the setting aside of foreign awards, to not allow the public policy to be construed too broadly as such and should also ensure that courts do intervene only in cases of gross violations. These revisions would also reduce unnecessary interference, as the parties seeking the enforcement of arbitration rulings would have more confidence due to these changes.

Adoption of institutional reforms is needed to follow those legislative changes. Specialised arbitration benches in high courts with capable judges can enhance the quality as well as speed of adjudication. Optimizing technology to facilitate. case tracking and e-filing could free up more logs elsewhere. These initiatives would not only help in making the arbitration proceedings more expedient, but would also help further India's credibility as a seat of arbitration which is received more favourably in the international community for settling disputes.

Mediation and friendly resolution of issues is progressively finding a place in present-day dispute resolution framework. India could emulate the CETA's structured mediation timeline by amending the Arbitration Act to require parties to engage in pre-arbitration mediation for investment disputes.

Additionally, the establishment of dedicated investment mediation centres could facilitate more efficient resolutions of disputes before they escalate to full-blown arbitration. India can bring itself into line with international standards by offering investors more choices for resolving disputes by implementing the CETA's voluntary settlement procedures.

India might draft a law that combines the new arbitration and mediation procedures into an "Indian Investment Arbitration and Mediation Act", patterned after the CETA, to promote these reforms. This would guarantee a thorough and unified legal framework for Indian investment disputes. Moreover, capacity-building initiatives might be developed to educate judges, arbitrators, and legislators on arbitration best practices in cooperation with CETA-member specialists. Another option to lessen the cost of upholding permanent tribunals is to look into public-private partnerships. Lastly, pilot projects for transparency provisions could be implemented in disputes

[34] *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49.
[35] *Vijay Karia v Prysmian Cavi e Sistemi SRL* (2020) 11 SCC 1.

involving public sector undertakings to test the feasibility of these reforms before rolling them out nationwide.

By integrating international standards like the Singapore Convention on Mediation, India could strengthen its institutional mediation framework through bodies such as the Indian Council of Arbitration, and the Mediation and Conciliation Project Committee. Additionally, the CETA's provisions for Med-Arb and recognition of mediated settlements would be particularly relevant in complex commercial disputes involving technology, media, and intellectual property, aligning India's system with global best practices.

By selectively adopting and customizing these solutions to India's legal, financial, and cultural context, the country can modernize its arbitration and dispute resolution framework. In the increasingly international arbitration industry, these adjustments will help India maintain its strategic interests and sovereignty while also bringing it into line with international best practices.

Conclusion

Legal requirements can never be the main drivers behind dispute resolution in either economy, which is instead built on trust. The inclusion of these components, quintessentially CETA, presents India with the unprecedented chance to not merely upgrade its arbitration architecture but also to reshape global perceptions of doing business in India.

The CETA's innovations a standing tribunal, the transparency requirements, the application of agreed upon legal principles are not only reforms; they are also a signal that fairness, efficiency and stakeholder confidence are priorities. These techniques would enable India to preserve its own legal and cultural environment, as well as uphold international standards.

Trust, and trustworthiness, has to be at the foundation of any development building that is taking shape in, and for, India as we emerge as an economic power with a catalogue of possibilities. In addition to resolving conflicts, a revised arbitration system modelled after international best practices would communicate to the world that India is transparent, equitable, and prepared for international trade.

This goes beyond only resolving the problems of the present. It's about creating a future in which India is a leader in both justice and trade. The question now is not whether India should change its arbitration system, but rather when.

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FORCE MAJEURE IN SMART CONTRACTS: A CONFLICT BETWEEN REMEDIAL AND OBLIGATORY FRAMEWORKS

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Introduction

Smart Contracts have not been defined adequately; or rather, they do not have a single attributable definition. Some define them as autonomous machines, while others refer it to as contracts between parties stored on a blockchain.[1] It is a self-executing computer program stored on a blockchain network that automates the enforcement and execution of specific contractual terms when predefined, objective conditions are met. It functions either as the primary representation of an agreement or as a supplement to traditional contracts by carrying out automated transactions, such as transferring digital assets between parties. While current implementations are limited to precise "if this, then that" logic for relatively simple actions, complexity is expected to increase as more assets and transactions become digitised on-chain.[2] The central premise of smart contracts lies in the integration of contractual terms on collateral, bonding, or property rights, directly into technological systems, thereby making non-performance costly and deterrent.[3] By substantially lowering the costs of mediation, enforcement, and arbitration, Szabo[4] conceptualised smart contracts as a shift from traditional paper-based agreements to digitally governed systems, such as computer-supported financial networks and databases.

[1] Josh Stark, 'Making Sense of Blockchain Smart Contracts' (*CoinDesk*, 4 June 2016) https://perma.cc/37QL-6TCN accessed 22 October 2025.
[2] Stuart D Levi and Alex B Lipton, 'An Introduction to Smart Contracts and Their Potential and Inherent Limitations' (*Harv L Sch Forum on Corp Gov*, 26 May 2018) https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations/ accessed 25 October 2025; Christopher D Clack, Vikram A Bakshi and Lee Braine, 'Smart Contract Templates: foundations, design landscape and research directions' (*Cornell University Working Paper*, 4 August 2016).
[3] Max Raskin, 'The Law and Legality of Smart Contracts' (2017) 1 Geo L Tech Rev 305.
[4] Nick Szabo, 'Smart Contracts: Building Blocks for Digital Markets'(1996) <https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html> accessed 1 November 2025.

In *Ricketts v. Scothorn*[5], where a grandfather's monetary promise induced his granddaughter to leave her employment, and upon his death, the estate's refusal to honour that promise led the court to grant her relief on the ground of detrimental reliance. Transposed into the present context, the scenario illustrates how a smart contract could preclude such disputes. If the grandfather had encoded the promise within a program specifying whether or not revocation was permissible, the code itself would have governed performance. Once inscribed into the bank's system, the automated terms would operate with finality, rendering any subsequent change of intent quite impossible. However, despite their technological sophistication, smart contracts are not universally preferred over traditional contracts. Their rigid adherence to code often undermines the flexibility required to address unforeseen contingencies and exceptional circumstances. When integrated with verified digital identities, smart contracts enable complete automation of the authentication and validation of a transaction. For instance, ST Aerospace employs a blockchain-based 3D printing system that authenticates design origins, secures files through digital rights management, and autonomously initiates production in its Singapore facilities. Similarly, aviation authorities such as the Federal Aviation Administration have adopted blockchain tracing mechanisms to verify the provenance of aircraft components, reducing both costs and inefficiencies.[6] In the financial sector, Nasdaq's blockchain-based payment infrastructure facilitates automated execution of trades, liquidity adjustments, and reconciliations, effectively minimising reliance on intermediaries and lowering transaction expenses.[7]

A critical issue arises in relation to the non-compliance of smart contracts with the principle of *force majeure*, as embodied in Article 79 of the United Nations Convention on Contracts for the International Sale of Goods ["**CISG**"].[8] Traditional contracts allow parties to invoke *force majeure* when events beyond their control prevent performance, but smart contracts, being entirely co-dependent, lack the capacity to interpret or accommodate such disruptions. This rigidity raises profound questions about fairness, justice, and the accessibility to remedies in cases of supervening impossibility.

To address these concerns, this paper proposes the incorporation of a model clause that introduces a multi-tier dispute resolution mechanism within smart contracts. Such a framework would enable

[5] *Ricketts v. Scothorn* [1898] 57 Neb 51, 77 NW 365.
[6] Ibrahim A, Fernando Y, Shaharudin MS, Ganesan Y, Ahmad NH and Amran A, 'Aerospace supply chains using blockchain technology: implications for sustainable development goals' (2024) 26 Foresight 470.
[7] Nasdaq, 'Nasdaq and Citi Announce Pioneering Blockchain and Global Banking Integration' (Nasdaq, 22 May 2017) https://www.nasdaq.com/articles/nasdaq-and-citi-announce-pioneering-blockchain-and-global-banking-integration-2017-05-22 accessed 31 October 2025; 'Nasdaq All In on Blockchain Technology' (*TheStreet*, 28 June 2017) https://www.thestreet.com/investing/nasdaq-all-in-on-blockchain-technology-14551134 accessed 31 October 2025.
[8] U.N. Convention on Contracts for the International Sale of Goods art 79, 11 April 1980, 1489 UNTS 3.

parties to first resort to negotiation and mediation before invoking arbitration as the final means of redress. By embedding a structure similar to the 'Arb-Med-Arb' clause embodied in the Singapore International Arbitration Centre ["**SIAC**"] Rules[9], parties would retain the opportunity to communicate, reassess obligations, and resolve disputes in good faith before irreversible execution of the contract occurs. The authors ultimately argue that smart contracts should evolve from being purely obligatory instruments to becoming remedial frameworks that integrate human judgment, equitable relief, and adaptive dispute resolution in the face of unforeseen circumstances.

The Problems with Smart Contracts

Despite the operational advantages that smart contracts bring with them, as written at length above, the utility of smart contracts remains circumscribed. In circumstances of substantial or impossible performance, their inflexibility becomes a liability. Consequently, while courts may prefer smart contracts for their certainty and precision, they are likely to favour traditional contracts when confronted with unprecedented situations which demand a novel interpretation or remedial intervention by adjudicative bodies.[10]

Are smart contracts affected by problems of ambiguity?

Ambiguity, though integral to human expression in literature and communication, is incompatible with computer language, which derives its utility from precision and predictability. Unlike natural language, programming languages demand completeness and fixed interpretation; a computer cannot comprehend meanings beyond its coded parameters. Consequently, when contracts are expressed in code, the scope for misinterpretation diminishes significantly, as every instruction must be predefined and logically coherent.

Despite this structural clarity, traditional contract doctrines such as unconscionability and illegality continue to apply. For instance, a smart contract that enables a certain vending machine to sell alcohol to minors, or sell alcohol at extremely high prices, or in prohibited jurisdictions, would still be void under the law.[11] Such situations may be addressed either *ex ante* through regulatory safeguards (such as mandatory verification systems) or *ex post* (through redressal mechanisms).

Thus, while the principles governing the formation of any contract remain consistent across traditional and smart contracts, their implementation diverges in precision. Smart contracts

[9] Singapore International Arbitration Centre, SIAC Arbitration Rules (7th edn, SIAC 2025).
[10] Pragna Kolli and others, Making Sense of Blockchain: How Firms Can Chart a Strategic Path Forward (The Mack Institute, Wharton School, University of Pennsylvania, Fall 2018) https://mackinstitute.wharton.upenn.edu/wp-content/uploads/2018/10/Blockchain_Strategic-Path_White-Paper.pdf accessed 30 October 2025.
[11] *Modern Cigarette, Inc v Town of Orange* 774 A 2d 969, 970–71 (Conn, 2001).

remove uncertainty in interpretation but cannot adapt to contextual nuances. The code invariably executes as written, even when the result deviates from the parties' intended purpose. Nevertheless, their rule-bound predictability provides a closer approximation to the parties' agreed terms than the inherently variable interpretations of natural language.

The common law principle of substantial performance allows a contract to be upheld even when execution falls short of its exact terms, provided the essential purpose is fulfilled. For example, a contract for a custom interior design that depends on the homeowner's personal taste involves subjective judgment that an automated computer code cannot adequately replicate. Parties may attempt to address this by incorporating a degree of flexibility within the programmed terms or by opting against the use of smart contracts, in cases where subjective judgment is essential. However, when such contractual performance departs from the parties' legitimate expectations, the question remains whether the issue should be addressed through prospective regulation or retrospective judicial intervention.

Force majeure clauses and smart contracts

One of the most complex challenges concerning smart contracts lies in their capacity for modification. Traditional contract law recognises doctrines such as impossibility and impracticability, which excuse performance or necessitate alteration when compliance becomes illegal or unfeasible. Smart contracts, are inherently the opposite. For instance, if a contract was made to import certain goods that were later banned by the government, the performance of the contract becomes legally impossible. The contract is thereby discharged due to the supervening illegality caused by the change in law. This is akin to the scenario where an automated contract code would continue execution on outdated terms despite the legal change.[12] While programming languages permit insertion of new code into existing code, contracts involving irrevocable terms pose a distinct legal dilemma. In such cases, judicial intervention becomes inevitable, as judges must balance the enforcement of previously coded obligations with principles that may override them. Ultimately, party autonomy embedded in such code cannot supersede the foundational principles of legality and public policy upheld by judicial systems at the state level.

Enforcement of contractual obligations in the context of smart contracts may occur through both 'traditional or non-traditional mechanisms'.[13] Traditional enforcement encompasses established processes such as arbitration or the intervention of courts, and non-traditional methods represent a paradigm in which compliance is ensured at the network level through code itself. This model

[12] Indian Contract Act 1872, s 56.
[13] Clack, Bakshi and Braine (n 2).

envisions 'tamper-proof' systems[14] that execute obligations automatically, rendering breach or deviation theoretically impossible. Such mechanisms, while efficient, signify a departure from conventional legal oversight, replacing *ex post* adjudication with *ex ante* enforcement embedded within the technological architecture of the contract.

Smart contracts presently lack an efficient mechanism for amendment, creating practical difficulties for parties seeking to modify their agreements. Unlike traditional contracts, which can be readily adjusted through mutual consent or supplementary documentation, smart contracts operate within immutable blockchain systems that severely restrict alterations post-deployment. This inflexibility not only complicates the process of incorporating any necessary changes but also elevates transaction costs and the risk of inaccuracies in reflecting revised terms. Accordingly, while smart contracts provide certainty, they do so at the expense of the flexibility that is found in traditional contracts.

It is quite apparent from the preceding discussion that the inherent nature of smart contracts (specifically, their immutability), renders the enforceability of a *force majeure* clause embedded within the contract, absolutely impossible.

Multi-tier Dispute Resolution: Way towards Remedial Frameworks

The principal flaw of existing smart contracts lies in their obligatory architecture: once deployed, they function as irreversible instructions enforcing performance regardless of fairness or feasibility. Multi-stage contracts exemplify the *"endless execution problem."* Transactions continue even when the underlying purpose has collapsed or the obligations have become impossible to fulfil. Traditional contract remedies, such as rescission, injunction, or reformation, cannot operate effectively because the contract is self-enforcing; by the time a dispute arises, execution is already complete. The future calls for reconceptualising smart contracts as remedial tools rather than mere automatic executors, integrating some mechanisms for human judgment alongside the certainty of automation.

Multi-tier dispute resolution framework

A practical solution involves incorporating multi-tier dispute resolution ["**MDR**"] clauses directly within smart contract code. MDR clauses require parties to exhaust negotiation and mediation before resorting to formal arbitration. This staged approach aligns automation with equitable relief, preserving efficiency whilst restoring contextual judgment. An integrated MDR framework would incorporate a *"pause function"* triggerable upon dispute invocation. Upon invocation, parties engage

[14] Ibid.

with decentralised interfaces for negotiation. If negotiation fails, disputes then shift to mediation by neutral third parties, who exercise equitable judgment to assess whether unforeseen circumstances justify relief. Where such mediation does not result in settlement, disputes proceed to formal arbitration under previously agreed procedural rules, which enables arbitrators to determine whether supervening events constitute a *force majeure* event, and to decide the appropriate remedies. This structure mirrors the SIAC's Arb-Med-Arb model, which integrates mediation within arbitration proceedings.

Emerging technologies

Kleros, a decentralised arbitration protocol built on Ethereum, employs crowdsourced jurors selected through stake-weighted random sampling, with appeals available through larger jury pools.[15] Kleros demonstrates that decentralised decision-making can serve as a scalable dispute resolution mechanism, enabling subjective judgment through human deliberation rather than deterministic code.[16]

The Aragon Network Court ["**ANT**"] uses governance tokens to encourage participation, requiring jurors to stake tokens in exchange for the right to resolve disputes, with a system of multi-round appeals that allows matters to be reviewed by increasingly larger juries.[17] These systems demonstrate the feasibility of embedding human judgment within smart contracts.

Framework of Article 6.2.3 of the UPICC

The UNIDROIT Principles of International Commercial Contracts ["**UPICC**"] mandate renegotiation as the first tier of remedial action in situations of hardship.[18] Where performance becomes excessively onerous due to altered circumstances, Article 6.2.3(1) of the UPICC[19] requires that *"in case of hardship, the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based."* The UPICC framework establishes a binding four-tier mechanism: first, the disadvantaged party must request renegotiation (mandatory, not discretionary); second, parties must attempt negotiation in good faith; third, if negotiation fails, *"either party may resort to the court"*; and fourth, the court may either *"terminate the*

[15] Clement Lesaege, Federico Ast, and William George, Kleros: A Decentralized Application to Arbitrate Disputes (Kleros White Paper, September 2019).
[16] Luis Bergolla, 'Kleros: A Socio-Legal Case Study of Decentralized Justice and Blockchain Arbitration' (2022) 37 Ohio State Journal on Dispute Resolution 55.
[17] Aragon Foundation, Aragon Network Whitepaper: An Opt-In Digital Jurisdiction for DAOs and Sovereign Individuals (April 2017).
[18] UNIDROIT, *Principles of International Commercial Contracts* (2016), arts 6.2.1-6.2.3.
[19] UNIDROIT *Principles on International Commercial Contracts* (2016) art 6.2.3(1).

contract at a date and on terms to be fixed" or *"adapt the contract with a view to restoring its equilibrium."*[20] This directly parallels the MDR structures proposed for smart contracts. Significantly, UPICC Article 6.2.3 operates through an *ex-post* evaluation, which is an assessment made after changed circumstances arise, permitting contextual judgment about whether adaptation is warranted. This demonstrates that international commercial law recognises tiered dispute resolution not merely as best practice but as a binding doctrine.[21]

Recent international jurisprudence reinforces the enforceability of MDR mechanism as binding contractual obligations, establishing that multi-tier resolution is not discretionary but legally mandatory. In *Max Engineering Works Pte Ltd v. PQ Builders Pte Ltd,*[22] the Hon'ble High Court of Singapore issued a specific performance order compelling parties to proceed to mediation despite pending arbitration, treating MDR compliance how is it mandatory contractual obligation. Justice Steven Chong held that while the court would ordinarily refrain from compelling mediation, the contractual language "*shall refer the dispute to mediation"* created an inforce liable obligation binding the parties throughout the arbitration process.

This jurisprudential development establishes that MDR compliance is enforceable through arbitration itself, creating a self-executing mechanism by which arbitrators can compel adherence to staged resolution. This development is significant, given the direction which international jurisprudence on the subject has taken recently.

The Holdup Problem and Smart Contracts Remedial Design

Beyond legal and equitable considerations, economic theory offers a compelling rationale for incorporating MDR mechanisms into smart contracts. The *"holdup problem",* which arises in contract renegotiation, happens when changed circumstances after contract formation enable one party, holding superior bargaining leverage, to exploit the other party, who is now facing changed circumstances. For example, a supplier facing unexpected production disruptions may be forced to accept significantly higher prices from a buyer who threatens to source from competitors if contract prices are not renegotiated upward. In such situations, the supplier, facing a production crisis, may lack realistic alternatives and accept exploitative renegotiation terms.[23] Traditional contract theory addresses the holdup problem through two mechanisms: commitment devices that impose irreversible consequences

[20] Ibid.
[21] Nupur Trivedi, 'Application of Force Majeure and Hardship Principles Under CISG and UNIDROITt' (2015) 5(1) International Journal of Reviews and Research in Social Sciences 1.
[22] *Max Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2023] SGHC 71 (Singapore High Court, 26 May 2023).
[23] Oliver Hart, *Firms, Contracts, and Financial Structure* (Clarendon Press, Oxford, 1995).

for breach, and equitable remedies that permit contract adaptation when changed circumstances warrant it. However, these mechanisms create a tension: tools designed to prevent bad-faith hold-ups can also block mutually beneficial renegotiation when genuine changes in circumstances call for adapting the contract. Professor Richard Holden's analysis demonstrates that blockchain-based smart contracts with immutable commitment devices can resolve this tension.[24] Smart contracts can impose a credible commitment to enforce original terms while simultaneously embedding staged renegotiation mechanisms. Specifically, MDR-embedded smart contracts incorporate: (1) coded verification that original contract terms will be enforced absent mutual agreement to modification; (2) mandatory negotiation and mediation stages permitting parties to propose and discuss adaptation; and (3) arbitration mechanisms for neutral assessment of whether changed circumstances justify adaptation. This architecture permits parties to distinguish between illegitimate holdup and legitimate adaptation.

Conclusion

Smart contracts mark a significant advance in how agreements are formed and enforced, but their immutable nature limits their ability to respond to unprecedented *force majeure* events. Incorporating stages of negotiation, mediation, and arbitration allows human judgment to operate alongside automation, ensuring that fairness and efficiency are maintained. Until technology develops further, a broader and more purposive interpretation of existing laws can help bridge the gap between innovation and justice.

[24] Richard Holden, 'Can Blockchains Solve the Holdup Problem in Contracts?' (Becker Friedman Institute for Research in Economics, University of Chicago, Working Paper No. 2018-12, February 2018).

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WHEN FINALITY MEETS SOVEREIGNTY: ISSUE ESTOPPEL AND THE ENFORCEMENT OF ARBITRAL AWARDS AGAINST STATES

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Introduction

Estoppel as defined by the Black's Law Dictionary refers to: "*A bar or impediment raised by the law, which precludes a man from alleging or from denying a certain fact or state of facts, in consequence of his previous allegation or denial or conduct or admission, or in consequence of a final adjudication of the matter in a court of law.*"[1] The doctrine rests upon the maxim *Interest reipublicae ut sit finis litium* which means that it is in the interest of the state that the litigation comes to an end. Most nations governed by common law adhere to the principles of estoppel.[2] Estoppel, therefore, in essence is a species of the doctrine of res judicata. Among this species lies a sub-species called issue estoppel. Issue estoppel, a rule of preclusion, precludes parties from re-arguing the same issues that have already been decided by another competent court.

This rule is of great relevance in international arbitration in facilitating and aiding enforcement of an award once its validity is confirmed by the seat court. However, when the award-debtor is a state, particularly in investor-state disputes, the application of the rule of preclusion is itself precluded by a plea of sovereign immunity. This effectively renders an award infructuous leaving the award-creditor remedy-less. This paper explores the jurisprudence of issue estoppel, its recent application in international commercial and investor-state arbitrations and advances the view that plea of state immunity must not be allowed to stymie enforcement, frustrating the award itself.

[1] *"Estoppel"*, Black's Law Dictionary (2nd ed, 1910).
[2] Gary Born, *International Commercial Arbitration* (2nd ed.), Kluwer Law International, p. 3734-3735 (2014).

Issue Estoppel *per rem judicatam*

The doctrine of issue estoppel, coined in *Hoysted v Federal Commissioner of Taxation*[3] was enunciated by J. Diplock in *Thoday v Thoday*[4]: "*The second species, 'issue estoppel', is an extension of the rule of public policy. If in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.*"

This doctrine was differentiated from res judicata by the Supreme Court in *Bhanu Kumar Jain v Archana Kumar*[5] holding that res judicata prevents a court from exercising its jurisdiction to adjudicate a dispute once it has already attained finality between the parties. In contrast, issue estoppel operates against a party: where a particular issue has been conclusively decided against that party in earlier proceedings, he is barred from re-agitating the same issue in subsequent proceedings.[6]

Transnational Issue Estoppel

The application of issue estoppel becomes peculiar when the previous judgement that is sought to invoke issue estoppel is rendered by a foreign court. In order to establish issue estoppel, the English court in *Carl Zeiss Stiftung v Rayner C Keeler Ltd.*[7] laid down four conditions namely, (i) the judgment given by foreign court has proper jurisdiction; (ii) the judgement is final and conclusive; (iii) there must be identity of parties and; (iv) there must be identity of subject matter. These conditions have been widely accepted to constitute a basis for the application of issue estoppel.

In *Carpatsky Petroleum Corporation v PJSC Ukrnafta*,[8] the English Commercial Court has ruled that substantial over exact similarity of issues is sufficient for the doctrine to be applied. These principles were reiterated in the celebrated judgement of *Good Challenger Navegante v Metal Export Import* ["**Good Challenger**"][9] which today serves as a yardstick for application of issue estoppel in most jurisdictions.

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[3] *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561.
[4] *Thoday v Thoday* [(1964) 1 All ER 341 : (1964) 2 WLR 371 : 1964 P 181 (CA)].
[5] *Bhanu Kumar Jain v Archana Kumar*, (2005) 1 SCC 787.
[6] Ibid ¶ 30.
[7] *Carl Zeiss Stiftung v Rayner C Keeler Ltd* (No 2) [1967] 1 AC 853.
[8] *Carpatsky Petroleum Corporation v PJSC Ukrnafta* [2020] EWHC 769 (Comm). ¶ 122.
[9] *Good Challenger Navegante v Metal Export Import* [2003] EWCA Civ 1668.

Relevance of Issue Estoppel in International Arbitration

The genesis of issue estoppel in international arbitration stems from the primacy of the court of the seat of arbitration. The enforcement court proceeds on the premise that the decision of the seat court was conclusive of those matters estopping the enforcement court from reopening issues already decided.[10]

Tenets of the principle conferring primacy to seat court can be found in Article V(1)(e) of the New York Convention 1958 which reads as: "*Article V(1)(e) Recognition and enforcement of the award may be refused…if the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*"[11]

The application of issue estoppel in the context of international commercial arbitration arose as early as 1902 from the U.S Supreme Court judgement in *Southern Pacific Railroad Co v United States*[12] which ruled that a right, question or a fact put in issue and determined by a competent court as a ground of recovery cannot be disputed.[13] This position was succinctly followed and affirmed by the France-Venezuela Mixed Commission in *Company General of the Orinoco Case.*[14]

Issue estoppel in investor-state disputes

This rule of preclusion has been equally applied in arbitrations arising out of investment disputes. In *RSM v Grenada*,[15] RSM, the sole claimant brought a claim against Grenada for a contractual breach. In *Grynberg v Grenada*,[16] the additional claimants brought claim under bilateral investment treaty but arising out of the same contract. The claimants contended that the earlier dispute arose out of a contract while the current arises out of breach of treaty. Rejecting the argument, the tribunal acknowledged that issue estoppel is an established principle of international law.[17]

The rule is not merely a feature of common law but also has its foundation in principle of comity which is the acknowledgment by one State of the validity of another state's legislative, executive,

[10] Kshama A. Loya and Oindrila Mukherjee, 'The Issue of Issue Estoppel in International Arbitration', *Asian Dispute Review*, Volume 26, Issue 4 (2024), pp. 178 - 184, <https://www.kluwerarbitration.com/document/kli-ka-adr-2024-04-003> accessed 4 December 2025.
[11] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958) art V(1)(e).
[12] *Southern Pacific Railroad Co v United States* 168 US 1, (1897).
[13] *Southern Pacific Railroad Co v United States* 168 US 1, (1897) ¶ 48-49.
[14] Company General of the Orinoco Case, Reports of International Arbitral Awards, 31 July 1905, Volume X, p. 276.
[15] *RSM Production Corporation v Grenada*, ICSID Case No. ARB/05/14.
[16] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010.
[17] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 4.6.5.

or judicial acts within its own territory, exercised out of respect for international community and practical necessity, without prejudice to the rights of its own persons.[18]

However, an impediment to the application of issue estoppel is created when the former, a predominantly common law principle comes into direct conflict with another foundational principle of international law i.e. state immunity.

Issue Estoppel vs State Immunity

For the uninitiated, state immunity forms one of the foundational principles of international law drawing its authority from the presupposition that all sovereigns are equals. The law of immunity is procedural in nature, being concerned with the exercise of jurisdiction and not as such the substantive question as to whether the particular conduct in question was or was not lawful.[19] The United Nations Convention on Jurisdictional Immunities of States and Their Property[20] is a manifestation of this principle of customary international law. Although not in force, this convention has been instrumental in guiding jurisprudence on state immunity.

When a party obtains an arbitral award in its favour, it holds a significant leverage knowing that its claim can be enforced in any jurisdiction that is a signatory to the New York Convention[21] or the International Centre for the Settlement of Investment Disputes ["**ICSID**"][22]. But when a sovereign is an award-debtor, state immunity acts as a bulwark against the enforcement of such award. [23]

This conflict of principles arose in one of the most prominent international disputes, the *Devas-Antrix* saga where the Singapore Court of Appeal in *The Republic of India v Deutsche Telekom AG*[24] ["**Deutsche Telekom**"] rejected India's application to set aside a Swiss ruling by applying issue estoppel, ruling that the doctrine of transnational issue estoppel is applicable in the context of international commercial arbitration, at least in relation to a prior decision of a seat court regarding the validity of an award.[25]

The question of application of transnational issue estoppel resurfaced again in *Hulley Enterprises v Russian Federation*[26] ["**Hulley case**"]. Russia commenced proceedings in the Netherlands to set

[18] *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 (at 1096).
[19] Malcolm N Shaw, *International Law* (9th edn, Cambridge University Press 2021).
[20] United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004).
[21] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958).
[22] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966).
[23] Ylli Dautaj, 'Sovereign Immunity from Execution of Foreign Arbitral Awards in India: The "New" Kid on the (Super) Pro-Arbitration Block' (2012) 4 *Arbitration Law Review*.
[24] *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10.
[25] ibid ¶ 102.
[26] *Hulley Enterprises Ltd & Ors v The Russian Federation* [2025] EWCA Civ 108.

aside the awards, arguing that there was no arbitration agreement and the Dutch court set aside the award. The award was later restored by the Dutch Court of Appeal, and this judgement was further upheld by the Dutch Supreme Court. In proceedings initiated by claimants in UK for the enforcement of the award, Russia claimed sovereign immunity by virtue of UK's State Immunity Act, 1978[27].

Section 1 of the State Immunity Act, 1978 confers immunity however subject to exceptions. While Russia argued that the EWHC's duty under the Civil Jurisdiction and Judgements Act, 1982[28] requires it to be satisfied on its own analysis of the existence of a valid arbitration agreement, the claimants' argument as accepted by the EWHC, was that the court is positively invited to rule on the state immunity, by deciding if Section 9 would apply. However, there is nothing mentioned on how the court shall determine the issue, and therefore, the EWHC could very well apply the rules of English common law, i.e. issue estoppel in this case, and conclude that Russia cannot claim state immunity.[29]

In another proceeding before the Singapore Court[30], the Russian Federation sought to set aside the award on grounds of state immunity in terms of the State Immunity Act, 1979 (Singapore) contending that the exception of arbitration under Section 11 does not apply because it had never submitted to arbitration in writing. The Claimants relied on the decisions of The Hague Court of Appeal and the Supreme Court of Netherlands, stating that they give rise to issue estoppel precluding the Russian Federation from raising the same legal and factual issues. The Court based its decision on the *Deutsche Telekom* case, and said that the application of transnational issue estoppel applies even to questions of state immunity. This established Russia's written consent to submit the dispute to arbitration, and the exception set out in Section 11 of the State Immunity Act, 1979 applies, thereby dismissing its application to set aside its award.

Exceptions to issue estoppel

While issue estoppel has facilitated proper enforcement of arbitral awards, it is well established that it "*should not arise in relation to any issue that the court of the forum ought to determine for itself under its*

[27] Simon Bushell, Lian-Ying Tan and Deekshitha Swarna, 'Should Issue Estoppel Apply to Questions of State Immunity?' (*Kluwer Arbitration Blog*, 30 April 2025) <https://legalblogs.wolterskluwer.com/arbitration-blog/should-issue-estoppel-apply-to-questions-of-state-immunity/> accessed 4 December 2025.
[28] Civil Jurisdiction and Judgments Act 1982 (UK).
[29] Esha Rathi, 'The Hulley Case: Decoding the Unprecedented Role of Issue Estoppel in Jurisdictional Issues' (*Kluwer Arbitration Blog*, 9 March 2024) <https://legalblogs.wolterskluwer.com/arbitration-blog/the-hulley-case-decoding-the-unprecedented-role-of-issue-estoppel-in-jurisdictional-disputes/> accessed 4 December 2025.
[30] *Hulley Enterprises Ltd. & Ors. v The Russian Federation* [2025] SGHC(I) 19.

own law"[31] meaning thereby issue estoppel cannot arise where the enforcement court is bound to make a determination upon its own public policy, a facet not under consideration before the seat court.

India's Stance

Indian courts have taken inconsistent stands specifically upon the application of issue estoppel in context of international arbitrations. In *International Investor KCSC v Sanghi Polyesters Ltd.*[32] the Andhra Pradesh High Court took a favourable view that an argument submission refused by the seat court cannot be re-argued before an enforcement court. However, the Delhi High Court in *Cruze City 1 Mauritius Holdings v Unitech Limited*.[33] The court had to decide whether Unitech was precluded from opposing enforcement on a particular ground which was not raised during the proceedings before the seat court. Answering in negative, the court stated that the cause of action for the enforcement proceedings is distinct from the one before the seat court and therefore, objections not raised before the seat court can still be urged during enforcement proceedings. The court went on to rule that res judicata and issue estoppel are merely indicative for courts when deciding upon the enforceability of an award.

But it is pertinent to note India's judicial approach to foreign states invoking immunity as a ground to obstruct the enforcement of awards. Unlike the UK, India does not have any specific statute governing state immunity. India is a signatory to the United Nations Convention on Jurisdictional Immunities of States and their Properties but has not ratified it yet. The only provision that reflects the intention to confer state immunity is Section 86 of the Code of Civil Procedure.[34] The Bombay High Court in *German Democratic Republic v The Dynamic Industrial Undertaking Ltd.*[35] has ruled that Section 86 does not confer sovereign immunity as recognised under international law but rather acts as an exception to the plea of immunity. In *Ethiopian Airlines v Ganesh Narain Saboo*,[36] the Supreme Court rejected the plea of state immunity on the following grounds: (i) that a specific statute, later in time, will have a non-obstante effect on the general statute; (ii) that a state expressly waives its immunity by virtue of being signatory to a convention; and lastly that sovereign immunity cannot be claimed when it enters into transactions of commercial nature. The Ministry of External Affairs has also submitted that prior consent under Section 86(3) is not a sine qua non

[31] *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14 ¶ 55.
[32] *International Investor KCSC v Sanghi Polyesters Ltd.* [2003] 43 SCL 271(AP).
[33] *Cruze City 1 Mauritius Holdings v Unitech Limited* 2017:DHC:1911.
[34] The Civil Procedure Code s. 86.
[35] *German Democratic Republic v The Dynamic Industrial Undertaking Ltd.,* AIR 1972 Bombay 27.
[36] *Ethiopian Airlines v Ganesh Narain Saboo*, Civil Appeal No. 7037 of 2004.

for the enforcement of an arbitral award against an award-debtor state.[37] Therefore, the executive as well as judicial approach appears to be progressive upholding the principles of arbitration.

Conclusion

Party autonomy is one of the cornerstones of international arbitration. Issue estoppel operates as a common law principle in post-award litigation, preventing the courts from re-deciding settled issues, in the nature of those elaborated in *Good Challenger*.[38] Therefore, this operates as a barrier to parties challenging the award in set-aside proceedings, and rightfully so. One well-known barrier to enforcement of arbitral awards rendered by Tribunals against a sovereign entity is sovereign immunity, which many state parties are bound to argue at some point during the proceedings. The development of issue estoppel, and the application/non-application of the same, has been discussed in various proceedings. Against this doctrinal backdrop, a contemporary question regarding its applicability in deciding questions of public policy (violation of which in itself forms an exception under the New York Convention), such as sovereign immunity, has been subject to much controversy. While some judgements interpret it as being non-applicable to sovereign immunity,[39] the developing jurisprudence overwhelmingly shows that issue estoppel can be applied to decide against sovereign immunity, even in the context of changing state immunity legislations. The *Hulley Case* (EWHC), relying upon *Deutsche Telekom*, seems to be the most recent decisions in this series, and the court's decision provides a more concrete approach to the evaluation of the application of issue estoppel in the context of sovereign immunity. If the application of issue estoppel were to be outside the lines of sovereign immunity, then the enforcement of awards against state, especially in investor-state disputes, would prove to be difficult. In a pro-arbitration regime, especially such as India, the upholding of the award, and execution thereof, dictate that state immunity must not stymie the arbitral award.[40]

[37] *KLA Const Technologies Pvt. Ltd. v The Embassy of Islamic Republic of Afghanistan* OMP(ENF)(COMM) 82/2019 & I.A. No. 7023/2019 & *Matrix Global Pvt. Ltd. v Ministry of Education, Federal Democratic Republic of Ethiopia* O.M.P.(EFA)(COMM) 11/2016 & E.A. 666/2019.
[38] *Good Challenger Navegante v Metal Export Import* [2003] EWCA Civ 1668.
[39] *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14.
[40] Ylli Dautaj, 'Sovereign Immunity from Execution of Foreign Arbitral Awards in India: The "New" Kid on the (Super) Pro-Arbitration Block' (2012) 4 *Arbitration Law Review*.

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IN CONVERSATION WITH MR. TIMOTHY NELSON, PARTNER, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP AND AFFILIATES

MR. TIMOTHY NELSON

PARTNER, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP AND AFFILIATES

Editor's Note: Mr. Timothy G. Nelson is a Partner at Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates in New York, and his primary focus is on international arbitration and cross-border litigation.

Mr. Nelson has consistently appeared before leading arbitral institutions, including the ICC, LCIA, SIAC, HKIAC, ICSID, and AAA, and represented parties before federal and state courts in the United States. Leading ranking publications, including Chambers Global and Benchmark Litigation, have recognised his contributions to the field of international arbitration. Mr. Nelson completed his B.A. and LL.B. (1990) at the University of New South Wales, Australia, and a B.C.L. at the University of Oxford. He is admitted to practice in New York and in England & Wales. Besides his legal work, he acts as co-editor for major publications in the domain of international arbitration and is a regular contributor of articles to the field of public international law and dispute resolution. Mr. Nelson's erudition has been instrumental in the development of international arbitration.

Editorial Board ["EB"]: You have worked in various law firms at different locations, including London, Australia and the United States. How have these diverse legal cultures influenced the kind of advocate you became?

Mr. Timothy Nelson ["TN"]: Well. I suppose one has to begin with Australia, where I was born and raised, and how it influenced my advocacy. I was brought up in Sydney, New South Wales, Australia. I attended the University of New South Wales for my first law degree and also completed a Bachelor of Arts, a process that spanned 5.5 years. I realise in retrospect that growing up in Australia is narrower than it seems at the time, in some ways. However, I was still fortunate to receive a broad education and was encouraged at law school to examine both the local legal issues in Australia, as well as international issues. I also had the opportunity to hear lecturers from around the world, including India. We were encouraged to view the common law as a body of law that we shared amongst numerous countries. So that was always a good outlook to begin with.

Then, I practised. I worked for a judge, practised in a law firm in Australia, and worked in litigation, dealing very closely with the bar as well. Australia has a rule that separates the roles of solicitor and barrister. So, I began as a solicitor, and if I had stayed in Australia, I probably would have become a barrister because one typically transitions from being a solicitor to a barrister after a certain amount of time. I was lucky to work in a commercial law practice with a traditional legal team that was very rigorous, questioning, and demanded very high standards. When I came into contact with other legal cultures, I noticed differences – the London legal culture benefits from having a broader body of case law. If you handle international cases in London, you will deal with a diverse range of cases from around the world, which I greatly benefited from. English culture differs slightly from Australian culture. I would say it is more conservative in some ways, not in others. I had to adapt to a somewhat new world there, and then came to the United States ["**US**"], which was really just for family reasons. My wife and I went to the United States in 1999. That's where I saw a very different culture, because the United States is culturally distinct from other parts of the English-speaking world, and the law reflects that.

You have a similar body of law, such as the content of law of torts or the content of law of contracts, rules of evidence, or rules of civil procedure, which is actually quite similar to the Australian or English legal system. But the way these are applied in the American way, the energy and zeal with which the Americans operate, and the industry of the law in the United States, is all very different. So, I had to adapt a lot to that. In terms of how that affects the kind of advocate, that might be facing the judge or tribunal, you know, I like to think it's not that different. I want to believe that on those occasions when I was in front of a judge in Australia, or sometimes a Master (because some of the Queen's Bench cases are before Masters in the English system), the

personal style is the same as the style of being an advocate in front of American judges, or international arbitrators.

However, it has likely evolved and changed over time, as life does. One of the most significant differences for the working advocate in all three cultures is also relevant to the practice of law in India. The amount of time the judge or arbitrator has to hear from you will vary across different legal cultures. I recall arguing in the Commercial Court of England in the 1990s, and the judge gave me the entire morning to present my case. By contrast, in the United States, time is much more regimented and limited. You could be in front of Court of Appeals, the Circuits Courts in the United States which are the major Appellate Courts, and they will literally tell you that have ten minutes, and they will tell you that you have nine minutes in chief, and one minute in rebuttal, and there's little lights – a green and red light, that tells you. The red light means you stop talking now, after 9 minutes. That significantly changes the way you present your case. All of these things have been part of my life, and they have shaped my personality.

EB: Alongside your advocacy, you have been recognised with the Burton Award for legal writing. When you read memorials or procedural submissions, what qualities signal robust written advocacy? And for students or young practitioners, what habits best foster exceptional legal writing?

TN: I think, the most essential thing in the good written advocacy is organising the arguments, it's almost as the battle is won before the pen even hits the page, because once you know the correct order in which to argue or present your case, everything will flow from that and an actual experienced reader, be like arbitrator or judge or another lawyer, would say that it makes sense. For instance, if you have a submission and one of the points in there is that there's a six-year statute of limitations that precludes the claim, it will feel really jarring, or peculiar, if that point is buried in the back as a footnote.

So, I think order and logic are the fibre of a good written advocacy. It makes the prose look good. Good prose is wonderful for its own sake, but it only gets you so far if you haven't organised properly. Other things you look for are thoroughness. Once you have learnt to look for spots and gaps in an argument, it's very hard to unsee them. If a legal submission ducks a critical issue or fails to address one that must be on the mind of the decision maker, that's really frankly toxic to the submission. It's just this bell that keeps ringing in your head, saying "Why haven't they talked about their limitations problem?", or whatever the case may be.

So, thoroughness means conveying to the decision maker that "I understand the issues and that they need to be addressed, and here's how I address them." That gives integrity to the written advocacy. On top of that, if you avoid making too much of evidence that doesn't support your propositions, if you avoid repetitions, all those things are good. I believe the architecture of advocacy begins with thoroughly understanding your case, presenting it correctly, and addressing the relevant issues. Once you can do that, a lot of other aspects of style sort themselves out. So, I would say to the students and young practitioners, looking at the issues, look at your case, think about what the decision maker or the judge, needs to do or not do in this case, think about the results you can realistically achieve and steer the decision maker, honestly and forthrightly towards that result.

EB: You have participated in institutional arbitration proceedings across various institutions. Building on your experience, what are the guiding factors for choosing the most appropriate institution for arbitration?

TN: That's a really good question. People do sometimes jump into discussions about the institutions, whether it's the International Chamber of Commerce ["**ICC**"] or the London Court of International Arbitration ["**LCIA**"], and things like that. You should step back and ask yourself a few questions first about whether you are choosing international arbitration; that choice must be based on the client's needs. I'm assuming that there's a client reason for not wanting to litigate the cases in the courts of a country or province. I am assuming there is some cross-border transaction, where you are unlikely to get the parties to agree to litigate in the courts of Mumbai, New Delhi, London, or Singapore. You therefore need to look at international arbitration. The first question I have is, what's the governing law? That is often overlooked, yet it is sometimes the most important question. Is it Indian law, English law, New York law, or Singaporean law that can be a guiding factor for choosing the right institution?

The next question is, what will be the seat of arbitration? "Are you seated in India, Hong Kong, Singapore, or London?" Let's take Singapore as an example; it's a frequently used forum. Assume I had a Singapore seat and I had New York, English or Singapore law as governing law. The guiding factors for choosing the institution should then be: which one, firstly, would be acceptable to the client and secondly, which institution is going to get me the most transparent and most efficient result with minimum interference from the institution itself? Another of the factors is whether the order can be easily enforced, for example, in the courts of Singapore, India, Australia, the United Kingdom ["**UK**"], or any other relevant jurisdiction. Going back to my example, you

can soon see that the home institution, Singapore International Arbitration Centre ["**SIAC**"], has some advantages. But the main advantage of the SIAC is that it is a known quantity. It is not as if I think they have a magic formula that is unique in itself. It has a set of rules and a framework.

Other institutions have the same thing. So, in my example, it doesn't give SIAC a monopoly even though it is the home institution. Some factors may prompt me to choose ICC, or may prompt me to choose LCIA, remembering that it doesn't have to be headquartered in London. Alternatively, I would probably not use the Hong Kong International Arbitration Centre ["**HKIAC**"] rules for Singapore-seated arbitration. There are several institutions, such as the ICC, International Centre for Dispute Resolution ["**ICDR**"], American Arbitration Association ["**AAA**"], and LCIA, that are transnational and can be used in numerous places. Additionally, there are other regionals, such as the Stockholm Chamber of Commerce ["**SCC**"] (Sweden), which I will likely use only if the venue is in that country.

There can be many guiding factors that relate to "Is your client used to this institution?" "Does your client think that the institution is fierce and competitive, something that's an issue?" Then, there are recent decisions emanating from the tribunals of these institutions that people have confidence in. Usually, choice of seat and choice of institution is a conservative question: do we know what it is, and has it worked in the past? This particular function of practice in International Arbitration isn't the one that rewards innovation; it's one that generally rests on past performances and a sort of conservativism, and that is why it's quite challenging to establish a new arbitral institution. The decision-making at the clause drafting stage is usually driven by conservatism.

EB: From a practitioner's standpoint, what are the fundamental differences in the approach adopted towards building an investment arbitration case compared to international commercial arbitration?

TN: Let me begin with a word of caution to everyone in the initial phase of their law career. I have been privileged to participate in several significant investment arbitration cases, as well as notable international commercial arbitration cases. Investment arbitration is generally less common in practice, and I hold no particular bias in favour of one or the other. Good lawyers can do either, but I would say, as a general caution, that getting into investment arbitration is a little more complicated than getting into general private commercial arbitration. But having said that, when you work an investment arbitration case, you are likely to look at a few things differently. Obviously, you will be in a situation where there is a dispute with a host state. That is the paradigm

of investor-state arbitration. You will have a client, usually a private entity, that went into a country, put capital down, and for whatever reason, is experiencing difficulties; that's why they are coming to you for investment arbitration advice. The first thing you have to confront is that bringing an investment arbitration against certain governments can disrupt previously harmonious relations with that government, if they were harmonious. Investment arbitration is usually something that business-people do when the relationship is (at a minimum) in jeopardy. Obviously, in the extreme paradigm of expropriation, when an investor's investment has been taken away, the relationship is already bad. However, you have to explain to an investor that being in a situation where the government is against you, or you are against the government, brings risks and downsides that are very different to being in a business-to-business commercial dispute, where things can be acrimonious between two rival businesses. It's very different when you are against the government; you need to be well aware of governmental powers as you conduct the case. I will say nothing more than that.

The other differences you need to be aware of are the source of your rights. Sometimes, the investor may have a contract with the government that provides for arbitration in a known forum. However, more often nowadays, the investor will rely on a treaty, which frequently, but not always, grants the right to sue the government in arbitration at a neutral location. Therefore, you must identify the treaty and pinpoint the unique treaty breaches, which many lawyers are accustomed to recognising. A treaty breach differs from a contract breach; an expropriation differs from a contract termination. They are different in legal character. Of course, in some situations where the government terminated a contract, it could also amount to an expropriation. However, you would have to look at it analytically, differently, because you are looking at the definition of expropriation when you're building a treaty case in an investment arbitration. Another fundamental difference that is often overlooked is the need to remain conscious, when creating an investment arbitration case, that your claim will ultimately need to be enforced in some court forum or other. Therefore, litigation may be necessary after the award is rendered, in which you pursue the sovereign's assets, and this process can take a certain amount of time.

That has certainly been the experience with numerous investors who have claims against governments, and this needs to be fully taken into account by the investor from the outset of the case, as it may be a lengthy process. Of course, private commercial disputes can be lengthy, but they are not as protracted as disputes involving governments. There are likely several other factors to consider. A few come to mind: the arbitrators you select for an investor-state case need to be

competent in interpreting treaties and handling investor-state issues, which means it may likely be a different pool of arbitrators than for private commercial arbitrators. You need to explain the differences in the ways damages are calculated in investor-state cases – and for various reasons, that is a different process than is involved in building a case in commercial private arbitration. All these factors make investment arbitration a fascinating field of study. However, these also carry traps for the unwary in the wrong case. Therefore, you need to know what you are doing if you bring either type of case. Finally, I would say that sometimes, you have disputes so significant and of such a nature that both investment arbitration and commercial arbitration run in parallel; such cases bring up special challenges, which is another sub-issue.

EB: Your matters regularly involve not just corporations but sovereigns and state-owned entities. How does your strategic approach shift when representing a state client, particularly given the political, bureaucratic, and public-policy dynamics that do not arise in purely private disputes?

TN: A state client has several distinct characteristics compared to private clients. They have a lot in common. They will have smart people working for them, competent in-house counsel, and often demanding management boards. It changes in a couple of respects. First and most obviously, if you are representing a sovereign client in a court proceeding, it typically benefits from sovereign immunity or some related defence. Sometimes, there are special courts where you need to sue them. For instance, in the United States, if you have a akings claim against the United States government, you can only bring it in a Court of Federal Claims. If you are representing a non-US sovereign in a US court (or a non-UK sovereign in a UK court), you will be dealing with issues related to sovereign immunity.

Culturally, when dealing with a sovereign client, few points arise. First of all, expenditures are often subject to a different kind of scrutiny. It is subject to political scrutiny. Whereas, case budgets and spending for a private company are board-supervised or general counsel-supervised, or under the supervision of the owner of the client, costs of a sovereign are supervised by government bureaucrats or politicians. A byproduct of that is that, if you represent a sovereign, settlement and decision-making are different, too. If you work for a private company, it can decide to settle a case as long as the management wants to, or as long as the owner wants to, whereas a sovereign client sometimes can't settle a case because the bureaucrats involved will be subject to parliamentary or other scrutiny and will potentially be criticised. So, sometimes they will tell you that they want the case to proceed to final judgment rather than settle. Also, sometimes, if you're representing a state

or sovereign entity, it's harder to find, or it's a different process to see documents or testimony. In formulating their position, various government departments and agencies need to communicate with each other, and that's not always an easy task. There are positions it won't take for foreign policy reasons or fiscal reasons, and so it might be conservative in the legal arguments it has to be prepared to make, or it might be more adventurous; you don't know.

So, I think self-evidently, governments do behave differently from corporations and private individuals. It is a different thing to represent a state.

EB: A significant part of your work concerns post-award issues, including injunctions and asset-tracing actions. At what point, in your view, did enforcement move from being seen as the "final step" of arbitration to becoming a specialised practice area of its own? What market or systemic changes drove that evolution?

TN: Enforcement against sovereigns has always been a bit of a problem. If you look back 50 years ago, if you had an award against a sovereign, you would still be worried about collection. In the 1970s, there were many awards against Libya -- about 3 or 4 big claims decided against Libya in oil and gas expropriation cases. They either awarded, or they implied (because one of them was just a partial award without a quantum), significant damages figures against the Libyan government, which had expropriated a number of oil concessions. However, most of these awards were eventually settled for less than 50 cents to a dollar. Enforcement was not considered a separate area of practice back in those days.

Enforcement has always been less of a problem with private actors for several reasons. Enforcement cases involving sovereigns are more prominent, at least in the United States.

As you say, I have handled numerous cases in the United States involving sovereigns seeking to have awards recognised, confirmed, and enforced, and I have also represented sovereigns on the other side of the enforcement paradigm.

Enforcement is prominent in American jurisprudence, as well as in the UK, Australian, Canadian, Singaporean, French, and Dutch courts. Those are the major enforcement arenas at the moment, with significant awards against sovereigns, Russia being a notable example. Spain is another. *Why is this a big deal at the moment*? In the Russian cases, because the awards are substantial, they're not being paid, and sanctions have also been imposed, restricting the amounts of assets that might otherwise be available to judgment creditors. *Why has enforcement become a specialised practice area of its*

own? I think it's just the volume of public awards against sovereigns, and that is a byproduct of International Centre for Settlement of Investment Disputes ["**ICSID**"] and similar tribunals receiving a large number of investor-state claims.

Today, Spain is a major award debtor. Venezuela is another. If I move back a few years, Argentina used to be a principal award debtor. Ecuador had its moments as well. Ultimately, Argentina and Ecuador were able to satisfy many of their creditors. We will see what happens with the other award debtors at the moment. I do think that in the United States, the courts have realised that this is an important area, and they're developing their own standards for dealing with them. You can see that this is also the case in several jurisdictions, including Australia.

As to why this has grown as an area of practice, this could be traced back to the inception of investor-state arbitration, which was approximately 25 years ago, as a widely used means for investors to seek redress from sovereigns.

I suspect some of the sovereign cases resolve themselves. And then, the more interesting area of practice remains enforcement against private individuals, asset tracing against private individual and corporations. What's driven that area where you deal with private individuals, has been the free flow of information and the greater ability of people to have to collect information, use the internet and other databases to find assets worldwide, and the corresponding greater ability of some award debtors in the private sphere to move their money worldwide. I don't think that private creditor-debtor disputes are new; they're as old as time itself. It's just that they're being played out on a larger stage. Private enforcement is merely a continuation of a long-standing saga that dates back to ancient times.

EB: What is the most common practical obstacle you see parties facing when they attempt to enforce a foreign arbitral award? And how do you typically approach overcoming or navigating that challenge?

TN: Well, the most obvious one is, you could have a judgement entered upon a foreign arbitral award using the New York Convention in any number of countries, and find that the debtor has no assets in the relevant jurisdiction. A client will tell you that's a practical obstacle. Other obstacles of the more legal variety would include legal systems that require you to serve the award debtor, which means that you have to start the case against the award debtor. That's certainly the case in the United States. Legal systems that allow for a stay of execution or enforcement while the award itself is the subject of set-aside proceedings in courts of the seat of the arbitration can create a time

delay. And in investor-state cases, sovereigns may sometimes claim sovereign immunity from enforcement. Sovereign immunity issues are very technical and often require litigation before the question of whether judgement can be rendered on the award is addressed.

EB: How do you view the diverging outcomes in the Devas Multimedia award enforcement cases before the English High Court and the Australian Federal Court? Is the USA the appropriate jurisdiction for enforcement?

TN: In Devas, there were three awards, and I was involved in two of those cases, although I am no longer actively involved in the enforcement stages and won't comment specifically. Generally (outside that case), with awards against sovereigns, one might ask why people go to the UK, the United States, or Australia to enforce an investment award rendered by a tribunal against a sovereign. Why do they go around the world to enforce award contracts against sovereign entities? Award creditors will say they do this because of their rights under the New York Convention of 1958, which covers approximately 150 countries (including all of the countries I have mentioned). That is a scheme of international law (private international law, but international law nonetheless), that is meant to give an award creditor the right to enforce an arbitration award in any one of the member states, as long as relatively minimal criteria are met.

Those criteria, as outlined in Article II of the New York Convention, consist of authenticating a copy of the award and authenticating a copy of the contract that contains the arbitration clause. Once that is done, the burden then shifts effectively to the award debtor, under Article 5 of the New York Convention, to persuade the court that the award should not be enforced. The grounds set forth under Article V(1) and V(2) are very narrow. They involve some things, such as the award debtor didn't have notice of the proceedings, or was denied fundamental due process, or, in the extreme case, that the award violated international public policy (that's Article V(2)(b)). But absent one of these grounds, one of the other discretionary grounds to decline enforcement of the award, the basic obligation of the court is to confirm the award as a judgement. The scheme that was set up was one of universal, worldwide enforcement of arbitral awards. If you accept that as the premise, then there is no room for arguing whether any one particular court is the appropriate court for enforcing the award.

That gets to another issue, which is in play in some American jurisdictions, of whether you could argue forum non-conveniens, where you could say that even though the New York Convention might apply, that this is not an appropriate forum for enforcement. However, many jurisdictions

in the United States and most jurisdictions outside the United States, including those in Australia and England, hold that forum non conveniens is not an appropriate basis for resisting the enforcement of a foreign arbitral award. If that's true and if you accept the premise that the New York Convention sets up a scheme for worldwide enforcement of international awards, then there is nothing wrong in principle with going to Convention member states for award enforcement, for which expression some people use is "worldwide rollout of the award". That is certainly happening in the Spanish, Italian and Russian cases. The only questions then, which the award debtor has the right to raise, is whether it has the right to go to the court of the seat of arbitration and argue that it must be set aside according to the rules of the court of the seat of arbitration. But even then, the New York Convention doesn't provide an absolute rule that an order setting aside the award in the seat of arbitration blocks enforcement worldwide. It's a question of discretion for the enforcing courts as to whether that's an adequate basis for refusing to enforce the award worldwide.

I'd add that the ICSID Convention creates a parallel, and that's an explicit parallel, worldwide enforcement regime.

So, if you accept the premise that there is a system for worldwide enforcement, one shouldn't argue too much about which particular place is the right place to be seeking enforcement. I suspect Gary Born's text and Redfern and Hunter come out the same way as I have just described it. But, you know, opinions can differ.

EB: Our final question on enforcement arises from the recent decision of the Commercial Court in London regarding the non-assignability of ICSID and ECT awards. What are the possible ramifications of this ruling? Do you feel it would pose as a roadblock to enforcement?

TN: I am intrigued by the ruling, which, I understand, will be appealed. And which, I know, is contrary to the settled jurisprudence in some other countries. So, it's a first instance commercial court judgement that is, at the very least, contestable. I didn't find much to commend in terms of sourcing and reasoning when I read it. It seemed to less well reasoned than the American or Australian cases. However, leaving that aside, I don't think it will actually be a roadblock to enforcement for a variety of reasons. Among other things, because, the main issue with assignability of awards is, once you've won an award, once you've won a case – and this is true of judgements, this is true of debts – the winning party sometimes says: "Look, I have a $100 million in a judgement, that's a right to receive $100 million from the debtor. I don't have five years to

collect it, why don't I realise the value by assigning it to someone else who will buy the award and collect the money?" That's a very standard commercial decision. It's as old as time itself. People have been buying and selling debts for centuries. But, even if you can't formally assign an award, it doesn't necessarily stop an award creditor from going to their bank manager and saying, "Look, I've got another asset now. Can you lend me money on the strength of this asset?" That's just standard garden-variety banking. Such a transaction might take the form of funding or involve financing from a private equity fund.

At the end of the day, even if the UK ruling is correct, I don't think it fundamentally changes the landscape for how awards are enforced. There may be some particular cases where it creates an inconvenient situation for award creditors. But I strongly doubt it.

I would add that it is strange to puts award creditors in a different position than holders of sovereign bonds. Argentina had sovereign bonds that were traded for many years, both before and after they were defaulted. Most countries in the world, including virtually every country, issue bonds. They've always been able to be traded. They're a form of indebtedness. Awards and judgements are also, functionally, a form of debt. I've no idea why it would not be possible to assign them where it's possible for sovereign bonds to be traded. I'll let the English courts have the final say on that.

EB: Your practice spans public international law, commercial law, and cross-border enforcement. How do you continue learning across such a wide range of fields? What advice would you offer young lawyers on staying intellectually agile in an ever-changing profession like law?

TN: Well, I don't know if I continue learning as much as I keep up. It's probably the same thing. I would say to any lawyer beginning their career that maintaining an interest not only in the field of law that you are practising, but also in the broader world is absolutely vital. If you are interested in pursuing international work and feel you don't have enough experience in the area, but want to gain more, the best thing to do is to read more about it. Read books, read whatever there is – fiction, non-fiction, read about your area, dig into the area, don't give up your other work. Keep your work-life balance. Don't give up on it - whether it's sports or theatre or whatever it is that you do outside the law. Don't stop doing that as well.

Now is the best time, in the sense that the availability of information is generous, thanks to the internet and other resources, allowing you to continue reading up on the relevant field and remain

curious. If you have that kind of ambition and curiosity it will, I think, in the long help you get into an area, well, either the area that you are aiming for which happens a lot, but doesn't happen to everyone or the same skills that you picked up or the same energy that you picked up in reading about some area or other that you interested in gives you the tools to dig into other areas as well.

You might begin your career thinking, "I really want to do investor-state law," and you might start reading a whole lot about it and gaining a lot of background knowledge. When push comes to shove, it might not be the right thing for you, and the opportunities might not open up. However, the passion you've been able to build and the skills you've developed in learning about that area, I guarantee that you will be able to apply those same skills to learn and become passionate about other areas that may, in the end, be even more interesting. It's like literature. You might start as a fan of Charles Dickens, but you might end up as a fan of Hardy. I think the passion and the commitment and the ability to immerse yourself in these through reading and learning and engagement with others in the field are the long-term skills that will carry you to whichever area you end up in.

EB: One final question: If you were starting your career again today, would you still choose international arbitration? If so, would you take the same path or approach it differently?

TN: Well, I'm not the best person to ask that; I'm not even sure if I chose that at the very beginning. I believe I have had a long-term ambition to work in various countries. I didn't know I would end up working in three; I probably thought I would end up working in one or two other countries. I frankly do not know whether I would choose international arbitration today because I am unsure about the quality of the courses offered at universities and law schools. I probably would; there is no particular reason not to.

In terms of subject matter, it's difficult for me to comment in some ways. For example, I'm doing a number of cases involving crypto, bitcoin and that field. For me, that's just one of the bundles of things that I am working on. But for somebody beginning their career, that could legitimately be an area of practice in and of itself. It could become an entirely self-contained field of practice, completely self-sufficient, so that you could "ride the wave" I that field for the next thirty years. But sadly, I cannot tell if that is the case.

So, I can't tell people what the right choice is or isn't. I had a general approach that I wanted to work in litigation across different countries, and I took the opportunities as they arose. And I

ended up where I am. I can't offer any wisdom, other than this: if you have a general approach or a few general goals and take the opportunities as they arise, good luck to you.

GNLU SRDC ADR

MAGAZINE

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QUARTERLY ALTERNATE DISPUTE RESOLUTION ROUND-UP (SEPTEMBER 2025 – DECEMBER 2025)

SEPTEMBER

1. **Section 37(1)(a) of the Arbitration Act doesn't bar the arbitral tribunal from granting the pendente lite interest.**

   The Supreme Court, in *Oil and Natural Gas Corporation Ltd. v M/s G & T Beckfield Drilling Services Pvt. Ltd.,*[1] observed that an arbitral tribunal can grant pendente lite interest unless the contract expressly or impliedly bars it. Furthermore, the Court held that the contractual clause barring interest on delayed payments did not take away the arbitral tribunal's power under Section 37(1)(a) of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] to award pendente lite interest.

2. **Execution of an award cannot be stalled merely due to the pendency under Section 37 of the Arbitration Act.**

   The Supreme Court in *Chakardhari Sureka v Prem Lata Sureka through Spa & Ors.*[2] held that the execution of an arbitral award cannot be stalled merely on the ground that an appeal under Section 37 of the Arbitration Act is pending.

3. **Arbitral award must be within the parameters of the Agreement between the parties.**

   The Supreme Court in *Sepco Electric Power Construction Corporation v GMR Kamalanga Energy Ltd.,*[3] held that the arbitral tribunal had erred by reinterpreting the contractual terms and departing

[1] *ONGC Ltd. v G & T Beckfield Drilling Services Pvt. Ltd.* [2025] SCC OnLine SC 1888.
[2] *Chakardhari Sureka v Prem Lata Sureka through Spa & Ors.* [2025] SC 919.
[3] *Sepco Electric Power Construction Corp. v Kamalanga Energy Ltd.* [2025] SCC OnLine SC 2088.

from the agreed stipulations, which constituted a violation of Section 28(3) of the Arbitration Act.

4. **Counterclaim in arbitration cannot be allowed after the commencement of the claimant's evidence.**

   In *Gayatri Granites & Ors. v Srei Equipment Finance Ltd.,*[4] the Calcutta High Court held that a counterclaim in arbitration proceedings cannot be allowed after the commencement of the claimant's evidence, as it will cause grave injustice to the other party.

5. **Independent panel of arbitrators not curated by either party cannot be challenged on the ground of impartiality.**

   In *M/s KNR Tirumala Infra Pvt. Ltd. v National Highways Authority of India,*[5] the Delhi High Court held that when the panel of arbitrators comprising retired judges of the Supreme Court and other eminent officials, from which appointments are to be made, is broad-based, independent and not controlled by any party, the other party cannot refuse to abide by the institutional rules on the ground of impartiality.

6. **Absence of the word "seat" does not oust the Court's jurisdiction by the arbitration agreement.**

   In *SNS Engineering Pvt. Ltd. v M/s Hariom Projects Pvt. Ltd & Anr,*[6] the Delhi High Court held that the absence of the word "seat" does not take away the Court's exclusive jurisdiction to decide disputes arising out of an arbitration agreement.

7. **The purpose of the Arbitration Act will be defeated if there are delays in executing the arbitral award.**

   The Jharkhand High Court in *R.K. Construction Pvt. Ltd. v State of Jharkhand,*[7] observed that the purpose and the object of the Arbitration Act, would stand defeated if there are delays in the execution of the arbitral award.

[4] *Gayatri Granites & Ors. v Srei Equipment Finance Ltd.* [2025] Cal 2449.
[5] *KNR Tirumala Infra Pvt. Ltd. v National Highways Authority of India* [2025] SCC OnLine Del 5701.
[6] *SNS Engineering Pvt. Ltd. v Hariom Projects Pvt. Ltd.* [2025] SCC OnLine Del 5836.
[7] *R.K. Construction Pvt. Ltd. v State of Jharkhand* [2025] SCC OnLine Jhar 3116.

OCTOBER

1. **Delay in pronouncing arbitral award can render it void if it makes the award unworkable.**

   In *Lancor Holdings Ltd. v Prem Kumar Menon & Ors.,*[8] the Supreme Court ruled that mere delay in pronouncing an arbitral award does not invalidate it. However, an unreasonable and unexplained delay, which makes the award impracticable or renders it useless, can result in the annulment of the award in accordance with Sections 34(2)(b)(ii) and 34(2A) of the Arbitration Act.

   The Court noted that the question of delay affecting the arbitral process and findings in the award has to be decided based on the facts of each case. The Supreme Court also held that an award that does not result in effective and final relief, thus compelling the parties to file fresh proceedings, is against the public policy of India and amounts to patent illegality. The Court, therefore, exercised its authority under Article 142 of the Constitution to make a just and final settlement and thus put an end to the dispute. It considered that lengthy delays and incompetent adjudication weaken the very object of arbitration.

2. **Non-operation of arbitration clause due to statutory amendment does not vitiate arbitration agreement.**

   In the case of *Offshore Infrastructures Ltd. v Bharat Petroleum Corporation Ltd.,*[9] the Supreme Court decided that a situation where a statutory amendment results in the non-operation of an arbitration clause for the appointment of an arbitrator does not affect the arbitration agreement itself. The Court noted that the removal of a particular arbitrator under Section 12(5) of the Arbitration Act, as amended in 2015, is not the removal of the parties' intention to refer the matter to arbitration. It explained that courts have the power to appoint an independent and impartial arbitrator under Section 11(6) of the Arbitration Act so as to give effect to that intention. The Court, therefore, ruled that an arbitration clause was to be read with reference to its purpose to ensure that the parties' contract did not result in the abolition of the clause due to changes in law.

[8] *Lancor Holdings Ltd. v Prem Kumar Menon & Ors*. [2025] SCC OnLine SC 2319.
[9] *Offshore Infrastructures Ltd. v Bharat Petroleum Corporation Ltd*. [2025] SCC OnLine SC 2147.

3. **C.A.-certified audited statements held reliable evidence of expenditure and arbitral award partially sustained.**

In *National Highways Authority of India v Hindustan Construction Co. Ltd.,*[10] Delhi High Court decided that C.A.-certified audited statements are genuine records of actual expenditure and thus, partly, the Court upheld the arbitral award, which was challenged under Section 34 of the Arbitration Act. The Court noticed that it was proper for the arbitral tribunal to depend on the audited financial statements certified by the statutory auditors since these documents were the most accurate ones to reflect the contractor's overhead and operational costs for the extended period of the project. The Court found that the arbitral tribunal's findings were its reasons and not its perverse, and that the Court cannot look at the evidence afresh under Section 34 of the Arbitration Act unless the award is obviously illegal or against public policy.

4. **Orissa High Court dismisses Section 37 appeal and reiterates limited judicial review under Section 34.**

In *Union of India v Pyari Mohan Mohanty,*[11] the Orissa High Court has refused an appeal under Section 37 of the Arbitration Act, thus maintaining the decision of the District Judge, who had confirmed the arbitral award. The Court, referring to its earlier decision, held that the interference under Section 34 is limited to very few grounds like conflict with public policy, fraud, corruption, or manifest illegality, and that courts cannot review the evidence or act as appellate authorities in the case of arbitration. It pointed out that the arbitral tribunal is the main fact-finding authority and that the court's role is to give judicial respect to its findings if they are supported by evidence and not perverse in the obvious. Analysing the matter, the Court found the tribunal's conclusions regarding the delay and the awarding of the claims for specific construction components as its reasoning and backed by the record. Noticing no obvious illegality or procedural irregularity, the Court rejected the appeal and confirmed the arbitral award, without making any order as to costs.

[10] *National Highways Authority of India v Hindustan Construction Co. Ltd.* [2025] LiveLaw (Del) 1330.
[11] *Union of India v Pyari Mohan Mohanty* [2025] Latest Caselaw 8908 Ori.

5. Supreme Court rejects Section 11 petition as barred by limitation and reiterates non-arbitrability of stale claims.

In *Alan Mervyn Arthur Stephenson v J. Xavier Jayarajan,*[12] on a point of limitation, the Supreme Court rejected a request under Section 11(5) of the Arbitration and Conciliation Act, 1996 for the appointment of an arbitrator. The plaintiff, a United Kingdom ["**UK**"] resident, as per the allegations, in a partnership agreement for a real estate project, had to perform and therefore sought the refund of the money advanced. The Court pointed out that the property was bought in May 2016, while the arbitration notice was only given on 9 December 2020, i.e., after the expiration of the three-year limitation period set for contractual disputes. Acknowledging the last payment in August 2017 at the very latest, the claim would still be out of time. The Court, held that the delay in filing the arbitral proceedings intentionally is against the very idea of speedy dispute resolution laid down in the Act since arbitration cannot be invoked for stale claims.

[12] *Alan Mervyn Arthur Stephenson v J. Xavier Jayarajan* [2025] SCC OnLine SC 2227.

NOVEMBER

1. **Arbitral award would be liable to be set aside if contractual terms are re-written by the arbitral tribunal.**

   The Supreme Court in *Indian Railways Catering and Tourism Corporation Ltd. v M/s Brandavan Food Products,*[13] set aside a substantial arbitral award on the ground that the arbitral tribunal had gone beyond its mandate by granting claims contrary to the Master License Agreements and policies governing catering operations. The Court noted that the Agreements expressly subordinated themselves to Railway Board circulars, and once the contract clearly gave primacy to the latest catering policy, the tribunal could not disregard these binding directions. By granting claims relating to additional meals and welcome drinks in contradiction to the applicable policy, the arbitrator effectively rewrote the core contractual obligations. The Court held that such deviation amounted to a breach of fundamental principles of justice, warranting interference under the narrow contours of patent illegality. The tribunal's reasoning ignored the plain text of the agreements, was found inconsistent with the established principles in *Ssangyong Engineering and Construction Company Ltd. v National Highway Authority of India.*[14]

2. **Indian courts lack jurisdiction to appoint arbitrators in foreign-seated arbitrations despite Indian nationality of parties.**

   The Supreme Court in *Balaji Steel Trade v Fludor Benin S.A.*[15] has held that Indian courts cannot assume jurisdiction under Section 11 of the Arbitration Act where the principal contract designates a foreign juridical seat. The Buyer–Seller Agreement expressly provided for arbitration seated in Benin and governed by Beninese law. The Court stated that the existence of subsequent ancillary contracts, including those containing India-seated arbitration clauses, could not override the dispute resolution mechanism of the mother agreement. Since the alleged breaches arose from the principal contract, only the foreign-seated clause governed the dispute.

   The Court further rejected reliance on the Group of Companies doctrine to invoke domestic jurisdiction, noting that ancillary sales contracts and high-seas agreements merely facilitated performance and did not alter the juridical seat. The judgment relied on the territoriality

[13] *Indian Railways Catering and Tourism Corporation Ltd. v M/s Brandavan Food Products* [2025] INSC 1294.
[14] *Ssangyong Engineering and Construction Company Ltd. v National Highway Authority of India* (2019) 15 SCC 131.
[15] *Balaji Steel Trade v Fludor Benin S.A.* [2025] INSC 1342.

principle and reiterated that Part I of the Arbitration Act does not extend to foreign-seated arbitrations.

3. **Pendente lite interest would not form part of principal amount awarded unless expressly capitalised by arbitral tribunal for purposes of post-award interest.**

The Delhi High Court in *BWL Ltd. v BSNL,*[16] addressed the question whether pendente lite interest can form part of the principal sum for the purpose of post-award interest under Section 31(7)(b) of the Arbitration Act. The decree-holder argued that the Supreme Court's reference to statutory interest implied that interest awarded for the period during which the award subsisted must automatically be capitalized. However, the Court held that only the amount expressly incorporated into the sum by the tribunal or appellate court forms the base for post-award interest.

After examining the appellate modification, the Court held that *pendente lite* interest had been awarded as a lump sum and not merged with the principal. Since the Division Bench did not capitalize interest, post-award interest could only accrue on the principal amount. The Court thus rejected the decree-holder's attempt to enlarge the scope of the award through execution proceedings, concluding that the decretal obligation stood fully satisfied.

4. **Bombay High Court sets aside award for relying on uncommunicated internal materials and contradicting the contract:**

In *Konkan Railway Corporation Ltd. v SRC Company Infra Pvt. Ltd.*,[17] the Bombay High Court set aside an award that had shifted liability for royalty payments from the contractor to the employer. The Court found that the arbitral tribunal had disregarded the explicit terms of the contract, which placed the burden of royalty on the contractor. Despite this clarity, the tribunal relied on tender committee minutes and pre-contractual deliberations to infer a different intention. The Court held that such materials, never communicated to the contractor, could not override the operative contract.

The Court concluded that the tribunal had not only rewritten essential contractual terms but had also travelled beyond the reference by applying principles of rectification without any pleading, prayer or issue framed under the Specific Relief Act. Accordingly, the Court allowed

[16] *BWL Ltd. v BSNL* [2025] SCC OnLine Del 8506.
[17] *Konkan Railway Corporation Ltd. v SRC Company Infra Pvt. Ltd.* [2025] BHC-OS 20965.

the petition and set aside the award holding that the tribunal travelled beyond the contractual terms and wrongly place liability to bear royalty charges on Konkan Railway.

5. Prior interpretation of a similar clause does not disqualify an arbitrator for "issue conflict".

The Delhi High Court in *Steel Authority of India Ltd. v British Marine L.L.C.*[18] rejected a challenge to two arbitrators on grounds of "issue conflict" arising from their prior interpretation of a similar clause in an earlier arbitration involving Steel Authority of India. The Court held that prior professional engagement or experience with analogous contractual questions does not automatically give rise to justifiable doubts under Section 12 of the Arbitration Act. Bias must be demonstrated through a real likelihood of prejudgment, not inferred from the mere existence of prior opinions. The Court also remarked that in specialized fields such as maritime arbitration, the pool of qualified arbitrators is small and repeat appointments or similar issues are inevitable. Treating prior interpretative experience as a disqualification would undermine the efficiency and expertise that arbitration demands.

6. Courts cannot reassess evidence under Section 34.

The Delhi High Court in *National Building Construction Corporation v Sharma Enterprises*[19] held that an arbitral tribunal is the master of the quantity and quality of evidence, and Section 34 does not confer appellate jurisdiction. The Court, reviewing a long-running dispute arising from flooring and cladding works at a railway station project, held that most of the factual determinations such as delays caused by third parties, approval timelines, and extra-item claims lay squarely within the tribunal's domain and could not be revisited unless shown to be perverse or patently illegal.

The Court noted that the arbitrator had provided a reasoned assessment based on material on record and that mere disagreement with conclusions did not justify interference. Except for modifying the award on the limited aspect of interest due to a specific contractual bar, the Court declined to disturb the substantive findings. The Court reiterated that judicial review under Section 34 must remain narrow, focusing only on statutory grounds such as patent illegality, jurisdictional error, or violation of natural justice.

[18] *Steel Authority of India Ltd. v British Marine L.L.C.* [2025] DHC 3394.
[19] *National Building Construction Corporation v Sharma Enterprises* [2025] DHC 10215.

7. Repeated remands under Section 37 without reversing findings are unworkable and legally impermissible.

In *Electronics Corporation of Tamil Nadu Ltd. v ICMC Corporation Ltd.,*[20] the Madras High Court addressed an unprecedented situation in which a Division Bench had remanded several applications under Section 37 of the Arbitration Act without reversing the underlying findings on merits. The Court held that such wholesale remands were unworkable because the findings of the Single Judges continued to stand, leaving the remand courts without jurisdiction to re-examine merits afresh. Since the Division Bench had not vacated the findings, the doctrine of merger was inapplicable.

The Court held that remand powers under Order 41 Rules 23, 23-A, and 25 of the Code of Civil Procedure, 1908 are strictly limited and cannot be exercised unless the appellate court first reverses or sets aside the findings on merits. The Court also noted that unnecessary remands impose undue strain on judicial resources and lead to avoidable duplication. It accordingly granted liberty to the parties to seek review before the appropriate Division Benches.

8. Supreme Court upholds 24% contractual interest in arbitral award; not contrary to fundamental policy of Indian law:

In *Sri Lakshmi Hotel Pvt. Ltd. v Sriram City Union Finance Ltd.,*[21] the Supreme Court upheld the award of 24% interest in a commercial loan dispute, thus rejecting the argument that such a rate violated public policy or the fundamental policy of Indian law. The Court held that Section 31(7)(a) of the Arbitration Act gave primacy to party autonomy, and once the parties agree to a particular rate in a commercial setting, it cannot later be characterized as unconscionable unless it shocks the conscience of the Court. The award reflected the risk-based pricing practices of non-banking financial companies and was consistent with prevailing commercial standards. The Court observed that public policy under Section 34 of the Arbitration Act does not extend to disagreements about rate of interest unless the award is manifestly arbitrary. It held that high interest rates may legitimately reflect market risks, discourage defaults, and compensate lenders for volatility in credit conditions.

[20] *Electronics Corporation of Tamil Nadu Ltd. v ICMC Corporation Ltd.* [2025] MHC 2614.
[21] *Sri Lakshmi Hotel Pvt. Ltd. v Sriram City Union Finance Ltd.* [2025] INSC 1327.

DECEMBER

1. Claimant can pursue alternate remedy for severed part of award without limitation bar.

In L*aguna Resort Pvt. Ltd. v Concept Hospitality Pvt. Ltd.,*[22] the Bombay High Court clarified that a claimant can invoke an alternate remedy for the severed portion of an arbitral award without being barred by limitation, even if a fresh dispute arises from a different contract. The Court held that Section 43(4) of the Arbitration Act allows exclusion of the time spent in earlier arbitral proceedings when computing limitations for fresh proceedings.

2. The appointment of arbitrator under ODR clauses is valid.

In *Amit Chaurasia v ICICI Bank Ltd.,*[23] the Bombay High Court upheld the validity of a pre-agreed Online Dispute Resolution ["**ODR**"] clause and confirmed that an arbitrator appointed via an ODR platform pursuant to that clause was properly appointed. The Division Bench reviewed the underlying contract and found no infirmity in the ODR mechanism or the appointment process, holding that parties' autonomy to choose a digital dispute resolution route must be respected where it is clearly stipulated in the agreement.

3. Review Petition not maintainable against order refusing to appoint arbitrator.

In *Koshy Phillip v Thomas P Mathew*,[24] the Kerala High Court reaffirmed that review petitions are not maintainable against orders passed under Section 11 of the Arbitration Act. The Court dismissed a review petition filed against an order refusing to appoint an arbitrator, holding that the Arbitration Act operates as a self-contained code, allowing only such judicial interventions as are expressly provided in the statute. The Court emphasized that absent clear statutory authority for review in such matters, a review petition cannot be entertained simply because one party is aggrieved by the High Court's Section 11 order.

[22] *Laguna Resort Pvt. Ltd. v Concept Hospitality Pvt. Ltd.* [2025] BHC-OS 25034.
[23] *Amit Chaurasia v ICICI Bank Ltd.* [2025] BHC-OS 24269.
[24] *Koshy Phillip v Thomas P. Mathew & Ors.* [2025] KER 88222.

4. Bombay High Court Upholds Arbitral Award Granting Specific Performance of Development Agreement Between BTRA and Nilkanth Enterprise.

In B*ombay Trans-Harbour Roadway Authority v Nilkanth Enterprise,*[25] the Bombay High Court dismissed a challenge under Section 34 of the Arbitration Act, upholding a 2017 arbitral award directing specific performance of a negotiated development agreement relating to approximately 57,000 sq. m. of land in Ghatkopar (West), Mumbai. The petitioners had contended errors in the award, but the Court found no valid ground to interfere, holding that there was nothing on record to justify setting aside the award on merits or on public policy grounds.

5. Unexplained delay as grounds to set aside arbitral award.

In T*he Tamil Nadu Housing Board v M/s N.C.C. Ltd.,*[26] the Madras High Court set aside an arbitral award of ₹51.48 lakh that had been granted in favour of the contractor. The Court observed that while delay alone is not an automatic ground for interference, an inordinate and unexplained delay that adversely affects the integrity and purpose of arbitration which is primarily used to provide a time-bound dispute resolution mechanism can vitiate an award's legality and public policy compliance. The Court also noted it would be unreasonable to enforce interest for the entire delayed period, holding this was contrary to legal principles. The award was quashed, and parties were left free to agree on the appointment of a new arbitrator strictly to take submissions and pass a fresh award within a stipulated timeframe.

[25] *Bombay Textile Research Association v Nilkanth Enterprise* [2025] BHC-OS 24545.
[26] *The Tamil Nadu Housing Board v M/s N.C.C. Ltd.* [2025] MHC 2775.

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