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INVESTOR'S RIGHT TO RETRIEVE AN INVESTMENT VIS-À-VIS THE HOST STATE'S RIGHT TO REGULATE UNDER BILATERAL INVESTMENT TREATIES-AN ANALYSIS

By DR.R.J.R.Kasibhatla

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"The Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied in corporate on methods or by direct reference to certain supplementary rules, whether or international law character or domestic law nature."

-Asian Agricultural Products Ltd V Republic of Srilanka, (ICSID case No ARB/87/3, Paras 20-1)

ABSTRACT

An investment treaty normally provides treatment provisions with respect to several matters. General standards of treatments include host state's commitments to grant investors and their investments 'fair and equitable treatment, 'full protection and security', 'treatment in accordance with the international minimum standard', 'national treatment', and 'most-favoured-nation treatment. Specific treatment

standards include 'monetary transfer provision', 'expropriation and investor rights in times of war, revolution, or civil disturbance. BITs generally contain an arbitration clause, which is essentially an offer by the State party to eligible investors; it does not, however, establish jurisdiction of a Tribunal by itself. The investor may take up this offer by formally accepting it or merely by instituting proceedings against the host State, which is an implied acceptance. In the circumstances, there is always a debate with regard to the investor's right to non-impairment of investments vis-à-vis the host state right to regulate. It may not be proper and prudent to incline fully towards one and an amicable balance is need to be maintained. The present paper is an attempt to make analysis of both the rights.

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INTRODUCTION:

Any international investment is based on an agreement between two countries, generally in the form of an investment treaty. When the treaty exists between only two countries, it is known as a Bilateral Investment Treaty (BIT) or Bilateral Investment Programme Agreement (BIPA)[1]. BITs generally contain an arbitration clause, which is essentially an offer by the State party to eligible investors. It does not, however, establish jurisdiction of a Tribunal by itself. The investor may take up this offer by formally accepting it or merely by instituting proceedings against the host State, which is an implied acceptance[2]. India's bilateral investment treaty (BIT) programme is part of a larger trade and investment agenda of the Indian government to boost investor confidence and increase investment flows into and out of the country[3].

Interpretation of Bilateral Investment Treaties (BITs) is governed by Public International Law but it does not exclude Domestic Law from consideration

[1] Umbrella Clauses in International Investment Arbitration: Adopting a Narrow or Broad Interpretation for Mutual Protection of Investors and Host States, 4.2 NLIU LR (2015) 99 at page 100.
[2] Tokios Tokeles v. Ukraine, International Centre for Settlement of Investment Disputes, (2004) Case No. ARB/02/18, p. 94-100.
[3] Law Commission of India Report No.260 Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty.

by Investment Treaty Tribunals. The main role of Domestic Law is in defining the scope of investment protected. Mere entering in to a BIT do not mean that the Host State loses its inherent sovereign right to regulate. By virtue of its inherent constitutional power the State can always is entitled to regulate through law in a fair and reasonable manner. However, in the said process there is always a question that arises is the investor's right vis-à-vis the State's right. The present paper is an attempt to analyse the same.

INVESTMENT TREATY PROVIDES TREATMENT PROVISIONS:

An investment treaty normally provides treatment provisions with respect to several matters. Various treatment standards in an investment treaty may be categorized as 'general' or 'specific', The former applies to all forms of investment activities in the host state while latter only concerns particular matter relating to an investment[4]. General standards of treatments include host state's commitments to grant investors and their investments 'fair and equitable treatment[5]', 'full protection and security'[6], 'treatment in accordance with the international minimum standard', 'national treatment'[7], and 'most-favoured-nation treatment[8]'. Specific treatment standards include 'monetary transfer provision', 'expropriation and investor rights in times of war, revolution, or civil disturbance[9]. Investment Treaties are the agreements within the framework of India's domestic laws and inter alia provide for dispute resolution between foreign investors and the Government of India.

[4] Santhosh Kumar, Full Protection and Security Standard in International Investment Law and Practice : an Indian Perspective, 2 SML L Rev 177 (2019) at page 178

[5] The fair and equitable treatment as required under International law no discrimination is allowed in respect of nationality or origin for matters such as access to local courts and administrative bodies, applicable taxes and administration of governmental regulations.

[6] Subject to domestic laws our Investment Treaty text provides for full security and protection to the investments made against any violations.

[7] National Treatment is an obligation of the host State to treat foreign investments on par with Domestic Investments.

[8] According to this principle, if the host State is granting special favorable treatment to one foreign investor, the same treatment shall be extended to all other investors without any discrimination.

[9] Bilateral investment treaties 1995-2006 : Trends in Investment Rulemaking UNCTAD 28 (2007), (Jan. 10, 2020), https : //unctad.org/en/pages/Publication Archive.aspx?publicationid=196

DEBATE ABOUT INVESTMENT TREATIES: -

The growth of investment treaties and investment treaty arbitration has led, within a short space of time, to a lively debate about the benefits, justification, and problems of this special regime for foreign investors. Indeed, this debate has developed into what is often called a "legitimacy crisis" of international investment law[10]. Symptoms of this crisis are the withdrawal of some states from Bilateral Investment Treaties (BITs) and the International Centre for Settlement of Investment Disputes (ICSID)[11]; the efforts of many countries to recalibrate their investment treaty obligations and to reconsider investment treaty arbitration[12]; and by now a more general public debate about the possibly harmful impact of investment treaties on states' right to regulate, inter alia, for the protection of the environment, human rights, or other public interests. Critics question the democratic accountability, independence and impartiality of arbitrators, disapprove of the vagueness of treaty standards, condemn the extent to which arbitrators' interpretations of these standards restrict the right of host states to regulate in the public

[10] See Charles N Brower and Stephan W Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?" (2009) 9 Chicago Journal of International Law 471 at 473 (with further references).

[11] (a) ICSID was created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed 18 March 1965, entered into force 14 October 1966, 575 UNTS 159 (ICSID Convention). For example, Bolivia, Ecuador and Venezuela denounced the ICSID Convention in 2007, 2009 and 2012, respectively; South Africa is currently in the process of terminating several of its BITs, see Robert Hunter, "South Africa Terminates Bilateral Investment Treaties with Germany, Netherlands and Switzerland" (2013) (accessed 9 June 2014). Indonesia too is planning to terminate most of its BITs see Financial Times, "Indonesia to terminate more than 60 bilateral investment treaties" (26 March 2014) (9 June 2014). See further the Trade Policy Statement of the Australian Gillard Government expressing opposition to the inclusion of investor-state dispute settlement provisions in future trade agreements: Australian Government, Department of Foreign Affairs and Trade, "Gillard Government Trade Policy Statement: Trading Our Way To More Jobs and Prosperity" at p 14 (April 2011), (accessed 9 June 2014). Criticism is also omnipresent in the current debates on the EU-level about the direction and content of a future EU international investment policy and the future of investment agreements of Member States; see, in particular, the European Parliament Resolution of 6 April 2011 on the future European international investment policy, 2010/2203 (INI).

(b) As referred by Stephan W. Schill1 Amsterdam Centre for International Law, University of Amsterdam.

[12] See José E Alvarez, "Why Are We "Re-calibrating" Our Investment Treaties?" (2010) 4 World Arbitration & Mediation Review 143. For various reform proposals that aim at restricting investment treaty arbitration, see UNCTAD, "Reform of Investor-State Dispute Settlement: In Search of a Roadmap", IIA Issues Note No 2 (2013) (accessed 9 June 2014) at pp 4ff.

interest, and deprecate the institution of investor-state dispute settlement[13]. Criticism of international investment law and investment treaty arbitration has also been launched in respect of the rule of law. One of the most vocal critics, Gus Van Harten, says the following:

"Investment treaty arbitration is often promoted as a fair, rules-based system and, in this respect, as something that advances the rule of law. This claim is undermined, however, by procedural and institutional aspects of the system that suggest it will tend to favour claimants and, more specifically, those states and other actors that wield power over appointing authorities or the system as a whole. On the other hand, other states and investors (especially those that bring claims against a powerful state) can expect to be disadvantaged"[14].

In view of the debate over the Investment Treaty Arbitration many States have revisited their model Investment Treaty Text and revised them to maintain a balance between the investor's right and their right to regulate. Government of India also revised its model negotiating text in 2015.

It is also relevant to mention that pursuant to the Note by the UNCITRAL Secretariat, "Possible reform of Investor-State Dispute Settlement (ISDS)" of 18 September 2017 European Union has proposed to identify and consider concerns as regards the current system of Investor to State Dispute Settlement (ISDS) in line with the first stage of the mandate given to Working Group III by the UNCITRAL Commission.

DISPUTE RESOLUTION CLAUSES IN BITs:

Dispute resolution clauses in BITs provide mechanism for resolution of

[13] See, especially, Gus Van Harten, Investment Treaty Arbitration and Public Law (Oxford University Press, 2007) at pp 152ff; David Schneiderman, Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise (Cambridge University Press, 2008); Kyla Tienhaara, The Expropriation of Environmental Governance (Cambridge University Press, 2009).

[14] Gus Van Harten, "Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law" in Stephan W Schill (ed), International Investment Law and Comparative Public Law (Oxford University Press, 2010) at p 627.

disputes between the foreign investor and the Host State, arising either under the BIT or under any investment agreement between the investor and Host State – the breach of which rises to the level of treaty violation. The protection offered by dispute resolution provisions in treaties is sufficiently important and rises to the level of a substantive principle in its own right[15]. Dispute resolution clauses in BITs play a crucial role in an investment activity. While some clauses provide for exhaustion of local remedies, these clauses now appear with various combinations of fora and mechanisms, thereby removing the default dispute resolution mechanism of approaching domestic courts for disputes relating to international investment[16].

FOREIGN INVESTMENT IS NOT A NEW CONCEPT:

Foreign Investment is not a new concept. Many countries have been recipient of Foreign Investment under bilateral treaties commonly known as Bilateral Investment Treaties (BITs). Hitherto Foreign Investment was regulated domestically and rules of customary International Law were applied to it. In the past, State exercised its sovereign function of complete control of foreign investment and the restrictions were imposed on entry of foreign investment, acquisition of property by foreign capital and the operations of foreign companies. In view of opening up of the economy and regulated globalisation, there has been a radical change in foreign investment. Foreign investors now purchase shares of a company, enterprise, commercial establishment in the host country. Equity capital is the main ingredient of Foreign Direct Investment. Under Foreign Direct Investment, foreign investors keep control over the activities and operations of the company. Controlling interest is one of the basic and key factors of the Foreign Direct Investment. Franchising, licensing, good-will, alliances and grants which are non-equity forms of investment also come within the

[15] McLachlan, Shore & Weiniger, International Investment Arbitration (Oxford International Arbitration Series, 2010)
[16] OECD Investment Division Sample Survey, Paris 2012

definition of Foreign Direct Investment[17].

PROTECTION OF INVESTOR'S RIGHTS:

The bilateral treaty is between the two sovereign nations. An investor[18] under the treaty has been given certain special rights and privileges, which is enforceable under the treaty[19]. The rights and privileges of investors have been extensively protected and promoted and these changes have found their expression in numerous bilateral investment treaties. The host country must take foreign investors no less favourably than its domestic investors. These bilateral treaties provide minimum standards of treatment, performance requirements dispute settlement mechanism. The body of International Law on investment has developed with high speed providing extensive rights and privileges to the foreign investors and increasing investment liberalization. The foreign investment reached 1.4 Trillion dollars in the year 2000 and next 50 years would see Brazil, Russia, India and China would have greater economy than that of G-8 countries today.

When we talk of Foreign Direct Investment let us not forget that the Foreign Direct investment is a result of globalisation of economy. It will be foolish on our part if we assume that a person or a transnational corporation or multinational corporation is coming to other countries for the purpose of charity. It is their desire to multiply their money that brings them to our shores. A person with money power would never like to come to a place, a

[17] Justice (Mr) VIjender Jain Judge Delhi High Court Concept of Foreign Direct Investment, (2006) 1 LW (JS) 57

[18] As per the BIT an "investor" means in respect to either Contracting Party:
(a) the "national", that is a natural person deriving his or her status as a national of that Contracting Party from the relevant laws of that Contracting Party; and
(b) the "company that is a legal person, such as a corporation, firm or association, incorporated or constituted in accordance with the law of the Contracting Party;"

[19] Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS [G.A. 1997 of 2014 decision dated 29th September, 2014] the Calcutta High Court held that the question of whether an entity is to be treated as an investor under the BIT Agreement is to be determined by the Arbitral Tribunal.

country, or a system where his money does not multiply manifold.

INVESTOR'S RIGHT TO RETRIEVE:

The terms retrieve means to get something back that has been lost, taken, or left somewhere. It can be equated with 'recourse' that means the act of seeking help or advice; enforcement or method of enforcing a right. It is the ability of an investor/purchaser to seek compensation for the loss sustained against the investment made[20]. In Anubhav Kumar Choudhary v. Union of India[21], while interpreting the term 'recourse' it was observed that it is a right to prosecute the legal remedy in the court of law to challenge any decision of the State or/and its agency is a valuable legal right of the citizen and the High Court could not take away such right from the appellant without assigning any reason.

FOREIGN INVESTOR'S OBLIGATION TO COMPLY WITH THE LAWS: -

The foreign investor has to comply with the law at the central (federal) level, state (provincial) level and local levels. Investment Tribunals have time and again reiterated that a foreign investor has to comply with the general regulatory frame work of the host state, as well as, which would encompass all those laws[22]. The Salini Case[23] is one of the first awards to deals with the meaning of the terms 'in accordance with laws and regulations'. In response to the Kingdom of Morocco's objection on jurisdiction[24], the tribunal had to

[20] For further details, refer P Ramanatha Aiyar, "Advanced Law Lexicon" 6th Edition Volume 4 Lexis Nexis.
[21] (2016) 12 SCC 408 : (2016) 4 SCC (Civ) 761 : (2017) 1 SCC (L&S) 414 : 2016 SCC Online SC 214 at page 409
[22] Inceysa Vallisoletana S.L. v. Republic of El Salvador, Award, ICSID Case No. ARB/03/26,para.262 (2 Aug.2006)
[23] Salini Construttori S.P.A and Itals trade S.P.A V Kingdom of Morocco, ICSID Case No ARB/00/4 decision on Jurisdiction 23, July 2001.
[24] In this case, the Kingdom of Morocco alleged that the jurisdiction of the Tribunal is dependent on the existence of an investment. It considered that because of article 1 (1) of the Italy/Morocco BIT (1990) which refers to the laws and regulations of the host state, the law and regulations of the Morocco must be looked at to define the notion of investment and according to the national law, the transaction in question is not an investment contract.

decide on the existence of an investment within the meaning of the Italy/Morocco BIT, which refers to the laws and regulations of the host state[25].

DOCTRINE OF ILLEGALITY:

If the foreign investor does not comply with the conditions of entry and operation then the investor cannot access Investment Treaty Arbitration (ITA) due to Doctrine of Illegality. The requirement of compliance with domestic laws is prerequisite for obtaining access to the substantive provisions on the protection of investor under the BIT[26]. The requirement of legality or absence of illegality is reflected in the standard "in accordance with host state law" contained in the investment Treaties. The requirement of compliance with domestic laws is a pre-requisite for obtaining access to the substantive provisions on the protection of the investor under the BIT[27].

COMPLIANCE OF HOST STATE LAWS IS IMPLIED:

The importance of the need to comply with domestic law is such that whether or not the BIT contains a clause on 'in accordance with host state law' clause, a foreign investor has to comply with the laws of the host state. This clause is implied even if it does not exist in an investment treaty[28]. Therefore, the host state retains its power to regulate in a non-discriminatory fair in a reasonable manner. If the foreign investor does not comply with the conditions of entry and operation then the investor cannot access Investment Treaty Arbitration (ITA) due to Doctrine of Illegality. The

[25] Article 1 of the Italy/Morocco BIT (1990) provides that the terms "investment" designate all categories of assets invested; [….], in accordance with laws and regulations of the aforementioned Party. In particular, but no way exclusively, the term "investment" includes:[…] (g) the elements mentioned in (c), (d) and (e) above must be the object of the contract approved by the competent authority".
[26] Phoenix Action Limited vs. the Czech Republic, ICSID Case No. ARB/06/5 para 104
[27] Ibid. Para 104.
[28] (a) Plama Consortium Ltd V Republic of Bulgaria, ICSID Case No ARB/03/24, Para 138-9.
(b) Followed in Pheonic Actin Ltd.
(c) Fra port AG Frankfurt V Republic of the Philippines, ICSID Case No ARB/11/12 Para 332(10 Dec 2014).

requirement of compliance with domestic laws is prerequisite for obtaining access to the substantive provisions on the protection of investor under the BIT[29].

INVESTMENT TREATIES WITH SOME LIMITS:

Protection of investments under a BIT[30] is obviously not without some limits. It does not extend, for instance, to an investor making an investment in breach of the local laws of the host state. A State thus retains a degree of control over foreign investments by denying BIT protection to that investment that do not comply with its laws[31].

INVESTMENTS ARE COMPLEX OPERATIONS AND HAVE A CLOSE NEXUS WITH DOMESTIC LAWS:

Investments are complex operations, which involve numerous transactions of different kinds. Many of these transactions take place under domestic law and have a close connection with the laws of host State[32]. Foreign Investment involves the transfer of tangible or intangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets[33]. An investment is frequently a rather complex operation, copse of various interrelated transactions each element of which, standing alone, might not in all cases qualify as an investment[34]. In White Industries v India, claims

[29] Phoenix Action Limited vs. the Czech Republic, ICSID Case No. ARB/06/5 para 104.
[30] Bilateral Investment Treaty
[31] Ioannies Kardaassopoulos V The Republic of Georgia, ICSID Case No ARB/05/18 Para 182 (6 Jul 2007).
[32] Rudolf Dolzer and Christoph Scherer, 'Principles of International Investment Law' 288 (2nd ed; Oxford University Press 2012).
[33] Compare the definition of foreign investment I the Encyclopedia of Public International Law (vol. 8 P 246), where foreign investment is defined as 'a transfer of funds or materials form one country (called capital exporting country) to another country (called host country) in return for a direct or indirect participation in the earnings of that enterprise.'
[34] Ceskoslovenska Obchodni Banka, A.S. V The Slovak Republic, Decision on Jurisdiction, ICSID Case No. ARB/97/4 Para 54 (1 Dec.2000); Enron Corporation and Ponderosa assets, L.P. V Argentine Republic at Para 70.

to money were considered to be wide enough to include an unenforced commercial arbitration award[35].

NEW LAW TO SAFEGUARD FOREIGN INVESTMENT:

The central government is reportedly working on a new law to safeguard foreign investment. It is widely believed that the purpose of the proposed law is two-fold. First, offering legal protection to foreign investors from abrupt policy changes. Second, keeping in mind the slowness of the Indian legal system, to provide speedier dispute resolution. Overall, the expectation is that the new law will help in attracting more foreign capital to boost the stuttering economic growth[36]..

GOVERNMENT CAN CHANGE ITS POLICIES÷

The Government is entitled to change its policies with changing circumstances and only on grounds of change a policy does not stand vitiated. The Government has the discretion to adopt a different policy, alter or change its policy to make it more effective. The only qualifying condition is that such change in policy must be free from arbitrariness, irrationality, bias and malice and must be in conformity with the principle of Wednesbury reasonableness[37]. It has been the consistent view of the Apex Court that a change in policy by the Government can have an overriding effect over private treaties between the Government and a private party, if the same was in the general public interest and provided such change in policy was guided by reason[38].

[35] White Industries Australia Limited v The Republic of India, Final Award UNCITRAL Paras 7.3.8 (30 Nov. 2011)
[36] Refer "A domestic law may not protect foreign investments in India" an analysis by Prabhas Ranjan, Hindustan Times dated 4th February, 2020
[37] Shimnit Utsch India (P) Ltd. v. W.B. Transport Infrastructure Development Corpn. Ltd (2010) 6 SCC 303.
[38] APM Terminals B.V. v. Union of India, (2011) 6 SCC 756 at page 778

The Supreme Court in the case of Rajasthan State Industrial Development and Investment Corporation and Anr. v. Diamond & Gem Development Corporation Ltd. and Anr[39] observed thus:

"23. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meaning unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely[40].

POLICY IS NOT LAW:

A policy is not law. A statement of policy is not a prescription of binding criterion[41]. A circular or self-made rule can become enforceable on the application of persons if it was shown that it had created legitimate expectation in their minds that the authority would abide by such a policy/guideline. However, the doctrine of legitimate expectation applies only when a person had been given reason to believe that the State will abide by the certain policy or guideline on the basis of which such applicant might have been led to take certain actions. This doctrine is akin to the doctrine of promissory estoppel[42]. However, it has to be borne in mind that the

[39] (2013) 5 SCC 470

[40] Vide United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal, (2004) 8 SCC 644, and Polymat India (P) Ltd. v. National Insurance Co. Ltd., (2005) 9 SCC 174.

[41] Narendra Kumar Maheshwari v. Union of India, 1990 Supp SCC 440 at page 508. In this connection, reference may be made to the observations of Sagnata Investments Ltd. v. Norwich Corpn. [(1971) 2 QB 614, 626 : (1971) 2 All ER 1441:(1971) 3 WLR 133] Also the observations in British Oxygen Co. v. Board of Trade [1971 AC 610 : (1970) 3 All ER 165] . See also Foulkes' Administrative Law, 6th edn. at pp. 181-184. In R. v. Secretary of State, ex parte Khan [(1985) 1 All ER 40].

[42] See also the observations of Lord Wilberforce in IRC v. National Federation [1982 AC 617 :

guidelines, which are not statutory, are not judicially enforceable. The competent authority might depart from these guidelines where the proper exercise of his discretion so warrants[43].

INTERFACE BETWEEN FOREIGN INVESTMENTS AND REGULATORY DISCRETION:-

The interface between foreign investments and regulatory discretion of the host State is not a novel issue. Common sense tells us that once an investor has entered into a country to do business; her conduct has to be in accordance with the regulations of the host State. To protect the investor from arbitrary and discriminatory exercise of regulatory discretion is indeed an important objective of the BIT[44]. However, problem arises not when the regulation is arbitrary or discriminatory, but when it is genuine. For instance, an important question that the entire body of international investment law is grappling today, is, that if in the course of exercising genuine public regulatory discretion the host State's action result in an adverse impact on the business of the foreign investor, then should host nation pay damages to the investor. The answer to this question will depend on innumerable number of factors, relevant to a case, such as the provisions given in the BIT[45].

EU-CANADA MODEL:

A perusal of the Comprehensive Economic and Trade Agreement (CETA)

(1981) 2 All ER 93 : (1981) 2 WLR 722]

[43] Supra 17

[44] (a) Shaivlini Khemka and Aishwarya Padmanabhan- Vth Year Law Students, BA LLB (Hons.) WB National University of Juridical Sciences (NUJS), Calcutta. "Walking A Tight Rope: Balancing Sovereign Regulatory Discretion and The Inviolability of International Investment Treaty Obligations", [2012] 2.1 NULJ 123 at page 134.

(b) Also See Salacuse, J.W. (1990): "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries", International Lawyer 24: 655 76).

[45] Ibid., at 138

between Canada, and the European Union (EU)[46] reveals that Parties have reaffirmed their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. It is clearly agreed in the agreement that if a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation. It was also agreed that a Party's decision not to issue, renew or maintain a subsidy:

(a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or

(b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy, does not constitute a breach[47].

NAFTA[48] MODEL:

Chapter 14 Article 14.16 of the NAFTA on Investment provides that nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives[49]. It means it upholds State's power to regulate the investment activity on the grounds of health, safety etc and such an activity cannot be considered as violation of the commitments made with

[46] An agreement signed between Canada and EU (i) to strengthen their close economic relationship and build upon their respective; (ii) rights and obligations under the Marrakesh Agreement Establishing the World Trade; (iii) Organization, done on 15 April 1994, and other multilateral and bilateral instruments of cooperation;(iv) Create an expanded and secure market for their goods and services through the reduction or elimination of barriers to trade and investment;(v) Establish clear, transparent, predictable and mutually-advantageous rules to govern their trade and investment;
[47] For further details, see Article 8.9 under Section D of the CETA.
[48] North America Free Trade Agreement signed amongst USA, Canada and Mexico
[49] For further details refere Article 14.16, Chapter 14 of the NAFTA.

respect to Investment.

TRANS PACIFIC PARTNERSHIP (TPP)[50] MODEL:

Article 9.16 under Chapter 9 of the TPP permits a Party in adopting, maintaining or enforcing any measure otherwise consistent with the Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives[51]. It reveals that the investor's right to invest is un-controlled and not subject to any regulations by the State. The common public international practice is that the State retains its power to regulate in a non-discriminatory manner.

INDIAN MODEL:

In the preamble to the India's model text for the Bilateral Investment Treaty (BIT) the right of Parties to regulate investments in their territory in accordance with their law and policy objectives has been reaffirmed. Article 2.1 of the model draft BIT provides that it shall apply to measures adopted or maintained by a Party relating to investments of investors of another Party in its territory, in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter, and which have been admitted by a Party in accordance with its law, regulations and policies as applicable from time to time. A perusal of the definition of the 'Investment' also reveals that 'Investment' means an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made. As per Article 5.5 non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate

[50] Trans Pacific Partnership Agreement was a proposed trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New-Zealand, Peru, Singapore, Vietnam, and the United States signed on 4 February 2016.
[51] For further details, refer Article 9.16 under Chapter 9 of the TPP.

public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article[52].

DIFFERENCE BETWEEN PRIVATE CONTRACTS AND CONTRACTS WITH STATE:

There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions[53].

PUBLIC LAW TO PROTECT CITIZENS:

[52] For further details, refer Preamble, Article 2 and Article 5 of the Indian Model Text of the Bilateral Investment Treaty, 2015.
[53] Supra 39

Public law principles designed to protect the citizens should apply because of the public nature of the body, and they may have some role in protecting the public interest[54]". The trend now is towards judicial review of contractual powers and the other activities of the government. It is significant to note that emphasis now is on reviewability of every State action because it stems not from the nature of function, but from the public nature of the body exercising that function; and all powers possessed by a public authority, howsoever conferred, are possessed 'solely in order that it may use them for the public good'. The only exception limiting the same is to be found in specific cases where such exclusion may be desirable for strong reasons of public policy. This, however, does not justify exclusion of reviewability in the contractual field involving the State since it is no longer a mere private activity to be excluded from public view or scrutiny[55].

PUBLIC OFFICE HOLDER IS A TRUSTEE HIS DUTY IS TO PROTECT PUBLIC:-

Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for

[54] See article "Judicial Review and Contractual Powers of Public Authorities" [(1990) 106 LQR 277-92. Also refer Shrilekha Vidyarthi (Kumari) v. State of U.P., (1991) 1 SCC 212 : 1991 SCC (L&S) 742 at page 238

[55] Reference is made to the decision of the Court of Appeal in *Jones* v. *Swansea City Council* [(1990) 1 WLR 54 : (1989) 3 All ER 162] where the court's clear inclination to the view that contractual powers should generally be reviewable is indicated.

public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14[56].

CONSTITUTION ENVISAGES FAIRNESS:-

The Preamble of the Constitution of India resolves to secure to all its citizens *Justice*, social, economic and political; and *Equality* of status and opportunity. Every State action must be aimed at achieving this goal. Part IV of the Constitution contains 'Directives Principles of State Policy' which are fundamental in the governance of the country and are aimed at securing social and economic freedoms by appropriate State action which is complementary to individual fundamental rights guaranteed in Part III for protection against excesses of State action, to realise the vision in the Preamble. This being the philosophy of the Constitution, can it be said that it contemplates exclusion of Article 14 — non-arbitrariness which is basic to rule of law — from State actions in contractual field when all actions of the State are meant for public good and expected to be fair and just? We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. In our opinion, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief, which may be available, are different matters but that does not justify the view of its total exclusion. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequal's[57].

[56] Supra 43 P293

[57] Shrilekha Vidyarthi (Kumari) v. State of U.P., (1991) 1 SCC 212 : 1991 SCC (L&S) 742 at page 236

BURDEN TO PROVE STATE ARBITRARINESS LIES ON THE PERSON:

No doubt, it is true, that there is a presumption of validity of the State action and the burden is on the person who alleges violation of Article 14 to prove the assertion. However, where no plausible reason or principle is indicated nor is it discernible and the impugned State action, therefore, appears to be ex facie arbitrary, the initial burden to prove the arbitrariness is discharged shifting onus on the State to justify its action as fair and reasonable. If the State is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged [58] . The scope of judicial review is limited as indicated in Dwarkadas Marfatia case[59] to oversee the State action for the purpose of satisfying that it is not vitiated by the vice of arbitrariness and no more. The wisdom of the policy or the lack of it or the desirability of a better alternative is not within the permissible scope of judicial review in such cases. It is not for the courts to recast the policy or to substitute it with another, which is considered to be more appropriate, once the attack on the ground of arbitrariness is successfully repelled by showing that the act, which was done, was fair and reasonable in the facts and circumstances of the case. The power of judicial review is limited to the grounds of illegality, irrationality and procedural impropriety. In the case of arbitrariness, the defect of irrationality is obvious[60].

STATE ACTION MUST NOT BE SUSCEPTIBLE:

It is now too well settled that not every State action, in order to survive, must be susceptible to the vice of arbitrariness, which is the crux of Article 14 of the Constitution and basic to the rule of law, the system that governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic

[58] Shrilekha Vidyarthi (Kumari) v. State of U.P., (1991) 1 SCC 212 : 1991 SCC (L&S) 742 at page 242
[59](1989) 3 SCC 293
[60] As indicated by Diplock, L.J., in Council of Civil Service Unions v. Minister for the Civil Service [(1984) 3 All ER 935]

test in every State action is sine qua non to its validity and in this respect; the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind[61].

TRUE IMPORT OF ARBITRARINESS:

The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always[62].

STATE ACTION MUST BE INFORMED BY REASON:

It is a well settled law that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution[63].

[61] Shrilekha Vidyarthi (Kumari) v. State of U.P., (1991) 1 SCC 212 : 1991 SCC (L&S) 742 at page 243
[62] Ibid.,
[63] Mahabir Auto Stores v. Indian Oil Corpn., (1990) 3 SCC 752 at page 760. Reliance in this connection was also placed on the observations of this Court in Radha Krishna Agarwal v. State of Bihar [(1977) 3 SCC 457

The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked[64].In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable[65]. Rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions[66].

In cases where the decision-making authority exceeded its statutory power or committed breach of rules or principles of natural justice in exercise of such power or its decision is perverse or passed an irrational order, the Supreme Court has interceded even after the contract was entered into between the parties, the Government, and its agencies[67]. Where the breach

[64] Ibid., at P 462

[65] In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu [(1974) 4 SCC 3 : 1974 SCC (L&S) 165] , Maneka Gandhi v. Union of India [(1978) 1 SCC 248] , Ajay Hasia v. Khalid Mujib Sehravardi [(1981) 1 SCC 722 : 1981 SCC (L&S) 258] , R.D. Shetty v. International Airport Authority of India [(1979) 3 SCC 489] and also Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay [(1989) 3 SCC 293].

[66] Supra 41.

[67] Verigamto Naveen v. Govt. of A.P., (2001) 8 SCC 344.

of contract involves breach of statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority, though cause of action arises out of or pertains to contract, brings it within the sphere of public law because the power exercised is apart from contract. The freedom of the Government to enter into business with anybody it likes is subject to the condition of reasonableness and fair play as well as public interest. After entering into a contract, in cancelling the contract, which is subject to terms of the statutory provisions, it cannot be said that the matter falls purely in a contractual field[68].

POWERS OF PUBLIC AUTHORITY ARE DIFFERENT FROM THOSE PRIVATE PERSONS:

The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.[69]"

INVOKING THE PROVISIONS OF BIT TO CHALLENGE STATE ACTION:

[68] The Court adverted to three decisions of this Court in Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay [(1989) 3 SCC 293], Mahabir Auto Stores v. Indian Oil Corpn. [(1990) 3 SCC 752] and Shrilekha Vidyarthi (Kumari) v. State of U.P. [(1991) 1 SCC 212: 1991 SCC (L&S) 742: AIR 1991 SC 537.

[69] Meerut Development Authority v. Assn. of Management Studies, (2009) 6 SCC 171: (2009) 2 SCC (Civ) 803. Also see Administrative Law, 9th Edn., H.W.R. Wade & C.F. Forsyth.

Private foreign investors, relying on the broad provisions of a BIT, have used the investor State arbitration mechanism to challenge the actions of the State — that emerge from the exercise of their public authority and not their private actions, to claim damages[70]. In Metalclad v. Mexico[71] , Mexico was ordered to pay US $16 million as damages to a foreign investor because of Mexico adopting an environmental standard in order to address certain environmental concerns that adversely affected the business of the foreign investor[72].

In Occidental Exploration Corporation v Ecuador[73], Ecuador was ordered to pay US $75 million to an US oil company because of Ecuador's tax policy violating the US-Ecuador BIT. The tribunal held that by distinguishing between foreign oil exporter and domestic flower and seafood exporters, Ecuador had discriminated between exporters (exporters taken as one homogenous group irrespective of the sector involved) and hence violated the national treatment provision of the US-Ecuador BIT. The tribunal rejected Ecuador's argument that since the tax regime was same for domestic and foreign oil companies there was no discrimination.[74] There are many more cases, a discussion of which is not possible here to due to constraints of space.

NON-DISCRIMINATORY REGULATIONS ARE UPHELD:

[70] See Van Harten, G. and M. Loughlin (2006): "Investment Treaty Arbitration as a Species of Global Administrative Law", European Journal of International Law, 17:121 50].] .
[71] Metalclad Corpn. v. United Maxican States, ICSID Case No. ARB (AF)/97/1
[72] See Dodge, W.S. (2001): "International Decisions", American Journal of International Law, 95: 910 18. Also see "Walking A Tight Rope: Balancing Sovereign Regulatory Discretion and The Inviolability of International Investment Treaty Obligations," [2012] 2.1 NULJ 123 at page 138 Shaivlini Khemka and Aishwarya Padmanabhan-Vth Year Law Students, BA LLB (Hons.) WB National University of Juridical Sciences (NUJS), Calcutta
[73] Occidental Exploration and Production Co. v. Republic of Ecuador, London Court of International Arbitration.
[74] See Kurtz, J. (2007): "National Treatment, Foreign Investment and Regulatory Autonomy: The Search for Protectionism or Something More" in P. Kahn and T.W. Walde (Ed.) New Aspects of International Investment Law (Hague: Martinus Nijhoff), 311 51.]

In Methanex V USA[75] the arbitrators ruled that:

"[....] as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."

Equally, in the majority award in S.D Myers, two arbitrators observed in a some-what general statement:

"The general body of precedent usually does not treat regulatory action as expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 the NAFTA, although the tribunal does not rule out that possibility"[76].

CONCLUSION AND COMMENTS:

In the light of the above analysis, it can be inferred that the investor who made investment in accordance with the laws of the host State is entitled to the protection of the investment as envisaged in the Bilateral Investment Treaties. In case if his investment is affected by any regulatory measures in an arbitrary, unreasonable manner without following the due process of law he is entitled to retrieve his investment. Of course the burden lies on the Investor to prove that the regulatory action of the State is arbitrary, unreasonable and unfair without affording him reasonable opportunity. At the same time, it may not be legally correct to say in view of signing of a BIT the Host State loses its right to regulate. As long as the regulatory measures are fair reasonable and non-discriminatory the Host, State can exercise its right to regulate and questioning such measures by the investor may not withstand the judicial scrutiny. However, in case the measures are not reasonable, discriminatory and effects the right of the investor then he is

[75] (NAFTA), Award, 3 August 2005, 44 ILM (2005) 1345, Part IV, Chapter D,
[76] S.D. Myers Vs Canada, Partial Award , 13th November, 2000 para 281

entitled to retrieve and the Host State may be held liable to compensate the loss if any sustained due to such measures. Therefore, it is advisable to maintain an amicable balance between the right to regulate and the investor's right to retrieve.

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LEGAL CONUNDRUM OF ANTI-ARBITRATION INJUNCTION IN MALAYSIA

By Heather Yee

Ms Heather Yee is the first female global lead and youngest Head of the AIADR Secretariat. She has wide experience in alternative dispute resolution and served as arbitrator / moot judge in numerous international moot competitions. She is a strategic thinker who has developed a mature and pragmatic approach to any task that she undertakes. Highly organized with a strong record of executing work under different disciplines

INTRODUCTION

Despite the occurrence of coronavirus pandemic, arbitration has been increasingly popular as the preferred means of resolving international commercial disputes.[1] It is recognised as the default choice in deciding construction disputes,[2] capable of delivering enforceable justice and recognizable awards.[3] The International Chamber of Commerce ("**ICC**") for instance recorded almost thirty-fold of increase in arbitration cases over 60 years[4] with recent statistics showing that the construction sector had generated the largest number of caseloads.[5]

[1] Gary Born and Wendy Miles, 'Global Trends in International Arbitration' (2016); Simon Chapman, Rebecca Warder and Jacob Sin, 'Rise in Arbitration Cases In 2020 Despite Reduced Volume of In Person Hearings Due To Coronavirus Pandemic' (2021)

[2] Aisha Nadar, 'Construction Arbitration in the Context of China's Belt and Road Project' (2019)

[3] Michael Evan Jaffe and Ronan J. McHugh, 'International Construction Disputes in Today's Economy, PLC Arbitration Handbook' (2009); James G. Zack Jr. 'Trends in International Construction Arbitration: A Research Perspective' (2012)

[4] International Chamber of Commerce, 'The International Chamber of Commerce (ICC) has announced record requests in 2020 for its arbitration and ADR services' (2021) < https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/> accessed 27 April 2021

[5] Craig Tevendale and Vanessa Naish, '2019 Statistics Show A "Record Year" For The ICC' (2020)

Construction projects not only present opportunities for economic growth and global connectivity but concomitant of multitude legal issues which require robust dispute resolution framework.[6] With the advantages of global enforceability, impartiality, flexibility and confidentiality, arbitration whether institutional or ad hoc have been advocated as the best alternative dispute resolution to court litigation.

In Malaysia, there have been recent judicial pronouncements on anti-arbitration injunction which raises the legal conundrum on the efficacy and efficiency of arbitration and role of national courts in arbitration. Against this backdrop, this paper will examine the Malaysian judicial approach to anti-arbitration injunction and the implication in the context of international commercial arbitration. It is well noted that the degree of court intervention is significant in determining safe seat for arbitration as propounded in the CIArb London Centenary Principles.[7] With the above consideration, this paper will also address the issue of third-party application for anti-arbitration injunction and the threshold tests applicable against party and non-party to arbitration agreement.

In the final analysis, it is humbly suggested that a measured approach should be adopted by the court in exercising its power to intervene in arbitration in contemplation of the arbitral bedrock principle of *kompetenz-kompetenz* and party autonomy.

WHAT IS ANTI-ARBITRATION INJUNCTION?

Anti-arbitration injunction is an order by court restraining parties and/or the tribunal from commencing or continuing with arbitration. It is different from anti-suit injunction, which is pro-arbitration in nature, intended to prevent court proceedings. In the English case of ***Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KTF [2011] EWHC 345***, Justice Hamblen J recognised that the issue of anti-arbitration injunction is "*a matter of debate*

[6] IBA OBOR Subcommittee Semi-Annual Report' (2020) <file:///C:/Users/user1/Downloads/IBA-OBOR-Subcommittee-Semi-Annual-Report-December-2019.pdf>
[7] CIArb London Centenary Principles 2015 <https://www.ciarb.org/media/1263/london-centenary-principles.pdf.>

and controversy".[8] While Judge Stephen Schwebel described it as "*one of the gravest problems of contemporary international commercial arbitration*" and "*violate conventional and customary international law, international public policy and the accepted principles of international arbitration*".[9]

The court involvement in granting of anti-arbitration injunction not only undermines the arbitration foundation of competence-competence and party autonomy but exposes the possibility of abuse, obstruction, or disruption to the arbitral proceedings. Professor Gary Born once remarked that anti-arbitration injunctions are *"deliberate obstructionist tactics, typically pursued in sympathetic local courts, aimed at disrupting the parties' agreed arbitral mechanism."*[10]

Anti-arbitration injunction also been criticised as being tools used by state entities to get the disputes adjudicated by courts rather than neutral arbitration forum on basis of judicial protectionism.[11] Despite that, anti-arbitration injunction is often sought to safeguard applicant's legal or equitable rights against vexatious, oppressive, or unconscionable arbitral proceedings. It is also used to prevent risk of parallel court and arbitral proceedings to the danger of inconsistent findings.

INTERNATIONAL ARBITRATION FRAMEWORK

Before proceeding with the judicial development of injunctive relief discussion, it is crucial to look at the existing legal framework. The *sine qua non* of international arbitration is the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* ("**New York Convention**") for the recognition and enforcement of foreign arbitral awards. This framework is complemented by the *UNCITRAL Arbitration Rules 1976* on the procedural conduct of arbitral proceedings and the UNCITRAL Model Law

[8] Claxton Engineering Services Ltd v Tam Olaj-Es Gazkutato KTF [2011] EWHC 345

[9] Stephen M Schwebel, 'Anti-Suit Injunctions in International Arbitration – An Overview', in Emmanuel Gaillard (ed), Anti-suit injunctions in international arbitration, (Juris, 2005)

[10] Gary B. Born, *International Commercial Arbitration* (3rd ed., Volume 1, Wolters Kluwer, 2021) at p. 1410.

[11] Sharad Bansal, Divyanshu Agrawal, 'Are anti-arbitration injunctions a malaise? An analysis in the context of Indian Law', Arbitration International, Volume 31, Issue 4 (1 December 2015) pp. 613-629 at p. 614.

1985 (with amendments in 2006) for the harmonisation of domestic arbitration laws.

Although the New York Convention or Model Law did not explicitly or impliedly displace the court's jurisdiction to grant anti-arbitration injunction, it is still arguably inconsistent and contrary to the international arbitration regime.[12] Under the New York Convention, a contracting state is obligated to give recognition to an arbitration agreement.[13] The UNCITRAL Model Law also give supremacy to the principle of *kompetenz-kompetenz* and limits court intervention. As stated in the UNCITRAL Secretariat's explanatory note to the UNCITRAL Model Law, court involvement in arbitration should be delimited to ensure expediency and finality where parties had consciously excluded court jurisdiction by opting for arbitration.[14]

The minimal interventionist policy of national courts in arbitration can be seen in the New York Convention where it limits judicial involvement by allowing only for recognition and enforcement of awards at the seat of the arbitration or the place of enforcement. On the other hand, the UNCITRAL Model Law limits the court involvement in arbitration to the appointment of tribunal, review of issues of fundamental jurisdiction and challenge of the award.[15] Whereas the UNCITRAL Arbitration Rules stipulates that the tribunal have power to rule on its own jurisdiction and may continue with proceedings and make award notwithstanding pending challenge in court.[16]

Malaysia being one of the eighty five states which adopted domestic legislation i.e., Malaysian Arbitration Act 2005 based on the UNCITRAL Model Law has a similar legal structure.[17] The Arbitration Act 2005 repealed the Arbitration Act 1952 is intended to be user friendly for parties in arbitration, to facilitate the resolution of international disputes by arbitration

[12] Romesh Weeramantry, '*Anti-Arbitration Injunctions: The Core Concepts'* (2014)
[13] Article II.1, New York Convention
[14] Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration
[15] Please see Articles 16 and 34 of the UNCITRAL Model Law *pari materia* sections 18 and 37 of the Malaysian Arbitration Act 2005.
[16] Please see Article 23 of the UNCITRAL Arbitration Rules 2010
[17] United Nations Commission on International Trade Law, '*Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006'* <https://uncitral.un.org/en> accessed on 23 April 2021

and provide for recognition and enforcement of awards for international arbitration.[18]

ANTI ARBITRATION INJUNCTION IN MALAYSIA

In Malaysia, the issue of anti-arbitration injunction was first tested in the Court of Appeal case of ***Nishimatsu Construction Co Ltd v Kecom Sdn Bhd [2009] 2 MLJ 404***. The learned Judge Gopal Sri Ram dismissed the application for anti-arbitration injunction to restrain the institution of foreign arbitration proceedings in Singapore on the reasoning that there was no pleading on which the injunction could issue.

Almost a decade later, the issue of anti-arbitration injunction was finally ventilated and decided in the Malaysian apex court. The Federal Court unprecedently granted an anti-arbitration injunction to the applicant who was not a party to the arbitration agreement in the case of ***Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1***.

The *Jaya Sudhir* case concerns disputes over shareholding of a joint-venture company formed to build, own and manage tugboats and provision of harbour tugs services for a project. The shares were owned by the first and second respondents. Due to alleged breaches, the respondents referred the disputes to arbitration pursuant to the parties' arbitration agreement.

The applicant for the anti-arbitration injunction was neither a party to the arbitration agreement nor the ongoing arbitration proceedings. It was alleged that the continuation of arbitration without him as a party would impinge his proprietary rights over the shares and be oppressive, vexatious and unconscionable.[19] The contention was that he had a collateral understanding with one of the respondents that he would be given a shareholding in the joint-venture company which is now a subject matter of the arbitration.

The Federal Court in granting anti-arbitration injunction reversed the Court of Appeal's decision and held that the delimitation of court intervention under

[18] Malaysian Arbitration Act 2005
[19] Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1

Sections 8 and 10 of the Arbitration Act 2005 did not apply to non-party to the arbitration agreement. It was further held that the more stringent test laid down in the English High Court case, ***J Jarvis v Blue Circle Dartfort Estates [2007] EWHC 1262 (TCC)*** for granting anti-arbitration injunction examining whether injustice will be caused to the claimant in arbitration and whether continuation of arbitration would be oppressive, vexatious, unconscionable or abuse of process is inapplicable to non-party to arbitration. Rather, the fairest approach is to adopt the general test for grant of interlocutory injunction as propounded in the ***Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193*** case by looking at whether there is serious issue to be tried, the balance of convenience and whether there will be irreparable injury to the applicant. It rejected the position that higher threshold is to be satisfied by non-party to arbitration.

The court further held that priority should be given for matters to be dealt with by the court because of significant degree of multiplicity, duplication and overlap of issues in the arbitration and the court proceeding to prevent the risk of inconsistent findings, delay and increased costs.

DOCTRINE OF KOMPETENZ-KOMPETENZ

The anti-arbitration injunction essentially undermines the principle of *kompetenz-kompetenz* which is the power of the tribunal to adjudicate on its jurisdiction.[20] This principle is crucial to avoid risk and effect of dilatory tactics. Article 16(1) of the UNCITRAL Model Law stipulates that the tribunal has the competence to rule on its own jurisdiction on the foundation of its mandate and power.

In Malaysia, section 18 of the Malaysian Arbitration Act 2005 requires the tribunal to decide on its own jurisdiction based on the doctrine of *kompetenz-kompetenz* and separability. The court in ***Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd [2008] 1 MLJ 233*** once recognized that the tribunal had wide jurisdiction and powers under section

[20] S R Subramaniam, 'Anti-Arbitration Injunctions and their compatibility with the New York Convention and the Indian Law of Arbitration: Future directions for Indian law and policy', *Arbitration International,* Volume 34, Issue 2 (June 2018) at p. 2; Sharad Bansal, Divyanshu Agrawal, 'Are anti-arbitration injunctions a malaise? An analysis in the context of Indian Law', *Arbitration International,* Volume 31, Issue 4 (1 December 2015) pp. 613-629 at p. 618.

18 when its jurisdiction, competence and scope of authority was challenged and when the agreement was null and void. Non-parties should not be easily allowed to restrain arbitral proceedings as that would seriously undermine the rationale and objective of the legislation.

Despite there is no explicit provision for or against an anti-arbitration injunction in the New York Convention and UNCITRAL Model Law to suggest that a court has a duty to compel arbitration rather than a duty to 'refer' a party to arbitration. Some had argued that the principle of *kompetenz-kompetenz* is not absolute to limit the powers of the court. This is elucidated by Lord Collins in ***Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan [2010] 3 WLR 1472, [2010] UKSC 46***:

"…the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law… But it does not follow that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it. Nor does it follow that the question of jurisdiction may not be re-examined by the supervisory court of the seat in a challenge to the tribunal's ruling on jurisdiction. Still less does it mean that when the award comes to be enforced in another country, the foreign court may not re-examine the jurisdiction of the tribunal."[21]

On the other spectrum, civil law countries tend to be more restrictive and reluctant to interfere in the process chosen by the parties besides lacking the legal basis for granting anti-arbitration injunctions. It adopts the *lis alibi pendens* principle of first come first serve.[22] For example, in France, the Code of Civil Procedure states that a court shall decline jurisdiction when a dispute subject to an arbitration agreement is brought before a court, except if the tribunal has not yet seized of the dispute and if the arbitration

[21] Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan [2010] 3 WLR 1472, [2010] UKSC 46

[22] Julian Lew, 'Does National Court Involvement Undermine the International Arbitration Process?' (2009) American University International Law Review Volume 24 Issue 3

agreement is manifestly void or not applicable.[23]

Similarly, the Swiss court of first instance in the case ***Air (PTY) Ltd v International Air Transport Ass'n Case No. C/1043/2005-15SP*** found that anti arbitration injunctions are contrary to Swiss legal system and contradict the principle of *kompetenz-kompetenz*. The court further held that "*As a matter of Swiss law there is no such thing as "judicial tutelage" of the courts over arbitrators; quite to the contrary, Swiss law fully implements the principle of "Kompetenz-Kompetenz" both in its positive effect . . . and its negative effect . . . . The jurisdiction of a court to determine whether an arbitration agreement is valid—which cannot in any event lead to an anti-suit injunction—exists only when the arbitration agreement is relied upon as a defence before the court."*[24]

Unlike civil laws, the judiciary in Malaysia had developed in such way which undermines the doctrinal principle of *kompetenz-kompetenz* by firstly recognizing the court's undisputed power to restrain arbitral proceedings and secondly the readiness to grant anti-arbitration injunction with less stringent threshold test if the applicant is a third party.

THIRD-PARTY INTERVENTION

The recognition of third-party's rights to restrain an arbitration proceeding with less stringent test than party to arbitration heightens the possibility of non-party intervention in arbitration which is clear contradiction to the principle of party autonomy. This brings about the peril of non-party undercutting the arbitration agreement entered between parties.

The current standing in Malaysia is that non-party to arbitration agreement can move the court at any stages of an arbitration to prevent the parties / tribunal from initiating or continuing with arbitration. This is disregard of whether the parties had

[23] Article 1448 of the Civil Procedure Code

[24] Julian Lew, 'Does National Court Involvement Undermine the International Arbitration Process?' (2009) American University International Law Review Volume 24 Issue 3

validly exercised their rights to refer disputes to arbitration pursuant to agreement and / or the disputes falling within the jurisdiction of the tribunal.

The arbitral doctrine of party autonomy and the procedural safeguards as contemplated under the UNCITRAL Model Law in reducing the risk and effect of dilatory tactics through short time frame to resort to court, non-appealable court decision and discretion of tribunal to continue with arbitration and make award while the matter is pending in court are superfluous in the context.

As a matter of principle and policy, the Federal Court case in ***Master Mulia Sdn Bhd v Sigur Sdn Bhd [2020] 9 CLJ 213*** had pointed out that the role of courts in arbitral regime is one of assistance and supportive of the arbitral process, not interference. In ordinary cases, caution must be exercised by the court in considering anti-arbitration injunctions.[25] It is only in exceptional circumstances that an anti-arbitration injunction should be granted.[26]

MULTIPARTY ARBITRATION

In relation to the issue of third-party intervention, it is suggested that the possible resolution through joinder of third party should be contemplated. Joinder is the addition of one or more parties in a pending arbitration. Factually, in *Jaya Sudhir* case, the appellant did not even attempt to join the arbitration proceedings despite asserting interest on the subject of the arbitration which allegedly would impair his rights to the subject.

The measure in granting injunction to prevent the arbitration from going any further under the pretext of multiplicity of proceedings and inconsistent findings resulting would give rise to the possibility of abuse, obstruction, or disruption to the arbitral proceedings. With joinder of party to the arbitration, the additional party would have the same rights and obligations as other party in presenting submission, raising objections and claims.[27]

[25] Albon (t/a N A Carriage Co) v Naza Motor Trading Sdn Bhd [2007] EWCA Civ 1124, [2007] All ER (D) 80 (Nov)
[26] Elektrim SA v Vivendi Universal SA (No 2) [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8, Nomihold Securities Inc v Mobile Telesystems Finance SA [2012] EWHC 130 (Comm), [2012] 1 Lloyd's Rep 442
[27] Alexander G. Gessas and Ana Serra e Moura, 'Multiparty and Multicontract Arbitration', CIArb Lecture delivered in March 2021

The provision of joinder of third party in arbitration could resolve the unnecessary court intervention by third parties in seeking anti-arbitration injunction. It is also particularly relevant as multi-party and multi-contract disputes are permeating in arbitration especially in large construction projects. By having the proper procedures on joinder of third party in arbitration could avoid the unnecessary delay to arbitration caused by court intervention and consequential increase in costs. Recognising the importance of joinder provision, the ICC for example had launched its 2021 Arbitration Rules adding the new exception to Article 7(5) which allows application to join additional parties after the constitution of tribunal and recognises the tribunal's power and discretion to permit joinder despite party objection to the joinder.

In England, the Court of Appeal had also opined that parties can and ought to include in their arbitration agreements the procedural right for third parties to insist on claims against them which are connected to the disputes brought in arbitration.[28] Whereas in Singapore, the High Court had considered that a non-party to an arbitration agreement could be joined to an arbitration, with the consent of all the parties to the arbitration.[29]

Driven by the considerations of efficiency, efficacy, aversion of duplicate and parallel proceedings, legal certainty and ultimate justice, the courts and tribunal ought to construe the *ratione materiae* and *ratione personae* of arbitration and justify the extension to third parties through joinder.[30]

FOREIGN-SEATED ARBITRATION

After the pronouncement in *Jaya Sudhir* case, the Malaysian High Court in March 2020 granted another anti-arbitration injunction restraining the defendants from participating or taking any steps or participate in *ad hoc* foreign arbitration proceedings in Spain on ground of sovereign immunity in

[28] Fortress & Ors v Blue Skye & Ors [2013] EWCA Civ 367
[29] The Titan Unity (No. 2) [2014] SGHCR 04
[30] Prof. Dr. Mohamed S. Abdel Wahab, 'International Arbitration & Third Parties', the CIArb Lecture delivered in March 2021

the case of ***Government of Malaysia v Nurhima Kiram Fornan & Ors [2020] 6 CLJ 429***.

The court's power in granting interim reliefs to maintain the status quo pending determination of a dispute, prevent any action that is likely to cause harm or prejudice to the arbitral process, preservation of assets and evidence relevant and material to the resolution of the dispute is expressly provided under section 11 of the Malaysian Arbitration Act 2005 and even extends to international arbitrations where the seat of arbitration is not in Malaysia.[31]

Similarly, in the English Court of Appeal case of ***Sabbagh v Khoury and others, [2019] EWCA Civ 1219***, it was confirmed that the court has jurisdiction to grant an anti-arbitration injunction restraining foreign-seated arbitration in Lebanon. It is clear arbitral regime introduced by the New York Convention and domestic laws in England and Malaysia which did not displace the underlying jurisdiction to grant anti-arbitration injunction on foreign seated arbitration.

However, the Court of Appeal in *Sabbagh* case held that the grant of anti-arbitration injunction to restrain foreign-seated arbitration remains an exceptional step and only in exceptional cases where the arbitration would be vexatious and oppressive that the injunction will be granted.[32] The English court also gave the proposition that anti-arbitration injunctions will not be granted to the extent that the issues under consideration in the arbitration are issues capable of constituting a dispute or difference within the scope of the arbitration agreement and the agreement is not null and void, inoperative, or incapable of being performed. The Court of Appeal in this case restrained parties from participating in the Lebanon-seated arbitration on the grounds that the party who had been joined in the arbitration had earlier obtained a ruling from the English court that she was not bound by the arbitration agreement.[33]

Unlike the English position, the court in Malaysia did not elaborate on the

[31] Section 11(3) of the Malaysian Arbitration Act 2005
[32] Sabbagh v Khoury and others, [2019] EWCA Civ 1219
[33]Sabbagh v Khoury and others, [2019] EWCA Civ 1219

threshold tests applicable in granting anti-arbitration injunction in foreign seated arbitration by parties to proceedings.

In other common law jurisdictions, such as Hong Kong, a consistent philosophy with the English position in *Sabbagh* case where power to grant anti-arbitration injunction is to be exercised sparingly in a narrow approach is adopted. For instance, in the two Hong Kong cases of ***SA v KB [2011] HKCFI 2029*** and ***Lin Ming v Chen Shu Quan [2012] HKCFI 2029***, the court had refused to grant injunction retraining the conduct of arbitration which concerned concurrent proceedings in respect of same subject matter brought in court and arbitration.

The Canadian court in ***Li v Rao [2019] BCCA 264*** also adopted the consistent approach in *Sabbagh* case where in the analysis, the court held that "*courts should exercise caution before granting any injunction affecting the conduct of foreign proceedings whether those be judicial or arbitral in nature. Courts should pay due regard to the objectives of arbitration before granting an anti-arbitration injunction, just as they must pay due regard to comity before granting an anti-suit injunction*." The anti-arbitration injunction was granted on the basis that the claimant had undertaking amounting to a promise not to pursue the arbitration which rendered the arbitration agreement inoperative which replaced the foreign arbitration with British court jurisdiction.

MEASURED APPROACH TO ANTI-ARBITRATION INJUNCTION

From the above analysis, it can be seen that although Malaysia and most common law jurisdictions assert the power to grant anti-arbitration injunctions, it ought to embrace a measured approach in exercising this power with caution,[34] vigilance,[35] and frugality.[36]

[34] *Intermet FZCO v. Ansol Ltd*, [2007] EWHC 226 (Comm).
[35] *British Caribbean Bank Ltd v. The Attorney General*, [2013] CCJ 4 (AJ)
[36] *J. Jarvis & Sons Ltd v. Blue Circle Dartford Estates Ltd*, [2007] EWHC 1262 (TCC); *Injazat Technology Capital Limited v. Dr Hamid Najafi*, [2012] EWHC 4171 (Comm).

As stated by the Indian High Court in ***Devi Resources Limited v. Ambo Exports Limited***, *"it is the duty of the court to exercise extreme caution and circumspection before issuing an anti-suit or anti-arbitration injunction."*[37] Hence, it is humbly suggested that courts ought to exercise such injunctions only in exceptional circumstances when the proceedings are an infringement of a legal or equitable right of a party[38] or the arbitration are vexatious and unconscionable in nature.[39]

The courts also need to ensure that certain competing claims are balanced when deciding whether to grant an anti-arbitration injunction. These are:

(1) Sanctity of the arbitration process;

(2) Costs suffered by party to the arbitration; and

(3) Possibility that it will have to adjudicate upon the validity of the arbitration agreement post rendering of the award.[40]

Injunctions to prevent and restrain the initiation or continuation of arbitration should only be used sparingly.[41] Despite the fact that an anti-arbitration injunction cannot take away the right of a party to pursue its substantive remedies, a failure to comply could amount to contempt of court. It may also result in the court refusing to enforce the arbitral award.[42]

CONCLUSION

As a conclusion, the power to grant anti-arbitration injunction signifies the important role national courts are playing in preserving and ensuring the

[37] 2019 SCC OnLine Cal 7774.
[38] *Elektrim S.A. v. Vivendi Universal S.A. (No. 2),* [2007] EWHC 571 (Comm)
[39]*Excalibur Ventures LLC v. Texas Keystone Inc.,* [2011] EWHC 1624 (Comm)
[40] Sharad Bansal, Divyanshu Agrawal, 'Are anti-arbitration injunctions a malaise? An analysis in the context of Indian Law', *Arbitration International,* Volume 31, Issue 4 (1 December 2015) pp. 613-629.
[41] J Lew, 'Does National Court Involvement Undermine the International Arbitration Processes?', (2009) 24 3 American University International Law Review at p 499; Shearer and Jaynel, 'Anti-suit and Anti-Arbitration Injunctions in International Arbitration: A Swiss Perspective', (2009) Int ALR.
[42] Nicholas Poon, 'The Use and Abuse of Anti-Arbitration Injunctions', (2013) 25 SacLJ 244, Singapore Academy of Law Journal at p. 246.

efficacy and robustness of arbitration framework. In the Federal Court decision of *Master Mulia*, it pointed out that the role of courts in arbitral regime is one of assistance and supportive of the arbitral process with minimal interference. Caution must therefore be exercised by the court in considering anti-arbitration injunction without undermining the bedrock principle of *kompetenz-kompetenz* in arbitration.

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Uniform Law on Immunity of Arbitrators: A Legal Fiction or Real Possibility?

By Vishal Aggarwal

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"The strongest bulwark of authority is uniformity; the least divergence from it is the greatest crime"

~ Emma Goldman

INTRODUCTION

Over the past decade, there has been an exponential growth in the use of international arbitration for resolving cross border disputes displacing the conventional court litigation. Despite its popularity, one can also observe an equivalent rise in hostility towards this alternative dispute resolution. In the investment arbitration regime, revamping of the entire investor-state dispute resolution is an indicator of such hostility. In commercial arbitration too, parties are losing faith in the process, citing *"lack of confidence in neutrals and arbitrators tending to compromise"* as primary concerns.[1] As a result, the entire international arbitration apparatus is being attacked on numerous

[1]Thomas J Stipanowich and J Ryan Lamare, 'Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations' (2014) 19 Harvard Negotiation Law Review 1 17.

fronts throughout the world. A large majority of these attacks[2] relate to the liability of the arbitrator or institutions administering arbitration for alleged misconducts during the course of the arbitration. With such pessimism as the backdrop, it becomes almost essential to discuss the immunity of arbitrators.

Given that the arbitrator is granted authority through the agreement of the parties, it is understandable, that parties would want to make arbitrators accountable by having an option to sue them for breach of their contractual duties. However, theorists and arbitration statutes in common law jurisdictions have stipulated extension of absolute judicial immunity to arbitrators since they perform a quasi-judicial function. This difference in approach on the immunity of arbitrators, trying to balance attributes of accountability and independence has sparked a debate about the magnitude of protection that should be granted to arbitrators. Major countries and arbitral institutions have dealt with this issue in their own singular manner. There has been an absence of a uniform benchmark of treatment for arbitrators when it comes to their immunity. The current spectrum of treatment represents complete immunity from any liability at one end to no form of protection on the other. Such lack of harmonization has led to uncertainty for arbitrators, who keep guessing liability arising out of their actions.

A critical question to put pertains to the law that will decide the liability or immunity of the arbitrator, would it be the law of the domicile of the arbitrators, law of the arbitration agreement or law of the seat. This is a matter of conflict of laws branch of private international law which blends into the comparative analysis to show that diverse provisions on immunity may lead to perverse results and ambiguity. This paper makes an attempt at such comparative analysis of the provisions in the national legislation granting immunity to the arbitrator highlighting the mess resulting from their distinct character. The paper suggests reconciling all laws into one definite law

[2] 'GAR Article: Arbitrators Convicted in Qatar' <https://globalarbitrationreview.com/article/1177942/arbitrators-convicted-in-qatar> accessed 01 March 2022.

representing a middle ground amongst all types of standards of treatment which can guide all nations towards having a Uniform Law on Immunity of Arbitrators. Such a law would best serve to provide functional immunity and act as a middle ground among the extreme treatments while diffusing the uncertainty and concerns resulting from the conflicts of laws. The majority of the studies on this subject have limited themselves to suggesting an ideal bargain between the various treatments, however, almost none have suggested an implementation mechanism to bring coherence and completeness through their suggested alternative. This paper makes an ambitious attempt in this direction of recommending an implementation mechanism of such middle ground.

The structure of this paper will be as follows: **Part I** will provide a succinct definition of immunity of the arbitrator to identify the spectacle on which this paper basis its postulation and emphasize why there is a need for such immunity in the first place while balancing attributes of accountability and independence in arbitration. **Part II** of the literature would set discourse on deciding immunity *vis-à-vis the* relationship between the arbitrator and the parties. It examines this relationship under two schools[3] of thoughts i.e. *Contractual Relation and Status School* which generally forms the foundation for the state's legislation on immunity. **Part III** would analyse gamut of national legislation and illustrate how their distinctive attitudes towards immunity generate a source of tension. **Part IV** proposes a middle ground to altering positions in various countries, inspecting certain principles and acts covered by those principles required while drafting such middle ground. Finally, **Part V** makes a unique recommendation regarding how the hybrid provision suggested earlier may be implemented and convince states to adopt the same. It also elucidates how such a proposed amendment would serve the purpose of diffusing the uncertainty pertaining to arbitral immunity[4]. During the essay, the author uses the words 'liability' or

[3]Nigel Blackaby and Martin Hunter, *Redfern and Hunter on International Arbitration (Sixth Edition)* (Oxford University Press Oxford, United Kingdom 2015) 321.

[4]The present paper would restrict it's focus on the immunity related to civil liability. There might be instances related to criminal liability and immunity of the arbitrators from criminal acts, but that is beyond the scope of this literary piece. Further this paper would not pay heed to the immunity of arbitral institutions which is a matter of separate debate, but rather focus on the immunity of arbitrators in general.

'immunity' of arbitrators interchangeably since having a civil liability in effect means having no immunity and vice versa.

PART I

A. Defining immunity of Arbitrators

Arbitrators often find themselves vulnerable to the feelings of the party which is dissatisfied with the award, making it imperative to provide protection to the arbitrator from any legal recourse undertaken by the parties post-award.[5] Recognizing that the arbitrators and the judges in courts are in the same line of business, namely adjudication of disputes and providing justice, a similar argument can be extended to providing immunity to arbitrators resembling judicial immunity granted to judges in courts.[6] Use of the word 'immunity' in the context of arbitrators employs the principle that arbitrators would not be held liable for performing their judicial functions.[7] They would be immune from a lawsuit for incorrect decision making, misapplication of law or erroneous factual determination.[8] Arguably, such immunity is only provided in respect of the acts performed in the course of resolving a dispute over which an arbitrator has jurisdiction.[9] *Jones v. Brown*[10] of Iowa in 1880 represents one of the earliest cases which dealt with arbitral immunity. Therein the court had dismissed an action against an arbitrator ruling that he was immune from liability for his judicial acts.

Unsurprisingly, most of the conventions on international commercial arbitration stay silent with respect to arbitral immunity, with exception of the

[5]Philippe Fouchard, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Hague, London: Kluwer Law International 1999) 588.
[6]Julian DM Lew, *Comparative International Commercial Arbitration* (The Hague, New York: Kluwer Law International 2003) 288; *Bompard v Consorts C et al* (Court of Appeal of Paris 22 May 1991).
[7]ibid.
[8]Matthew Bricker, 'The Arbitral Judgment Rule: Using the Business Judgment Rule to Redefine Arbitral Immunity.' (2013) 92 Texas Law Review 197.
[9]Dennis Nolan and Roger Abrams, 'Arbitral Immunity' (1989) 11 Industrial Relations Law Journal 233.
[10]6 N.W. 140 (Iowa 1880);Mark A Sponseller, ', "Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators"' (1993) 44 HASTINGS LJ 427.

International Convention on Settlement of International Disputes (ICSID) which provides broad immunity to arbitrators from national courts and or any kind of civil liability from parties.[11] This phenomenon is exhibited in the national legislation in broadly three categories. Some statutes[12] contain rules providing immunity save for certain exceptions like fraud, while others[13] take a contrasting stand and enlist acts for which an arbitrator might be liable. A considerable amount of arbitration statutes around the world still contains no provision relating to the immunity of arbitrator. Indifferent to the statutory protection by the states, arbitral institutions[14] have considered it desirable to amend their rules explicitly limiting their own liability and liability of their arbitrators. However, these institutions rules face a set back when they are up against the mandatory provisions of the national statutes. This tussle between institutional rules and national arbitration law will be dealt with in the latter part of the essay.

B. Making a case for Arbitral Immunity

The very first policy argument in favour of immunity for arbitrators germinates from the peril to independence and the integrity of the decision making the process in arbitration.[15] If the arbitrators are subject to suits and legal proceedings, this would embolden parties to deter arbitrators from ruling against them.[16] Such actions against arbitrators are likely to have a destabilising effect on arbitration.[17] It has been held that *"the integrity of the arbitral process is best preserved by recognizing the arbitrators as*

[11]Gary Born, *International Commercial Arbitration* (Kluwer Law International 2014)2027.
[12]Arbitration Act 1996, s. 29.
[13]Austria - Code of Civil Procedure (as modified by Federal Law of February 2, 1983) Fourth Chapter, Article 584(2)
[14] International Chamber of Commerce (ICC) Rules of Arbitration 2017, Article 34; London Court of International Arbitration (LCIA) Rules 2014, Article 31; Singapore International Arbitration Centre (SIAC) Rules 2016, Rule 38; Hong Kong International Arbitration Centre (HKIAC) Arbitration Rules 2018, Article 46; American Arbitration Association (AAA) Commercial Arbitration Rules and Mediation Procedures 2013, Rule 52.
[15]Blackaby and Hunter (n 3) 324.
[16]Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge: Cambridge University Press 2012) 154.
[17]Fouchard (n 5) 592.

independent decision-makers who have no obligation to defend themselves to a reviewing court"[18]*.* Arbitrators would be truly neutral when they are not influenced by the fear of the consequences of their decisions.[19] Unless such immunity is imparted to arbitrators, the idea of non-partisan neutral decision-maker would be utopian. In addition, arbitrating without immunity would act as a disincentive to arbitrators working alongside their primary professional career.[20] This could indeed be damaging to international arbitration as a whole if individuals choose not to serve as arbitrator out of the fear of civil liability.[21] Furthermore, it has often been argued that since arbitration is consensual i.e. parties themselves decide as to who will be their arbitrator, parties should not be allowed to challenge omissions of their arbitrators in the courts.[22] Finally, such immunity would ensure the absoluteness/definitiveness of the awards by parties not being able to sue the arbitrators for allegedly incorrect decisions.[23]

Nevertheless, such immunity has not failed to attract criticism from various commentators. The foremost critique for immunity derives its strength from a comparison of an arbitrator with other professionals who render specialised services. It is often argued that similar to doctors, lawyers and accountants, arbitrators too are just private professionals contracted for their specialised services.[24] When a professional act negligently, they might cause damage to the party. While in the case of other professionals, such damage would be converted into a liability, in our case, immunity saves arbitrators from such liability. It was observed in English case law that *"Arbitrators should be liable like any other professional person selected for his expertise and who pledges to exercise skill and care in the exercise of*

[18]*Fong V American Airlines, Inc, 431 F Supp 1340 (Nd Cal 1977)*; Emmanuela Truli, 'Liability V. Quasi-Judicial Immunity Of The Arbitrator: The Case Against Absolute Arbitral Immunity' 17 The American Review Of International Arbitration 385.
[19]*Babylon Milk & Cream Co*. 4 A D 2d 777 (1957).
[20]Matthew - Rasmussen, '- Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France Note' - Fordham International Law Journal 1844.
[21]ibid.
[22]William H Daughtrey, 'Quasi-Judicial Immunity Lost By The Arbitrator Who Sat On The Award: Baar V. Tigerman' (1985) 22 American Business Law Journal 583.
[23]Moses (n 17) 154; Blackaby and Hunter (n 3) 324.
[24]Peter B - Rutledge, '- Toward a Contractual Approach for Arbitral Immunity' - Georgia Law Review 154.

his duties"[25]*.* Further, judges are not appointed by the parties, neither do they assure skills to the participants in the dispute. On the contrary, the arbitrator's mandate originates from the consent of the parties itself and their selection is made contingent on the skills they possess. While arguing against such immunity, the focus has been centred around the origin of parties' intention and the character of appointment (expertise of the arbitrator), but not on duties (dispute resolution) which the appointee has to perform. [26] Further, protection from any kind of liability might ensue carelessness and poor quality service on the part of arbitrators.[27] Lastly, no disciplinary remedies are available against the arbitrators, except vacation of award and withholding of fees which prove to be inadequate.[28] This concern is magnified given that there is no general recourse available against an award for any errors or omissions by the arbitrator during the process.[29]

Antagonistic arguments to the doctrine of immunity corroborate that one can't have a blindsided view towards absolute immunity. There is a need to find a middle course which upholds both independence and accountability of international arbitration.

PART II

Before delving into the comparative analysis of the scope of the arbitrator's immunity and liability in various jurisdiction, it is critical to understand the models which make the foundations for provisions in legislations. Part II of the paper talks about deciding the immunity *vis-à-vis* relationship between the arbitrator and the parties. It examines the relationship under two schools of thoughts i.e. *Contractual School and Status School*. Understanding this

[25] Dissent in *Arenson v Casson Beckman Rutley & Co.* [1977] A.C. 405 ; Lew (n 6) 289.
[26] Andrew I Okekeifere, 'The Parties' Rights Against a Dilatory or Unskilled Arbitrator – Possible New Approaches' [1998] Journal of International Arbitration 129; Lew (n 6) 289.
[27] Asif Salahuddin, 'Should Arbitrators Be Immune from Liability?' (2017) 33 Arbitration International 571; Blackaby and Hunter (n 3) 325.
[28] Ramon Mullerat and Juliet Blanch, 'The Liability of Arbitrators: A Survey of Current Practice' (2007) 1 Dispute Resolution International 106.
[29] Moses (n 17) 154.

will enable us to quickly identify, which model is being followed while going through the state legislations.

A. Status School

This school is based on the performance of a judicial or quasi-judicial function by the arbitrators, which entitles them to a 'status' and a treatment corollary to that of a judge.[30] The underlying theory for this school is that arbitral immunity stems from judicial immunity.[31] Judicial immunity dates back to an English case[32] where the court announced the rules, purpose and limits of immunity for judges of the courts. Judicial immunity ensured that the judges are not liable for the damages arising out of their decision-making process. This judicial immunity was then further extended to cover other official decision-making entities.[33] Such extension was motivated from the court's reasoning that immunity is not aimed at the person to whom it is attached, rather it is justified and defined by the function it protects and serves. A respected commentator explained that: *"functional similarity to a judge depends upon: (i) whether a dispute exists, (ii) whether there is an ultimate determination of liability, and (iii) whether the decision-maker conducts a hearing and takes evidence from the parties, as would a judge."*[34] Such functional similarity has been used to bring arbitrators under the ambit of such judicial immunity. In *Hutchins v. Merril,* the U.S. court while granting immunity to a log appraiser acting in the capacity of an arbitrator ruled that the discharge of duties by the scaler involved exercising skill and judgement as well as absolute impartiality, such attributes were enough to grant him with immunity.*[35]*

[30]Blackaby and Hunter (n 3) 323.
[31]Nolan and Abrams (n 10) 229.
[32]*Floyd v Barker* (1607) 12 Coke Reports 23.
[33]*Forrester v White,* 484 US 219, 227 (1988).
[34] William W Park, 'Text and Context in International Dispute Resolution Symposium: International Commercial Dispute Resolution' (1997) 15 Boston University International Law Journal 191.
[35]*84 A 412 (Me 1912)*; Susan D - Franck, '- The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' - New York Law School Journal of International and Comparative Law 20.

However, limits of judicial immunity are that it is only applicable to judicial acts over which the judge had some jurisdiction. It would not save the judges' for their administrative, legislative, or personal acts, or in the cases where a judge lacked jurisdiction.[36] Analogically, arbitrator's should not attract liability for their adjudicatory function, i.e. decision making in fulfilment of their duty to render an award.[37] Although the arbitrator would not be protected for his misconduct in arbitration and negligence in the performance of duties which fall outside the final rendering of the award.[38] In *Baar v. Tigerman,*[39] the Californian court found that a failure to render an award does not constitute a part of the quasi-judicial function for which immunity may be granted

Despite extensive acceptance of this model by common law statutes, it has attracted a lot of censures. The leading criticism comes from the points of difference between the judges and the arbitrators. Judges derive their power and authority from the state while the arbitrator's do so from their private contract with the parties, and because of the judge's relationship with the state, it is vital to protect judiciary for the preservation of democracy.[40] Judges are required to follow the law and create precedents, while the arbitrator does not have to adhere to any law and is neither bound by any precedent; finally, unlike court judgements, arbitral awards are not subject to judicial review.[41] This shows that the arbitrators are not as accountable as the judges. The difference in the threshold of accountability means that the functional analogy between the judges and arbitrators eventually breaks down.[42] The arbitrator's being less accountable should not be granted the same level of immunity as judges. Further, there is a disbalance when it comes to remedies available against misconducts of judges as compared to that of arbitrators.[43] There is an option of impeachment, non-renewal of terms or even administrative actions in certain cases for judges. Since

[36]Nolan and Abrams (n 10) 230.
[37]Martin Domke, 'The Arbitrator's Immunity from Liability: A Comparative Survey' (1971) 3 University of Toledo Law Review 100.
[38]ibid 102.
[39]189 Cal Rptr 834,836-39 (Cal Ct App 1983).
[40] Franck (n 36) 23.
[41]Bricker (n 8) 203.
[42] Franck (n 36) 23.
[43]Bricker (n 8) 206.

arbitration is a product of a private contract, there is hardly any such recourse available against the arbitrators. Such a reproach to status school has given way to a more favourable theory of contract school.

B. Contract School

Contractual Theory school first originated in the nineteenth century and has since been adopted by some civil law countries.[44] This school institutes that an arbitrator is appointed by or on behalf of the parties for performing a service for a fee.[45] It does not look at the arbitrators and the judges as equivalents.[46] It recognises a contractual relationship between the parties and the arbitrator i.e. *receptum arbitri*, which may be characterized as a *quasi-agency* or *sui generis* contract.[47] The arbitrators are seen like any other professional rendering services, who can be subject to civil liability from the parties for whom service is performed.[48] However, there are sub-theories regarding the nature of the arbitrator's contract. It is beyond the scope of this literature to delve into a descriptive analysis of such theories. It suffices to know for this paper that legal relation established on the basis of arbitrator's contract involves *"two-tiered juridical mechanism based on the conventional proposal-acceptance contract formation procedure wherein the arbitrator assumes obligations in exchange of a fee"*[49]. It is important to clarify here that the arbitrator's contract discussed above is separate and independent of the arbitration agreement, although the former emanates only because of the latter[50].

Unlike the status school, this school does not talk about the immunity. It

[44]Anastasia Tsakatoura, 'Immunity of Arbitrators - International Arbitration' <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm> accessed 5 July 2019.
[45]Blackaby and Hunter (n 3) 322.
[46]Tsakatoura (n 45).
[47]Domke (n 38) 100.
[48]Brown (n 34) 229.
[49]Dario Alessi, 'Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability' [2014] Journal of International Arbitration 743.
[50]Emilia Onyema, 'International Commercial Arbitration and the Arbitrator's Contract' (2010) 28 ASA Bulletin 708.

rather states undertakings for which the arbitrator may be liable to the parties, *de facto* giving immunity for all other activities of the arbitrator. These undertakings basically relate to the duties which an arbitrator agrees to adhere to under his contract. Duties include: to act in an independent and impartial way, to render a timely award, to decide the dispute by rendering an enforceable award, to treat both parties equally, to act in good faith, not to resign without good cause and to maintain confidentiality.[51] Breach of any or all of these duties may attract legal proceedings for civil liability from the parties. It is not only that the contractual model of the arbitrator-party relationship which makes party eligible for suing the arbitrator, but it is rather the provisions in the arbitration statutes[52] which grant such authority to the parties. It is rare that the contractual relationship between the arbitrator and party would provide for any limitation of liability or any kind of immunity. Although it might be a different scenario if the arbitrators are appointed under the institutional rules[53], wherein in the institutional rules on limitation of liability or immunity may become part of the contract between the party and the arbitrator.[54]

Proponents of this theory have argued that contractual liability of the arbitrator for breach of his obligations would bring professional competence and further the scope of justice in the society.[55] Nonetheless, this theory has its share of scepticism as well. Primary disapproval for this approach comes from the fear of liability affecting the integrity of the decision-making process.[56] Conversely, it is in the public interest that the arbitrators do not work under the impression of partiality from the fear of legal action.[57] This illustrates that immunity based on the contractual liability school is another extreme end in itself and may not pose an appropriate solution to the dogma of immunity treatment of arbitrators. The discussion of the two schools will allow us to identify which school has been adopted by a national arbitration

[51]Mullerat and Blanch (n 29) 101. List is not exhaustive and is only illustrative.
[52]Austria Code of Civil Procedure 1895 (n 14).
[53]ICC Rules of Arbitration; LCIA Rules; SIAC Rules; HKIAC Arbitration Rules; AAA Commercial Arbitration Rules and Mediation Procedures (n 15).
[54]Lew (n 6) 290-291.
[55]Truli (n 18) 31.
[56]Bricker (n 8) 223.
[57]ibid 224.

law and observe their disparate treatment of arbitrator's immunity.

PART III

A. Comparative analysis of national statute's provisions for immunity

The following chart is a non-exhaustive comparative analysis of stipulations in national arbitration statutes relating to liability and immunity of the arbitrator. The paper tries to bring together 10 national statutes ensuring equal representation of both civil and common law countries as well including the most chosen seats in international arbitration.

S.No.	Statutes	Provision	Immunity Treatment Comment
1.	English Arbitration Act	*Section 29 Immunity of arbitrator* *"(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as an arbitrator unless the act or omission is shown to have been in bad faith.* *(2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.* *(3) This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25)"*[58]	Arbitrators have been provided statutory immunity comparable to that enjoyed by the judges in performing their 'judicial functions'. The only exception to the immunity is for an act in bad faith and unreasonable resignation. English Arbitration act being a common-law statute embraces the concept of the status school and provides a very high degree of immunity.
2.	People Republic of China's (PRC) Arbitration Law	*Article 34:* *"In one of the following circumstances, the arbitrator must withdraw, and the parties shall also have the right to challenge the arbitrator for a withdrawal: (1) The arbitrator is a*	The arbitrators in People Republic China ("PRC") have not been provided with any sort of immunity. On the contrary, the arbitrator can be made legally liable for some of the acts[61] mentioned within the PRC arbitration law. PRC has failed to adopt a definite stand among the two schools for immunity of arbitrators. Absence of any

[58] Arbitration Act 1996, s. 29

[61] Acts Include: "*if the arbitrator has privately met party or arbitrators have committed embezzlement, accepted bribes or done malpractices for personal benefits or perverted the law in the arbitration of the case"*

		party in the case or a close relative of a party or of an agent in the case; (2) The arbitrator has a personal interest in the case; (3) The arbitrator has other relationship with a party or his agent in the case which may affect the impartiality of arbitration; or (4) The arbitrator has privately met with a party or agent or accepted an invitation to entertainment or gift from a party or agent."[59] *Article 38:* *"If an arbitrator is involved in the circumstances described in item (4) of Article 34 of this Law and the circumstances are serious or involved in the circumstances described in item (6) of Article 58 of this Law, he shall assume legal liability according to law and the arbitration commission shall remove his name from the register of arbitrators."*[60]	specific provision on immunity indicates squeaky protection of the arbitrators in PRC.
3.	Singapore Arbitration Act	*Liability of Arbitrators* *"Section20: An arbitrator shall not be liable for:* *(a) negligence in respect of anything done or omitted to be done in the capacity of the arbitrator; or* *(b) any mistake of law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award."*[62]	Singapore arbitration act provides the mirror effect in reverse by limiting the liability of the arbitrator for specific acts. This is in line with the status school where an arbitrator would not be liable for anything done in the capacity of the adjudicator. However, the provision makes no mention of acts done in bad faith or with fraudulent intent which means they can be made liable for the same.[63]
4.	Spanish Arbitration law	*"Article 21: Responsibility of the arbitrators and of arbitral institutions:* *Acceptance compels arbitrators and, as the case may be, the*	Spanish law provides for the broadest liability (narrowest immunity) compared to other jurisdictions. Arbitrator being held liable for recklessness indicates the vulnerability of arbitrators with respect to any

[59]Arbitration Law of the People's Republic of China 1994, Article 34
[60]ibid. Article 38
[62]Singapore Arbitration Act 2001, s. 20
[63]Rutledge (n 25) 207.

		arbitral institution, to faithfully fulfil their assignment, otherwise incurring in liability for damages arising from actions committed in bad faith, recklessness or wilful intent."[64]	kind of negligence.[65] Such provision is a step further than the contract school which prescribes limited acts for attracting liability.
5.	Argentina's Civil and Commercial Procedural Code	*"Arbitrator Performance* *Art. 745. – Arbitrator acceptance will entitle the parties to compel them to fulfil their assignment, with liability for damages."*[66] *"Arbitrator Liability* *Art. 756. - Arbitrators who, without justifiable cause, do not issue the award within the established time limit, shall not be entitled to fees. They shall also be held liable for damages."*[67]	Argentina's provision in reference to arbitrator's liability/immunity is a clear reflection of the contractual nature of arbitrator's relation with the parties.[68] It is a broad provision on liability with very limited protection. It provides damages also with respect to negligence.
6.	France Code of Civil Procedure of Arbitration	There is an absence of any provision dealing with the liability or immunity of the arbitrator.	French jurisprudence doesn't equate arbitrators with judges and introduces an implied liability provision.[69] Under French case law, it appears that the arbitrator can be made fully liable for his acts, and such liability follows from the contractual relationship between the parties and the arbitrator,[70] irrespective of whether his/her actions fall under jurisdictional function or not.[71] French law affords no immunity to the arbitrator and makes them liable for all of their wrongful acts.[72] French case laws[73] have been on the extreme end of the spectrum with consistent rulings in favour of arbitrator's civil liability.

[64]The Arbitration Act 60/2003, Article 21.
[65]Dyalá Jiménez, 'Proposal for a Uniform Rule on Arbitrator Immunity' [2017] ICC Dispute Resolution Bulletin 13.
[66]Argentine Civil and Commercial Procedural Code, Book VI, Article 745; Jiménez (n 67) 11.
[67]Argentine Civil and Commercial Procedural Code, Book VI, Article 756; Jiménez (n 67) 11.
[68]Jiménez (n 66) 11.
[69]Rutledge (n 25) 204.
[70]Mullerat and Blanch (n 29) 112.
[71]Franck (n 36) 45.
[72]Jean-Louis Delvolve, 'Immunity of Arbitrators under French Law', *The Immunity of Arbitrators* (Lloyd's of London Press Ltd with School of International Arbitration 1990) 35-36.
[73]*Société Annahold BV* (Tribunal de Grande instance de Paris 9 December 1992); *Raoul Duval* (Tribunal de Grande instance de Paris 12 October 1995).

7.	German Code of Civil Procedure	There is an absence of any provision dealing with the liability or immunity of the arbitrator.	Despite no statutory provision, a distinction has been made under the German law between judicial and non-judicial acts of an arbitrator. This allows *'privilege of liability'* to be extended to the arbitrator for their judicial functions, however, they still can be held liable for damages for breach of their contractual duties not related to deciding the dispute.[74] This exemplifies a hybrid position between the status of school and contract school.
8.	The United States Federal Arbitration Act	There is an absence[75] of any provision dealing with the liability or immunity of the arbitrator.	United States' absolute protection to arbitrators for his decision-making functions has its roots in the state court precedents.[76] This immunity may even extend to the situations where an arbitrator has acted carelessly, has been grossly negligent or has intentionally acted in a fraudulent manner.[77] Such high threshold of immunity follows from two-fold reasoning: (i) the functional comparability between the judges and the arbitrators in line with the status school; (ii) the *"emphatic federal policy in favour of arbitral disputes which play a vital role in international commerce."*[78]

The above chart reflects diversity in the provisions of immunity. The comparison exhibits the range of immunity offered, from being completely immune under English and US laws to being completely liable under civil law countries such as Spanish and French law. Some countries have also made an ambitious attempt for middle ground among the extreme ends such as Germany and Singapore law on arbitration. This lack of uniformity which is at the root of this paper, poses a real difficulty in ascertaining the protection available to the arbitrator. The predicament arising out of the non-conformity of national laws leads to the various sources of obscurity which have been dealt with in the next section with the help of conflict of laws.

[74]Stefan Kröll and others, *Arbitration in Germany : The Model Law in Practice* (Place of publication not identified Kluwer Law International 2015) 177.

[75]However, certain state statutes such as California Civil Procedure Code, Georgia Civil Procedure Code and even Uniform Arbitration act have codified provisions on general immunity for arbitrators.

[76]David J Branson and Richard E Wallace Jr., 'Immunity of Arbitrators under United States Law', *Immunity of Arbitrators* (Lloyd's of London Press Ltd with School of International Arbitration 1990).96

[77]Franck (n 36) 32.

[78]*Mitsubishi Motors v Soler Chrysler-Plymouth,* 473 US 614 (1985).

B. Problems surfaced from lack of synchronisation

Since the international instruments are silent with respect to arbitral immunity and are mainly dependent on the national legal systems, 'conflict of laws' is a necessity to ascertain which national law would apply.[79] The author through this paper is not trying to project as to which is the best conflict of laws theory to determine the law applicable to arbitrator's liability. Rather, the aim is to stage how the available private international law theories are inapt because of the inconsistency in the provisions. Priory, the issue to ascertain is the characterisation of the civil liability claim from the parties if it is based upon contract or tort.[80] Hypothetically, if a suit for damages is brought by a party in European Union (EU) for a breach of duties is based on tort, the 'law applicable' would be of the country where the damage occurred.[81] Transposing it onto the aforementioned scenario would imply that the party from the EU can, in theory, sue the arbitrator under the law of the place where a breach of his/her duty caused damage to the party. This will lead to a scenario, wherein, every time a party wants to sue an arbitrator under tort under national law, he/she will have to show that financial damage resulting from the breach of non-contractual obligations by the arbitrator occurred in that place. The outcome, being an arbitrator will be sued under a national law with which he has no connection. This is one of the repercussions of using conflict of law while deciding immunity or liability of the arbitrators.

In reference to the contract school in Part II, parties' and arbitrator enter into a contractual relationship of a service provider, henceforth the issue of the liability or immunity of the arbitrator would be governed by the law applicable

[79]Mullerat and Blanch (n 29) 106.

[80]Pierre Lalive, 'Irresponsibility in International Commercial Arbitration' (1999) 7 Asia Pacific Law Review 161.

[81]Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) 2007 (OJ L) Article 4.1. In most circumstances, the parties and the arbitrators wouldn't have same habitual residence, ruling out application of Article 4.2 of Rome II regulation.

to the arbitrator's contract.[82] If the court characterizes the arbitrator's contract i.e. *receptum arbitri* as a part of the arbitration agreement, then the law applicable to the arbitration agreement might also be the law applicable to the arbitrator's contract, *de facto* deciding arbitral immunity.[83] This can have far-reaching implication that the arbitrator's immunity will be at the mercy of the law applicable to the arbitration agreement. Putting reliance on the law applicable to arbitration agreement for deciding immunity poses a serious challenge since in many cases courts are struggling to find the exact law for ruling on the validity of arbitration agreement.[84]As far as the law of the matrix contract is concerned, *Fouchard Gaillard* argues that the law of the disputing contract should not be the one governing the arbitral status since the arbitrator's mandate is related to arbitral proceedings.[85]

Considering situations when the arbitrator's contract is separate from the arbitration agreement, although parties are free to choose the law applicable to the arbitrator's contract, it is rare that parties make such express choice, in the end, it has to be determined by the conflict of law rules.[86] In the absence of such express choice, there are various theories promulgated to find the pertinent law. First, is to use Article 4.1(b) of *Rome I* regulation as a guidepost. According to Article 4.1(b), in case of a contract entered into for the provision of services, the *law of the country of the habitual residence* of the service provider (arbitrator in our case) would govern the contract.[87] Since, it is very common to have a panel of arbitrator(s) in international arbitration, using the *habitual residence* theory would imply that each arbitrator's liability/immunity under his contract would be decided by a different law. This theory, which otherwise would have worked is abandoned solely due to conflicting decisions emanating from the diverse treatment of

[82]Varapnickas, 'The Law Applicable to Arbitrators' Civil Liability from a European Point of View' (*Kluwer Arbitration Blog*, 25 March 2019) <http://arbitrationblog.kluwerarbitration.com/2019/03/25/the-law-applicable-to-arbitrators-civil-liability-from-a-european-point-of-view/> accessed 15 March 2022.
[83]- Franck (n 37) 51.
[84] See *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors [2012] EWCA Civ 638*.
[85]Fouchard (n 5) 558.
[86]Klaus Lionnet, 'The Arbitrator's Contract' (2014) 15 Arbitration International 169.
[87]Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) 2008 (OJ L) Article 4.1(b).

arbitrator's immunity under national laws.[88] Another policy reason for rejecting this theory is that arbitrators, may alter their performance depending upon the liability they face as per the law of their own country in case of any misconduct.[89] This showcases another potent shortcoming of not having consistency in the national provisions on arbitral immunity. The second theory is to consider the law of the place of the performance of the obligation since it is more intimately connected to the arbitration proceedings. Place of performance of the obligation by the arbitrators cannot be equated with the seat because of the fact that arbitral proceedings are happening in a different place regardless of the seat of arbitration.[90] In international arbitration, we see arbitral proceedings taking place in several places, sometimes they even happen via teleconferencing. With such multiplicity of places and platforms for the performance of the obligation, it is difficult to find out the effective place of the performance of the obligation[91] and thus almost impossible to select the appropriate law to rule on arbitrator's liability. Only if all the places of the performance of the obligation had the same rule, one can choose any place and apply its law to decree on immunity of arbitrators.

The third and the most widely accepted theory is to apply the law of the seat of arbitration for matters related to immunity of the arbitrator. This theory gets its inspiration from Article 4.3 of *Rome I* regulation, wherein "*if the contract is most closely connected with a country other than the one indicated in paragraphs 1 and 2, then the law of that country should apply*".[92] Commentators state that the seat is the formal legal domicile of the arbitration and is the most appropriate connecting factor to arbitration proceedings.[93] *Lex loci arbitri* as is argued controls certain important aspects of arbitration such as judicial assistance, mandatory rules and due process.[94] Many advocate that applying the law of the seat to the critical

[88]Jiménez (n 66) 15.
[89]Franck (n 36) 53.
[90]Alessi (n 50) 739.
[91]ibid.
[92]Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I); Varapnickas (n 87).
[93]Lionnet (n 86) 169.
[94] Tadas Varapnickas, 'Arbitrator's Civil Liability and Its Boundaries' (Vilnius University 2018)

question of arbitrator's liability would produce predictable results.[95] The author feels that with the increasing proliferation of international arbitration, there is a significant number of new potential upcoming seats of arbitration to the group of traditional seats. It would be a strenuous task for an arbitrator to be vary of the immunity law of every new jurisdiction he or she is taking an appointment in, let alone tracing divergent attitudes of already established seats of arbitration. Questions have also arisen regarding the competency of the courts at the seat to decide such questions pertaining to arbitrator's liability.[96] Blindly following the seat theory, with each seat having its distinctive attitude towards the immunity, will often lead to a conflict of interest between the institutional rules and *lex loci arbirti.* While ICC[97] and LCIA[98] rules on the exclusion of liability have been broad enough to give way to the more stringent applicable law of the seat, not all institutions have been able to come up with enough flexibility in their rules. To illustrate, consider a SIAC institutional arbitration seated in Spain. Spanish Arbitration law[99] can make SIAC's institutional arbitrator liable for negligence, despite SIAC arbitration rules[100] providing for protection. This is in line with the scenario of AAA's administered arbitration being seated in France. French civil procedural law, as observed, can uphold an arbitrator liable for his actions despite blanket immunity provided under the AAA's arbitration rules[101]. Following the seat theory, makes institutional rules on immunity futile. Only if, we could have single unified rule on immunity among all national statutes, it would enable all the arbitral institutions to amend their rules to be in parity with that uniform rule.

PART IV

<https://epublications.vu.lt/object/elaba:32731966/index.html> accessed 17 July 2019 39.
[95]Franck (n 36); Lew (n 6) 278.
[96]Jiménez (n 66) 15.
[97]ICC Rules of Arbitration, Article 41.
[98]LCIA Rules, Article 31.
[99]The Arbitration Act 60/2003, Article 21.
[100]SIAC Arbitration Rules, Rule 38.
[101]AAA Commercial Arbitration Rules, Rule 52.

Drafting Unified Rule on Arbitral Immunity

This part aims to suggest a model solution to immunity, which could act as a compromise between different rules. This unified rule would be the linchpin in bringing about much-needed uniformity ambitioned. It is ideal to discuss certain much needed elements of unified solution before casting out. First is *temporality*, i.e., the moment from which an arbitrator can be held liable for his actions.[102] The arbitrators' mandate starts from the date of his appointment and finishes off once he renders an award. Hence, he should only be accountable for prospective actions from the said starting date till rendering of the award. However, we have instances such as a breach to disclose a potential conflict of interest before starting of arbitration which can make an arbitrator liable outside his term as well. Pre-contractual obligations are there to ensure that the arbitrator diligently provides all the information in good faith before entering in the contract.[103] In *Société Annahold*[104], the sole arbitrator was acting in the capacity of the financial consultant to the chairman of one of the parties. Courts categorically held that such a person can be sued for the loss suffered by the parties due to failure to disclose conflict of interest. Duty to keep things confidential is another instance for which an arbitrator can be held liable even after termination of the case.[105] Save for these two circumstances, the model solution needs to ensure that arbitrators are immune for all their actions outside their term-time.

The second element is *intentional wrongful behaviour* on part of the arbitrator while rendering the services. This element carefully weaves into the balance between independence and responsibility in international arbitration discussed in the first half of the paper. This element can be further subdivided into two strands: wilful misconduct and withdrawal from services without any reason. Majority of the national arbitration statutes have a consensus when it comes to the first strand i.e., liability for wilful misconduct or action in bad faith except for the United States. For accountability reasons, it is important to ensure that there is a level playing field when it

[102] Jiménez (n 66) 15.
[103] Alessi (n 50) 44.
[104] *Société Annahold B.V.* (n 74).
[105] Jiménez (n 66) 15.

comes to liability for wilful fraudulent behaviour and safeguards that such conduct does not get any reinforcement. Nevertheless, the standard of proof to show the intent of the arbitrators should be high enough in these cases so that arbitrators aren't harassed with vexatious litigation. In *Florange v. Brissart et Corgié,* Paris court of first instance held that *"arbitrators could only incur liability in the event of gross fault, fraud or connivance with one of the parties"*[106]. In the second strand, one ought to consider the liability of an arbitrator for withdrawal from the arbitration process without any justifications. It has been argued that *"An arbitrator's resignation without good cause is a breach of her contractual undertaking"*[107] and that it should attract strict liability. International arbitration procedure involves high stakes in terms of both time and money. Inexcusable withdrawal from services may result in huge damages for the parties. It is most important that while formulating an immunity rule, to not provide protection to the arbitrator from groundless resignations which cause loses to parties and obstruct proceedings.

The third element relates to *acts done in judicial capacity* while acting as an adjudicator. These acts can again be classified into two categories. The first *category* involves purely judicial acts which are undertaken for resolving the disputes. Unlike some civil law countries such as France, Argentina and Spain, these acts almost always receive protection to ensure the independence of international arbitration. These judicial acts may include: *rendering an award, deciding for interim reliefs, applying the law.* While *Guzman*[108] in his article argues in favour of arbitrator's liability when failing to *apply mandatory laws*, the author feels that any such stint is clearly unwarranted, since the discretion to decide which mandatory law to apply is a judicial function for which an arbitrator needs to be given immunity. The ambit of protection of such acts may even extend to any *procedural error* committed by the arbitrator during the arbitration proceedings. In *Castin* v. *Gomes,* the arbitrator was sued for alleged breach of applicable procedural rules. The Paris court rejected the claim against the arbitrator and ruled that

[106]*Florange v Brissart et Corgié* (Tribunal de Grande instance de Paris 27th September 1978).
[107]Alessi (n 50) 770.
[108]Andrew T Guzman, 'Arbitrator Liability: Reconciling Arbitration and Mandatory Rules' (2000) 49 Duke Law Journal 1279.

"parties have undermined the honour of the arbitrator and disregarded the considerations with which we entrust an arbitrator for performing his function"[109].

The controversy arises when an arbitrator acts with *negligence in performance* of his judicial obligations. Many nations[110] opine that any such negligence is a breach of contractual obligations accepted by the arbitrator under the contract and he shall be made liable for the same. One can also observe an equally disparate behaviour from countries such as Singapore[111], England[112] and Australia[113], where an arbitrator cannot be made liable for any negligence done in the course of the arbitration except for when it is done intentionally. This is another area which requires reconciliation. Author's outlook would be to segregate between negligence done inadvertently and negligence in bad faith, thus enabling to afford protection only to the former. Thus, the proposed rule on immunity must ensure a clear guard for an arbitrator for performing his judicial function, otherwise, the autonomy of international arbitration would be greatly undermined.

The second *category* of *acts done in judicial capacity* includes observance of certain obligations which are ancillary to judicial performance but do not exactly form their part. These may include: *rendering an enforceable award, rendering an award within the time limits, ensuring independence and impartiality.*[114] Failure on the part of the arbitrator to render a decision amount to non-performance of the contractual obligations. Such non-performance almost always attracts strict liability and is difficult to be protected from. In the celebrated case of *Baar* v. *Tigerman*[115], parties sued the arbitrator Tigerman who had failed to deliver an award even after several time extensions. The California court while decreeing the arbitrator liable

[109]*Castin v Gomez* (Tribunal de Grande instance de Paris 2nd October 1985).
[110]Spanish Arbitration law, French Jurisprudence and Switzerland's Federal Code on Private International law
[111]Singapore Arbitration Act 2001, s. 20
[112]English Arbitration Act, s. 29
[113]Australia Commercial Arbitration Act 2010, s. 39
[114]Alessi (n 510 762.
[115]189 Cal Rptr 834,836-39 (Cal. Ct. App. 1983) (n 40).

held that *"failure to render an award is one of the most egregious errors that an arbitrator can make and lack of immunity to arbitrator who failed to render the award will influence other to render awards and end dispute expeditiously"*[116]. The projected rule should not provide protection in case of failure to render an award.

In addition to above, another controversial arbitrator's obligation is to render an award within the set time limits. States like Argentina[117] have provided for damages against the arbitrator in the circumstances when the arbitrator fails to render an award in the time mandated.[118] U.S. Courts of Appeal in *E.C. Ernest Inc.* maintained that *"an arbitrator who does not take a decision in due time cannot take benefit from immunity because he has breached contractual duties towards the parties"*[119]. The author feels that given the multifaceted and complex nature of the cases in international dispute resolution, one can have a little laxity in terms of strictly adhering to the time limits. Thus, only in blatant infringement of timetables should the arbitrators be held responsible for breaching their contractual obligations. Independence and impartiality are underpinnings of due process. In order to ensure that parties keep reposing their faith in the private justice mechanism, arbitrator and arbitral institutions have to ensure at the outset that independence and impartiality of the arbitrator are not called into question.[120] No nation specifically provides for civil liability against lack of impartiality and independence and recourse against it has been restricted to setting aside of the award.[121] There is no reason for any new immunity rule to provide any protection in case of any alleged lack of impartiality and independence. Any proposed universal rule on the immunity of arbitrator should take into account all of these elements discussed above.

[116]ibid; Daughtrey (n 23) 9.
[117]Argentine Civil and Commercial Procedural Code, Book VI, Article 745; Jiménez (n 67).
[118]Franck (n 36) 14.
[119]*E C Ernst, Inc v Manhattan Construction Co, 559 F2d 268*.
[120]Hong-Lin and Shore (n 7) 937.
[121]*Case KKO 2005:14* (Finnish Supreme Court).

Proposed Neutral Rule on Immunity of Arbitrator

The rule suggested below is an attempt to ensure a new arrangement when it comes to immunity. It directly addresses the issue of diversity by suggesting a neutral territory among all treatments offered in different jurisdictions. It is inspired by the comparative analysis of national laws as well as from suggestions advanced by reputed commentators such as *Susan. D. Franck*[122]and *Mark A. Sponseller*[123]. It puts emphasis on the *functional immunity* highlighted over and again in almost all literature on this issue. It provides us with a meeting ground between the divergent solutions in national systems

Rule:

"Arbitrators shall be immune from any civil liability from the parties for any act, omission or negligence committed in the course of discharge of his functions except when the situations qualify under the exception clause.

Exception:

(a) An arbitrator shall be liable for any act done in bad faith or with wilful fraudulent intent.

(b) An arbitrator shall be liable for failing to render an award at all; or only in most egregious violations of stipulated time deadlines.

(c) An arbitrator shall liable for damages incurred by parties as a reason of his unjustifiable resignation."

The suggested rule doesn't aim to change anything in relation to the criminal liability of the arbitrator which originates from the vertical relationship between the arbitrator and the state. It is solely directed to reform the relationship between the parties and the arbitrator in relation to the civil

[122]Franck (n 36) 58.
[123]Sponseller (n 10) 442.

liability of the arbitrator.

PART V

Implementation Mechanism of Unified Rule through Model Law to bring Uniformity

United Nations Commission on International Trade Law (UNCITRAL) Model Law has failed to provide with any provision which can potentially guide us in respect of the immunity of the arbitrator.[124] Looking at the legislative history of the model law, the issue has been flagged and discussed numerous times amongst the working group. In the first report of the Secretary-General on possible features of a model law on international commercial arbitration, the text reflects the complacent attitude of the commission towards the issue of liability. They speak about the lenient attitude of the states towards the liability of the arbitrator and expressed their doubts if model law could indeed provide a satisfactory solution in this regard.[125] It was again in a subsequent report that a consensus was reached wherein it was decided that, neither model law could appropriately deal with this question of immunity, nor will there be any attempt to create any code of ethics for arbitrators.[126] Finally, it was only in 1985, that a feeble attempt was made by Canada suggesting to include a provision in the model law for allowing immunity to the members of the tribunal for actions taken in good faith.[127] Being a controversial issue does not provide with enough incentive for not dealing with it in the model law. Increasing litigiousness of parties towards the arbitrators every day should provide us with enough motivation to address this issue within model law.

There have been only a few recommendations on how model law should

[124]'UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006' <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration>.
[125] UNCITRAL Report of Secretary General 86 (14 May 1981) 14th Session UN Doc A/CN.9/207
[126]UNCITRAL Report of working group 13 (23 March 1982) 15th Session UN Doc A/CN.9/216
[127] UNCITRAL Report of Secretary General Addendum 22 (15 April 1985) 18th Session UN Doc A/CN.9/263/Add.1

address this issue. Professor Pieter Sanders in his book[128] made the very first recommendation for model law to include exclusion of the liability of the arbitrators but did not carve out the form it should take. Again, Dyalá Jiménez in his article suggested amending model law by adding a clause to article 12 or having a new article *15bis* altogether in chapter III *"Composition of Arbitral Tribunal"*[129]*.* Nonetheless, she argued for favouring the law of the seat in deciding the immunity through the suggested insertion, which the author has already debated in detail above and argued against. The authors' estimation of the most ideal solution would be to include it in a manner of additional article but placing it immediately after Article 14 like *Article 14A*.[130] Article 14 talks about the arbitrator's failure to perform and impossibility to act. It makes much sense to have immunity provision after Article 14 since only after we have determined the circumstances wherein the arbitrator is unable to perform, we can decide the question of his liability or immunity. Since model law aims to end the disparity among the national laws, as explained by subheading "*Disparity between national laws"* under the "*Part Two Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration"*, it would be a good judgement to include an extra paragraph and illustrate the disparity problem with the conundrum of several standards of immunity. Such an explanation would endorse the new provision on immunity and persuade nations to make the necessary changes bringing their national arbitration law in parity with the Model law.

The annexation of such proposed provision would potentially resolve the uncertainty pertaining to arbitral immunity. The goal of having a uniform law on arbitral immunity can only be accomplished through such a unified law. The proposed conceptual platform would develop a unitary approach to arbitral liability, rather than recourse to the choice-of-law

[128]Pieter Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (2nd and expanded ed., The Hague 2004) 165.
[129]Dyalá Jiménez, 'Are We Beyond The Model Law — Or Is It Time For A New One?' (*www.djarbitraje.com*) <http://djarbitraje.com/pdf/600arewebeyondthemodellaworisittimeforanewonebydyalajimenezfigueres.pdf> accessed 24 July 2019.
[130]'UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006' (n 129), Article 14.

method.[131] Irrespective of which theory is called into question, be it seat theory or domicile of the arbitrators, with a uniform rule, one can decide the liability of the arbitrator using any national law. More importantly, it ensures the *minimum standard treatment* to the arbitrator across all the nations irrespective of the seat of arbitration. The arbitrator need not worry about extra liability which might arise in the civil law countries and neither parties have to worry about extra protection to the arbitrators in common law countries. Tracking the number of countries which have transposed and revised their own law in line with model law, this amendment to model law is the most potent tool for bringing about harmonisation on this controversial issue, which has been pending for decades now.

CONCLUSION

Increasing participation of more arbitrators is indispensable for the aspired growth of international arbitration. However, it is difficult to see this happening without assurances regarding the arbitrator's protection from liability. After years of permissiveness, it is high time that we bring in a uniform definite solution to arbitrator's liability. As illustrated before, each country has its own specification when it comes to this issue and such an attitude has only led to uncertainty. Some nations do not provide any provision in this regard at all, which creates further confusion for arbitrators. Even for the parties in international arbitration, there should be an alternative available for making arbitrators accountable. The issue is further complicated because there is no unambiguous conflict of law theory to ascertain which law will decide the immunity of the arbitrator. Depending on the theory chosen, one can end up with different law and their unique treatment of arbitrator.

One solution put forward to this predicament is making necessary changes in UNCITRAL Model Law. Such a change would cause enough impetus for the countries to amend their respective national laws and bring them in line

[131] Alessi (n 50) 738.

with a common standard. Implementing such uniformisation will surely act as a safety valve against the arbitrator in times of rising hostility towards international arbitration. If achieved, this will surely provide a pedestal for international arbitration to flourish in times to come.

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