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INDIA'S FIRST STEPS IN RECOGNISING EMERGENCY AWARDS

By Ramalingam Vallinayagam *

Emergency Awards given by Emergency Arbitrators, is a relatively new proposition in the Indian context. Several arbitral institutions have adopted provisions to enable the appointment of emergency arbitrators and empowering the making of emergency awards. However, the area of Emergency Arbitrators and Emergency Awards has been operating in a legal hiatus with no recognition from the Arbitration and Conciliation Act, 1996 (India) or the New York Convention. That being said the Hon'ble High Court of Delhi has inched one step closer to recognizing emergency arbitrators by stating that the Emergency Arbitrator is 'not a coram non judice', that is, not without authority.

Emergency awards play an important role in international commercial arbitration, as they aim to preserve evidence, protect assets and maintain the *status quo* of the pending award. Although Emergency Awards have been part of institutional arbitral proceedings, the recognition of emergency arbitrators and enforcement of emergency awards are nascent subjects in which jurisdictions such as Singapore[1] and Hong Kong[2] have made great strides. India, being one of the up-and-coming jurisdictions in terms of Commercial Arbitration, is yet to recognize emergency arbitrators

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[1] International Arbitration Act (Cap 143A, 2002 Rev Ed) s 2 (1).

[2] The Laws of Hong Kong, Arbitration Ordinance (2011), Cap. 609, §§ 22A and 22B.

and emergency awards under the Arbitration and Conciliation Act, 1996 which makes it difficult in terms of enforcing the same.

EMERGENCY AWARDS

The concept of Emergency Arbitration emerged in 1990 when the International Chamber of Commerce (ICC) established pre-arbitral referee rules[3], which was loosely based on the referee procedure available before the French State Courts[4], however the pre-arbitral referee procedure was not much sought after, for it was only used in less than a dozen instances[5]. The pre-arbitral referee rules are also said to have met with limited success due to the fact that the procedure for such pre-arbitral reference were not set in the rules[6] and the parties intending to invoke the pre-arbitral referee rules had to execute a separate and specific agreement.

The procedure for Emergency Arbitration varies slightly in that emergency arbitration procedures allow an "emergency arbitrator" to be appointed prior to the formation of the arbitral tribunal to order urgent interim measures[7], usually to address certain situations which require relief to prevent further harm to the Claimant. Often the relevant test for these situations is whether the measure sought could be ordered by the arbitral tribunal once constituted or whether the measure, if ordered by the arbitral tribunal once constituted, would come too late to prevent the harm[8]. Another important reason

[3] International Chamber of Commerce (ICC) Pre-Arbitral Referee Rules, 1990.
[4] Articles 808 and 809, Code de procedure civile (France).
[5] Gaillard & Pinsolle, The ICC Pre-Arbitral Referee: First Practical Experience, 20 *Arb. Int'l* 13 (2004).
[6] Jason Fry, The Emergency Arbitrator – Flawed Fashion or Sensible Solution, *Dispute Resolution International,* 179, 182 (2013).
[7] Nathalie Colin and Alexandre Hublet, 'Is it a violation of the arbitration clause for parties to seize national courts instead of emergency arbitrator when the institution rules include the latter in their rules?, in Dirk De Meulemeester, Maxime Berlingin, et al. (eds) Liber Amicorum CEPANI (1969 – 2019): 50 Years of Solutions, pp.63-78.
[8] W.L.Craig and L.Jaeger, The 2012 ICC Rules: Important changes and issues for future resolution, *The Paris Journal of International Arbitration* 15, 18 (2012); C.Aschauer, Use of the ICC Emergency Arbitrator to protect the arbitral proceedings, *23(2) ICC International Court of Arbitration Bulletin 5,10* (2012); B.De Bock, The emergency arbitrator in 2013 CEPANI Arbitration Rules, *b-Arbitra 67, 72* (2015).

for the development of provisions for Emergency Arbitrators by arbitral institutions is that under most legal systems and institutional rules, national courts are accorded concurrent jurisdiction to grant provisional measures[9].

The International Centre for Dispute Resolution (ICDR) introduced the term 'emergency arbitrator' and incorporated an optional set of rules for emergency measures in its International Arbitration Rules[10]. Soon thereafter, several other arbitral institutions such as the Arbitration Institute of the Stockholm Chamber of Commerce introduced Emergency Arbitration provisions in its Rules in the year 2010 and the Court of Arbitration at the International Chamber of Commerce introduced the same in 2012[11]. Parties can now opt-out of the emergency arbitral procedures of the relevant institution only upon an agreement between them[12].

EMERGENCY AWARDS IN INDIA AND THEIR ENFORCEMENT

The Arbitration and Conciliation Act, 1996 as enacted in India is an adaptation of the UNCITRAL Model Law. Although Indian arbitration law enables parties to obtain interim relief prior to commencement of arbitral proceedings[13], in order to obtain relief a party would be required to approach the Courts. However, the irony still remains that several arbitral institutions such as Mumbai Centre for International Arbitration (MCIA)[14], Delhi International Arbitration Centre (DIAC)[15] have provisions for a party to invoke emergency arbitral proceedings. In fact, the Madras High Court Arbitration Centre also provides for

[9] 'Chapter 17: Provisional Relief in International Arbitration', Gary B. Born, International Commercial Arbitration (Third Edition), pp. 2601 – 2758.
[10] International Centre for Dispute Resolution (ICDR) Rules, (2010), Art. 37.
[11] Eva Storskrubb, 'Chapter 8: Emergency Arbitration: A Maturing and Evolving Procedure' in Axel Calissendorff and Patrik Schöldström (eds), Stockholm Arbitration Yearbook 2020, Stockholm Arbitration Yearbook Series, Volume 2, pp.115 – 136.
[12] International Chamber of Commerce (ICC) Rules, Art.29 (6c); International Centre for Dispute Resolution (ICDR) Rules (2010), Art. 37(1).
[13] The Arbitration and Conciliation Act, 1996, § 9.
[14] MCIA Rules, Rule 14.
[15] The Delhi International Arbitration Centre (DIA) (Arbitration Proceedings) Rules, 2018, Rule 14.

emergency arbitration[16], despite there being no mechanism for recognition of awards made by emergency arbitrators under the Arbitration and Conciliation Act, 1996.

While emergency arbitrators and awards by emergency arbitrators are permissible under the various institutional rules in India, there exists no mechanism for the enforcement of the awards under the Arbitration and Conciliation Act, 1996. The definition for arbitral award[17] provided in the Act merely states that an arbitral award includes an interim award and there is no mention of emergency awards. Further clarity might be obtained by analysing difference between an 'interim award' and an 'emergency award' which would also throw some light into the enforcement of the said awards.

An interim award as differentiated from "provisional award" does not dispose finally of a particular claim (e.g., one of the several claims for damages arising from several alleged breaches of contract), but instead decides on a preliminary issue relevant to the disposing of such claims (e.g., choice of law, liability, construction of a particular provision) and in this sense an award is 'interim' because it is a step towards disposing of a portion of the parties' claim, but does not purport to make a final decision either granting or rejecting those claims[18]. However, provisional awards, on the other hand, are awards that are issued to protect a party from damage during the course of the arbitral process[19], as such provisional awards are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought from the tribunal having jurisdiction as to the substance of the case[20].

Since provisional awards do not definitely or finally dispose of either

[16] The Madras High Court Arbitration Centre (MHCAC) (Internal Management), Rules 2017, Rule
[17] The Arbitration and Conciliation Act, 1996, § 2 (1) (c).
[18] PT Perusahaan Gas Negara (Persero) TBK vs. CRW Joint Operation [2015] 4 SLR 364; Chapter 23: Form and Contents of International Arbitral Awards, in Gary B. Born, International Commercial Arbitration (Second Edition), p 3014.
[19] PT Perusahaan Gas Negara (Persero) TBK vs. CRW Joint Operation [2015] 4 SLR 364.
[20] Chapter 17: Provisional Relief in International Arbitration, in Gary B. Born, International Commercial Arbitration, 2nd Edition, p. 2427.

a preliminary issue or a claim in arbitration and examples of provisional awards include (a) maintaining the *status quo;* (b) preserving assets; (c) preserving evidence or providing for inspection of property (d) preventing aggravation of the parties' dispute; (e) ordering the provision of security for underlying claims; (f) ordering the provision of security for costs; and (g) ordering compliance with a confidentiality obligation[21].can be made in respect of those matters in which a final award can be made (i.e.,) it is an award which determines the rights or liabilities of the parties[22]. However, when it comes to an emergency award, there is no determination of rights or liabilities of the parties concerned. Emergency Awards are more provisional than normal interim relief[23]. Thus, it becomes abundantly clear that an interim award would be an award determining the rights and liabilities of parties or in other words where the issues are finally determined by the Arbitral Tribunal[24] and a final award can be understood in a number of ways such as being reference to an award which resolves a claim or matter in an arbitration with preclusive effect[25] and it varies vastly from an Emergency Award which is passed prior to constitution of the Arbitral Tribunal. An emergency award can also be modified during the course of arbitration[26], however in certain circumstances, granting provisional relief can be regarded as 'final' notwithstanding the fact that they will be superseded by subsequent relief, because they finally dispose of a particular request for relief[27] .

Further, unlike the interim measures which can also be ordered by Courts, emergency Awards are often issued in a time-bound manner with the appointment of the Emergency Arbitrator occurring often as

[21] PT Perusahaan Gas Negara (Persero) TBK vs. CRW Joint Operation [2015] 4 SLR 364.
[22] Deepak Mitra v. District Judge, Allahabad AIR 2000 All 9.
[23] Baruch Baigel, 'The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis' (2014) 31 (1) J Int'l Arb 1, 4.
[24] McDermott International Inc. vs. Burn Standard Co. Ltd., and others (2006) 11 SCC 181.
[25] PT Perusahaan Gas Negara (Persero) TBK vs. CRW Joint Operation [2015] 4 SLR 364.
[26] Rania Alnaber, Emergency Arbitration: Mere Innovation or Vast Improvement, *Arbitration International* Volume 35, Issue 4, December 2019, Pages 441-427.
[27] Chapter 23: Form and Contents of International Arbitral Awards, in Gary B.Born, Internatinal Commercial Arbitration, p. 3013.

short as one working day[28] and the emergency award within a period of fourteen days from the date of his appointment[29]. An evident disadvantage in attempting to obtain orders for interim measures from the Courts is often the problem of overburdened Court lists, with relief not being provided in a timely manner often defeats the purpose of urgent applications for interim measures. Recognizing this issue, the Law Commission of India had recommended that the Arbitration and Conciliation Act, 1996 recognise emergency arbitrators and emergency awards[30]. However, to date, no legislative amendment has been proposed to amend the Arbitration and Conciliation Act, 1996 to recognize Emergency Arbitrators.

STANDARDS FOR ISSUING EMERGENCY AWARDS

While emergency awards enable the parties to apply to the emergency arbitrator within the arbitral institution for urgent relief instead of resorting to courts[31], the question remains as to whether the principles for emergency applied by the Courts would also be applied by the Emergency Arbitrators. To invoke the powers of the Court under Section 9 of the Arbitration and Conciliation Act, 1996 in India, (i) there should be a dispute which has arisen with respect to the subject matter of the agreement and referrable to the dispute (ii) there has to be a manifest intention on the part of the applicant to take recourse to the arbitral proceedings at the time of filing application under this section and (iii) the application can be entertained before the court only if in a given case the subject-matter of the arbitration comes within the original civil jurisdiction of the Court, both pecuniary and territorial[32]. On the other hand, there are no set principles to be applied by emergency arbitrators in making a decision.[33] However, there are three possible guiding factors in

[28] MCIA Rules, Rule 14.2.
[29] *Ibid.*
[30] Law Commission of India, Report No.246.
[31] Rania Alnaber, Emergency Arbitration: Mere Innovation or Vast Improvement, *Arbitration International* Volume 35, Issue 4, December 2019, Pages 441-427.
[32] Harita Finance Ltd., vs. ATV Projects India Ltd., 2003 (2) Arb LR 376 (Mad).
[33] Gary B. Born, *International Commercial Arbitration,* Second Edition at 2458.

practice such as (i) *lex arbitri* (ii) the law governing the parties' underlying the contract (i.e.,) *lex causae* and (iii) international standards[34]. However, in addition to the above one other test to determine granting emergency award is that of irreparable harm ensuing unless urgent relief is granted. Although, economic hardship alone has not been sufficient grounds for irreparable harm[35] there have been instances where an emergency award has been granted despite an emphasis that the possibility of monetary damages not necessarily eliminating the possible need for interim measures[36]. Further, in the instance of emergency arbitrators which is a temporary role requiring a minimal involvement[37], it is necessary for the emergency arbitrators to ensure that interim measures do not assist a vexatious claim[38]. Although there is no necessity for the emergency arbitrator to consider the 'real prospect of success' in the arbitration proceeding, there have been instances where the emergency arbitrator has considered the same before granting an emergency award[39]. Nevertheless, these standards are only a guide[40] and even the institutional rules have not suggested principles, thus leaving significant flexibility for the emergency arbitrator to provide a relief[41].

PROGRESS TOWARDS RECOGNIZING EMERGENCY AWARDS

India isone of the signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ('New York Convention') which are now incorporated in its arbitration law[42]. However, neither the New York Convention nor the Arbitration and

[34] Gary B. Born, *International Commercial Arbitration,* Second Edition at 2451; Mika Savola, 'Interim Measures and Emergency Arbitrator Proceedings' (2016) 23 Croat Arbit Yearb 73, 74.
[35] Evrobalt LLC vs. The Republic of Moldova SCC EA Case No.2016/82.
[36] Kompozit LLC vs. The Republic of Moldova SCC EA 2016/95.
[37] Marc Goldstein, 'A Glance into History for the Emergency Arbitrator' (2017) 40 Fordham Int'l LJ 779, 780.
[38] *Ibid.*
[39] Rocky Mountain Biological vs. Microbix Biosystems (2013) 986 F Supp. 2d (United States District Court, Montana)
[40] Andrea Carlevaris and Jose Ferris, 'Running in the ICC Emergency Arbitrator Rules: The First Ten Cases' (2014) 25 (1) ICC Int'l Court Arb Bull 25,30.
[41] Marc Goldstein, 'A Glance into History for the Emergency Arbitrator' (2017) 40 Fordham Int'l LJ 779, 780.
[42] The Arbitration and Conciliation Act, 1996, Part II.

Conciliation Act, 1996 in India have enacted provisions for emergency arbitrators and enforcement of emergency awards.

Courts have often therefore interpreted arbitral awards[43] as not including an interlocutory order but only awards which finally determine the rights of the parties, i.e., one in which the arbitrator has already "considered" those matters and reflected his views in an award[44]. In addition, the New York Convention also provides several grounds for refusing to recognize or enforce an arbitral award, one being that the award is not binding or not final [45] Another interpretation of the New York Convention that stymies the enforcement of emergency awards in India is that it provides for the refusal of recognition and enforcement of the award if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.[46] Since it can be argued that the relief provided under the emergency award falls outside the scope of submission to arbitration the emergency award has hit a roadblock in India. This is due to the fact that emergency awards are most often to maintain the *status quo* pending an award and also the fact that the emergency awards are given prior to the constitution of the arbitral tribunal.

The Courts in India, until very recently did not recognize emergency arbitrators or emergency awards passed[47] due to the fact that the nomenclature of 'emergency arbitrator' or 'emergency award' does not exist in Arbitration and Conciliation Act, 1996. Until recent times, the Courts in India had adopted a hybrid approach[48] wherein the

[43] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article I (2).
[44] Resort Condominiums Int'l Inc. vs. Bolwell, Supreme Court of Queensland, 1993.
[45] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article V (1) (e).
[46] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article V (1) (c).
[47] Raffles Design International India Pvt. Ltd., & Anr. vs. Educomp Professional Education Limited & Ors. 2016 SCC Online Del 5521.
[48] Grant Hanessian and Alexandra Dosman, 'Songs of Innocence and Experience: Ten Years of Emergency

Courts provided orders for interim measures mirroring the emergency award[49].

Although this had been the practice, the Courts in India are increasingly reluctant to hold a view that emergency arbitrator is not a *coram non judice* and the consequential emergency award was not invalid on the ground that it lacks jurisdiction[50]. The judgment of the Hon'ble High Court of Delhi in *Future Retail Ltd., vs. Amazon.com Investment Holdings LLC* [51] takes it one step closer for the recognition of emergency awards, especially for International Commercial Arbitrations, because Part I of the Arbitration and Conciliation Act, 1996 does not be apply to International Commercial Arbitration.[52] Further, parties to the arbitration agreement can also choose to derogate from provisions such as application for interim measures from Court[53], if the parties so desire[54]. The decision of the Hon'ble High Court of Delhi in *Future Retail* is a significant shift from having to rely on the Courts for an order for interim measure, despite having obtained a similar emergency award[55] to observing that an emergency arbitrator is not a *coram non judice*[56].

LATENT ISSUES ARISING OUT OF FUTURE RETAIL LTD., VS. AMAZON.COM INVESTMENT HOLDINGS LLC:

Although it is a step in the right direction for the Hon'ble High Court of Delhi in recognizing emergency arbitrator, this observation meets with a latent issue that seems to have been overlooked, which is enforcement of emergency awards. The Hon'ble High Court of Delhi, dealt with the substantial issue of whether emergency arbitrator is a

Arbitration' (2016) 27 Am Rev Int'l Arb 215.
[49] Avitel Post Studioz Ltd., vs. HSBC PI Holdings (Mauritius) Ltd., 2014 SCC Online Bom 929.
[50] Future Retail Ltd., vs. Amazon.com Investment Holdings LLC 2020 SCC Online Del 1636.
[51] *Ibid*.
[52] Bharat Aluminum Company vs. Kaiser Aluminum Technical Services Inc. (2012) 9 SCC 552.
[53] The Arbitration and Conciliation Act, 1996, § 9.
[54] The Arbitration and Conciliation Act, 1996, § 2 (2).
[55] HSBC Pi Holdings (Mauritius) Limited vs. Avitel Post Studioz 2014 SCC Online Bom 102.
[56] Future Retail Ltd., vs. Amazon.com Investment Holdings LLC 2020 SCC Online Del 1636.

coram non judice[57], and prior to the above judgment, the Courts would indulge in mirroring the order of the emergency arbitrator when the party move for the same relief before the Courts. The problem that creeps with this 'mirroring' method is that it forces the successful party in the emergency arbitration proceeding to move the Courts under Arbitration and Conciliation Act, 1996[58]. So far, the reported judgments across the Courts in India, have shown consistency in allowing the same orders as that of the emergency arbitrator. However, that being said, due to the absence of recognition and enforcement of the emergency awards, parties would rather, it would seem, move the Courts which provides them the teeth for enforcement of such interim measures.

As mentioned *above*, prior to the order of the Hon'ble High Court of Delhi[59], the Courts in India, although not recognizing the orders of the Emergency Arbitrator, are mirroring such orders and granting interim relief under the Arbitration and Conciliation Act, 1996[60]. This did not pose a problem until the Hon'ble High Court of Delhi determined the Emergency Arbitration as *'not a coram non-judice'*. Such an observation, while laudable and a step in the right direction, currently operates in a void and provides no tangible remedy to the parties who invoke emergency arbitration proceedings. This is due to the fact that while the emergency awards may not be completely dismissed as being beyond the scope of the Arbitration and Conciliation Act, 1996, enforcing the same would be impossible, considering there is no legislative amendment recognizing the same. Considering the fact that the emergency awards are often necessary to protect the interests of the Claimant prior to the formation of the Arbitral Tribunal, an amendment to the Arbitration and Conciliation Act, 1996 is necessary to encourage arbitral proceedings. An appropriate amendment would also prevent unnecessary backlogs

[57] Future Retail Ltd., vs. Amazon.com Investment Holdings LLC 2020 SCC Online Del 1636.
[58] The Arbitration and Conciliation Act, 1996, § 9.
[59] Future Retail Ltd., vs. Amazon.com Investment Holdings LLC 2020 SCC Online Del 1636.
[60] The Arbitration and Conciliation Act, 1996, § 9; HSBC Pi Holdings (Mauritius) Limited vs. Avitel Post Studioz 2014 SCC Online Bom 102.

of applications of interim relief in Courts. Further, an amendment could also be another step in encouraging institutional arbitration by encouraging parties to make use of the emergency arbitral proceedings in the arbitral institutions in India.

FUTURE PROGRESS IN EMERGENCY ARBITRATION – *EX PARTE* PROCEEDINGS

While discussing *ex parte* relief in an Emergency Arbitration proceeding might seem like jumping the gun, it is however relevant to understand the progress of other jurisdictions on this front. It is surprising to note that grant of *ex parte* relief by an Emergency Arbitrator has been in practice countries such as New Zealand[61] when Singapore has often opted for a much more conservative approach in granting *ex parte* relief by Emergency Arbitrators and has only restricted granting such *ex parte* relief pending any hearing, telephone or video conference or written submissions by the parties[62]

While it may be a half-step solution, it is indeed a progress towards evolving *ex parte* proceedings in respect of Emergency Arbitration due to the fact that the unavailability of *ex parte* relief in Emergency Arbitrator proceedings is commonly identified as a shortcoming, since it is uncontroversial that, without the element of surprise, the purpose for which a party initiated Emergency Arbitrator proceedings may be frustrated[63].

CONCLUSION

While provisions for emergency arbitration are being incorporated in the rules of several arbitral institutions, enforcing the same still remains a challenge. The New York Convention does not spell out anything pertaining to the enforcement of emergency award,

[61] Arbitrators' and Mediators' Institute of New Zealand Arbitration Rules, Art.52.2.
[62] Singapore International Arbitration Centre (SIAC) Rules, 2016, Schedule I, para 8.
[63] Jasmine Sze Hui Low, Emergency Arbitration: Practical Consideration [2020], *Asian Dispute Review*, 109-114.

therefore barring recognition and enforcement of the same in jurisdictions which are signatories to the New York Convention. The hybrid manner adopted by the Courts in India is only an *ad hoc* solution, albeit one that suffers a legal void due to lack of statutory validation and recognition, with the fact that the Courts of law are hinting at recognizing emergency awards. In addition to the above, due to the absence of an international instrument in recognizing and enforcing emergency awards, it falls upon the shoulders of the respective national laws to bring about amendments to recognize the same. India can take a leaf out of the books of Singapore and Hong Kong and amend the definition of 'arbitral awards' to include emergency awards, until an international instrument is enacted to recognize emergency awards. That being said, the decision of the Hon'ble High Court of Delhi in holding that an emergency arbitrator is not a *coram non judice* is the first step for India to begin recognizing and enforcing emergency awards.

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THE "DUAL RAILWAY TRACK SYSTEM", "PRIMACY OF STATUTORY ADJUDICATION" PRINCIPLES OF STATUTORY ADJUDICATION - A COMPARATIVE STUDY[1]

S. Magintharan*

INTRODUCTION

In 1998, there was a formidable new entrant[2] into the world of alternative dispute resolution in construction disputes in the common law jurisdictions – statutory adjudication - with the United Kingdom Parliament's enactment of the Housing Grant, Construction and Regeneration Act 1998 ("HGCRA")[3] and the incorporation of the statutory dispute resolution mechanism of the Scheme for Construction Contracts (England and Wales) Regulations 1998[4] ("the "Scheme") in England and Wales into all construction contracts. The genesis of statutory adjudication is contractual adjudication provisions inserted into standard forms of contract as part of the

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[1] This article is an edited, updated version of the present author's detailed views expressed recently in: (a) *S. Magintharan, Recent Developments in Construction Adjudication in Singapore* [2020] 36 Issue 3 Const. LJ 219 ("S. *Magintharan, Recent Developments in Construction Adjudication in Singapore*") and (b) *S. Magintharan, The Derailment of the "Dual Railway Track System", "Primacy of Statutory Adjudication" Principles in Statutory Adjudication in Singapore – Shimizu Corporation v Stargood Construction Pte Ltd* [2020] Const. LJ Vol 36 Issue 6 459 (hereinafter referred to as "*S. Magintharan, "Derailment of "Dual Railway Track System*").

[2] See the recent English Supreme Court decision of *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020) UKSC 25 ("*Bresco*") per Lord Briggs at [13] approval and confirmation that statutory adjudication was "designed to be, and more importantly has proved to be, a mainstream dispute resolution mechanism in its own right, producing *de facto* final resolution of most of the disputes which are referred to an adjudicator".

[3] Amended by the Local Democracy, Economic, Development and Construction Act 2009 ("LDEDCA").

[4] Amended by the Scheme for Construction Contracts (England and Wales) Regulations 2011 (SI 2011/2333).

dispute avoidance/dispute resolution mechanisms in the course of the construction contracts.[5] However, there was a fundamental enhancement to the existing contractual alternative dispute resolution mechanism by statutory adjudication following Sir Michael Latham's recommendation[6] that "a system of adjudication should be introduced *with all the Standard Forms of Contract* (except where comparable arrangement already existed for mediation or conciliation) and that this should be *underpinned by legislation*..". This fundamental enhancement is a necessary aspect of statutory adjudication arising from Sir Michael Latham Report's recognition of: (a) the "mischief"[7] in the common law doctrine of freedom of contract in construction contracts which enabled onerous terms being incorporated into standard forms of contracts preventing and delaying the cash flow of downstream contractors who have carried out construction works; (b) the need for Parliament to intervene and legislate to restrict the common law doctrine of freedom of contract in favour of ensuring fairness and the downstream contractor's entitlement to prompt progress payments for construction work carried out and (c) the need for Parliament to introduce a low-cost and speedy dispute resolution mechanism that will enable a quick, temporary but legally enforceable decision in construction disputes.[8] The UK Parliament accepted Sir Michael Latham's Report, the Fair Contract Paper and enacted HGCRA with the significant objective to resolve the "cash flow" problems in the construction industry which was ensured by: (a) a statutory entitlement to progress payment for

[5] S. *Magintharan, "Derailment of "Dual Railway Track System*", *fn* 1 above 461 at fn 18; See *Andrew Burr, Chapters 1 & 2, International Contractual and Statutory Adjudication* [2017] ("ICSA") Informa Law from Routledge pp 1- 17, paragraphs 1.1-1.10, 2.1.

[6] Sir Michael Latham – Review of Procurement and Contractual Arrangement in the United Kingdom Construction Industry, published in July 1994, "Constructing the Team (HMSO, 1994), Chapter 9.14 – Recommendation 26.1-26.5 (with emphasis); see also the Department of Environment consultation paper – "Fair Construction Contracts", 1995; *S. Magintharan, "Derailment of "Dual Railway Track System" fn 1 above, page 461*.

[7] See *Rupert Morgan Building Services Ltd v Jervis* [2004] 1 W.L.R. 1868 per Jacob LJ referring to the mischief that s 111(1) of HGCRA was intended to resolve citing *Keating on Building Contract*, Latham Report – "main contractors were abusing their position to wrongfully withhold payment from subcontractors who were in no position to make any effective protest"; See S. Magintharan, "Derailment of 'Dual Railway Track system", *fn* 1 above page 461at *fn* 22.

[8] See *S. Magintharan, "Derailment of 'Dual Railway Track System", fn* 1 above page 461.

works carried out under a construction contract[9], (b) the introduction of a "speedy mechanism"[10] for settling construction disputes on a provisional interim basis and (c) "the decision of the adjudicators to be enforced pending the final determination of disputes" – thereby giving rise to the statutory adjudication as the formidable dispute resolution mechanism in construction disputes in the common law.[11] The wisdom of statutory adjudication was very quickly assimilated by the other common law jurisdictions including Australia[12], Singapore[13], Malaysia[14] and New Zealand[15], with each country enacting their own statutory adjudication regimes which, although based on HGCRA, have significant differences.

DUAL RAILWAY TRACK AND PRIMACY OF STATUTORY ADJUDICATION PRINCIPLES

Inherent in statutory adjudication are "two related but distinct fundamental principles" intended to reconcile the tension between the employer's freedom of contract (the right to make provisions for the withholding of payment due to the contractor for construction works carried out) and the contractor's statutory entitlement to progress payment for construction works carried out,

[9] Section 109(1) HGCRA (as amended).
[10] Sections 110 – 111 HGCRA.
[11] Section 111 (4) HGCRA. See *Macob Civil Engineering Limited v Morrison Construction Limited* [1999] All ER 143 as per Dyson J. See also *Carillion Construction Limited v Devonport Royal Dockyard Limited* [2005] 1358 per Chadwick LJ; *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited* [2000] BLR 522 at] per Buxton LJ; *C and B Scene Concept Design Limited v Isobars Limited* [2002] BLR 93; See S. *Magintharan, "Derailment of the 'Dual Railway Track System", fn 1* above page 462, fn 26 – 29.
[12] Building and Construction Industry Security of Payment Act 1999 (NSW), as amended; Building and Construction Industry Security of Payment Act 2002 (Victoria), as amended; Building and Construction Industry Payment Act 2004 (Queensland), as amended; Building and Construction Industry (Security of Payment Act 2009 (Australian Capital Territory), as amended; Building and Construction Industry Security of Payment Act 2009 (Tasmania), as amended; Building and Construction Industry Security of Payment Act 2009 (South Australia)- "East Coast Model" and Construction Contracts Act 2004 (Western Australia); Construction Contracts (Security of Payment) Act 2004 (Northern Territory) – "West Coast Model".
[13] Building and Construction Industry Security of Payment Act 2004, ("SOPA") as amended. Please refer to the detailed summary of the recent developments in statutory adjudication in *S. Magintharan, Recent Developments in Statutory Adjudication in Singapore*, *fn* 1 above cited as a "comprehensive review" of Singaporean case law: Construction Contracts and Adjudication, Webinar led by Sir Rupert Jackson at the Asthana International Financial Centre Court on 11 June 2020, para 4.5.
[14] Construction Industry Payment and Adjudication Act 2012 ("CIPAA").
[15] Construction Contracts Act 2002.

notwithstanding contrary contractual provisions. The principles are: (a) the "dual railway track system principle" where the Act (HGCRA) created a statutory system alongside any contractual regime and "(b) the "primacy of statutory adjudication principle", namely, where statutory adjudication (the Parliamentary legislation – HGCRA) has primacy over freedom of contract where there is a conflict".[16] These two fundamental principles in statutory adjudication had been recently reiterated and applied in the United Kingdom,[17] Australia[18] and Malaysia.[19] In Singapore however, these principles, which were entrenched in statutory adjudication *prior* to 2019[20], were "put to rest" in the trilogy of the Singapore Court of Appeal decisions of *Far East Square*,[21] *Shimizu Corporation* and recently reiterated and applied in *Orion-One Residential Pte Ltd*.

[16] *S. Magintharan, "Derailment of the 'Dual Railway Track System", fn* 1 above page 462.
[17] *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25 per Lord Briggs at [20], [59]. See also *Melville Dundas Ltd (in receivership) v George Wimpey UK Ltd* [2007] 1 W.L.R. 1136 per Lord Neuberger at [63] – [83], Lord Mance at [48]-[50 (in the minority). See also *Harding (trading as MJ Harding Contractors) v Paice* [2016] 1 W.L.R. 4068, CA; *Adam Architecture Ltd v Halsbury Homes Ltd* [2018] 1 W.L.R. 3739. See *S. Magintharan, Derailment of the "Dual Railway Track System", fn* 1 above, pages 461 – 464.
[18] *Maxon Construction Pty Ltd v Michael Christopher Vadaz* v [2018] HCA 5; *Beckhaus v Brewarrina Council* [2002] NSWSC 960 at [60] as per Macready A J (overturned on appeal in *Brewarrina Shire Council v Beckhaus Civil Pty Limited* [2002] NSWCA 4 on other grounds); applied *in Walter Construction Group Ltd v Cpl (Surry Hills) Pty Ltd* [2003] NSWSC 266 per Nicholas J at [52] – [53]; *Transgrid v Siemens & Anor* [2004] NSWSC 87 per Master Macready at [48]-[52]; *Minister for Commerce v Contrax Plumbing & Ors* [2004] NSWSC per McDougall J at [39] – [43]; John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd [2012] QCA 150; Lean Field Development Pty Ltd v E & I Global Solutions (Aust) Pty Ltd [2014] QSC. See *S. Magintharan, Derailment of the "Dual Railway Track System", fn* 1 above pages 464 – 469.
[19] *Ireka Engineering & Construction Sdn Bhd v PWC Corporation Sdn Bhd* [2020] 1 MLJ 311, FC; *Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd* [2020] 1 M.L.J. 174;[19] *Martego Sdn Bhd v Arkiteck Meor & Chew Sdn Bhd & Anor* [2018] 4 MLJ 496, FC; *Martego Sdn Bhd v Arkiteck Meor & Chew Sdn Bhd* [2018] 4 M.L.J. 496, CA (majority decision); *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] C.L.J. 728. See *S. Magintharan, Derailment of the "Dual Railway Track System"*, fn 1 above pages 469 – 471.See generally *S. Magintharan - Chapter 13, Malaysia: International Contractual and Statutory Adjudication* [2017] A Burr Edn, Informa law from Routledge ("ICSA"), pages 219 – 246.
[20] See *S. Magintharan, Derailment of the "Dual Railway Track System", fn* 1 above pages 471 – 478; See generally *S. Magintharan - Chapter 18, Singapore: ICSA, fn* 19 above, pages 284, fn 15; See *Tienru Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 S.L.R. 852, HC; *Cho Kum Peng v Tan Poh Eng* [2014] 1 S.L.R. 1210, HC; *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 S.L.R. 1382, HC; *Shinsung Construction Pte Ltd v Dian Fatt Construction Pte Ltd* [2013] OS No: 370 of 2013 (unreported), HC.
[21] *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 S.L.R. 189; *Shimizu Corporation v Stargood Construction Pte Ltd* [2020] 1 S.L.R. 1338 and *Orion-One Residential Pte Ltd v Dong Chen Construction Pte Ltd* [2020] SGCA 121 judgement delivered on 22 December 2020.

The purpose of this article is to consider the underlying nature and merits of the "dual railroad track system", and the "primacy of statutory adjudication" principles; the significant roles these two (2) fundamental principles play in the effectiveness of statutory adjudication as a dispute resolution mechanism, and to undertake a comparative study into the status of these fundamental principles in some of the common law jurisdictions,[22] which have adopted the "pay now, argue later" [23] dispute resolution mechanism in construction disputes.

THE UNITED KINGDOM[24]

The United Kingdom is the "mother" of statutory adjudication with Parliament's enactment of HGCRA. Fundamental to the effectiveness of HGCRA are the "dual railway track system" and "primacy of statutory adjudication" principles.

THE "DUAL RAILWAY TRACK SYSTEM" PRINCIPLE OF STATUTORY ADJUDICATION IN THE UNITED KINGDOM

The essential feature of statutory adjudication under HGCRA is the "dual" and distinct rights the parties to the construction contract have in seeking a speedy resolution to their construction disputes under the construction contract – namely, the contractual payment mechanism under the construction contract and the statutory Scheme under HGCRA. This duality is essential in order to preserve the parties' rights and ready access to the speedy statutory mechanism contained in the Scheme, as opposed to the "agreed" contractual certification process under the Standard Form which are less expedient and often deliberately skewed in favour of the owners/main contractors. It is also necessary to prevent parties from

[22] Namely, Australia, Malaysia, Singapore and the United Kingdom.
[23] The apt description of the desired objective of statutory adjudication by Ward LJ in *RJT Consulting Engineering Limited v DM Engineering (Northern Ireland) Limited* [2002] 1 WLR 2344 at [1] affirmed by May LJ in *Pegram Shopfitters Limited Tally Weiji (UK) Limited* [2002] 1 WLR 2082.
[24] See generally S*. Magintharan, Derailment of the "Dual Railway Track System", fn 1* above pages 461 – 464.

resorting to the "mischief" in utilizing the unruly freedom of contract doctrine [25] in subjecting the contractor to layers of certification processes with the intention (or otherwise) to delay essential cash flow to the party who had actually incurred costs and carried out construction works under the contract for the benefit of the "upstream" contracting party. In *Rupert Morgan Building Services Ltd*[26], Jacob LJ succinctly summarized the "mischief" which HGCRA was intended to resolve as follows:

> "14(e) *It is directed at the mischief which section 111 (1) was aimed at*. This mischief is mentioned in Keating on Building Contract. *A report called the Latham Report had identified a problem, namely, that "main contractors were abusing their position to wrongfully withholding payments from subcontractors who were in no position to make any effective protest*…"

In *Adam Architecture Ltd*[27] the claimant (a firm of architects) had made an adjudication application for construction works against a developer for works carried out *prior* to the termination of the contract. The respondent did not serve a pay less notice required under section 111 HGCRA but *inter alia*, argued that there was no monies due to the claimant because the contract was terminated, there was no "notified sum" under the contractual provision[28] and therefore there was no requirement for the developer to issue a pay less notice under section 111 HGCRA. The Court of Appeal, in allowing the claimant's appeal and the enforcement of the

[25] *S. Magintharan, ICSA, Chapter 18, Singapore, fn 19* above , paragraph 18.59.
[26] *Rupert Morgan Building Services Ltd v Jervis* [2004], fn 7 above at 1872 [14] (e) citing *Keating on Building Contract*.
[27] *Adam Architecture Ltd v Halsbury Homes Ltd* [2018] 1 WLR 3739 judgment delivered by Rupert Jackson LJ with whom Lindblom and Thirlwall LJJs agreed in allowing an appeal from the decision of the Edwards-Stuart J.
[28] Royal Institute of British Architects "Conditions of Appointment for an Architect" – Clauses 5.15 and 5.17. See *Adam Architecture Ltd*, fn 27 above, per Rupert Jackson LJ at [30], [32] succinctly summarizing the developer's argument in defence to an enforcement of the adjudicator's determination and Edwards-Stuart J's judgment on not enforcing the adjudicator's determination on *inter alia* the ground that the developer was not contractually required to serve a pay less notice.

adjudication determination, held *inter alia*, that (a) HGCRA applied to both interim payment and final payments [29] and (b) that upon termination of the contract the claimant "had the benefit of the statutory payment regime" [30] for works carried out *prior* to the termination of the contract, even though the claimant had accepted the developer's wrongful repudiation and terminated the contract.

In the recent seminal decision of the UK Supreme Court in *Bresco Electrical Services Ltd (In Liquidation)*[31], Lord Briggs emphatically reiterated the "dual track" nature and right of the contracting party (including the party in insolvency) to the statutory dispute mechanism as the "starting point" under HGCRA as follows:

> 20. First, construction adjudication is semi compulsory. That is the parties are not required to adjudicate every dispute. *Rather each party is given a statutory and contractual right to require an adjudication of any dispute, including difference, which may arise under a construction contract, and to do so at any time, even after the contract has been fully performed or come to an end, whether by effluxion of time or discharge, including discharge by breach*….
>
> ……
>
> "59. *The starting point*, once it is appreciated that there is jurisdiction under section 108 in such circumstances, is that the insolvent company *has both a statutory and a contractual right to pursue adjudication as a means of achieving resolution of any dispute arising under a construction contract to which it is a party*, even though that the dispute relates to a claim which is

[29] *Adam Architecture Ltd, fn 27* above [42] – [65] applying *Rupert Morgan Building Services (LLc) v Jervis* [[2004] 1 WLR 1867 and *Harding (trading as M J Harding Contractors) v Paice* [2016] 1 WLR 4068.

[30] *Adam Architecture Ltd, fn 27* above [71] & [72]. Importantly, see the confirmation of the "dual track" principle in the recent UK Supreme Court decision of *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, at [20], [59], per Lord Briggs.

[31] *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, the unanimous decision delivered by Lord Briggs on 17 June 2020 with whom Lord Reed, Lord Kitchin, Lord Hamblen and Lord Leggatt concurred. See the erudite discussion of *Bresco Electrical Services Ltd, fn 2* above, in its journey from the High Court to the Supreme Court and the effect of insolvency in statutory adjudication under HGCRA by Peter Sherridan, *Insolvency and Adjudication: Liquidation* [2020] 36 (6) Constr. L J 501.

affected by insolvency set-off. *It follows that it would ordinarily be entirely inappropriate for the court to interfere with the exercise of that statutory and contractual right*…." (emphasis added).

THE "PRIMACY OF STATUTORY ADJUDICATION" IN UNITED KINGDOM[32]

Intertwined with but distinct from the principle of the "dual railway track" principle is another essential and necessary principle in statutory adjudication – the primacy of statutory adjudication, namely, when there is a conflict between the contractual provision and the scheme, the statutory scheme must prevail. The "primacy of statutory adjudication" principle is the practical and essential tool to prevent the "mischief" of abuse which was the problem identified by the Latham Report[33], to reconcile the tension between the abuse of the freedom of contract and to enable the downstream contractor to invoke the speedy statutory mechanism to resolve the "cash flow" of the contractor.

In *Melville Dundas Ltd*[34]*,* Lord Neuberger and Lord Mance (in the minority of the House) recognized the tension between the common law doctrine of freedom of contract (and law on insolvency) and the HGCRA in their holding that insofar as the contractual provision were

[32] *S. Magintharan, Derailment of "Dual Railway Track System", fn* 1 above, pages 462 & 463.
[33] *Rupert Morgan, fn 7* above per Jacob LJ at [14(e)].
[34] *Melville Dundas Ltd (in receivership) and others v George Wimpey UK Ltd and another* [2007] 1 WLR 1136, HL (hereinafter referred to as "*Melville Dundas Ltd*") Lords Hoffman, Lord Hope and Lord Walker in the majority interpreting the contractual term which preserved the employer's common right of automatic set off in insolvency as not being inconsistent with the contractor's right to his payment under section 111 HGCRA which were due prior to the insolvency. Lord Mance and Lord Neuberger (in the minority) held that such contractual provision were "ineffective". It has to be noted that that UK Parliament remedied and, it is submitted, reinforced the minority decision by carving out the common law automatic set-off in insolvency doctrine by way of the express exception- inter alia "where – (a) the contract provides that, if the payee becomes insolvent the payer need not pay any sum due in respect of payment and (b) the payee has become insolvent after the prescribed period …" - under section 111(10) introduced in the amendment of HGCRA brought about by section 142 to 144 of the Local Democracy, Economic Development and Construction Act 2009 (hereinafter referred to as "LDEDCA"). See *Adam Architecture Ltd v Halsbury Homes Ltd* [2018 1 WLR 3739 per Rupert Jackson LJ at [54] – [61] explaining that section 111(10) as amended by LDEDCA "specifically addresses the problem which arises on insolvency, as identified by the House of Lords in the *Melville Dundas Case*".

inconsistent with HGCRA, they were "ineffective". Lord Neuberger held as follows[35]:

> "63. As I see it, the respondent's case is simple……*Accordingly, in so far as clause 27.6.5.1 has the effect of permitting the appellant to withhold payment of the sum, it is purporting to permit that which section 111 (1) prohibits. Therefore, to that extent, it is ineffective. That simple approach commended itself to the Inner House*.
> 64. *It is also an approach that commends itself to me*, at least as a matter of simple statutory interpretation. *On the face of it at any rate, if a statute provides that a person "may not withhold payment" after a specified date has passed, it appears to me that a contractual provision that he may do so must be ineffective*…" (emphasis added)

In *Macob Civil Engineering Ltd*[36], Dyson J was confronted with an application to set aside an adjudication application *inter alia*, on the ground that the adjudicator had no jurisdiction to adjudicate the dispute because the construction contract specifically provided that all disputes were to be referred to arbitration and hence, the party was precluded by the contractual provision and the adjudicator had no jurisdiction to adjudicate the matter under HGCRA. Dyson J rejected such an argument and declared *inter alia* that "the defendant was required by the decision to pay the sum identified by the adjudicator forthwith in accordance with the Scheme, and is now in default" and hence reinforced primacy of the statutory adjudication

[35] *Melville Dundas Ltd, fn 33* above, Lord Neuberger at [63], [64] and at [67] – [69], [76-[83] rejecting the argument by Akenhead QC [as he then was] that, *inter alia*, the doctrine of freedom of contract entitled the employer to include contractual provisions in the construction contract to withhold payment due to contractor for construction works carried out after Termination/insolvency. See Lord Mance at [48] – [50], with Lord Neuberger concurring. See also *Reinwood Ltd v Brown & Sons Ltd* [2008] 1 WLR 696 per Lord Walker at [16} – "16……*Within limits permitted by sections 109 to 111 the parties to a written building contract are free to agree the content of the basic provisions which must be included in the contract*; but so far as they omit to do so, *the Scheme fills the gap*…"(emphasis added). See also *Harding (trading as M J Harding Contractors) v Paice* [2016] 1 WLR 4068, CA where the Court dismissed the employer's application to restrain the contractor from proceeding with adjudication under the HGCRA on the ground, *inter alia*, that the contractor was precluded from doing so after the termination of the contract.

[36] *Macob Civil Engineering Ltd v Morrison Construction Ltd [*1999] EWHC 254 (TCC), the first adjudication case under the HGCRA to come before the English High Court, per Dyson J (as His Honour then was).

principle.

In *Rupert Morgan Building Services* (LLC)[37], the English Court of Appeal was confronted with an appeal to set aside an adjudicator's determination on, *inter alia*, the ground that there is "no monies due" under the contractual interim certification process and therefore there was NO "need for a withholding notice" mandated under section 111 (1) HGCRA. Jacob LJ[38] rejected the argument, emphasizing that "The fundamental thing to understand is that section 111 (1) is a provision about cash-flow. It is not a provision which seeks to make any certificate, interim or final, conclusive", and reinforced that the purpose of HGCRA was to prevent the "mischief" of main contractors "abusing their position to wrongfully withhold payment from the subcontractors who were in no position to make any effective protest" and the primacy of statutory adjudication mandatory requirement regardless of the parties' contractual provisions.

AUSTRALIA[39]

The New South Wales ("NSW") Parliament was the first other common law jurisdiction to accept the wisdom and importance of remedying the injustice in the construction industry, restricting the parties' common law freedom of contract, and recognizing the need to ensure progress payment due to the contractors who had undertaken construction works.[40] In essence, the NSW Parliament assimilated the recommendations of Sir Michael Latham and the radical reforms brought about by HGCRA, and enacted a detailed framework in their primary legislation in *Building and Construction Industry Security of Payment Act 1999*.[41]

[37] *Rupert Morgan Building Services (LLC) Ltd, fn 7 above*.
[38] *Rupert Morgan, fn 7* above at [11] – [16], with whom Schiemann, Sedley LLJ agreed applying the dicta and analysis of Sheriff Taylor in the Scottish case of *Clark Contracts Ltd v The Burrell & Co (Construction Management) Ltd* [2002] SLT (Sh Ct) 103, 105.
[39] *S. Magintharan, Derailment of the "Dual Railway Track System", fn* 1 above at pages 464 – 469.
[40] See generally, Samer Skaik, Chapter 3 [Australia: East Coast Model (NSW)], *ICSA, fn 5* above 34 – 71 paragraphs 3.1 – 3.93.
[41] Building and Construction Industry Security of Payment Act (No 46) 1999 as amended in 2002, 2016 and 2018, hereinafter referred to as "SOPA [NSW]". It has to be noted that there is a fundamental difference

THE DUAL RAILWAY TRACK SYSTEM PRINCIPLE IN AUSTRALIA

The dual railway track principle is expressly provided in section 32 SOPA [NSW] which provides as follows:

> "32 Effect of Part on civil proceedings
> (1) *Subject to section 34, nothing in this Part affects any rights that a party to a construction contract: (a) may have under the contract, or (b) may have under Part 2 in respect of the contract, or (c) may have apart from this Act in respect of anything done or omitted to be done under the contract*…

In *John Holland v RTA*[42] McDougall J interpreted section 32 SOPA [NSW] to "reinforce the interim nature of adjudication determination, *and to provide that parties' legal rights (as decided by a court or tribunal) are given full effect notwithstanding what may have been determined by an adjudicator and what may have been done in pursuance of, or obedience to, that determination*" (emphasis added) and reiterated the "dual railroad track system" which preserved the parties' final contractual rights under the contract.

In Australia, the Courts established the "dual railroad track system"[43]

between the objective and purpose of HGCRA and SOPA [NSW], namely that unlike HGCRA (section 110) which provides for a "adequate mechanism" for determining of all disputes arising "under the contract", the SOPA [NSW] mechanism (as in Singapore's SOPA) relates only to the contractor's entitlement to progress payment. It has to be noted that in *Jemzone v Trytan* [2002] *NSWSC 395 at [37]* Austin J interpreted SOPA [NSW] to be only applicable to "interim progress payment" and not final payment. This decision was subsequently corrected by the Building and Construction Industry Security of Payment (Amendment) Act 2002 which defined a progress payment to include a final payment. In England HGCRA has been interpreted to include both interim and final payments; See *Melville Dundas, fn 30* above, as per Lord Neuberger at [76]-[77]; *Rupert Morgan Building Services (llc) Ltd v Jervis* [2004] 1 WLR 1867, CA as per Jacob LJ at [51] approved and applied in *Adam Architecture Ltd v Halsbury Home Ltd* [2018] 1 WLR 3739. See also *Tiong Seng Contractors (Pte) Limited v Chuan Lim Construction Pte Limited* [2007] 4 SLR 364 [27], HC, approved in *Lee Wee Lick v Chua Say Eng &Anor* [2013] 1 SLR 401 , CA at [95].

[42] *John Holland v RTA* [2006] NSWSC 874 at [33] affirmed by the NSWCA in *John Holland v RTA* [2007] NSWCA 140.

[43] See Samer Skaik, Chapter 4, Australia: East Coast, *ICSA fn* 5 above page 47 para 3.35.

under the SOPA [NSW] where "The NSW Act provides for a statutory right to progress payments, alongside the existing contractual right, through a speedy and strict statutory procedure" – in grappling with the tension between the doctrine of the freedom of contract, the contractor's statutory entitlement to progress payment under the SOPA and the effect of section 34 SOPA [NSW]. In this regard, McDougall J, extra judicially, aptly opined as follows:[44]

> "***Regardless of the Act's apparent attempts to preserve contractual freedoms***, *I suggest that s 34 is a bulwark against provisions attempting to eradicate or limit the right established by the Act.* ***The section, as amended, may be seem to have transformed the Act from a legislative scheme providing default mechanisms to one which establishes a strong entitlement to a prompt, interim progress payment***. It may be that s 34 will also have an impact on rights outside the Act, in that its avoiding effect may be permanent, and for all purposes". (emphasis added).

In *Beckhaus v Brewarrina Council*[45]*,* Macready AJ considered the employer's contention that the contractor's right to issue a payment claim did not arise under the contractual provisions (the Superintendent did not issue a payment certificate required under the contract for progress payment) and therefore the contractor was not entitled to commence an application for adjudication under SOPA (NSW). Macready AJ rejected the argument and held, after considering all the relevant SOPA [NSW] provisions,[46] that the contractor's progress claim under the contract gave rise to two (2) separate situations: (a) a contractual right under the contractual

[44] *McDougall J R (2006) Prohibition On Contracting Out Of the Building and Construction Industry Security of Payment Act 1999* (NSW) (2006) NSWJ School 6. See also Samer Skaik, Chapter 4 Australia: East Coast, *ICSA* fn 5 above, page 56 para 3.57.

[45] *Beckhaus v Brewarrina Council,* fn 18 above.

[46] Sections 3 (1), 3(4) (a) SOPA [NSW] (contractors statutory entitlement to progress payment for construction works carried out under the contract), 8 [statutory entitlement to progress payment], section 11 (when the progress payments becomes due and payable under the contract/SOPA [NSW], section 13 (the contractor's right to serve a payment claim), section 14 (the respondent's duty to issue a payment schedule) and section 34 (no contracting out).

mechanism for progress payment when it is certified by the Superintendent; and/or (b) a statutory right to his entitlement for progress payment under sections 8, 13 SOPA [NSW]. His Honour held as follows:

> "55. *Thus, in the present circumstances as the contract has the relevant provisions a contractor is entitled under s 8 to a statutory "progress payment" under the Act on the date the progress claim may be made under the contract. Such a statutory progress payment becomes due and payable under s 11 on the date when the contractual payment become due and payable*….
>
> 56. *The rights that flow from the entitlement to a statutory progress payment are set out in Part 3 Division 1 which commences with s 13*[47] …
> ……
>
> 60. *The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payment when the contract is silent and gives remedies for non-payment. One thing that the Act does not do is affect the parties' existing contractual rights. See ss 3(1), 3 (4) (a) and 32. The parties cannot contract out of the Act (see s 34) and thus, the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual* …
> ……
>
> 61. *The trigger that commences the process that leads to the statutory right is s 15(2) is the service of the claim under s. 13*…..
> ……
>
> 65. *<u>As under 42.1 the plaintiff is entitled to progress payment there is no reason why he cannot make the statutory claim</u>*

[47] Service of a payment claim under section 13 SOPA [NSW].

> *at the same time as his contractual claim. The statutory claim must comply with Section 13 (2)*…
>
> 66. *The fact that statutory claim can be made at the same time as the contractual claim lends itself to the claims being made in the one document*. Provided it is made clear in the document that this is the case then there can could be no objection to this course……..” (emphasis added).

In *Walter Construction Group Ltd*[48], Nicholas J considered a similar argument, *inter alia*, that the payment claim was premature because the contract required the Superintendent’s certificate before the payment was due and as such the contractor was not entitled to make a statutory claim for adjudication under SOPA [NSW]. Nicholas J rejected the argument, reinforced the “dual railway track” system, and held[49] that “In my opinion, therefore, the Defendant’s submission that a claimant’s entitlement to the amount claimed must be established under the contract before a person is entitled to make or serve a payment claim under s 13 (1) of the Act is unsound”.

In *Transgrid v Siemens and Anor*[50] Master Macready considered, *inter alia*, the argument whether the adjudicator under the SOPA [NSW] was acting within his jurisdiction in reviewing the certificate issued by the Superintendent under the contract. His Honour, in dismissing the application to set aside the adjudicator’s determination referred to the “dual railroad track system”[51] and concluded as follows:

> “50. *Given that there is a parallel system as I have described*, it is plain that the parties to a construction contract which has complex procedures for certification, valuation or other mechanisms for determining a progress payment by a

[48] *Walter Construction Group Ltd v Cpl (Surry Hills) Pty Ltd [2002], fn* 18 above [52] – [53].
[49] *Walter Construction, fn* 18 above, at [55].
[50] *Transgrid v Siemens & Anor* [2004] NSWSC 87, fn 18 above, per Master Macready at [48] – [50]
[51] *Transgrid, fn* 18 above [56] applying his previous decision of *Beckhuas v Brewarrina Shire Council, fn* 18 above, as approved by Nicholas J n *Walter Construction, fn* 18 above. See also *Leighton Contractors Pty Limited v Campbelltown Catholic Club Limited* [2003] NSWSC 1103 per Einstein J at [55] – [77] approving the “dual system” approach; *Abacus v Davenport [*2003] NSWSC 1027 per McDougall J at [30]-[40] also approving the dual system approach; *Fyntray Construction Pty Ltd v Macind Drainage & Hydraulic Services Pte Ltd* [2002] NSWCA at [74]-[75].

superintendent or other certifier *will of necessity involve the parties in having to pursue the contractual route*. *Failure to do so would normally produce default results which would have severe ramifications on the parties' contractual entitlement to payments.*

51. *In these circumstances where there is a need, because of the contractual entitlement, to engage in a process which involves a determination of the contractual entitlement to a progress payment it seems strange that that whole process could be opened up again under the statutory regime*…" - (emphasis added).

THE PRIMACY OF STATUTORY ADJUDICATION IN AUSTRALIA

In Australia (SOPA [NSW]), the primacy of statutory adjudication is set out in section 34 SOPA [NSW] in the following emphatic terms:

"**34. No contracting out**

(1) *The provisions of this Act have effect despite any provision to the contrary in any contract*.

(2) A provision of ***any agreement (whether in writing or not)***—

(a) under which *the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or*
(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act, is void." (emphasis added).

In *Chase Oyster*[52], McDougall J succinctly summarised the primacy of the SOPA [NSW] over the parties' freedom to include terms in the construction contract:

[52] *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 at [110].

> "*The SOP Act seeks to ensure, among other things, that those who perform construction work pursuant to construction contracts have enforceable rights to progress payments.* The statutory mechanisms for achieving that aim include a number of elements. *There is a statutory right to progress payments despite any contractual provision to the contrary*. In the event of disagreement, there is a statutory mechanism, called adjudication, for the interim determination of entitlements to progress payments". (emphasis added)

In *Minister for Commerce*[53], McDougall J considered and applied the "dual railroad track system", and the "primacy of statutory adjudication principle" in his consideration of an application to set aside the adjudication determination on, *inter alia*, the jurisdictional ground that the contractor had no right to commence the application for a claim beyond the contractual price when the contract contained an express stipulation that the contractor's claim was limited only to the contract price. His Honour held that the contractual term was invalid under section 34 SOPA [NW] as it amounted to preventing the contractor from exercising his statutory right to progress payment under section 8 SOPA [NSW]. His Honour held as follows:[54]

> "43. In my judgment, it *is plain that the relevant contractual provisions exclude, modify or restrict the operation of the Act*. They do so because, if relied upon, they defer the entitlement given by s 8(1) of the Act to be paid from a reference date for construction works carried out prior to that reference date." (emphasis added).

[53] *Minster for Commerce v Contrax Plumbing & Ors* [2004] NSWSC 823, fn 18 above affirmed on appeal in *Minister for Commerce (formerly Public Works & Services) v Contrax Plumbing (NSW) Pty Ltd & Ors* [2005] NSWCA 142. *Contra John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707 at [69] - [80 wherein McDougall J applying a balancing of the contractual rights and the contactor's statutory entitled to progress payment under the statutory adjudication, albeit accepting that "it is necessary to pay due regard to the objects and policy underlying the Act" but s. 34 SOP[NSW] does not require "the court to strain to find that a provision of a contract offends the Act" held at [82] that the objected clause did not purport to prevent the contractor from applying for the statutory right but merely identified what the contractor was entitled under the contract to make a claim under SOP [NSW].

[54] *Minister for Commerce*, *fn* 18 above at [43].

Similarly, in *John Holland Pty Ltd v Coastal Dredging & Construction Pty Limited*[55], the Queensland Court of Appeal gave primacy to statutory adjudication [SOPA[56] (Qld)] by holding that a contractual term in the contract which *inter alia* precluded a contractor from issuing his payment claim unless it complied with contractual conditions, amounted to "contracting out" of the SOPA (Qld) and hence was "void" under section 99 (2) SOPA (Qld).[57]

In the recent Australian High Court decision of *Maxcon Constructions Pty Ltd*[58], the court upheld the primacy of the SOPA [Southern Australia][59] in holding that the express contractual term in the sub-contract[60] which precluded the contractor's right to the release of the retention monies subject to the Certificate of Occupancy ("CFO") to be issued under the "head contract" [Main contract], amounted to a "pay when paid" clause and therefore was void under section 12(2)

[55] *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd* [2012] QCA 150.

[56] Building and Construction Industry Payments Act 2004 section 99 (2) which was *pari materia* to section 34 SOP [NSW].

[57] See also *Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd & Anor* [2014] QSC 292, per Applegarth J where the NSW Supreme Court *inter alia* held at [74] – [76], [80] –[91] that a contractual provision which required a draft claim for payment to be delivered on a certain date before a payment claim could be delivered under the contract, was void under section 99 SOPA [Qld] because it amounted to contracting out of SOPA (Qld).

[58] *Maxcon Construction Pty Ltd v Michael Christopher Vadasz (trading as Australasian Piling Company) & Ors* [2018] HCA 5 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordan and Edelman JJ) heard together with *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd & Ors* [2018] HCA 4. See *S. Magintharan, Unravelling the Quagmire of Setting Aside Adjudication Determination on the Grounds of Jurisdictional Errors and Non-jurisdictional Errors on the Face of the Record – Shade System and Maxcon* [2018] Vol 34 Issue No: 5 Const. LJ 329 . *Contra* the earlier decision of the Australian High Court in *Southern Han Breakfast Point Pty Ltd (In Liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52 (Kiefel CJ, Bell, Gageler, Keane and Gordan JJ) wherein the High Court held that contractor was not entitled to invoke the statutory adjudication and claim progress payment for works carried out *after* the contract was terminated when there was a contractual term which precluded further payments until final certification because, *inter alia*, such claim were not in compliance of the mandatory section 13 (1) the SOPA [NSW] for there can be no "reference date" after the termination of contract. With respect, it is submitted, that the decision of *Southern Han Breakfast Point Pty Ltd*, fn 58 above should be restricted to its facts for the contractor was not seeking to make a claim for the accrued works *prior* to the termination of the contractor by the employer but was seeking to make a "rolled-up" claim for progress payment with a reference period beyond the termination when it was not possible for the contractor to have undertaken any construction work.

[59] Section 12 *Building and Construction Industry Security of Payment Act 2009* [Southern Australia], hereinafter referred to as "SOP [SA]".

[60] *Maxcon Construction, fn* 18 above at [16] – [26] applying a purposive and objective interpretation of section 12 of SOP [SA] rather than a "balancing of interests" expounded by McDougall J in *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707 at [78].

(c) of SOPA [SA].

MALAYSIA[61]

Statutory adjudication was inducted into Malaysian law with the Malaysian Parliament enacting the Construction Industry Payment and Adjudication Act ("CIPAA") 2012.[62] The dual system[63] and primacy of statutory adjudication are entrenched under CIPAA.

THE DUAL RAILWAY TRACK OF STATUTORY ADJUDICATION IN MALAYSIA

In *Bina Puri Construction Sdn Bhd*[64]the Malaysian High Court was confronted with the argument, in an application to set aside the adjudication determination, that the adjudicator had acted *ultra vires* because the claimant had commenced an adjudication prematurely when the payment was not due under the contractual provision, for there was no interim certification issued and hence no payment due to the contractors for works carried out. Ravintharan J rejected such a contention, emphatically upheld the principles of the "dual system" and primacy of statutory adjudication (CIPAA) and held that "s. 5 does not require the existence of certified progress or interim claim before a Payment Claim can be issued".

In *Martego Sdn Bhd*[65], the Malaysian Court of Appeal was

[61] *S. Magintharan, The Derailment of the of the "Dual Railway Track System"*, fn 1 above pages 469 – 471.
[62] *Construction Industry Payment and Adjudication Act 2012* which came into effect on 15 April 2014. See generally, *S. Magintharan, Malaysia, Chapter 13, ICSA, fn 5* pages 219 – 246. See also *A. Burr & S. Magintharan, Malaysia: Construction Industry Payment and Adjudication Act 2012* (2016) Vol 32 (7) Constr.LJ 699. In essence CIPAA also assimilates the Latham Recommendations of into Malaysia. However, CIPAA is akin to the HGCRA rather than the SOPA [NSW], SOPA [S} for it entitles the contractor to raise *any* dispute, although primarily intended to apply to payment disputes, under the construction contract for adjudication and is not limited to only progress claim disputes (as in the case of SOPA [NSW] & SOPA [S]).
[63] See *S. Magintharan, Malaysia, Chapter 13, fn* 5 above, page 240 paragraph 13.33. See also *A. Burr & S. Magintharan, Malaysia: Construction Industry Payment and Adjudication Act 2012*, fn 62 above.
[64] *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sn Bhd* [2015] MJJU 941; [2015] 8 CLJ 728, per R. Ravinthran J at pages 34 & 35.
[65] *Martego Sdn Bhd v Arkiteck Meor & Chew Sdn Bhd & Anor* [2018] 4 MLJ 496, the majority decision of David Wong, Umi Kalthum JJCA with Hamid Sultan JCA dissenting.

concerned, *inter alia*, with arguments that CIPAA did not apply to an Architect's consultancy agreement for a construction project; that CIPAA applied only to interim payments and the contactor had no right to make a claim under CIPAA when the construction contract had been terminated. The majority of the Court of Appeal rejected the said arguments and held *inter alia* (a) that CIPAA applied[66] to an Architect's consultancy contract for a construction project (b) that CIPAA applied to both interim and final claims,[67] and (c) that under section 4 CIPAA the contractor who had carried out works was entitled to progress payment *prior* to the termination and therefore entitled to invoke the CIPAA.[68]

The decision of the majority of the Malaysian Court of Appeal (and the High Court) in *Martego Sdn Bhd*[69] was recently affirmed by Malaysia's Federal Court in *Martego Sdn Bhd (FC)*[70]*.*The Federal Court reiterated that CIPAA should be read purposively[71]; the "mischief" that CIPAA was intended to resolve was "to alleviate cash flow issue"[72]; that a purposive interpretation of CIPAA will require the conclusion that CIPAA was intended to apply to both interim and final payment as long as it was a claim for "works carried" out under the construction contract[73]; and importantly, that under sections 4 & 5 CIPAA the contractor had the statutory right to commence statutory adjudication for "unpaid payments" for works carried out *prior* to the

[66] *Martego Sdn Bhd, fn* 65 above by the majority at [14] - [18] with the minority Hamid Sultan JCA at [74] interpreting CIPAA be not applicable to a consultancy contract for a construction project.
[67] *Martego Sdn Bhd, fn* 65 above by majority a [36] – [54] with the minority Hamid Sultan JCA at [75] – [82] reasoning that CIPAA only applied to interim payments.
[68] *Martego Sdn Bhd, fn* 65 above, majority at [44].
[69] *Martego Sdn Bhd*, fn 65, above.
[70] *Martego Sdn Bhd v Arkiteck Meor & Cheow Sdn Bhd & Anor* [2020] 6 MLJ 224, unanimous judgment delivered by Zawawi Salleh FCJ, "*Martego Sdn Bhd(FC)*".
[71] *Martego Sdn Bhd (FC), fn* 70 above, [27] – [68].
[72] *Martego Sdn Bhd (FC), fn* 70 above [55].
[73] *Martego Sdn Bhd (FC), fn* 70 above [55]- [72] – applying the purposive interpretation of the SOPA (S) by the Singapore Courts in *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Ptd Ltd* [2007] 4 SLR 364 at [25]-[28; applied by the Singapore Court of Appeal in *Lee Wee Lick Terrence v Chua Say Eng* [2013] 1 SLR 401 at [46]; *Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2016] 1 SLR 481 at [46] and distinguishing and not applying the Australian Case of *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106, SC per Vickery J.

termination of the construction contract.[74] The Federal Court in *Martego Sdn Bhd (FC)* therefore reinforced the "dual track system" and the contractor's right to invoke the separate payment dispute resolution mechanism provided by CIPAA regardless of the contractor's contractual rights or obligations under the construction contract.

THE PRIMACY OF STATUTORY ADJUDICATION IN MALAYSIA[75]

In Malaysia, as in the case of the UK Supreme Court in *Melville Dundas*[76], the Federal Court of Malaysia grappled with the tension between the parties' freedom of contract and the primacy of statutory adjudication (CIPAA) in the two (2) recent appeals heard "back to back" – *Ireka Engineering & Construction Sdn Bhd*[77] *and Jack-In Pile (M) Sdn Bhd*[78]*.*

In *Ireka Engineering & Construction* the Federal Court considered, *inter alia*, the significant conflicting decisions of the Malaysian Court of Appeal[79] on whether the CIPAA was prospective or retrospective in affecting the parties' freedom of contract. The Federal Court was concerned with an express stipulation in a contract entered into *prior*

[74] *Martego Sdn Bhd (FC), fn* 70 above [58] – [61]
[75] S. Magintharan, The Derailment of the "Dual Railway Track System", fn 1 above, pages 470 & 471.
[76] *Melville Dundas, fn* 34 above.
[77] *Ireka Engineering & Construction Sdn Bhd v PWC Corporation Sdn Bhd* [2020] 1 MLJ 311 judgment delivered on 16 October 2019 by Idrus Harun FCJ, with whom Ahmad Maarop PCA, Azahar Bin Mohamed, Alizatul Khair Osman Khairudden FCJJs, agreed.
[78] *Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd & Anor* [2020] 1 MLJ 174 judgment delivered also on 16 October 2019 by Idrus Harun FCJ and the same coram as in *Ireka Engineering & Construction Sdn Bhd, fn* 77 above, on substantially the same grounds.
[79] *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor, CA* (unreported) upholding the decision of the High Court in *UDA Holding Bhd v Bisraya Construction Sdn Bhd & Anor* [2015] 11 MLJ 499, HC which held, *inter alia*, that CIPAA was only a procedural legislation, not giving rise to substantive rights and hence CIPAA affected all contractual terms retrospectively and *Jack-In Pile (M) Sdn Bhd v Jack-In Pile (M) Sdn Bhd and Anor* [2018] 4 AMR 425, which *inter alia*, held otherwise, did not agree that CIPAA was merely procedural, held that CIPAA gave rise to substantive rights and therefore had no retrospective effect to take away the contractual rights of the parties on contracts entered into *prior* to the CIPAA coming into effect (15 April 2014).

to CIPAA being brought into effect[80], which expressly[81] allowed the main-contractor to set-off monies due from other cross-contracts claims (set-off payments due from different contracts entered into between the parties) to a payment claim under the construction contract upon which the adjudication was commenced. The question, *inter alia*, for the Federal Court was whether section 5 of CIPAA (payment claims) read with section 41 (a saving provision which provided that CIPAA affected any payment disputes under a construction contract in court or arbitration "before the coming into operation" of CIPAA) and section 35 CIPAA (prohibition of conditional payment) affected the substantive freedom and rights of the parties to contract and applied to construction contracts entered into *prior* to CIPAA coming into effect (15 April 2014). The Federal Court held, *inter alia* in allowing the appeal, that CIPAA was a substantive (and not merely a procedural legislation),[82] it operated only prospectively (and not retrospectively) and substantively affected the parties' freedom to exercise their contractual rights of set-off and pay-when-paid clauses only with contracts entered into *after* CIPAA was brought into effect (i.e. 15 April 2014). His Honour Idrus Harun FCJ succinctly emphasized the primacy, adverse and substantive effect of CIPAA over the common law freedom of contract as follows:

> "[62]. Besides … *It cannot be denied that CIPAA impacts parties to a construction contract significantly.*

[80] Ie 15 April 2014. See generally, *A. Burr & S. Magintharan, Malaysia: Construction Industry Payment and Adjudication Act 2012* (2016) 32 Issue 7 Const. LJ 699 *fn 62* above; S*. Magintharan, Chap 13, Malaysia, ICSA, fn 5* above.

[81] Clause 13.1 which *inter alia* provided as follows "13.1 - *Notwithstanding any other provisions in the Sub-Contract*, *the main contractor shall be entitled to deduct from or set-off any money due or becoming due to the Sub-Contractor* (including any Retention Money) *any sum or sums which the Sub-Contractor is liable to pay the Main Contractor whether under this Sub-contract or otherwise or any other contract between the parties*."(emphasis added).

[82] See *A. Burr & S. Magintharan, fn* 62 above at 701 fn 9; See S. Magintharan, Chapter 13, Malaysia, *fn* 5 above page 221 & 222 paragraph 13.5 fn 10 above wherein it was submitted that the Malaysian High Court had erred *in UDA Holdings Bhd v Bisraya Construction Sdn Bhd*, fn 79 above in holding that CIPAA was merely a procedural legislation, not a substantive legislation giving rise to new substantive rights to the contractor and deprived the contractual rights of parties in a construction contract. It is submitted that the significant Federal Court decisions *of Ireka Engineering & Construction, fn* 77 above and *Jack-In Pile (M) Sdn Bhd, fn* 78 above in fact confirms the authors' views.

> *The entire basis has changed. The financial structures used previously are now prohibited and the entitlement to exercise the right of cross-contract set-offs and pay-when-paid contractual arrangement even though provided for in the construction contract are now prohibited*." (emphasis added)

In *Jack-In Pile (M) Sdn Bhd*[83] the Federal Court was also concerned with an express contractual term – a "pay when paid" clause – in a construction contract entered into between the parties *prior* to CIPAA coming into force (15 April 2014) and whether the parties' freedom to enter into such terms were retrospectively affected by CIPAA (sections 5, 41 & 35). The Federal Court held[84] that such contractual rights to include "pay when paid" clauses in construction contracts were substantive rights which the parties had the freedom to enter into *prior* to the coming into force of CIPAA; that CIPAA was a substantive legislation which affected this (amongst others) substantive right, freedom of the parties to contract and therefore CIPAA did not and was not intended by Parliament to operate retrospectively to deprive the parties of contractual rights in construction contracts which they had entered into *prior* to the coming into force of CIPAA.

SINGAPORE[85]

"DUAL RAILROAD TRACK SYSTEM" AND "PRIMACY OF STATUTORY ADJUDICATION" PRINCIPLES IN SINGAPORE *PRIOR* TO *FAR EAST SQUARE*,[86] *SHIMIZU CORPORATION*[87]

[83] *Jack-In Pile (M) Sdn Bhd, fn* 78 above
[84] *Jack-In Pile (M) Sdn Bhd, fn* 78 above [12 -29], [30] – [40, [60] – 72].
[85] S. Magintharan, The Derailment of the "Dual Railway Track System", *fn 1* above, pages 471 – 502.
[86] *Far East Square, fn* 21 above. See critiques of *Far East Square* in respect to the derailment of the "dual railway track system" principle and "primacy of statutory adjudication" principles in *S. Magintharan, Recent Developments in Construction Adjudication in Singapore, fn 1 above* at 260-264; *S. Magintharan, The Derailment of the "Dual Railway Track System", fn 1* above page 459, 476 – 502
[87] *Shimizu Corporation, fn* 21 above. See also critique *Shimizu Corporation*, in respect to the derailment of the "dual railway track system" principle and "primacy of statutory adjudication" principles in "*S. Magintharan – Recent Developments in Construction Adjudication in Singapore*", fn 1 above page 459, 476 – 502

AND ORION-ONE RESIDENTIAL PTE LTD[88]

Statutory adjudication in Singapore was modelled upon the SOPA [NSW] with substantial provisions being *pari materia*. Prior to the decision of the Singapore Court of Appeal in *Shimizu Corporation*[89]*,* the "dual railroad track system" of construction adjudication was an entrenched principle in Singapore.[90] With regards to the issue of "dual railroad track system principle" and the "primacy of statutory adjudication principle" the following *inter alia* are the relevant provisions under the SOPA [S]:

a. Section 5 SOPA [S] which provides for the contractor's statutory" entitlement to progress payment"[91] as follows "Any person *who has carried out any construction work,* or supplied any goods or services, *under a contract is entitled to a progress payment*" (emphasis added).

b. Section 34 SOPA [S] on the "Effect on other proceedings" mandates that "*Nothing in this Act shall affect any right that a party to a contract may have* – (a) *to submit the dispute relating to or arising from the contract* to a court or tribunal, *or to any other dispute resolution proceedings*…" (emphasis added);

c. Section 36 (1) SOPA [S] which deals with "No contracting out", it is submitted, statutorily enforces the "primacy of statutory adjudication principle' in that it mandates that "The provision of

[88] *Orion-One Residential Pte Ltd*, *fn* 21 above – the Singapore Court of Appeal recently, it is respectfully submitted erroneously affirming *both Far East Square* and *Shimizu Corporation* and thus effectively "putting to rest" the "dual railway track system" and the primacy of statutory adjudication" principles in statutory adjudication in Singapore.

[89] *Shimizu Corporation v Stargood Construction Pte Ltd* [2020] 1 SLR 1338. See also the predecessor decision of the Singapore Court of Appeal decision in *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2019] 2 SLR 189. See critiques of these 2 decisions in respect to the derailment of the "dual railway track system" principle and "primacy of statutory adjudication" principle in S*. Magintharan, Recent Developments in Construction Adjudication in Singapore, fn 1 above* at 260-264; S. Magintharan, The Derailment of the "Dual Railway Track System*", fn 1* above page 459, 476 – 502.

[90] See *S.Magintharan, Chapter 18, Singapore, ICSA, fn* 5 above, page 282 para 18.6 fn 15.

[91] In material aspects similar to section 109 (1) HGCRA, *pari materia* to section 9 (1) of SOPA [NSW], *pari materia* to section 36 CIPAA.

this Act *shall have effect notwithstanding any provision to the contrary in any contract or agreement*" (emphasis added);

d. Section 36 (2) SOPA [S], it is submitted, statutorily enforces the "dual railroad track system principle" in that it mandates that: "T*he following provisions in any contract or agreement (whether in writing or not) shall be void*: (a) a provision under which the operation of this Act, or any part thereof is, or is *purported to be, excluded, modified, restricted or in any way prejudiced, or that has the effect of excluding, modifying, restricting or prejudicing the operation of this Act* or any part thereof; (b) a *provision that may reasonably be construed as an attempt to deter a person from taking action under this Act*" (emphasis added); and

e. Section 36 (4) SOPA [S], it is submitted further, reiterates the "dual railroad track system principle" and the "primacy of statutory adjudication principle" in that it preserves the other rights [not excluded by the "no contacting out" provision of section 36 (1) SOPA] of the parties to the contract and provides as follows: "*Nothing in this Act shall*, *except as provided in subsection (1)*, *limit or otherwise affect the operation of any other law* in relation to *any right, title, interest, privilege, obligation or liability of a person arising under or by virtue of a contract or an agreement*" (emphasis added).

In *Tienrui Design & Construction Pte Ltd*[92] the Singapore High Court considered an application to set aside an adjudication determination on, *inter alia*, the ground that payment claim was served prematurely

[92] *Tienru Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852, fn 20 above, per Lee Sieu Kin J. See also the earlier unreported High Court decision of *Shinsung Construction Pte Limited v Dian Fatt Construction Pte Ltd* [2013] OS No 370 of 2013, argued by the present author before Lee Sieu Kin J, that the adjudication determination should be set aside as the payment claim was served prematurely because the contract provided that progress payment were due only when payment was certified by the architect and since there was no interim certificate for the progress payment, the claimant had no right to invoke his right under SOPA [S]. The Learned Judge dismissed the application recognising the "dual system railroad track system" in that the claimant's entitlement to invoke the concurrent statutory regime under the SOPA notwithstanding that the progress claim was not certified and the contractor was no right to progress payment under the contractual regime. See *S. Magintharan, Chapter 18, Singapore, ICSA, fn* 5 above, page 283 & 284, paragraph 18.6 fn 15.

and not in accordance with the contractual terms, therefore the whole adjudication determination was invalid. In the course of the High Court's decision, the Learned Judge had to consider if the parties' construction contract solely determined their contract rights to progress claims or whether the statutory regime was a separate and alternate regime. The Learned Judge held, *inter alia*, that the parties' contractual provision did not apply to the statutory time-lines for service of the payment claim, reiterated and applied the "dual railroad track system" succinctly as follows:

> "The applicable law
> 30. The SOP Act establishes a speedy and low cost dispute resolution mechanism to facilitate the cash flow of contractors operating in the building industry. *Under the SOP Act, a party who carries out any construction work* or supplies any goods or services under a construction contract is entitled to progress payment (s 5). *While that statutory entitlement is founded on the underlying contract, it is separate and distinct from a party's contractual entitlement to be paid. The result is a "dual railroad track system" consisting of the statutory regime under the [SOP Act] which operates concurrently with, but is quite distinct from, the contractual regime (TransGrid v Siemens [2004] NSWSC 87 at [56]).*
>
> 31. *In practical terms, the dual track regime allows a claimant to make separate claims under the contract and the SOPA Act, or, makes a claim that has both contractual or statutory force. Likewise, a respondent may provide separate responses under the contract and the SOP Act, or, issue a response that has both contractual and statutory force*…." (emphasis added).

The "dual railroad track system" was reiterated in another Singapore High Court decision in *Choi Kum Peng& Anor v Tan Poh Eng*[93]*.* In *Choi Peng Kum*, the Singapore High Court was considering an

[93] *Choi Kum Peng & Anor v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210*, fn* 20 above, per Woo Bih Li J.

application to set aside and adjudication determination on, *inter alia*, the ground that the claimant was not entitled to invoke the statutory regime because the contract was terminated after the claimant had served his progress payment. Clause 32 (8) (a) Singapore Institute of Architect's Conditions of Contract ("SIA Form") expressly precluded any payment of progress payment after the termination of the contract, and provided "no further sums shall be certified as due to the contractor until the issue of the Architect of the Costs of Termination certificate… nor shall the Employer be bound to pay any sums previously certified if not already paid". The Employer argued, *inter alia*, that (a) the payment claim was premature because the progress payment was not certified (no Cost of Termination Certificate was issued) by the Architect upon termination; and (b) the adjudicator had no jurisdiction to consider the adjudication application unless the contractual provisions were complied with and the Architect has issued a certificate of the progress payment after termination. The High Court rejected and dismissed the employer's application to set aside and held[94], *inter alia*, that the employer's arguments "conflated a claim for payment and overlooked the fact that there are dual tracks for the contractor to claim payment", and that the employer's arguments that the claimant is not entitled to commence statutory adjudication until the progress payment is certified/valued under the contractual mechanism was "antithesis to the adjudication process under the SOPA".[95] Woo Bih Li J succinctly summarized the fallacy of the employer's arguments as follows:

> "25. *It seems to me that the Plaintiff's had conflated a claim for payment with a progress claim and also overlooked the fact that there are dual tracks for a contractor to claim payment*. *Under the Contract, the Defendant is permitted to submit a claim for a progress payment. This is referred to under s 10(1) SOPA as a payment claim.* When it does so, its claim is

[94] *Choi Kum Peng, fn* 20 above [25]
[95] *Choi Kum Peng, fn 20* above [27]. The Singapore High Court at [30] referred to the dual railroad track system applied under SOP [NSW] in *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 226.

supposed to be valued by PQS whereupon PQS will certify the amount of payment, if any, that is to be made to the Defendant. *The Defendant is entitled under the Contract to be paid the amount certified but it is also entitled under SOPA to lodge an AA for the difference*. *Previously, before SOPA was enacted, the Defendant would have had to claim the difference in arbitration or court proceedings if the Contract did not preclude it from doing so before the final completion of the Contract*.

26. *The valuation is the payment response that is supposed to be given to the Defendant under s 11 SOPA. It is precisely because there is no valuation that the Defendant is entitled to lodge an AA pursuant to s 12 (2) (b) SOPA*.

27. *If the Defendant is precluded from lodging an AA until a valuation is done by PQS then, it will be a simple matter for the Plaintiff to stymie the Defendant's recourse to the adjudication process under SOPA by instructing PQS not to issue any valuation*.

28. *Furthermore, under the Contract, the Defendant is only entitled to be paid whatever is certified by PQS pending recourse to arbitration or the courts*. *If the AA is confined to what that the Defendant is "entitled" to receive under the Contract, meaning whatever is certified by PQS, then the AA is unnecessary in most instances and the Defendant will not be entitled to lodge an AA for an amount more than what is certified. That is the antithesis of the adjudication process under the SOPA*.

29. *In my view, s 5 SOPA does not preclude the Defendant from lodging an AA*…." (emphasis added).

Further, the Learned Judge held[96] significantly that if Clause 32 (8) (a) SIA Form precluded the contractor from issuing a payment claim and proceeding under the SOPA because the progress payment was

[96] *Choi Kum Peng, fn 20* above [32]-[41].

not valued/certified by the architect, then it amounted to contracting out of the SOPA [S] and will be rendered void under sections 36 (1), (2) SOPA (S) – thereby, it is submitted, giving effect to the primacy[97] of SOPA. The Learned Judge held as follows:

> "**Whether clause 32(8) (a) SIA conditions precluded the adjudication process under SOPA**
>
> ……
>
> 40. *If clause 32(8) (a) had the effect contended by the Plaintiff it would in any event be rendered void by ss 36 (1), 36 (2) (a) and 36 (2) (b) SOPA*…". (emphasis added)

The dual railroad track system in the SOPA was recognized but, with utmost respect, erroneously misapplied in the Singapore High Court decision of *CHL Construction Pte Ltd*[98]*.* In *CHL Construction*, the Singapore High Court considered an application to set aside an adjudication determination by the Main Contractor on, *inter alia*, the jurisdictional ground that the payment claim was served prematurely by failing to comply with Clause 37 of the contract which expressly provided that the sub-contractor had to withhold its penultimate payment claim until *three months* after the certificate of statutory completion to be received by the Main Contractor. The sub-contractor completed the construction works and the Certificate of statutory completion was issued to the Main Contractor. The sub-contractor issued its penultimate progress claim but the Main Contractor, through its lawyers, terminated the sub-contract. The sub-contractor applied for statutory adjudication based on its penultimate progress claim and the adjudicator granted the contractor the claim notwithstanding clause 37 of the contract for the works accrued *prior* to the termination.

The High Court allowed the Main Contractor's application to set aside

[97] Embedded in section 36 (1), (2) SOPA [S].
[98] *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382,fn 20 above, Chan Seng Onn J.

the adjudication determination on *inter alia* grounds that (a) the High Court recognized and purportedly applied the "dual railroad track system" set out in *Tienrui Design;* [99] (b) Notwithstanding, it is respectfully submitted that the High Court misapplied the dual railroad track system and the primacy of the statutory adjudication principle in erroneously holding that "*SOPA accords primacy to the parties' agreement* with respect to payment claim timelines [see s 10(2) SOPA]"; [100] and (c) it is submitted that the Court also erroneously interpreted [101] Clause 37 of the agreement – which prevented the contractor who had carried out construction works from invoking his statutory right to progress payment and entitled the Main Contractor to delay the sub-contractor's payment for progress payment for works carried out for 3 months – as justified and not void under section 36 (1) SOPA.

THE DEMISE OF THE FUNDAMENTAL PRINCIPLES OF "DUAL RAILWAY TRACK SYSTEM" AND PRIMACY OF STATUTORY ADJUDICATION IN SINGAPORE – THE REVIVAL OF THE "MISCHIEF" THAT STATUTORY ADJUDICATION WAS "AIMED" TO REMEDY.

In Singapore, as late as March 2018, the Singapore Court of Appeal in *Civil Tech Pte Ltd*[102] gave effect to the dual railway track system and primacy of statutory adjudication in Singapore by rejecting the arguments[103] and suggestions that the policy behind the SOPA was to preserve the "net cash flow" [104] of both the contractual parties (namely the owners/main contractors (the "upstream parties) and the

[99] *Tienrui Design & Construction Pte Ltd, fn* 20 above.
[100] *CHL Construction Pte Ltd, fn* 20 above, [38], emphasis added.
[101] Contra, decision of the Singapore High Court of *Choi Kum Peng, fn* 20 above where the High Court had previously interpreted a similarly restrictive clause 32(8)(a) SIA Conditions as contrary to s 36(1) SOPA. The relevant decision of *Choi Kum Peng, fn* 20 above was however not brought to the High Court's attention in *CHL Construction, fn* 20 above and not considered.
[102] *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 judgement delivered on 2 March 2018 by the Menon CJ.
[103] See discussion in *S.Magintharan, Recent Developments in Construction Adjudication in Singapore, fn* 1 above pages 278 &279.
[104] *Civil Tech, fn* 102 above, at [23] – [36].

contractors ("downstream parties) and reiterated that the purpose and intention of SOPA was to protect the cash flow of only the "downstream contractors" who have carried out works under construction works – namely the prevention of the "mischief" which SOPA was intended to remedy.[105] The Court of Appeal rejected the "net cash flow" argument and held that such argument under the SOPA gave rise to "injustice" to the downstream contractors, and arose as the result of a failure to understand the temporary finality nature of statutory determination.[106]

THE *VOLTE-FACE* IN THE POLICY BEHIND SOPA IN SINGAPORE – INADVERTENT LOBBY TO REVIVE THE "MISCHIEF" SOPA WAS AIMED TO REMEDY.[107]

However in 2018, as part of the purported "reform" to SOPA, the Building Construction Authority and the Law Review Committee recommended *inter alia* the erroneous "logic"[108] that SOPA had to be amended to give effect to "the common industry practice" expressly provided in Standard Forms of Contract[109], which precluded the contractor from applying for any progress payment for construction work carried out when the construction contract was terminated or which precluded the contractor from making such progress claim until final certification and to enable the "net financial position of the parties". This erroneous "logic", it is respectfully reiterated, is an unwitting form of "lobby" by the main contractors/employers for Parliament to revive the very "mischief" which SOPA was intended to remedy (the primacy of the contractual freedom of contract that statutory adjudication was enacted to prevent), the fallacious need to consider the "net financial position of the parties" which the

[105] *Rupert Morgan Building Services, fn* 7 above.
[106] *Civil Tech, fn* 102 above at [18], [28] & [79]. See also *S. Magintharan, Recent Developments in Construction Adjudication in Singapore", fn 1* above 278 & 279; S*. Magintharan, Derailment of "The Dual Railway Track System", fn* 1 above, 496 & 497.
[107] See detailed discussion in *S. Magintharan, Derailment of "The Dual Railway Track System", fn 1* above, 496 & 497.
[108] See *S. Magintharan, Derailment of "The Dual Railway Track System", fn 1* above, 496 & 497.
[109] Example Clause 31 (11) (c) SIA Standard Form; Clause 33.2 REDAS Standard Form.

Singapore High Courts have resisted and the Singapore Court of Appeal had emphatically rejected in *Civil Tech Pte Ltd*, on the ground that it gave rise to palpable "injustice" to the downstream contractors, and the failure to understand the temporary finality nature of the adjudication determination".[110]

The Singapore Parliament however, inadvertently accepted the erroneous "logic" to give effect to the "common industry practice"[111] and introduced by amendment a new section 4 (3) SOPA which precluded a contractor from invoking the SOPA for construction works carried out *prior* to termination of the construction contract if the construction contract contained such express provision to "suspend progress payment to the claimant until a date or the occurrence of an event specified in the contract and the date has not passed or that event has not occurred".[112] However, the SOPA (Amendment) Act which was passed on 16 November 2018 did not come into effect until 15 December 2019.[113]

FAR EAST SQUARE[114] – THE BEGINNING OF THE REVIVAL OF THE "MISCHIEF"

In the meantime, pending the SOPA (Amendment) Act coming into force, the Singapore Court of Appeal decided *Far East Square* on 16 May 2019.

Far East Square is a developer of a commercial residential project and Yau Lee was their main contractor. The construction contract

[110] *S. Magintharan, Derailment of "The Dual Railway Track System", fn* 1 above, 496 & 497.

[111] The Minister of State for National Development, Mr Zaqy Mohamad at the Second reading of the Building and Construction Industry Security of Payment (Amendment) Bill (No: 38 of 2018). See *S. Magintharan, Derailment of "The Dual Railway Track System", fn 1* above at 497

[112] See critique of the new amendment by the present author in *S. Magintharan, Derailment of "The Dual Railway Track System", fn* 1 above at 497 – 500.

[113] Building and Construction Industry Security of Payment (Amendment) Act 2018 (Commencement) Notification 2019.

[114] *Far East Square*, fn 21 above. See detailed discussion of facts and critique in *S.Magintharan, Recent Developments in Statutory Adjudication in Singapore*, *fn 1* above, pages 256 – 268; *S. Magintharan, Derailment of "The Dual Railway Track System*, *fn* 1 above 479 & 480.

was in the Singapore Institute of Architects (SIA) Standard Form of Contract which *inter alia* provided under Clause 31(11) (c) that the contractor is required to submit their "final payment claim to the Employer ……within 14 days after the occurrence of (whichever is later): (i) the issuance of the Maintenance Certificate or (ii) the receipt by the Contractor of the Statement of Final Account". Clause 31(12) (a) also provided that the architect "shall within 14 days of receipt of the final payment claim from the contract, issue the Final Certificate to the Employer with a copy to the Contractor".

The project was completed on 6 May 2014 but the contractor failed to issue its final progress claim either during the maintenance period or after being served with the Final Statement of Account, despite reminders from the Architect. On 4 August 2017, the Architect issued the maintenance certificate and on 5 September 2015, the Final Certificate certifying that the sum of S$1,545,776.20 was due and payable by Far East to Yau Lee despite the contractor not having made his final progress payment claim.

After the issuance of the Final Certificate, Yau Lee issued two (2) further progress claims which the Architect rejected on the basis that he was *functus officio* to make any certification as the result of the issuance of the Final Certificate and hence was not able to issue any payment response as required under the contract and SOPA.

Yau Lee then on 27 December 2017, issued a payment claim under SOPA and claimed the sum of $2,276,284.68 from Far East Square which included a claim for additional preliminaries arising from prolongation to the works caused by the Architect or Far East Square. It is indisputable that the claim was for construction works carried out *prior* to the issuance of the Final Certificate. Far East Square did not issue the mandated payment response required under section 11 (1) SOPA.

The matter proceeded for adjudication and Yau Lee argued that Far

East was precluded from raising, *inter alia*, any jurisdictional defences since they did not serve the mandated payment response and therefore, following the seminal decision of the Singapore Court of Appeal in *Audi Construction*[115], Far East Square was estopped and precluded under section 15(3) SOPA from raising any defence – including jurisdictional defences – against Yau Lee's payment claim under SOPA. Far East Square on the other hand, argued that they were not estopped from raising their jurisdictional argument because Yau Lee's payment claim was not within the scope of the SOPA and void since it was a claim expressly prohibited by the contract.

The adjudicator agreed with Far East Square that the payment was issued not in accordance with the construction contract, as it was issued after the Final Certificate had already been issued and when the Architect became *functus officio*. However, the adjudicator held that he was bound by the decision of the Singapore Court of Appeal in *Audi Construction*[116] and Far East was estopped and precluded by section 15(3) SOPA from raising the jurisdictional defence because Far East Square had not served the mandated payment response required under section 11 SOPA. The adjudicator therefore disregarded Far East Square's jurisdictional defence and granted Yau Lee their adjudication claim in the sum of $2,276,284.68.

Far East Square did not pay the adjudication determination, applied to the High Court to set aside the adjudication determination whilst Yau Lee applied to the High Court to enforce the adjudication determination for the sum of S$2,276,284.68.

The Singapore High Court[117] dismissed Far East's application to set aside the adjudication determination and ordered the enforcement of

[115] *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317. See the critique of *Audi Construction Pte Ltd* by the present author in *S. Magintharan, Recent Developments in Construction Adjudication in Singapore", fn 1* above pages 227 -242.
[116] *Audi Construction, fn* 115 above.
[117] *Yau Lee Construction (Singapore) Pte Ltd v Far East Square Pte Ltd* [2018] SGHC 261 per Lee Sieu Kin J ("Yau Lee (HC)".

the adjudication determination. The High Court held, *inter alia*, that: (a) Yau Lee was not precluded by SOPA to issue their payment claim for construction works carried out *prior* to and notwithstanding the issuance of the Final Certificate by the Architect[118] and (b) following *Audi Construction*, Far East Square was in any event estopped and precluded from raising the jurisdictional defence that Yau Lee was not entitled to commence the adjudication application under SOPA because Far East Square had not raised this defence in their payment response.[119] Far East Square appealed to the Court of Appeal.

The Court of Appeal allowed Far East Square's appeal and, *inter alia*, held[120] that: (a) the contractor's right to progress payment arose only from the underlying construction contract; (b) SOPA did not give the contractor any independent right to progress payment because it was merely a procedural legislation[121]; and (c) Yau Lee was therefore not entitled to issue any payment claim after the Final Certificate was issued by the Architect and after the Architect had become *functus officio* under that contract and therefore the payment claim did not fall within the purview of SOPA.

For the purpose of the present discussion, Steven Chong JA[122] opined as follows to signal the beginning of the demise of the fundamental principles "dual railway track system" and the "primacy of statutory adjudication" in Singapore:

> "30 That being said, *we must stress that the SOPA is merely a legislative framework to expedite the process by which a contractor may receive payment through the payment certification/adjudication process in lieu of*

[118] *Yau Lee* (HC), *fn* 117 above at [45] – [49].
[119] Yau Lee (HC), fn 117 above at [34] – [44], [50] – [60].
[120] For the purpose of the article herein. See however, *S. Magintharan, Recent Development in Construction Adjudication in Singapore, fn 1* above at pages 256 – 270 for the full facts of Far East Square and the detail critique of the said significant decision.
[121] See *S. Magintharan, Derailment of "The Dual Railway Track System", fn* 1 above at 479.
[122] *Far East Square, fn* 21 above at [30] & [31].

> *commencing arbitral or legal proceedings. It does not, in and of itself, grant the contractor a right to be paid. The right of a contractor to be paid ultimately stems from the construction contract, pursuant to which construction works are carried out.* Indeed, a "progress payment" is defined in s 2 of the SOPA as "a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, *under a contract*" [emphasis added]……
>
> 31 *In our judgment, the SOPA was not meant to alter the substantive rights of the parties under the contract, neither was it intended to give rise to a payment regime independent of the contract. In order to claim for progress payments under the SOPA, it is imperative for the contractor to first establish that he is entitled to such payment under the contract. It follows that in order to determine a contractor's entitlement to submit payment claims under the SOPA, the court must necessarily have regard to the provisions of the underlying construction contract."*

The present author had respectfully submitted[123] that the Singapore Court of Appeal had, *inter alia*, erred in *Far East Square* in so holding because the Court inadvertently failed to consider the fundamental principles of the "dual railway track system" and "primacy of statutory adjudication" which were contrary to the Court's decision.

SHIMIZU CORPORATION – "PUTTING TO REST" THE FUNDAMENTAL PRINCIPLES OF THE "DUAL RAILWAY TRACK SYSTEM" AND "PRIMACY OF STATUTORY ADJUDICATION" IN SINGAPORE[124]

[123] *S. Magintharan, Recent Development of Construction Adjudication in Singapore, fn 1* page 260 & 261. This material fact was in fact confirmed by the subsequent Singapore Court of Appeal decision in *Shimizu Corporation, fn* 21 above at [3], [21] – [37].

[124] See *S. Magintharan, Derailment of "The Dual Railway Track System", fn 1* above at 476 – 502 for a full

Shimizu Corporation ("Shimizu") was the main contractor for a construction project and employed Stargood Construction ("Stargood") as their sub-contractor to undertake construction works. The construction contract dated 8 February 2018 was in the standard Real Estate Developers' Association of Singapore Design and Build Conditions of Contract (3rd Ed 2013) ["REDAS"].

By Clause 16 of the sub-contract the parties agreed to the appointment of a Project Director to undertake matters under the sub-contract including certification of progress payment and issuance of payment response. Clause 33.2 of the sub-contract provided *inter alia*, that the Main Contractor was entitled, without further notice, to terminate the employment of the sub-contractor by issuing to the sub-contractor a Notice of Termination of the sub-contract if the Sub-contractor failed to rectify defects within seven (7) days of receipt of the Project Director's notice of Default to the sub-contractor.

Stargood carried out construction works but disputes arose between the parties in the course of the construction works resulting in the Project Director issuing to Stargood a notice of default on 4 March 2019 under Clause 16. Subsequently, Shimizu relying on the Project Director's notice of default, issued to Stargood a Notice of Termination on *22 March 2019*. After the termination of the construction contract, Stargood on *30 April 2019* issued their payment claim under SOPA [S][125] (PC 12) claiming for works carried out "up till April 2019" in the sum of S$2,599,359.44, but it was not disputed that it was for works carried out by Stargood up to the time of termination of Stargood's employment on 22 March 2019. Shimizu did not issue any payment response[126]. Stargood commenced

discussion and detail critique on the decision of *Shimizu Corporation, fn 21 above.*

[125] Pursuant to section 10 SOPA.

[126] As required under section 11 (1) SOPA and thereby, it is submitted, gave rise to the draconian provision of section 15 (3) which precluded Shimizu from raising any set-off, defence, counterclaim (including jurisdictional defences) to the payment claim – save as to the controversial "patent errors". See *S. Magintharan, Setting Aside Payment Claim and Jurisdictional Issues in Singapore – The "Sungdo Principles*"

adjudication proceedings against Shimizu in Adjudication Application No: 203 ("AA 203") for the sum of S$2,599,359.44. Although Shimizu failed to serve a payment response, Shimizu raised the following "patent errors" as defences: (a) that PC 12 was not properly served because, *inter alia*, there was no certification by the Project Director (namely, the construction contract was terminated and in any event the Project Director was *functus officio* and therefore unable to certify any payment due to the sub-contractor); and (b) PC 12 was outside the "purview of the SOPA".[127]

In the meantime, Stargood also issued another payment claim No: 13 on 31 May 2019 (prior to the commencement of AA 203) and claimed for the same amount of $2,599,359.44 for works carried out "up till May 2019" but again it was also not disputed that the claim was in fact for works carried out by Stargood up to the time of termination of Stargood's employment on 22 March 2019. Stargood also commenced another adjudication application in relation to PC 13 – adjudication application No: 245 – but *before* the adjudication determination in AA 203 – for the same (but not yet adjudicated amount) sum of $2,599,359.44.

In AA 203, the adjudicator on 27 June 2019 dismissed Stargood's application on *inter alia*, the grounds that: (a) PC 12 failed to comply with the mandatory requirement of section 10 (2) SOPA for it was not properly served; and (b) PC 12 was an invalid payment claim and not within the purview of the SOPA because no payment claim can be properly served by Stargood on Shimizu under Clause 33.2 of the construction contract *after* the termination of the contract, there was

[2011] 27 (6) Const. LJ 506 at 507-510; *S. Magintharan, Construction Adjudication in Singapore – Lee Wee Lick Terence v Chua Say Eng*, [2014] 30 (2) Const. LJ 73 at pages 81 – 82; *S. Magintharan, Recent Developments in Construction Adjudication in Singapore* (2020) 36 (3) Constr LJ page 219, fn 1 above.

[127] It is utmost respect submitted, an erroneous "hair-splitting" term coined by the Singapore Court of Appeal *in Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189, fn 21 above to distinguish jurisdictional error amounting to "patent error", which cannot be waived by the respondent in an adjudication proceedings [a patent error "outside the purview of the SOPA"), and a jurisdiction patent error which can be waived by the respondent in an adjudication proceedings [a patent error "within the purview of SOPA"]. See the criticism of *Far East Square Pte Ltd, fn* 21 above in *S. Magintharan, Recent Developments in Construction Adjudication in Singapore*, fn 1 above. See also further discussions/critique below.

NO certification of the progress claim by the Project Director, and in fact the Project Director was incapable of issuing any certification because he was *functus officio* after the termination of the construction contract.[128]

In July 2019 (*after* the dismissal of AA 203), Stargood lodged another adjudication application in respect PC 13 (served on end of May 2019) in AA 245. The adjudicator in AA 245 dismissed Stargood's AA 245 on the ground that Stargood was bound by the determination of AA 203.

Stargood challenged the determination in both AA 203 and AA 245 and applied to the High Court in OS 1099 of 2019 to set aside both the adjudication determinations and sought a declaration that Stargood was entitled to serve the payment claim (PC 12) and the further payment claim (PC 13) on Shimizu.

The Singapore High Court[129] allowed Stargood's applications and held *inter alia* that (a) the Adjudicator in AA 203 had erred in law in concluding that "upon termination" of Stargood's employment under the subcontract, Stargood was not entitled to submit any further payment claim[130]; (b) it was trite law in Singapore[131] that the contractor was entitled to commence adjudication under the SOPA for his accrued right to payment for construction works carried out *prior* to the termination of the construction contract; and (c) that in

[128] Relying on the decision of *Far East Square Pte Ltd, fn* 21 above.
[129] *Stargood Construction Pte Ltd v Shimizu Corp* [2019] SGHC 261 per Vincent Hoong JC at [2], hereinafter referred to as" Shimizu, HC".
[130] *Shimizu, HC* fn, 129 above, at [12]-[16], [17] – [30] distinguishing *Far East Square*, CA fn 21 above, and *Engineering Construction Pte Ltd v Attorney-General* [1994 1 SLR (R) 125 (a case before SOPA and not dealing with SOPA).
[131] *Shimizu,HC, fn* 129 above, the High Court at [17] – [27] referring to the "authorities with one voice in showing that a contractor who has performed works under a construction contract can continue to claim for such works after his employment under the contract has been terminated. This is because the contractor has an accrued statutory entitlement to payment, which necessarily survives the termination: *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] 4 SLR 1382 at [21] – [22], *AU v AV* [2006] SGSOP 9 at [13] and *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR (R) 364 at [17] – [18]". The Learned JC also relied on the decision and dicta of the Singapore High Court in *Choi Peng Kum and another v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210 at [38] per Woo Bih Li J.

any event the Project Director was not *functus officio* to issue payment certification, because Shimizu Corporation had merely terminated the *employment* of Stargood and not the *sub-contract*.[132] Shimizu appealed to the Singapore Court of Appeal.

The Singapore Court of Appeal heard and allowed Shimizu's appeal on *inter alia*, the following grounds: (a) The court referred to and applied its previous decision in *Far East Square*[133] and the principle stated therein that: (i) SOPA was merely a procedural legislation and not a substantive legislation giving the contractor a right to payment[134]; and (ii) that the contractor's right to progress payment, even under the SOPA, was subject to and only arises from the construction contract;[135] (b) SOPA did not provide the contractor with an independent right to continue serving payment claims for works completed regardless of the provisions of the underlying contract and thereby rejected[136], overruled and "putting to rest"[137] the previously entrenched "dual railroad track system" in the cases of *Choi Kum Peng*, [138] *Tienrui Design & Construction* [139] and *CHL Construction;*[140] and (c) the Project Director was, under the contract, *functus officio* and was not capable of certifying any further progress payment upon the termination of the agreement regardless of whether the contractor's employment or the sub-contract was terminated.[141]

[132] *Shimizu, HC, fn* 129 above, [12] – 16].
[133] *Shimizu, CA, fn 2*1 above, [1], [3]-[4][20] & [21].
[134] *Shimizu, CA, fn* 1 above, [1],[3], [21], [22]- [39].
[135] *Shimizu, CA, fn* 21 above, [1], [3], [21]
[136] *Shimizu, CA, fn* 21 above [38] – [49]
[137] *Shimuzu, CA, fn* 21 above [4].
[138] *Choi Kum Peng, fn* 20 above. See discussion, above.
[139] *Tienrui Design & Construction, fn* 20 above. See discussion, above.
[140] *CHL Construction, fn 20*above. See discussion, above.
[141] *Shimizu, CA, fn* 21 above, [50] – [52] applying the same reasoning *in Far East Square, fn* 21 above which related to a contractual clauses which precluded the Architect from certifying further payment upon the completion of the project and pending final certification.

ORION-ONE RESIDENTIAL[142] – CEMENTING THE END OF THE FUNDAMENTAL PRINCIPLES OF "DUAL RAILWAY TRACK SYSTEM" AND "PRIMACY OF STATUTORY ADJUDICATION" IN SINGAPORE

Orion-One Residential is the most recent reiteration by the Singapore Court of Appeal which cemented the demise of the fundamental principles of "dual railway track system" and "primacy of statutory adjudication" in Singapore.

Orion-One Resident is the owner and developer of a condominium project known as the "Residential Flat Development" (the Project). Dong Cheng were the main contractor of the project. The construction contract dated 19 May 2015 was in the Real Estate Developers' Association of Singapore ("REDAS") Standard Form of Contract. Clause 30.3.1 of the REDAS form provided for the "Effect of Termination for Default" and provided, inter alia, that "the Employer shall not be liable to make any further payments to the Contractor until such time when the costs of the design, execution and completion of the incomplete Works, rectification costs for remedying any defects, liquidated damages for delay and all other costs incurred by the Employer as the result of the termination has been ascertained".

Orion-One Residential, terminated the employment of Dong Cheng on 2 March 2017, utilizing the Notice of Termination[143] provision in the contract and alleging that Dong Cheng was in breach of contract and engaged another contractor to undertake the outstanding works under the Project on 15 March 2017. The project was completed by the alternative contractor around August 2017.

[142] *Orion-One Residential, fn* 21 above.
[143] It is to be noted that since the termination was on 2 March 2017, section 4(3) the SOPA (Amendment) Act 2018, which only applied to construction contracts entered into on or before 15 December 2019 did not apply.

About 2 years later after their termination, Dong Cheng issued seven (7) payment claims to Orion-One Residential and commenced three (3) separate adjudications against Orion-One Residential. It was not disputed that Dong Cheng's claim was for construction works carried out *prior* to the termination by Orion-One Residential.
The adjudicator granted Dong Cheng's application in part, awarding Dong Cheng the sum of $1,981,579.50 including goods and services tax for the construction works carried out by Dong Cheng prior to the termination and despite the termination by Orion-One Residential.

Orion-One Residential applied to the Singapore High Court to set aside the adjudication determination, relying[144] on the decision of the Singapore Court of Appeal in *Far East Square*[145] on the ground that the adjudicator had no jurisdiction to make the adjudication determination, the payment claims were invalid because, *inter alia*, the construction contract was terminated, and the issuance of the payment claims after the Employer's Representative becoming "*functus officio*" under the contract was invalid. Dong Cheng on the other hand, argued that the adjudication determination was valid because the payment claim was made for works done prior to the termination of Dong Cheng and therefore valid.

The Singapore High Court[146] dismissed Orion-One Residential and enforced the adjudication determination on the ground that the payment claim was for construction works carried out prior to the termination, and Dong Cheng was entitled to invoke the SOPA. Orion-One Residential appealed to the Court of Appeal.

The Singapore Court of Appeal allowed Orion-One Residential's appeal, set aside the adjudication determination, applied[147] their earlier decision of *Far East Square*[148] and *Shimizu Corporation*[149]

[144] *Orion-One Residential*, fn 21 above at [17].
[145] *Far East Square, fn* 21 above
[146] *CEQ v CER* [2020] SGHC 70 at [23].
[147] *Orion-One Residential*, fn 21 above [23].
[148] *Far East Square (CA)*, *fn* 21 above
[149] *Shimizu Corporation(CA), fn* 21 above.

and cemented the demise of the "dual railway tracks system" and the "primacy of statutory adjudication" principles that (a) SOPA was only a procedural legislation and did not provide the contractor with an independent right to progress payment for construction works carried out under the construction contract; and (b) the contractor's right to make a payment claim under SOPA arose only under the construction contract. Steven Chong JA, again unequivocally reiterated the said ruling of the Court in the following emphatic terms[150]:

> "Our decision
> *The operative termination provision*
> 23. *As this court observed in Yau Lee ([17 supra) at [31] and reiterated in Shimizu Corp ([2] supra) at [2] and [21], the starting point of the analysis must always be the terms of the contract. Ultimately, "the contractor making a claim for progress payment under the SOPA must show that there is a basis for claiming such payment under the terms of the contract in question" (Shimizu Corp at [28]). Thus, in order to determine whether a contractor is entitled to serve a payment claim after the termination of its employment, the court must have regard to the terms of the contract, with particular reference to the rights that were exercised by the parties leading up to the termination of the contractor's employment*".

CRITIQUE OF THE DECISION OF *FAR EAST SQUARE*, *SHIMIZU CORPORATION* AND NOW *ORION-ONE RESIDENTIAL* IN SINGAPORE

The present author has respectfully submitted earlier that the decision of *Far East Square*, *Shimizu Corporation* and the "putting to rest" of the fundamental principles of "dual railway track system" and the "primacy of statutory adjudication" in Singapore is an unfortunate

[150] *Orion-One Residential, fn* 21 above [23]

regression in the development of statutory adjudication and with utmost respect, erroneous because *inter alia*: (a) *Far East Square* was, with utmost respect, erroneously decided[151]; (b) the Courts inadvertently overlooked and did not consider or give adequate consideration to the purpose, objective of statutory adjudication and the "mischief" it aimed to remedy [152] – the "cash flow of the downstream contractor" – by "putting to rest" the fundamental "dual railway track system" principle in statutory adjudication[153]; (c) the Courts inadvertently erred in holding that SOPA was only a procedural legislation and did not give the contractor an independent substantive statutory right to progress payment for works carried out prior to the termination of the construction contract[154]; (d) the Courts inadvertently erred in giving rise to the incorrect principle of "primacy of the contractual provisions" under the SOPA[155]; (e) the Courts inadvertently erred in failing to give any or adequate consideration to the principle of "primacy of statutory adjudication" in construction adjudication[156]; and (f) the Courts inadvertently erred in disapproving and overruling the entrenched "dual railway tack system" cases the Singapore High Court cases.[157]

The present author respectfully reiterates that for the same reasons, the recent decision of the Singapore Court of Appeal in *Orion-One Residential*[158] is also erroneous, incompatible with the fundamental principles of the dual railway track system and primacy of statutory adjudication principles which are in fact essential fabrics of statutory adjudication.

[151] See discussion in *S. Magintharan, Recent Developments in Construction Adjudication in Singapore*, fn 1 above, 219, 256 – 268.; *S.Magintharan, Derailment of "The Dual Railway Track System", fn 1* above 479 & 480.
[152] *S. Magintharan, Derailment of "The Dual Railway Track System, fn* 1 above at 480
[153] *S. Magintharan, Derailment of "The Dual Railway Track System, fn* 1 above at 480 - 485
[154] *S. Magintharan, Derailment of "The Dual Railway Track System", fn* 1 above at 485 – 492.
[155] *S. Magintharan, Derailment of "The Dual Railway Track System", fn* 1 above at 492 – 494.
[156] *S. Magintharan, Derailment of "The Dual Railway Track System", fn* 1 above at 494 – 500.
[157] *S. Magintharan, Derailment of "The Dual Railway Track System", fn* 1 above at 500 - & 501.
[158] *Orion-One Residential, fn* 21 above.

CONCLUSION

Lord Briggs in the Supreme Court of the United Kingdom in *Bresco Electrical*[159] recently acknowledged the effectiveness of statutory adjudication as a dispute mechanism in construction disputes in the following emphatic terms:

> "13. But solving the cash flow problem should not be regarded as the sole *objective of adjudication*. It was designed to be, and *more importantly has proved to be, a mainstream dispute resolution mechanism in its own right, producing de facto final resolution of most of the disputes which are referred to an adjudicator*."(emphasis added)

The dual railway track system and primacy of statutory adjudication principles are necessary and essential fabrics in statutory adjudication which have been reiterated recently in Australia[160], Malaysia[161] and the United Kingdom[162]. Their purpose is aimed at and have been effective to prevent the "mischief" where "main contractors were abusing their position to wrongfully withhold payment from subcontractors who were in no position to make any effective protest"[163] and in seeking to stifle their subcontractor's "lifeblood" - cash flow - for construction work carried out by onerous contractual terms in their contract which the subcontractors are in reality in no position to effectively protest.

However, regrettably in Singapore, it is respectfully reiterated that statutory adjudication is in a state of regression with Parliament and the Courts having "put to rest" these two (2) fundamental principles of statutory adjudication – the dual railway track system and the primacy of statutory adjudication principles. It is respectfully

[159] *Bresco Electrical*, fn 2 above at [13].
[160] See cases referred to in *fn* 18 above.
[161] See cases referred to in *fn* 19 above.
[162] See cases referred to in *fn* 17 above.
[163] *Rupert Morgan, fn* 7 above 1872 at [14 (e)] per Jacob LJ.

reiterated that, with the abrogation of these two (2) fundamental principles in statutory adjudication, Parliament and the Courts in Singapore have inadvertently opened the floodgates for the revival of the very "mischief" that statutory adjudication was aimed to prevent in the first place – "the common industry practice" where owners/main contractors impose onerous terms in their construction contract (Standard Forms or otherwise); "abusing their position to wrongfully withhold payment from subcontractors who were in no position to make any effective protest";[164] stifle the contractors of their "life blood" – cash flow – by preventing the subcontractors from invoking the low cost speedy statutory adjudication process under SOPA but instead allowing the "common industry practice" where owners/main contractors deliberately delay, drag the already cash-stripped contractor through the whole ordeal of a final resolution of the construction dispute by way of litigation or arbitration, leading to the contractor's ruin along the way without the final determination of the contractor's entitlement to his "life blood" – cash flow.

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[164] *Rupert Morgan, fn* 7 above 1872 at [14 (e)] per Jacob LJ.

ARTIFICAL INTELLIGENCE & NEW TECHNOLOGIES - ARE WE READY FOR ROBOT ARBITRATORS?

By Kanika Saran

ABSTRACT

An evolving generation of technological tools like cryptocurrency and blockchain could play a significant role in international business and commerce. These tools enable transactions to be entered into securely and grow in exponential volumes. The disputes arising from arrangements made through the use of these technologies in turn would lead to a greater utilisation or reliance on these same technologies to resolve any disputes arising therefrom. Arbitration and these technologies share a mutually beneficial relationship. Arbitration provides a well fit solution for in the same way that these new technologies promote transaction making, they could also expeditiously facilitate the process of dispute resolution.

The central theme of this paper focuses on application of Artificial Intelligence (from which cryptocurrency and blockchain are its derivatives) in the resolution of technical and complex disputes by arbitration.

This work is divided in four parts. Part I addresses that the unlimited freedom in the use of technologies under the arbitral framework and draws lessons from the results of various surveys on the preferences of parties in their choice of dispute resolution mechanisms. Part II,

focuses on the significance and scope of Artificial Intelligence and its use as tools in international arbitration. In Part III, attention is devoted to the challenges and limitations pose by its use i.e. confidentiality, lack of due process and reasoned awards, risk of bias, role of the arbitrator, form and content of arbitration award, and how a 'Robot Arbitrator'[1] can overcome these issues.[2] In Part IV, the author considers the question of whether the use of robot arbitrator is an appropriate alternative in comparison with human arbitrators.

INTRODUCTION

With the increment in complex disputes, the cost of resolution of a dispute is increasing and the process of administration of justice is taking longer durations.[3] In such a scenario, technology[4] can play a vital role in resolution of international commercial disputes by being a significant assistive toolbox. Usage of latest technological tools can aid in improvement of the contemporary state of the functioning of the legal industry, thereby assisting and facilitating in fast-tracking the dispute resolution process by handling voluminous documents. It will not only save cost but also make justice accessible to the parties irrespective of their economic power.[5]

In the times when usage of computers along with other technologies was negligible, legal professionals relied on books for references and submitted handwritten petitions before the legal forums to present their cases. However, with socio-economic development and advancement in technology, the legal industry embraced various technological tools like online legal database for research and

[1] Robot Arbitrator/ Artificial Intelligence Arbitrator in reference to this research paper is a tool of artificial intelligence that helps to conduct arbitration proceedings through a software and not a human.
[2] This part of the paper regarding remarks for overcoming challenges of Robot Arbitrators draws ideas from the author's own submission for the module on Future of International Commercial Arbitration in APAC Region.
[3] Gabrielle Kaufmann-Kohler and Thomas Schultz, 'The Use of Information Technology in Arbitration' (2005) Jusletter Vol.5, 4 <https://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf> accessed on 4th March, 2020. (Kaufmann-Kohler, Schultz).
[4] Pursuant to this directed research the scope of technology/ technologies/ technical includes Cryptocurrencies and Blockchain contracts.
[5] Kaufmann-Kohler, Schultz (n 3) 5.

computer programmes for analysing and drafting bulky contracts and/or petitions. Resultantly, the aforesaid have made the dispute resolution process flexible and convenient.

Modern technologies like cryptocurrencies[6], blockchain[7]and artificial intelligence[8] ("AI") are relatively novel concepts amongst the legal professionals and their usage is yet to be fully explored. Currently, usage of 'new' technologies in arbitration proceedings are limited to the areas of word processing, electronic communications, document management, audio/video conferencing and real-time transcription. These to a certain extent increase the productivity and utility of arbitration, thereby expanding the scope of arbitration in more industrial sectors.[9]

With the increase in reliance to AI technologies in international commercial transactions, it could be expected that there will be an addition in the complex class of disputes with features of such technology. [10] Arbitration by AI can pose challenges relating to unreasoned awards, risk of bias, lack of empathy and emotion, inflexibility as well as issues of unambiguous law. Few academicians [11] have also discussed and commented on various

[6] "Cryptocurrency" is a type of a digital currency which operates independently of any bank and is dependent upon encryption for security and for verification of the transactions. A more detailed discussion regarding the same is in Part II of the research paper.

[7] A "blockchain" is "a database that stores digital information in a highly secure manner by using cryptographic functions to encrypt such information and distributing the database across a number of networks. A more detailed discussion regarding the same is in Part II of the research paper.

[8] John McCarthy has defined "Artificial Intelligence" as a machine that behaves in ways that would be called intelligent if a human were so behaving. A more detailed discussion regarding the same is in Part II of the research paper.

[9]Gauthier Vannieuwenhuyse, 'Arbitration and New Technologies' (2018), Journal of International Arbitration, Vol.35IssueNo.5,119<http://www.kluwerarbitration.com.libproxy1.nus.edu.sg/document/kli-joia-350105?title=Journal%20of%20International%20Arbitration>accessed on 4th March, 2020. (Vannieuwenhuyse).

[10] Ibid. 120.

[11] Maxi Scherer (PhD (Sorbonne), LLM (Cologne), MA (Sorbonne)) is a full-time tenured Professor of Law at Queen Mary, University of London and a Special Counsel at Wilmer Cutler Pickering Hale a Dorr LLP in London. She has extensive experience with arbitral practice both in civil and common law systems.

challenges to AI arbitration.[12] The question which remains to be answered is - are we ready to deal with these challenges?

The parties to such technical disputes may not wish to be stuck in long drawn litigation process and would want to prefer an alternate dispute resolution mechanism which resolves disputes efficiently and effectively. Although, arbitration asserts of a decentralised regime, the benefits of its enforcement mechanism, and flexibility makes it the most suitable dispute resolution mode.[13]

Disputes arising out of use of new technologies are generally referred to the national courts, rather than arbitration.[14] However, the customised rules make international arbitration desirable for resolution of conflicts. Moreover, international arbitration awards are considered international judicial decisions which are delocalized from the national laws of the countries.[15] Thus, delocalization makes it difficult to enforce coded contracts i.e. smart contracts [16] under domestic arbitration laws. Therefore, the method of arbitration is a 'perfect fit' to resolve the unpredictable and complex conflicts. The goal is to achieve a balance between arbitration and AI which is still in its nascent stage. AI can be fruitful in improving efficiency, effectiveness as well as the quality of the arbitral proceedings.[17]

AI has undergone a significant advancement since 1950s. It germinated by creating smart gears and programmes and progressed to researching and educating deep neutral networks. In these five decades, it could not have been forecasted that today e-

[12] Maxi Scherer, 'Artificial Intelligence and Legal Decision-Making: The Wide Open?' (2019) Journal of International Arbitration, Vol.36 Issue No. 5, 539-574. <http://www.kluwerarbitration.com.libproxy1.nus.edu.sg/document/kli-joia 360501?title=Journal%20of%20International%20Arbitration> accessed on 6th March, 2020. (Scherer).
[13] Vannieuwenhuyse (n 9) 119.
[14] RikkaKoulu, 'Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement' (2016) Scripted, Vol. 13 Issue No.1, 40, 54 <https://helda.helsinki.fi//bitstream/handle/10138/165933/Koulu_2016_Blockchains_and_ODR.pdf?sequence=1> accessed on 6th March, 2020.
[15] Vannieuwenhuyse (n 9) 128.
[16] A "smart contract" has been defined as a set of promises, specified in digital form, including protocols within which the parties shall perform the promises.
[17] Vannieuwenhuyse (n 9) 128-129.

mail correspondences will be sent for records or system of digital/ e-courts will come into place. AI has been trying to work out the logistics in the legal field which might not work as of today, but it seems to be an effective form of dispute resolution, free from unreasonableness and prejudice of an arbitrator. I believe that AI will be able to make reasonable awards in the future with its ever-growing evolution.

The major part of the paper presents a detailed examination of the scope, challenges and recommendations for use of AI in international arbitration. The rest discusses whether disputes arising from new technologies like blockchain contract and cryptocurrency can be resolved by 'Robot Arbitrators'.

The challenges faced by arbitrations conducted by AI has not garnered enough attention from academicians leaving a dearth of literature in that space. I hope, the present paper will be valuable in filling the vacuum between the technical advancements and arbitration which are likely to have a huge impact in the future.

PART I

NO BAR OF USING NEW TECHNOLOGIES IN ARBITRATION

The present legal framework in most of the countries does not specifically exclude the usage of latest technologies in arbitral proceedings. "*Technology is not a new partner of arbitration".*[18] The decision to resolve their dispute through arbitration and the manner in which arbitral proceedings will be conducted are based on the concept of party autonomy. Thus, until stated specifically, the parties and the arbitrator enjoy a substantial operational freedom.

The Model law as well as rules of a various International Arbitration

[18] LitoDokopoulou, 'Arbitration X Techonlogy' (*Kluwer Arbitration Blog,* 14 January, 2019) <http://arbitrationblog.kluwerarbitration.com/2019/01/14/arbitration-x-technology-a-call-for-awakening/> accessed on 7th March, 2020.

Institutions have provisions highlighting such liberty.

Under the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") Article 19(1) states that *"subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting proceedings".*[19] Furthermore, Article 19(2) of the Model Law states that "*failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such a manner as it considers appropriate"*.[20]

The Arbitration Rules of the International Chamber of Commerce ("ICC") under Article 25(1) of state that *"the arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means."*[21]

Moreover, Article 19(1) of the Singapore International Arbitration Centre ("SIAC") Rules states that *"the tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute".*[22]Furthermore, Article 19(2)of the SIAC Rules goes on to state that *"the Tribunal shall determine the relevance, materiality and admissibility of all evidence [and] is not required to apply the rules of evidence of any applicable law in making such determination"*.[23]

Also, the London Court of International Arbitration Rules ("LCIA")under Article 14(4)(ii) states that *"the Arbitral Tribunal's general duties at all times during the arbitration shall include: a duty to adopt procedures suitable to the circumstances of the arbitration,*

[19] United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006, G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (4th December, 2006), Art, 19(1).
[20] Ibid. Art. 19(2).
[21] Arbitration Rules in force as from 1March 2017 Mediation Rules in force as from 1 January 2014, International Court of Arbitration, International Chamber of Commerce, r.25(1).
[22] Arbitration Rules of the Singapore International Arbitration Centre, 6th Edn.,1 August 2016, r. 19.1.
[23] Ibid. r. 19.2.

avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute."[24]

Article 22(2) of the Hong Kong International Arbitration Centre("HKIAC") states that *"the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence".*[25]

Therefore, the most popular international arbitration institutional rules do not highlight any manner by which an arbitrator can establish the facts of cases and determine evidence.

In fact, even under the rules of International Bar Association ("IBA") on taking evidence in international arbitration, it provides for a broad meaning/scope of a "document" viz. *"writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means".*[26]Therefore, this wide definition includes contracts written in the form of a computer code.

The concept of party autonomy allows the parties to enjoy the liberty to direct the case management as well as the fact- finding process. Thus, the idea of using new technologies in international arbitration cannot be restricted on the basis of institutional rules followed by the respective arbitral tribunal.[27]

Albeit, there are a few countries which are exceptions to this general view and specifically limit the reference of an arbitrator to "people", thus excluding the scope of Robot Arbitrators.

The Peruvian Arbitration Act under Article 20 provides for the restrictions while selecting an arbitrator and states *"any individual*

[24] London Court of International Arbitration Rules, 2014, arts. 14(4)(ii), art. 22(1)(vi).
[25] Hong Kong International Arbitration Centre Administered Arbitration Rules, 2013, art. 22.2.
[26] International Bar Association Rules on the Taking of Evidence in International Arbitration, 2010.
[27] Francisco Urbarri Soares, "New Technologies and Arbitration" [2018] 7(1) Indian Journal of Arbitration Law, 84- 103. (Soares).

with full capacity to exercise his civil rights" may act as an arbitrator.[28] Moreover, Article 24(1)(c) of the U.K Arbitration Act states that "*a party to arbitral proceedings may apply to the court to remove an arbitrator on the grounds that he is physically or mentally incapable of conducting the proceedings……..."*.[29] Similar references are under Article 13(1) of the Brazil Arbitration Law[30] and Article 19 of the Ecuador Arbitration and Mediation Law, 1997[31].

Moreover, the arbitration legislations for international arbitration in Columbia and Chile do not state a definite reference to the appointment of "people" as arbitrator in the exercise of their civil right.[32] Thus, one can argue that there is a scope of interpreting robot arbitrators within the arbitration law of these countries.

RELATIONSHIP BETWEEN ARBITRATION AND NEW TECHNOLOGIES

The results of a number of surveys have highlighted the reasons for preferring arbitration as a more suitable method for resolution of technical disputes.

EXAMPLES OF VARIOUS SURVEYS

Survey of the Silicon Valley Arbitration and Mediation Centre ("SVAMC") has ranked the benefits of arbitration as follows – expert decision making (80%), time (54), confidentiality (41%) and

[28] Law No. 1071, 1st September, 2008, Arbitration Act Legislative Decree No. 1071, Art. 20 (Peru). 108.
[29] The Arbitration Act 1996, Art. 24(1)(c).
[30] Law No. 9.307/96, 23rd September, 1996: See Art. 13(1)- *"Any individual with legal capacity, who is trusted by the parties, may serve as arbitrator".*
[31] Ley No. 000. RO/ 145, 4th September, 1997, art. 19 (Ecuador); Also see Arbitration Rules in force as from 1March 2017 Mediation Rules in force as from 1 January 2014, International Court of Arbitration, International Chamber of Commerce: *"Article 19 of the AML compels the arbitrator to reveal any reasons that might disqualify him or her from performing his or her functions due to the presence of a conflict of interest."*
[32] José Maria de la Jara, Daniela Palma, Aljandra Infantes, 'Machine Arbitrator: Are We Ready? (Kluwer Arbitration Blog, 4 May, 2017) <http://arbitrationblog.kluwerarbitration.com/2017/05/04/machine-arbitrator-are-we-ready/> accessed on 6th March, 2020 (De la Jara, Palma, Infantes)

streamlined process (38%).[33]

A survey was conducted by Queen Mary University of London in 2015 wherein the essential and most suitable elements of international arbitration were decentralisation (64%), flexibility of procedure (38%) and enforceability of awards (65%).[34]

Another survey was conducted by the WIPO Centre of International Survey on Dispute Resolution in the Technology Transaction which concluded that the parties to the hi-tech disputes prefer out of court dispute resolution mechanism due to: cost effectiveness (71%), less time consumption (56%), enforceability of the awards (52%), expertise of the arbitrator providing for quality outcome (44%) as well as confidentiality (32%).[35]

Consequently, it can be said that parties prefer arbitration over litigation as party autonomy allows them to appoint an arbitrator with sector specific expertise in comparison to a national judge of a country. Moreover, arbitration seems more promising with respect to its effectiveness and efficiency in the dispute resolution process. At this juncture, another question is whether AI arbitration conducted by a Robot Arbitrator can take over the human arbitrators for resolution of complex and technical disputes arising from cryptocurrencies and blockchain contracts?

PART II

UNDERSTANDING ARTIFICIAL INTELLIGENCE

[33] Benton, Chris Compton and Les Schiefelbein, 'Cost is the Top Tech Litigation Problems', Survey Shows, Arbitration strongly preferred for Specialised Expertise, Silicon Valley Arbitration and Mediation Centre (2017) available at <https://svamc.org/wp-content/uploads/SVAMC-2017-Survey-Report.pdf>

[34] White & Case, School of International Arbitration 2015 International, Queen Mary University of London, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration 'available at <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf>(White & Case International Arbitration Survey)

[35] WIPO Arbitration and Mediation Centre, 'Results of the WIPO Arbitration and Media Centre International Survey on Dispute Resolution in Technological Transactions', March, 2013 available at <https://www.wipo.int/export/sites/www/amc/en/docs/surveyresults.pdf>

Artificial Intelligence ("AI") is a term coined by John McCarthy in her Dartmouth Summer Research project of 1956[36], wherein she defined AI as *"a machine that behaves in ways that would be called intelligent if a human were so behaving".*[37] Although no agreement has been reached yet on the clear and definitive definition of AI[38], it can be understood as *"the process where the software has the ability to learn automatically from the pattern recognition of the data"*.[39] It incorporates machine learning, deep learning, natural language processing ("NLP") and cognitive computing.[40] The concept of machine learning is different from deep learning.[41] Deep learning consists of connected layers of networks, where each unit in such layers uses the external data (i.e. pixels of images for recognition) and subsequently distributes the information among other layers of the network.[42] Thus, in order to produce the output, the input is integrated through multiple layers with the help of a simple mathematical rule.[43]Therefore, AI generates a "probabilistic output"

[36]James Moor, 'The Dartmouth College Artificial Intelligence Conference: The Next Filthy Years' (2006) AI Magazine, Vol. 27. Issue No. 4, 1 <https://www.aaai.org/ojs/index.php/aimagazine/article/view/1911> accessed on 12th March, 2020

[37]J. McCarthy, M.L. Minsky, N. Rochester, 'A Proposal for the Dartmouth Research Project on Artificial Intelligence' (31 August, 1955) available at <http://jmc.stanford.edu/articles/dartmouth/dartmouth.pdf>

[38] Luke Muehlhauser & Louie Helm, 'Intelligence Explosion and Machine Ethics' (2012) Machine Intelligence Research Institute, 1-29 <https://intelligence.org/files/IE-ME.pdf> accessed on 15th March, 2020.

[39] Kathleen Paisley and Edna Sussma, 'Artificial Intelligence Challenges and Opportunities for International Arbitration' (2018) NYSBA New York Dispute Resolution Lawyer Vol.11 Issue No.1, 35 <https://sussmanadr.com/wp-content/uploads/2018/12/artificial-intelligence-in-arbitration-NYSBA-spring-2018-Sussman.pdf> accessed on 15th March, 2020.

[40] Ibid.

[41]Thomas R. Snider, SerjejsDelevka, 'Artificial Intelligence and International Arbitration: Going beyond E-mail' (*Mondaq*, 21 May, 2018) <https://www.mondaq.com/saudiarabia/Technology/703064/Artificial-Intelligence-And-International-Arbitration-Going-Beyond-E-Mail> accessed on 15th March, 2020. (Snider, Delevka).

[42] Dr. Axel Walz & Kay Firth Butterfield, 'Implementing Ethics into Artificial Intelligence: A contribution, from a legal perspective, to the development of an AI governance regime' (2019) Duke Law and Technology Review, Vol. 18 Issue No.1, 183 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1352&context=dltr> accessed on 15th March, 2020 (Walz, Butterfield).

[43] YacarBathaee, 'The Artificial Intelligence Black Box and the Failure of Intent and Causation' (2018) Harvard Journal of Law & Technology Vol.31, Issue No.2, 901 <https://jolt.law.harvard.edu/assets/articlePDFs/v31/The-Artificial-Intelligence-Black-Box-and-the-Failure-of-Intent-and-Causation-Yavar-Bathaee.pdf> accessed on 15th March, 2020; Also see, Davide Castelvecchi, 'Can We Open the Black Box of AI?' (*Nature,* 5 October, 2016) (Oct. 5, 2016) <https://www.nature.com/news/can-we-open-the-black-box-of-ai-1.20731> accessed on 15th March, 2020.

based on the statistical result from the mathematical rule.[44]Moreover, the concept of NLP technology plays an important part of AI. NLP can be understood as a way of understanding strings of characters that lead to formation of words and sentences in 'natural' language' like English.[45]

In the present scenario, AI is used in almost every part of our daily lives. *For example*, AI helps the companies operating goods/ items for online retail to have a better understanding of what their customers want. When the customers shop online, the company software tracks the items viewed by the customer and predicts the probable choice depending on the previous searches. Thus, the AI software helps the company develop and retail products as per the specific needs of the customers.[46]

On one hand, AI can make the arbitration proceedings cost effective whereas on the other hand it focuses on creating programmes that will soon replace human arbitrators by Robot Arbitrators. Therefore, it is apt to state that international arbitration "promotes freedom from the judiciary" and AI "promotes 'freedom from cognitive limitations".[47]

Despite the traditional conflict resolution regime, technology has made pierced its way to be a significant part of the dispute resolution process. Taking an *example* of an international commercial arbitration with its venue in Singapore, when the foreign parties as well as the Swiss Arbitrators are not be able to fly down to Singapore for the arbitral proceedings due to some personal difficulty, one option is to delay the arbitration proceedings and the other option is to conduct the arbitration proceedings through video-conferencing, by using AI tools to manage and analyse the documents. In a survey conducted by the Queen Mary University in 2015, 46% out of the 763

[44] Walz, Butterfield (n 42) 183.
[45] Snider, Delevka (n 41).
[46] Online retail stores like 'Amazon' available at <https://www.amazon.com/>.
[47] Lucas Bento, 'International Arbitration and Artificial Intelligence: Time to Tango?' (*Kluwer Arbitration Blog,* 23 February, 2018) <http://arbitrationblog.kluwerarbitration.com/2018/02/23/international-arbitration-artificial-intelligence-time-tango/> accessed on 15th March, 2020.

respondents felt that the counsel in an arbitration proceeding should make 'better use' of technology to save time and cost.[48] With the development of latest technologies and more operative AI programmes, robot arbitrators are expected to take over human functions and their jobs. The robot arbitrators claim to render arbitral awards effectually in comparison to the human arbitrators.

Paul Cohen and Sophie Nappert argue that because the parties to international arbitration are dissatisfied by the long and costly arbitration proceedings, we are at the threshold of being transformed by AI as technology is readily available and affordable to be able to address the grievances of the users regarding such process.[49]

EFFECTS OF REPLACING HUMAN ARBITRATORS WITH ARTIFICIAL INTELLIGENCE

1. Party Autonomy

Parties to the arbitration proceedings have the independence to nominate their own arbitrator. There is no bar in the definition of 'arbitration agreement' of various international institutional rules and statues that the arbitrator shall be human.[50] However, in domestic arbitrations, the State has control on the appointment of AI arbitrators, by defining an arbitrator to be a human being.[51]Therefore, there is a chance of disruption in international arbitration proceedings as the parties are allowed to choose a Robot Arbitrator in place of a human arbitrator; whereas, in court adjudication, only the State has the authority to replace judges of the Court.

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[48] White & Case International Arbitration Survey (n 34).
[49] Paul Cohen & Sophie Nappert, 'The March of the Robots' (*Global Arbitration Review*, 15 February, 2017) <https://globalarbitrationreview.com/article/1080951/the-march-of-the-robots> accessed on 15th March, 2020 (Cohen &Nappert); Also see, Jack Wright Nelson, 'Machine Arbitration and Machine Arbitrators'(*Young ICCA Blog,* 28 July 2016) <http://www.youngicca-blog.com/machine-arbitration-and-machine-arbitrators/> accessed on 15th March, 2020; See generally, Christine Sim. 'Will Artificial Intelligence take over Arbitration?' (2018) Asian International Arbitration Journal (Kluwer Law International), Vol.14 Issue No.1, 1-14 <http://kluwerlawonline.com/abstract.php?area=Journals&id=AIAJ2018001> accessed on 15th March, 2020 (Sim).
[50] Sim (n 49) 1.
[51] Ibid. 1-2.

2. Available Programmes

A number of AI programmes are being developed to assist the international arbitrators in the resolution of disputes. There is a programme called the "Adjusted Winner", which will help in fairly dividing the goods between two parties on the basis of an algorithm.[52] Another programme has been developed by eBay, "Mondria" which helps in resolution of disputes by using an algorithm on the basis of the pre-programmed rules.[53] Moreover, Mondria also acts as a case management tool and it is ideal for resolution of disputes of consumers who are not able to afford the cost of arbitration.[54]

3. Combined Tribunal consisting of Human Arbitrators and Robot Arbitrator

Is constitution of a tribunal consisting a combination of robot arbitrators and human arbitrators a better option than a sole robot arbitrator? Is it possible for robot and human arbitrators to work together to resolve a conflict?

I believe the stage where the robot arbitrators can completely replace the human arbitrators is not far enough with regard to resolution of complicated technical disputes. In any case, in today's scenario, support of AI is crucial for an arbitrator to resolve a dispute whether it is technical, non- technical or commercial. AI is becoming an indispensable part of the dispute resolution process.

[52]Adjusted Winner- "Adjusted Winner (AW) is an algorithm developed by Steven J. Brams and Alan D. Taylor to divide n divisible goods between two parties as fairly as possible" available on <http://www.nyu.edu/projects/adjustedwinner/>; Also see, Sim (n 49) 2.

[53] Daniel E González, Maria Catalina Carmona & Roland Potts, 'Controlling the Rising Costs in Arbitration: Where Technology Can Help (And Where It Can't)' (2015) The Journal of Technology in International Arbitration Vol.1 Issue.1, 47– 56 <http://arbitrationlaw.com/files/free_pdfs/jtia_vol_1_no_1_toc_tc.pdf> accessed on 15th March, 2020; Also see, Sim (n 49) 4-5.

[54]Jack Graves, 'Leveraging Technology for More Cost-Effective Arbitration of Cross-Border Commercial Disputes: An Introduction to the Range of Possibilities with a Focus on MSMEs' (2015) The Journal of Technology in International Arbitration Vol.1 Issue.1, 35– 47 <http://arbitrationlaw.com/files/free_pdfs/jtia_vol_1_no_1_toc_tc.pdf> accessed on 15th March, 2020.

(a) Artificial Intelligence assists the Arbitrator by researching the law

One of the important initial AI tools called "Kira" was a *"powerful machine learning software that identifies, extracts, and analyses text in your contracts and other documents"*.[55]IBM also established an AI tool titled "Ross" which is the "world's first Artificial Intelligent Attorney" and has been assisting in handling the bankruptcy practice of the firm.[56] 'Ross' is more efficient than a human attorney and can assist in compilation of research, preparation of notes as well as in generation of responses by digesting large database of legislations, academic material and precedents.[57]Acceptance of such technology in resolving conflicts in commercial arbitration is not far in time as it makes the dispute resolution process flexible, quicker and less costly.

(b) Analysing submissions and evidences of the parties

Assistance of AI tools can be used in predictive coding for discovering documents in research database and in assessing the importance of various evidences. With the help of the algorithm, AI can quickly go through the documents which are required in an arbitration under the 'document production request'.[58] Cohen and Sophie argued that AI can take over the work of the tribunal secretaries by summarizing the submissions of the parties, analysing the facts of the case and finding similar research case laws.[59]

(c) Checking the final arbitration award rendered by the Human Arbitrator

[55] Julien Rodsphon,'Blockchain Technology & AI Arbitration: What May the Future hold?' (2019) Association for International Arbitration Newsletter, Articles on Investment and AI Arbitration <https://www.ipg-online.org/data/cms_uploads/module_partner/publications/AIAs-Newsletter5.pdf> accessed on 15th March, 2020 (Rodsphon); Also see, Kira System – "Kira is a powerful machine learning software that identifies, extracts, and analyses text in your contracts and other documents" available on <https://kirasystems.com/>.
[56]Joi Matthew, 'IBM's Watson-Powered Sales Associate Robots to Be Rolled out into U.S. Retailers by June 2016' (*Futurism,* 24 January, 2016) <https://futurism.com/ibms-watson-powered-sales-associate-robots-to-be-rolled-out-into-u-s-retailers-by-june-2016>accessed on 15th March, 2020.
[57] Sim (n 49) 3.
[58] Sim (n 49) 3.
[59] Cohen and Sophie (n 49).

AI can help in checking errors in the award much faster than the human arbitrators. Pertinently, Cohen suggested that AI can be used to correct the bias of the arbitrator and one can compare the decision of the human arbitrator against the decision of the robot to cross check the impartiality and independence of the arbitrator.[60]

Therefore, AI can significantly help in making the arbitral proceedings cost friendly.

SIGNIFICANT BENEFITS OF CONDUCTING ARBITRATIONS BY ROBOT ARBITRATOR WITH THE SUPPORT OF ARTIFICIAL INTELLIGENCE TOOLS

(a) Predictive coding

Predictive coding is one of the important tools of AI. It can be understood as a form of controlled machine learning that takes the data input of documents reviewed by humans and applies it to other voluminous documents.[61] Thus, predictive coding aids in identifying the documents responsive to the algorithm.[62] The English courts[63] as well as US Courts[64] have been relying on the results of such coding in the litigation practice for years. Moreover, the use of such tools in International arbitration has been encouraged in a number of guidelines of various international arbitration institutions.[65]

The technological tools like online signatures, e-filing and video conferencing are used to accelerate the efficiency of the dispute

[60] Ibid.
[61] Claire Morel de Westgaver, Olivia Turner, 'Artificial Intelligence, A driver for Efficiency in International Arbitration- How PREDICTIVE Coding can Change Document Production' (*Kluwer Arbitration Blog,* 23 February, 2020) <http://arbitrationblog.kluwerarbitration.com/2020/02/23/artificial-intelligence-a-driver-for-efficiency-in-international-arbitration-how-predictive-coding-can-change-document-production/> accessed on 15th March, 2020 (De Westgaver, Turner).
[62] Ibid.
[63] *Brown v BCA Trading Ltd* [2016] EWHC 1464 (Ch).
[64] *Moore v Publicis Groupe* 11 Civ 1279 (ALC) (AJP) (US District Court SDNY, 24th February 2012).
[65] 'ICC Commission Report for Managing E-Document Production' Commission on Arbitration and ADR available at <https://iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production-2012.pdf>; 'International Arbitration Protocol, Protocol for E- Disclosure in International Arbitration' Chartered Institute of Arbitrators available at <https://www.ciarb.org/media/1272/e-iscolusureinarbitration.pdf>; Also see, De Westgaver, Turner (n 61).

resolution process[66] whereas, predictive coding is used for saving costs.[67]

Example – 'ArbiLex' is a start-up that assists the parties reach a resolution effectively and efficiently with the use of data analytics.[68] This product helps the international litigators use the predictive data given by an expert on a particular factor of a case to match their perception in solving the conflicts.[69]

The start-up's algorithm can be used as a standard for the parties to think on the basis of probability while assessing results of these disputes rather than having a unclear mindset.[70] This Bayesian approach followed by ArbiLex beats the element of confidentiality, which has been an issue in the sphere of prediction of results by AI as the machine learning model is unable to explain the reasons as well as the algorithms used for reaching a particular conclusion.[71]

Moreover, even law firms like "LexPredict" are building their own tools to predict the results of litigation and arbitration in order to

[66] Edwin Montoya Zorrilla, '*Towards a Credible Future: Uses of Technology in International Commercial Arbitration'* (2018) German Arbitration Journal Vol.16, 106, 109 <https://beckassets.blob.core.windows.net/product/toc/7892/7892_schiedsvz_2018_02_inhaltsverzeichnis.pdf> accessed on 15th March, 2020; Also see, Also see Zhen Qin, 'The Use of New Technologies in International Arbitration' (2019) The American Review of International Arbitration, Columbia Law School <http://aria.law.columbia.edu/the-use-of-new-technologies-in-international-arbitration/?cn-reloaded=1> accessed on 15th March, 2020. (Qin).

[67] Maura R. Grossman and Gordan V. Cormack, 'Technology- Assisted Review in E-Discovery Can Be More efficient Than Exhaustive Manual Review' (2011) Richmond Journal of Law and Technology Vol 17 Issue 3, 1-49 <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1344&context=jolt> accessed on 14th March, 2020.

[68] Arbilex – "ArbiLex offers an empirical, coherent, and explainable framework for counsel to quantify uncertainties, reduce errors, and maximize desirable outcomes in high-stakes international arbitration cases in a cost-effective manner" available at <https://www.arbilex.co/welcome>.

[69] Frederick Daso, 'ArbiLex, A Harvard Law School Legal Tech Startup Uses AI to Settle Arbitrations' (*Forbes,* 4 February, 2020) <https://www.forbes.com/sites/frederickdaso/2020/02/04/arbilex-a-harvard-law-school-legal-tech-startup-uses-ai-to-settle-arbitrations/#414cbe0152c5> accessed on 14th March, 2020. (Daso).

[70] Ibid.

[71] Qin (n 66); Also see, Benjamin Roe, *'The Year Ahead – Innovation: A new generation of legal analysis tools is emerging'* (Global Arbitration News, 12 January, 2019) <https://globalarbitrationnews.com/the-year-ahead-innovation-a-new-generation-of-legal-analysis-tools-is-emerging/> accessed on 14th March, 2020 (Roe); Also see, Daso (n 69).

provide better legal services.[72]

Therefore, it can be said that predictive coding is a significant feature of AI as it helps in achieving higher consistency and lowers the risk of error.[73]

(b) Digestion and review of voluminous document

The benefits of natural language processing and machine learning have attracted a lot of investment in the legal industry.[74]AI assists in highlighting the necessary part of the documents required for conflict resolution. The process of interpreting relevant parts of documents can be crucial, thus AI trains its programmers through a 'neutral network' which alters the relevance of the connections, so that more weight is given to the neurons that will trigger the desired outcome.[75]Thus, the algorithm system helps in achieving the correct output in a quicker manner in comparison to the convention programme by the expert human arbitrator.[76]

AI can also be used to assess the evidence in order to determine the relevance of the document. The software can assist in preparing summaries of evidence and witness statements. However, even though AI programmes can evaluate the materiality of documents, the issue of admissibility should be left to the arbitrator.[77]

Nowadays, several law firms are installing such software's to reduce the workload of analysing lengthy documents on their highly qualified professional attorneys, and instead spend more time in preparing

[72] Roe (n 71).
[73] De Westgaver, Turner (n 61).
[74]Joanna Goodman, '*Robots in Law: How Artificial Intelligence is Transforming Legal Services',* (ARK Group, 2016).
[75]Martin Davidson, 'AI and a New Way of Looking at Contract Pre-Screening' (*Tech Law, Singapore Law Gazette,* February, 2019) <https://lawgazette.com.sg/practice/tech-talk/ai-and-a-new-way-of-looking-at-contract-pre-screening/> accessed on 15th March, 2020.
[76] Ibid.
[77]Rodsphon (n 55).

arguments.[78]

(c) Drafting awards and Speech Recognition

Generally, arbitrators take a long time to draft a particular section of the award like the information regarding parties, procedural history and details about the arbitration clause. The process of rendering an award will be efficient if this part of the award is drafted with the assistance of an AI software, as it will be able to extract the relevant content from the voluminous documents effectively with the help of an algorithm as compared to a human arbitrator.[79]

AI automatically starts the process of Natural Language Generation ("NGL") which helps in creating a written description of the content.[80] The format of the content in NGL is constructed by the software provider and the data is fed through "conditional logic" which is part of the narrative design.[81] *For example*: AI can assist in drafting awards by creating summaries of the claimants and respondents and submissions by referring to longer versions of the documents. Moreover, the scope of error is minimal as the algorithm will use the relevant source document and then import the necessary part in a fluent summary format.

In fact, another benefit of AI is the speech recognition technology which allows the parties –

(1) To *avoid hiring a transcription specialist* to provide the details of the hearing *as AI will be able to record the minutes of the hearing and provide a real-time transcript* along with details of the speaker in a shorter period of time[82];

[78]Snider, Delevka (n 41).
[79] Ibid.
[80]Bernard Marr, 'Artificial Intelligence Can Now Write Amazing Content- What Does That Mean For Humans?' (*Forbes*, 29 March, 2019) <https://www.forbes.com/sites/bernardmarr/2019/03/29/artificial-intelligence-can-now-write-amazing-content-what-does-that-mean-for-humans/#3eecc1b250ab> accessed on 15th March, 2020.
[81] Ibid.
[82] Snider, Delevka (n 41).

(2) To *cut the costs of calling for assistance* to provide interpretation to the statements of the witnesses as AI can fulfil this purpose[83]; and

(3) To *avoid the expenses of translation of documents.* In international arbitration, there is high probability that the arbitrator is not fluent with the language of the contract as well as the documents in the dispute[84]. Thus, AI *reduces the cost by translating the documents with higher accuracy*.

(d) Expert Arbitrator

With modern technologies springing up, the task of selecting an arbitrator is becoming less challenging. The traditional process of selecting an arbitrator was an intuitive process based on various factors like personal references, previous awards rendered, standing and influence in the arbitration fraternity etc. However, with the help of AI, the process of appointment has become more reliable as it is based on specific data collected from the surveys conducted by the parties, their attorneys or firms which helps in providing definite information regarding the arbitrator without any bias.[85]This precise information can be helpful when a party wants to appoint an arbitrator with certain expertise. *For example:* in order to appoint an arbitrator to settle an international investment dispute under the International Centre for Settlement of Investment Disputes ("ICSID"), the institution database provides for a list of potentially suitable candidates who can be appointed for a specific dispute.[86] The search engine provides various filters like language, nationality, number of pending and concluding international arbitrations, membership of the arbitral panels, expertise etc. which turns out to be fruitful in short listing an arbitrator without any external personal reference.[87] As the

[83] Ibid.
[84] Ibid.
[85]Catherine A. Rogers, 'Arbitrator Intelligence: From Intuition to Data in Arbitrator Appointments' (2018) New York Dispute Resolution Lawyer, Vol.11 Issue No.2 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3113800> accessed on 14th March, 2020.
[86] ICSID: Arbitrators Overview Search engine available at <https://icsid.worldbank.org/en/Pages/arbitrators/Arbitrators-Overview.aspx>.
[87] Ibid.

search engine can be accessed by anyone and is not limited to the knowledge and reference of the attorney, the doubts regarding bias are minimal. AI provides reasons for the logical appointment of a particular arbitrator. Therefore, the appointment of expert arbitrator with the help of computer software has made the process of selection timely, less cumbersome and less costly.

(e) Efficient and cost-effective process for legal research and data analytics

In the current state of affairs, AI is changing the way attorneys approach a dispute and how they interact with the client. AI may turn out to be the next step in transforming the way disputes are resolved. AI provides for various software's that help in researching of legal sources with a goal of making the process effective and efficient. *For example*: the AI known as "Exterro" helps in legal research by performing the e- discovery tasks of the lawyers.[88]Another *example* of AI is "Lex Machina" which allows the attorneys to get quick research on whether the counsels have conflict with the parties or the arbitrators in the dispute.[89]

These software's not only reduce the cost and the time in conducting the arbitral proceedings but also provides for more satisfactory results. Furthermore, with the help of predictive coding AI also provides some level of certainty with regard to the likely damages to be awarded, estimated time for the conclusion of the arbitral proceeding, range of cost as well as experience of the opposing counsel.[90] Moreover, keeping in mind the relevance of the other non-economic factors, the certainty about the outcome will reduce the unmeritorious claim and will accelerate the resolution of the dispute

[88] Exterro: "Exterro's e-discovery and privacy software are available for legal Governance, Risk and Compliance (GRC) solutions" available at <https://www.exterro.com/>; Also see, Daniel Faggella, 'AI in Law and Legal Practice- A Comprehensive View of 35 Current Applications' (*Business Intelligence and Analytics,* 14 March, 2020) <https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/> accessed on 15th March, 2020. (Faggella).

[89]Lex Machina: "Predict the behaviour of courts, judges, lawyers and parties with Legal Analytics" available at <https://lexmachina.com/>; Also see, Falggella (n 88).

[90] Snider, Delevka (n 41).

in an effective manner.[91]

PART III

CHALLENGES AND ISSUES WITH ARTIFICIAL INTELLIGENCE ARBITRATIONS

AI is a now a growing business as it has already impacted several areas in the legal domain like contract analysis, e-discovery of documents and evidence, drafting and proof reading of submissions, documents translation and organization, case management as well as legal research.[92] However, the use of digital technology tools and AI pose various challenges in the process of dispute resolution.

I. Confidentiality

The confidential nature of the arbitral award is one of the fundamental reasons for the parties to prefer arbitration over other methods of dispute resolution. The problem with confidentiality in AI arbitral proceedings is with regard to access to precedents and the external assistance required to operate latest technologies while conducting arbitration proceedings.[93]

Commentators have stated that even though most of the jurisdictions do not provide for an express duty of confidentiality, there is a general duty of implied confidentiality in the arbitration agreement. [94]

[91] Ibid.

[92] Scherer (n 12) 540.; Also see, Richard Susskind, *'Tomorrow's Lawyers: An Introduction to Your Future'* (2d ed., Oxford University Press, 2017); See, Philip Hanke, 'Computers with Law Degrees? The Role of Artificial Intelligence in Transnational Dispute Resolution, and Its Implications of the Legal Profession' (2017) Transnational Dispute Management TDM (2) in Non- legal Adjudicators in National and International Disputes < https://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=72 > accessed on 14th March, 2020; Also see, Kate Apostolova & Mike Kung, 'Don't Fear AI in IA', (*Global Arbitration Review*,27 April, 2018)< https://globalarbitrationreview.com/article/1168595/don%E2%80%99t-fear-ai-in-ia > accessed on 15th March. 2020; Also see, Dr. Adesina Temitayo Bello, 'Online Dispute Resolution Algorithm: The Artificial Intelligence Model as a Pinnacle' (2017) The International Journal of Arbitration Mediation and Dispute Management Vol. 84 Issue No.2 < https://publication.babcock.edu.ng/Publications/about/4850> accessed on 15th March, 2020.

[93] Vannieuwenhuyse (n 9) 125.

[94] Gary B. Born, '*Chapter 20: Confidentiality in International Arbitration, in International Commercial Arbitration*' (2d ed., Kluwer Law International. 2014) 2779, 2785.

Moreover, unlike investment arbitration awards, a general rule suggests that the commercial arbitration awards and procedural orders are confidential in nature.[95] In order to feed the AI database, the only way to access the confidential awards is through the Arbitral Institutions or databases which can provide such information.[96] Currently, the institutions are working together to have a common database for such information in order to facilitate operations of arbitral proceedings through AI.[97] An *example* of such a database is 'LegalTech Dispute Resolution Data' which has been built as a caselaw database wherein almost all international arbitration institutions upload the confidential arbitration awards.[98] The awards are accessed without breaching the principle of confidentiality as the parties sensitive information is not disclosed in this database.[99]

Generally, it is suggested that the confidentiality agreement shall be signed by the individuals who have specific technical knowledge and are required for the functioning and supervision of these technological tools.[100]

II. Due process in decision making

Due process is a significant principle of international arbitration.[101]The programme of predictive coding puts the facts of the case, applicable law as well as the reasoning applied in the precedents on the same footing. This may result in following a conservative approach for the resolution of disputes.[102] AI places higher emphasis on the precedents and mostly duplicates the

[95] Vannieuwenhuyse (n 9) 126.
[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] Ibid.
[100]Ibid.
[101] Matti S Kurkela, Santtu Turunen & Conflict Management Institute, '*Due Process in International Commercial Arbitration*' (2nd edn., Oxford University Press, 2010); Also see, Bernardo M. Cremades, 'The Use and Abuse of Due Process in International Arbitration' (2016) Arbitraje Vol IX Issue No.3, 661-676 < https://arbitrajeraci.files.wordpress.com/2018/07/the-use-and-abuse-of-e2809cdue-processe2809d-in-international-arbitration.pdf> accessed on 12th March, 2020.
[102] Vannieuwenhuyse (n 9) 126.

observations of the such cases.[103] This conduct leads to absence of original thinking during the process, which is critical in order to produce novel and innovative solutions[104]

Although, the tools are helpful, the question emerges on the degree of reliance that can be placed on their 'services'. Digital technologies definitely reduce the time and the cost by going through precedents and distinguishing judgments on the basis of facts, however such tools need to be used with abundant caution. Over reliance on the programme decision might interfere with the process of intuitive justice.[105]

The United States Supreme Court in the case of *Loomis* addressed the issue of the viability and reliance on digital technology in order to render a justified decision.[106] The Court used the AI tool system 'The Correctional Offender Management Profiling for Alternative Sanctions', ("COMPAS") to determine the probability of an individual to be a repeat offender in comparison to its own decision. [107] Previously the Court relied on *"intuition, instinct and a sense of justice which could result in a more severe sentence based on an unspoken clinical prediction"* to measure the risk of recidivism.[108] In the current case, whilst considering the gender as well as the right of the offender to be sentenced, the Court observed that the Judges should rely on 'objective bearings' which promote transparency in determining the final decision.[109] The decision was challenged by the defendants on the ground that it was based on the findings of the AI

[103] Ibid.
[104] Ibid.
[105] Ibid.
[106]Winston Maxwell, Laurent Gouiffes and Gauthier Vannieuwenhuyse, 'The Future of Arbitration: New Technologies are Making a Big Impact – and AI Robots May Take "Human Roles' (*Hogan Lovells Publications,* 21 February, 2018) < https://www.hoganlovells.com/en/publications/the-future-of-arbitration-ai-robots-may-take-on-human-roles > accessed on 12th March, 2020. (Maxwell, Gouiffes, Vannieuwenhuyse)
[107]Sentencing Guidelines, 'Wisconsin Supreme Court Requires Warnings Before Use of Algorithmic Risk Assessments in Sentencing- *State v Loomis* 881 N.W.2d 749 (Wis. 2016)' (2017) Harvard Law Review, Vol. 130, 1530 < https://harvardlawreview.org/wp-content/uploads/2017/03/1530-1537_online.pdf > accessed on 12th March, 2020.
[108] Ibid
[109] Ibid.

"COMPAS", ,but this argument was rejected by the Court. The United States Supreme Court concluded that the tool was only used for informative purposes and did not have any influence on the decision delivered by the Judges.[110]

It can be inferred from above that if the machine learning is able to achieve an adequate balance with human input, the application of such technological tools can unequivocally enhance the quality of the awards rendered. [111] 'Lex Machina' is another *example* of a technological tool which makes use of the data in court litigations to reveal the perceptions about the judges and fathoms the likelihood of a judge to grant a particular motion.[112]

III. Lack of reasoned awards

The AI software system fails to provide explanations pertaining to the issue of 'how a particular conclusion was reached'. [113] This is referred to as the 'black box system' and the underlying issue often arises within deep learning programmes.[114] Hence, the AI arbitration results cannot be completely trusted as the losing party to the dispute might never know whether its submissions, evidence and witness statements were considered by the AI system prior to rendering of the award. Parties to the dispute would seek to understand the reasons behind a decision being made. [115] The relevant question which needs to be analysed is the concern regarding the viability of the AI mechanism to be able to provide well-reasoned decisions in order to facilitate the parties to the dispute to trust the said

[110] *State v. Loomis*, 881 N.W.2d 749 (2016).
[111] Vannieuwenhuyse (n 9) 126.
[112] Roe (n 71).
[113] Simon Lester, 'Guest Post: The risks of the use of Artificial Intelligence in International Arbitration' 9th Conference of the Postgraduate and Early Professionals/Academics Network of the Society of International Economic Law (*International Economic Law and Policy Blog,* 15th November, 2019) <https://ielp.worldtradelaw.net/2019/11/guest-post-the-risks-of-the-use-of-artificial-intelligence-in-international-arbitration.html> accessed on 13th March, 2020. (Lester).
[114] Ibid.
[115]Karl Bayer, 'Digital Disagreements: Neural Networks and Their Potential', (*Karl Bayer Disputing Blog,* 22 March, 2013) < https://www.disputingblog.com/digital-disagreements-artificial-intelligence-arbitration/> accessed on 13th March, 2020.

prediction?[116] Although, there is absence of a definite answer, the European Union has established "right to explanation" under General Regulation for Data Protection ("GDPR") which allows the parties to the dispute to ask for explanations and have clear access to the logic behind the decision of the AI.[117]

IV. Risk of bias

Robot arbitrators may not be as "objective" and "neutral" as it appears to be.[118] Machine learning will undoubtedly make the arbitration process more efficient. However, the limitation is whether the robot arbitrators are free from unexpected bias on the basis of past case studies?[119] These AI arbitrators are condemned for being discriminatory: "Sexism, Agism, Racism".[120] A computer software which predicted future criminal tendency within a particular racial group was found to be biased towards that minority group.[121]

Moreover, as the process of machine learning depends on the past cases that have been fed into the database, AI arbitrator generally favours the companies who have either won the disputes more frequently or the parties with specific claims.[122] Furthermore, the problem originates from the moment the data that is fed in for training purposes is biased itself, which consequently leads the AI arbitrator to become a mere source of reproducing human prejudices.[123] Thus,

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[116] Ron Schmelzer, 'Understanding Explainable AI' (*Forbes*, 23 July, 2019) < https://www.forbes.com/sites/cognitiveworld/2019/07/23/understanding-explainable-ai/#2e0f48dc7c9e > accessed on 13th March, 2020.

[117] Sandra Wachter, Brent Mittlestadt and Luciano Floridi, 'Transparent, Explainable, and Accountable AI for Robotics' (2017) American Association for Advancement of Science Robotics Vol.2 Issue No.6 < https://robotics.sciencemag.org/content/2/6/eaan6080 > accessed on 12th March, 2020.

[118] See, for example, the reference to AI as "neutral and bias-free" in Scherer (n 12) 55; Also see, Lester (n 113)

[119] Sim (n 49) 9-10.

[120] Sim (n 49) 9-10; Alex Hern, 'Microsoft Scrambles to Limit PR Damage over Abusive AI Bot Tay' (*The Guardian,* 24 March, 2016) < https://www.theguardian.com/technology/2016/mar/24/microsoft-scrambles-limit-pr-damage-over-abusive-ai-bot-tay > accessed on 13th March, 2020.

[121] Hope Reese, 'Bias in Machine Learning, and How to Stop It' (*Tech Republic*, 18 November, 2016) < https://www.techrepublic.com/article/bias-in-machine-learning-and-how-to-stop-it/> accessed on 13th March. 2020.

[122] Sim (n 49) 10.

[123] Lester (n 113).

there is an essential requirement to study the algorithms and the computer programmes before a party decides to submit its disputes to robot arbitrator.[124] In such circumstances, this requirement of background study before submitting a dispute to AI tends to be more tedious and costly to the parties rather than appointing and having a human arbitrator to resolve the conflict. However, with programmes like Diversity AI[125]and Open AI[126], efforts are being taken to correct the prejudice, but the software's for checking bias are still in the preliminary stages.[127]

V. Arbitrator's role vis a viz new technology

There is a fair chance that robot arbitrator will take over human arbitrators completely with regard to technical disputes. However, until that time, arbitrators shall be cautious that the new technologies like predictive coding do not dominate the commercial and non-technical arbitration proceedings.[128] As of today, AI is still acting as a fundamental assistant to human arbitrators for the resolution of disputes. Commentators have often observed that the role of the tools of new technology is so impactful that it is referred to as the "fourth party" to the arbitration proceedings.[129] There is no specific point at which it can be concluded that the technology is influencing the decision rather than just aiding in the process[130] Therefore, it is important for the arbitrators to have substantial control over the proceedings in order to prevent new technologies from dismantling the arbitral proceedings.[131] Moreover, as the new technologies have

[124] Sim (n 49) 10.
[125] Diversity AI – "*Preventing racial, age, gender, disability and other discrimination by humans and A.I. using the latest advances in Artificial Intelligence"* available on <http://diversity.ai/>
[126] Open AI- "*Discovering and enacting the path to safe artificial general intelligence"* available on <https://openai.com/>.
[127] Eric Horvitz, 'AI, People, and Society' (2017) American Association for Advancement of Science Vol. 357 Issue. 6346, 7 < https://science.sciencemag.org/content/357/6346/7> accessed on 13th March, 2020.
[128] Vannieuwenhuyse (n 9) 123.
[129] Philippe Pinsolle, '*Arbitration and New Technologies, in International Arbitration: The Coming of a New Age?'* ICCA Congress Series No. 17, 643, 643 (Albert Jan van den Berg ed., Kluwer Law International, 2013).
[130] Vannieuwenhuyse (n 9) 123.
[131] Ibid.

a sharp learning curve, it is not easy to strike the suitable equilibrium between the machine and the human input.[132]

VI. Form and content of decision and Smart Contracts

There is hardly any academic literature on the validity of the decisions rendered by robot arbitrators as various jurisdictions have different codified legislations. For *example,* in France, if a decision lacks the required inclusion of the "ratio decidendi" to be stated in words, the decision will be considered invalid.[133] Now the question arises as to the validity of the smart contracts in different jurisdictions such as France?

In comparison to the traditional contracts, the validity of the smart contracts can be challenged basis two aspects– (a) the smart contracts are entirely written in computer code and not words and (b) the presence of an arbitral clause in the coded smart contract.[134]

Parties rely on the interpretation of Article II(1) of the New York Convention, 1958 for the enforcement of awards rendered in disputes arising from smart contracts which states that *"each Contracting State shall recognize an agreement in writing……."*[135] Furthermore, Article II(2) states that *"the term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement……."*[136]. Although, a plain reading of Article II of the New York Convention, seems to be unclear as to whether the coded smart contracts containing an arbitration clause will be considered to have fulfilled the requirement under Article II or

[132] Soares (n 27) 97.
[133] Maxwell, Gouiffes, Vannieuwenhuyse (n 106).
[134] Derric Yeoh, 'Is Online Dispute Resolution the Future of Alternative Dispute Resolution?' (Kluwer Arbitration Blog, 29 March, 2018) < http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/ > accessed on 10th March, 2020 . (Yeoh); Also see, Soares (n 27) 98.
[135]United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), available at < https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> Art. II(1) (New York Convention).
[136] Ibid. Art, II (2).

not.

The solution to the same can be found in the UNCITRAL Recommendation regarding the interpretation of Article II (2) of the New York Convention and in paragraph 16 of the UNICITRAL Model law on Electronic Commerce, 1996.[137]

The Recommendation regarding the interpretation of Article II, para. 2 of the New York Convention *"encourages States to apply article II (2) of the New York Convention recognising that the circumstances described therein are not exhaustive"*[138] Moreover, paragraph 16 of the UNCITRAL Model Law on Electronic Commerce 1996 states that it *"relies on a new approach, sometimes referred to as the 'functional equivalent approach', which is based on an analysis of the purpose and functions of the traditional paper based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques."*[139]

These suggestions were accepted by the UN Commission on International Trade Law in its 39th session, which permitted a more lenient approach while interpreting the requirement of "in writing" under Article II (1) and (2) of the New York Convention.[140]

Further, the New York Convention, 1958 poses another impediment for the arbitrations on the blockchain platform. As the selection of panel of adjudicators is based on the evidence stored in the blockchain, Article V(1)(b) of the New York Convention might act as a hinderance to the enforcement of the award on ground of being "unable to present its case" by the party against whom the award was

[137] Soares (n 27) 99

[138] Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) 'Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006' available at < https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf>.

[139]UNCITRAL Model Law on Electronic Commerce Guide to Enactment with 1996 with additional article 5 as adopted in 1998, United Nations Publication, ISBN 92-1-133607-4 available at < https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf>.

[140] Soares (n 27) 99.

supposed to be invoked.[141] Parties to the dispute might want to present their case in person before the adjudicators rather than having to accept a decision on the basis of stored evidence in the blockchain.[142]

VII. Lack of empathy in Robot arbitrator

The lack of emotional sensitivity and perception in a machine arbitrator reduces the chances of robots to replace humans as arbitrators.[143] Researchers have found that the link between the brain, emotions and reasons is significant in the process of decision making.[144] Researchers have also observed that the '*part of the brain that controls the emotions have a powerful impact on the choices made'*.[145]

To understand the above notion, a reference has been made to Terry Moroney's observation in her paper titled "*Angry Judges"* wherein she states that *the "anger of the judges kept the parties engaged*."[146] *Moroney (2012)* also found that "*anger motivates responsive action. It is associated not only with judgments of injustice, but also with a motivation to restore justice".* [147] Therefore, one can say that emotional sensitivity can be considered to be a precondition for an arbitrator to conduct its duties effectively which is directly linked to processing information for making decisions.[148]

VIII. Law is not straightforward and ambiguous

AI will only be able to assist in the arbitral proceedings if it is constantly updated with new and relevant data like legislations,

[141] Yeoh (n 134); Also see, Ibid.
[142] Soares (n 27) 99.
[143] De la Jara, Palma, Infantes (n 30).
[144] Gardiner Morse, 'Decision Making: Decisions and Desire'(2006) Harvard Business Review, January, Issue. 44-45 < https://hbr.org/2006/01/decisions-and-desire> accessed on 13th March, 2020.
[145]Ibid.; Also see, Soares (n 27) 99
[146]Terry A. Maroney, 'Angry Judges' (2012) Vanderbilt Law School Faculty Publications, 65 Vand. L. Rev. 1205 2012 < https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1844&context=faculty-publications> accessed on 15th March, 2020.
[147] Ibid.
[148] De la Jara, Palma, Infantes (n 32).

precedents, submissions of the parties, witness statements etc. Due to democratic law making process, there might be various amendments/modifications in law as well as territorial limitations that will bind people within respective national states.[149] In such a scenario, the salient feature of AI being a cost effective tool might turn into a myth and the process of feeding new legislations, cases and awards may seem to be more costly and time consuming.

IX. Robot Arbitrators are inflexible

Flexibility is one of the important reasons which is prized by the parties who prefer International arbitration for their disputes. With robot arbitrators, the flexibility to be able to modify procedures in order to achieve settlement between the parties may be compromised.[150] Lack of capacity to offer innovative approaches to redress the conflict while ensuring quality and trust in the decision can make the arbitral proceedings conducted by robot arbitrator a costly and ineffective process.

REMARKS TO OVERCOME THE CHALLENGES OF ARTIFICIAL INTELLIGENCE ARBITRATIONS[151]

Keeping in mind the various challenges encountered by the robot arbitrator while conducting an AI arbitration, following are the remarks through which it can be established that these issues can be overcome to make the AI arbitration process effective and efficient.

(a) Capability of performing an Arbitration agreement

Arbitral award rendered by a robot arbitrator does not affect the capacity of the parties to perform the arbitration agreement. Under most of the domestic legislations, the definition of an 'arbitrator' is

[149] Walz, Butterfield (n 42).
[150] Vannieuwenhuyse (n 9) 10-11.
[151] This part of the paper regarding remarks for overcoming challenges of Robot Arbitrators draws ideas from the author's own submission for the module on Future of International Commercial Arbitration in APAC Region- LL5379V.

wide enough to include robot arbitrators except of Peru, Brazil, Ecuador and Colombia.[152] These countries have expressly narrowed the scope of an Arbitrator to a human being only. In my view, the lawmakers avoided to take a restricted approach as they had foreseen the development of AI into the legal field. The end goal of the process of dispute resolution by arbitration for it to be "effective and efficient" is not compromised by the use of AI and its tools. Moreover, currently International Institutions are accepting robot arbitrators and are inserting tailor made provisions.[153] *Example* - the Dubai International Financial Centre ("DFIC") and LCIA Arbitration Rules have inserted Article 5.2. wherein the definition of "arbitral tribunal" includes arbitration by AI software.[154]

(b) Irrationality and Bias

The decision of the AI is not swayed by emotions or empathy in any manner and is strictly based on the law and the merits of the dispute. Therefore, an AI rendered arbitral award will be more effective as it will be free of irrationality and bias. The appointment of the arbitrator can be challenged on the basis of his independence and impartiality by the National Courts. This challenge negates the principle of cost friendly and timely resolution of the dispute. Moreover, the data is fed in the AI software by human beings, who might or might not be biased. In any case, AI will either be equally bias or less bias than the human arbitrator. AI can only be bias to the extent of being fed with bias data. Additionally, the appointment of a robot arbitrator will neither be hit by the issues of nationality nor by any justifiable doubts regarding its neutrality.

(c) Correction of award

There is a minimal chance that an error will be made by a robot arbitrator. A proper application of AI tools such as 'text mining' helps

[152] De la Jara, Palma, Infantes (n 32).
[153] Snider, Delevka (n 41).
[154] DIFC-LCIA Arbitration Rules, Adopted to take effect for arbitrations commencing on or after 1 October 2016, Art.5.2 available at < http://www.difc-lcia.org/arbitration-rules-2016.aspx>.

in identifying the important facts of the case which aids in increases the quality of the award.[155] Therefore, an AI will be able to render an arbitration award effectively and efficiently without any errors in comparison to the human arbitrators. Humans tend to make mistakes. Therefore, International Arbitration Institutions provide for scrutiny of the award which further delays the procedure for enforcement of the award.

(d) Can be preferred for simple arbitrations

Academicians are of an opinion that in AI arbitration proceedings, the data is neither vast nor easily accessible.[156] There is vast variety of data on International Arbitration like judgments, awards, procedural orders, academic writings by arbitrators in books and articles, materials in conferences and debates etc. that can be referred and be fed in the AI software. The Robot arbitrator can recognize a pattern from such data which links to the intuition of the brain to render an award. Even if the information regarding the decisions is unavailable due to confidentiality, robot arbitrator can give an award in simple and non-technical arbitrations. Resolution of a dispute by AI arbitrator will be a fit choice for uncomplicated disputes which only require interpretation of the provision rather than laying down of the law. The analytical and statistical technology can be used by the AI software to construe the question and thereafter determine the dispute. give the decision. Thus, feeding the AI software with the data is the only effort to be undertaken for an effective arbitration award.

(e) Easier Enforcement

Enforcement of an award is the most important feature of arbitration. The Model Law as well as domestic laws of the countries have several grounds for refusal of such enforcement. The arbitration award rendered by the Robot Arbitrator is final and binding and

[155] Sandoval, A. M., and T. Redondo, 'Text Analytics: the convergence of Big Data and Artificial Intelligence' (2016) International Journal of Interactive Multimedia and Artificial Intelligence Vol.3 Issue No.6, 57-64 <https://www.ijimai.org/journal/node/940> accessed on 14th March, 2020.
[156] Scherer (n 12) 555.

enforceable like any other award given by a human arbitrator. However, the AI arbitration award narrows the scope of refusal to enforce an award under the grounds mentioned under Article V of the New York Convention. Reasons for refusal of an enforcement such as: agreement not being valid under the law it has been subjected to, proper notice of appointment and composition of the tribunal[157] will have weak probability to be accepted in an award passed by the robot arbitrator. Moreover, keeping the aspect of party autonomy intact, the Robot arbitrator is appointed by the parties to the arbitration. Therefore, the award given by the AI arbitrator is not against the public policy of the states as most of the states are pro-arbitration. Therefore, as AI arbitrators leaves minimum loopholes for refusal of enforcement under Article V of the New York Convention.

(f) Boosts the predictability of decision making

As more data is fed in the AI software, the predictability of decisions will increase. Human arbitrators also predict the outcome of the award, however, the predictability by a robotic arbitrator will be trusted more as it is free from any doubts and bias.

(g) Saves time and Cost

Limited challenge to the award, minimum errors and free from bias makes the award rendered by robot arbitrator as effective and efficient.

AI arbitral awards are based on logic, hypotheses, evidence as well as on pattern recognition from legislations, past precedents and academic reading[158]Therefore, an AI arbitration award is capable of giving reasonable awards. Moreover, the AI software and tools have been assisting the arbitrators in researching judgments, preparing submissions, keeping a track of the arbitral process as well as in drafting the award. Therefore, most of the work of an arbitrator is

[157] New York Convention (n 135), Art. V.
[158] Snider, Delevka (n 41).

already been delegated to AI. The human arbitrator only provides reasoning to the logic provided by the AI. In my opinion, with the evolution of technology, AI tools are contributing extensively in the legal field and few years, AI will be able to resolve the problem of not being able to give reasoned awards.

PART IV

TECHNOLOGY CAN RESOLVE TECHNICAL DISPUTES BETTER WITHOUT HUMAN INTERVENTION –

Human and AI arbitrators are both processors of data with diverse abilities to resolve such disputes. Human arbitrators use the 'data driven approach' which is also known as the 'balanced approach to resolve technical disputes with the support of software's that provides for distribution of the file system, management of huge volume of data and legal research on several aspects.[159] These decisions are primarily based on human arbitrators expertise, high tuned intuition and prior experience.

The other approach is 'AI driven approach' wherein the AI arbitrators are using software's for resolving the conflicts which are free from cognitive bias and are based on rational objectivity.[160] The dispute is resolved by AI and the award is rendered by an expert robot arbitrator based on predictive coding and inference from the data fed in with respect to previous decisions, awards, legislations etc.

In order to reach a conclusion between use of a balanced approach vis a viz an AI approach, it may be significant to distinguish both the

[159] Eric Colson, 'What AI- Driven Decision Making Looks like' (*Harvard Business Review,* 9 July, 2009) <https://hbr.org/2019/07/what-ai-driven-decision-making-looks-like> accessed on 1st April, 2020. (Colson).
[160] Ibid.

approaches in the context of technical disputes.

A. Misleading summaries

The human brain can store limited information for a limited time and a human being might feel exhausted - when crucial elements have to be used to draft summaries from huge volume of data.[161] Therefore, summaries made through human data processing might be unreliable and inaccurate.

In comparison, the AI algorithm can be used to explore and identify the relevant patterns in the hyper – dimensional voluminous data in order to make appropriate summaries by optimum resource allocation.[162]

B. Cognitive bias

Data summaries may be prone to human bias as humans tend to direct the summary in a way that is intuitive to them. *For example*: as an Attorney, taking the assistance of a software to make summaries and expect it to be divided into the segments as per the personal preference might not always be reliable. The interpretation of the relevant data between the software and the human arbitrator might be dissimilar. There is a sharp possibility of human arbitrator to either misinterpret the summary prepared or for the AI software to extract the elements from the data which are irrelevant or not as per the preference of the arbitrator. Consequently, using this balanced approach might lead to confusion and misunderstanding regarding extracting technical data from the voluminous documents fed in the AI.

Whereas, under 'AI driven approach', the AI software used for the background research, data collection and analysis is more or less on

[161] Ibid.

[162] Joe McKendrick, 'Forget the ROI: With Artificial Intelligence Decision- Making will Never be the same' (*Forbes,* 30 January, 2020) <https://www.forbes.com/sites/joemckendrick/2020/01/30/forget-the-roi-with-artificial-intelligence-decision-making-will-never-be-the-same/#7031d7673f7f > accessed on 1st April, 2020.

the same page with the Robot Arbitrator. Therefore, the decisions rendered by the Robot Arbitrator are consistent, objective and effective as they are not based on intuitive human ideas and perceptions.[163]

Although, this does not mean that with the use of 'AI driven approach', the 'data driven approach' by the human arbitrators will not be required. In simple disputes, the balanced approach can be used for successful and effectual resolution of disputes.

'AI DRIVEN APPROACH' IS SUFFICIENT FOR RESOLUTION OF DISPUTES ARISING FROM NEW TECHNOLOGIES

A. Blockchain contracts

In February, 2016, the computer systems of the Society for Worldwide Interbank Financial Telecommunications ("SWIFT) was compromised by the hackers who demanded for a transfer of USD 1 Million from the Central bank of Bangladesh.[164] Hayley Sweetland Edwards from the Time Magazine noted, *"that it was not the amount of the heist that caused a stir, but what shook the banking community was the breach of trust."*[165] Blockchain technology is a perfect rescuer in such a situation as it aids in detecting data tampering by data encryption and operational flexibility.[166]

A blockchain is "*a database that stores digital information in a highly secure manner by using cryptographic functions to encrypt such information and distributing the database across a number of networks*".[167] It is a collective public ledger which helps the users to

[163] Colson (n 167).
[164] Lee Bacon, Nigel Brook and James Contos, 'Arbitrating Blockchain disputes – will smart contracts require smart dispute resolution?' (LexisNexis, 28 July, 2016) <https://www.lexisnexis.co.uk/blog/dispute-resolution/arbitrating-blockchain-disputes-will-smart-contracts-require-smart-dispute-resolution> accessed on 10th March, 2020.
[165] Ibid.
[166] Ibrahim Shehata, 'The Marriage of Artificial Intelligence & Blockchain in International Arbitration: A Peak into the Near Future!!!' (Kluwer Arbitration Blog, 12 November, 2018) < http://arbitrationblog.kluwerarbitration.com/2018/11/12/the-marriage-of-artificial-intelligence-blockchain-in-international-arbitration-a-peak-into-the-near-future/ > accessed on 10th March, 2020 (Shehata).
[167] Ibid.

make privately permissioned transactions without requiring any third-party authorizations.[168]

Blockchain are decentralized and pre-designed contracts which ensure features like cybersecurity [169] and confidentiality for its users.[170] As International arbitration turns out to be a good fit for resolution of such disputes as it is a flexible private process of efficient dispute resolution,

In fact, "CodeLegit" conducted its first blockchain contract arbitration in July, 2017. The proceedings were conducted through video conferencing and it required the arbitrator to be appointed based on his expertise.[171] The aim of 'CodeLegit' is to bridge the distance amid technology and law with the help of a computer compliance code.[172]

APPLICABILITY OF AI DRIVEN APPROACH

The resolution of such complex disputes should strictly be based on objective rationality rather than the subjective cultures and values of human arbitrators. Although, human arbitrators are quick to adapt the technological change, the regulatory framework may take longer.[173] Thus, robot arbitrator is the only solution left for the tech industry as the machineries will become obsolete before the judiciary is well equipped to deal with such disputes.[174]

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[168] Negrutzi Andrei Darius, 'Artificial Intelligence and Blockchain usage for dispute resolution, (2019) European Business Law (Master Thesis), Faculty of Law, Lund University <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=8997153&fileOId=8997154> accessed on 1st April,2020.

[169] Vannieuwenhuyse (n 9) 121; Also see, Shehata (n 174).

[170] Ibid.

[171] Yeoh (n 134).

[172] Home: Codelegit, 'CODELEGIT', available at <http://codelegit.com/>

[173] Morrison & Foerster LLP, 'United States: The New ABC's: Artificial Intelligence, Blockchain and How Each Complements the Other (*Mondaq,*14 March, 2020). <https://www.mondaq.com/unitedstates/Technology/906574/The-New-ABC39s-Artificial-Intelligence-Blockchain-And-How-Each-Complements-The-Other> accessed on 1st April, 2020. (Morrison & Foerster LLP).

[174] 'Why is Blockchain-Based Arbitration the Only Future for Dispute Resolution?', (*Medium,* 5 October, 2017) < https://medium.com/@confideal/why-is-blockchain-based-arbitration-the-only-future-for-dispute-resolution-93e34d99ec83> accessed on 11th March, 2020.

Moreover, with the rise in the engineering around smart contracts there has been an increase in disputes arising out of blockchain. Smart contracts alter the legal transactions, as the blockchain technology supports the smart contracts to self-execute the instructions when certain pre-determined conditions are triggered.[175]

Consequently, AI is trained to find a solution to issues arising out of such contracts by analysing the data exposed to such contracts.[176]AI is based on machine learning and it can only function once it has been fed data to improve and learn. In blockchain, the machine learning mechanism uses the data contributed by the users in an openly decentralized network.[177] The blockchain technology is unable to judge the accuracy of the data, therefore, AI can act as a gatekeeper for the protection of the sensitive information.[178] Therefore, collaboration of blockchain technology with AI can provide successful results for the parties to the disputed transaction.

China is an *example* of efficacious application of this approach by launching blockchain and AI powered smart Internet Courts (Courts of future).[179] These 'Courts of future' are non- human, virtual robot judges which have resolved about 3.1 million litigation activities.[180] As per the reports released by the Chinese Supreme People's Court, more than a million citizens have already registered with this 'Courts of future' system.[181]

B. Cryptocurrencies

Cryptocurrency is a category of a digital currency which functions independently of any bank and is dependent upon encryption for

[175] Vannieuwenhuyse (n 9) 127.
[176] Morrison & Foerster LLP (n 181).
[177] Ibid.
[178] Ibid.
[179] Joeri Cant, 'Chinese Courts Increasingly Use Blockchain Technology to Settle Cases' (*Cointelegraph,* 16 December, 2019)<https://cointelegraph.com/news/chinese-courts-increasingly-use-blockchain-technology-to-settle-cases> accessed on 1st April, 2020.
[180] Ibid.
[181] Ibid.

verification of the transactions.[182] These currencies are held in blockchain wallets and their decentralized data base is usually updated on encryption of a new transaction.[183]

Digitalization at the global scale is making cryptocurrency as a capable alternative. In 2008, Bitcoin was the first cryptocurrency and has been in circulation for a decade now. Following the footsteps of several countries, in 2018, the Indian Supreme Court[184] held bitcoin to be a legal tender in India. Consequently, there will be an rise in investments which led to increase in the number of disputes concerning transfer of such currency, fraud under money laundering laws as well as terrorist financing.[185] In Russia, between 2014-2018, the courts have already reviewed about 148 cases relating to use of cryptocurrencies and obligations under the smart contracts.[186] Moreover, Singapore's first cryptocurrency dispute has been tried by the Singapore International Commercial Court ("SICC").[187] The dispute was tried by SICC effectively as it is an international division of the Singapore High Court wherein judges have expertise in various fields like construction, financing, banking etc. Nevertheless, all national judges do not possess such expertise around every country.

In order to tackle such risks, arbitration is a good fit for resolution of such disputes as it is a neutral forum which permits flexibility and

[182] James Rogers, 'Cryptocurrencies and arbitration – A match made in heaven?' (Norton Rose Fulbright, May, 2018) < https://www.nortonrosefulbright.com/en/knowledge/publications/cae35319/cryptocurrencies-and-arbitration-mdashbra-match-made-in-heaven> accessed on 10th March, 2020. (Rogers).

[183] Armand Terrien, Alexandra Kerjean, 'Blockchain and Cryptocurrencies: The New Frontier of Investment Arbitration?' (Kluwer Arbitration Blog, 18 October, 2018) < http://arbitrationblog.kluwerarbitration.com/2018/10/18/blockchain-and-cryptocurrencies-the-new-frontier-of-investment-arbitration/> accessed on 10th March, 2020.

[184] *Internet and Mobile Association of India v. Reserve Bank of India* Writ Petition (Civil) No. 528 of 2018, Supreme Court of India.

[185] Rogers (n 198).

[186] Lubomir Tassev, 'Arbitrators to Resolve Disputes in the Russian Cryptocurrency Industry' (Bitcoin, 23 March, 2020) < https://news.bitcoin.com/arbitrators-to-resolve-disputes-in-the-russian-cryptocurrency-industry/> accessed on 10th March, 2020 (Tassev).

[187] *B2C2 v. Quoine Pte. Ltd.* [2019] SGHC (I) 03; Also see Alastair Henderson, Emmanuel Chua, Nicholas Hoh, 'Singapore's first cryptocurrency dispute to go to trail' (Herbert Smith Freehills, 24 January, 2018) < https://hsfnotes.com/asiadisputes/2018/01/24/singapores-first-cryptocurrency-dispute-to-go-to-trial/> accessed on 10th March, 2020.

cross border enforceability.[188] With the expected number of 4000 cryptocurrency disputes by 2025, Russia has already set up a new arbitration board with expertise in digital disputes to look after the cryptocurrency cases.[189]

APPLICABILITY OF AI DRIVEN APPROACH

'Artificial Neural Networks' ('ANN') is a machine learning technique that has been constantly used in finance issues.[190] ANN learns from the inputs and outputs with the use of its computational tools that detect patterns and assist in predicting future variables based on inductive methods.[191] The 'AI driven approach' is appropriate for such disputes as ANN advances to act like the human brain, however the difference is that the information is processed among the neurons within the network.[192] ANN is said to consist of intertwined layers in a neural network which mimics the human brain[193], therefore, ANN algorithm has been used to detect short term behaviours of bitcoins.[194]

Thus, in order to resolve such complicated disputes, human arbitrators' knowledge and expertise might not be enough. Speech

[188]Simon Maynard, Elizabeth Chan, 'Decrypting Cryptocurrencies: Why Borderless Currencies May Benefit from Borderless Dispute Resolution' (Kluwer Arbitration Blog, 2 November, 2017) <http://arbitrationblog.kluwerarbitration.com/2017/11/02/decrypting-cryptocurrencies-borderless-currencies-may-benefit-borderless-dispute-resolution/> accessed on 10th March, 2020. (Maynard & Chan); Also see, Rogers (n 190).

[189] Tassev (n 1914.

[190]Matheus Jose Silva de Souza, 'Can Artificial Intelligence enhance the Bitcoin Bonanza' (2019) The Journal of Finance and Data Science Vol.5 Issue 2, 83-98 <https://www.sciencedirect.com/science/article/pii/S2405918818300953> accessed on 1st April, 2020. (Matheus Souza).

[191] Ibid.

[192] S. Haykin, *'Neural Networks: A Comprehensive Foundation*' (Second Edn, Prentice Hall Pearson Education, 1999); Also see, Farias Nazário, Rodolfo Toríbio & Silva, Jéssica Lima & Sobreiro, Vinicius Amorim & Kimura, Herbert, 2017. 'A literature review of technical analysis on stock markets' The Quarterly Review of Economics and Finance, Elsevier, Vol. 66(C), 115-126 < https://econpapers.repec.org/article/eeequaeco/v_3a66_3ay_3a2017_3ai_3ac_3ap_3a115-126.htm> accessed on 1st April, 2020; Also see, Matheus Souza (n 198).

[193] X. Zhong, D. Enke, 'Forecasting daily stock market return using dimensionality reduction' (2017) Expert System with Applications, Vol. 67, 126-139 < https://www.sciencedirect.com/science/article/abs/pii/S0957417416305115> accessed on 1st April. 2020. (Zhong).

[194] Ibid.

recognition of such complex networks, analysis of voluminous documents and understanding the high- tech terms while rendering a timely and cost-effective award, will only be possible in an AI driven approach. AI uses progressive computer technology to assess and make sense of the complex data in order to train the machine software to react intelligently while making the decision.[195]

In 2018, interplay between AI and cryptocurrency was the buzz during Japan's major technology conference.[196] The AI software's along with Big Data[197] analytics have been assisting the investors of cryptocurrency in effective and efficient resolution of disputes that have arisen due to outstanding payments of bitcoin transactions over the last decade.

CONCLUSION

The aftermath of COVID crisis has brought businesses to a halt and the has led to non-performance of a number of contracts due to stay home notices and social distancing rules. The commercial market is facing numerous legal problems which is increasing the pendency of cases in the courts and legal forums. The judges and arbitrators all around the world are facing difficulty to shift from the traditional legal approach to a technologically oriented one for resolution of disputes. They are using several technologies and AI tools to conduct the proceedings by video conferencing for oral arguments, reading e-petitions, using AI software's for recording statements and drafting orders, judgments, awards. I believe, technology is here to stay and AI seems to be the future not only in technical disputes but all around the legal fraternity.

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[195] Stuart Russell, Peter Norvig, *'Artificial Intelligence: A Modern Approach*' (3rd edn., Pearson Education Limited: Kuala Lumpur, Malaysia, 2016).

[196] C Baird, 'Cryptocurrency and AI' (*All the Buzz at Tech Conference Slush Tokyo,* 2018) < https://www.japantimes.co.jp/news/2018/03/29/business/cryptocurrency-ai-excite-tech-confab-slushtokyo/#.W4hZE-hKj6Q > accessed on 2nd April. 2020.

[197] Big data is defined by the 'four Vs: volume (scale of data), variety (different forms of data), velocity (analysis of streaming data) and veracity (uncertainty of data); Also see Soares (n 27);See The four V's of Big Data, IBM Big Data & Analytics Hub, available at < https://www.ibmbigdatahub.com/infographic/four-vs-big-data>.

The doctrinal and empirical research of the researcher indicates that we are transitioning from 'Data driven' to 'AI driven' approach. I believe, we are moving in the right direction and it may become necessary to acclimate to such technological changes in order to boost the International commerce.

For non-technical disputes, a synergy between AI and human arbitrator can be used to resolve the dispute.[198] The AI can assist in speedy collection and analyses of information, whereas the human arbitrator can use its superior insight and intuitive judgment.[199] This balanced approach will encourage a reasoned and collaborative decision-making process which will be helpful for determination of business conflicts.[200]

However, for the technical and complex disputes, it would be suggested to resolve the conflicts with the assistance of AI without human intervention. The disputes arising from new technologies like cryptocurrencies and blockchain contracts have several users and human intervention in resolution of such disputes will transform the impartial and objective process into a subjective, intuitive and political process.[201]

An impersonal and rational approach is required to resolve such disputes, rather than to be affected by context sensitive and subjective decisions.

Cognilytica Research has conducted a survey to predict the worldwide adaption of the AI technology and it results that by 2025, 50% of the Respondents say that they will implement AI.[202] and Nearly 90% respondents have specified that they will have some kind

[198] Jarrahi (n 154).
[199] Jarrahi (n 154).
[200] Jarrahi (n 154); Also see, Lisa A. Burke, Monica K. Miller, 'Taking the Mystery out of intuitive decision making, (1999) The Academy of Management Executive, Vol. 13 Issue No.4, 91-99 < https://www.jstor.org/stable/4165589?seq=1> accessed on 2nd April, 2020.
[201] Jarrahi (n 154).
[202] Cognilytica.com: Artificial Intelligence and Machine Learning Project management live online training available at <https://www.cognilytica.com/2020/01/22/global-ai-adoption-trends-forecast-2020/>.

of AI applications in their disputes within next 2 years.[203] AI by itself has a substantial transformative potential in the dispute resolution procedure.[204]AI is finest at the job of analysing huge volume of data and predicting results. AI seems to be a perfect solution for resolution of intricate technical disputes as AI awards are based on inputted data which are free from inherent unpredictable human behaviours and risks of bias.[205]

However, the process of AI is significantly influx and there is a requirement of further advancement and development to be able to tackle with the encounters of AI. The Institutions, arbitrators and arbitration attorneys shall work together to make the process rationalized. "*Arbitrations by humans is not over yet"*[206], and it is still farfetched dream for AI to completely take over the human arbitrator in commercial disputes. Although, AI driven approach is steadily taking over technical conflicts between parties and as a result making the process timely and cost effective.

The suggestions of the researcher do not entirely resolve the issues that lie ahead, they analyse the challenges that can be responded by further study in this particular field. Arbitration has become a popular dispute resolution mechanism due to its cost effectiveness. However, if the world of arbitration does not catch up with technological advances, it is likely to lose its edge and be left behind

The research raises the following questions for further research, for instance-

Will a separate arbitration legislation, specifically for AI proceedings be useful? Shall the International arbitration institutions have separate rules to resolve a dispute by AI? The finding to these questions would be useful in furthering the analysis presented in this

[203] Ibid.
[204]Jarrahi (n 154).
[205]Jarrahi (n 154).
[206]Vannieuwenhuyse (n 9).

research paper.

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MEDIATION FOR RESOLVING CROSS-BORDER COMMERCIAL DISPUTES

By Anjali Singh*

ABSTRACT

Everyday 'n' number of deals are made around the globe. The trend is to go international. With the increase in the number of cross-border deals, commercial disputes are also increasing. Currently the most preferred alternate dispute redressal method is arbitration due to its expedited enforcement mechanism facilitated by New York Convention. The aim of this paper is to answer, why people will prefer to use mediation for resolving cross-border disputes over arbitration? Mediation is negotiation facilitated by trusted individual, i.e. mediator. The paper discusses different elements of mediation that differentiate it from other forms of Alternate Dispute Redressal and the hindrance faced by the approach. The paper explains the role that lawyers play in the process and the attitude shift that they need to carry in order to cater the needs of their clients, i.e. cheap and speedy redressal of the process. The paper resort to various surveys conducted by international organisations and law firms to support the stand that mediation is effective in resolving not only minor disputes but also cross-border disputes and people are calling for its implementation at global level. ~~At~~ In the end, the paper goes on to discuss Singapore Convention, how it has facilitated the mediation process, how it will change the future of ADR and the mediation itself in the commercial world. This paper attempts to examine the approach of mediation for

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resolving cross-border commercial disputes while keeping in mind the present challenges being faced by corporations or individual due to Covid-19 crises.

KEYWORDS- International Dispute Resolution, Cross-border Disputes, Mediation, Singapore Convention and International Commercial Mediation.

'An ounce of Mediation is worth a pound of Arbitration and a ton of Litigation!'

-Josep Grynbaum

INTRODUCTION

The world is expanding. Companies and nations are investing in each other. Every other day, a new organization is globalizing itself. The competition is fierce. Large and multi contracts are being made and deals are being signed every other second. Nations are becoming lenient in their cross-border rules and regulations to attract investments. Trend is to become international. But corporations are run by people and every person and corporation has different beliefs, values, and norms. So, when we talk about cross-border engagements, people involved are from different origins, cultural beliefs, and motivations. And what might seem rationale at the conclusion of the deal might no longer be conceived as such. Thus, disputes arise.

International Commercial Arbitration is the most preferred method by parties in International Dispute Resolution; it is reported to be used by 74% of respondents between the years of 2016-2018[1]. The reason for this dominance is the presence of its expedited enforcement mechanism, facilitated by the New York Convention. The New York Convention is one of the most successful treaties in International Trade Law, signed by 164 states. The framework is simple: it requires estates'

[1] Singapore International Dispute Resolution Academy, *International Dispute Resolution Survey: Currents of Change* (2019 Preliminary Report).

to recognize and enforce arbitral awards as domestic awards by converting them into judgment enforceable by a national court or tribunal? An award is not converted into a judgment. NYC recognises awards as enforceable instruments. According to SMU SIDRA Survey Report 2020, enforceability is ranked the highest under the factors influencing the choice of Arbitration with 87%. Followed by - Neutrality (85%), Finality (80%), Flexibility in choice of the seat (73%), Speed (72%), and so on[2].

So, now the question arises why people will invest in any other mode of dispute resolution, when arbitration is already ingrained as the most effective one. The aim of this paper is to answer, why people will prefer to use mediation for resolving cross-border disputes over arbitration?

ELEMENTS OF MEDIATION IN CROSS-BORDER DISPUTES

Mediation is a negotiation facilitated by a trusted neutral person. In the first half of the twentieth century, mediation was often the preferred means of resolving international commercial conflicts. It was only after World War II that arbitration gained its momentum in the international disputes arena[3].

The absolute crucial element of mediation is neutrality. The moderator, who is the operator of the mediation, exists to facilitate the process. His presence is only to guide the parties towards a settlement, not to judge or pass a decree. His job is to understand the perspective of the parties involved in the dispute. This non-critic attitude in return helps the parties (whether a conglomerate or an individual) to open up, and put forward their issues. Under SIDRA Survey, neutrality is rated at 100% by the respondent users for the choice of mediation while in arbitration;

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[2] Singapore Management University, 'SIDRA International Dispute Resolution Survey: 2020 Final Report'<https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html#zoom=z> accessed 6 February 2021.

[3] Strong, S.I., Beyond International Commercial Arbitration? The Promise of International Commercial Mediation, 45 Washington University Journal of Law and Policy 11 (2014), University of Missouri School of Law Legal Studies Research Paper Series No. 2013-21, Available at SSRN: <https://ssrn.com/abstract=2363149> accessed 6 February 2021.

neutrality is rated at 85%[4]**.** Again in IDR Survey, 2019 it is rated at 86% for mediation[5]. In both of the surveys, neutrality is the highest factor influencing the choice for mediation.

Speed is that element that gives mediation an edge over the arbitration. An average ICC Mediation takes four months as compared to arbitration that takes around 18-20 months. There is a default mindset of arbitration to last up to 18 months[6]. In today's time corporations are involved in high-end transactions, therefore, none of them requires a dispute to drag along for a lengthy period. From conducting pre-mediation meetings to scheduling mediation sessions and to finally proceed with mediation the estimated time for cross-border mediation will be around three-four months[7]. In fact, according to the SIDRA Survey, Singapore Mediation Centre has administered 4400 cases since 1997. Out of which 70% of the cases were settled, with 90% resolved within a day[8]. In the midst of the challenges presented by Covid-19, a speedy redressal of disputes is far more favourable for the companies involved in cross- border transactions than to be stuck in delayed proceedings. The time saved could be better used in tackling the challenges laid ahead by covid crises.

Day by day clients' demand for cost control methods in dispute redressal is increasing. While cost is considered the worst feature of arbitration, mediation is more cost-effective. It not only tailors cost in

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[4] Singapore Management University, 'SIDRA International Dispute Resolution Survey: 2020 Final Report'<https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html#zoom=z> accessed 6 February 2021.

[5] Singapore International Dispute Resolution Academy, *International Dispute Resolution Survey: Currents of Change* (2019 Preliminary Report).

[6] White and Case LLP, '2018 International Arbitration Survey: The Evolution of International Arbitration'<https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international arbitration#:~:text=The%202018%20International%20Arbitration%20Survey,from%20stakeholders%20around%20the%20globe.> accessed 6 February 2021.

[7] Thomas Gaultier, 'Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?'(2013)26(1)NYSBA International Law Practicum <https://nysba.org/NYSBA/Sections/Dispute%20Resolution/Materials/DRS%20Fall%20Meeting%20Materials/Cross-Border%20Mediation%20-%20A%20New%20Solution%20for%20International%20Commercial%20Dispute%20Settlement.pdf> accessed 6 February 2021.

[8] Singapore Management University, 'SIDRA International Dispute Resolution Survey: 2020 Final Report'<https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html#zoom=z> accessed 6 February 2021.

terms of money but it also produces savings in the administration of justice. The lesser amount of time is spent in the process, the lower amount of cost is incurred. With the ongoing battle of pandemic and presence of uncertainty, saving cost is one of the major focuses of companies. Let's look at a graph that compares cost and time in arbitration and mediation[9]:

Assumptions	Arbitration	Mediation
Facilitators	3 Arbitrators	1 Mediator
Internal Counsel per Party	1	1
External Counsel per Party	3 (1 Partner + 2 Assoc.)	1 Partner
Witnesses for both Parties	10 (6 fact + 4 expert)	0
Document Production	Moderate	None
Venue	London, UK	London, UK
Hearing Time	1 week	2 days
Cost Items		
Institution	72,500	8,000
Arbitrators/Mediator	408,500	25,000
Internal Counsel	100,000	10,000
External Counsel	2,000,000	50,000
Facilities	5,000	2,000
Document Production	50,000	0
Witnesses	100,000	0
Travel	100,000	25,000
Total Costs	**US$ 2,836,000**	**US$ 120,000**
Average Time		
Hearing	1-3 weeks	1-2 days
Preparation	12-18 months	3-5 days
Overall Resolution Time	18-24 months	2-3 months

The comparison illustrates that the total cost of mediation would represent less than five percent of what arbitration would cost and the time allocated to mediation is between ten to fifteen percent of time consumed in arbitration[10]**.**

[9] Thomas Gaultier, 'Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?' (2013) 26(1) NYSBA International Law Practicum <https://nysba.org/NYSBA/Sections/Dispute%20Resolution/Materials/DRS%20Fall%20Meeting%20Materials/Cross-Border%20Mediation%20-%20A%20New%20Solution%20for%20International%20Commercial%20Dispute%20Settlement.pdf> accessed 6 February 2021.

[10] Thomas Gaultier, 'Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?' (2013) 26(1) NYSBA International Law Practicum <https://nysba.org/NYSBA/Sections/Dispute%20Resolution/Materials/DRS%20Fall%20Meeting%20Materials/Cross-Border%20Mediation%20-%20A%20New%20Solution%20for%20International%20Commercial%20Dispute%20Settlement.pdf>

Mediation provides the element of confidentiality. In today's time, companies especially MNCs want to avoid the public eye. The bigger the dispute, the more public attention. A public trial does a lot of damage to the goodwill of the business which in return hampers the profitability. With Covid-19, the companies especially the ones involved in cross-border transactions would want to maintain a steady stream of business and transactions. As one small negative attention will hamper their present and future deals and functioning of business. Parties want to avoid the risk of image demolition. Further, mediation also carries a restriction on the admissibility of evidence in legal and arbitration proceedings. This seeds trust in the party. The next three elements that are going to be mentioned ahead are the ones that set mediation apart from other methods of dispute resolution.

The first such element is company's business relations preservation. Arbitration and litigation presents a win-lose situation, while one administers loss and the other emerge victorious. But in mediation there is no 'win-lose', only a negotiated settlement. It provides an interactive environment, where the parties to dispute can sit and communicate with each other directly. This generates a chance to understand grievances and dive deep into the core from where the conflict is arising. Further, the process provides a sense of full autonomy to the parties. It is they who are in control and not the mediator. As the result is produced through self-determination of the companies, the degree of compliance becomes high. This freedom to decide the practical outcome of the dispute is a key factor which makes mediation a very appropriate means to resolve cross-border disputes[11]. Parties take ownership in the generated output produced through their hard work. Their investment of time and effort enhances the chances of upholding such settlement in the future. Mediation isn't just settlement of disputes amongst

accessed 6 February 2021.

[11] Thomas Gaultier, 'Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?' (2013) 26(1) NYSBA International Law Practicum <https://nysba.org/NYSBA/Sections/Dispute%20Resolution/Materials/DRS%20Fall%20Meeting%20Materials/Cross-Border%20Mediation%20%20A%20New%20Solution%20for%20International%20Commercial%20Dispute%20Settlement.pdf> accessed 6 February 2021.

companies; it is also an exercise to preserve a business relationship. Covid-19 has caused 'n' number of companies to go bankrupt and other few are on the verge of becoming bankrupt. What is needed right now for the companies especially the ones involved in cross-border transactions to resolve the conflicts as soon as possible and practice risk sharing. Whether the dispute has arisen due to the differences in-culture, legal provisions, ethics or political situation; all of these issues can be resolved between the companies through mediation on a timely basis, which in return preserves the ongoing relationship and helps the companies to survive the troubled market staged by COVID-19. Thus from demanding industrial relation challenges to the most contentious international trade disputes, Mediation offers a unique forum for understanding, adapting to, and ultimately fulfilling the interest of all parties, while avoiding the economic, social and political cost of a publicly damaging and drawn-out dispute[12]**.**

Let's go through an example before moving ahead, assume there are two entities; A Ltd and B Ltd. Now, A Ltd is an Indian partnership firm that sells surgical masks. B Ltd is Hong Kong incorporated company. On 13th March, 2020 B Ltd placed an order of 4000 Box of Surgical Masks with A Ltd. The order was supposed to be delivered by 1st April. But, on 17th March the Directorate General of Foreign Trade (DGFT) of India issued a notification according to which exports related to masks, ventilators, etc. were prohibited until further notice. For a period of one month both the companies waited patiently for the prohibition to be lifted. But B Ltd started to lose their patience as they have paid the whole amount in advance, plus the amount paid was higher than the usual price as the raw material in the month of March was expensive due to the high demand generated by Covid-19. B Ltd started demanding that either A Ltd provide them with full refund of the amount or the expedited delivery of the order. In the meantime, A Ltd requested special permission for the delivery of the order by DGFT, but the request was denied. A Ltd denied ~~the~~ to ~~pay~~ refund full amount stating that they too are suffering from the loss and again tried to explain the

[12] Oliver Carroll and Jemima Roe, 'Why mediation is needed now more than ever' (ICC Guest blog, 23 January 2020) <https://iccwbo.org/media-wall/news-speeches/guest-blog-why-mediation-is-needed-now-more-than-ever/> accessed 6 February 2021.

whole situation to B Ltd by providing a copy of all emails sent to DGFT to seek special permission. They further offered 15% refund along with expedited delivery as soon as the ban is uplifted. But B Ltd denied the offer and filed a complaint with DGFT, claiming that A Ltd has not delivered the order and is operating in bad faith. After getting the complaint, DGFT sent an email to A Ltd regarding the complaint filed by B Ltd and asked for a reply in return regarding the complaint filed. After going through the reply from A Ltd, DGFT suggested both the parties to try and reach a settlement within a week else they will decide on the matter. Acting on the suggestion of DGFT, A Ltd and B Ltd decided to go ahead with Mediation to resolve the matter. Both the parties, conducted a Virtual Mediation the very next day and the issue was resolved within a few hours. A Ltd in the spirit to preserve the future business relationship agreed upon 25% refund along with expedited delivery of the order as soon as they procure the license to export, as according to the new notification of DGFT, the surgical mask order can be exported but the export order quantity shouldn't exceed four crore units and further the exported is required to apply for a license to export. B Ltd accepted the offer. Both the parties informed DGFT of the settlement reached and requested for the license to be provided as soon as possible. The very next week after the settlement was reached, DGFT issued another notification, whereby the export limit was removed and the need for a license was eradicated. As soon as the notification was released, A Ltd informed B Ltd regarding the latest notification and start preparing for the delivery of the order.

Thus, through mediation a settlement was reached, virtual mediation was conducted, time and cost was saved and a business relationship was preserved. Now we move ahead to other elements of mediation.

Flexibility is the hallmark feature of mediation. It consists of its own elements-:

1. Voluntary Process- This voluntariness is the pillar of Mediation. Even after going through the thorough process of mediation, parties might feel that they have reached a dead

end and no scope of settlement is left. If so, they can opt-out of mediation and go for litigation or Arbitration.

2. It can be done in person or virtually. Under SIDRA Survey 48%[13] of client users have rated platforms for the conduct of virtual hearing as extremely efficient. Currently online mediation is becoming the go to option for resolving disputes whether domestic or international. Covid-19 is acting as a catalyst for bringing mediation to its golden age. Companies are trying to prioritize their spending, in covid crises when the courts backlog is increasing day by day due to emergence of new disputes like- cost increase, non-performance of contract, force majeure, etc. Mediation is serving as the saviour to resolve at least the less complex cross-border conflicts. Not only this, virtual mediation is helping to save time and cost of the companies by helping them to resolve their disputes from the place of their business rather than travelling at a designated place and incurring extra expenses. Plus it also makes mediators more accessible especially in international mediation.

3. Compatibility with other methods of ADR- This is known as Hybrid Dispute Resolution[14]. SIAC and SIMC offer an Arb-Med-Arb service where parties can opt for Mediation during Arbitration. Under SIDRA Survey 2020, legal users have shown a 14% preference for Ad hoc mediation over institutional mediation which suggests that Mediation might be being used on an Ad hoc basis within the arbitration framework[15]**.** It has been observed that in most situations, mediation often resolves the conflict without entering the arbitration phase[16].

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[13] Singapore Management University, 'SIDRA International Dispute Resolution Survey: 2020 Final Report' <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html#zoom=z> accessed 6 February 2021.
[14] Disha Thakkar, "*Hybrid Dispute Mechanisms*", Arbitration & Corporate Law Review, Published on 8th July, 2020 <https://www.arbitrationcorporatelawreview.com/post/hybrid-dispute-mechanisms> accessed 6 February 2021.
[15] Singapore Management University, 'SIDRA International Dispute Resolution Survey: 2020 Final Report' <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html#zoom=z> accessed 6 February 2021.
[16] Disha Thakkar, "*Hybrid Dispute Mechanisms*", Arbitration & Corporate Law Review, Published on 8th July, 2020 <https://www.arbitrationcorporatelawreview.com/post/hybrid-dispute-mechanisms> accessed 6 February

Cross-border mediation isn't restricted to only resolving conflicts. Deal Mediation[17] is that element which helps to resolve issues even before it is born. Under deal mediation the mediator assists the deal making process, thus looking at all the nitty-gritty of the process and pointing out at the possible areas that could emerge into a conflict in future. It reduces the chances of miscommunication and provides clarity on the stand of each party involved in the deal. For the deals that are to be made during Covid should make use of this method because covid has presented uncertain times, due to which the priorities of the commercial parties have changed. The method of doing business is going to change so rather than just adding a clause for dispute resolution in the agreement, it would be better to form an agreement where the chances of conflicts in future are reduced as much as possible.

HINDRANCE TO CROSS-BORDER MEDIATION

Lack of an internationally recognized expedited enforcement mechanism to give effect to a mediated settlement, acts as a hindrance to cross-border mediation. A significant amount of time and energy is required to reach a settlement and if the other party fails to agree on it, the company seeking compliance would have to start over in litigation or Arbitration. The settlement agreement is considered as a private contract that has to be enforced in the same way as an Arbitral Award which in an international context involves extra time and money. Thus the parties with complex disputes and deals find no point in investing in it when it ultimately leads to litigation or arbitration which possesses an enforceable decree or award. Thus causing a rigid mentality in commercial parties, that mediation is more suitable for domestic or less complex issues like family disputes. We will further see ahead if the lack of expedited mechanism continues to exist or not.

ROLE OF THE LAWYER

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[17] Claude Amar, 'Deal Mediation: The Future of ADR, Part 1' (EX CURIA INTERNATIONAL, 1 July 2020) <http://excuriainternational.com/2020/07/01/deal-mediation-the-future-of-alternative-dispute-resolution-i/> accessed 6 February 2021.

The lawyer's role in mediation is quite different to that in arbitration. Here the lawyer in turn becomes a negotiator and advisor for the client[18]**.** No commercial parties in cross-border disputes will take part in mediation without their counsel support, thus a lawyer must possess knowledge of negotiation techniques and should advise their client as to what can be disclosed and what cannot be disclosed. Further he/she should get themselves informed regarding their client expectations from the process. Lawyer will act as a helping hand for the mediator, thus ensuring smooth flow of the mediation process. No negotiation process can be successful without the complete support of parties counsel. The mentality of considering themselves weak if the dispute goes to mediation or considering ADR as the Alarming Drop in Revenue, will need to be eliminated on their part. *The legal market today needs more cooperative lawyers and fewer aggressive lawyers; it needs lawyers who can focus on generating value instead of crushing an opponent.*[19]

WHY CROSS-BORDER MEDIATION?

In the Global Pound Series 2016-2017[20]**,** 2/3rd of ADR stakeholders asked for legislation to aid enforcement of settlement agreements, especially international mediation settlement agreements. Therefore, with the adoption of the Singapore Convention in December 2018, mediation has grown its teeth. The convention finally establishes the international enforceability of Mediation Settlement Agreement thus eroding the edge of arbitration. By now 53 states have signed it and six have ratified it**.** The more countries will ratify it, the more power mediation will have. The Singapore Convention is expected to give the

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[18] Thomas Gaultier, 'Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?' (2013) 26(1) NYSBA International Law Practicum <https://nysba.org/NYSBA/Sections/Dispute%20Resolution/Materials/DRS%20Fall%20Meeting%20Materials/Cross-Border%20Mediation%20-%20A%20New%20Solution%20for%20International%20Commercial%20Dispute%20Settlement.pdf> accessed 6 February 2021.

[19] Thomas Gaultier, 'Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?' (2013) 26(1) NYSBA International Law Practicum <https://nysba.org/NYSBA/Sections/Dispute%20Resolution/Materials/DRS%20Fall%20Meeting%20Materials/Cross-Border%20Mediation%20-%20A%20New%20Solution%20for%20International%20Commercial%20Dispute%20Settlement.pdf> accessed 6 February 2021.

[20] PWC, 'Global Pound Conference Series: Global Data Trend and Regional Differences' <https://www.pwc.com/gx/en/forensics/gpc-2018-pwc.pdf> accessed 6 February 2021.

same status to mediation that the New York Convention gave to arbitration. Thus removing the hindrance of cross-border mediation, i.e. lack of enforcement mechanism and making International mediation as attractive to commercial parties as International Arbitration. As the playing field is levelled with respect to enforceability, parties would be free to choose their dispute resolution mechanism for cross-border conflicts based solely on process considerations[21].

CONCLUSION

The demand for less adversarial, less costly and more time efficient dispute resolution method by the companies is enhancing, especially due to covid crises. Companies are looking for out of the box solution. With Singapore Convention adoption and the world's shift to virtual mode of business, mediation has gotten a chance to prove itself more efficient than other forms of ADR. From neutrality to business relationships preservation to a different form of mediation, i.e. Deal Mediation, mediation provides a unique chance to the commercial parties to actually settle a dispute rather than winning or losing it. Cross-border deals are formed after going through a rigorous process of due diligence and negotiations. Further it involves large chunks of money. For a party it is more important to resolve these issues to ignore any further potential loss due to covid rather than enhancing the conflict. Arbitration or Litigation can pass a decree in regard to the issue but the conflict might still exist. Therefore, cross-border mediation provides a chance to the parties to actually resolve the issue with a tailored approach. Whether it is to end a deal in an amicable manner or to renegotiate the terms of deal, cross-border mediation assists the parties in achieving this.

With the imposition of lockdowns and travel restrictions, virtual cross-

[21] Strong, S.I., Beyond International Commercial Arbitration? The Promise of International Commercial Mediation, 45 Washington University Journal of Law and Policy 11 (2014), University of Missouri School of Law Legal Studies Research Paper Series No. 2013-21, Available at SSRN: <https://ssrn.com/abstract=2363149> accessed 6 February 2021.

border mediation is providing an opportunity to the commercial parties to a speedy redressal of the conflicts from the comfort of their place or country at a low cost. With the enforcement of Singapore Convention, the parties will be provided with the fair choice of the method to resolve their conflict with, rather than being discouraged by the absence of enforcement mechanism for cross-border mediation. Thus the post-covid world could look at two powerful method of alternative dispute resolution backed by two internationally recognized treaties, i.e.,

Ø Singapore Convention for International Commercial Mediation
Ø New York Convention for International Commercial Arbitration

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