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RECOGNIZING THE 'UTILITY' OF RELATIONSHIPS AND RAPPORT-BUILDING TO ENHANCE THE EFFECTIVENESS OF NEGOTIATIONS

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INTRODUCTION

As professionals trained in the formal adversarial style of court pleadings with limited scope of informal interaction, lawyers might underestimate and even ignore the importance of building rapport with the other party in a negotiation setting. They might keep informal interaction to a minimum and immediately head towards the negotiation. This might indeed be unconscious such as when the tension of previous interactions between the parties gets transferred to the negotiation, or as a matter of deliberate strategy to look assertive and powerful. Whatever might be the reason behind the lack of establishing rapport, the absence of familiarity and cordial relations early on impedes the effectiveness of negotiation.

This paper aims to highlight the advantages of establishing relationships and how it can lead to improving the effectiveness of negotiations. The article will begin by first arguing that establishing relationships is indeed advantageous because *inter alia* it leads to the creation of three distinct types of utilities. Each of these utilities would be introduced and applied to the context of negotiation and the author would suggest ways of maximizing these utilities. After having

established that relationships have immense strategic implication in negotiations, the paper will address the different components of 'rapport' and relationships between the parties. Thirdly, the impact of two crucial factors (i) Visual Access and (ii) Presence/Absence of prior affiliation will be evaluated on the rapport-building efforts of the parties. Lastly, this paper will suggest ten tips that negotiators can utilize while negotiating to strengthen their relationships and ease the rapport building exercise.

IS THERE ANY 'UTILITY' OF ESTABLISHING RELATIONSHIPS IN NEGOTIATION?

A pertinent reason for building relationships at the very beginning of a negotiation is forwarded by the utility theory. The majority of the research has portrayed negotiations as interactions motivated by economic factors. However, in recent times, scholars of negotiation have found that socio-psychological factors such as relationships have immense implications for negotiation.[1] The negotiators derive three distinct types of utilities by establishing relationships between themselves:

1. Decision utility
2. Experienced utility, and
3. Diagnostic utility.

Besides considering the objective outcome of the negotiation to assess the success of a negotiation, the Utility derived from relationships should be seen as an additional output of the negotiations.

The utility theory highlights that negotiators are motivated not only by

[1] Ashley D. Brown and Jared R. Curhan, | 'The Oxford Handbook of Economic Conflict Resolution' |in Rachel Croson and Gary Bolton (ed), | (2012)

the objective outcomes of the negotiation but also by societal factors such as relationships. The utility analysis puts forward three key points:

1. **Decisional Utility**: Relational factors can affect the decisions made by the negotiator and the overall outcome of the negotiation. The negotiator might choose to preserve the existing relationship as compared to pursuing interest selfishly. This translates to parties making sacrifices in the shorter run. However, such sacrifices prove to be economically beneficial in the long run and create objective value in the future.

2. **Experienced Utility**: Besides deciding the objective outcome of the negotiation, the relationship between the parties affects how the parties experience a negotiation session. The experience of being in a negotiation can elicit both positive and negative emotions and can therefore influence how the parties' assessment of how the negotiation felt like.

3. **Diagnostic Utility**: Building a strong relationship and acting in a kind, selfless manner enhances the self-image of a negotiator and also improves his reputation in front of the other party.

Traditionally, utility maximization has been considered as the primary driving force behind the decision making of people. People tend to make choices that get them the biggest share of the pie and put them in a place of maximum satisfaction. The purpose behind recognising the importance of relational factors in negotiations is to make the assessment of negotiation more holistic. We can now look beyond the objective outcomes and ask whether the negotiators can derive additional relational utility besides the objective outcomes.

DECISION UTILITY

'Decision utility' as applicable to the context of negotiation posits that

the choices and decisions made by people indicate their utility for different outcomes. This utility might be dependent upon a number of factors, including the relationships established between the parties. Relationships in this context would mean continuous interaction between the parties beyond one negotiation session. Negotiations are rarely completed in one session and therefore relationship building is episodic rather than a onetime instance. There are distinct advantages of establishing short term rapport as well as long term relationships. The benefits of establishing relationships in the short term are better explained through experienced utility which will be discussed in the next section.

In the context of multi-session negotiations, research by Curhan, Elfenbein, and Xu has found that the negotiators who developed a closer relationship in the first round created greater objective value, thus indicating the creation of tangible 'relational capital' as a result of establishing relationships between themselves.[2] It has been shown that the parties which develop trust and established strong relationships with the other party tend to share information more openly in the subsequent sessions.[3] With more information on the table, the parties can further devise creative ways of increasing the overall benefits and finding novel solutions.[4] Research by Mannix has shown that if the parties expected their relationships to continue in future and that the opportunity to negotiate with the same parties may arise again, they were seen to be more inclined to provide concessions in the present session to benefit from a reciprocating gesture by the other party in the future sessions.[5]

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[2] Wendi L. Adair, Jeffrey Loewenstein, | '*Handbook of Research in Negotiation*' | Edward Elgar (ed) | (2013)

[3] Ibid.

[4] Ibid.

[5] E. A Mannix, C. H. Tinsley, & M. Bazerman, | 'Negotiating over time: impediments to integrative solutions. Organizational Behavior and Human Decision Processes' | 241–251 | (1995), Jimena Ramírez-Marín, Francisco Medina Díaz, Wolfgang Steinel, | 'Negotiating for Better or Worse: Changing Pie Sizes Affect Negotiation Relationships | IACM Meeting Papers | (2007)

Besides the generation of the relational capital, the negotiators also benefit from the creation of 'social capital' by establishing relationships in negotiation. This point becomes especially pertinent for Legal Counsels negotiating on behalf of individuals and General Counsels representing the interests of their respective Company. Research by Curhan has indicated that the negotiator who established relationships more effectively were trusted by their clients to work on a larger number of deals which increased the total value created out of the transactions.[6] An increase in the number of appointments accompanied by the high success ratio of closing deals can prove to be vital for the reputation of legal counsel who often relies upon recommendations of their clients for expanding their practice and attracting more clients.

EXPERIENCED UTILITY

The existence or absence of relationships do not only change a negotiator's preference for outcomes, but also affects how a negotiator perceives and experiences negotiation. Depending on how negotiating with the other party feels like, it can lead to the creation of both positive and negative emotional responses in a negotiator. These emotions emerging out of the experience of emotion have an intrinsic value which is termed as 'experienced utility'. The experienced utility in the context of negotiation can be understood as an assessment of the "likability" of the counterparty and a post-negotiation evaluation of how the session felt.[7]

When negotiations happen between parties sharing a close relationship, it has been observed that disagreement with respect to

[6] Supra at 2.

[7] A.M., Rupert Do, G Wolford, | Evaluations of pleasurable experiences: The peak-end rule | Psychonomic Bulletin & Review | 96–98 | (2008), C.A. Schreiber and D Kahneman, | Determinants of the remembered utility of aversive sounds | Journal of Experimental Psychology | 129(1), 27–42 | (2000)

issues such as procedures, roles in the negotiation and division of responsibilities are minimised and the negotiators derive overall positive experience utility. [8] Negotiating with familiar people, negotiators exhibit a more cooperative and flexible behavior,[9]reach agreements quickly [10], discuss their interests openly. [11] Another important effect is that the parties in close relationships do not automatically assume the worst about the other parties intention behind an ambiguous word or action, but rather interpret it in a favourable light.[12] People experience a sense of accomplishment when they undertake joint tasks with other people.[13] Negotiators prefer negotiating with people with whom they share close ties because it assures them that they will be treated fairly. Since there exists a pre-established trust, the exchange of information happens without difficulties, the transaction costs are be minimised and the overall chances of the transaction being closed are higher.[14]

On the contrary, it is observed that because of lack of relational ties parties tend to adopt disruptive negotiation tactics and the negotiation turns hostile because of the negative emotions generated. [15] These negative emotions result in negative

[8] Seunghoo Chung | ‚Do Friends Perform Better?: A Meta-Analytic Review of Friendship and Group Task Performance' | (2015)
[9] Hillie Aaldering, Femke S. Ten Velden | 'How representatives with a dovish constituency reach higher individual and joint outcomes in integrative negotiations' | Group Processes and Intergroup Relations | (2016)
[10] C. K. W. De Dreu, H Aaldering, | Conflict and negotiation within and between groups. | J. Simpson (Ed.) | *Handbook on interpersonal relations and group processes* | 151–176 | (2014)
11 C. K. De Dreu, B Beersma, G.A. van Kleef, | The psychology of negotiation: Principles and basic processes. In Kruglanski | E. T. Higgins (ed) | *Handbook of basic principles in social psychology* | (2nd ed., 608–629) | (2007)
[12] C.H. Tinsley, K.M. O'Connor, & B.A. Sullivan, | Tough guys finish last: the perils of a distributive reputation | Organizational Behavior and Human Decision Processes | 88, 621–642 | (2014)
[13] F.S. Ten Velden, B Beersma, C.K. De Dreu, | It takes one to tango: The effects of dyads' epistemic motivation composition in negotiation | Personality and Social Psychology Bulletin | 36, 1454–1466 | (2010)
[14] Ibid
[15] Ibid.

experienced utility.

Seen from the perspective of negative experience utility, it is not surprising that in the absence of cordial relationships, parties display hostile behaviour to maximize their share.[16] In response, the opposite party displays rigid defensive tactics to guard against a perceived selfish action.[17] If such scepticism about the intentions of the other party emerges early on in the negotiation, it might result in a complete disruption of the process.

From the above discussion, it should not be inferred that in the presence of a positive relationship the parties will always experience positive experienced utility, or that in the absence of any relationships, or even worse when the relationships have turned sour, the parties will always experience negative experienced utility. The more accurate position would be that when the parties have built a strong relationship, all their emotions, both positive and negative, are intensified. The relationship allows the parties to express themselves with candid honesty. On the other hand, in the absence of a relationship the parties are unable to effectively and intelligently communicate their feelings to the other party. This results in parties bottling up their emotions and it makes the negotiation a far less pleasurable experience for them.

Based upon the previous discussion, it can be argued that the subjective value of relationships is important in itself separate from the objective outcomes of the negotiation. It would not be a complete evaluation of the negotiation if its success is assessed based only upon the outcomes, and subjective emotions such as that of pride, hopefulness, happiness, frustration and distress are ignored. There is a greater need to factor in all kinds of utility including experienced utility when analysing the effect of relationships on the party's

[16] Tinsley, Conner and Sullivan (n. 12)
[17] Ibid

motivation in the negotiation.

DIAGNOSTIC UTILITY

Up till now, the focus of utility analysis has been towards how the opposite party feels or how parties jointly experience the overall negotiations. However, negotiators might be motivated to treat others well to feel good about themselves thereby deriving a personal 'diagnostic utility'. Thus, the motivation of parties in negotiation can be seen as a form of self-signalling behaviour which has the purpose of enhancing their own image in the mind.[18]

This view has been supported by research in the domain of social psychology which concluded that expressing respect towards the other party enhances how the negotiators feel about themselves.[19] However, the analysis through the perspective of decision utility and experienced utility does not sufficiently explain how negotiators experience utility by enhancement of their self-image.

This is much better explained by the notion of 'Diagnostic utility', which refers to the idea that the choices made by people reveal their personal characteristics and dispositions to themselves and the opposite party.[20] Whether a negotiator feels satisfied or dissatisfied with their actions or choices in the negotiation is dependent upon how impressed they feel about their choices or actions.[21] By applying insights from the Self-Perception theory in psychology, it can be seen that negotiators evaluate themselves based upon their behaviour,

[18] R Benabou & J Tirole | Incentives and prosocial behavior | American Economic Review | 96(5), 1652–1678 | (2006)
[19] Louisa C. Egan, Paul Bloom, Laurie R. Santos | Choice-induced preferences in the absence of choice: Evidence from a blind two choice paradigm with young children and capuchin monkeys | Journal of Experimental Social Psychology | 46, 204–207 | (2010)
[20] D Prelec & R. Bodner | Self-signaling and self-control | In G. D. Loewenstein, & R. F. Baumeister (eds.) | Time and Decision: Economic and Psychological Perspectives on Intertemporal Choice | 277–298 | (2010)
[21] Egan, Bloom and Santos (n 19)

and therefore the maintenance and enhancement of self-image becomes critical for them while evaluating utility in negotiation.

Research in Cognitive Science has revealed that people signal to others, and more importantly to themselves, that they possess desirable qualities. They tend to take actions that confirm this belief.[22] For instance, during one of the experiments, the subjects were told beforehand that being able to keep their hands below cold water and tolerating the pain was an indicator of a good or a bad condition of the heart. It was observed that after knowing this information, the subjects either extended or shortened the duration of keeping their hand under the water in order to fit the preferable description.[23]

This has immense implications for how negotiators conduct themselves in the negotiation. The negotiators would be motivated to behave in a manner that signals to the other party and to oneself that they are indeed charitable and altruistic by nature.[24] In a similar vein, negotiators might be motivated to enhance their perception of their personal identity by adopting positive behaviour and coming off as "the bigger person". In the context of decision making, this can result in a sort of 'politeness ritual' between the parties, where they might deliberately choose to take the smaller share irrespective of their contribution through performance.[25]

At first, this behaviour might appear to be in complete contrast with the conventional idea of self-maximization. However, when seen from the perspective of diagnostic utility, it becomes obvious that if the negotiators use these opportunities to convey grand gestures of

[22] D Ariely, M. I. Norton, | How actions create—not just reveal—preferences | Trends in Cognitive Sciences | 12(1), 13–16 | (2010)
[23] Ibid
[24] Bodner & Prelec (n. 20)
[25] Michele J. Gelfand, | "Negotiating Relationally: The Dynamics of the Relational Self in Negotiations" | The Academy of Management Review | vol. 31, 427–51 | (2006)

collaborativeness and unselfishness, the extent to which the negotiators might choose to be selfless will depend upon the relationship shared by the parties.[26] Thus, particularly in those cases where negotiations happen between parties sharing cordial relationships in the past, the negotiators might settle on an equal division of resources, instead of trying to strike a hard bargain. Furthermore, the ability to reaffirm one's self-image of modesty and politeness may also enhance the experienced utility derived from the negotiation.

While it is true that the negotiator might be motivated by the desire to maintain a positive self-image, the contrary position of the concerns surrounding 'losing face' should also be considered. If the negotiators feel that they might lose their image in the society, it will give rise to negative emotions and it may affect the negotiations between the parties adversely.[27] The party which is anxious about losing face might even choose to avoid any interactions with the other party.[28] Consequently, the negotiations would be delayed and stalled. Further, it has also been shown that in negotiation settings where either or both the parties are extremely concerned about maintaining reputation, the likelihood of them reaching an impasse is higher.[29]

This highlights the importance of creating conducive environment for the negotiations where the parties do not feel threatened about losing reputation. It is also crucial from the perspective of deriving higher experienced utility, that the negative emotions emerging from the threat of losing respect should be controlled and managed. In a scenario where the parties are concerned about the loss of

[26] Ibid

[27] John Oetzel & Adolfo J. Garcia | An analysis of the relationships among face concerns and facework behaviors in perceived conflict situations: A four-culture investigation | International Journal of Conflict Management | 19(4):382-403 | (2008)

[28] Ibid

[29] T. D. Wilson & D.T. Gilbert | Affective forecasting: knowing what to want | Current Directions in Psychological Science | 14(3), 131–134 | (2005)

reputation, the parties should formulate ways of communicating in a manner that allows both of them to maintain face. For instance, utilising the help of the legal counsels to represent the parties will be beneficial. Some other ways in which the parties can overcome the threat of losing face is by using a neutral mediator to facilitate negotiations, maintaining strict confidentiality with respect to the sensitive information shared by the other party, signing a non-disclosure agreement at the very onset, and choosing a discrete private location for meetings.

If the parties establish early in the session that they are interested in achieving cordial relationships and in being honest about stating their interests, the self-signalling behaviour of the negotiator will influence their actions to meet these standards. This effect can also be achieved with the help of a neutral mediator who sets the ground rules of the mediation. Otherwise, even in a negotiation, the parties can on their own set out the desired attributes to be displayed in the negotiation, and their behaviour would mould itself to meet the standards set up by them.

WHAT IS RAPPORT?

Once the initial relationship has been established between the parties, and they have started to trust each other, they can move towards achieving a state of rapport between them. Interpersonal rapport refers to a state where the parties understand each other and communicate effectively. A good rapport between the parties motivates them to cooperate and freely share vital pieces of information, reduces the chances of parties threatening each other, and prevents the risk of reaching a dead-end in the negotiation. The development of rapport between the parties is composed of three components:[30]

[30] Ibid

1. Mutual attention and involvement of parties

Behind the idea of paying mutual attention is a commonly known fact that when both parties focus attention on each other, they make the other party feel more involved in the process and this improves the quality of communication between them.[31] The parties can signal that they are paying attention through several physical and non-physical cues. For instance, how the parties arrange themselves in a negotiation session has subtle but strong indications for the quality of the conversation. When sitting face to face across the table there is a possibility that the negotiators might consider it to be an interaction wherein their interests conflict with the other parties' interests and the conversation may turn confrontational. On the other hand, when parties arrange themselves in an angular fashion, either by sitting in a circular or a semi-circular arrangement, it indicates to the other party that one is interested in having an open conversation. This friendly positioning allows the parties to look at each other's face and assess the facial expressions thereby excluding the confrontational element from the previous seating arrangement. Lastly, if the parties choose to sit side by side, it is indicative of the fact that they are tackling the problem together. It conveys the impression that instead of being in opposition to each other, they are in fact allies jointly working towards reaching an integrative agreement.

Seating arrangements are only one such instance where physical and nonphysical cues determine the rapport between the parties. Leaning forward while the other party is speaking, sitting with an open body posture without crossing hands and legs, making eye contact, and signaling that they are following the conversation through short responses ('aha' or 'uh oh' depending upon the cultural context) etc. are some other ways in which the parties can foster

[31] Ibid

rapport between them.[32]

2. The spirit of positivity displayed by the parties

The second important component of developing rapport between the parties is the presence of positivity in the negotiation. Those negotiators who have successfully established a rapport experience a higher degree of amiability and agreeability between themselves, which in turn gives rise to the creation of a positive environment for collaboration.[33]

Although positivity is closely linked with mutual attentiveness, the higher presence of one element does not necessarily indicate the proportionately higher presence of the other. For instance, in case of a hostile standoff between two individuals, they might be fully concentrated on the actions and the words of the other person, but the positivity in interaction would be absent.[34]

3. Coordination in interaction

The third important element of rapport between the parties is establishing coordination between themselves. When negotiators are in synchronisation while interacting with each other they take natural and smooth turns in putting their point forward. They acknowledge and understand each other's concerns and interests, show agreement and acknowledgement of the person's issues by leaning forward, nodding their heads, taking notes, and other similar indications that conveys to the other party that they have been actively listening.

Another important indication that the parties have established a rapport is when they start mirroring each other's behaviour. This

[32] Ibid
[33] Jean R. Sternlight & Jennifer Robbennolt | Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients | Ohio State Journal of Dispute Resolution | (2008)
[34] Ibid

mimicry happens non-consciously and people tend to adjust themselves to match the other party's sitting posture, tone, and expressions of the face.[35] When the negotiators are motivated to forge strong bonds with the other party the mirroring increases and the behaviour of parties tends to resemble a form of 'choreographed dance'.[36] This non-conscious mimicry makes the parties forge better rapport between them and trust each other during the interaction.

In a negotiation where parties are face to face with each other, nonverbal gestures such as the orientation of the body, affirmative gestures, comfortable eye contact, nodding of head and para-verbal responses such as 'uh oh' can prove to be significant for developing rapport.[37] The reason why face to face negotiations are more effective is because we as humans rely heavily upon these subtle nonverbal gestures during interactions with others to fully process the point being made. These subtle signals are a vital aid to understanding the explicit articulation of the other party and can set the stage for the development of rapport and long-standing relationship between the parties.

At first, it might seem that the non-conscious mirroring of other people would be offensive to them. After all, in day-to-day interactions, people consider such mimicry as an attempt to mock them. However, in the state of rapport in interaction, parties do not realise that they are mirroring the mannerisms of the other party and the presence of such behaviour is usually subtle yet effective. However, an important caveat with regards to cross-cultural negotiations would be to be consciously aware of not going overboard with synchronising oneself with the other party's style of speaking, accent, or peculiar articulation, lest they should consider

[35] Nicolas Gueguen, Celine Jacob, and Angelique Martin, | 'Mimicry in social interaction: Its effect on human judgment and behavior' | European Journal of Social Sciences | vol. 8, no. 2, 253–259 | (2009)
[36] Ibid
[37] T.L. Chartrand, R. B. van Baaren, | 'Human mimicry' | in Advances in Experimental Social Psychology | M. P. Zanna (ed) | 219–274 | (2009)

this as an attempt to mock them. While recognition of diversity and sharing commonalities of culture should be the aim of cross-cultural negotiation, the parties should be consciously aware that an innocent attempt on their part might be interpreted by the other party as being offensive.

WHAT IS THE ROLE OF VISUAL ACCESS IN ESTABLISHING RAPPORT DURING A NEGOTIATION?

As mentioned in the previous section, the three essential components of building rapport between the parties are linked with non-verbal expressions and they can be perceived by the other party only visually. This established the role that visual access plays in strengthening rapport between individuals. The question which then pertinently arises is: *how can negotiators maintain and enhance the efficiency of rapport-building in the absence of visual access?*

Research on the effect of visual access on negotiation has revealed that when parties are able to interact with each other directly it tends to enhance cooperation between them.[38] As an example, one can consider a situation that resembles a Prisoner's Dilemma. In this game, the players have been called upon to decide on behalf of a small company whether to advertise a particular product that is otherwise sold only by one another small company (compete), or cooperate. This game resembles a classic prisoner's dilemma scenario where both the parties have to decide on whether they would choose to cooperate or compete with one another separately and simultaneously. If the parties choose to cooperate it would result in the highest collective outcome. However, the dominant strategy to maximise personal incentive will be to choose competition

[38] Aimee L. Drolet & Michael W. Morris | 'Rapport in Conflict Resolution: Accounting for How Face-to-Face Contact Fosters Mutual Cooperation in Mixed-Motive Conflicts' | Journal of Experimental Social Psychology | (2000)

irrespective of the decisions made by the other party.

During the study, three different simulations were enacted. In the first scenario, the parties were not allowed to interact with each other before making the decision. In the second scenario, the parties were allowed to have a brief face to face interaction before making the decision and in the third scenario instead of having a direct face to face conversation, the parties were asked to record a statement for the other party which would be played for both of them before they made their decision. The results of the study showed that in scenarios when the parties did not interact with each other face to face, the rate of cooperation was at the lowest.[39] On the contrary, in the second scenario where parties benefited from the direct interaction, the cooperation was the highest. However, the results of the third scenario are the most instructive for our discussion here. Even when the parties had a recorded interaction with the other party which was virtually face to face, it boosted their likelihood of cooperation as compared to the group that did not have a direct interaction.

The findings of the study clearly indicate that meeting in person would be the better way to establish rapport in negotiation as compared to having a conversation over a phone call or email. In today's world where the movement has become restricted due to COVID related safety concerns, video conferencing has become the new normal and has virtually replaced face to face meetings. Although the physical and the non-verbal cues that can be gathered from interacting over a video conferencing call are limited, it offers the crucial advantage of providing the closest experience to a physical meeting and for crucial negotiations, its use should be encouraged over emails and phone calls.

Besides enhancing the experienced utility of negotiation, face to face

[39] Ibid

interactions also improve the collective outcome.[40] For instance, a negotiation was conducted between the Labour Union and the Management representatives to resolve ongoing strikes where setting the strike quickly was advantageous for both. The negotiation was conducted in two different seating arrangements. In the first arrangement, the parties sat side by side and did not have complete visual access to the physical and nonverbal cues of the other party. In the second arrangement, the parties were seated across the table and faced each other directly. The results of the study showed that negotiators sitting side by side settled for a longer duration of strikes as compared to the negotiator sitting face to face. This distinction may be explained by the fact that negotiators sitting side by side do not have the opportunity to mimic the physical cues of the other party and cannot sufficiently engage the attention of the other party. Since rapport could not be established between them it led to the worse total outcome of having a longer duration of the strike.

WHAT IS THE ROLE OF PERCEIVED AFFILIATION BETWEEN THE PARTIES IN ESTABLISHING RAPPORT DURING NEGOTIATIONS?

Besides visual access, the extent to which negotiators engage in cooperative behaviour is affected by their perceived affiliation with the other party. Generally, people tend to draw inferences about commonalities with others by noticing apparent similarities and accordingly categorize people as 'in-group members' as contrasted with 'strangers'.[41] These internal categorizations that people make about each other are of immense implication in negotiation. Once the negotiators conclude that the other person shares an affiliation, they are prone to treat the people of their own group more favourably, allocate more incentives for them, and display more collaborative

[40] Ibid

[41] Cristina Bicchieri & Azi Lev-On | 'Computer-Mediated Communication and Cooperation in Social Dilemmas: An Experimental Analysis' | Politics Philosophy & Economics | (2007)

behaviour with them.[42]

The perception of affiliation might arise from even superficial and sometimes trivial details such as liking for the same sports team or musical artist. When such commonalities are found, the parties sense a commonality of values, attitude and worldview, and this can maximize the extent of cooperative behavior.[43]

This phenomenon becomes increasingly evident in negotiation surrounding the settlement of legal issues. In one of the studies conducted in this reference, the research was aimed at analysing how the existence of prior relationships between the lawyers from both parties affected their cooperative behaviour in negotiation.[44] It was found that the likelihood of cases being settled at the stage of negotiation itself was higher when the lawyers had faced each other previously, as opposed to when both lawyers were unfamiliar with each other.[45] This finding can be explained by considering that when opposing counsels have already faced each other in previous interactions, they are aware of how to best communicate with the other counsel to incentivize sharing of vital information. The counsels are better aware of how to steer the conversation in a manner that suits the preference of the other counsel. By eliminating the informational asymmetry, the legal counsels are able to strike a deal that can be considered beneficial for both parties.

This collaborative behaviour exhibited by the legal counsels is otherwise in stark contrast with the contentious nature of litigation practice which most lawyers are conditioned. So how can we reconcile the finding of this research with the commonly noticed contentious nature of interactions between litigating counsels? The answer to this question can be found in a study conducted on the

[42] Ibid
[43] Ibid
[44] Jason Scott Johnston & Joel Waldfogel, | 'Does Repeat Play Elicit Cooperation? Evidence From Federal Civil Litigation' | Journal of Legal Studies | 39-40 | (2002)
[45] Ibid

impact of group affiliation on cooperative behaviour. This study was designed in a manner where the subject negotiators negotiated with two sets of parties: first, from their own business school, and second, with negotiators from a different institution. It was observed that when interacting with the first group of people the negotiators asked more questions to explore other parties' interests and talked more openly about their own interests. This led to the result that the probability of striking a deal with the first group of people was higher as compared to the second set of people. The key finding of this study was that when parties are able to identify affiliation between them, it gives rise to a state of rapport, which lowers the probability of an impasse. On the contrary, when the parties are not able to identify a common basis for developing a relationship, sufficient rapport is not developed and the parties are more likely to get locked in a stalemate.

The question which then further arises is whether the same inference can be expected to be true for an interaction between the clients also. Although this question has not been explored in the context of legal negotiation, it might be equally applicable for clients sharing a long-standing relationship, such as in the case of two parties who have a long-standing contractual relationship with the delivery of goods. In the context of such a negotiation, the parties can better identify the commonality of business values, ethics and aspirations. This might motivate them to be more collaborative and work jointly towards the exploration of common interests. Finding commonality and affiliations would reduce the emotional distance between the clients and make them feel more comfortable to work collaboratively alongside each other and generate surplus value.

HOW TO DEVELOP RAPPORT WHEN THE VISUAL ACCESS AND RELATIONSHIP BETWEEN PARTIES ARE LIMITED?

As discussed above, the existence of visual access and prior relationships between parties is essential for establishing rapport,

which in turn promotes collaborative behaviour. Although the development of rapport emerges naturally out of social interactions without the negotiators even realising, the question which is of greater concern is '*what steps can the parties take to actively develop rapport and enhance the utility and objective outcomes of negotiation?*'

The following are some suggestions which the parties themselves may adapt to enhance the effectiveness of negotiation even with the limitation of visual access and prior relationship:

1. **Choose the right mode of communication**: Attention must be paid to the means of communication chosen for interaction between the parties. If the negotiators have only interacted over non-visual mediums of communication such as phone calls and emails, it might not provide sufficient intimacy of interaction to develop rapport between them. In such scenarios, the exchange of information will be heavily limited and the chances of reaching an impasse will be higher. Therefore, the negotiators can try to meet face to face to the extent possible and in the absence of such options prefer video conferencing calls as opposed to phone calls and emails.

2. **Warm-up before negotiating**: Where the parties already have a pre-existing relationship it will be advisable that they invoke warm feelings of affiliation and familiarity at the very outset of the negotiation in their opening statements. This could be a good starting point for beginning the collaborative act of resolving the differences between them.

3. **Schmooz before negotiating**: The negotiators could begin their interaction with an informal ice-breaker conversation rather than diving straight into the business. By getting to know each other through a brief informal interaction, the parties can set the stage for a fruitful negotiation. Schmoozing before getting into the crux of the matter can motivate the parties to open up and freely share

information and identify mutually beneficial solutions. By having a chat, in the beginning, the parties no longer remain strangers to each other. The seeds for the development of rapport between the parties are planted which can then be developed by the parties through their active efforts and the facilitation by a neutral third-party neutral such as a mediator. The pre-negotiation chit-chat motivates the parties to approach the negotiation with the most cooperative mental mindset. The parties can readily trust in the intention and the goodwill of each other. This also has the additional benefit of enhancing the experienced utility of the negotiations.

4. **Find commonality**: It will be of immense advantage to the negotiators if they can find commonality with the other party. It will be advisable if the parties can get to know about other parties' interests and background before meeting them in the negotiation. This can be achieved by exploring common interests and group affiliations such as belonging to the same *alma mater*.

5. **Balance and manage emotions**: Negotiators should make proactive attempts to balance their emotions with reasons. First, they must not conflate people's issues (relationship) with the substance of the problem and deal with both issues separately. Second, emotional claims should be tested on the touchstone of fair and objective criteria and standard practices. Third, the parties must remain aware that personal emotions and biases often cloud human judgment. By being aware of the effect that such emotions can have over their decision-making power, the parties can actively be guarded against reaching a biased judgment.

6. **Listen actively**: Demonstrating the skill of active listening is crucial for reaching a mutual understanding with the other party and fostering a good relationship with them. By listening keenly, the negotiators are better placed to appreciate the interests and concerns of the other party and it increases their ability to find

common interest and opportunities for collaboration. Listening actually also has the effect of reducing defensiveness and promoting cooperative spirit.

7. **Recognize differences and diversity of views**: In order to have a long-standing relationship, the parties should realise that they cannot look at issues only in a manner that is in line with their pre-existing notions and knowledge. We as individuals look at the world in myriad ways and appreciate things differently. It might be difficult at first to acknowledge that diverse interpretations and views exist as compared to ours. However, a successful relationship can only be built when the parties acknowledge the diversity of worldviews and use this as an opportunity to combine their knowledge with the other parties' knowledge and expand the overall perception.

8. **Build Trust**: In the context of negotiation, negotiators can be said to trust each other when they are not afraid to expose their vulnerabilities and concerns to the other party, and they are assured that they will not be taken advantage of. Parties rely upon the assessment of the trustworthiness of the other party to predict how they might behave in the future. Hence, if there is a deficit of trust and the parties feel that their gestures will not be reciprocated, it will have the effect of damaging the relationships between them. One of the ways of achieving trust is by demonstrating reliability so that the other party can predict our behaviour based on a positive experience in the past. In order to be reliable, one must speak and promise only that which we can achieve and should follow through with the promises. Therefore, false and lofty promises that one does not intend to keep up should be avoided.

9. **Manage Anger effectively**: Bringing negative emotions such as anger into the negotiation has a number of detrimental effects such as escalating the chances of conflict, creating biases in perception, reducing the net gains, promoting competitive

behaviour and increasing the probability of reaching an impasse. Therefore, it becomes essential that the negotiators not only manage their own emotions but also exert influence on the notions of the other party. Anger can be managed by establishing rapport at the early stages of negotiation. The negotiation should be framed cooperatively to convey to the other party that one is trying to look for a mutually beneficial solution and not a selfish deal for oneself alone. If the other party is angry, it is advisable to soothe their emotions by extending a sincere apology. However, the most effective way to manage anger in negotiation is to take a break, cool off and reconvene in a future session. Most negotiation sessions do not unfold in a single sitting and therefore, the parties should resist the urge of escalating conflict and take some time off to dissipate anger.

10. **Build trust, rapport and relationship beyond a single session**: The discussion so far has been centered around developing relationships in the pre-negotiation phase. However, it is crucial not to look at relationship building in negotiations as a onetime task but rather should be seen by the parties as an activity in progress. Therefore, the post-negotiation relationship becomes equally important as the pre-negotiation rapport. One of the ways to ensure that negotiations have been satisfactory to both parties is to ask open-ended questions such as "*how did the previous negotiations session make you feel?*" By soliciting information about other parties' reflections on the previous negotiation session, negotiators can take these inputs into account and can create more effective and intimate sessions in the future. Thus, seeking feedback would aid the progressive building of relationships between the negotiators.

CONCLUSION

In a typical negotiation, the negotiators try to exert 'power upon' the

other party to influence their behaviour and extract the best deal for themselves. This self-maximizing approach is also self-limiting because an individual has only finite resources at her disposal and can produce only a limited objective value by acting in a self-interested manner. On the contrary, if the negotiators can go beyond the 'fixed pie' mindset of negotiation and combine their efforts with the other parties to 'power with' them, they would be able to generate more net value in the transaction which would be mutually beneficial. This could be achieved by developing coalitions and collaborative networks to tackle problems together. In order to combine power and forces, it is important to forge bonds of strong relationships, because long-standing relationships and the network of relationships increase the negotiating power of negotiators. Therefore, relationship building should be paid close attention to because the parties stand to benefit from them both in the short-term and long-term.

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THE GRID AND *DER KRIEG*: A DISCUSSION ON THE APPLICABILITY OF THE ENERGY CHARTER TREATY TO THE WAR-AFFECTED INVESTMENTS IN NAGORNO-KARABAKH /ARTSAKH

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ABSTRACT

Following the 1994 Bishkek ceasefire agreement between Armenia and Azerbaijan[1], a *de facto* Republic of Nagorno-Karabakh/Artsakh with a "strong connection"[2] with Armenia emerged on the territories of the former Nagorno-Karabakh Autonomous Region (NKAR) of the Azerbaijan Soviet Socialist Republic and the seven adjacent districts of the NKAR. Later on, several Hydro Power Plants (HPP) were constructed on the region's fast-flowing rivers, primarily by Armenian nationals.[3] At face value, these HPP are nothing but investments in the energy sector owned or controlled by Armenian nationals. As of November 2020, Azerbaijan gained control over the territory where the investments were made. As a result, a *prima facie* expropriation

* The author would like to thank Aram Aghababyan for his constant support and valuable feedback.

[1] https://www.peaceagreements.org/view/990

[2] Talmon, Stefan. "The Responsibility of Outside Powers for Acts of Secessionist Entities." *International and Comparative Law Quarterly*. 583 (2009): 493-517.

[3] https://hetq.am/hy/article/113430

of the investments has played out. Due to the absence of any diplomatic relationships and the hostile relationships between Armenia and Azerbaijan, arbitration is not guaranteed but is seemingly the only plausible avenue should the owners of the HPP try and claim remedy for their damages.

This article will discuss the Armenian nationals' hypothetical attempts to submit their dispute to investment arbitration under the Energy Charter Treaty (ECT), arguably the only plausible remedy to fill in the possible legal vacuum in this case.

PART I

INTRODUCTION

The annexation of the Crimean Peninsula by Russia in 2014 proved detrimental for a number of investments owned by Ukrainian investors. Domestic hitherto, these investors overnight found themselves in the shoes of foreign investors deprived of their investments. Several investment arbitration proceedings followed claiming damages for the actions (expropriation) of Russia.[4]

More bizarre a framework can play out in relation with certain

[4] Oschadbank v The Russian Federation (Oschadbank v Russia) and PJSC CB PrivatBank and Finance Company Finilon LLC v The Russian Federation, PCA Case No. 2015-21 (PrivatBank v Russia); Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v The Russian Federation, CA Case No. 2015-07 (Belbek v Russia); (i) Stabil LLC, (ii) Rubenor LLC, (iii) Rustel LLC, (iv) Novel-Estate LLC, (v) PII Kirovograd-Nafta LLC, (vi) Crimea-Petrol LLC, (vii) Pirsan LLC, (viii) Trade-Trust LLC, (ix) Elefteria LLC, (x) VKF Satek LLC, (xi) Stemv Group LLC v The Russian Federation, PCA Case No. 2015-35 (Stabil LLC and others v Russia); PJSC Ukrnafta v The Russian Federation, PCA Case No. 2015-34 (Ukrnafta v Russia); Everest Estate LLC et al. v The Russian Federation, PCA Case No. 2015-36 (Everest Estate LLC and others v Russia); (1) Limited Liability Company Lugzor, (2) Limited Liability Company Libset, (3) Limited Liability Company Ukrinterinvest, (4) Public Joint Stock Company DniproAzot, (5) Limited Liability Company Aberon Ltd v The Russian Federation, PCA Case No. 2015-29 (Lugzor and others v Russia); NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrgasvydobuvannya and others v The Russian Federation, PCA Case No. 2017-16 (Naftogaz and others v Russia).

investments in the Nagorno-Karabakh region. First, the region appeared under the control of the self-proclaimed Republic of Artsakh, while Azerbaijan maintained *de jure* sovereignty over the area under international law.[5] In this period, investments (the Investments) by primarily Armenian nationals (the Investors) were made in the region's energy sector. As a result of the 2020 war between Armenia and Azerbaijan, the territory changed hands once again, leaving the owners of the Power Plants empty-handed. This paper inquires whether the Armenian nationals can bring their claims against Azerbaijan before arbitral tribunals as aggrieved foreign investors within this framework. I will be arguing that the Tribunals will most likely assume jurisdiction should *the Investors* initiate arbitral proceedings under the Energy Charter Treaty[6] (ECT). It is submitted that the ECT, in the absence of a bilateral investment treaty (BIT) between Armenia and Azerbaijan, is the only legal framework *the Investors* can rely upon.

In the following sections, it will be argued that *the Investors* are in a position of establishing (under the ECT) the existence of an investment (*ratione materiae*) made in the territory of a contracting state *(ratione loci*) at the time when the obligations were already in force (*ratione temporis*) by a national of the other contracting state (*ratione personae*).

Whilst Armenian nationality is sufficient for *the Investors* to be qualified as such under the ECT, and power generation and distribution is an economic activity permitting HPP to be qualified as Investments, the application of the ECT to the territory of the Nagorno-Karabakh can be a tricky challenge to overcome for the Tribunal. Nevertheless, it will be argued that the armed conflicts that affected the territory do not hinder the ECT application to the region, neither from a territorial nor temporal perspective. Next discussed is the alleged illegality of *the Investments,* which also, it

[5] https://www.un.org/press/en/2008/ga10693.doc.htm

[6] Energy Charter Treaty 1994.

is argued, falls short of hindering the arbitral jurisdiction over the dispute. Finally, the denial of benefits clause of the ECT will prove to be of no effect as a jurisdictional impediment.

PART II

THE INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) OF THE ECT ARBITRATION IN INDIA

This section will briefly introduce the dispute resolution under the ECT intended for investment disputes between foreign investors and the host States.

The principle *compétence de la competence* or *kompetenz-kompetenz* empowers the Tribunals to rule on their own jurisdiction.[7]

The Investor-State Dispute Settlement provisions of the ECT are found under Article 26(1) in Part V:

> Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III.

Therefore, an arbitration Tribunal provided for under ECT will have jurisdiction over the claims of an Investors should the following conditions be met: (i) there should be a dispute concerning an alleged breach of an obligation under Part III of the ECT by a

[7] See Article 41(1) of the ICSID Convention; Article 21 of the UNCITRAL arbitration rules; Section 2 of the Arbitration Act (Sweden); Section 30 of the Arbitration Act 1996 (England and Wales) . Also, Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic, ICSID Case No. ARB/14/32, Decision on Jurisdiction, para 169. Such a jurisdictional ruling of an ICSID Tribunal in rare occasions may be challenged before an ad hoc Committee pursuant to Article 52(1)(b) (the Tribunal has manifestly exceeded its powers). In the case of non-ICSID Tribunals, jurisdictional decisions may be challenged before national courts at the seat of the arbitration or in the place of enforcements of the award.

Contracting Party; (ii) the dispute must relate to an Investment as defined under ECT; (iii) the Investment must be in the Area of the Contracting Party; (iv) the claimant must be an Investor of a Contracting Party; (v) the events with which the claim is concerned must have occurred at a date such as to give the Tribunal jurisdiction. For the purposes of this discussion, it is assumed, that there is a legal dispute between *the Investors* and the host State, i.e., "a disagreement on the point of law or fact, a conflict of legal views or interests between parties".[8]

Article 26 of the ECT provides for three fora for submission of an unresolved investment dispute between private foreign investors and host States. Whilst this choice includes the national judiciary or administrative tribunals of the host State;[9] and previously agreed dispute settlement procedures[10], international arbitration[11] is the most essential remedy[12]. Article 26 of the ECT imposes no exhaustion of local remedies obligation on foreign investors. Since the ECT is not a "self-contained treaty" the disputes should be submitted to the arbitral institutions outside the ECT. [13] Under Article 26(4), investors have the option to choose one of the following venues of investment arbitration:

- ICSID-arbitration (given both the investor's home State and the host State have ratified the International Centre for Settlement

[8] Case Concerning East Timor (Portugal v Australia), ICJ Reports (1995), 89, 99. Cited in Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (Second edition), Oxford University Press, 2012, 245.
[9] Article 26(2) (a) of the ECT.
[10] Article 26(2) (b) of the ECT.
[11] Article 26(2) (c) of the ECT.
[12] As of 15 January 2021, the Secretariat is aware of 135 investment arbitration cases instituted under the Energy Charter Treaty (sometimes invoked together with a bilateral investment treaty). The full list is available **here.**
[13] Baltag, Crina. The Energy Charter Treaty: The Notion of Investor. Alphen aan den Rijn: Kluwer Law International (2012), 16.

of Investment Disputes Convention[14] (ICSID)) [15];

- arbitration under the provisions of the ICSID Convention or of the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID (ICSID Additional Facility Rules [16]) (when either only the investor's home State or only the host State have ratified the ICSID Convention)[17];

- a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law[18] (UNCITRAL)[19]; or

- arbitration under the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)[20].

Since the ECT is an international treaty, the provisions and terms therein should be interpreted according to the Vienna Convention on the Law of Treaties [21] (VCLT). The starting point of the ECT interpretation is the ordinary meaning of the terms read in their context and in the light of the ECT object and purpose stipulated under Article 2 of the Treaty.[22] Reference to the object and purpose together with good faith will ensure the effectiveness of the ECT terms (*ut res magis valeat quam pereat*, the *effet utile*)[23]. The context includes Preamble of the Treaty and its annexes. The documents of

[14] ICSID Convention 1966.
[15] Article 26(4) (a)(i) of the ECT.
[16] Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID, as amended on 10 April 2006.
[17] Article 26(4) (a)(ii) of the ECT.
[18] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013e.pdf
[19] Article 26(4) (b) of the ECT.
[20] Article 26(4) (c) of the ECT.
[21] Vienna Convention on the Law of Treaties (1969).
[22] Article 31 of the VCLT.
[23] Villiger, Mark E. Commentary on the 1969 Vienna Convention on the Law of Treaties. Leiden: Martinus Nijhoff Publishers (2009), 428.

the Final Act, e.g., the declarations and understandings should also be considered.[24]

1. *Ratione personae*

This section elaborates on the jurisdiction *ratione personae,* which simply put, refers to certain characteristics that an investor should meet to be covered by the investment treaty at hand. The treaty protection extends to an investor who is a national of a contracting party other than the contracting state hosting the particular investment.

Part III of the ECT accords protection only to the Investments of Investors within the meaning of the Treaty. Consequently, only these investors enjoy access to the remedies available under the ECT. Pursuant to Article 1(7) of the Treaty an Investor is (i) a natural person possessing the citizenship or nationality of, or is permanently residing in a Contracting State in accordance with its applicable law, (ii) or a company or other organization organized in accordance with the law applicable in that Contracting State.

Armenia signed and ratified the ECT on 17 December 1994 and 18 December 1997, respectively.[25] Hence Armenian nationals, citizens, and natural persons permanently residing in Armenia are at face value Investors for the purposes of the ECT. In the case of the ICSID arbitration, however, permanent presidency would not suffice to qualify as an Investor under Article 25(2)(a) of the ICSID Convention.[26]

The same threshold is to be applied *mutatis mutandis* to the legal

[24] Article 32 of the VCLT. Final Act of the European Energy Charter Conference. https://www.energychartertreaty.org/provisions/final-act-of-the-european-energy-charter-conference/
[25] https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/armenia/
[26] Hobér (2020), 443.

persons organized under the Armenian law. Article 1(7) of the ECT imposes no additional requirements with respect to shareholding, management, *siege social,* or location of business activities. The *Yukos*[27] Tribunal at this point held that "on its face, Article 1(7)(a)(ii) of the ECT contains no requirement other than that the claimant company be duly organized under the law applicable in a Contracting Party".[28] The *Plama*[29] Tribunal, similarly, ruled that "the Claimant is an "Investor of another Contracting Party" within the definition provided by Article 1(7)(a)(ii) ECT, being a company organized in accordance with the law applicable in Cyprus", and that it was "irrelevant who owns or controls the Claimant at any material time."[30] Therefore, *the Investors* are in the position of establishing the jurisdiction *ratione personae* under the ECT.

Fulfillment of the requirements under Article 1(7) of the ECT is, however, the first step only, not the end of the journey. Save for few instances where the ECT protects only Investors, the Contracting Parties grant promotion and protection to Investments of Investors.[31] Thus, the notion of "Investor" and that of "Investment" must be viewed in conjunction. Jurisdiction over a dispute concerning alleged breaches of the obligations of a host State stipulated in Part III of the ECT exists only when the investor meets the requirements of *ratione personae* and the investment satisfies the requirements *ratione materiae* within the meaning of the ECT.[32]

[27] Yukos Universal Limited (Isle of Man) v The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227.
[28] Yukos (Isle of Man) v Russia, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras 440-441; Veteran Petroleum Limited (Cyprus) v Russian Federation, UNCITRAL, PCA Case No. 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 497.
[29] Plama Consortium Limited v Republic of Bulgaria, ICSID Case No. ARB/03/24.
[30] Plama v Bulgaria, Decision on Jurisdiction, 8 February 2005, paras 124, 128.
[31] Under Article 10(1) of the ECT, FET and most constant protection and security is to be accorded to *Investments*.
[32] Baltag (2012), 19.

2. *Ratione materiae*

This section inquires whether the subject matter of the would-be dispute, i.e., *the Investments* can be qualified as such under the ECT definition of "investment".

As Article 1(6) of the ECT stipulates, ""Investment" refers to any investment associated with an Economic Activity in the Energy Sector…".

"Economic Activity in the Energy Sector" under Article 1(5) means:

> an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.

Understanding 2 of the ECT provides *inter alia* for seven illustrative (non-exhaustive) examples of "Economic Activity in the Energy Sector" for the purposes of the Treaty, the second and third of which read as follows: (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources; (iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines.[33] It is submitted that the HPP are *prima facie* Investments under Articles 1(5) and 1(6) of the ECT that are associated with (i) construction and operation of power generation facilities; and (ii) distribution and supply by way of

[33] Final Act of the European Energy Charter Conference, Understandings, n. 2. with respect to Article 1(5).

transmission and distribution grids.

Where *the Investors* elect to commence proceedings under the ICSID Convention, jurisdiction *ratione materiae* is to be established under both the ECT and the ICSID Convention.[34]

Addressing this point, the Tribunal in *Kardassopoulos v Georgia*[35]concluded that:

> In order for the Tribunal to have jurisdiction *ratione materiae* over the present dispute, it must be found to have jurisdiction under the ICSID Convention, and under the ECT.[36]

The reference to the undefined notion of "investment" in Article 25(1) of the ICSID Convention has brought about two conflicting approaches regarding the consequence of the provision *viz* the subjectivist and the objectivist theories.[37]

The subjectivist theory does not endorse the traditional economic terminology according to which "investment" is objectively definable. Instead, it is argued that the ICSID drafters have intentionally left the definition of the term to the parties that would avail themselves to the ICSID Tribunals through the respective investment documents containing such a definition. *Travaux préparatoires* of the Convention indicate that the Contracting Parties deliberately avoided defining the term "investment". The Report of the Executive Directors states that "no attempt was made to define the term "investment" given the essential requirements of consent by the parties…."[38]

The Tribunal in *MCI Power v Ecuador* noted that the ICSID did not define the term "investment" because it wants to leave the Parties free to decide what class of disputes they would submit to the ICSID.

[34] Baltag (2012), 19.
[35] Ioannis Kardassopoulos v The Republic of Georgia, ICSID Case No. ARB/05/18.
[36] Kardassopoulos v Georgia, Decision on Jurisdiction, para 113.
[37] Baltag (2012), 214.
[38] ICSID Reports 28, para 27.

Therefore, the definition of "investment" under the USA – Ecuador BIT was all the Tribunal should consider ruling on its jurisdiction under the ICSID.[39] The subjectivist approach is what *the Investors* want to stick to, provided they submit the dispute to an ICSID arbitration.

The objective reading of the term "Investment" under Article 25, on the other side, is what the Respondent would probably advocate for. Douglas sets a high-water mark for the Objectivist theory stipulating that albeit there is no definition of the term "investment" in the ICSID Convention:

> The term 'investment', however, is a term of art: its ordinary meaning cannot be extended to bring any rights having an economic value within its scope, for otherwise violence would be done to that ordinary meaning, in contradiction to Article 31 of the Vienna Convention on the Law of Treaties. [40]

If one perceives the notion of "investment" as a term of art, then "investment" under the ICSID Convention is to be given an absolute meaning of its own which outweighs any such meaning that the Parties can give. This line of thinking relies *inter alia* on paragraph 25 of the Report of the Executive Directors, providing that jurisdiction under ICSID according to Article 25(1) of the Convention cannot be established on consent alone.[41]

The Tribunal in *Joy Mining v Egypt* denying its jurisdiction stressed that should the parties to a dispute be allowed to define the notion of "investment" for the purposes of ICSID jurisdiction, in a way falling short of satisfying the objective requirements of Article 25, *per se* would be rendered as meaningless a provision. [42]

[39] M.C.I. Power Group L.C. and New Turbine, Inc. v Republic of Ecuador, ICSID Case No. ARB/03/6, paras 159-160.
[40] Douglas (2012), 164-165.
[41] ICSID Reports 28, para 25.
[42] Joy Mining Machinery Limited v Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award

Pushing the idea of objectivity towards the "criteria approach" was the Tribunal in *Fedax v Venezuela*[43]. The Tribunal held that:

> The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development.[44]

In *Salini v Morocco*[45], the Tribunal recognized four elements of "investment" within the meaning of the ICSID Convention. These criteria, known as the "Salini test", (i) include regularity of profits and returns, (ii) contribution made by the investor in performance of the activity, (iii) duration of a contract, investor participation in the risks of the transaction, and (iv) contribution to the economic development of the host state.[46]

In *Malaysian Historical Salvors v Malaysia* adhering to the *Fedax/Salini,* the Tribunal interpreted the notion of "investment" as an economic activity promoting positive contribution to the economic development of the host State.[47] Eventually, the Tribunal rejected its jurisdiction since the activity at hand lacked any economic contribution to the host State's development.[48]

Judge Shahabuddeen, in his dissenting opinion in the Decision on Annulment in *Malaysian Historical Salvors v Malaysia*, argued that the Contracting States had never agreed to grant the protection of the ICSID Convention to the economic activities that fail to promote

on Jurisdiction, 6 August 2003, paras 50, 53. See also Mr. Patrick Mitchell v Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, paras 39-40.

[43] Fedax N.V v The Republic of Venezuela, ICSID Case No. ARB/96/3.

[44] Fedax v Venezuela, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, para 43.

[45] Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco [I], ICSID Case No. ARB/00/4.

[46] Salini v Morocco [I], Decision on Jurisdiction, 23 July 2001, para 52.

[47] Historical Salvors v Malaysia, Award on Jurisdiction, 17 May 2007, paras 65-68.

[48] Historical Salvors v Malaysia, Award on Jurisdiction, 17 May 2007, paras 123, 132, 144

the economic development of the host State.[49] Nevertheless, in Schreuer's opinion, activities not evidently contributing to a host States' development should not be excluded from the protection of the ICSID Convention.[50] It is unfortunate in Schreuer's words that this has led Tribunals to view the elements as jurisdictional requirements. However, should the *test* be applied as such, "its criteria should not be seen as distinct jurisdictional requirements each of which must be met separately".[51]

Both the "*Fedax criteria" and "Salini test"* favor the Respondent's, since when applied in a restrictive manner, this approach constitutes a jurisdictional obstacle, especially should the Respondent stress on the contribution criterion, and the Tribunal considers the criteria as distinct jurisdictional requirements that should be met separately.

The opposing case law either dismisses the "*Fedax*/*Salini test"* or views it as a non-binding and flexible set of criteria.[52] The *Biwater* Tribunal dismissed the *Salini* criteria on two points: (i) Article 25 of the ICSID Convention contains no reference to the *"Salini test",*[53] (ii) the travaux préparatoires of the Convention clearly indicate that "investment" was intentionally not defined[54].

[49] Historical Salvors v Malaysia, Dissenting Opinion of Judge Mohamed Shahabuddeen, 19 February 2009, paras 21-24.
[50] Schreuer and Malintoppi (2013), 134.
[51] Schreuer, Christoph, and Malintoppi, Loretta. The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Cambridge: Cambridge University (2013), 133. See also Schreuer, Christoph. "Commentary on the ICSID Convention: Article 25." ICSID Review: Foreign Investment Law Journal. 11.2 (1996): 318-492, 372; Dolzer and Schreuer (2012), 68.
[52] Biwater v Tanzania, Award 24 July 2008; Historical Salvors v Malaysia, Decision on the Application for Annulment, 16 April 2009; Pantechniki S.A. Contractors & Engineers (Greece) v The Republic of Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009; RSM Production Corporation v Grenada, ICSID Case No. ARB/05/14, Award 13 March 2009; Alpha Projektholding GmbH v Ukraine, ICSID Case No. ARB/07/16, 8 November 2010; Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010.
[53] Biwater v Tanzania, Award 24 July 2008, para 312.
[54] Biwater v Tanzania, Award 24 July 2008, para 313.

The majority of the Annulment Committee in *Malaysian Historical Salvors v Malaysia* established that the Tribunal failing to apply the definition of investment as agreed by the Parties committed "a gross error that gave rise to a manifest failure to exercise jurisdiction".[55] The *Salini criteria* were wrongly elevated to a jurisdictional threshold, and the Committee relying on Article 52(1)(b) of the ICSID Convention specified that the Tribunal had manifestly exceeded its powers.[56]

In *Abaclat v Argentina,* the Tribunal pointed out that the *Salini* criteria absent in the ICSID Convention should not create a limit, which neither the Convention itself nor the Contracting Parties to a specific investment treaty intended to create.[57]

The Tribunal in *Pantechniki v Albania* noted that the *Salini* criteria were not found in the ICSID Convention and that they were elements of subjective judgment leading to unpredictability. [58]

In *Inmaris v Ukraine* the Tribunal stated that establishing what constitutes investment, one should defer to the relevant definition of the term in the investment treaties concluded between the Contracting Parties.[59]

The Tribunal in *RREEF v Spain* stated that no test, criteria, or guidelines should "restrict or replace the definition that exists in the ECT".[60]

[55] Malaysian Historical Salvors, SDN, BHD v The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, para 74.
[56] Historical Salvors v Malaysia, Decision on the Application for Annulment, 16 April 2009, para 80.
[57] Abaclat and Others v Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v The Argentine Republic), Decision on Jurisdiction and Admissibility, 4 August 2011, para 364.
[58] Pantechniki v Award, 30 July 2009, para 43.
[59] Inmaris v Ukraine, Decision on Jurisdiction, 8 March 2010, para 129-130.
[60] RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para 157.

The Tribunals in *Fakes v Turkey*[61]*; Alpha v Ukraine*[62]*; LESI SpA et ASTALDI SpA. v Algeria*[63] *and Pey Casado v Chile*[64]*,* refused to read Article 25 of the ICSID Convention as containing requirement of a contribution to the economic development of host States. The *Pey Casado* Tribunal firmly stated that "an investment may or may not prove to be useful to the host State without losing its status as such". Thus, the development of the host State was not a constitutive element of "investment".[65]

Although recently, the *Salini* elements have often been considered non-coercive, only the possible effect of Article 25(1) of the ICSID Convention must not be overlooked by *the Claimants*.

Isolux v Spain[66] and *Masdar v Spain*[67], decisions indicated that the objectivist approach, including the Salini elements, is not done yet. Accordingly, the *Isolux* Tribunal adopted an objective definition of "investment" containing three *Salini* elements.[68]

Unlike the ICSID Convention, neither the SCC Arbitration Rules nor UNCITRAL Arbitration Rules contain substantive provisions. Thus, these rules do not "filter claims through their own autonomous notion of investment as a condition of jurisdiction *ratione materiae".*[69]

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[61] Saba Fakes v Republic of Turkey, ICSID Case No. ARB/07/20, Award, 10 July 2010, para 110-112.
[62] Alpha v Ukraine, Award, 8 November 2010, para 312.
[63] L.E.S.I. S.p.A. and ASTALDI S.p.A. v République Algérienne Démocratique et Populaire, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006), para 72.
[64] Victor Pey Casado and President Allende Foundation v Republic of Chile, ICSID Case No. ARB/98/2, Award, 8 May 2008.
[65] Pey Casado v Chile, Award, 8 May 2008, para 232. Cited in Brown, Chester, and Miles, Kate. Evolution in Investment Treaty Law and Arbitration. Cambridge: Cambridge University Press (2011), 54.
[66] Isolux Netherlands, BV v Kingdom of Spain, SCC Case V2013/153.
[67] Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain, ICSID Case No. ARB/14/1.
[68] Isolux v Spain, Award, 12 July 2016, paras 685-686.
[69] Stephen R. Jagusch. Anthony C. Sinclair. The Limits of Protection for Investments and Investors under the Energy Charter Treaty, in Investment Arbitration and The Energy Charter Treaty in Ribeiro, Clarisse C. Investment Arbitration and the Energy Charter Treaty. Huntington, N.Y: JurisNet (2006), 73, 75, cited in Yannaca-Small (2010), 249.

Notwithstanding this, the *Salini test* was surprisingly applied to distinguish between a sale and an investment in the *Romak v Uzbekistan*[70] case. Under the UNCITRAL Arbitration Rules, the Tribunal considered the definition of "investment" under the Switzerland – Uzbekistan BIT (1993) as non-exhaustive and illustrative. It was ruled that the notion of "investment" must have an inherent meaning of its own.[71] The Tribunal held that the definition of "investment" under the BIT solely fell short of qualifying an asset as "investment", which had the same meaning both under the ICSID Convention and outside of it.[72]

However, in the case under discussion here, with a completely different factual background and a Treaty applicable (the ECT), the *Romak* scenario is improbable. Therefore, although not without considerable difficulties, establishing jurisdiction ratione materiae is not an insurmountable obstacle for *the Claimants.*[73]

3. *Ratione loci*

This section examines whether *the Investments* have been located in the territory of the Respondent, as required under the ECT as well as the ICSID Convention.

Article 26(1) of the ECT covers disputes arising out of alleged breaches of Part III of the Treaty relating only to Investments in the

[70] Romak S.A. (Switzerland) v The Republic of Uzbekistan, UNCITRAL, PCA Case No. AA280.
[71] Romak v Uzbekistan, Award, 26 November 2009, para 188.
[72] Romak v Uzbekistan, Award, 26 November 2009, para 194. See also Masdar v Spain, Award 16 May 2018, paras 196-197, 199-200.
[73] It is submitted, that the ICSID proceedings provide for more potential difficulties in this context than the non-ICSID options. However, I do not propose that the non-ICSID fora are preferable for *the Claimants* to the ICSID arbitration. The comprehensive comparison of the available arbitration options under the ECT is beyond the scope of this paper. For a comparative analysis of the available arbitral fora under the ECT see Roe, Thomas, Matthew Happold, and James Dingemans. Settlement of Investment Disputes Under the Energy Charter Treaty. Cambridge: Cambridge University Press (2011), 152-161; Hobér, Kaj. The Energy Charter Treaty, a Commentary. (2020), 443-447.

"Area" of the Contracting Parties.[74] Under Article 1(10) of the ECT:

"Area" means with respect to a state that is a Contracting Party:

(a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and

(b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.

Investment treaties, in their majority, contain similar requirements of nexus with the host State's territory. The Azerbaijan Model BIT 2016, for instance, defines the term "investment" as "every kind of asset established or acquired directly by an investor of one Contracting Party wholly or exclusively *in the territory* of the state of the other Contracting Party".[75] (emphasis added).

States may exclude certain territories from the application of international treaties. The general rule on the territorial application of a treaty is laid down in Article 29 of the VCLT:

> Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Evidently, Article 29 of the VCLT establishes the rule of territorial unity. But it also leaves room for the Contracting Parties to invoke exceptions to this general rule. Likewise, the ECT *a priori* covers the entire territory of the Contracting Parties. Yet, under Article 40(1), the Treaty allows the Contracting Parties to apply territorial derogations:

> Any state or Regional Economic Integration Organisation may

[74] Article 26(1) of the ECT.
[75] Article 1(1) of the Azerbaijan Model BIT 2016.

> at the time of signature, ratification, acceptance, approval or accession, by a declaration deposited with the Depositary, declare that the Treaty shall be binding upon it with respect to all territories for the international relations of which it is responsible, or to one or more of them. Such declaration shall take effect at the time the Treaty enters into force for that Contracting Party.

Territorial application stipulated under Article 40 of the ECT must be read in conjunction with Article 1(10), which defines the term "Area". Article 40(4) of the ECT provides that the "definition of 'Area' in Article 1(10) shall be construed having regard to any declaration deposited under this Article". Therefore, only territories not excluded by a Contracting Party from the application of the ECT can be construed as the Area of that Contracting Party for the purposes of the Treaty.

The Investors should establish that the HPP are located within the territory of the Respondent state *viz* Azerbaijan. This does not seem to be much of a trouble. Should the Respondent participate in the proceedings at all, it will hardly contest the notion that the region concerned is its territory. Indeed, the very conflict in the Nagorno Karabakh region has been of a territorial value for Azerbaijan. To be on the safe side, though, it would suffice to reiterate a statement of Azerbaijani leader Aliyev from 27 September 2020 – shortly after the war was unleashed in Nagorno Karabakh/Artsakh: "Nagorno-Karabakh is Azeri territory."[76]

However, Armenian investors will find themselves in quite a delicate situation, where they should acknowledge Azerbaijan's sovereignty over the concerned region, which can be perceived in Armenia as a controversial legal strategy, to say the least. However, it is essential to highlight that Tribunals only establish the territorial requirement under the investment treaties as a matter of jurisdictional

76 https://www.dailysabah.com/politics/diplomacy/nagorno-karabakh-belongs-to-azerbaijan-president-aliyev-says

requirement. They do not have the mandate to rule over the sovereignty of a state *vis-a-vis* any territory. Nor would they be interested in such an ambitious undertaking. This rationale was adopted in the "Crimean cases", where the Tribunals sought to avoid questions of the legality of Crimea's "annexation".[77] It should *arguendo* be stated that in any case, the Respondent will be estopped from denying (as a matter of legal strategy) its sovereignty over the territory concerned under the principle of consistency (*venire contra factum proprium non valet*).[78]

At any rate, there is no indication that Azerbaijan has elected not to apply the ECT to the Nagorno-Karabakh region, according to Article 40(1).[79] Consequently, the ECT applies to the entire territory which is considered by Azerbaijan to be under its sovereign authority, including the area on which the HPP were installed. Finally, the ICSID Convention, should it be the instrument governing the arbitral proceedings, contains no territorial requirement of its own. Article 70 of the ICSID Convention establishes a presumption that the Convention will apply to the entire territory of a State. The contrary would have to be expressed explicitly in a written notice to the Convention's depositary.[80]

To summarize, since the Republic of Azerbaijan has not applied any territorial exclusions[81], the ICSID Convention and the ECT apply to

[77] Olmos, Giupponi B. "Exploring the Links between Nationality Changes and Investment Claims Arising Out of Armed Conflicts: The Case of Russian Passportization in Crimea." in Gómez, Gourgourinis, and Titi (2019), 165, 167; Rees-Evans, Laura. "Litigating the Use of Force: Reflections on the Interaction between Investor-State Dispute Settlement and Other Forms of International Dispute Settlement in the context of the conflict in Ukraine." in Gómez, Gourgourinis, and Titi (2019), 186-187.

[78] Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru, ICSID Case No. ARB/03/28, Award, 18 August 2008, paras 5, 231.
See also in a different context in Happ and Wuschka (2016): 245-268; 261-262.

[79] https://www.energycharter.org/who-we-are/members-observers/countries/azerbaijan/

[80] Schreuer and Malintoppi (2013), 1276-1277. The current list of exclusions of territories is quite short. New Zealand has excluded Cook Islands, Niue, and Tokelau. The United Kingdom has excluded British Indian Ocean Territory, Pitcairn Islands, British Antarctic Territory, and the Sovereign Base Areas of Cyprus.

[81] https://icsid.worldbank.org/about/member-states/database-of-member-states/member-state-

the State's entire territory. Hence, *the Investors* are in the position of establishing jurisdiction *ratione loci*.

4. *Ratione temporis*

This section deals with the temporal jurisdiction of the Tribunals, which must exist on the date when the arbitral proceedings were initiated. The entry into force of the substantive obligations *the Investors* will be base their claim upon, i.e., the ECT (and the ICSID Convention if *the Investors* file their case to the Centre), is pivotal for the jurisdiction *ratione temporis.*

One recalls a quotation from the book "A Brief History of Time" by Stephen Hawking when grappling with the question of temporal application of investments treaties to the events leading to legal disputes:

> If there were events earlier than this time, then they could not affect what happens at the present time. Their existence can be ignored because it would have no observational consequences.

As stated by Douglas, "the tribunal's jurisdiction ratione temporis extends to claims relating to the claimant's investment, which are founded upon obligations in force and binding upon the host contracting state party at the time of the alleged breach".[82]

The temporal limitations on the right to arbitrate under Article 26 of the ECT are contained within the definition of "Investment" in Article 1(6):

> A change in the form in which assets are invested does not

details?state=ST8

[82] Douglas (2012), 329.

affect their character as investments and the term 'Investment' includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the 'Effective Date') provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

"Contracting Party" according to Article 1(2) of the ECT, "means a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force".

The ECT under Article 44, which deals with entry into force of the Treaty for the Contracting Parties, entered into force on 16 April 1998 for the states and REIOs – signatories of the Treaty which had deposited instruments of ratification, acceptance, or approval before this date. For states and REIOs acceding to, ratifying, accepting, or approving the ECT after 16 April 1998, the ECT enters into force on the ninetieth day after the date of deposit of the instrument of ratification, acceptance, approval, or accession.

Azerbaijan signed the ECT on 17 December 1994, ratified on 2 December 1997, deposited on 17 December 1997, and the Treaty entered into force on 16 April 1998.[83]

Armenia signed the ECT on 17 December 1994, ratified on 18 December 1997, deposited on 19 January 1998, and the Treaty entered into force on 19 April 1998.[84]

Having established this, let us now examine whether *the Investments* were made when the ECT was in force, and should it be the case,

[83] https://www.energycharter.org/who-we-are/members-observers/countries/azerbaijan/
[84] https://www.energycharter.org/who-we-are/members-observers/countries/armenia/

does the Treaty cover *the Investments*?

Treaties typically apply only prospectively from the date of their entry into force. This general rule reflects the non-retroactivity of law – a well-established principle in national and international law as expressed in Article 28 of the VCLT. The principle laying the basis for this rule is reflected in Article 13 of the International Law Commission's Articles on State Responsibility:

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.[85]

The ECT in Article 1(6) provides that it also applies to investments made before the Treaty entered into force for the Contracting Parties. However, this is not to be confused with a retrospective application of the ECT. There is an express difference between the application of the Treaty to all investments made, whether prior to or after the "Effective Date", and coverage by the substantive provisions of the ECT of the acts and events that occurred before the same date.[86] Indeed, the plain language "provided that the Treaty shall only apply to matters affecting such investments after the Effective Date" leaves no room for doubt.[87] Therefore, the *Investments of the Investors* that

[85] See Crawford, James. The International Law Commission's Articles on State Responsibility, PERSEE (2002), 90.

[86] See SGS Société Générale de Surveillance S.A. v Republic of the Philippines, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para 166; Técnicas Medioambientales Tecmed, S.A. v The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paras 53-68; Kardassopoulos v Georgia, Decision on Jurisdiction, 6 July 2007, paras 253-255; Bayindi v Pakistan, Award, 27 August 2009, paras 131-132; Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, para 170; Impregilo S.p.A. v Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paras 297-304.

[87] Similarly, Article 2(3) of the US Model BIT 2012 reads: "For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to

were made prior to or after 16 April 1998 are covered by the substantive provisions of the ECT provided the events affecting *the Investments* took place after the same date. The 2020 war that has outlined this *scenario* falls under this temporal requirement.

The "Effective Date" is the only point of temporal reference for determining jurisdiction *ratione temporis* if Investors chose to initiate arbitration under SCC or UNCITRAL Rules are concerned. Should, however, *the Investors* elect to resort to ICSID arbitration, both the home State of *the Investor* and the host State must also have ratified the ICSID Convention for the Tribunal to assume jurisdiction. As the Tribunal in *Salini v Jordan* [88] observed, "one must distinguish carefully between jurisdiction *ratione temporis* of an ICSID Tribunal and applicability *ratione temporis* of the substantive obligations contained in a BIT."[89]

The ICSID Convention entered into force on 14 October 1966, 30 days after ratification by the first twenty states.[90] According to Article 68 of the Convention, it enters into force for each State 30 days after the respective instrument of ratification has been duly deposited.[91]

The ICSID Convention entered into force for the Republic of Armenia on 16 October 1992.[92]

The ICSID Convention entered into force for the Republic of Azerbaijan on 18 October 1992.[93]

exist before the date of entry into force of this Treaty."

[88] Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13.

[89] Salini v Jordan, Decision on Jurisdiction, 9 November 2004, para 176.

[90] https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview

[91] See the respective dates on entry into force of the ICSID Convention for the Member States: https://icsid.worldbank.org/about/member-states

[92] https://icsid.worldbank.org/about/member-states/database-of-member-states/member-state-details?state=ST5

[93] https://icsid.worldbank.org/about/member-states/database-of-member-states/member-state-details?state=ST8

The relevant date for the jurisdiction of an ICSID Tribunal is the date of institution of proceedings. Both the State of *the Investors'* nationality and the host State must be parties to the ICSID Convention at any date after 18 October 1992. Not even denunciation of the Convention under Article 71 by the host State will affect the jurisdiction of Tribunals in proceedings instituted before the notice of denunciation.[94]

Natural persons, according to Article 25(2)(a) of the ICSID Convention, should have the nationality of a State Party to Convention both on the date of consent and on the date the request for arbitration is registered. *The Investors* must also not have the nationality of the host State on either date, which is not the case in *the present scenario.* Article 25(2)(b) requires that juridical persons on the date of consent must have the nationality of a State party to the ICSID Convention other than the host State. Since the consent to arbitration is a standing offer on behalf of the host State, the date of consent and the date of the institution of proceeding will normally (not necessarily) coincide.[95] To recapitulate: *the Investments* are covered by the jurisdiction *ratione temporis* under the ECT, regardless of the arbitral forum relied upon by *the Investors*.

Another question that should be grappled with is whether the ECT was suspended or otherwise affected during the war for the respective territory. The Respondent, it is assumed, might argue that the answer to the question is in the affirmative.

The ECT itself does not allow Contracting Parties to suspend the Treaty provisions.

The Draft Articles on the Effects of Armed Conflicts on Treaties (Draft Articles) of The International Law Commission of the United Nations (ILC) from 2011 reflect the contemporaneous state of international

[94] Article 72 of the ICSID Convention. See also Schreuer and Malintoppi (2013), 1279-1282.
[95] Dolzer and Schreuer (2012), 40.

law.[96] Article 3 of the Draft Articles provides that the existence of an armed conflict [97] does not *ipso facto* terminate or suspend the operation of treaties. This applies "as between the parties to the conflict and a State that is not". Article 7 of the Draft Articles refers to an indicative list of treaties, the subject matter of which implies continued operation during armed conflicts. The list includes "Treaties of friendship commerce and navigation and analogous agreements concerning private rights" and "treaties relating to commercial arbitration". [98] Although the Draft Articles do not expressly refer to investment treaties, the ILC in its Commentary views bilateral investment treaties as included in agreements concerning private rights analogs to treaties of friendship, commerce and navigation. [99] The assumption of continuity of investments treaties during armed conflicts is particularly true where the investment treaties expressly address the consequences of armed conflicts[100], which the ECT does in its Articles 12 and 24. Therefore, the ECT in its entirety continues to apply in situations of armed conflict. Otherwise, at least the relevant provisions of the ECT would be pillaged of their meaning and content. In conclusion, the 2020 war *per se* did not suspend or otherwise affect the application of the ECT to the territory concerned and did not hinder jurisdiction *ratione temporis* over the dispute.

[96] Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10). Yearbook of the International Law Commission, 2011, vol. II, Part Two.
[97] Pursuant to Article 2(b) of the Draft Articles "Armed conflict" means a situation in which there has been a resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.
[98] Schreuer, Christoph H. "The Protection of Investments in Armed Conflicts." Investment Law within International Law: Integrationist Perspectives, edited by Baetens, Freya Cambridge University Press, Cambridge (2019), 2.
[99] Draft articles on the effects of armed conflicts on treaties, with commentaries 2011, Commentary 48 to Annex to Article 7 as cited in Schreuer, Christoph H. "War and Peace in International Investment Law." in Gómez, Gourgourinis, and Titi (2019), 7.
[100] Article 7 of the Draft Articles.

5. *Ratione voluntatis*

Ratione voluntatis generally refers to the consent of the Respondent State to arbitrate. Under this section, we will be looking for such consent given by Azerbaijan to the would-be alien investors under the ECT. We also will be inquiring whether *the Investors* can benefit from (accept) that consent.

For an alien investor to commence arbitral proceedings against the host State, it is not sufficient to meet the jurisdictional requirements under the respective investment treaty. The host State should have given its express consent to arbitrate. As Douglas opines, "Consent of the respondent host state to investor/state arbitration in the investment treaty is the most important condition for the vesting of adjudicative power in the tribunal".[101]

The last paragraph of the Preamble of the ICSID Convention unambiguously requires separate consent by the host State for arbitral jurisdiction under the framework of the Convention to exist:

> "… no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration."

Azerbaijan has given such consent. Under Article 26(3)(a) of the ECT, each Contracting Party gives "unconditional consent to the submission of a dispute to international arbitration or conciliation according to this Article". A Contracting Party heralds its unilateral offer to arbitrate, which is accepted by an aggrieved foreign investor as soon as a notice of arbitration is served upon the host State or one of the institutions listed under Article 26(4) of the ECT.[102]

[101] Douglas, Zachary. The International Law of Investment Claims. Cambridge: Cambridge University Press (2012), 151.

[102] Douglas (2012), 75; Hobér (2020), 432; Paulsson, Jan. "Arbitration Without Privity." International Centre for Settlement of Investment Disputes Review. (1995), 232, 247, 250; Dolzer, Rudolf and Schreuer, Christoph. Principles of International Investment Law (Second

Accordingly, by signing and ratifying the ECT according to Articles 38 and 39, Azerbaijan has given its irrevocable consent to arbitrate over the disputes arising from alleged breaches of the ECT.[103] Once given, the consent cannot be withdrawn upon the commencement of arbitral proceedings.[104] The Latin maxim *pacta sunt servanda* (agreements must be kept) supports this rule. Under Article 26(3)(b) of the ECT, Azerbaijan has limited its consent only to the disputes previously not submitted to its national courts.[105] However, this factor is of no relevance since the chance that *the Investors* will avail themselves to the national courts of Azerbaijan is naught. The "cooling-off period" of three months under Article 26(2) of the Treaty will not constitute a significant issue either since it is plain that the dispute at hand cannot be settled in three months, let alone amicably. At any rate, this period is generally perceived as "procedural and directory, rather than jurisdictional and mandatory".[106]

Therefore, Azerbaijan has given its consent to arbitration to foreign investors for the purposes of the ICSID Convention and the other two options under the ECT[107]. Therefore, establishing the jurisdiction ratione voluntatis for the Claimants is not a major challenge.

6. Compliance with the law of the host State: implicit in the ECT?

This section addresses the anticipated argument of the illegality of

edition), Oxford University Press, (2012), 254, 260; Limited Liability Company AMTO v Ukraine, SCC, Case No 080/2005, Final Award, 26 March 2008, paras 44-47.

[103] Article 26(1) of the ECT.

[104] Hobér (2013), 230; Hobér (2020), 432.

[105] Annex ID of the ECT.

[106] Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania, ICSID Case No. ARB/05/22, Award 24 July 2008, para 343.

[107] UNCITRAL (Article 26(4)(b) of the ECT), SCC (Article 26(4)(c) of the ECT). Azerbaijan, in general, has also consented to arbitrate in international arbitration the disputes with foreign investors in Article 42 of its Law on the Protection of Foreign Investments. https://investmentpolicy.unctad.org/investment-laws/laws/9/azerbaijan-foreign-investments-law See the original at http://www.e-qanun.az/framework/7000

the Investments under Azerbaijani law. This argument may arguably be the bulk of the Respondent's defense. First, we will briefly discuss the nature of the notion of "legality" of investments and the respective consequences that might unfold. It will be finally argued that the legality issue does not necessarily or automatically constitute a jurisdictional bar of arbitral tribunals.

The issue of compliance with the law of host States may arise before Tribunals in the context of jurisdiction over the dispute. It otherwise reaches to the merits of the case or the question of admissibility of the claim. Due to the different wording and allocation in the investment treaties, provisions refereeing to the host state's law, if any, imply varying legal consequences.

Not only Tribunals have the competence to rule over their jurisdiction, but they also are required to do so.[108] Since Tribunals are obliged to render an enforceable award, any factor capable of affecting the validity of the awards should be considered by the Tribunal. Both the exercise of jurisdiction where it does not exist and unjustified denial of jurisdiction may be grounds for either annulment[109] of the award or setting it aside [110]. Therefore, even if the proceedings are conducted *in absentia* of the Respondent, it is assumed that the Tribunal will address *the Investments'* compliance with the law of the host State.

Many investment treaties contain "in accordance with host State law" clauses in the provisions defining investments. For example, article 1 (Definition) of the Azerbaijan – Czech Republic BIT (2011) provides:

> For the purposes of this Agreement:

[108] Article 41(1) of the ICSID Convention.
[109] Article 52(1)(b) of the ICSID Convention.
[110] Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

> The term "investment" shall comprise every kind of asset invested directly in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party *in accordance with the national legislation of the latter* … (emphasis added).

Some investment treaties require the investments to be approved or authorized in accordance with domestic laws and regulations.[111] Sometimes the requirement of compliance with domestic laws appears in provisions that define the scope and coverage of treaties' application, i.e., promotion, admission, and protection. An example is Article 3(1) (Promotion and admission) of the Azerbaijan – Switzerland BIT (2006):

> Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.[112]

The Tribunal in *Achmea v Slovakia* ruled that provisions providing for investment promotion and admission concerned "the duty of each State Party to promote inward investment". These provisions did not intend to qualify the meaning of the notion of "investment" under the investment treaty.[113]

In *Inceysa v El Salvador*, the Tribunal applying the El Salvador –

[111] Article 4(a) of the ASEAN Comprehensive Investment Agreement; Article I.1.b.ii of the UK – Malaysia BIT 1988 which refers to investments made in projects classified as an "approved project" by the appropriate Ministry of Malaysia, in accordance with its legislation and administrative practice; Article 9 of the Belgium–Indonesia BIT.

[112] Also, Article 2.1 of the Azerbaijan – Czech Republic BIT (2011).

[113] Achmea B.V v The Slovak Republic, PCA Case No 2008-13, Final Award, 7 December 2012, paras 165-166,
See also SAUR International S.A. v The Argentine Republic, ICSID Case No ARB/04/4, Decision on Jurisdiction, 6 June 2012, para 307; Álvarez y Marín Corporación S.A. and others v Republic of Panama, ICSID Case No. ARB/15/14, para 127; Churchill Mining Plc v Republic of Indonesia, ICSID Case No ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014, para 291, cited in Mouawad, Caline, and C. J. Beess, Jessica und Chrostin. "The Illegality Objection in Investor – State Arbitration." Arbitration International. (2021), 5-6.

Spain BIT (1995), although denying jurisdiction referred to the domestic laws of the host State not in the definition of investment but in the provisions on admission and protection. The Tribunal stated that the Respondent contested to arbitrate only when the claimant would act under the host State law.[114]

The *Albaclat Tribunal* diverged from this approach, concluding that where the legality requirement is found elsewhere than the definition of "investment", it should be examined as a matter of merits, not jurisdiction.[115]

The Tribunal in *Fraport v Philippines* dealt with the Germany – Philippines BIT (1997), which referred to the host State laws and regulations in the definition of Investments.[116] Also, the BIT referred to the Constitution, laws, and regulations of the host State in the provisions on admission.[117] According to the Tribunal, Fraport had sought to circumvent the legislation of the host State restricting shareholding and management by foreigners in public utility enterprises ("anti-dummy" law).[118] It was stated that no investment in accordance with law existed, and the jurisdiction *ratione materiae* was denied.[119] The dissenting arbitrator, however, was of the view that the requirement of acceptance of the investments according to the host State law was not to be interpreted as a jurisdictional impediment. The legality of the investor's conduct was a "merits

[114] Inceysa v El Salvador, Award, 2 August 2006, para 257.
[115] Abaclat v Argentina, Decision on Jurisdiction and Admissibility, 4 August 2011, para 382.
[116] Article 1 of the Germany - Philippines BIT (1997).
As Kriebaum opines "to include the clause in the definition of investment of BITs leads to a paradox: On the one hand host State law becomes a point of reference concerning the extent of the jurisdiction of the Tribunal. In that function host State law can limit the scope of legal review by the Tribunal. On the other hand, host State law is often the very subject of the legal review by the Tribunal, which has to determine whether host State law and its application led to breaches of the BIT. Therefore, host State law becomes yardstick and object of review at once". Kriebaum, Ursula. "Investment Arbitration – Illegal Investments" in Klausegger, Christian, Klein, Peter and others (eds), Austrian Arbitration Yearbook 2010, (Beck, Stämpfli & Manz) (2010), 308-309.
[117] Article 2 of the Germany - Philippines BIT (1997).
[118] Dolzer and Schreuer (2012), 96.
[119] Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines, ICSID Case No. ARB/03/25, Award, 16 August 2007, para 401.

issue".[120]

One applying the general principles of good faith[121] and *nemo auditur propriam turpitudinem allegans* (no one can be heard to invoke his own turpitude) to reject the jurisdiction arguably modifies the investments treaty. The Tribunal in *Saba Fakes v Turkey*, grappling with this issue, observed:

> Likewise, the principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be "legal" or "illegal", made in "good faith" or not, it nonetheless remains an investment. The expression "legal investment" or "investment made in good faith" is not pleonasms, and the expression "illegal investment" or "investment made in bad faith" is not oxymorons.[122]

The *Salini* Tribunal dismissing the Respondent's objection based on the wording of the Treaty applicable, which referred to the laws and regulations of the host State in the definition of the term "investment", stressed that the provision referred to the validity of the investment and not to its definition.[123] Nevertheless, the *Salini* Tribunal stated that the clause sought to prevent the Treaty from protecting investments that should not be covered because of their illegal nature.[124] In his profound criticism of this viewpoint, Douglas highlighted the lack of any cited authorities supporting this interpretation, which, without further analyses, was embraced "in a series of awards such that it now holds a virtual monopoly over the

[120] Fraport v Philippines, ICSID, Award, 16 August 2007, Dissenting Opinion of Mr. Bernardo M. Cremades, para 36, 38.
[121] Referred to in Fraport v Philippines, para 396.
[122] Saba Fakes v Turkey, Award, 10 July 2010, para 112.
[123] Salini v Morocco [I], Decision on Jurisdiction, 23 July 2001, para 46; Also, Kriebaum concludes that "in accordance with host State law" clauses "concern the legality of an investment not its definition". Kriebaum (2010), 334.
[124] Salini v Morocco [I], Decision on Jurisdiction, 23 July 2001, para 46.

interpretative space granted to tribunals".[125]

The foregoing discussion supports the notion that "in accordance with host State law" clauses should not be perceived as *ab initio* depriving the Tribunals of jurisdiction over the claims. Even less so is the case with the ECT, which does not contain any such clause at all.[126]

Emphasizing the absence of such a requirement, the Tribunal in *Stati v Kazakhstan* stated that if the Contracting Parties had intended to include such wording in the Treaty, they could have done so, especially in the case of the ECT where the definition of investment and other details are extremely detailed. At least regarding jurisdiction, the Tribunal did not see where such a requirement could come from.[127]

Instead, the ECT in Article 1(7) requires the legal entities to have been established in accordance with the law of the home State. Therefore, for the purposes of the ECT, it suffices for *the Claimants* to show that the relevant legal entities are organized according to the law of the *home* State.

Tribunals, nevertheless, sometimes assume an implied requirement of compliance with the host State law when the investment treaty does not contain such a clause.[128] *The Investors* should not overlook this factor since they do not meet the formal registration and authorization requirements, nor were *the Investors* granted property rights under the Azerbaijani law. Therefore, is it still possible under such circumstances for *the Investors* to have the arbitral jurisdiction

[125] Douglas, Zachary. "The Plea of Illegality in Investment Treaty Arbitration." *ICSID Review: Foreign Investment Law Journal*. 29.1 (2014), 172 (reference omitted). See also, Kozyakova, Anna. *Foreign Investor Misconduct in International Investment Law*, 2021, 103-105.
[126] Hobér (2020), 100.
[127] Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v Republic of Kazakhstan, SCC Case No. V 116/2010, Award, 19 December 2013, para 812.
[128] Mouawad and Beess (2021), 7-10.

established?

To this end, Douglas states that "a plea by the respondent host State to the effect that the claimant has violated its laws does not provide the basis for an objection to the tribunal's jurisdiction in any circumstances". [129]

Similarly, the *Plama* Tribunal upheld that the Claimant's misrepresentation could not affect the Parties' consent to arbitrate, which is contained in the ECT – "a completely separate document". Thus, under the doctrine of separability, even if the agreement regarding the purchase of the investment was invalid, the agreement to arbitrate remained intact.[130]

The Tribunal *in Malicorp v Egypt* endorsed this understanding observing that according to the doctrine of separability, "only defects that go to the consent to arbitrate itself can deprive the tribunal of jurisdiction", and "the offer to arbitrate thereby covers all disputes that might arise concerning that investment, including its validity".[131]

The consent to arbitrate under the ECT is established upon the ratification of the Treaty by the given Contracting Party. Hence it is immune to any subsequent defect or violation of law.

The existence of jurisdiction is concerned with the narrow question of whether the Tribunal itself is mandated with adjudicatory power.[132] Any objection to it should be aimed at the very competence of the Tribunal, not the factual circumstances around the dispute which are to be adjudicated upon at the merits. Under the ECT, the matter of alleged illegality of an investment does not affect the jurisdiction of

[129] Douglas (2014), 157.
[130] Plama v Bulgaria, Decision on Jurisdiction, 8 February 2005, para 130.
[131] Malicorp Ltd v Arab Republic of Egypt, ICSID Case No ARB/08/18, Award, 7 February 2011, para 119.
[132] Douglas, Zachary (2014), 171-172; Kozyakova, Anna. Foreign Investor Misconduct in International Investment Law (2021), 203; Knahr, Christina. "Investment "in Accordance with Host State Law". International Investment Law in Context. (2008), 28.

the Tribunal, since the very question of the veracity of those allegations should be determined by the Tribunal, which in order to bring that task about needs to establish its own competence of doing so in the first place. Therefore, the subsequent verdict on the legality of the concerned investment goes either to the admissibility or to the merits of the claim. The *Plama* Tribunal endorsed this understanding. So did the Tribunal in the *Yukos* case, when it resolved to examine the question of the Respondent's "unclean hands" allegation at the merits.[133]

As Paulsson explains, to understand whether the clause and the challenge based thereon pertains to jurisdiction or admissibility, one should imagine it succeeded:

- If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.

- If the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility[134] and the tribunal's decision is final.[135]

To summarize, the "illegality" argument should not hinder the jurisdiction of the Tribunal over the dispute in the case under discussion here.

6.1. Consequences on the merits?

The elaboration on possible complications *the Investors* may run into

[133] Yukos (Isle of Man) v Russia, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 436. 509; Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, para 187.
[134] Oxus Gold v Republic of Uzbekistan, UNCITRAL, Final Award, 17 December 2015, para 713.
[135] Paulsson, Jan. "Jurisdiction and Admissibility." Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner, (2005), 617.

on the merits is a walk through a *terra incognita* compared to the discussion of the jurisdictional stage.

The Investors are in *prima facie* breach of the Law of the Republic of Azerbaijan on the Protection of Foreign Investments (1992)[136] and the Law of the Republic of Azerbaijan on State Registration and State Register of Legal Entities (2003)[137]. Article 38 of the Land Code regulates granting rights for land use, including leasing. Furthermore, Article 28 of the Law on the Protection of Foreign Investments states that taxes are due for foreign investors according to the legislation of the Republic of Azerbaijan. Although the observation of the Azerbaijani law barely scratches the surface, it brings into the open the issues of state registration, acquisition of property rights, and taxation as acting against *the Investors'* case.

The *Plama* Tribunal having the issue of the compliance with the host State law tramped to the merits, assumed an implicit requirement of compliance with the host State law in the ECT:

> Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment: with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law.[138]

The Tribunal relied on an introductory note to the ECT by the Energy Charter Secretariat, saying that "the fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues"[139].

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[136] https://investmentpolicy.unctad.org/investment-laws/laws/9/azerbaijan-foreign-investments-law

[137] https://ereforms.org/store//media/documents/huq-sexs-rey-en.pdf (Eng.) http://e-qanun.az/framework/5403 (Az.)

[138] Plama v Bulgaria, Award, 27 August 2008, para 138.

[139] Energy Charter Secretariat, The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation, Chairman's Statement at Adoption Session on 17 December 1994, 158.

Then, referring to the *ex turpi causa non oritur actio* (no action can be based on a disreputable cause) principle, the Tribunal denied the claim in granting substantive protections of the ECT.[140]

However, Beltag emphasizes that Article 35 (Secretariat) of the ECT does not vest any interpretative prerogative upon the Secretariat. Nor is this rationale supported in the VCLT provisions.[141] Moreover, the ECT does not require the investments to comply with the host State's laws on authorization or approval as impediments to jurisdiction either.

The timing of the alleged illegality is often viewed in the context of its legal effect. Thus, if the violation of the host State law occurred at the moment of establishment of the investment, the Treaty protection is arguably unavailable.[142]

The *Yukos* Tribunal's observance echoes this understanding:

> An investor, who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host State, has brought itself within the scope of application of the ECT through wrongful acts. Such an investor should not be allowed to benefit from the Treaty.[143]

[140] Plama v Bulgaria, Award, 27 August 2008, 146.
[141] Baltag (2012), 198.
[142] Dolzer and Schreuer (2012), 93; Hobér (2020), 99-103; Kriebaum (2010), 329-334; Brown and Miles (2011), 187-200, 198; Mouawad and Beess (2021), 11; Kozyakova (2021), 203; Moloo, Rahim, and Khachaturian, Alex. "The Compliance with the Law Requirement in International Investment Law." Fordham International Law Journal. 34.6 (2011), 1473-1501, 1499; Douglas (2014), 161; Roe, Happold and Dingemans (2011), 88; Yukos (Isle of Man) v Russia, Final Award, 18 July 2014; Gustav F W Hamester GmbH & Co KG v Republic of Ghana, ICSID Case No. ARB/07/24, Award, 18 June 2010; Fraport v Philippines, Award, 16 August 2007, paras 345, 395; Vladimir Berschader and Moïse Berschader v The Russian Federation, SCC Case No. 080/2004, Award, 21 April 2006, para 111; Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para 277; Churchill v Indonesia, Decision on Jurisdiction, 24 February 2014, para 315.
[143] Yukos (Isle of Man) v Russia, Final Award, 18 July 2014, para 1352.

Likewise, the Tribunal in *Hamester v Ghana* distinguished between illegality *ab initio* being a jurisdictional issue and illegality *ex-post* constituting a merits issue.[144]

As for the subsequent illegalities, Kozyakova opines that such illegality eliminates neither the protection of the investment treaty nor the tribunals' jurisdiction. Therefore, it is with the merits that the tribunals should deal with it.[145]

Moreover, in the cases where Tribunals denied investment protection, the investors were in intentional violation of the host State law by means of corruption,[146] misrepresentation,[147] fraud[148] , or abuse of constitutional norms and "anti-dummy" law[149].

In *the Investors'* case, non-compliance with the host State law had never been vital for the success of *the Investments*. *The Investors* had no choice but to start the economic activities, assuming the risk of non-compliance with the laws of Azerbaijan, which at the moment was not even in effective control of the territory concerned, or they could have refrained from any business endeavors. *The Investors* elected the former. Nonetheless, non-compliance with the host State law was not detrimental in the way it was in the *Fraport* case, where the Tribunal found that the only option for the Investors to run a profitable Investment was the violation of the "anti-dummy" law of The Philippines. [150] To summarize, it is submitted that non-compliance with the host State law will not constitute a jurisdiction impediment for *the Investors.*

[144]Hamester GmbH & v Ghana, Award, 18 June 2010, para 127. Also cited in Stephan W, Schill. "Illegal Investments in Investment Treaty Arbitration" in The Law and Practice of International Courts and Tribunals, Martinus Nijhoff Volume 11 (2012) 19. See also Kriebaum (2010), 332.
[145] Kozyakova (2021), 202; Mouawad and Beess (2021), 11
[146] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006.
[147] Plama v Bulgaria, Award, 27 August 2008.
[148] Inceysa v El Salvador, Award, 2 August 2006.
[149] Fraport v Philippines, Award, 16 August 2007.
[150] Fraport v Philippines, Award, 16 August 2007, para 396.

6.2. The alleged infraction of the host State law in the light of the expropriation

This subsection discusses the possibility of reducing *the* damages according to *the Investors'* contribution to the injury. In our context, such contribution may be in the form of non-compliance with the host State law.

Article 39 of the ILC Articles on State Responsibility provides:

> In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

The Claimants, it is submitted. will claim damages inflicted by the Respondent's expropriation of *the Investments.* Should such damages be granted, the Tribunal will perhaps weigh the infraction of the host State law against the damages, provided that the gravity of the established non-compliance was insufficient to dismiss the claim as inadmissible.

Failing to assess investment-related risks on behalf of *the Investors* is one factor capable of reducing (or even eliminating) the damages. While the ECT addresses possible political risks by providing standards of treatment of foreign investments, the Treaty is not insurance against all investment-related risks.[151] Nevertheless, the investors should have assumed the risk of both business and political nature that no investment treaty would have addressed. Voluntarily and inadequate assumption of these risks can vest a portion of the

[151] As the Tribunal in MTD v Chile notes, "the BITs are not an insurance against business risk". MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile, ICSID Case No. ARB/01/7, Award, 13 November 2000, para 64. See also Ripinsky, Sergey. "Assessing Damages in Investment Disputes: Practice in Search of Perfect." Journal of World Investment & Trade. 101 (2009), 5-37, 19.

damages with *the Investors*.

The Tribunal in *MTD V Chile* decided to reduce the damages by 50% in light of the claimant's failure to undertake an adequate risk assessment. [152] The *Yukos* Tribunal reduced the compensation awarded to the Claimant by 25% for its misconduct, applying the doctrine of contributory fault. [153]

In the present case, however, it would be problematic to establish a contribution to the fault in the way understood in the doctrine. *The Investors* and the Respondent were "separated" in different political realms due to the pre-war status quo. Hence, should the Tribunal establish "fault" on both sides' behalf, *the Claimants'* fault would be hard to see as contributing to that of the Respondent. Thus, it seems plausible to weigh the misconducts of the respective sides against each other, reducing the damages awarded to *the Claimant*. This, however, cannot be done because it feels right to do. According to Article 13 of the ECT, should Investments be nationalized or expropriated in a nondiscriminatory way, for a purpose in the public interest, carried out according to due process of law, prompt, adequate, and effective compensation should be paid. Compensation also is due for losses, including requisitioning or destruction caused by war or other armed conflicts.[154] Hence, the discussion of reducing the damages is appropriate when the Tribunal finds the Respondent in breach of the ECT provisions providing for compensation.

PART III

DENIAL OF BENEFITS

[152] MTD v Chile, Award, 13 November 2000, paras 242-243.
[153] Yukos (Isle of Man) v Russia, Final Award, 18 July 2014, para 1637. See also Kozyakova (2021), 174-175.
[154] Article 12 of the ECT.

Under this final section, we will look into another (perhaps a desperate) attempt to exclude *the Investments* of *the Investors* from the coverage of the ECT by invoking Article 17 of the Treaty.

Article 17 of the ECT entitled "Non-Application of Part III in Certain Circumstances" can be relied upon by the Respondent as another tool to attack the jurisdiction of the Tribunal. While the arbitral tribunals usually examine their jurisdiction *ratione persona* and *ratione materiae* even *in absentia* of the Respondent, Article 17 of the ECT can be invoked only upon the Respondent's initiative. This article examines the relevant provision from the perspective of its invocation by the Respondent as an impediment to the Tribunal's jurisdiction.[155] Article 17 of the ECT reads as follows:

> Each Contracting Party reserves the right to deny the advantages of this Part to:
>
> (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised; or
>
> (2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:

[155] For a general discussion of Article 17 of the ECT see Hobér (2020) 325-346; Dolzer and Schreuer (2012), 55-56; Douglas (2012), 468-472; Baltag (2012), 148-164; Kozyakova (2021), 94-97; Gaillard, Emmanuel and McNeill, Mark "The Energy Charter Treaty" in Yannaca-Small, (2010), 43-46; Mistelis, Loukas A, and Crina M. Baltag. "Denial of Benefits and Article 17 of the Energy Charter Treaty." Dickinson Law Review. 113.4 (2009), 1301; Gastrell, Lindsay and Le Cannu, Laird Paul-Jean. "Procedural Requirements of "denial-of-Benefits" clauses in Investment Treaties: A Review of Arbitral Decisions." ICSID Review: Foreign Investment Law Journal. 30.1 (2015): 78-97; Chalker, James. "Making the Investment Provisions of the Energy Charter Treaty Sustainable Development Friendly." International Environmental Agreements: Politics, Law and Economics. 6.4 (2007): 435-458; Khachatryan, Davit. "What are the Procedural Requirements of the "Denial of Benefits" provision of the ECT?" Uppsala University (2018). Available at: http://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1212543&dswid=2738

(a) does not maintain a diplomatic relationship; or

(b) adopts or maintains measures that:

(i) prohibit transactions with Investors of that state; or

(ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.

From the plain wording "reserves the right" interpreted in the light of Article 31(1) of the VCLT, it is evident that the provision provides an option for a Contracting Party, not an obligation. Furthermore, the provision makes it possible to deny the advantages of "this Part" of the ECT – namely Part III Investment Promotion and Protection, which provides for substantial investment protection obligations. Article 26 of the ECT, containing ISDS, is found in Part V of the Treaty, meaning Article 17 does not affect Article 26.[156] The dissenting school of thought, however, argues that since Article 26 covers disputes arising of the alleged breach of the substantive obligations under Part III, Article 17 of the Treaty also denies the procedural remedies contained in Part V of the ECT.[157] However, the express language of the provision referring to Part III leaves no room for such an effect, which is the case with differently drafted investment treaties [158] . However, further discussion in this contribution would constitute an *obiter* since it suffices to examine

[156] Douglas (2012), 468-472; Hobér (2020) 334; Pinsolle, Philippe. "The Dispute Resolution Provisions of the Energy Charter Treaty." International Arbitration Law Review. 10.3 (2007), 74-81; Roe, Happold and Dingemans (2011), 77-87; Mistelis, Loukas A, and Crina M. Baltag. "Denial of Benefits and Article 17 of the Energy Charter Treaty." Dickinson Law Review. 113.4, (2009), 1301; Gaillard and Banifatemi (2018), 223-267; Plama v Bulgaria, Decision on Jurisdiction, 8 February 2005, paras 147, 240; Hulley Enterprises Limited (Cyprus) v Russian Federation (UNCITRAL (PCA Case No. AA 226)), Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 440; Stati v Kazakhstan, Award, 19 December 2013, para 745.

[157] Chalker (2007), 435-458; Baltag (2012), 150-153.

[158] For instance, Article 1113 of the NAFTA contained in Chapter Eleven refers to "this Chapter", which also contains the dispute resolution mechanism of the Agreement, meaning Article 1113 encompasses the ISDS too.

whether *the Claimants* are caught by the conditions set forth under Article 17 of the ECT.

According to Article 17(1) of the ECT Investments can be denied the benefits of Part III, should it be established that (i) the legal entity is controlled or owned by citizens or nationals of a third state, and (ii) the legal entity has no substantial business activity in the Contracting Party where it is organized. However, if even one of the requisites is not met, the advantages of Part III cannot be denied to the Investment concerned. Hence, for *the Investors,* it would suffice to establish that they are not nationals of a "third state" and own or control *the Investments.* The notion of a "third state" as a contradistinction to a "Contracting Party" is implicitly defined in Article 1(7)(b) of the ECT.[159] Also, Articles 10(3), 10(7), 7(10)(a)(i) clearly distinguish between a Contracting Party and a third State. The *Yukos* Tribunal having also examined the ECT *travaux préparatoires* established that:

The Treaty clearly distinguishes between a Contracting Party (and a signatory), on the one hand, and a third State, which is a non-Contracting Party, on the other. This conclusion is further supported by the *travaux préparatoires*, which demonstrate that the term "third state" was substituted for the term "non-Contracting Party.[160]

This understanding is in line with Article 2(1)(h) of the VCLT, under which a "third State" is "a State not a party to the treaty".

According to the *Plama* Tribunal, "ownership" includes indirect and beneficial ownership, whereas "control" includes an ability to exercise day-to-day control and management.[161]

Due to the express conjunction "and" between the two limbs of Article

[159] AMTO v Ukraine, Final Award, 26 March 2008, para 62. See also Hobér (2020), 336-339.
[160] Yukos (Isle of Man) v Russia, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 544. See also, Stati v Kazakhstan, Award, 19 December 2013, para 717.
[161] Plama v Bulgaria, Decision on Jurisdiction, 8 February 2005, para 170.

17(1) of the ECT, *the Claimants* will be immune from the application of Article 17, having established as much as their Armenian citizenship and ownership/control of *the Investments*, which is not a difficult task to bring about.[162] While the issue of substantial business activities in Armenia or any other Contracting Party of the ECT would be irrelevant, it is submitted as a supportive *obiter* to *the Claimants'* case, that substantive business activities under the ECT refer to the existence of (minimum) business activities *per se*. It does not necessarily mean "large" since the materiality, not the business activity's magnitude, is the decisive factor[163]. Thus, as much as an office operating with minimal staff in the state where the entity is organized will suffice. Consequently, Article 17(1) of the ECT does not apply to *the Claimants'* case.

As for the onus of proof, where Article 17(2) of the ECT expressly requires the denying Contracting Party to establish the alleged facts, Article 17(1) is silent on the matter. Nevertheless, according to the maxim *actori incumbit onus probandi,* the burden of proof rests on the party advancing the allegation. While *the Claimants* bear the onus of establishing their nationality of a Contracting Party and ownership or control of *the Investments,*[164] the Respondent, on the other side, seeking to invoke Article 17 of the ECT, shoulders the burden of proving the facts it relies upon[165]. *The Claimants* knowing better who owns or controls *the Investments* and what business

[162] Gran Colombia Gold Corp. v Republic of Colombia, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para 134. See also Hobér (2020), 341.
[163] AMTO v Ukraine, Final Award, 26 March 2008, para 69; Gran Colombia. v Colombia, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para 136, where the Tribunal opined that *"some"* substantial business activity would do; Petrobart Limited v The Kyrgyz Republic, SCC Case No. 126/2003, Arbitral Award, 29 May 2005, para 63.
[164] Final Act of the European Energy Charter Conference, Understandings, n. 3. with respect to Article 1(6); AMTO v Ukraine, Final Award, 26 March 2008, para 69. Gran Colombia v Colombia, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para 64; Plama v Bulgaria, Award, 27 August 2008, 89; CCL v Republic of Kazakhstan, SCC Case 122/2001, Jurisdictional Award, 1 January 2003, 152.
[165] Liman v Kazakhstan, Excerpts of Award, 22 June 2010, para 187; AMTO v Ukraine, Final Award, 26 March 2008, para 65; Generation Ukraine, Inc. v Ukraine, ICSID Case No. ARB/00/9, Award, 13 September 2003, para 15.7. See also Hobér (2020), 344-346.

activities they carry on in Armenia or another Contracting Party of the ECT may be asked by the Tribunal, or alternatively volunteer to disclose the information required.

The Respondent under Article 17(2) of the ECT is required to establish that *the Claimants* are nationals of a third state (only) with which the Respondent does not maintain diplomatic relationships or adopts or maintains measures that would conflict with the advantages offered by Part III of the ECT. Since *the Claimants* are nationals of Armenia, the remaining conditions are irrelevant, and Article 17(2) of the ECT does not apply.

In conclusion, *the Claimants*, citizens or nationals of Armenia and owning or controlling the Investments, are immune from the denial of benefits clause of the ECT. Should it be established that Article 17 of the ECT does not affect the Tribunal's jurisdiction over the dispute, the Respondent will be estopped from invoking the provision at a later stage of the proceedings. Hence, whether the provision belongs to the admissibility or the merits of the dispute is of no relevance for this paper.

PART IV

CONCLUSION

This article has sought to apply the advantages of International Investment Law in the context of a hypothesis that emerged by the consequences of the recent war in Artsakh/Nagorno-Karabakh. As observed, international arbitration is the only plausibly effective dispute resolution for *the Investors*. Furthermore, the ECT is the only investment treaty that offers substantive protection to foreign investors that both Armenia and Azerbaijan are Contracting Parties. The jurisdictional threshold under the ECT is arguably not insurmountable should *the Investors* try to benefit from the ISDS of the Treaty.

Jurisdiction *ratione personae* is relatively easy to establish since, under Article 1(7) of the ECT, it suffices for a natural person to be a national citizen or a permanent resident of Armenia to be qualified as an Investor. For a legal entity, the threshold is the proper organization under the law applicable in Armenia. Consequently, *the Investors* qualify as "Investors" under the ECT.

Next comes *ratione materiae* defining the notion of "Investment" under the ECT. Investments must be associated with an Economic Activity, which encompasses a broad circle of activities that *inter alia* includes construction and operation of power generation facilities and distribution grids. The HPP concerned fall under this scope.

Nevertheless, the disputes under the ECT are submitted to arbitral tribunals governed by separate sets of procedural rules, including the ICSID Convention, a self-contained system. This feature has led many Tribunals to view an autonomous definition of "Investor" in Article 25(1) of the treaty. Should a tribunal adhere to the objectivist theory, the jurisdictional threshold is set higher for virtually every putative investor, let alone *the Investors* with their delicate position. This notwithstanding, it has been argued in this paper that the definition of "Investment" under the ECT and the lack of that under the ICSID Convention should suffice to establish the jurisdiction *rantione materiae. The Investments* meet the respective definitions, thus qualifying as "Investment" under the ECT.

Somewhat tricky is establishing jurisdiction ratione loci since the Investors should at minimum agree not to disagree that the HPP are on the territory of the Republic of Azerbaijan (for the purposes of Article 1(10) of the ECT), something Armenia has never been prone to recognize.[166] However, this is the price of the stand before an

[166] A similar, but by far not the same situation had played out in the "Crimean cases", where in order to establish the territorial application of the BIT at hand, the Ukrainian investors were to argue that Crimea constituted a Russian territory. See Giupponi (2019), 165; Rees-Evans (2019), 195; Tzeng, Peter. "Sovereignty Over Crimea: A Case for State-to-State Investment Arbitration." *Yale Journal of International Law*. 41.2 (2016), 462.

International arbitral tribunal against the host State. Azerbaijan, on the other hand, will hardly argue that the region is its territory. Since Azerbaijan has not applied any territorial reservations under Article 40(1) of the ECT, establishing *ratione loci* will not pose any serious issue. As for Armenia, it may apply to be granted to file *amicus curiae* submissions to the Tribunals as Ukraine did in the Crimean cases.[167]

Since both the ECT and the ICSID Convention are in force for Armenia and Azerbaijan, and alleged expropriation took place after "the Effective Date" under the ECT, the requirements for jurisdiction *ratione temporis* can be deemed established as well.

Absent any express language in the ECT, the (implicit) requirement of compliance with the host State's law might be a difficult obstacle to overcome for *the Investors*. To this end, it bears to emphasize that according to the principle *compétence de la competence,* a tribunal needs to uphold and exercise its jurisdiction in the first place to address any allegations against its jurisdiction. Therefore, any illegality apart from one committed at the point of consenting to arbitrate falls short, affecting the Contracting Parties' consent to arbitration under the ECT according to the cornerstone principle of separability. The consent to arbitrate under the ECT, thus, remains uncompromised by possible allegations concerning the legality of *the Investments* under the Azerbaijani law.

Finally, was addressed Article 17 of the ECT designed to secure the Contracting Parties' right to deny the investors of third states to the substantive protections of the Treaty. Since the provision refers to the ECT Part III (Investment Promotion and Protection), the ISDS found in Part V remains unaffected by it. In any case, *the Investors* are not caught by the cumulative conditions under Article 17 of the ECT, rendering this tactic attacking the arbitral jurisdiction effectively perspectiveless for *the Respondent*.

[167] Tzeng (2016), 462; Rees-Evans (2019), 179.

To recapitulate: signing the ECT, the Contracting States have consented to arbitrate the disputes arising out of investments in the energy sector, thus shouldering a considerable burden of obligations as well as a certain level of due diligence in the spirit of *pacta sunt servanda.* Therefore, regardless of State policies, private actors in the energy sector should not be undermined as mere collateral damages, much less where the respective economic activities claim being covered by the ECT or/and other investment treaties.

It is not my intention to advocate for *the Investors'* case (nor is there one yet, for that matter). The arbitral jurisdiction has been viewed in this piece as something the ECT Contracting States have bindingly and irrevocably consented to, as Hobér notes, "a sovereign state must be sovereign enough to make a binding promise"[168]. As for *the Investors,* they are certainly in the position to try and attain a stand before an international Tribunal against the host State.

What comes next is a different matter well outside the scope of this paper. Although more efficient than litigation through national courts,[169] investment dispute settlement is still a bumpy road since even the most generous award is not the end of the story since only the effective enforcement of the award is the desirable culmination. Furthermore, the execution stage has time and again proved to be a real headache for the winning party. At any rate, international arbitration is worth trying, unless a legal vacuum is what *the Investors* do not mind. A daring "test case", would set an example for the affected actors in the region and answer many questions that can only be speculated upon at this stage.

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[168] Hobér (2013), 500.
[169] Dolzer and Schreuer (2012), 236.

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LEGAL IMPLICATIONS OF JOINDER OF NON-CONSENT THIRD PARTY TO INTERNATIONAL COMMERCIAL ARBITRATION: RECENT CHALLENGES AND DEVELOPMENTS 2022

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ABSTRACT

Arbitration was a long time ago considered a creature of contract. However, as international transactions become more complex, certain procedural problems are becoming more common. One of the most disturbing issues in such an area of law concerns the joinder of third parties to an existing arbitration.

The joinder of the non-consenting third party to the arbitral proceedings may have legal implications since party autonomy is a fundamental principle of international arbitration. These disadvantages include limitations of the third party's right to equal participation, the concern of the confidentiality of the arbitral proceedings, and possible adverse recourse against the final award initiated by the third party forced to joinder. However, the joinder of the third party is also crucial to ensure procedural efficiency and prevent parallel arbitral proceedings with conflicting awards.

INTRODUCTION

The statistical data provided by the arbitration institutions reveals a substantial increase in multi-party arbitral proceedings in the last years.[1] This is explained by the trend of international commerce and trade becoming more complex.[2] One of the forms of a third parties' involvement in the arbitral proceedings is the joinder of a third party. The general approach to the joinder of a third party to the arbitral proceeding is that it can be executed only with the unanimous consent of the parties to it. This approach relies on the consensual nature of international arbitration.[3] However, a third party may be forced to join arbitral proceedings despite its objection. While the extension of the arbitration on non-signatories relies on the legal theories,[4] the procedural matters of the joinder are regulated by the institutional rules. National courts provide the judicial review on the joinder within the annulment and recognition proceedings.[5]

On the one hand, the main idea behind the joinder of either consenting or non-consenting third parties to arbitral proceedings is to increase the procedural efficiency and ensure the consistency of arbitration.[6] On the other hand, the joinder of a third party despite its objection may lead to legal implications due to the absence of

[1] Smitha Menon & Charles Tian, Joinder and Consolidation Provisions under 2021 ICC Arbitration Rules:Enhancing Efficiency and Flexibility for Resolving Complex Disputes Kluwer Arbitration Blog (2021), http://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-provisions-under-2021-icc- arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/

[2] Gary Born, Parties to International Arbitration Agreements, in International Commercial Arbitration 1517 (GaryBorn 3 ed. 2021).

[3] Gary Born, Consolidation, Joinder and Intervention, in International Commercial Arbitration 2764 (Gary Born3 ed. 2021).

[4] Gary Born, International Arbitration: Cases and Materials 551 (2 ed. 2015).

[5] Gary Born, Consolidation, Joinder and Intervention, in International Commercial Arbitration 2793 (Gary Born3 ed. 2021).

[6] Ibid. 2777-2778.

consent to arbitrate, due process and public policy concerns.[7] Moreover, the lack of a coherent approach in the application of joinder enhances complications related to the joinder of non-consenting third parties. Due process concerns related to the joinder of third parties envisage the issues on the equal participation right of the parties.

Such limitations imposed by Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provide ground for the refusal to recognize and enforce an arbitral under public policy concerns.[8]

The UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards states that in the application of Article V(2)(b) of the New York Convention the courts should take into account both the substantive outcome of the awards, as well as the procedure leading to the award.[9]

Thus, in the last years, the international institutions amended rules to increase the certainty of the provisions on the joinder of a third party to address complications related to this procedural mechanism and ensure procedural efficiency.

The article aims to analyse the legal basis for joinder of a non-consenting third party and how institutional rules address the consent and the equal participation of a third party in the arbitral proceedings, as well as the possible adverse effect of such decision on the joinder of the non-consenting third party on the enforcement and recognition of the award. The article is based on the hypothesis that the joinder

[7] S.I. Strong, Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?, 31 Vanderbilt Journal of Transnational Law 922 (1998).
[8] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art. V, New York,Jun. 10, 1958.
[9] UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 247 (2016).

of a non-consenting third party may be necessary to ensure procedural efficiency and prevent parallel proceedings with inconsistent and conflicting awards. However, the institutional rules should have explicit provisions ensuring the equal participation right of the non-consenting third party to prevent the risk of annulment of the award during judicial review by national courts.

The article should answer the following questions. The main question is whether the non-consenting third party can be joined to the arbitral proceedings, and the finality of the award rendered in such arbitral proceedings can be ensured. Additionally, how institutional rules regulate the consent and equal participation rights in relation to the joinder of a third party. While analysing the institutional rules, the article will cover the recent amendments made to provisions on the joinder. Finally, what are the grounds for the annulment of an arbitration award rendered in arbitral proceedings with a joinder of a non-consenting third party.

The article comprises an introduction, two chapters, and a conclusion. The first chapter evaluates the institutional rules and arbitration law on the joinder of a third party, including the joinder despite the third party's objection. The second chapter addresses legal implications related to the joinder of a non-consenting third party. The article conclusion provides findings on the possible approach that may ensure the joinder of a non-consenting third party and prevent an adverse recourse against arbitral award at the stage of its recognition and enforcement

CHAPTER 1

EVALUATION OF INSTITUTIONAL RULES AND NATIONAL ARBITRATION LAWS ON THE JOINDER OF A THIRD PARTY

1.1 REGULATION OF THE JOINDER UNDER INSTITUTIONAL

RULES

If there is no regulation in institutional rules addressing the procedural issues regarding the joinder of a third party, the joinder is possible if all involved parties provide consent to the joinder. However, in such scenario, the arbitral tribunals avoid ordering a joinder even if all the parties agree to it unless the arbitration agreement contained a provision on the appropriate mechanism for the joinder of the possible third parties.[10]

The presence of a provision on the joinder of third parties in the institutional rules ensures legal certainty and predictability on this matter. While choosing the specific institutional rules, the parties already can analyse how particular rules regulate the joinder and what criteria should be met to allow such procedural order. Thus, this can give an advantage and better clarity to the parties at the moment of signing the arbitration agreement.[11]

Consequently, the increase in the number of complex issues submitted to arbitral tribunals and the need to ensure legal certainty required arbitral institutions to adjust their institutional rules to the new realities. Until these changes in rules of many major arbitration institutions, only Article 22.1(h) of the London Court of International Arbitration (LCIA) Rules (1998) and Article 4.2 Swiss Rules of International Arbitration (2012) contained a specific provision on the joinder of third parties.[12] The situation has overwhelmingly changed with the[13] inclusion of joinder provisions in revised editions of the rules of many arbitration institutions.[14] The adopted changes in the institutional rules address two issues related to the joinder of a third

[10] Manuel Gómez Carrión, Joinder of third parties: new institutional developments, 31 Arbitration International 484, 2015.
[11] Ibid. 484.
[12] Ibid. 480-481.
[13] See: https://lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article22
[14] Ibid. 483.

party: consent to joinder and equal participation rights.[15]

1.1.1. CONSENT AS A REQUIREMENT FOR THE JOINDER OF A THIRD PARTY UNDER INSTITUTIONAL RULES

One of the core issues related to the third party's joinder is the requirement of consent due to the consensual nature of arbitration. Thus, the arbitration is based on the understanding that the tribunal's jurisdiction derives from the parties' agreement. Therefore, according to this approach, the joinder is possible if all parties, including the third party, provide consent to it.[16]

The institutional rules can be clustered in three groups based on the requirement for the provision of consent to the joinder: 1) agreement of all parties involved; 2) agreement of the requesting party and the third party to be joined despite the objection of the non-requesting initial party; 3) allowing the joinder based on the circumstances of the case despite the objection of the third party and non-requesting initial party.[17]

1.1.1.1. INSTITUTIONAL RULES ALLOWING JOINDER OF THIRD PARTY BASED ON THE CONSENT OF ALL INVOLVED PARTIES

An explicit example of the institutional rule falling under the first group mentioned above is the Netherlands Arbitration Institute (NAI) Rules. The NAI Rules 2015 differentiate three forms of third party's participation. Pursuant to Article 37, joinder and intervention can be

[15] Dongdoo Choi, Joinder in international commercial arbitration, 35 Arbitration International 29 (2019).
[16] Manuel Gómez Carrión, Joinder of third parties: new institutional developments, 31 Arbitration International 2015.
[17] Ibid. 484.

invoked based on a third party request.[18] NAI Rules 2015 determine the form of the participation based on the request of one of the original parties as impleading. The requirement of the third party's consent for joining the proceeding as impleader is clearly set out in Article 37(4). It requires the party initiating a request to send the notice to the arbitral tribunal, the administrator, and the other original party only after receiving the third party's consent. Another proof of the requirement of a third party's consent is explicitly reflected in Article 37(1). The request to implead a third party can be proceeded under two circumstances:

1) impleaded party is one of the original parties to the arbitration agreement, 2) the arbitration agreement initiating the proceeding enters into force between requesting party and third party. Moreover, Article 37(2) requires the arbitral tribunal to allow original parties and third party to "make their opinions on the request".

The International Arbitration Rules adopted by the Korean Commercial Arbitration Board (KCAB, 2016) also require the consent of all parties to the joinder. Following Article 21(1), a joinder is only allowed based on the application of one of the original parties with a claim raised against a third party to be joined.[19] The application on the joinder should meet one of the two requirements: the unanimous agreement of all parties, including party to be joined, submitted in writing under Article 21(1)(a): or the consent of the third party to the joinder if that party is also the party to the underlying arbitration agreement under Article 21(1)(b).

Hence, the arbitral tribunal's discretion to allow the joinder is contingent upon written consent of the third party no matter this additional party is a signatory or non-signatory to the arbitration agreement. Although in a relatively different interpretation, the requirement of consent of all parties, including the third party to be

[18] Netherlands Arbitration Institution Rules, art. 37 (2015).

[19] Korean Commercial Arbitration Board International Arbitration Rules, art. 21 (2016).

joined is observed under the Arbitration Rules of International Centre for Dispute Resolution (ICDR) amended in 2021. Following Article 8(1), the third party can be joined to arbitral proceedings upon the submission of a Notice of Arbitration by one of the original parties. The date on which the Administrator receives the Notice is considered as the date of commencement of arbitration against the additional party.

The article does not explicitly address the issue of the consent of the third party. However, it is required from the requesting party to send the Notice of Arbitration to the Administrator, other original parties, and the third party. Article 8(2) clarifies the requirements for the Notice of Arbitration by referral to Article 2(3), where one of the listed requirements is the submission of "a copy of the entire arbitration clause or agreement being invoked, and, where claims are made under more than one arbitration agreement, a copy of the arbitration agreement under which each claim is made".[20] Some scholars interpret this as the presence of an implied rule that the third party should be a party to the underlying arbitration agreement.[21]

However, a different interpretation of the ICDR Arbitration Rules is provided by other scholars. This approach focuses on the absence of the explicit requirement of consent for the joinder before the appointment of an arbitrator. As such, it is considered that the Administrator can take a prima facie decision to accept Notice of Arbitration, which will bind the third party to the arbitral proceedings. Only in case of deficiency of prima facie evidence, this decision will be left to the discretion of the arbitral tribunal.[22]

Regardless of the interpretation of the issue of consent for the joinder of third party, Article 8(1) also refers to Articles 13 (appointment of

[20] ICDR International Arbitration Rules, art. 2 (2021).
[21] Dongdoo Choi, Joinder in International Commercial Arbitration, 35 Arbitration International 42-43 (2019).
[22] Martin F. Gusy & James M. Hosking, A Guide to the ICDR International Arbitration Rules 85 (2 ed. 2019).

arbitrators) and 21 (arbitral jurisdiction) to guarantee equal right participation of the joining party.

Amended ICDR Arbitration Rules have a more certain approach regarding the joinder of a third party after the appointment of arbitrators. The Rules allow a joinder at this stage under two circumstances: all parties, including third party agreed to joinder, or the constituted arbitral tribunal determines the joinder to be appropriate accompanied with the consent of the third party to joinder.

1.1.1.2. INSTITUTIONAL RULES ALLOWING JOINDER OF A THIRD PARTY BASED ON THE CONSENT OF THE REQUESTING PARTY AND THIRD PARTY

As mentioned above, another approach applied by international institutions is to allow joinder relying on the consent of the requesting party and the third party to be joined despite the objection of the non-requesting initial party. The Arbitration Rules of the LCIA adopt such approach.

The possibility of joinder has already been provided under the LCIA 1998 Rules[23] and the later revisions maintain provision relatively unchanged (the tribunal's power to allow the application of the joinder based on its own initiative was removed).[24] The LCIA 2020 Rules enable joinder only after the constitution of the arbitral tribunal and provision on joinder is provided under Article 22 on additional powers of the arbitral tribunal.[25] Following Article 22.1(x), the arbitral tribunal

[23] Maxi Scherer, Lisa Richman & Remy Gerbay, Arbitrating under the 2014 LCIA Rules: A User's Guide Par. 250 (2015).
Maxi Scherer, Special Powers of the Tribunal, in Arbitrating under the 2020 LCIA Rules: A User's Guide Par. 54 (Maxi Scherer, Lisa Richman & Remy Gerbay 2015).
[24] Manuel Gómez Carrión, Joinder of third parties: New Institutional Developments, 31 Arbitration International 486 (2015).
[25] The provision is under Article 22.1(x) under the LCIA 2020 Rules, while it was under Article

holds discretion to decide on the joinder of one or more third persons based on the application of any original party of the proceedings. As such, LCIA Rules do not require the third party or parties to be a signatory to the underlying arbitration agreement and do not require establishing a prima facie test proving that the arbitration agreement binds the third party or parties. Thus, the Rules provide a broad scope for the joinder of third parties.[26] The article conditions such decision on the third party's and requesting party's consent expressed in writing "following the Commencement Date or (if earlier) in the Arbitration Agreement". The provision does not require the party initiating a request of joinder to raise a claim against the third party to be joined.[27]

As such, the LCIA Rules depart from the standard practice[28] and do not require the non-requesting party's consent to the joinder. Moreover, the LCIA Rules use the terminology "one or more third persons" not "parties" under Article 22.1(x).[29] Such provision allows the arbitral tribunal to join the third persons that may not be parties to the arbitration agreement, and thus do not require the privity of the third party to the underlying arbitration agreement.[30] This can lead to a scenario, where a non-requesting party has to arbitrate a dispute with a third person in spite of objecting to the joinder. It is considered that the non-requesting party generally consented to the joinder

22.1(viii) in previous revisions. The provision remained similar to the provision in the LCIA 2014 Rules. Bernard Hanotiau, Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study 329- 330 (2 ed. 2020).

[26] The provision is under Article 22.1(x) under the LCIA 2020 Rules, while it was under Article 22.1(viii) in previous revisions. The provision remained similar to the provision in the LCIA 2014 Rules.

[27] Bernard Hanotiau, Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study 329- 330 (2 ed. 2020).

[28] Maxi Scherer, Multiple Parties, Consolidation and Joinder, in Arbitrating under the 2020 LCIA Rules: A User's Guide Par. 54 (Maxi Scherer, Lisa Richman & Remy Gerbay 2021).

[29] Dongdoo Choi, Joinder in international commercial arbitration, 35 Arbitration International 44 (2019). Peter J. Turner & Reza Mohtashami, A Guide to the LCIA Arbitration Rules 149 (2009).

[30] Manuel Gómez Carrión, Joinder of third parties: new institutional developments, 31 Arbitration International 487 (2015). Dongdoo Choi, Joinder in international commercial arbitration, 35 Arbitration International 45 (2019). Peter J. Turner & Reza Mohtashami, A Guide to the LCIA Arbitration Rules 149 (2009).

provision by agreeing to arbitrate under the LCIA Rules.[31]

In the context of the aforementioned, some scholars provide a more restrictive interpretation of the provision stating that Article 22.1(x) LCIA Arbitration Rules allows a claim between the third party and the requesting party only. This provision, intrinsically, cannot encompass arbitration of a claim between the non-requesting party and the third party by relying on the agreement of the non-requesting party to arbitrate under the LCIA Rules. However, this approach is not supported in the drafting of the provision.[32] Nevertheless, the practice reveals the arbitral tribunals being reluctant to order joinder notwithstanding the absence of an arbitration agreement binding third party or objection of any party involved.[33]

1.1.1.3. INSTITUTIONAL RULES ALLOWING JOINDER DESPITE THE OBJECTION OF THE THIRD PARTY AND NON-REQUESTING INITIAL PARTY

The provisions of some institutional rules apply a mixed approach for ordering joinder of a third party to arbitral proceedings. First, the provisions on joinder of international arbitration institutions belonging to this group allow joinder based on the consent of all parties following the traditional approach. In addition to that, in case of contest of the joinder, some institutional rules allow the joinder of a third party by establishing a prima facie test binding the third party to the arbitration agreement. Some provisions falling under this category can be substantially restrictive, while other provisions could be flexible and permissive.[34]

[31] Dongdoo Choi, Joinder in international commercial arbitration, 35 Arbitration International 45 (2019).
[32] Peter J. Turner & Reza Mohtashami, A Guide to the LCIA Arbitration Rules 149 (2009).
[33] Ibid. 149.
[34] Manuel Gómez Carrión, Joinder of third parties: new institutional developments, 31 Arbitration International 487 (2015). Bernard Hanotiau, Complex Arbitrations: Multi-party, Multi-

The Singapore International Arbitration Centre (SIAC) Rules 2016 significantly expanded the joinder provision in comparison with the previous edition by providing wider flexibility.[35] According to Rule 7.1 request on joinder can be filed by one of the original parties or the third party before or after the constitution of the arbitral tribunal.[36]

Either one of the original parties or a non-party can submit an application for a joinder. Rules 7.1 to 7.7 regulate application for a joinder submitted to SIAC Court before the constitution of the tribunal, while Rules 7.8 to 7.11 set out the procedure of requesting a joinder after the constitution of the tribunal[37]. According to Rule 7.2(c), the additional party should be joined either as Respondent or Claimant. As such, the third party may not be joined for a mere access to the arbitration case file reserving its right to raise a claim at a later stage of the proceedings.[38]

With regards to the consent for the joinder the SIAC Rules 2016 require satisfaction of two alternative criteria set out under Rule 7.1 and Rules 7.8, regulating procedural matters for joinder before the constitution of the tribunal and after the constitution of the tribunal respectively: 1) third party to be prima facie bound by the arbitration agreement; or 2) consent of all parties, including the party to be joined.[39] Moreover, following Rule 7.4, the rejection of the joinder application by the SIAC Court does not deprive the original parties and the third party of the right to submit application on the joinder for the arbitral tribunal's review after its constitution.[40] Consequently, if

contract, Multi-issue – A comparative Study 330 (2 ed. 2020). Manuel Gómez Carrión, Joinder of third parties: new institutional developments, 31 Arbitration International 490 (2015).

[35] Gordon Smith, Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules, 35 Journal of International Arbitration 182 (2018)

[36] Bernard Hanotiau, Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study 329- 330 (2 ed. 2020).

[37] John Choong, Mark Mangan & Nicholas Lingard, A Guide to the SIAC Arbitration Rules 114 (2 ed. 2018).

[38] Ibid. 115.

[39] Gordon Smith, Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules, 35 Journal of International Arbitration 184 (2018).

[40] John Choong, Mark Mangan & Nicholas Lingard, A Guide to the SIAC Arbitration Rules 117,

an application was initially made to the SIAC Court and was rejected, the joinder application can be also submitted to the tribunal's consideration.

The prima facie test for the joinder of a third party may be applied if there is no unanimous consent of all parties to the joinder. For the prima facie test the institution does not need to determine the existence and scope of the arbitration agreement but only to establish the existence of a valid arbitration clause covering the issue at dispute and the third party. According to the public consultations on the earlier draft of the SIAC 2016 Rules, two issues should be taken into account for allowing the joinder to the arbitration proceedings: whether joinder will contribute to the expeditious, fair, and economical dispute resolution and claim in relation to the third party is related to the same transaction(s).[41]

The requirement of consent in SIAC Rules has been reviewed by the Singapore Court of Appeal in PT First Media. It was stated that the establishment of consent based on the arbitration agreement or by agreement to arbitrate under a set of institutional rules allowing forced joinder is sufficient to prevent any following allegations on the absence of the agreement to arbitrate with the joined party.[42]

However, the SIAC Rules 2016 also contain a provision safeguarding the award from being challenged on the ground of breaching equal participation rights, especially in cases with a joinder executed after the constitution of the tribunal. Pursuant to Rule 7.10, all parties, including the third party, hold a right to be heard and express their position regarding equal participation. If the third party to be joined to arbitration proceedings does not waive its right to nominate an

120 (2 ed. 2018).
[41] Ibid. 116 ,118. See: https://www.nortonrosefulbright.com/en/knowledge/publications/f0b94286/singapore-court-of-appeal#:~:text=The%20court%20found%20in%20favour,option%3A%20not%20curtail%20their%20options. (last visit Feb 2022)
[42] Ibid. 116.

arbitrator and objects to the joinder, the tribunal should not have the power to order forced joinder, so that the final award is not endangered with a possible recourse.[43]

In the Rules amended in 2021, the Australian Centre for International Commercial Arbitration (ACICA) has expanded the joinder provisions.[44] According to Articles 17.1 and 17.8, one of the original parties or a third party may request the joinder. Article 17.1 enables the arbitral tribunal to decide on the joinder application, while Article 17.8 regulates the procedural matters on the joinder if the request is made before the constitution of the tribunal. Both arbitral tribunal and ACICA shall decide on the application of joinder after giving all parties the opportunity to be heard by satisfying the prima facie test binding third party to the arbitration agreement. As such, the ACICA Rules 2021 also depart from the party autonomy in arbitration by enabling institution or tribunal to bind third party to the arbitration agreement. Moreover, with reference to Article 32.1 on the power of the arbitral tribunal to rule on objections on the absence of its jurisdiction, Article 17.9 sets out the competence of the arbitral tribunal to review the institution's decision on rejection of the joinder application and enables the third party to apply for a joinder after the constitution of the tribunal. This provision resonates with the rules 7.4 set out in the SIAC Rules 2016.

The Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018 resonate in regulation of the joinder of a third party with the SIAC Rules 2016 and also represents a departure from the party autonomy. Pursuant to Article 27.1, HKIAC in cases in which the arbitral tribunal has not been constituted yet or the arbitral tribunal holds the power to allow joinder based on two alternative grounds: 1) third party being prima facie bound by the

[43] Dongdoo Choi, Joinder in international commercial arbitration, 35 Arbitration International 49-50 (2019).
[44] Kevin O'Gorman, Tamlyn Mills & Daniel Allman, Revised ICDR and ACICA Rules (2021), https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/international-arbitration-report- issue-16.pdf?la=en-mh&revision= (last visited Jun 15, 2021).

arbitration agreement; 2) express consent of all parties, including the third party, to the joinder. However, the decision on joinder made before the constitution of the tribunal does not prejudice the power of the arbitral tribunal to make the final decision on its jurisdiction in relation to joinder.[45] Article 27.6(h) requires the introduction of a claim either by a third party seeking a joinder or by an original party against a third party sought to be joined. In order to increase the efficiency of the arbitral proceedings, the latest revision of the Rules amended the time limit for requesting a joinder. While in previous revision the time limit could have been fixed by HKIAC,[46] in the HKIAC Rules 2018 the request for joinder shall not be submitted, aside from exceptional circumstances, later than the time limit set in the Statement of Defence.[47] Whether request on a joinder raised by one of the original parties or a third party, the answer to the request for joinder shall be communicated by the respective party within 15 days after receiving it (Articles 27.5 and 27.7).

As such, in case of the contest on the issue of the joinder, the HKIAC Rules give the power to the institution and the arbitral tribunal to decide on the joinder notwithstanding the objecting of one of the parties based on the satisfaction of prima facie test.

The China International Economic and Trade Arbitration Commission (CIETAC) Rules 2015 stand out from the other institutional rules with the exceptionally large power provided to the institution in deciding the joinder requests.[48]

According to Article 18.1, only one of the original parties of arbitral proceedings may submit a request for a joinder of a third party. The request shall be based on the arbitration agreement that prima facie bound the third party. Even if the arbitral tribunal has already been

[45] Hong Kong International Arbitration Centre Administered Arbitration Rules, art. 27.2 (2018).
[46] Hong Kong International Arbitration Centre Administered Arbitration Rules, art. 27.2 (2013).
[47] Hong Kong International Arbitration Centre Administered Arbitration Rules, art. 27.3 (2018).
[48] Dongdoo Choi, Joinder in international commercial arbitration, 35 Arbitration International 46 (2019).

constituted, the institution holds the power to decide whether a third party is prima facie bound by the arbitration agreement. Despite the obligation of the institution to ensure the right of all parties to be heard in relation to joinder, there is no explicit mention of the requirement of consent of the parties. Another requirement for the request of the joinder is the existence of a claim raised against the party sought to be the joinder.[49]

In comparison with the other institutional rules, the CIETAC Rules 2015 explicitly set out the power of the institution to decide on the joinder based on the agreement and relevant evidence despite the objection of any party "to the arbitration agreement and jurisdiction over the arbitration with respect to the joinder proceedings".[50] The Rules simultaneously give the institution the power to reject joinder based on two alternative grounds: the third party is prima facie not bound by the arbitration agreement, or any other circumstances make joinder inappropriate.[51]

The Stockholm Chamber of Commerce (SCC) introduced a provision on joinder in Arbitration Rules in 2017.[52] According to Article 13(1), an original party to the arbitration agreement may request the SCC Board to order a joinder of one or more third parties. The SCC Rules 2017 set out a time limit for the submission of a request and the request shall not be considered if it is made after submission for an answer. However, the SCC Board still holds the discretion to decide to proceed with a request made after the set time limit. Article 13(5) enables the SCC Board to decide to join a third party if it does not manifestly lack jurisdiction over all parties, including third parties. Article 13(6) on a joinder with claims made under more than one

[49] China International Economic and Trade Arbitration Commission Arbitration Rules, art. 18.2 (2015).
[50] China International Economic and Trade Arbitration Commission Arbitration Rules, art. 18.3 (2015).
[51] China International Economic and Trade Arbitration Commission Arbitration Rules, art. 18.7 (2015).
[52] Bernard Hanotiau, Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study 331(2 ed. 2020).

arbitration agreement obliges the SCC Board to consult with the parties for deciding on the joinder of a third party, and to regard such factors, as the arbitration agreements are compatible, the sought relief is related to same transactions, the procedural efficiency, and other relevant circumstances.

The analysis of the provision reveals the absence of a strict requirement in the rules for the consent of the parties. Hence, the SCC 2017 Rules provision on the joinder is an example of a departure from the principle of party autonomy. There is no clear requirement to consider the consent of the non-requesting original party or the third party to be joined.[53]

In light of the recent increase in the number of multi-party arbitral proceedings, the newly adopted the ICC Rules 2021 provide wider flexibility with the possibility of joining a third party after the constitution of the arbitral tribunal.[54] Following Article 7.1, the ICC Rules allow joinder of a third party based only on the request of one of the original parties to the arbitral proceedings. A joinder application submitted before the constitution of the tribunal shall be decided by the arbitral tribunal. However, the Secretary General may refer the matter to the ICC Court.[55]

For the joinder request submitted at this stage of the arbitral proceedings, the ICC Rules under Article 6.4(i) require the satisfaction of the prima facie test, which proves the third party to be bound by the underlying arbitration agreement. This provision existing in the previous version of ICC Rules adopted in 2017 allows

[53] Gordon Smith, Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules, 35 Journal of International Arbitration 181 (2018).
[54] Smitha Menon & Charles Tian,, Joinder and Consolidation Provisions under 2021 ICC Arbitration Rules: Enhancing Efficiency and Flexibility for Resolving Complex Disputes Kluwer Arbitration Blog (2021), http://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-provisions-under-2021-icc- arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/ (last visited Jun 1, 2021).
[55] International Chamber of Commerce Arbitration Rules, Article 6.3 (2021).

the forced joinder of the third party to the arbitral proceedings.[56] Moreover, there are also no clear provisions on the requirement of consultations with and/or receiving consent from the non-requesting original party in relation to the joinder.[57]

Under ICC Rules 2017, the joinder of a third party after confirmation or appointment of any arbitrator was only possible upon the unanimous agreement of all parties, including the third party. However, the ICC Rules 2021 under Article 7.5 introduced an additional alternative criterion for the joinder of a third party after confirmation or appointment of any arbitrator – only based on the agreement of the third party to accept the authority of the constituted arbitral tribunal and concluded Terms of Reference. This requirement of the consent of a third party is important to ensure that the final award is not under risk of annulment or challenging in relation to the constitution of the arbitral tribunal.[58] The aforementioned article (7.5) also indicated the circumstances which should be taken into consideration by the arbitral tribunal while deciding on the joinder. These circumstances include the third-party being prima facie bound by the underlying arbitration agreement, the time when the joinder request was made, possible conflict of interests, as well as the impact of the joinder on the arbitral procedure.[59]

Such amendment of the provision provides wider power to the arbitral tribunal on the joinder of the third party. The rationale of this amendment is the rarity of the practice, where parties provided unanimous consent for the joinder after confirmation or appointment of any arbitrator.[60] However, this may raise a question of whether

[56] Dongdoo Choi, Joinder in international commercial arbitration, 35 Arbitration International 51-52 (2019).
[57] Gordon Smith, Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules, 35 Journal of International Arbitration 178 (2018).
[58] Raluca Maria Petrescu & Alexandru Stan, The 2021 ICC Arbitration Rules – New Commitments to Achieving Better Arbitration, 15 Romanian Arbitration Journal 21 (2021).
[59] International Chamber of Commerce Arbitration Rules, art. 7 (2021).
[60] Michael Bühler et al., The Launch of the 2021 ICC Rules of Arbitration (2021), https://www.orrick.com/en/Insights/2020/12/The-Launch-of-the-2021-ICC-Rules-of-Arbitration

such broad power of arbitral tribunal is a great departure from the party autonomy. Some scholars view this approach as not being in breach of party autonomy, since the original parties of the arbitration agreement provided consent to arbitrate under the Rules including the provision on the joinder, and this party's consent remains as a perquisite for the joinder at the aforementioned stage.[61]

The Rules adopted by the Swiss Arbitration Centre is also one of the institutional rules giving a high degree of power to the institution and the arbitral tribunal on the issue of the joinder.[62] The Swiss Rules as revised in 2021 have introduced significant changes in the procedure of the joinder. First, as in the previous revision of 2021, either one of the original parties may bring a claim against a third party (joinder) or the third party may request participation in the arbitral proceedings with a raised claim (intervention).[63] In contrast with previous revision, Swiss Rules 2021 expressly differentiates two possible stages of introducing a request of a joinder: prior to the constitution of the arbitral tribunal and after the constitution of the arbitral tribunal. According to Article 6.2, a notice of claim shall be submitted to Secretariat if the request is made prior to the constitution of the tribunal. Following the notification sent by the Secretariat to all parties and any confirmed arbitrators, the addressee of the claim, other parties should raise their objection in 15 days. In case the objection is raised by any party, including the party requested to be joined, the Secretariat following Article 5 applies a prima facie test to determine if the third party is bound by the underlying arbitration agreement.[64]

(last visited Feb 10, 2022).

[61] Raluca Maria Petrescu & Alexandru Stan, The 2021 ICC Arbitration Rules – New Commitments to Achieving Better Arbitration, 15 Romanian Arbitration Journal 21 (2021).

[62] Gary Born, Consolidation, Joinder and Intervention, in International Commercial Arbitration 2799 (Gary Born 3 ed. 2021).

[63] Swiss Rules of International Arbitration, art. 6.3 (2021).

[64] Xavier Favre-Bulle et al., International Arbitration in Switzerland: Revised Swiss Rules Of International Arbitration (2021), https://www.mondaq.com/trials-appeals-compensation/1076746/international-arbitration-in-switzerland-revised-swiss-rules-of-

If the joinder request is submitted after the constitution of the arbitral tribunal, the arbitral tribunal holds the discretion to decide on the issue of the joinder under Article 6.3. Such decision shall be made after consulting with all the parties, including the third party, as well as taking into account all relevant circumstances. This provision requiring the tribunal to consult with parties and consider circumstances resonates with the wording provision in the previous edition of the Rules.[65] This provision on the power of the arbitral tribunal on deciding the joinder in the previous edition of the Rules was interpreted differently by scholars. Some scholars consider such provision without express mention of the consent of the parties as giving to the tribunal a wide discretion on ordering joinder notwithstanding the objection of original parties or third party to be joined. Other group of scholars argues that the third party's consent is necessary, and Rules do not allow for an implied consent of a third party if the claim against the third party is raised by one of the original parties. The third group of scholars interprets Swiss Rules in a restrictive manner arguing that the arbitral tribunal can order joinder only based on the consent of all parties. This interpretation relies on the argument that if the Rules intended to bypass consent it would have been expressly stated in the provision.[66]

Nevertheless, the restrictive interpretation does not correspond with the provision. The most resonating interpretation is the provision being a declaratory norm reflecting the competence of the arbitral tribunal.[67] The provision does not expressly allow the arbitral tribunal to disregard the objection of the parties in all cases. It allows the arbitral tribunal to order joinder notwithstanding objection in the view of third party being prima facie bound by arbitration agreement,[68]

international-arbitration (last visited Jun 9, 2021).

[65] Swiss Rules of International Arbitration, art. 4.2 (2021).

[66] Manuel Gómez Carrión, Joinder of third parties: new institutional developments, 31 Arbitration International 497-498 (2015).

[67] Natalie Voser, Multi-party Disputes and Joinder of Third Parties, 50 Years of the New York Convention: ICCA International Arbitration Conference 396 (2019).

[68] Manuel Gómez Carrión, Joinder of third parties: new institutional developments, 31

considering all circumstances, as well as balance of interest being in favor of the requesting party not the refusing party.[69]

1.1.1.4. EQUAL PARTICIPATION OF THIRD PARTY IN THE PROCESS OF NOMINATING ARBITRATORS UNDER INSTITUTIONAL RULES

A right to select arbitrators is one of the features of international arbitration that is rooted in the principle of party autonomy and distinguishes it from litigation.[70] This possibility to resolve possible disputes with selected arbitrators instead of pre-established court, as supported by the empirical findings, is one of the features that make arbitration a favourable dispute resolution method for the parties.[71] Nevertheless, the right to nominate an arbitrator is not an absolute right. This right is correlative to the right of the other party to nominate an arbitrator. As such, it is described as the equal opportunity of the parties to participate in the formation of the arbitral tribunal. Consequently, the possible breach of the equal opportunity of parties to nominate arbitrators may qualify to unequal treatment of the party, which may subsequently raise public policy concerns. The party whose rights to equal participation in the appointment of the arbitrators are breached may challenge the final award on the ground of legality and validity of the formation of the tribunal.[72] The joinder of a third party to arbitral proceedings may be accompanied with the problems related to ensuring an equal participation of the parties in the designation of an arbitral tribunal.[73] This may be particularly

Arbitration International 497-498 (2015).

[69] Natalie Voser, Multi-party Disputes and Joinder of Third Parties, 50 Years of the New York Convention:ICCA International Arbitration Conference 396 (2019).

[70] Orkun Akseli, Appointment of Arbitrators as Specified in the Agreement to Arbitrate, 20 Journal ofInternational Arbitration 247-248 (2003).

[71] Gary B. Born, International Arbitration: Cases and Materials 1764-1766 (2 ed. 2015).

[72] Dongdoo Choi, Joinder in international commercial arbitration, 35 Arbitration International 37-38 (2019).

[73] Ricardo Ugarte & Thomas Bevilacqua, Ensuring Party Equality in the Process of Designating

pertinent where the third party is not willing to participate in arbitral proceedings or there are conflicting interests leading to difficulties in the appointment of an arbitrator.[74]

This eventually may endanger the final award due to the possible challenges on the aforementioned grounds. Thus, ensuring the orderly and fair designation of the arbitral tribunal is essential for efficient case management and the finality of the award.[75]

Scholars provide several possible solutions to ensure equal participation right for the parties in the arbitral proceedings involving a joined third party. The first solution is related to the joinder occurring before any arbitrator has been appointed. In such scenario, each side makes a joint nomination. Second, if the parties do not agree to make a joint nomination, the institution appoints arbitrators, and all parties become deprived of their right to nominate an arbitrator. Third, if the joinder occurs after the appointment of any arbitrator, the third party can be joined to the arbitral proceedings by agreeing to waive its right to nominate an arbitrator. Another possible scenario with joinder occurring after the appointment of any arbitrators is the revocation of the appointment and the reconstitution of the tribunal. Numerous institutional rules contain provisions that represent the combination of these approaches to ensure an orderly and fair appointment of arbitrators in the case of joinder.[76]

Some institutional rules enable only arbitral tribunal to decide on the request of joinder. This consequently means that the third party requested to be joined may become a party to the arbitration only after the constitution of the tribunal. The NAI Rules 2015, the KCAB

Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions, 27 Journal of International Arbitration 9-10 (2010).

[74] Orkun Akseli, Appointment of Arbitrators as Specified in the Agreement to Arbitrate, 20 Journal ofInternational Arbitration 252 (2003).

[75] Ricardo Ugarte & Thomas Bevilacqua, Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions, 27 Journal of International Arbitration 9-10 (2010).

[76] Ibid. 39.

Rules 2016, the LCIA Rules 2020 fall into this group.

The NAI Rules 2015 provide discretion to arbitral tribunal only to decide on the application of an original party to join a third party as impleader. However, the Rules apply a very strict approach to the joinder of the third party upon the request of an original party. According to Article 37, the joinder of a third party as impleader is possible if the underlying arbitration agreement is applied to the third party, or the third party enters into the same arbitration agreement with requesting party. However, some scholars state that being a party to an arbitration agreement cannot amount to a waiver to object against the constitution of the arbitral tribunal.[77] Article 1028(1) of Dutch Code of Civil Procedure allows the impleaded party to object if the other parties have a preferential position in the appointment of arbitrators. Accordingly, Article 1028(2) allows state court intervention in the tribunal's constitution.[78]

A similar and explicit approach is applied in the KCAB Rules 2016. The joinder ordered by the tribunal cannot affect the constitution of the arbitral tribunal following Article 21(2). Since there is no provision on the joinder of a third party before the constitution of the tribunal, the third party cannot participate in the nomination of arbitrators under KCAB Rules 2016. However, as in the case of NAI Rules, KCAB Rules require explicit and written consent of the third party to joinder, which serves as a waiver of the right to equal treatment in the constitution of the arbitral tribunal.

Since the LCIA Rules 2020 grant discretion to the arbitral tribunal to decide on the joinder, the third party cannot participate in the tribunal's constitution. As such, the written consent required to be provided by the third party for a joinder under Article 22(x) will be regarded to contain a waiver of the right to participate in the

[77] Albert Marsman, International Arbitration in the Netherlands, with a Commentary on the NAI and PCAArbitration Rules 646-647 (2021).
[78] Ibid. 337-338.

appointment of the arbitrators on equal terms as original parties.

A complex approach is applied by the institutional rules that allow the joinder decision to be made on two different stages of the arbitral proceedings: by the institution before the constitution of the tribunal and by the arbitral tribunal after its constitution. The ICDR Rules 2021, the SIAC Rules 2016, the HKIAC Rules 2018, the ACICA Rules 2021, the CIETAC Rules 2015, the ICC Rules 2021, as well as the Swiss Arbitration Rules 2021 apply a different procedural method falling under this group.

According to Article 8(1) of the ICDR Rules 2021 the appointment of arbitrators in case of a joinder before the constitution of the tribunal should follow multi-party appointment procedures mentioned under Article 13. According to Article 13(5), in an arbitration of more than two parties the appointment should be agreed upon within a set time limit. If the parties fail to appoint arbitrators within the mentioned timeframe, the institution holds power to suggest parties to choose arbitrators using the list method. If parties fail to appoint arbitrators from the list within a specified time, the institution is empowered to appoint the tribunal.

ICDR Rules 2021 allow joinder of a third party after the constitution of tribunals only if all original and joining parties agree to joinder or arbitral tribunal decided on the appropriation of the joinder based on the consent of the third party. The requirement of the third party consent to joinder is much more scrutinized if the joinder can be ordered only by the arbitral tribunal or the joinder application is submitted after the appointment of arbitrators. Rules allow joinder on this stage under two circumstances: all parties, including the third party agreed to joinder, or the constituted arbitral tribunal determines the joinder to be appropriate accompanied by the third party's consent to joinder. Consequently, the joinder to proceedings with an already constituted tribunal is contingent upon the agreement of the third party to waive its right to equal participation.

The SIAC Rules 2016 allowing the application of a prima facie test for a joinder of a third party apply a very complex approach in the appointment of arbitrators to guarantee the equal participation rights and avoid any challenges related to possible claims on its breach.[79] In cases, where an application for a joinder is submitted before the constitution of the tribunal, the SIAC Court is allowed to revoke any appointment of arbitrator(s) that has already been made under Rule 7.6. The Court has the power to appoint all arbitrators if the parties fail to make join appointment under Rule 12.2. When the third party is joined after the constitution of the tribunal, the possible objection of the third party in relation to its equal participation right is very crucial for the proceedings. Thus, the SIAC 2016 Rules under Rule 7.12 guarantee the waiver of the right of the third party in the constitution of the tribunal if the joinder is granted. The objective of such provision is to inform the third party that consent to joinder will be regarded as its waiver of equal participation rights. Moreover, the institution and the arbitral tribunal are obligated to determine the position of the third party regarding its equal participation right while hearing the opinion of all parties on the joinder request.[80]

The HKIAC Rules 2018 enable the institution to join the third party before the constitution of the tribunal and revocation of the appointment of any already designated arbitrator(s). Following Article 27.12, once the joinder decision is made, all the parties “shall be deemed to have waived their right to designated arbitrator”. Consequently, the institution holds the discretion to appoint all the arbitrators, which is a means to ensure the right of equal treatment of all parties involved in the proceeding. Moreover, revocation of the appointment by the institution is discretionary. Thus, if no objection is made by any party during consideration of the joinder application,

[79] Dongdoo Choi, Joinder in international commercial arbitration, 35 Arbitration International 51 (2019).
[80] Ibid. 51.

the institution may withhold from revocation.[81]

However, if the joinder request is submitted after the constitution of the tribunal, the Rules do not require the revocation of the appointed arbitrators. Thus, as indicated in Article 27.5(b) Hong Kong International Arbitration Centre (HKIAC) Rules the third party to be joined to pending arbitral proceedings have an opportunity to express its objection in relation to its equal participation rights in the Answer to the Request for Joinder. In case of the existence of any plea submitted to a third party, the tribunal will avoid ordering joinder to ensure the finality of the award and avoid possible adverse recourse against it. Moreover, the HKIAC Rules contain another safeguarding rule under Article 27.13 stating that the parties are deemed to waive any objection to the validity and/or enforcement of the award in relation of a decision to join a third party to the arbitration unless a waiver can be validly made. This provision has the function of notifying in advance the parties on their right the raise an objection in relation to the joinder request.[82]

The ACICA Rules 2021 apply a considerably similar approach to the HKIAC 2018 Rules in relation to the joinder of a third party before the constitution of the tribunal. According to Article 17.12, the institution shall revoke the appointment of any designated arbitrator if a third party is joined to pending arbitral proceedings. On the contrary to the similar provision under HKIAC Rules, the ACICA Rules provision on the revocation of the appointment is not discretionary. If the parties do not agree with the already nominated arbitrator(s) within the set timeframe, ACICA is obliged to initiate the revocation of the appointment. If such scenario happens, the institution has the discretion to constitute a tribunal.

If the joinder application is submitted after the constitution of the tribunal, similar to HKIAC Rules 2018, the ACICA Rules do not

[81] Ibid. 40-41.

[82] *Ibid. 41.*

require the revocation of the tribunal. Following Article 17.5(b) a third party may raise an objection to the constitution of the tribunal in its Answer to the Request for Joinder. Moreover, Article 17.14 provides a similar safeguarding mechanism to ensure the finality of the award. The parties are considered to renounce their right to raise "objection to the validity and/or enforcement of the award in relation of a decision to join a third party to the arbitration, unless a waiver can be validly made".

The ICC Rules 2021 introduced amendment to the procedure of the constitution of arbitral tribunal if a third party is joined to arbitral proceedings. According to Article 12.7, if a third party joined before the constitution of the tribunal and the tribunal consists of three arbitrators, the third party can make a joint appointment with one of the relevant original parties (either respondent or claimant). If the parties fail to make a joint nomination, the Court has the power to appoint all tribunal members under Article 12.8.

The joinder of a third party after the appointment of any arbitrator or the constitution of the tribunal is subject to the requirements of Article 7.5 of the latest edition of the Rules. In order to avoid any potential challenges of the final award, the Rules enable the joinder of the third party at this stage only based on the acceptance of the third party of the authority of the arbitral tribunal and concluded Terms of Reference. Consequently, having agreed with the constituted tribunal the third party is deemed to waive its right to equal participation.

Since the institution and the arbitral tribunal hold a discretion to join a non-consenting third party based on the prima facie test, the Rules allow the third party to express its objection regarding its right to equal participation in the appointment of arbitrators. As such, Article 5.1(e) of ICC Rules requires the third party to include "any observations or proposals concerning the number of arbitrators and their choice… and any nomination of an arbitrator required thereby". The latest edition of the Rules introduced a new provision under

Article 12.9 aiming to safeguard the award from possible challenges on the ground of unequal treatment. This rule enables the Court to appoint all members of the tribunal in exceptional cases in order to avoid risks of unequal treatment of the parties no matter what agreement is made by the parties in relation to the constitution of the tribunal. However, this provision may also be regarded as the limitation of the party's autonomy, which is a cornerstone of arbitration.[83]

The Swiss Rules of International Arbitration address the issue of the appointment of arbitrators under Article 11. However, the specific provision of this Article sets out procedural issues with regard to all forms of multi-party proceedings without any specific rule to be applied for the proceedings involving joinder of a third party. According to Article 11.3, in the proceedings with multiple parties, the arbitral tribunal shall be constituted based on the parties' agreement. In case of failure to reach such agreement on the procedure of arbitral tribunal's constitution, the Court shall set a time limit for the designation of the arbitrators. The Court may appoint some or all arbitrators if any party or all parties fail to submit its nomination.

An outstanding feature of the Swiss Arbitration Rules is the lack of the provisions addressing legal matters on the equal participation right of the third parties in case of the joinder after the constitution of the tribunal. Article 6.3 setting out the joinder mechanism after the constitution of the tribunal is interpreted by many scholars as a significant departure from the concept of party autonomy. Although there is no explicit requirement to have the consent of the parties, the tribunal should consult with all parties on the request of joinder. A possible objection of the third party based on the concerns of its

[83] Craig Tevendale, Thierry Tomasi & Vanessa Naish, Inside arbitration: the new ICC Rules 2021: What you need to know (2021), https://www.herbertsmithfreehills.com/latest-thinking/inside-arbitration-the-new-icc-rules-2021-what-you-need-to-know (last visited Feb 14, 2022). See also: Jalal El Ahdab, et al., New 2021 Rules at the ICC, after the LCIA, and before the SIAC (2021),https://www.twobirds.com/en/news/articles/2020/global/new-2021-rules-at-the-icc-after-the-lcia-and-before- the-siac (last visited Feb 14, 2022).

equal participation right in the constitution of the tribunal at that stage would be a significant factor for the tribunal to reject the joinder application.

The CIETAC Rules 2015, as mentioned in the previous chapter, provide outstandingly wide discretion to the institution to decide on the joinder of a third party both prior to and after the constitution of the tribunal. Under Article 18.5 the institution is also granted wide discretion in relation to the nomination of arbitrators in case of a joinder both prior to and after the constitution of the tribunal. If the joinder takes place before the constitution of the tribunal, the formation of the arbitral tribunal should follow the rules set out in Article 29. In a situation, where the joinder occurs after the constitution of the tribunal, the tribunal shall hear the position of the third party on the formation of the tribunal. In case the third party does not agree with the constituted tribunal and entrust the appointment of arbitrator institution, the other parties to the proceedings shall entrust nomination of arbitrators to the tribunal and the tribunal should be constituted based on Article 29. According to Article 29.1, in the proceedings involving two or more claimants and/or respondents, the parties should entrust the appointment of arbitrators to the Chairman of CIETAC. In case of failure of the parties to act in accordance with Article 29.1 within a set timeframe, the Chairman of CIETAC shall constitute the arbitral tribunal.

The SCC Rules 2017 differ from the rules belonging to both groups since they do not address the joinder decision made by the arbitral tribunal. As mentioned in the previous chapter, under Article 13(5) the SCC Board holds the power to decide on the joinder of a third party if the SCC does not manifestly lack jurisdiction over all original and third parties. Article 13(8) sets out the procedural matters with regard to the appointment of arbitrators if a third party joined the arbitral proceedings. Where the third party raises an objection against any already designated arbitrator, the SCC Board may revoke the appointment. However, such decision of the Board on

revocation is discretionary. If, however, revocation takes place, either all parties may agree on a different procedure of appointment, or the Board constitutes the tribunal.

CHAPTER 2

LEGAL IMPLICATIONS RELATED TO THE JOINDER OF NON-CONSENTING THIRD PARTY

2.1. PUBLIC POLICY CONCERN AS A GROUND FOR THE ANNULMENT OF AWARD DUE TO THE JOINDER OF THE NON-CONSENTING PARTY

The joinder of a third party despite its objection may raise legal implications related to the absence of consent to arbitrate and public policy concerns. Annulment and recognition proceedings allow the national courts to provide the judicial review on the joinder of the third party to arbitral proceedings.

The courts determine the existence of the consent to arbitrate on a case basis following the articles of the New York Convention and UNCITRAL Model Law. As mentioned earlier, Article II of the New York Convention and Article VII of UNCITRAL Model Law on International Commercial Arbitration interpret arbitration agreement as an agreement between parties to resolve disputes regarding a defined contractual or non-contractual legal relationship.[84] The definition relies on the party autonomy and doctrine of privity of contracts, which relies on the consent of the parties.[85] Nevertheless, as discussed in previous chapters, the institutions and arbitral tribunals may order joinder of the non-signatory third party despite its objection.

[84] Ibid.
[85] Gary Born, Parties to International Arbitration Agreements, in International Commercial Arbitration 1518 (Gary Born 3 ed. 2021).

Such joinder of a third party may raise legal implications related to public policy concerns. Among all public policy concerns, due process and equal participation is a primary issue absolute the joinder of non-consenting this party.[86] Due process concerns related to the joinder of third parties cover the issues of equal participation of the parties and the right of each party to fully present its case. Although equal participation is not an absolute right, infringement of the right of third parties to equally participate in the constitution of the arbitral tribunal can be aground to challenge the arbitral award.[87] Following Article V(2)(b) of the New York Convention, procedural violations, such as the violation parties' equal participation right, can be a ground for the court to set an award aside.88 89 This public policy concern as a ground for the refusal of the recognition and enforcement of the award is set under Article 32(2)(b)(ii) of the UNCITRAL Model Law.[90]

Following the aforementioned articles, which are also reflected in the national arbitration law of most of the countries, the national courts analyse whether the arbitral tribunal ensured due process and equal treatment of the parties while ordering joinder of the third party. Some national courts have also provided a comprehensive definition of the procedural violations that can be considered to be contrary to public policy.

One of the landmark cases in relation of the judicial review of an

[86] S. I. Strong, Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?, 31 Vanderbilt Journal of Transnational Law 922 (1998)
[87] Dongdoo Choi, Joinder in international commercial arbitration, 35 Arbitration International 37-38 (2019). 137 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, New York, Jun. 10, 1958.
[88] UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 247 (2016).
[89] UNCITRAL Model Law on International Commercial Arbitration, UN Doc A/40/17, art. 32 (2006).
[90] Caroline Kleiner, Country Report: France, in Due Process as a Limit to Discretion in International Commercial Arbitration 165-166 (Franco Ferrari, Friedrich Jakob Rosenfeld & Dietmar Czernich 2020).

arbitral award is the decision of the French Court of Cassation in Dutco case. In French law, Article 1510 CCP requires the arbitral tribunal to ensure equal treatment of the parties and uphold the dues process. As such, Article 1520.4 CCP expressly indicated the violation of due process as grounds for setting aside an award. The requirement to guarantee equal treatment is covered under Article 1520.5 CCP, which considers the violation of this rule as a breach of international public policy.[91]

Article 1065(1) of the Dutch CCP sets out the scope of the public policy concerns that may be grounds for setting aside a final award rendered by an arbitral tribunal. A violation of public policy can be established if there has been a violation of fundamental principles of the procedural law. The Dutch Supreme Court[92] determined that these principles cannot be limited by procedure and include the parties' right to be heard and equal treatment.[93]

Swiss Private International Law Act addresses public policy concerns very broadly under Article 190(2)(e). According to this provision, domestic public policy and mandatory rules are different from international public policy concerns in relation to the most fundamental principles of the legal order. As such, domestic public policy concerns have a broader concept. Swiss Federal Supreme Court finds the violation of public policy concerns if the decision violates the fundamental and recognised procedural principles of domestic legal order in an "intolerable manner".[94] The court also differentiates procedural public policy and substantive public policy.[95]

[91] Jacob van de Velden & Abdel Khalek Zirar, Country Report: The Netherlands, in Due Process as a Limit to Discretion in International Commercial Arbitration 284-285 (Franco Ferrari, Friedrich Jakob Rosenfeld & Dietmar Czernich 2020).
[92] See the Dutch Supreme Court judgment of 22 December 2006, ECLI:NL:HR:2006:AZ1593, NJ 2008/4 (Kers/Rijpma),
[93] Commercial Arbitration 383 (Franco Ferrari, Friedrich Jakob Rosenfeld & Dietmar Czernich 2020).
[94] *Simon Hohler, Country Report: Switzerland, in Due Process as a Limit to Discretion in International WORD(S) MISSING*
[95] *Ibid. 381.*

In common law jurisdictions, courts apply a more cautious approach to consider public policy concerns as grounds for setting aside an arbitral award. The provision under Section 103 of the English Arbitration Act favours the enforcement of the award and puts the burden of proof "firmly" on the party challenging the enforcement of the award. In the cases involving procedural injustice, English court sets a high threshold for the establishment of the recognition of the procedural violation amounting to a rejection of the enforcement of the final award.[96]

A similar approach to the determination of the scope of public policy concerns is observed under the U.S. Federal Arbitration Act, which allows the award to be set aside by the court only on limited grounds. The U.S. courts apply a very restrictive approach to establish a violation of public policy concerns and recognise the existence of such violation only if there is an explicit violation of "the basic notions of morality and justice" or some explicit public policy that is well defined and dominant."[97] Hence, the court does not qualify the misapplication of the legal principles as a violation of public policy and court decisions rejecting enforcement of an arbitral award due to its contrariness to public policy are rare.

Although the countries apply different approaches and thresholds for the public policy concerns, the joinder of a third party despite its objections is a substantial ground for the court to annul the arbitral award. However, some countries stand out with the application of a very strict approach in this matter, while other countries, predominantly common law jurisdictions, tend to set the higher threshold to confirm the violation of procedural law in arbitral

[96] Hattie R. Middleditch, Country Report: United Kingdom, in Due Process as a Limit to Discretion inInternational Commercial Arbitration 406 (Franco Ferrari, Friedrich Jakob Rosenfeld & Dietmar Czernich 2020).
[97] See: United Paper Workers' International Union, AFL-CIO v. Misco, Inc, 484 U.S. 29, 43, 108 S.Ct. 364, 373-374, 98 L. Ed. 2d 286 (1987). Also: W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 766 (1983).

proceedings amounting to a violation of public policy.

2.2. JUDICIAL REVIEW OF ARBITRAL AWARDS DUE TO THE JOINDER OF THE NON-CONSENTING THIRD PARTY

The third-party consent as a ground for ordering a joinder was a subject of the case law. The case law includes decisions examining the requirement of the consent of the initial parties, as well as the joinder of the third party. Although the focus of the article is the consent of the non-signatory third party, the decisions on the requirement of the consent of the original parties can also provide a better understanding of the approach of national courts on the consensual nature of arbitration.

It is noteworthy to mention the PT First Media case where the Court of Appeals of Singapore interpreted the importance of the consent for the joinder of a third party. In the arbitral proceedings, claimant parties filed an application to join a third party, PT First Media. The latter was a guarantor in the joint venture and a member of the conglomerate Lippo Group, which was the original party to the proceedings. SIAC ordered joinder despite the objection of Lippo Group. The court reviewed the award based on the allegation of the third party. In its decision, the court analysed the importance of the consent, including consent of the original parties, to be considered while ordering joinder of a third party. This consent can be provided in any form, either under arbitration agreement or through agreement to arbitrate under specific institutional rules. However, this institutional rule should have explicit provisions that allow "unambiguously" forced joinder. In such case, the subsequent allegation of the party on the absence of the consent to arbitrate with the joinder party would not have a ground for the annulment of the award.[98]

[98] *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara*

In the case *Bay Hotel & Resort Ltd and Zurich Indemnity Company of Canada v. Cavalier Construction Co. Ltd*, the respondent filed an application for the joinder of Cavalier CTI as a party. The reasoning for the application on the joinder was that Cavalier CTI carried out the contract and was formed and entirely financed by the respondent. The institution ordered joinder despite the objection of the claimant. The court held that arbitral tribunal lacks jurisdiction to order a joinder in circumstances, where a non-consenting party rejects to arbitrate with the non-signatory.[99]

The most recent case on the arbitral proceedings administered under LCIA 2020 Rules provides a further step in relation to the judicial review of the forced joinder. According to the court's decision in the *Bay Hotel* case, the simple fact that a third party is a signatory to an arbitration agreement does not evidence the implied consent to a specific arbitration between other two parties arisen out of the underlying arbitration agreement. In the dispute between CJE and CJD, the latter filed an application to join the CJE's parent company, CJF to the arbitral proceedings according to Article 22.1(viii) LCIA Rules. As the provision requires the party's written consent to be joined, the arbitral tribunal rejected the application.

The High Court of Singapore upheld the decision of the arbitral tribunal in its review of the award. The court stated that forced joinder is not about the joinder of the third party despite its objection, but the joinder of the third party based on its consent despite the objection of one of the original parties to the arbitration proceeding. Moreover, the court restated the doctrine of "double separability" with reference to the PT First Media Case. The court mentioned that being a signatory to an arbitration agreement does not preclude the consent of the party to also arbitrate in the arbitration proceeding initiated based on the separate agreement

International BV et al., Court of Appeal, Civil Appeals Nos. 150 and 151 of 2012, 31 October 2013.

[99] *Bay Hotel & Resort Ltd and Zurich Indemnity Company of Canada v. Cavalier Construction Co. Ltd and Cavalier Construction Co. Ltd*, UK Privy Council, 16 July 2001.

between the original parties for the particular arbitration reference.[100] This case allows concluding that courts are very cautious on the joinder of the third party to an arbitration proceeding despite its express objection to such request.

Moreover, another issue to be considered in the case of the joinder of the non-consenting third party is the procedures available to ensure its equal participation rights. One of the fundamental cases on the right of the joined third party to equal participation is the Dutco case. The decision of French Court of Cassation in *Dutco*[101] had a far-fetched impact on the practice of the arbitration institutions in the designation of arbitrators in multi-party arbitrations, including joinder.[102] The arbitration involved one claimant and two respondents, where the latter had to make a joint appointment under protest. The interim award was set aside by the Court holding that the tribunal was irregularly constituted despite the objection of the parties. The Court quashed the argument that parties' agreement to arbitrate under the specific rules should be considered as a waiver of their right to nominate the arbitrators. On the contrary, the Court states that the right to nominate an arbitrator is a matter of public policy and can be waived only after the dispute has arisen.[103] As such, this decision led to two conclusions with regards to the equal participation of the parties in the multi-party arbitrations. First, the decision confirmed the appointment of arbitrators as a right to equal participation is a public policy concern. Second, this right cannot be waived before the dispute

[100] Jay Randhawa & Asya Jamaludin, Joinder of third-parties to arbitral proceedings: High Court of Singapore rules on the requirements for consent (2021), https://www.cms-lawnow.com/ealerts/2021/04/joinder-of-third-parties-to-arbitration-proceedings-high-court-of-singapore-rules?cc_lang=en (last visited Feb 16, 2022).
[101] Cour de cassation,7 January 1992, *Societes BKMI et Siemens c/ societe Dutco*, Rev.arb. 1992 p 470.
[102] Orkun Akseli, Appointment of Arbitrators as Specified in the Agreement to Arbitrate, 20 Journal of International Arbitration 253 (2003).
[103] Christopher R Seppala, Multi-Party Arbitrations at Risk in France, 12 International Financial Law Review 34 (1993).

has arisen.[104]

Joinder of the non-consenting third party shows that there is still a heavy reliance on the fundamental principle of the arbitration, which is its consensual nature. Thus, the arbitral tribunals and national courts avoid the joinder of the third non-consenting party if there is no fundamental ground and facts proving the close ties between the third party and the dispute.

CONCLUSION

The main aim of the article was to explore the legal issues around the joinder of the non-consenting third party to arbitral proceedings. This analysis was based on the two main principles related to international arbitration, consent and equal participation of the parties. The article looked at the approaches of institutional arbitration to balance these two principles concerning the joinder of the non-consenting third party.

Overall, the analysis shows that the third party's consent is crucial for safeguarding the finality of the award. However, international arbitration is becoming more complex and predominantly involves multiple parties. The arbitration agreement cannot foresee all the possible future disputes to be the only basis for the provision of the specific consent of the original parties to include particular third parties to the arbitral proceeding in case a dispute arises. Thus, the complexity of international trade and transactions requires arbitration institutions to include broad provisions on the joinder. However, these broad provisions, especially provisions relying on the prima facie tests, need to be balanced with the guarantees of the third party's right to equal participation in the appointment. Unless the third party openly waives its right to participation in the appointment of the

[104] Dongdoo Choi, Joinder in international commercial arbitration, 35 Arbitration International 38 (2019). P. 38.

arbitrators, the joinder of the non-consenting third party may not ensure the finality of the rendered award. In this context, special attention may be given to the attempts of the institutional rules to avoid the risk of the annulment of the rendered award by including safeguarding provisions. Such provisions require the party to express its waiver to the appointment of the arbitrator.

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ARBITRABILITY/ NON- ARBITRABILITY OF SUBJECT MATTER: JUDICIAL APPROACH UNDER INDIAN LAW

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ABSTRACT

The determination of arbitrability of a subject matter is essential to submit or refer such a subject matter of dispute to the realm of arbitration, which is the most coveted form of Alternate Dispute Resolution (“ADR”).

The concept of arbitrability involves finding out whether a certain subject matter is capable of resolving through the mode of arbitration or not. The idea behind deducing this fact is that since arbitration is a private forum for resolution or adjudication of disputes, all matters cannot be allowed to be decided by the arbitral tribunals. Matters which are explicitly kept out of the purview do not raise any doubt as to their arbitrability, since they are deemed by legislature to be not

capable of arbitration.

Apart from the subject matters excluded by the statutes, Indian Courts have time and again expressed their unequivocal opinion for certain subject matters to be not arbitrable in nature. In this aspect, the case of ***Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532*** ("**Booz Allen**") is considered to be the first case in the Indian arbitration arena to lay down pointers for determination of arbitrability of subject matter of disputes. A new stir was raised with passing of the landmark judgement of ***Vidya Drolia v. Durga Trading Corporation (2020) SCC OnLine SC 1018*** which reiterated the principles of ***Booz Allen*** along with laying new tests for deciding the arbitrability of disputes.

In this article, the authors trace the jurisprudence in the Indian legal system as to the evolving postulates of the determination of the notion of arbitrability for various disputes. For bye, the article studies the parameters laid down by Indian judiciary in various rulings for examining arbitrability of disputes and then analyses the arbitrability and non-arbitrability of various subject matters of disputes as held by the Courts.

INTRODUCTION

Former President of the International Bar Association, Mr. David W. Rivkin once said "*Arbitration is the grease that helps economies flow and brings us benefits around the world"*. No one can deny this statement in the current era.

Arbitration is one of the most accepted and highly accredited forms of the Alternative Dispute Resolution ("**ADR**") which has proved itself to be a worthy mechanism of pursuing the objective of settling disputes without or with minimal judicial intervention. Arbitration ensures effectiveness, efficiency and speedy resolution of a dispute.

It surpasses the lengthy and expensive judicial proceedings which take years to come to an end. Arbitration being time and cost effective is preferred by the entrepreneurs globally for resolving their disputes. Arbitration might be an all-pervasive dispute resolution process but it has its own limitations. Not all disputes cannot be resolved through arbitration. Various subject matters are not arbitrable and require adjudication by conventional Court process.

What are the disputes which are arbitrable? Is it required to look into the arbitrability of the dispute at an initial stage by the Courts and the arbitral tribunal? What does 'arbitrability' mean? The authors seek to analyse such issues in this paper.

WHAT DOES 'ARBITRABILITY' SIGNIFY?

The term 'arbitrability' has different meaning in different context[1]. A reasonably precise and limited meaning of 'arbitrability' is whether specific classes of disputes are barred from arbitration because of national legislation or judicial authority [2]. In simpler terms, 'arbitrability' refers to whether or not the arbitrators have authority to rule on a dispute. Normally the arbitration as a dispute resolution mechanism is envisaged in the arbitration agreement itself which lets either party to approach the arbitral tribunal on occurrence of difference of opinion on a matter contained therein. An arbitration agreement is an accord between the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship.[3] However, the Courts of various jurisdictions have put a rider on this right given to the parties holding that the subject matters which require determination

[1] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532

[2] Defining 'Arbitrability', New York Law Journal, <https://indiacorplaw.in/wp-content/uploads/2016/08/shore-definingarbitrability.pdf> accessed March 16, 2021

[3] Arbitration and Conciliation Act 1996, s 7 & UNCITRAL Model Law on International Commercial Arbitration (1985), Article 7

only by the Court of law in view of the country's legal framework, the nature of disputes involved therein and applicable public policy cannot be referred for determination through arbitration. Thus, it has created the need to understand the concept of arbitrability.

ARBITRABILITY OF SUBJECT MATTERS: LEGISLATIVE INTENT

Deciding the arbitrability of a subject matter pertaining to dispute is one of the most essential tasks to begin with the arbitration proceedings.

The Arbitration and Conciliation Act, 1996 **("Arbitration Act")** clearly recognizes and accepts that certain disputes or subjects are not capable of being resolved by arbitration[4].

Section 2(3) of the Act states that "*this part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration*." It implies if any law provides either expressly or by implication, that the specified disputes may not be submitted to arbitration, in that case, in spite of the non-obstante provision in section 5 of the Arbitration Act, that law will be saved by virtue of section 2(3) of the Arbitration Act[5].

Section 16 of the Arbitration Act empowers the Arbitral Tribunal to rule on its own jurisdiction. A party may raise the plea that the arbitral tribunal does not have jurisdiction to adjudge the subject matter of dispute[6]. In other words, if a party challenges the 'arbitrability' of disputes in question and raises the concern about their arbitrability/non-arbitrability before submission of statement of defence, it will invoke the tribunal's jurisdiction to rule on its own

[4] Vidya Drolia v. Durga Trading Corporation (2020) SCC OnLine SC 1018
[5] Central Warehousing Corp. v. Fortpoint Automotive Pvt. Ltd. (2009) SCC OnLine Bom 2023
[6] Arbitration and Conciliation Act 1996, s 16 (2)

jurisdiction to adjudicate that issue.

The legislature has also taken cognisance of 'arbitrability' of a dispute while framing section 34 of the Arbitration Act. Section 34(2)(b)(i) empowers the Courts to set aside the arbitral awards if the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Thus, 'arbitrability' of a dispute is not only a matter of concern for tribunals' jurisdiction but also vital for maintainability of an award.

Since section 2(3) and 34(2)(b)(i) of the Arbitration Act do not enumerate or categorise non-arbitrable matters or state the principles for determining when a dispute is 'non-arbitrable' by virtue of any other law, it is left to the Court to formulate the principles for determining 'non-arbitrability' within the framework of law[7].

In other words, the Arbitration Act does not itself explicitly declare on the point of arbitrability, but section 2(3) and section 34(2)(b)(i) of the Arbitration Act have vested an obligation on Courts and tribunals to decide what matters are arbitrable and what are not.

Every civil or commercial dispute, whether contractual or non-contractual, which can be decided by Court is in principle arbitrable, i.e., capable of being adjudicated and resolved by an arbitral tribunal unless arbitral tribunal's jurisdiction is excluded expressly or by necessary implication[8].

Legislature is entitled to treat certain categories of disputes as 'non-arbitrable' and exclude Arbitral Tribunal's jurisdiction by exclusively reserving proceedings in relation thereto for public forum, be it a Court or forum created or empowered by the State[9]. A clearly stipulated 'non-arbitrability' should be respected by the Courts and

[7] Vidya Drolia v. Durga Trading Corporation (2020) SCC OnLine SC 1018
[8] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532
[9] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532; Vidya Drolia v. Durga Trading Corporation (2020) SCC OnLine SC 1018

tribunals as it alleviates pain and sufferings of unwarranted in-depth working on the issue of 'arbitrability' of a dispute.

When issue of arbitrability is an important factor to be looked into by the Courts and the tribunal in an arbitration dispute, what aspects should be evaluated by them while deciding it?

To make it fathomable, the Supreme Court has delineated three facets of arbitrability relating to the jurisdiction of arbitral tribunal[10]:

(i) *Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).*

(ii) *Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement.*

(iii) *Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal.*

A dispute, even if it is capable of being decided by arbitration and falling within the scope of an arbitration agreement, will not be "arbitrable" if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such a joint list of disputes, does not form part of the disputes raised in the pleadings before the

[10] Ibid

Arbitral Tribunal.

An arbitration agreement though is the creation of the parties, its terms, conditions, phraseology, etc. are their prerogative and the parties may concur on issues which they may agree to refer to arbitration, but it is not obvious that all the subject matters agreed to be referred to in the arbitration agreement are 'arbitrable'. They may be 'non-arbitrable' as per the statutes in force or may affect the rights of the third parties or may relate to public interest functions of the state, etc.

Generally, 'non-arbitrability' of a subject matter would relate to non-arbitrability in law[11].

Exclusion or 'non-arbitrability' of subjects or disputes from the preview of an arbitration by necessary implication, requires setting out the tests that should be delved into.

To ease the burden of the Courts and tribunals, a four-fold test is propounded by the Supreme Court in ***Vidya Drolia v. Durga Trading Corporation[12] ("Vidya Drolia – 2020")*** to determine the 'non-arbitrability' of the subject matter in an arbitration agreement which calls for the Court and tribunal to scan it in the light of the following:

(1) *when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.*

(2) *when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;*

[11] Vidya Drolia v. Durga Trading Corporation (2020) SCC OnLine SC 1018
[12] (2020) SCC OnLine SC 1018

(3) *when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and*

(4) *when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).*

The above tests are not water-tight compartments, however when applied with care and caution, holistically and pragmatically, they will help and assist in determining and ascertaining with great degree of certainty about 'arbitrability' or 'non-arbitrability' of a dispute or subject matter as per law in India.

Picking up threads from the four-fold test propounded by Supreme Court to scan the 'non-arbitrability' of the subject matter, evidently the first calling had to have an overview of them to understand the concept enlarged therein.

RIGHT IN REM AND RIGHT IN PERSONAM

First test spelled out in ***Vidya Drolia – 2020 case***[13] denotes that the subject matter of dispute if relates to a *right in rem* is not arbitrable. To understand this, let us sift what is manifested by the argot '*right in rem'*.

A *Right in rem* is a right exercisable against the world at large. An *action in rem* refers to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property.

A proceeding *in rem*, in strict sense, is one taken directly against

[13]Ibid

property, and has for its object the disposition of the property, without reference to the title of individual claimants but in the larger and more general sense, the term 'proceeding *in rem*' is applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein[14].

As a contrast to *right in rem, right in personam* is an interest protected solely against specific individuals. *Actions in personam* refer to actions determining the rights and interests of the parties themselves in the subject matter of the case.

Cancellation of the sales deed by a non-executant would be an *action in personam* since a suit has to be filed under section 34 of the Specific Relief Act, 1963 **("SR Act").** However, cancellation of the same deed by an executant of the deed, being under section 31 of SR Act would somehow convert the suit into a suit being *in rem*[15].

A *judgment in rem* determines the status of a person or thing as distinct from the particular interest in it of a party to the litigation; and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided. Such a judgment "settles the destiny of the res itself" and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence[16].

By contrast, a *judgment in personam*, "although it may concern res, merely determines the rights of the litigants inter se to the res"[17].

Judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself[18].

[14] Deccan Papers Mills Co. Ltd. v. Regency Mahavir Properties (2020) SCC OnLine SC 655
[15] Ibid
[16] Ibid
[17] Ibid
[18] Black's Law Dictionary

A *judgment in personam* refers to a judgment against a person as distinguished from a judgment against a thing, right or status[19].

Judgment in rem has been defined as 'a judgment of a court of competent jurisdiction determining the status of a person or thing (as distinct from the particular interest in it of a party to the litigation); and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided.' A judgment in rem settles the destiny of the res itself 'and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence'; a judgment in personam, although it may concern res, merely determines the rights of the litigants inter se to the res. The former looks beyond the individual rights of the parties, the latter is directed solely to those rights.[20]

Distinction between *judgments in rem* and *judgments in personam* turns on their power as res judicata, i.e. *judgment in rem* would operate as res judicata against the world, and *judgment in personam* would operate as res judicata only against the parties in dispute[21].

Generally, and traditionally, all disputes relating to *rights in personam* are considered to be amenable to arbitration, which is a private dispute resolution mechanism binding on the parties to the arbitration agreement. The Arbitral Tribunal's jurisdiction is confined to the parties to the arbitration agreement.

Only the Courts established by law, enjoy jurisdiction to adjudicate the disputes relating to *right in rem*. For conferring jurisdiction, the Courts do not require agreement of the parties like the Arbitral

[19] Ibid
[20] R. Viswanathan v. Rukn-ul-Mulk Syed Abdul, (1963) 3 SCR 22
[21] Vidya Drolia v. Durga Trading Corporation (2020) SCC OnLine SC 1018

Tribunals.

The following have been set out as disputes falling in *right in rem:*

(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

(ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;

(iii) guardianship matters;

(iv) insolvency and winding-up matters;

(v) testamentary matters (grant of probate, letters of administration and succession certificate), and

(vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes[22].

Many times, *right in rem* results in subordinate *rights in personam.* They are commonly known as *subordinate rights in personam* arising from *rights in rem* and are always considered to be arbitrable. For instance, rights under a patent license though validity of the underlying patent may not be arbitrable[23]; right to damages for personal injury caused to the claimant, even though the offence committed by causing such injury may not be arbitrable[24]; the husband and wife can make a valid agreement on the terms on which they may separate and can be referred to arbitral tribunal to resolve that issue irrespective of the fact that the matrimonial dispute in between them may not be arbitrable[25]; a claim for infringement of

[22] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532
[23] Vidya Drolia v. Durga Trading Corporation (2020) SCC OnLine SC 1018
[24] Olympus superstructure v. Meena Vijay Khaitan (1999) 5 SCC 651
[25] Ibid

copyright against an individual is arbitrable notwithstanding that in this process the arbitrator may examine a right to copyright, which is a *right in rem*[26].

The Courts while deciding the arbitrability of a subject matter takes into account the concept of *right in rem* and *right in personam.*

ERGA OMNES EFFECT

The second test set out in ***Vidya Drolia - 2020 case***[27] connotes about *erga omnes* effect of subject matter. When subject matter of dispute affects third party rights, it has *erga omnes* effect and is not arbitrable.

The concept of '*erga omnes'* has its origin dating back to Roman law and is used to describe obligation or rights 'towards all'. In legal terminology, *erga omnes* rights and obligations are owed towards all, videlicet the property right is an *erga omnes* entitlement and is enforceable against anybody violating that right.

According to the determinant of *erga omnes*, if the subject matter has the potential to have an effect towards the right and liability of persons who are not a party to the proceedings and the effect would be on many, such disputes are not arbitrable. They would sabotage the foremost object to secure just, fair, speedy and cost-effective resolution of disputes through arbitration.

An arbitration agreement between two or more would be obscure and inexpedient in situations when the subject matter of the dispute affects the third parties' rights and interests or without presence of others, an effective and enforceable award is not possible[28]. Thus, any matter or dispute affecting third party has an *erga omnes* effect

[26] Vidya Drolia v. Durga Trading Corporation (2020) SCC OnLine SC 1018
[27] (2020) SCC OnLine SC 1018
[28]Vidya Drolia v. Durga Trading Corporation (2020) SCC OnLine SC 1018

and needs central adjudication rather than arbitration[29]. Arbitration is unsuitable and should not be enforced as an alternative to public fora when it is futile, ineffective and would be a no-result exercise[30].

SOVEREIGN AND PUBLIC INTEREST FUNCTIONS OF STATE

The third test elucidated in ***Vidya Drolia - 2020***[31] bespeaks that mutual adjudication would be unenforceable in sovereign and public interest functions of the state. State has a sovereign duty. Its sovereign functions are in appropriable. They cannot be delegated to anyone. State has exclusive right and duty to perform them.

Supreme Court has taken note of observations of Lord Wattson and Issacs J. on this aspect in ***APMC v. Ashok Harikuni (2000) 8 SCC 61***.

Lord Wattson in ***Coomber v. Berks Justices***[32] describes the functions such as administration of justice, maintenance of order and repression of crime, as amongst the primary and non-transferable functions of a constitutional government.

Issacs J. in his dissenting judgment in ***Federated States Schools teachers' Association of Australia v. State of Victoria***[33] states Regal functions are inescapable and inalienable. Such are the legislative power, the administration of laws, the exercise of the judicial power.

Defence of the country, raising armed forces, making peace or war, foreign affairs, power to acquire and retain territory are approved to

[29]Ibid
[30]Ibid
[31] (2020) SCC OnLine SC 1018
[32](1883) 9 AC 61: 53 LJQB 239
[33] (1928-29) 41 CLR 569

be 'sovereign'[34].

Sovereign functions for the purpose of the Arbitration Act would extend to exercise of executive power in different fields including commerce and economic, legislation in all forms, taxation, eminent domain with police powers which includes maintenance of law and order, internal security, grant of pardon, etc.[35] Their correctness and validity cannot be made a direct subject matter of a private adjudicating process.

Similar is the position with respect to decisions and adjudicatory functions of the state having public interest element like the legitimacy of the marriage, citizenship, winding-up of companies, grant of patents, unless the statute relating to them expressly or by clear implication permits arbitration[36].

State has monopoly in dispute resolution of the sovereign functions. Correctness or validity of State's decision in exercise of its sovereign duty cannot be adjudicated through a private process and is 'non-arbitrable'.

DESIGNATED NON-ARBITRABILITY UNDER THE STATUTES

Vidya Drolia – 2020's [37] fourth test of arbitrability explicates designated non-arbitrability under the statutes. A statute on the basis of public policy can expressly or by implication restrict or prohibit arbitrability of the disputes and reserve their determination exclusively through public fora[38].

While making an enactment, the legislature can draw upon dispute

[34] APMC v. Ashok Harikuni (2000) 8 SCC 61
[35] Vidya Drolia v. Durga Trading Corporation (2020) SCC OnLine SC 1018
[36] Ibid
[37] (2020) SCC OnLine SC 1018
[38] Vidya Drolia v. Durga Trading Corporation (2020) SCC OnLine SC 1018

resolution provisions in it. The enactment may provide the rights and liabilities created in it and their determination by the tribunals and Courts especially and specifically constituted for the said purpose. Conformant of exclusive jurisdiction on specific Courts or tribunals to adjudge the disputes arose under statute excludes choice of choosing arbitration as a forum to judge the disputes. Parties have no choice but to seek remedy before the forum so stated in the statute. Arbitration as a dispute resolution process cannot be espoused to determine such rights and liabilities.

However, arbitration may be chosen as a dispute resolution mechanism where the law accepts arbitration as an alternative remedy. [39] Hence, to understand the concept of arbitrability with respect to a subject matter, it is necessary to examine whether the statute has created a mechanism to adjudicate, the rights or liabilities by the specified Court or the public forums. If answer is yes, arbitration is prohibited.

ISSUE OF NON-ARBITRABILITY – WHEN CAN IT BE RAISED?

Issue of non-arbitrability should be raised by the parties at the earliest possible stage, keeping in view the fact that its determination may go to the root of the adjudging process. Under the Arbitration Act, it can be raised at three stages, i.e., *first,* at the referral stage before the Court on an application for reference under section 11 or for stay of pending judicial proceedings and reference under section 8 of the Arbitration Act; *secondly,* before the arbitral tribunal during the course of arbitration proceedings by raising objection at appropriate stage under section 16 of the Arbitration Act and; *thirdly,* before the Court at the stage of challenge to the award or its

[39] Under Section 89 Civil Procedure Code, 1908 **("CPC")**, courts may refer arbitrable disputes for adjudication through arbitration

enforcement[40].

Both the Courts and the tribunals have the powers to decide arbitrability if it is challenged before them at appropriate stage.

If the Court at the referral stage has decided issue of arbitrability under section 8 or 11 of the Arbitration Act, the same shall also be binding on the arbitral tribunals. But if the parties have approached arbitral tribunal without recourse to section 8 and 11, the arbitral tribunal shall have jurisdiction to rule its own jurisdiction on objections to existence and validity of the arbitration agreement under section 16 of the Arbitration Act[41].

From the above discussion, it is evident:

- The Courts have explicitly enumerated the subject matters which are arbitrable and which are not, following the principle of Common law that disputes of public nature, etc are not capable of settlement by arbitration.

- Non-arbitrable subjects are carved out by the Courts, keeping in view the principles of Common law that certain disputes of public nature, etc. are not capable of adjudication and settlement by arbitration and for their resolution, public forums are better suited[42].

- Where the cause/dispute is non-arbitrable, the Court where a suit is pending will refuse to refer the parties to arbitration, under section 8 of the Arbitration Act, even if parties might have agreed upon arbitration as the forum for settlement of such disputes[43].

- Disputes or matters which the arbitrator is competent or

[40] Vidya Drolia v. Durga Trading Corporation (2020) SCC OnLine SC 1018
[41] SBP & Co. v. Patel Engineering Ltd. and Another (2005) 8 SCC 618
[42] A. Ayyaswamy v. A. Paramsivam (2016) 10 SCC 386
[43] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532

empowered to decide under law can be referred to Arbitral Tribunals[44].

JUDICIAL APPROACH ON DIVERGENT ISSUES

11. **Disputes involving Fraud**

Fraud is a part of the Indian Contract Act, 1872 and is defined under section 17. As an offence, it is punishable under the Criminal law which is the subject matter of State's sovereign functions.

The Courts, at an earlier stage, pre-1996 era, had put the onus to decide the jurisdiction of matters pertaining to fraud in the hands of the parties[45]. It was held that the party who is charged with the allegation of fraud, if desire that the matter should be tried in the open court, it would be sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference[46]. Subsequently, the law developed and it was clarified only because some allegations have been made about the accounts being not correct or that certain items are exaggerated, are not sufficient enough to induce the court to refuse to make a reference to arbitration[47]. Following the principles laid down in Russel's case[48], it was held that, where the allegations are of fraud of a serious nature, the court will refuse reference to arbitration[49]. The civil court can refuse to refer the matter to arbitration if complicated question of fact or law is involved or where allegation of fraud is made[50].

However, later on, this proposition was overruled and the Court

[44] *Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. (1999) 5 SCC 688*
[45] Abdul Kadir Samshuddin Bubere v. Madhav Prabharkar Oak and Another (1962) AIR SC 406
[46] Ibid
[47] Ibid
[48] Russels v. Russels [1880] 14 Ch D 471
[49] Abdul Kadir Samshuddin Bubere v. Madhav Prabharkar Oak and Another (1962) AIR SC 406
[50] H.G. Oomor Sait v. O. Aslam Sait (2001) 3 CTC 269 (Mad); (2001) 2 MLJ 672

held that allegations of fraud are capable of being adjudicated by Arbitral Tribunals[51].

Mere allegations of fraud simpliciter may not be a ground to nullify the effect of arbitration agreement between the parties. While dealing with an application under Section 8 of the Arbitration Act, if Court finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can side-track the agreement by dismissing the application under Section 8 and proceed with the suit on merits[52]. Similarly in case of a partnership firm, where there were serious allegations of malpractice in the account books and manipulation of the finance of the partnership firm, the application filed under Section 8 of the Arbitration Act held to be rightly rejected on the ground that such a situation can only be settled in Court through furtherance of detailed evidence by either party and cannot be properly gone into by the arbitral tribunal[53].

The Court had made distinctions between serious allegations of forgery and fabrication in support of the plea of fraud opposed to simple allegations and examined the law on invocation of 'fraud exception' in great detail and had laid following two tests to determine what comes within the serious allegations[54]:

(1) Does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or

(2) Whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the

[51] Vidya Drolia v. Durga Trading Corporation (2020) SCC OnLine SC 1018
[52] A. Ayyaswamy v. A. Paramsivam (2016) 10 SCC 386
[53] N. Radhakrishnan v. Maestro Engineers and Others (2010) 1 SCC 72
[54] Rashid Raza v. Sadaf Akhthar (2019) 8 SCC 710

public domain.

12. **Tenancy Disputes**

The issue of arbitrability of tenancy matters can be traced back to the case of ***Natraj Studios (P) Ltd. v. Navrang Studios***[55] **("Natraj Studios")** wherein an application under Section 8 of the Arbitration Act, 1940 to refer the matter to the arbitrator for adjudication of the dispute pertaining to a tenancy which was protected under the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947 **("Bombay Rent Act")** was dismissed observing that on broader consideration of public policy, the arbitrator lacked jurisdiction to decide the question whether the licensee-landlord was entitled to seek possession as the dispute could be exclusively decided by the Court of Small Causes, which alone had jurisdiction under the Bombay Rent Act. Similarly, relief of eviction claimed by the landlord in a suit under section 6 of the West Bengal Premises Tenancy Act, 1997 was found to be non-arbitrable as it was observed that under the said statute only the Civil Judge had the jurisdiction to grant such relief[56].

Supreme Court also examined eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection and found them non-arbitrable as they can be adjudicated only by the specified courts[57].

Despite what was settled in ***Natraj Studios***[58] and ***Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd***[59] **("*Booz Allen*")**, the Supreme Court in ***Himangni Enterprises v. Kamaljeet Singh***

[55] (1981) 1 SCC 523
[56] Ranjit Kumar Bose v. Ananya Chowdhary (2014) 11 SCC 446
[57] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532
[58] (1981) 1 SCC 523
[59] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532

Ahluwalia[60] ***("Himangni Enterprise")*** still upheld the order rejecting the application under section 8 of the Arbitration Act seeking reference to arbitration. The Court's observation that the disputes in relation to the premises governed by the Transfer of Property Act, 1882 **("TPA")** would be triable by the Civil Court and not by the arbitrator, brought within their sweep, non-arbitrability of the disputes relating to lease/tenancy governed under the TPA.

A two-judge bench in ***Vidya Drolia v. Durga Trading Corporation***[61] ***(Vidya Drolia – 2019)*** held that ***Natraj Studios***[62] dealt with tenancy under the Rent Act and ***Booz Allen***[63] had made reference to special statutes and had not stated with respect to non-arbitrability of cases arising under the TPA. It was observed that everyone of the grounds, stated in section 111, read with section 114 and/or section 114-A of TPA are grounds which can be raised before an arbitrator to decide as to whether a lease has or has not been terminated[64]. In view of different interpretation of similar provisions of law in ***Himangni enterprises***[65] and ***Vidya Drolia -2019***[66], the matter was referred to a larger bench.

The larger bench decided in the ***Vidya Drolia-2020***[67] that the eviction of tenancy relating to matters governed by special statutes, where the tenant enjoys statutory protection against the eviction can be adjudicated only by the Courts/forums specified under the statute and such disputes are held to be non-arbitrable. If these special statutes do not apply to the property and the lease is created by an agreement containing an arbitration clause to deal with the disputes arising therein, the dispute between the parties would be arbitrable with no impediment to invoke the arbitration

[60] (2017) 10 SCC 706
[61] (2019) 20 SCC 406
[62] (1981) 1 SCC 523
[63] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532
[64] Vidya Drolia v. Durga Trading Corporation (2019) 20 SCC 406
[65] (2017) 10 SCC 706
[66] (2019) 20 SCC 406
[67] (2020) SCC OnLine SC 1018

clause.

It is further clarified in the subsequent judgment of ***Suresh Shah v. Hipad Technology India Pvt. Ltd.***[68]***,*** that in respect of a dispute between the landlord and tenant with regard to determination of the lease under the TPA, the landlord to secure possession of leased property is required to institute a suit in the Court which has jurisdiction. However, if the parties in the contract of lease or in such other manner have agreed upon the alternate mode of dispute resolution through arbitration, the landlord would be entitled to invoke the arbitration clause and make a claim before the Learned Arbitrator including an award of ejectment on the ground that lease has been forfeited and it would be open for the arbitrator to take note of section 114 and section 114-A of TPA and pass appropriate award in the similar manner as a Court would have considered that aspect.

13. **Copyright Disputes**

The Court allowed the application under Section 8 of the Arbitration Act to refer the dispute pertaining to copyright infringement.[69]

Following the ratio of ***Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya & Anr. (2003) 5 SCC 531,*** the bifurcation of the subject matter of the suit to refer the matter to arbitration was refused by the court in a copyright assignment case , wherein Satellite rights were, as per the Plaintiff, about to be exploited by the Defendants without paying the dues and the Plaintiff had filed the suit seeking permanent injunction restraining the Defendants, their men, agent, servant, distributor or anyone claiming under them from infringing the Plaintiff's copyright, particularly, the Satellite rights in Telugu

[68] (2021) 1 SCC 529
[69] G. Tandav Film Entertainment v. Four Frame Pictures (2009) SCC OnLine Del 3930

dubbing and remake of the movie in question[70].

Claimant's claim of royalties with respect to broadcasting of a soundtrack was held to be non-arbitrable upholding the submission of the Respondent that broadcast of a sound recording without the permission of the owner of the copyright in the literary work and/or musical work infringes the copyright in literary work and/or musical work and a declaration of that nature would entail a determination of the rights of the Respondent *in rem*[71].

Where authors had alleged infringement of copyright, the claim was held to be arbitrable and out of the jurisdiction of the Copyright Board in view of arbitration clause in the respective agreements holding that the Copyright Board is a quasi-judicial forum with limited jurisdiction and does not have the jurisdiction in relation to remedy for breach of moral rights, which lies only with the arbitrator[72].

The disputes pertaining to a Manufacturing Agreement were held arbitrable declining the Respondent's objection that they were not arbitrable being related to Copyright, a right in rem. It was elucidated that the Copyright disputes are not included in the category of non-arbitrable disputes given in ***Booz Allen*** [73].

The reliefs of decree in damages and injunction sought by the Plaintiff in respect of the disputes arising out of an agreement, relating to copyright protective material and providing the mode of resolution of disputes by arbitration was held to be arbitrable as a finding on the disputes would be a finding of a fact and not making an *order in rem*[74].

Where there are matters of commercial disputes and parties have

[70] R.K. Productions Pvt. Ltd. v. N.K. Theatres (2012) SCC OnLine Mad 5029
[71] IPRS v. Entertainment Network (2016) SCC OnLine Bom 5893
[72] Uday Chand Jindal v. Galgotia Publications Pvt. Ltd. (2017) SCC OnLine Del 10626
[73] Impact Metals v. MSR India (2016) SCC OnLine Hyd 278
[74] Eros International Media v. Telemax Links India (2016) SCC OnLine Bom 2179

consciously decided to refer them to a private forum, no question arises of those disputes being non-arbitrable and such actions are always *actions in personam*, being not against the world at large[75].

14. **Specific Relief Act Disputes**

Section 4 of the SR Act enumerates that Specific relief is granted only for the purpose of enforcing individual civil rights, and hence all actions under SR Act are *actions in personam*[76].

Thus, there is no prohibition in the SR Act that issues relating to specific performance of contract cannot be referred to arbitration. Likewise, there is no such prohibition contained in the Arbitration Act.[77] The rectification of a contract can be the subject matter of a suit for specific performance and can also be the subject matter of an arbitral proceeding.[78] Similarly, a relief of specific performance can be granted by an Arbitral Tribunal in respect of a dispute pertaining to a contract relating to an immovable property[79].

15. **Partnership Disputes**

Matters concerning partnership are held to be arbitrable. Disputes pertaining to accounts of the partnership firm are arbitrable[80].

In deference to the arbitration clause covering all matters, there was no principle of law or provision that bars an arbitrator from deciding whether the dissolution of a partnership is just and

[75] Ibid
[76] Deccan Papers Mills Co. Ltd. v. Regency Mahavir Properties (2020) SCC OnLine SC 655
[77] Olympus superstructure v. Meena Vijay Khaitan (1999) 5 SCC 651
[78] Deccan Papers Mills Co. Ltd. v. Regency Mahavir Properties (2020) SCC OnLine SC 655
[79] Olympus superstructure v. Meena Vijay Khaitan (1999) 5 SCC 651
[80] Mohammadali Mohammadhusain Gandhi vs. Universal Icon Builders and Ors. MANU/GJ/0255/2020

equitable[81].

16. **Industrial Disputes**

The disputes pertaining to the Industrial Dispute Act **("IDA")** are not arbitrable in nature[82]. The legislature has made provisions for the investigation and settlement of industrial disputes between the workmen and the management. The authorities constituted under the IDA have extensive powers. Labour Courts and Tribunals can lay down new industrial policy for industrial peace and order, or reinstatement of dismissed workmen, which no civil court can do. The provisions of IDA completely oust the jurisdiction of the civil court for trial of the industrial disputes. The intent of the legislature is to protect the interest of workmen and consumers in larger public interest in the form of special rights and by constituting a judicial forum with powers that a civil court or an arbitrator cannot exercise. Neither the workmen nor consumers can waive their right to approach the statutory judicial forums by opting for arbitration[83].

17. **Disputes under 'NPA Act' and 'DRT Act'**

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 **("NPA Act")** set out an expedient, procedural methodology enabling the financial institutions to take possession and sell secured properties for non-payment of their dues. Such powers cannot be exercised through the arbitral proceedings. However, prior arbitration proceedings are

[81] Ibid
[82] Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke of Bombay and Ors, (1976) 1 SCC 496
[83] Ibid

not a bar to the proceedings under the NPA Act[84].

The decision of full bench of Delhi High Court holding matters covered under the Recovery of Debts and Bankruptcy Act, 1993 **("DRT Act")** are arbitrable[85] was overruled by Supreme Court in ***Vidya Drolia-2020***[86] holding that non-arbitrability may arise in case the implicit provision in the statute, conferring and creating special rights to be adjudicated by the Courts/ public fora, which rights including enforcement of order/provisions cannot be enforced and applied in case of arbitration and thus observed that to hold the claims of the banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act.

18. **Disputes under Indian Trusts Act, 1882**

Disputes under the Indian Trusts Act, 1882 **("Trusts Act")** are non-arbitrable by necessary implication, as the Trusts Act has conferred specific powers on the principal judge of the civil court, which powers an arbitrator could not exercise[87]. The Supreme Court in case of ***Vidya Drolia – 2019*** has further held that:

"*Under Section 34 of the Trusts Act, a trustee may, without instituting a suit, apply by petition to a Principal Civil Court of original jurisdiction for its opinion, advice, or direction on any present questions respecting management or administration of trust property, subject to other conditions laid down in the section. Obviously, an arbitrator cannot possibly give such opinion, advice,*

[84] M.D. Frozen foods Exports Pvt. Ltd. v. Hero Fincorp Ltd., (2017) 16 SCC 741; India Bulls Housing Finance Ltd. v. Deccan Chronicle Holdings Ltd., (2018) 14 SCC 783; Vidya Drolia and Ors. v. Durga Trading Corporation, (2020) SCC OnLine SC 1018
[85] HDFC Bank Ltd. v. Satpal Singh Bakshi, 2013 (134) DRJ 566 (FB)
[86] (2020) SCC OnLine SC 1018
[87] Vimal Kishor Shah and Others v. Jayesh Dinesh Shah and Other (2016) 8 SCC 788

or direction. Under Section 46, a trustee who has accepted the trust, cannot afterwards renounce it, except, inter alia, with the permission of a Principal Civil Court of original jurisdiction. This again cannot be the subject-matter of arbitration. Equally, under Section 49 of the Trusts Act, where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, only a Principal Civil Court of original jurisdiction can control such power, again making it clear that a private consensual adjudicator has no part in the scheme of this Act. Under Section 53, no trustee may, without the permission of a Principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust property or any part thereof. Here again, such permission can only be given by an arm of the State, namely, the Principal Civil Court of original jurisdiction. Under Section 74 of the Trusts Act, under certain circumstances, a beneficiary may apply by petition to a Principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee, and the Court may appoint such trustee accordingly. Here again, such appointment cannot possibly be by a consensual adjudicator. It can only be done by a petition to a Principal Civil Court of original jurisdiction. Also, it is important to note that it is not any civil court that has jurisdiction, but only one designated court, namely, a Principal Civil Court of original jurisdiction. All this goes to show that by necessary implication, disputes arising under the Trusts Act cannot possibly be referred to arbitration[88].”

While dealing with the issue whether the disputes relating to affairs and management of the Trust including the disputes arising inter se trustees, beneficiaries in relation to their appointment, powers, duties, obligations, removal etc. are capable of being settled through arbitration by taking recourse to the provisions of the Arbitration Act, if there is a clause in the Trust Deed to that effect or such disputes have to be decided under the Trust Act with the aid of forum prescribed under the said Act, it was held that relevant

[88] Vidya Drolia v. Durga Trading Corporation (2019) 20 SCC 406

provisions of the Trust Act provides that the jurisdiction is conferred on the Civil Courts. The Court observed that though the Trust Act does not provide any express bar in relation to applicability of other Acts for deciding the disputes arising under the Trust Act yet there exists an implied exclusion of applicability of the Arbitration Act for deciding the disputes relating to Trust, trustees and beneficiaries through private arbitration[89]. The Supreme Court, thus, added one more category of cases, i.e., cases arising out of Trust Deed and the Trust Act, in the list of categories of cases specified as non-arbitrable in ***Booz Allen***[90].

19. **Disputes of a Charitable or Religious Trust**

Even though there are arbitration clauses, they cannot be applied to the suits filed under section 92 CPC pertaining to charitable or religious trust[91].

20. **Trademark & Patent Disputes**

Where the subject matter of the arbitration clause was the entire agreement, which in substance was an agreement authorizing use of the mark, names etc. which are essentially intellectual property matters, the court interpreting the agreement in a manner as to give efficacy by adopting a common-sense approach, held that the questions relating to intellectual property rights and obligation of confidentiality can be made subject matter of arbitration. [92]

However, in a suit for relief against infringement and passing off,

[89] Vimal Kishor Shah and Others v. Jayesh Dinesh Shah and Other (2016) 8 SCC 788
[90] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532
[91] Application No. 2019 of 2011 in C.S.(D)No.12244 of 2011, decided on August 11, 2011 by Madras High Court available at https://www.mhc.tn.gov.in/judis/index.php/casestatus/ju
[92] Ministry of Sound v. Indus Renaissance Partner (2009) SCC OnLine Del 11

the Bombay High court held that the rights to a trademark and remedies in connection therewith are matters *in rem* and by their very nature not amenable to the jurisdiction of an arbitrator, a private forum chosen by the parties.[93] Subsequently, a departure was taken from this observation by the same Court holding that between the two claimants to a copyright or a trademark in either infringement or passing off action, such action and remedy can only ever be an *action in personam* and not an *action in rem*[94].

"Patents, Trademarks and Copyright disputes are generally treated as non-arbitrable", the Supreme Court cleared the cloud in ***A. Ayyaswamy v. A. Paramsivam***[95].

Following the settled proposition of law that a right *in rem* is not arbitrable but subordinate right *in personam* derived from right *in rem* are arbitrable[96], it was held that the patent right may be arbitrable, the very validity of the underlying patent is not arbitrable[97].

CONCLUSION

The culmination of the above discussion is that the discernment of arbitrability of a subject matter is an important aspect to be looked into by the Courts while referring a matter for adjudication through arbitration. Similarly, in view of the scheme of the Act, it is also the duty incumbent upon the Arbitral Tribunal to ensure that they are proficient to adjudge the arbitrability/non-arbitrability of the disputes

[93] SAIL v. SKS Ispat and Power Ltd. (2014) SCC OnLine Bom 4875
[94] Supra Note 74.
[95](2016) 10 SCC 386
[96] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532; Vidya Drolia v. Durga Trading Corporation (2020) SCC OnLine SC 1018
[97] Lifestyle Equities v. QD Seatoman Designs (2017) SCC OnLine Mad 7055

referred to them.

The criteria and principles settled in ***Booz Allen*** and ***Vidya Drolia – 2020*** are guiding factors for Courts and Arbitral Tribunals for deciding arbitrability/ non-arbitrability of the subject matter of disputes. If they are followed in letter and in spirit, unwarranted and undesirable litigation apropos of arbitral disputes may be avoided to a great extent.

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