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Artificial Intelligence in Construction Contracts and Arbitration: Enforceability, Governance, and Institutional Readiness in Egypt

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Abdulrahman Kamal Mohammed is a Commercial and Contracts Manager specializing in construction contract governance, dispute resolution, and strategic commercial management across major development portfolios in the Middle East and Africa. With nearly a decade of professional experience, he has administered and advised on complex FIDIC-based contracts within mutli-billion-dollar hospitality, infrastructure, and mixed-use projects, working alongside sovereign entities, international consultants, and global operators.

His professional practice centers on contractual risk allocation, variation management, extension of time and prolongation analysis, claims strategy, and dispute avoidance mechanisms. He has been actively involved in arbitration support, mediation processes, and dispute adjudication board proceedings across regional institutional frameworks within the MENA region, contributing to case preparation, contractual analysis, and structured settlement strategies.

Kamal holds a Master of Science in Civil Engineering and a double-major MBA in Global Business Management and Finance. His academic research focuses on the intersection of artificial intelligence, contract governance, and arbitration, with particular attention to enforceability, regulatory alignment, and institutional readiness within civil law jurisdictions. His recent empirical work examines AI adopt on in construction contract management in Egypt, integrating Technology–Organization–Environment (TOE) modelling with sector-specific legal analysis.

An Associate of the Chartered Institution of Arbitrators (ACIArb), he contributes to professional and academic forums addressing construction law, digital transformation, and the evolution of dispute resolution frameworks in emerging markets.

Abstract

The integration of Artificial Intelligence (AI) into construction contract administration presents significant doctrinal and procedural challenges within civil law systems. While AI-assisted tools are increasingly deployed for clause drafting, compliance monitoring, delay analysis, and risk modelling, their legal status in arbitration remains under-theorised. This article examines the enforceability, evidentiary classification, and procedural implications of AI-assisted contractual processes within the Egyptian legal framework.

The study argues that AI-generated material cannot be treated as a neutral technological enhancement. Rather, its integration affects fundamental principles of consent, attribution, burden of proof, and due process. Particular attention is devoted to the classification of AI outputs in arbitral proceedings, the risk of epistemic opacity, and the potential annulment implications under Egyptian arbitration law and the New York Convention.

The article proposes a governance-oriented framework grounded in human attribution, methodological transparency, auditability, and institutional soft-law reform. It contends that without structured safeguards, AI risks undermining arbitral legitimacy through procedural asymmetry and enforcement vulnerability. By situating algorithmic contracting within civil law doctrine and regional arbitral practice, the study contributes to emerging scholarship on AI-compatible dispute resolution in construction-intensive emerging markets.

1. Introduction

The construction industry has historically relied on highly negotiated, risk-sensitive contracts characterized by complex allocation of obligations, layered subcontracting structures, and jurisdiction-specific amendments to international standard forms such as the FIDIC Conditions of Contract . These instruments operate not merely as technical documentation, but as calibrated mechanisms for distributing commercial and legal risk across multi-party project environments. In recent years, Artificial Intelligence (AI) systems have begun to enter this environment, offering automated clause analysis, compliance monitoring, predictive risk detection, and document standardization . While these tools promise operational efficiency and enhanced data management, their integration raises deeper legal questions regarding contractual validity, enforceability, and arbitral reliance.

The growing literature on algorithmic governance and AI-assisted decision-making emphasizes that technological automation is not normatively neutral . When applied to contractual processes, AI systems may influence drafting choices, risk allocation patterns, and dispute preparation strategies. In civil law jurisdictions such as Egypt, contractual legitimacy is grounded in principles of consent, authorship, and lawful cause . The increasing reliance on algorithmic outputs, particularly in drafting, risk assessment, and dispute preparation, therefore challenges traditional understandings of intention and human agency in contract formation and performance. The issue becomes even more acute when disputes arise and arbitral tribunals are required to assess the evidentiary weight of AI-assisted analysis or automated compliance records.

Simultaneously, arbitration across the MENA region has experienced

measurable growth in caseloads and dispute value, particularly within the construction sector . Institutions such as the Dubai International Arbitration Centre (DIAC), the Saudi Centre for Commercial Arbitration (SCCA), and the Cairo Regional Centre for International Commercial Arbitration (CRCICA) have reported increasing reliance on arbitration as the preferred mechanism for resolving high-value infrastructure and development disputes . As arbitration consolidates its position as the primary forum for construction conflict resolution, questions surrounding the admissibility, classification, and governance of AI-generated contractual material acquire heightened doctrinal significance.

Although international arbitration scholarship has extensively examined digital transformation, cybersecurity, and remote proceedings , comparatively limited attention has been directed to the intersection between AI-assisted contract administration and enforceability within civil law systems. This gap is particularly visible in emerging markets where technological adoption in commercial practice may outpace institutional adaptation.

This article examines the intersection between AI adoption in construction contract management and arbitral enforceability within the Egyptian legal framework. It argues that AI integration is not merely a technological enhancement but a doctrinal and institutional development requiring regulatory clarity, procedural safeguards, and structured human oversight. By situating algorithmic contracting within civil law theory and arbitration practice, the study proposes a governance-oriented approach capable of preserving legal accountability while accommodating technological innovation.

2. Civil Law Foundations and the Limits of Algorithmic Contracting

Under Egyptian civil law, contractual validity is predicated upon legally attributable consent between parties possessing capacity and juridical personality. Article 89 of the Egyptian Civil Code provides that a contract is concluded once two corresponding declarations of will are exchanged. Article 90 further requires that offer and acceptance coincide on essential terms. These provisions embed the classical civil law understanding that contractual obligation arises from conscious and attributable human intention, a principle deeply rooted in French-inspired voluntarist doctrine.

Consent must be free from vitiating defects. Articles 125–135 of the Civil Code recognize mistake, fraud, duress, and exploitation as grounds for annulment. These doctrines presuppose that contractual will is formed through human cognition and evaluative judgment. The law does not contemplate non-human actors as sources of binding intention. Artificial Intelligence systems, irrespective of their computational sophistication, lack legal personality and cannot independently generate juridical will.

The binding force of contract is further reinforced by Article 147(1), which provides that agreements lawfully concluded shall have the force of law between the contracting parties. This principle assumes that contractual allocation of risk and obligation reflects deliberate human agreement. Article 148 imposes the duty of good faith in performance, introducing an ethical and behavioral dimension to contractual execution. AI systems, however, cannot exercise good faith, nor can they bear responsibility for deviation from equitable performance standards.

The integration of AI into construction contract management therefore produces a doctrinal asymmetry. Algorithmic systems may draft clauses, identify risk

exposures, generate delay projections, or recommend amendments. Yet the Civil Code framework does not recognize algorithmic agency. Any clause drafted through AI-assisted processes must ultimately be attributed to the party adopting it. Liability for misallocation of risk, defective drafting, or misinterpretation cannot be displaced onto the technological system.

This structural limitation becomes particularly significant in construction contracts, where risk allocation is intricate and frequently negotiated through bespoke amendments to international standard forms such as FIDIC. If AI modifies indemnity provisions, liquidated damages thresholds, or variation mechanisms based on predictive modelling, the legal consequences remain humanly attributable. The deployment of AI does not alter the allocation of responsibility under Articles 147 and 148.

Moreover, in disputes concerning interpretation, Egyptian law prioritizes common intention over literal expression where ambiguity arises. Judicial and arbitral interpretation seeks the true intention of the parties rather than mechanical textual parsing. This interpretative doctrine, influenced by comparative civil law jurisprudence, reinforces the centrality of human intention in contractual analysis. AI systems trained on probabilistic language patterns may optimize textual coherence, but they do not embody contractual intention. Thus, while AI may assist in drafting or interpretation, it cannot substitute for juridical attribution of will.

The doctrinal conclusion is therefore clear: AI cannot contract; it can only assist contracting parties. Its outputs acquire legal relevance only through human validation. This principle establishes the first boundary of algorithmic contracting

in Egypt. Any future regulatory development must reconcile technological functionality with foundational doctrines of consent, capacity, attribution, and good faith.

3. Artificial Intelligence in Construction Contract Performance and Risk Allocation

The integration of Artificial Intelligence into contractual processes has generated increasing scholarly debate concerning the legal character of algorithmic participation in private ordering. While early discourse focused primarily on so-called "smart contracts" deployed through blockchain infrastructures, contemporary AI-assisted contracting raises a distinct set of conceptual questions. Unlike deterministic code-based smart contracts that execute predefined conditional logic, AI systems operate through probabilistic inference, pattern recognition, and machine-learning architectures that evolve through exposure to data. The legal implications of such adaptive systems are fundamentally different.

The prevailing position within civil and common law scholarship rejects the attribution of legal personality to Artificial Intelligence systems. Juridical capacity remains reserved to natural persons and legally recognized entities. AI systems, irrespective of autonomy in computational output, do not possess intention, volition, or normative consciousness. They operate through algorithmic optimization rather than purposive agency. Accordingly, contractual effects arising from AI-assisted drafting or decision-making must be attributed to the human or corporate actor deploying the system.

This principle of human attribution preserves doctrinal continuity. Contract law, particularly within civil law traditions influenced by French legal theory, grounds

obligation in expressed will and mutual assent. Egyptian jurisprudence reflects this classical voluntarist orientation. The idea that contractual obligations arise from meeting of minds presupposes intentional human participation. Even where contracts are standardized or heavily templated, courts and arbitral tribunals seek to identify attributable intent. Algorithmic output cannot displace this foundational premise.

However, the complexity introduced by machine-learning systems complicates attribution analysis. Traditional legal tools assume that drafting party can explain the reasoning underlying contractual text. In contrast, certain AI systems generate outputs through high-dimensional pattern recognition that may resist intuitive explanation. This phenomenon, frequently described as the “black box” problem, introduces epistemic opacity into contractual formation and administration.

Opacity raises two interrelated concerns. First, where parties rely on AI to allocate risk or modify clauses, they may lack full understanding of the probabilistic basis of such modifications. Second, in the event of dispute, evidentiary scrutiny may require disclosure of algorithmic logic that is technically complex or commercially proprietary. The tension between explainability and trade secrecy complicates procedural fairness in arbitration.

Scholars of algorithmic governance have argued that legal systems must distinguish between automation as tool and automation as authority. When AI functions as assistive technology, processing documents, flagging inconsistencies, or suggesting revisions, the human decision-maker retains normative control. However, where AI outputs are treated as determinative, automatically adjusting contractual obligations, calculating entitlements, or

recommending rejection of claims without substantive review, the boundary between assistance and substitution begins to blur.

The doctrinal risk lies not in the existence of AI systems, but in their epistemic authority. If contractual outcomes are shaped by computational inference that parties cannot meaningfully interrogate, the principle of informed consent may be weakened. Civil law theory demands that obligations arise from conscious acceptance of legal consequences. Over-reliance on opaque algorithmic optimization could produce asymmetry between textual agreement and subjective understanding.

Moreover, the deployment of AI in construction contracting intersects with theories of risk allocation. Construction contracts, particularly those based on FIDIC forms, distribute risk through calibrated mechanisms addressing delay, variation, force majeure, and payment certification. These mechanisms are not merely technical clauses; they reflect negotiated economic balance. If AI systems adjust such allocations based on predictive modelling without explicit deliberation, the normative foundation of contractual equilibrium may be altered without transparent negotiation.

This theoretical tension becomes more acute in high-value infrastructure projects where risk exposure is substantial and disputes frequent. The more economically significant the contract, the greater the scrutiny applied in arbitral proceedings. The introduction of algorithmic decision-support systems therefore necessitates doctrinal safeguards ensuring that computational efficiency does not erode accountability.

Another strand of scholarship examines whether AI-generated contractual content should be treated analogously to automated trading systems in financial markets. Courts addressing algorithmic trading have generally attributed outcomes to the deploying entity, even where unintended consequences arise from machine-learning processes. This approach reinforces the principle that technological complexity does not dilute legal responsibility. Applying similar reasoning to construction contracts suggests that parties remain fully accountable for AI-assisted drafting and administration decisions.

The concept of "algorithmic agency" has occasionally been proposed as a descriptive shorthand, but such terminology risks conceptual confusion. Agency in law entails representation, authority, and fiduciary obligation, attributes incompatible with non-sentient systems. Rather than conceptualizing AI as agent, it is more precise to treat it as instrumentality. The legal question then becomes one of supervision and control: whether the deploying party exercised reasonable oversight consistent with professional standards.

This supervisory dimension intersects directly with arbitration. Where disputes arise from AI-influenced decisions, tribunals must evaluate not the internal cognition of software, but the conduct of the party relying upon it. Did the party validate outputs? Were anomalies investigated? Was reliance reasonable in light of available information? These inquiries remain squarely within established doctrines of negligence, good faith, and contractual interpretation.

Consequently, the theoretical foundation of AI-assisted contracting within civil law systems rests upon three principles:

(1) non-recognition of machine legal personality;

(2) mandatory human attribution of contractual effects; and

(3) supervisory accountability for algorithmic deployment. These principles preserve doctrinal coherence while accommodating technological innovation.

The challenge for Egypt, and similarly situated jurisdictions, is not whether to adopt AI within commercial practice, but how to integrate it without destabilizing foundational legal concepts. Arbitration, as a dispute resolution mechanism grounded in party autonomy and procedural fairness, becomes the testing ground for this integration. The admissibility and weight of AI-generated material must reflect these theoretical constraints.

This theoretical framing sets the stage for examining how AI-assisted performance and evidentiary submission operate within Egyptian construction arbitration practice.

4. Artificial Intelligence and Arbitration: Evidentiary Status, Due Process, and Procedural Legitimacy

The integration of Artificial Intelligence into construction contract administration inevitably extends into arbitral proceedings once disputes arise. The central question is not whether AI-assisted material may be submitted, but how such material should be classified, scrutinized, and weighed within the arbitral evidentiary framework. Egyptian arbitration law, while procedurally flexible, was not drafted with algorithmic systems in mind. Consequently, doctrinal adaptation becomes necessary.

4.1 Classification of AI-Generated Material in Arbitral Proceedings

Under Law No. 27 of 1994 on Arbitration in Civil and Commercial Matters, arbitral

tribunals enjoy broad discretion in determining the admissibility and weight of evidence. Article 25 affirms that tribunals may conduct proceedings in the manner they deem appropriate, subject to party agreement and fundamental due process safeguards. This flexibility mirrors Article 19 of the UNCITRAL Model Law on International Commercial Arbitration.

However, flexibility does not eliminate the need for classification. AI-generated material may enter arbitral proceedings in several forms:

- AI-assisted delay analyses
- Automated compliance tracking reports
- Risk scoring outputs
- Clause extraction summaries
- Predictive modelling of quantum

The doctrinal difficulty lies in determining whether such material constitutes documentary evidence, expert evidence, or a hybrid category.

If treated as documentary evidence, AI outputs are simply processed project data. Their admissibility would depend on authenticity and relevance. However, where AI systems generate probabilistic assessments or infer causation, their function resembles that of expert testimony. Unlike traditional expert reports authored by identifiable professionals subject to cross-examination, AI systems lack a human declarant.

Arbitral practice traditionally requires that expert evidence be attributable to a qualified individual capable of explaining methodology and assumptions. If algorithmic outputs materially influence entitlement determinations, particularly in delay and disruption disputes, the tribunal must ensure that adversarial testing

remains possible. Treating AI outputs as self-validating documentary evidence risks bypassing methodological scrutiny.

Accordingly, AI-generated analyses that move beyond clerical aggregation and into evaluative inference should be treated analogously to expert material, requiring disclosure of methodology, data inputs, and limitations. Failure to adopt such classification risks procedural asymmetry.

This is not a call to exclude AI-generated material. Rather, it is a call to subject it to appropriate evidentiary discipline.

4.2 Burden of Proof and Standard of Proof in AI-Influenced Disputes

Construction arbitration frequently hinges upon the burden of proof. Parties asserting entitlement to extension of time or additional payment must substantiate causation, quantum, and compliance with contractual notice requirements. Egyptian arbitration practice follows the general principle that the claimant bears the burden of proving its claim.

The introduction of AI-assisted analysis does not alter this allocation. However, it may influence how evidence is structured and presented. For example, a contractor relying on algorithmic delay modelling to demonstrate critical path impact must still establish causation under the contractual framework. An AI-generated probability of delay attribution does not displace the need for legal reasoning linking contractual provisions to factual findings.

The standard of proof in civil arbitration is typically assessed on a balance of probabilities. Yet algorithmic outputs often express conclusions in statistical or probabilistic terms. A predictive model may suggest an 80% likelihood that

employer variation caused delay. Such quantification may appear persuasive but does not automatically satisfy juridical standards of proof.

Tribunals must therefore distinguish between probabilistic inference and legally sufficient evidence. Computational confidence levels cannot substitute for structured legal analysis. Where AI outputs are introduced, tribunals should require clarification of:

- Data sources used
- Assumptions embedded in modelling
- Margin of error
- Validation procedures

Absent such disclosure, reliance on algorithmic inference may undermine the integrity of fact-finding.

The assertive proposition advanced here is that tribunals should not treat AI-generated probability metrics as determinative without independent legal reasoning. Algorithmic support may inform, but cannot replace, adjudicative evaluation.

4.3 Due Process, Equality of Arms, and the Principle of Explainability

A foundational pillar of Egyptian arbitration law is procedural fairness. Article 18 of Law No. 27 of 1994 requires equal treatment of parties and full opportunity to present one's case. This principle reflects the broader international arbitration commitment to equality of arms.

The deployment of proprietary AI systems introduces potential asymmetry. One party may possess sophisticated algorithmic tools capable of processing vast

datasets, while the opposing party lacks comparable resources. If tribunals accept AI-generated analyses without ensuring explainability and access to methodological information, procedural imbalance may arise.

The “black box” problem, where algorithmic reasoning cannot be readily explained, poses particular concern. If a party cannot meaningfully interrogate how a conclusion was reached, its ability to challenge evidence is impaired. Procedural fairness requires that evidence be open to adversarial testing.

International arbitration scholarship increasingly recognizes that digital transformation must not compromise due process. While arbitral tribunals enjoy flexibility, that flexibility is bounded by fairness. Accordingly, a minimum standard of algorithmic explainability should be required where AI outputs materially affect the case.

Explainability does not require disclosure of proprietary source code. Rather, it requires sufficient transparency regarding methodology, categories of data considered, and logical structure of inference to permit adversarial engagement. Without such transparency, tribunals risk relying on opaque authority rather than reasoned persuasion.

4.4 Annulment Risk and Public Policy Review

The most significant doctrinal risk associated with AI-assisted arbitration arises at the enforcement stage. Under Article 53 of Law No. 27 of 1994, an arbitral award may be annulled if it violates public order or if procedural irregularities affected the award. Egyptian courts retain supervisory jurisdiction to review

awards on these limited grounds.

If an award appears to rely decisively on opaque algorithmic reasoning without affording parties meaningful opportunity for challenge, an annulment application could allege violation of due process. Moreover, if algorithmic processes embed assumptions inconsistent with mandatory statutory provisions, such as restrictions on penalty clauses or limitations on liability, the award could be challenged as contrary to public order.

While Egyptian courts traditionally adopt a restrained approach to annulment, they remain vigilant in safeguarding procedural fairness. The opacity of algorithmic reasoning may invite judicial skepticism, particularly where technical complexity obscures the tribunal's reasoning.

Beyond domestic annulment, enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards may raise parallel concerns. Article V(1)(b) permits refusal of enforcement where a party was unable to present its case. If reliance on non-transparent AI-generated evidence impaired adversarial engagement, enforcement challenges could emerge.

Accordingly, the integration of AI into arbitral proceedings is not merely a procedural curiosity; it carries enforceability implications. Tribunals that adopt structured transparency standards reduce the risk of post-award vulnerability.

The argument advanced here is measured but clear: arbitral tribunals seated in Egypt should adopt a principled approach to AI-generated material grounded in classification, burden of proof discipline, explainability, and enforcement

sensitivity. Such an approach preserves arbitration's legitimacy while accommodating technological innovation.

5. Institutional Readiness, Regulatory Gaps, and the Path Toward Structured Reform

While Egyptian arbitration law provides procedural flexibility aligned with the UNCITRAL Model Law, its normative architecture remains technologically neutral. Law No. 27 of 1994 was drafted in a pre-digital era and does not address algorithmic decision-support systems, data provenance standards, or computational transparency requirements. This silence does not prohibit technological use; however, it leaves doctrinal adaptation to tribunal discretion rather than institutional guidance.

The absence of explicit regulation produces what may be described as regulatory lag. Technological capability advances rapidly within commercial practice, particularly in large-scale construction projects where data volume and complexity incentivize automation. Yet arbitration frameworks evolve more cautiously, prioritizing stability and predictability. The resulting asymmetry places tribunals in the position of resolving disputes involving AI-assisted processes without codified evaluative standards.

Institutional readiness must therefore be assessed across three dimensions: procedural infrastructure, normative guidance, and judicial compatibility.

5.1 Procedural Infrastructure vs Normative Preparedness

Egypt's leading arbitral institution, the Cairo Regional Centre for International

Commercial Arbitration (CRCICA), has modernized its procedural rules and embraced digital case management. Similar developments are observable within regional institutions such as the Dubai International Arbitration Centre (DIAC) and the Saudi Centre for Commercial Arbitration (SCCA), which have adopted virtual hearing protocols and electronic filing systems.

These developments demonstrate procedural digitalization. However, digitalization of process is not equivalent to governance of algorithmic evidence. Virtual hearings and electronic submissions address logistics, not evidentiary integrity.

At present, neither CRCICA nor major regional institutions have promulgated structured guidance concerning AI-assisted submissions. There are no formal disclosure standards addressing algorithmic methodology, no soft-law protocols governing computational explainability, and no institutional commentary on classification of AI-generated material. This silence leaves parties and tribunals without predictable reference points.

Comparatively, certain jurisdictions have begun articulating digital evidence frameworks. While not specific to AI, such initiatives reflect recognition that technological mediation requires structured treatment. Egypt's arbitration ecosystem has yet to engage in this normative elaboration.

5.2 The Need for Soft-Law Instruments

Statutory amendment is neither necessary nor desirable at this stage. Arbitration thrives on flexibility, and rigid codification risks technological obsolescence.

Instead, reform may be achieved through institutional soft-law instruments.

Guidance notes issued by arbitral institutions can clarify expectations regarding:

- Disclosure of AI methodology
- Attribution of algorithmic outputs
- Classification standards
- Tribunal powers to appoint technical experts
- Procedural safeguards ensuring equality of arms

Such guidance would not bind tribunals, but would promote consistency and reduce unpredictability. Soft-law development has historically shaped arbitral practice in areas such as evidence-taking and conflicts of interest. A similar model could be adopted for AI-assisted processes.

This approach preserves party autonomy while signaling institutional awareness of technological evolution.

5.3 Judicial Compatibility and Enforcement Confidence

Institutional readiness cannot be evaluated solely within arbitral circles. Enforcement ultimately depends on national courts. Egyptian courts reviewing annulment applications focus primarily on procedural regularity and public order compliance under Article 53 of Law No. 27 of 1994. While courts traditionally adopt a deferential posture toward arbitral reasoning, opacity in algorithmic reliance may test that deference.

Judicial skepticism toward non-transparent technical processes is not unique to

Egypt. Courts globally remain cautious where automated systems influence legal outcomes without clear reasoning pathways. In the context of arbitration, the tribunal's reasoning must remain intelligible and attributable.

If arbitral awards begin incorporating references to algorithmic modelling without explanatory narrative, courts may question whether adjudicative reasoning was effectively delegated to software. Even if such delegation is illusory, perception matters in enforcement.

Judicial familiarization therefore becomes an element of institutional readiness. Continuing legal education initiatives addressing digital evidence, AI systems, and computational methodology would enhance enforcement confidence. The goal is not technical mastery by judges, but sufficient literacy to distinguish assistive analysis from adjudicative substitution.

5.4 Comparative Signals: Emerging Global Regulatory Trends

Although Egypt has not yet adopted AI-specific arbitration guidance, global regulatory developments offer comparative signals. The European Union's emerging regulatory framework for Artificial Intelligence emphasizes risk classification, transparency obligations, and accountability of deploying entities. While not directly applicable to arbitration in Egypt, such frameworks reflect growing international consensus that algorithmic systems require governance proportional to their impact.

Within international arbitration discourse, scholarly commentary increasingly addresses digital transformation, cybersecurity, and remote proceedings. Yet

structured engagement with AI-generated evidence remains nascent. Egypt therefore stands at an early but strategically advantageous stage: it can observe comparative developments and adopt calibrated reform rather than reactive codification.

The opportunity lies in proactive articulation of governance principles before contentious case law emerges. Institutions that anticipate technological shifts strengthen their credibility as modern dispute resolution forums.

5.5 A Measured Reform Agenda

The argument advanced in this article does not call for radical overhaul. Instead, it proposes a measured reform agenda built on five pillars:

- Affirmation of human attribution principle
- Adoption of minimum explainability standards
- Structured classification of AI-generated material
- Tribunal authority to request independent technical verification
- Judicial engagement through education and dialogue

Such reforms preserve doctrinal continuity while integrating technological functionality.

Institutional readiness is not measured by technological sophistication alone, but by the capacity to embed innovation within normative safeguards. Arbitration's legitimacy derives from enforceability, fairness, and predictability. AI-assisted processes must operate within those boundaries.

Egypt's arbitration framework possesses sufficient flexibility to accommodate these developments. What remains necessary is deliberate articulation of principles ensuring that algorithmic tools enhance rather than obscure legal reasoning.

The preceding analysis demonstrates that doctrinal coherence and procedural safeguards are necessary but not sufficient. What remains required is an articulated governance model capable of operationalizing these principles within arbitral practice.

6. Toward a Governance Framework for AI-Compatible Construction Contracting and Arbitration

The integration of Artificial Intelligence into construction contract administration requires a governance architecture capable of reconciling technological functionality with legal accountability. Reform should not seek to anthropomorphize AI or grant it juridical autonomy, an approach widely rejected in contemporary legal scholarship. Rather, governance must establish clear principles governing attribution, transparency, evidentiary discipline, and procedural fairness.

Technological integration in private ordering has historically been accommodated through adaptive doctrinal interpretation rather than radical statutory transformation. A similar approach is appropriate here: structured articulation of principles within existing legal frameworks.

6.1 Principle of Human Attribution

Any AI-assisted contractual determination must remain legally attributable to a natural or juridical person. Deployment of algorithmic tools cannot dilute responsibility under Articles 147 and 148 of the Civil Code. The binding force of contract and the duty of good faith remain human obligations.

Arbitral institutions and tribunals should explicitly affirm that AI-generated outputs constitute evidentiary aids rather than autonomous determinations. Such clarification prevents attempts to externalize liability onto software systems and preserves coherence with foundational doctrines of consent and accountability.

6.2 Mandatory Disclosure of Algorithmic Methodology

Where AI-generated analysis is submitted in arbitration, parties should disclose sufficient information regarding the system's function, input data categories, modelling assumptions, and validation processes to permit meaningful adversarial scrutiny. Procedural fairness under Article 18 of Law No. 27 of 1994 requires that parties be afforded full opportunity to present and challenge evidence.

Complete source-code disclosure may be commercially impractical and unnecessary. However, functional explainability is indispensable. Without transparency at the methodological level, cross-examination rights risk becoming illusory.

6.3 Auditability and Replicability Standards

Tribunals should retain express authority to request independent technical review where algorithmic outputs materially affect entitlement determinations. Auditability enhances evidentiary reliability. Replicability, whether through neutral expert appointment or supervised re-analysis, strengthens confidence in computational findings.

This approach aligns with established arbitral practice in complex technical disputes, where tribunal-appointed experts are routinely utilized to ensure neutrality and methodological integrity.

6.4 Distinction Between Assistive and Determinative Use

Governance reform should draw a principled distinction between:

- Assistive AI (document classification, clause comparison, data aggregation)
- Determinative AI (causation modelling, quantum calculation, entitlement scoring)

The latter category warrants heightened scrutiny given its substantive impact on rights and obligations. Treating both forms identically risks under-regulating systems with materially different normative consequences.

This distinction mirrors emerging regulatory frameworks internationally, which differentiate AI systems according to risk profile and impact intensity.

6.5 Institutional Guidance Notes

Arbitral institutions, including CRCICA, may consider issuing non-binding

guidance notes addressing AI-assisted submissions. Such notes would not constrain tribunal discretion but would promote consistency and transparency.

Soft-law instruments have historically shaped arbitral practice in areas such as conflicts of interest, evidence-taking, and procedural efficiency. A comparable instrument addressing AI-generated material would represent doctrinal continuity rather than innovation.

6.6 Judicial Familiarization and Training

Because enforceability ultimately depends on national courts, judicial education concerning algorithmic evidence becomes essential. Courts reviewing awards for procedural fairness must be equipped to distinguish assistive computational analysis from impermissible adjudicative substitution.

The objective is not technical mastery by judges, but institutional literacy sufficient to preserve enforcement confidence. Judicial familiarity strengthens arbitration's legitimacy in technologically mediated disputes.

7. Conclusion

Artificial Intelligence is reshaping construction contract administration with undeniable operational advantages. Automated clause extraction, predictive delay modelling, and data-driven compliance systems enhance efficiency and reduce informational asymmetry. Yet efficiency does not automatically translate into legal legitimacy.

Within Egyptian civil law, contractual validity remains anchored in human intention, attribution, and good faith. Within arbitration, procedural fairness, equality of arms, and reasoned adjudication remain indispensable.

AI cannot replace juridical agency. It can only augment it.

The future of construction contracting in Egypt will not depend on technological adoption alone, but on the development of governance structures capable of integrating algorithmic tools without compromising doctrinal coherence. Arbitration, as the preferred mechanism for resolving high-value construction disputes, occupies a critical position in this transition.

If left structurally unarticulated, AI risks remaining peripheral, trusted for administrative efficiency yet distrusted at the enforcement stage. If governed thoughtfully, it may enhance procedural clarity, improve risk allocation analysis, and strengthen institutional credibility.

The challenge, therefore, is not technological innovation but legal adaptation. Egypt's arbitration framework possesses sufficient flexibility to accommodate AI-assisted processes. What remains necessary is deliberate articulation of standards ensuring that algorithmic tools serve law rather than silently reshape it.

The evolution of Artificial Intelligence in construction contracts is not merely a technical phenomenon. It is a question of governance, accountability, and the future architecture of dispute resolution in emerging markets. The direction chosen now will determine whether algorithmic integration reinforces arbitration's

legitimacy, or gradually erodes it through opacity and doctrinal uncertainty.

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Legal and Judicial Analysis of Cross Border Insolvency Law

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ABSTRACT

At one point of time kings used to fight with each other to expand their kingdoms. In the present days of globalisation and mass trade corporate kings are fighting

with each other to expand their corporate kingdoms. This led to cross border trade and investment. With the advent of WTO, the World has become a global village and trade barriers across States vanished and new regulatory regime came into existence. Corporates expanded their business beyond territories by taking loans, financial aids etc. In the circumstances a question that may arise how to address when the debtor is unable to pay its debts and other liabilities as they become due. A range of interests needs to be accommodated by the legal mechanism. The present paper attempts to analyse the legal aspects of the cross-border insolvency, global practices and the Indian position.

INTRODUCTION

Insolvency and bankruptcy law is a form of social legislation that aim to provide relief to an individual, or a firm or a corporate person who for various reasons and circumstances committed default in paying back their debts and they are entitled to seek relief in accordance with the provisions of the law. At one point of time kings used to fight with each other to expand their kingdoms. In the present days of globalisation and mass trade corporate kings are fighting with each other to expand their corporate kingdoms. This led to cross border trade and investment. With the advent of WTO, the World has become a global village and trade barriers across States vanished and new regulatory regime came into existence. Corporates expanded their business beyond territories by taking loans, financial aids etc not only from domestic creditors and financial institutions but also from creditors and financial institutions in other jurisdictions. In the circumstances a question that may arise how to address when the debtor is unable to pay its debts and other liabilities as they become due or becomes insolvent or bankrupt. A range of interests needs to be accommodated by the legal mechanism. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve ease of doing business and facilitate more investments

leading to higher economic growth and development. It is therefore, customary to analyse the legal provisions relating to cross border insolvency.

GLOBALISATION - SOURCE FOR THE RISE OF CROSS BORDER INSOLVENCY:

Globalization has enhanced the involvement of companies in international business and cross border transactions. With greater integration of the world economy, instances of cross-border insolvency have risen. Modern day insolvency entangles legal regimes of more than one jurisdiction.

INSOLVENCY-WHAT IT IS:

The term “insolvency’ refers to a state of a person who has not sufficient means for payment of his debts. A person is said to “insolvent” who has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not. Insolvency may take place when an individual, corporation or other organisations cannot meet its financial obligations for paying debts as they are due.

CROSS-BORDER INSOLVENCY WHAT IT INVOLVES:

Cross-border insolvency involves shareholders, corporations and national courts of different States in various forms. First, the entity under insolvency proceedings may be a multinational corporation operating in different States, with management, presence and assets in different States. Second, the shareholders and other creditors may be located in different jurisdictions. Third, more than one court may have jurisdiction, due to the first two situations, thereby giving rise to multiple judicial proceedings in different States.

CROSS BORDER INSOLVENCY IS PRIMARILY THE DOMAIN OF PRIVATE INTERNATIONAL LAW:

The legal issues arising from cross-border insolvency primarily belong to the domain of private international law. However, in recent times, cross-border insolvency is arising under and giving rise to issues of public international law. Yet, the consequences of cross-border insolvency for public international law are unexplored. One of the reasons for the relative neglect of public international law towards matters of cross-border insolvency is the status of legal persons in public international law. In public international law, corporations are not treated as 'subjects' of international law, rather only 'objects, since they are neither created nor possess any obligations directly under public international law.

BARCELONA TRACTION CASE:

In this case the claim was brought before the ICJ by Belgium against Spain for wrongfully conducting insolvency proceedings against the company, Barcelona Traction. Barcelona Traction was incorporated in Canada. After the First World War, Belgian nationals obtained majority of shares of the company. The Company had issued bonds. However, it failed to pay dividends on the bonds and the bondholders-initiated bankruptcy proceedings in Spain. These were decreed and the Company was declared bankrupt. This case presents complex challenges to international law. The Court rejected Belgium's claim on the technical ground that there is a distinction between damage caused to a company and to its shareholders. In the instant case, the damage may have been caused to the company, but no damage to the shareholders had been shown.

ELSI PRINCIPLE:

In the ELSI case, a company called Elettronica Sicula S.p.A. was incorporated in

Italy and was controlled by two American companies, who were major shareholders in the company. The company had a plant for the production of electronic components. The Company was unable to repay its debts and its liabilities had exceeded one third of its revenues. Therefore, according to Italian laws, its equity had to be reduced and capital stock was devalued. This process had to take place one more time. There were efforts made by the American controlling companies to negotiate with the Italian Government to introduce an Italian buyer, so that the Company could do well. The negotiations failed, and the two American companies decided to liquidate the assets so that after repaying the debts, the Company would remain a going concern and attract an international buyer. Since the Company decided to dismiss employees, the Mayor of the town requisitioned the plant on the ground that dismissal of employees, would have terrible economic consequences. He entrusted the management to the Managing Director of the Company with a directive to preserve the machinery. The requisition order did not take away the control of the American companies. After analyzing the facts, the International Court of Justice concluded that liquidation was not realistic and the Company could not have repaid its debts. The Court upheld the requisition order and the bankruptcy proceedings in Italian Courts on the ground that there were matters of domestic law and its application in which the Court could not intervene. Also, the United States had failed to prove otherwise.

INSOLVENCY PROCEEDINGS AREALSO MATTER OF DOMESTIC LAW

Insolvency proceedings were a matter of domestic law. It is difficult for an international tribunal to interfere with the findings of the domestic courts unless there are situations of denial of justice. In the case of ELSI since the workforce had occupied the plant, the United States argued that this amounts to violation of

Full Protection and Security provision in the FCN treaty. The Court rejected the argument because every act of occupation or disruption of possession could not amount to violation of the Full Protection and Security clause. In this case the American argument that the proceedings amounted to taking or indirect expropriation was rejected, because the Company was not in a position to repay its debts and its bankruptcy was not a consequence of the actions of the Italian Government. The argument of arbitrary actions was rejected on the ground that similar proceedings were initiated against various similarly placed Italian companies. It was not established that ELSI was singled out for the purpose of these proceedings. Since there was nothing in the bankruptcy order that could shock the conscience of the Court, it could not be argued that the actions of the Italian authorities were arbitrary and therefore contrary to the rule of law.

NEED TO ADDRESS INSOLVENCY:

An insolvency law will need to provide for an institutional framework for its implementation. Since the adjudication of disputes is a judicial function, insolvency proceedings should be conducted under the authority of a court of law where judges will, at a minimum, be required to adjudicate disputes between the parties on factual issues and, on occasion, render interpretations of the law. The judiciary will only be able to fulfil this function if it is made up of independent judges with particularly high ethical and professional standards.

Insolvency should be addressed and resolved in an orderly, quick and efficient manner, with a view to avoid undue disruption to the business activities of the debtor and to minimizing the cost of the proceedings. Achieving timely and efficient administration will support the objective of maximizing asset value, while impartially supports the goal of equitable treatment. The entire process needs to

be carefully considered to ensure maximum efficiently without sacrificing flexibility. At the same it should be focused on the goal of liquidating non-viable and inefficient business and the survival of efficient potentially viable business.

QUICK AND ORDERLY RESOLUTION:

Insolvency should be addressed and resolved in an orderly, quick and efficient manner, with a view to avoiding undue disruption to the business activities of the debtor and minimize the cost of the proceedings. Achieving timely and efficient administration will support the objective of maximizing asset value, while impartially supports the goal of equitable treatment. Quick and orderly resolution of a debtor's financial difficulties can be facilitated by an insolvency law that provides easy access to insolvency proceedings by reference to clear and objective criteria, provides a convenient means of identifying, collecting, preserving and recovering assets and rights that should be applied towards payment of debts and liabilities of debtor, facilitates participation of the debtor and its creditors with the least possible delay and expense, provides and appropriate structure for supervision and administration of proceedings and provides ,as an end result, effective resolution of the debtors' financial obligations and liabilities .

ASPECTS OF CROSS BORDER INSOLVENCY:

Usually, a situation concerning cross-border insolvency arises when the debtor has assets or creditors in different jurisdictions or when different insolvency proceedings have been filed in multiple jurisdictions. As such, the mechanism pertaining to cross-border insolvency is primarily focused towards regulating the insolvency proceedings that operate much beyond the realm of domestic jurisdiction and the constraints therein. Broadly speaking, the following aspects

are involved in a cross-border insolvency:

(i) Equal protection of the interests of domestic and foreign creditors;

(ii) Safeguarding the value of the assets of a debtor, which are located in different jurisdictions;

(iii) Coordination and cooperation amongst courts and judicial authorities in various jurisdictions and the domestic laws applicable therein;

(iv Uniformity in the insolvency law and practices of different jurisdictions.

INTERNATIONAL CONVENTIONS:

INSOL PRINCIPLES:

INSOL-International is a worldwide federation of national organizations of accountants and lawyers specialized in the broad field of insolvency and insolvency law. The principles are jurisdiction neutral and are applicable in any jurisdiction.

INTERNATIONAL BAR ASSOCIATION -CROSS BORDER INSOLVENCY CONCORDAT, 1995:

The Section on Insolvency, Restructuring, and Creditor's Rights (SIRC), a section of the legal practice division of IBA has been actively involved in international insolvency law for over 30 years. The CONCORDT was officially approved in 1996 by the IBA Council. It is presented as a temporary measure. There are several other international conventions dealt with the subject.

THE AMERICAN LAW INSTITUTE'S TRANS-NATIONAL INSOLVENCY PROEJCT: CO-OPERATION AMONG NAFTA COUNTRIES:

The NAFTA was signed in December 1992 and entered into force on 1 January 1994. All Rules concerning cooperation among NAFTA countries focus on

insolvency of corporations and other legal entities engaged in 'commercial operations' and exclude insolvency of natural persons. Furthermore, Rules regarding insolvency of non-profit and financial institutions fall outside the Scope.

NORDIC BANKRUPTCY CONVENTION:

It was concluded in 1933 between Denmark, Finland, Iceland, Norway and Sweden. The foundation for the convention was the similarity of the legal systems of these countries and the conformity in their approach to insolvency law. The convention is based on in principle, on the universality of insolvency proceedings opened in one of the States within its own territory. The convention is only applicable to declaration of bankruptcy for natural persons and legal persons. Liquidations and corporate re-organisations do not fall within its scope. The Convention also applies to the public liquidation of banks in so far as such liquidation precludes bankruptcy proceedings in accordance with the law of the State in which the bank is situated.

EU CONVENTION OF INSOLVENCY PROCEEDINGS, 1996:

The EU Convention on insolvency proceedings was open for signature between 23 November 1995 and 23 May 1996. It is followed by European Insolvency Regulations.

UNCITRAL MODEL LAW 1997:

The UNCITRAL Model Law has been strongly recommended for providing a wide-ranging solution for resolving cross-border insolvency issues. The international aspects of insolvency proceedings have been acknowledged by the World Bank, which has further noted that the insolvency laws should provide for rules of jurisdiction, choice of law, cooperation amongst courts of different

countries and recognition of foreign judgments. Further, the IMF encourages the adoption of the UNCITRAL Model Law as the same would provide for an effective means of reducing the difficulties faced in cross-border disputes and further in achieving cooperation and coordination amongst courts and concerned authorities in different jurisdictions.

SCOPE OF UNCITRAL MODEL LAW:

The Scope of the Model Law is mainly limited to some procedural aspects of Cross-border Insolvency cases. Furthermore, the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting state. The Purpose of the Model Law is to provide effective mechanism for dealing with cases of cross-border insolvency.

GOVERNING PRINCIPLES OF UNCITRAL MODEL LAW:

The four main principles governing the UNCITRAL Model Law are: Access, Recognition, Cooperation and Coordination. It aims to provide the foreign professionals and creditors with a direct access to domestic courts, which in turn enables them to participate and/or commence domestic insolvency proceedings against the concerned debtor. In terms of recognition, the UNCITRAL Model Law accounts for the recognition of foreign proceedings in domestic courts and enables the courts to accordingly determine the relief to be granted. Further, the UNCITRAL Model Law provides for bringing about effective cooperation between insolvency professionals and courts of different countries and also ensuring coordination so as to efficiently manage the conduct of concurrent proceedings in different jurisdictions

INTENT OF UNCITRAL MODEL LAW:

The intent of the UNCITRAL Model Law seems is to assist States to mould their insolvency laws in a modern, harmonised and fair framework so as to address the instances of cross border insolvency more effectively. It respects the differences in various national laws and primarily focuses on improving cooperation and coordination between countries, instead of attempting to unify the national laws. It proposes recognition of foreign proceedings.

PROMOTION OF UNIFORMITY IN APPLICATION, ACCESS TO FOREIGN REPRESENTATIVE, PARTICIPATION IN LOCAL COURTS & ACCESS TO CREDITORS:

The main object of the UNICITRAL model law is to promote uniformity in application, access to foreign representation and participation in the proceedings before the local courts. Article 8 of the Model Law provides that in the interpretation of the law, regard is to be had to its intentional origin and to the need to promote uniformity. Article 9 entitles a foreign representative to apply directly to a local court. Article 11 entitles a foreign representative to commence a proceeding under the local insolvency laws if the creditors for commencing proceedings are otherwise met. Under article 12 upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a local insolvency proceeding of debtor. Article 13 permits access to the foreign creditors to the courts of the enacting State or participate in local insolvency proceedings

RECOGNITION OF FOREIGN PROCEEDINGS:

The UNICTRAL model law also emphasizes on recognition of foreign proceedings. Under the provisions of the model law an application for recognition and presumption of authenticity of the application is to be filed . Article 20 provides that upon recognition of a foreign proceedings certain automatic relief

ensures stay of execution, suspension of the debtors right to transfer the assets etc. Article 21 allows the court to grant discretionary relief upon a recognition of a foreign main proceeding. Article 22 requires the court to be satisfied that the interest of the creditors and other interested persons are adequately protected while granting the relief under Article 21. Article 27 contains a non-exclusive list of the types of cooperation which may be helpful to the states where cross border cooperation has traditionally been limited.

HOTCH POT -RULE:

It is a principle established under UNICTRAL Model law to avoid un-due enrichment. It is a kind of subrogation. Article 32 establishes the 'Hotch Pot Rule', which requires that before a Creditor can lodge a proof and receive dividend in local insolvency proceedings, it must account for what has been obtained abroad.

POSITION IN OTHER JURISDICTIONS:

The issue of cross-border insolvency has been emerging under several jurisdictions, due to an increase in transnational transactions and establishment of various branches and offices in different countries. Recognition of foreign proceedings has assumed prime importance in an effective cross-border insolvency regime. While the Indian courts do recognize foreign judgments and decrees of some reciprocating countries such as the UK and Singapore, no recognition has been accorded to foreign proceedings, particularly with regard to insolvency proceedings such as reorganizations.

AUSTRALIA:

In 2002 the Common wealth department of Treasury Published the Corporate Law Economic Reform Program Proposals for reforms of Cross Border

Insolvency. In February 2008 the Cross Border Insolvency Bill 2008 was introduced. It was finally passed in May 2008. The purpose of the law is to provide effective mechanisms for dealing with cases of cross border insolvency. Recognizes foreign proceedings and relief.

CANADA:

Canadian insolvency legislation was amended in 1997 to include provisions that would provide an equitable balance between local and foreign creditors and permit Canadian Courts to facilitate Multinational Insolvencies. Prior to 1997 the Companies Creditors Arrangement Act, (CCAA) contained no provisions dealing with international insolvencies. The Act was amended in 1997 to address the gap in the legislation. Companies Creditors Arrangement Act, (CCAA) 1985 incorporated the Model law into Canadian Insolvency law in 2003. The current international insolvency provisions of the CCAA are extremely flexible and provide Canadian Court with the ability to harmonize cross-border proceedings.

UK (ENGLAND)

UK Parliament enacted Section 14 of the Insolvency Act, 2000 to enable the secretary of State to implement the Model Law-with or without modification by secondary legislation. By exercising the said power under section 14 Cross Border Insolvency Refutations, 2006 are made. The Regulations came in to force on April 4 2006 and apply to Great Britain only. Model law is set out in Schedule –I. The Regulations are mirror of Model Law.

JAPAN:

Prior to the reforms Japanese insolvency laws strictly adhered to the concept of territoriality. The Bankruptcy law enacted in 1922, dealt only with liquidation

proceedings. The Corporate Reorganization law, enacted in 1952 specially excluded a debtor's foreign assets from the reach of domestic proceedings. In 1996 the Japanese Government began series of reforms that coincided with the Model Law. Japanese Civil Rehabilitation Law came into effect in 2000 recognizing foreign insolvency proceedings. The Corporate Reorganization Law and the Bankruptcy Law were then amended in 2002 and 2004 respectively. Model law is not embodied in its totality in a single law and all of Japan insolvency laws are to be examined.

NEW ZEALAND:

The Law Commission recommended that New Zealand adopt the model law and proposed draft legislation in that report. In February 1999 the New Zealand Law Commission published a report on the question of New Zealand should adopt the model law. The New Zealand Government agreed to adopt the UNCITRAL Model Law in August 2001. The pertinent legislation, the Insolvency (Cross Border) Act, 2006 was enacted on November 7, 2006.

SOUTH KOREA:

After the 1997 financial crisis the South Korean Government reformed the Nation's bankruptcy law by revising the Corporate Reorganization Act, The Composition Act, and the Bankruptcy Act. In 2000 the legislature prepared a comprehensive Bankruptcy Bill and a new Bankruptcy Statute-The Debtor Rehabilitation and Bankruptcy Act- was passed in 2005 (Effective from April 2006). Chapter 5 of the Act adopts Model Law. However, certain provisions of the Model law have not been adopted for local reason.

UNITED STATES OF AMERICA:

The United States formally incorporated the Model Law virtually intact into its bankruptcy law with effect from October, 17 2005. In doing so the US Congress took the highly unusual step of creating an entire new Chapter of the US bankruptcy Code replacing the former single Section 304 with a 32 Section Chapter. The Objectives of Chapter 15 are virtually identical to those outlined in the Model law. A centralized mechanism to determine whether a foreign proceeding should be entitled to recognition and access to comity and cooperation with the United States. Chapter 15 is also intended to afford non-US proceeding swifter, less subjective, more certain and predictable relief in the US in aid of effectuation and implementation of the foreign proceeding.

CROSS BORDER INSOLVENCY REGIME IN INDIA:

In India, the primary legislation governing insolvency and bankruptcy is the Insolvency and Bankruptcy Code, 2016 ("the Code"). However, even though the Code has made strides in drastically harmonising the insolvency process in India, it does not account for a sufficient procedure to regulate cross-border insolvency proceedings. The Code offers two provisions that assist in cross-border insolvency disputes i.e. Section 234 and Section 235. Section 234 of the Code empowers the Central Government to enter into bilateral agreements with other countries for purposes of enforcing the Code. Section 235 of the Code empowers the adjudicating authority under the Code to issue a letter of request to a court in a country in which an agreement under Section 234 has been entered into, to deal with assets situated in that country in a specified manner.

LIMITATIONS OF THE PRESENT LEGAL FRAMEWORK:

As such, the present legal system governing cross-border insolvency in India, comes nowhere even close to addressing the real issues associated with the

process and has many drawbacks, including but not limited to the select few listed below:

(i) Though Section 234 and Section 235 of the Code have been notified no steps have been taken to implement them. Therefore, the development of a cross-border insolvency regime is mostly still up in the air and not many positive steps have been taken in that regard.

(ii) India's willingness and ability to negotiate and then enter into bilateral treaties with foreign governments is one of the pre-requisites for the smooth functioning of cross-border insolvency. The burdensome nature of the tasks involved and the time required in negotiating and finalizing such treaties cannot be undermined.

(iii) There exists no procedure to deal with cross-border insolvency issues in a scenario where the assets or creditors of the debtor are situated in a country with which no bilateral treaty has been affected.

(iv) Further, there's not much guidance on the process and options available to insolvency professionals to avail evidence etc. in a case where the assets of an Indian debtor are located in a different jurisdiction.

(v) The Civil Procedure Code, 1908 provides for a mechanism for enforcing foreign judgments, however the same is not broad enough to include all insolvency orders, for example, orders regarding reorganization processes, administrative order etc. Moreover, procedural and jurisdictional issues such as parallel proceedings, coordination, cooperation, etc. remain unaddressed by the present system concerning cross-border insolvency cases.

INSOLVENCY LAW COMMITTEE REPORT:

The Insolvency Law Committee Report (ILC, 2018) has stressed the need for a broader Cross-border insolvency framework and has proposed a Draft Part Z, which is based on the UNCITRAL Model Law on Cross-border Insolvency and its provisions for adaptation in India. ILC Report identifies some key challenges that need to be addressed comprehensively. The draft Law states that the adjudicating authority may refuse action under the Cross-border provisions of the law if implementation of such action would be "manifestly contrary to public policy". The ILC has suggested adoption of the reciprocity principle in the initial stages of implementation of the Cross-border insolvency framework.

CENTRE OF MAIN INTEREST (COMI):

The ILC Draft provides a rebuttable presumption that the place of registered office of a corporate person be considered its COMI. Other factors to be considered for establishing COMI include assessment of the place of central administration of the corporate debtor and the easy ascertainment of such place by third parties, including creditors. It further provides that the Adjudicating Authority will conduct an assessment of where the corporate debtor's central administration takes place in order to determine the corporate debtor's COMI. Such assessment might also include factors as prescribed by the Central Government and should be carried out in a manner that is ascertainable by third parties, including the creditors of the corporate debtor. A look at the global best practices suggests that while these presumptions are common across jurisdictions, most jurisdictions have, over time, adopted indicative factors which may provide further clarity on the issue of determining COMI.

FACTORS THAT DETERMINE COMI:

Factors considered in practice, in determining the COMI and rebutting the presumption of the registered office being the COMI, include identifying the location where the following are found / controlled from:

(a) internal accounting functions;
(b) treasury management;
(c) law governing the main contracts;
(d) business relations with clients;
(e) lenders;
(f) human resources functions and employees;
(g) purchasing control;
(h) contract pricing control;
(i) strategic control;
(j) IT systems;
(k) domicile of directors;
(l) board meetings;
(m) general supervision;
(n) corporate identity and branding; and
(o) restructuring negotiations with creditors (Re Euro food IFSC Ltd)

POSITION OF COMI IN EU:

The EU also contains a presumption similar to that mentioned in India. It holds the presumptions that the registered office is the center of main interest and such presumption should be rebuttable. However, it is possible to rebut this presumption by:

(a) assessing whether the company's central administration is located in a place other than that of its registered office, and

(b) whether it is ascertainable by third parties, that the company's actual center of management and supervision and of the management of its interests is located in another jurisdiction.

These two factors assist in determining the COMI of the corporate debtor.

POSITION IN UNITED STATES:

Chapter 15 of the US Bankruptcy Code also contain a presumption similar to that suggested by the ILC. However, the United States Bankruptcy Court of New York has developed a widely adopted list of COMI factors, which include:

- Location of the debtor's headquarters;
- Location of those who actually manage the debtor;
- Location of the majority of the debtor's creditors or of a majority of creditors who would be affected by the case in question; and / or
- The jurisdiction whose law would apply to most disputes concerning the debtor

KEMSLEY VS. BARCLAYS BANK, CASE -DETERMINATION OF COMI:

"Forum Shopping" is an extensive practice that is followed by debtors to get their cases heard in a different country wherein the court is more likely to provide a favorable judgment. Historically, foreign litigants are attracted to the US because of its favorable litigation environment. Kemsley, an English businessman whose principal place of business was in the UK, obtained a loan from Barclays Bank and several other banks during the course of his business. In 2009, when Kemsley's business collapsed in the UK, he moved to the US in the same year. He also led for Bankruptcy under the UK jurisdiction and subsequently, the UK representatives led a Chapter 15 petition with the New York Bankruptcy Court, seeking recognition as a "Foreign Main Proceeding". If the petition would be

granted, the UK representatives would be granted the right to investigate Kemsley's assets in the US. By the time the insolvency proceedings could be initiated, Kemsley had permanently relocated to the US and had commenced his business. Additionally, Kemsley did not have a place of establishment in the UK. Since a “look back” period was not provided in the judgment of COMI, wherein Kemsley's former activities could be taken into account, US courts denied UK's rights to be a foreign main proceeding. Doing so, the COMI was established in the US and thus, the New York Bankruptcy Court maintained full control of the insolvency proceedings.

EUROFOOD INSOLVENCY CASE:

The Eurofood Insolvency case evaluates the Model Law's presumption of Centre of Main Interest as the “Registered Office” and is hailed as a prototype for Insolvency cases pertaining to the classification of COMI. Several factors are explored vis-à-vis the Eurofood Insolvency case which emphasize that the position of COMI is not limited to “Registered Office”. Eurofood was a subsidiary of the international dairy conglomerate, Parmalat. Parmalat was based in Italy and had operations in 30 countries, whereas Eurofood was its subsidiary, located in Ireland. Eurofood was a shell company whose principal purpose was to obtain financing for Parmalat's Venezuelan & Brazilian subsidiaries. It had no employees of its own and its day-to-day processes were managed by Bank of America, which was also its prime creditor.

In 2003, when Parmalat was hit by a deep financial crisis, Bank of America led an “Involuntary Winding up Case” for Eurofood in Ireland and insolvency proceedings were commenced under the Irish Law. However, Parmalat's official administrator also led insolvency proceedings for Eurofood under the Italian law.

Both countries assumed COMI on the basis of the following facts:

(i) Eurofood was a subsidiary of the international dairy conglomerate;

(ii) Parmalat. Parmalat was based in Italy and had operations in 30 countries;

(iii) whereas Eurofood was its subsidiary, located in Ireland;

(iv) Eurofood was a shell company whose principal purpose was to obtain financing for Parmalat's Venezuelan & Brazilian subsidiaries;

(v) It had no employees of its own and its day-to-day processes were managed by Bank of America, which was also its prime creditor.

Based on the elements of the case, ECJ ruled in favour of Ireland and recognized it as the Centre of Main Interest. It is imperative to note that the “Registered Office” assumption was not the only factor taken into consideration while determining COMI.

RECOGNITION OF PROCEEDINGS-PUBLIC POLICY EXCEPTION:

While recognition of proceedings is at the crux of the adoption and implementation of the Model Law, most jurisdictions provide for an exception to such recognition owing to public policy concerns. This exception has been recognized in the Model Law itself and has been adopted in the ILC Draft. The ILC Draft states that the adjudicating authority may refuse action under the cross-border provisions of the law if implementation of such action would be "manifestly contrary to public policy". While the exception has been established, no guidance has been provided as to the meaning of the phrase 'manifestly contrary to public policy'. While it is admitted that developing jurisprudence under the proposed law will aid interpretation of the phrase, in the initial stages, reference may be made to existing public policy exceptions under other domestic laws.

JUDICIAL ANALYSIS OF CROSS BORDER ANALYSIS IN INDIA:

RAJAH OF VIZIANAGARAM V. OFFICIAL RECEIVER, VIZIANAGARAM:

It is a significant landmark decision in Indian corporate insolvency law. The central issue was whether foreign creditors could prove their claims and be included in the official receiver's certificate during the winding up process. The Rajah of Vizianagaram opposed the inclusion of foreign creditors' claims in the winding up proceedings of the Vizianagaram Mining Company. The Hon'ble Supreme Court held that foreign creditors are not barred from proving their claims and can be included in the list of creditors during winding up proceedings. This decision upheld the principle that foreign creditors are not treated differently from Indian creditors in the context of winding up.

JET AIRWAYS –A CASE OF PARALLEL PROCEEDINGS:

State Bank of India filed Section 7 application against Jet Airways, upon the admission of which the Corporate Insolvency Resolution Process ("CIRP") of Jet Airways was commenced on June 20, 2019. National Company Law Appellate Tribunal ("NCLAT") gave a ruling, consequent to which Jet Airways (India) Limited ("Jet Airways") became the first Indian company to be subjected to cross-border insolvency. The adjudicating authority was aware of the fact that a Dutch Court had already initiated insolvency proceedings and a Bankruptcy Administrator was appointed in Netherlands to take charge of Jet Airways' assets located therein. The same was done at the instance of a bankruptcy petition which was filed by two European creditors against Jet Airways for claims of unpaid dues amounting to nearly INR 280 crores. The European creditors were seeking the seizure of one of the Jet Airways' Boeing 777 aircraft as the same was parked in the Schiphol Airport in Amsterdam.

In this case the primary issue that was considered was pertaining to the jurisdiction of the courts in Netherlands to adjudicate upon and pass suitable orders in the matter relating to the bankruptcy of Jet Airways which is registered and incorporated in India. Subsequent to Jet Airways' admission to CIRP in India, the Bankruptcy Administrator appointed by the Dutch Court moved the National Company Law Tribunal, Mumbai Bench ("NCLT") praying for the recognition of the insolvency proceedings in the Netherlands. The Administrator also requested the NCLT to withhold the CIRP on account of the ongoing bankruptcy proceedings against Jet Airways. However, the NCLT refused to withhold the Indian insolvency proceedings. The basis provided for the same was that Section 234 and Section 235 of the Code, deal with cross-border insolvency and they were not yet brought into effect. Hence, the NCLT held that in absence of such a law, the Bankruptcy Administrator was barred from participating in the Indian insolvency proceedings and further declared that ongoing proceedings in Netherlands were null and void.

JET CASE APPEAL BEFORE NCLAT:

The Bankruptcy Administrator, being aggrieved by the NCLT's decision, moved an appeal against the same in the NCLAT. As such the NCLAT allowed the appeal in the following manner:

- NCLAT set aside the order passed by the NCLT upon an assurance being provided by the Bankruptcy Administrator that it would not alienate any offshore assets of Jet Airways.
- NCLAT allowed the Bankruptcy Administrator to cooperate with the Resolution Professional as appointed under the Code and also to participate in the meetings of the Committee of Creditors, however only to the extent of observing and preventing any likely overlap of powers.

- Further, the NCLAT ensued cooperation between the Indian parties and the Dutch counterpart in order to finalise a resolution plan that would be in the best interest of the Jet Airways and all its stakeholders

CROSS BORDER INSOLVENCY PROTOCOL FOLLOWED IN JET CASE:

Pursuant to the directions of the NCLAT, the Resolution Professional under the Code and the Bankruptcy Administrator, which was appointed by the Dutch Court, mutually agreed upon a "cross-border insolvency protocol" which was essentially construed on the basis of the principles provided in the UNCITRAL Model Law. Thereby, India was recognised as the "centre of main interest" and the proceedings being held in Netherlands were taken as the "non-main insolvency proceedings". Therefore, the case of Jet Airways presents itself to be an interesting study relevant to the legal position pertaining to cross-border insolvency proceedings in India as it highlights an earnest attempt by the Indian judiciary to be a front-runner in evolving principles and effecting mechanisms to deal with cross-border insolvency proceedings.

STATE BANK OF INDIA V. SEL MANUFACTURING CO. LIMITED

This case posed a formidable question about the status of foreign creditors during CIRP. In its dispute resolution, NCLT adhered to the principle ‘nemo debet esse judex in propria causa’ (no one should be a judge in their own cause) to ensure independent adjudication for creditor claims under CIRP. Proceedings concluded on characteristics of ‘fiat justitia ruat caelum’ ("let justice be done though the heavens fall") thereby framing normal treatment for foreign creditors.

United Bank of India Vs. Kingfisher Airlines Limited & Vijay Mallya highlighted the critical problems arising from foreign creditors and properties abroad. While

proceedings to effect resolution in India under the IBC concerned domestic claims, international creditors could not use the redress mechanisms without hitting procedural walls. The courts, however, invoked the maxim actus curiae neminem gravabit which, if put to work, meant that procedural gaps should not cause any injustice to foreign creditors.

In Macquarie Bank Vs. Shilpi Cable Technologies Limited it was a matter concerning a foreign petitioner who made an application for initiation of corporate insolvency resolution process, but the national company law tribunal and later on the national company law appellate tribunal declined to accept such petition due to lack of compliance with procedural requirement of having such application supported with certificate from financial institution regarding unpaid operational debt. The Hon'ble Supreme Court, through a landmark judgment, stated that the procedural provisions are only directory and not mandatory and thus produced an emphasis on substance rather than process. This progressive interpretation dissolved procedural obstacles for foreign creditors in consonance with the spirit behind the IBC to promote ease of doing business.

In the case of Stanbic Bank Ghana Limited Vs. Rajkumar Impex Private Limited NCLT allowed CIRP proceedings against an Indian corporate debtor at the behest of foreign creditor through a guarantee extended by debtor for its subsidiary in Ghana. This exemplifies the extraterritoriality of the IBC and capacity to tackle contemporary problems associated with needs of global financing. In the case of State Bank of India vs Dr. Vijay Mallya, the Hon'ble Supreme Court determined that Vijay Mallya was a "wilful defaulter," emphasising that his actions revealed deliberate nonpayment of loans despite having the resources to do so. The bench found in favour of the consortium of banks, finding

that their classification of Mallya as a defaulter was consistent with Reserve Bank of India norms and based on credible evidence. The court confirmed the banks' right to recover the debts by seizing Mallya's assets, both domestic and foreign, in accordance with applicable laws. It further stated that his transfer of assets overseas and lack of cooperation with Indian authorities supported the claims of fraudulent purpose and asset diversion.

In Agrocorp International Private vs. National Steel and Agro Industries Limited, the NCLT has allowed the initiation of insolvency resolution process by a foreign creditor on the basis of a foreign arbitral award. Recently in State Bank of India and Ors. vs. The Consortium of Mr. Murari Lal Jalan and Mr. Florian Fritsch and Ors the Hon'ble Supreme Court ordered the liquidation of Jet Airways after the Jalan-Kalrock Consortium (JKC), the winning resolution applicant, failed to implement the approved resolution plan. The court invoked its plenary powers under Article 142 of the Indian Constitution to mandate liquidation, citing JKC's failure to fulfil its obligations and the inordinate delay in implementing the plan.

APPLICABILITY OF THE PROVISIONS OF SECTIONS 13 AND 44A OF CIVIL PROCEDURE CODE, 1908:

In Usha Holdings L.L.C. and Another vs Francorp Advisors Pvt. Ltd. a Petition has been filed u/s. 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the IBC') by Usha Holdings, L.L.C. and Mr. Atul Bhatara with the prayer to initiate corporate insolvency resolution process in the matter of Francorp Advisors Private Limited ('FAPL' for brevity). In this case the petitioners placed on record the demand notice dated 12.4.2015 (Form 3), judgment and decree passed by the District Court of US dated 5.10.2015 besides licence agreement executed between the petitioners and 'FAPL'. Vide its Order dated 11.12.2017 it was held

by the NCLT that the Judgment of the United States Court has to pass through the test of section 13 and 44 A of the CPC and it completely fails to qualify the test. The stand taken in the reply is that the corporate insolvency resolution process cannot be used as a substitute for civil proceedings.

PROTOCOLS IN CROSS BORDER INSOLVENCY-LEHMAN BROTHERS CASE:

The issue of conducting insolvency proceedings for enterprise groups is a complicated exercise even under the domestic law. Varying policy motives and differing principles underlying insolvency laws across jurisdictions complicate the conduct of insolvency proceedings against members of an enterprise group. Protocols have been used in complex cross border insolvency cases such as Lehman Brothers (2009), involving 2985 legal entities in over 50 countries. The insolvency of Lehman Brothers, a prime investment management firm was the biggest bankruptcy in history. The treatment of an insolvent rm as colossal as Lehman Brothers was a gripping task, that was eventually conquered via commendable cooperation between the multiple jurisdictions and development of a transnational protocol. On September 15th, 2008, Lehman Brothers announced bankruptcy. Given the integrated and global nature of Lehman Brothers' business, with around 4000 subsidiaries many of their assets were spread across different jurisdictions and require administration which is subject to the laws of more than one forum. Hence, a Protocol was designed to facilitate cooperation & communication between official representatives and tribunals in different jurisdictions.

A cross-border Protocol on the scale of Lehman Brothers, involving 16 different jurisdictions and a debt of $613 billion, had never been attempted. The primary

objective of the Protocol was “communication” between the different jurisdictions to promote fair liquidation of assets and protection of creditors spread across the arenas of involvement

NEED TO FILE A CERTIFIED COPY OF A RECIPROCATING TERRITORY:

A perusal of the provisions of Section 234 of IBC and 44A would show that a certified copy of the decree of any superior Court of any reciprocating territory needs to be filed in a District Court for execution in India as if it had been passed by the District Court. A further requirement is provided by Sub-section 2 which provide for filing of a certificate from such superior Court of Foreign Country stating the extent, to which the decree has been satisfied or adjusted. According to Sub-section 3 a District Court is obliged to refuse execution of any such decree, if it is shown to the satisfaction of the Court that such a decree falls within any of the exceptions specified in clauses (a) to (f) of section 13. A reciprocating territory has also been defined to mean any Country or territory outside India which the Central Government may notified in the official gazette as such.

RECOGNITION OF FOREIGN JUDGMENT ON MERIT:

In the case of International Woolen Mill v. Standard Wool (UK) Ltd., it was held that a judgment and decree granted by a Foreign Court can be said to be on merit only if such Court has considered the case on merit by looking into evidence led by plaintiff and documents proved before it. Such a judgment was not to be regarded as the one on merit.

CROSS BORDER INSOLVENCY PROCEEDINGS ARE DIFFERENT:

In cross-border insolvency proceedings, the parties involved are from different States. What is necessary is that the parties should belong to one of the parties

to the BIT and should be suing another party. In most cases, the test of nationality of the investor is the place of incorporation. This allows corporations to use the nationality of the place where they are incorporated – through restructuring – and initiate arbitration accordingly. However, the restructuring should be bona fide and not solely for the purpose of gaining access to arbitration. Therefore, each of the parties having stakes in cross-border insolvency, whether caused due to the governmental action of the host State or actions of the judiciary, could initiate arbitration proceedings.

INVESTMENT TREATY ARBITRATION AND INSOLVENCY:

Arbitration and insolvency can present a significant conflict of policy interests. Arbitration is a consent-based mechanism for the resolution of claims in a private forum outside of court, resulting frequently in an internationally enforceable award. Insolvency proceedings are a collective, court-based process to resolve the interests of a plurality of parties and generally prohibit the conduct of individual enforcement actions against the insolvent party in order to protect the collective interest. When arbitration is pursued while insolvency proceedings are pending or imminent, arbitrators face important legal questions about whether they are authorized to continue the arbitration, whether the debtor continues to have legal capacity to arbitrate, and whether an award ultimately issued will be enforceable, among others. The potential for significant differences in approach is illustrated by the well-known example involving the Polish company Elektrim S.A., in which two different arbitration tribunals seated in two different jurisdictions (England and Switzerland) came to opposite conclusions as to whether arbitration could continue following the opening of insolvency proceedings over Elektrim in Poland.

ACTIONS MUST BE IN GOOD FAITH:

The actions of the government and the conduct of the judiciary regarding insolvency proceedings should be conducted in good faith. Tribunals have confirmed that good faith is one of the elements of fair and equitable treatment. Good faith enshrines the requirement of not inflicting any damage upon the foreign investor purposefully. An unfair motive to defeat the rights of foreign investor, if proved, is the basis for breach of the fair and equitable treatment standard.

DENIAL OF JUSTICE:

Municipal courts should entertain cross-border insolvency proceedings carefully. If they have jurisdiction and they do not exercise it, then it would amount to denial of justice. On the other hand, if they entertain proceedings without having jurisdiction, then an illegitimate assertion of jurisdiction would also result into denial of justice. The municipal courts would have to carefully look at the transition and conflict of laws before entertaining a cross-border insolvency proceeding. The judicial proceedings would have to be conducted fairly. If there is bias in favour of or against any of the parties to insolvency proceedings such as the promoters, shareholders, the company or the debtors, it would constitute denial of justice.

In Loewen v. United States, the proceedings in the Mississippi state courts against a Canadian investor were conducted in such a manner that the trial exhibited a gross absence of due process and protection of the investor from prejudice on account of his nationality. The Tribunal found that the conduct of the trial was so flawed, that it constituted a miscarriage of justice. Judicial decisions based on discrimination of prejudice, arbitrariness or gross incompetence

constitute denial of justice.

RATIONALE OF DENIAL OF JUSTICE:

The rationale of the rule of denial of justice is that all States are obliged to provide a judicial system that adheres to certain standards of fairness, particularly while treating foreigners within their jurisdiction. Cross-border insolvency proceedings take place before domestic courts. Domestic courts are under an obligation to act fairly in all proceedings including cross-border insolvency proceedings. Under the standard of denial of justice, the merits of the decision cannot be reviewed. The assessment is limited to whether the judiciary acted fairly. Thus, all that is to be seen is whether the domestic courts have applied the insolvency laws in good faith. If there is a manifestly unjust and unfair application of insolvency laws, that would amount to denial of justice. Denial of justice entails procedural fairness. Procedural unfairness would include judgments tainted by fraud, bias, dishonesty or malice.

SERVICE OF FOREIGN SUMMONS:

As per Section 29 of the Civil Procedure Code, 1908 Summons and other processes issued by—

(a) any Civil or Revenue Court established in any part of India to which the provisions of this Code do not extend, or

(b) any Civil or Revenue Court established or continued by the authority of the Central Government outside India, or

(c) any other Civil or Revenue Court outside India to which the Central Government has, by notification in the Official Gazette, declared the provisions of this section to apply, may be sent to the Courts in the territories to which this Code extends, and served as if they were summons issued by such Courts .

By exercising the powers conferred under section 29 (c) vide Notification dated 12.1.2009 the Central Government declared that the provisions of the said Section shall apply to all civil courts in all the countries who are Parties to the Hague Convention on the service abroad of Judicial or extra judicial Documents in Civil or Commercial Matters 1965.

EXECUTION OF DECREE OUTSIDE INDIA:

Execution of decree outside India is provided under Section 45 of the Code of Civil Procedure, 1908. It provides that so much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in any State to send a decree for execution to any Court established by the authority of the Central Government outside India to which the State Government has by notification in the Official Gazette declared this section to apply.

The Agreement on Mutual Legal Assistance Treaty (MLAT) in Civil and Commercial matters is a comprehensive agreement for reciprocal arrangement with foreign countries for service of summons under Section 29(c) of the Code of Civil Procedure, 1908(CPC), for execution of Civil Decrees under Section 44 A of the CPC, for issuing Letter of Request under Section 77 of the CPC, for taking of evidence under Section 78 of the CPC and for enforcement of Arbitral Awards under Section 44 (b) of the Arbitration and Conciliation Act, 1996.

CONCLUSION AND COMMENTS:

The UNCITRAL Model Law, in essence, provides a fairly independent framework which allows the concerned jurisdiction to evaluate and thereby decide the

operational nitty gritty best suited to those countries legal landscape. As such, the UNCITRAL Model Law offers a wide scope of benefits and clarity w.r.t. cross-border insolvency disputes. In January 2020, Ministry of Corporate Affairs had constituted a special committee to further understand and recommend the necessary rules and regulatory framework for a smooth implementation of proposed cross border insolvency provisions in the Code. However, there does not seem to be many updates on the progress made by the said committee regarding their work on the inclusion of cross-border insolvency provisions in the Code.

In this regard, reference may also be made to the observations of the Division Bench of the Supreme Court in SRM Exploration Pvt. Ltd. v. N & S & N Consultants S.R. O. The observations are as under:

"13. …The world is a shrinking place today and commercial transactions spanning across borders abound. We have wondered whether we should be dissuaded for the reason of the transaction for which the appellant Company had stood surety/guarantee being between foreign companies. We are of the opinion that if we do so, we would be sending a wrong signal and dissuading foreign commercial entities from relying on the assurances/guarantees given by Indian companies and which would ultimately restrict the role of India in such international commercial transactions."

As highlighted above, presently there exists not much of a legal framework for addressing cross-border insolvency disputes in India. As such, eventually the draft chapter recommended by the Committee would have to be adapted and included in the Code, thereby resulting in the introduction of various amendments

and rules to accommodate the draft chapter. Cross border insolvency involves both domestic as well international provisions and need to be handled in a comprehensive way. Further, there's not much guidance on the process and options available to insolvency professionals to avail evidence etc. in a case where the assets of an Indian debtor are located in a different jurisdiction. The Civil Procedure Code, 1908 provides for a mechanism for enforcing foreign judgments, however the same is not broad enough to include all insolvency orders, for example, orders regarding reorganization processes, administrative order etc. Moreover, procedural and jurisdictional issues such as parallel proceedings, coordination, cooperation, etc. remain unaddressed by the present system concerning cross-border insolvency cases.

Lot of procedural and legal challenges would have to be addressed for the effective adaptation and implementation of the law. Law being a living organ cannot remain static. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms, which would adequately deal with the new problems, which arise, in a highly industrialized economy. It is therefore may be advisable to bring necessary amendments in the extant law for bringing about effective cooperation between insolvency professionals and courts of different countries and also ensuring coordination so as to efficiently manage the conduct of concurrent proceedings in different jurisdictions

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Adversarial System: An influencing legal framework for Party-Appointed Experts or Hired Guns?

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Abhijay Basu is a qualified lawyer practicing in India, with a strong background in navigating complex legal challenges. He completed his law degree at the University of Petroleum and Energy Studies, India, and later pursued an LL.M. at Queen Mary University of London. During his master's studies, he focused on Comparative International Commercial Arbitration and Dispute Resolution, broadening his understanding of global legal standards.

Abhijay has built his career around handling litigation and arbitration, with a particular focus on complex corporate and commercial disputes. He is known for his strategic approach to solving problems and his ability to manage difficult cases effectively. By combining his international education with practical, hands-on experience, he provides clear and reliable counsel to his clients. Abhijay is committed to excellence in the legal field and continues to grow his expertise within the dynamic environment of Indian commercial law.

Abstract

Introduction of new and complex areas of business industries are leading to an exponential expansion in the commercial market. As a consequence, we witness the increasing dependence of such industries towards arbitration, as a medium for dispute resolution. Due to complexities of such industries, parties often rely on specialised experts to present their case. However, party-appointed experts' credibility is often challenged especially in adversarial systems offering parties liberty of appointing experts. This Article provides an insight into stigmatisation of party-appointed experts in adversarial systems of the world. The Article will cover the factors that potentially influence a party-appointed expert's partisan nature, subsequently the author has

covered the challenges the adversarial biasness arising due to such partisan. The Article will further cover the tested methods for tackling adversarial biasness and concluding the article by sharing author's opinion over the impact of a party-appointed expert in novel industries and increasing requirements of the experts' opinion for rightful adjudication of complex disputes arising out such industries. The conclusion further highlights how nations have adopted the frameworks to mitigate, and has embedded in the domestic legislation setting precedents to approach adversarial biasness

1. Introduction

Most common law nations have adopted the adversarial system in their legal framework. The framework offers parties to present their evidence which includes evidence through experts where required. The general term for such experts is 'Party-Appointed Experts'.

While nations approach the definition of an 'expert' differently the meaning remains the same.

Though a party-appointed expert's role is assisting their appointing party, the duty spans further to assist tribunals, in the role of an Amicus Curae, irrespective of who remunerates them. UK legislations have expressed such duties as an *"overriding duty of an expert to the court".*[1]

Legislations and rules have made an expert's roles and duties abundantly clear irrespective of who they are appointed by. Then despite an expert's impartial

[1] UK Civil Procedure Rule 1998 (Eng), pt 35.3.

nature why has the label of a 'Hired Gun' been stigmatised on them?

This essay focuses on the issue of expert's biasness arising out of adversarial systems, what cause the partisan behaviour of the experts and how the issue can be mitigated while noting the view of common law systems on experts through precedent disputes.

2. Experts or Adversarial Biasness of a Hired Guns?

Despite their nature of an Amicus Curiae, party-appointed experts are essentially and inherently, partisan.[2] The very factor that an expert is being appointed and compensated for their expertise by the appointing party, weaponizes their opinion against the opposition making the label of a 'Hired Gun' an apt description. It has been surveyed that 51% of the Respondents considered that party-appointed experts are 'Hired Guns' in disguise'.[3]

"Once an expert has been engaged to assist in a case, there is a significant risk that he or she becomes part of "the team" which has a single objective of solving the problem or problems facing the party who engaged them to "win" the adversarial context".[4]

[2] Doug Jones, *'Hired Gun: Modern Solutions to Ancient Problems'*, (SCL India International Conference, India, December 2023), <https://dougjones.info/content/uploads/2023/11/Doug-Jones-Hired-Guns-Modern-Solutions-to-Ancient-Problems-SCL-India-9-December-2023.pdf> accessed on 06 September 2025.

[3] Bryan Cave Leighton Paisner 'Annual Arbitration Survey 2021, Expert Evidence in International Arbitration Saving the Party-Appointed Expert', (Bryan Cave Leighton Paisner, 2021),<https://bclplaw.marketing/flipbooks/68217-Arbitration%20Survey%202021%20-%20Report%20v6%20-%20Single%20Pages/> accessed 06 September 2025.

[4] McClellan CJ, Wood v. R, [2012] NSWCCA 21.

Adversarial System is a legal framework where parties in difference present their evidence in support of their arguments in a capacity of persuasive value before the court or tribunal. The very nature of the system, invites competition amongst parties, which in matters of high stakes becomes the root cause of adversarial bias, affecting counsels, parties, and experts the same.

In adversarial framework when parties are given the liberty to call their 'own' experts, it is inevitable that the evidence will be infected by adversarial bias. In such situations only the most extraordinary expert, when cross-examined, would readily confess error, accept their view was wrong and the client's money was wasted. It would be even harder to do this if the client is a regular litigator or the solicitor for the client is commonly looking for experts to help in forensic contests.[5]

It will be essential to mention here that closed community of experts plays a role in adversarial biasness. In a limited pool with increasing demand for expert opinion, an expert will endeavour to maintain a relation with the appointing party with the hopes of being retained for foreseeable disputes, as there is a likelihood that a matter may escalate to a subsequent stage of litigation.[6] The potential risk of an expert reacting only to the issues indicated by the appointing party arises, making them sand of seeing or articulating one side of the whole truth, often resembling the arguments of the appointing party.[7]

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[5] The Hon Justice Peter McClellan, *'Expert Witnesses - the Experience of the Land & Environment Court of New South Wales'*, (XIX Biennial Law Asia Conference 2005, Gold Coast, March 2005), <https://lec.nsw.gov.au/documents/speeches-and-papers/expert_evidence_in_the_land_and_environment_court_v2.pdf.> accessed on 06 September 2025.

[6] *id*

[7] Dr. Klaus Sachs, 'Expert: Neutral or Advocates, 2010, (ICCA Congress 2010), aper. 1, 6, (2010), <https://www.josemigueljudice

This overly partisan behaviour, could have significant impact during evidentiary procedure, eventually affecting outcome of the whole arbitration. In cases where expert rigidly abides by the parties may present technical points which could either have adverse effects on the tribunal's decision or exasperate arbitrators, calling into question the credibility of evidence and its weightage in distilling the key issues and forming reliable conclusions. [8]

3. Conflict of Interest: Expert's Impartiality or Lack of Independence

Once the adversarial biasness is evident, aggrieved parties will challenge the appointment of experts, aiming for removal or discrediting of expert evidence on the grounds for conflict of interest arising out of expert's impartiality and lack of independence.

A. *Repeated collaboration with the same expert*

As previously stated, in a small pool of experts a party or firm often tend to rely upon the same expert in arising disputes. The repeated collaboration with the same client tends to raises objections over the expert's independence.

In the Governors and Company of the Bank of Ireland and another v. Watts Group

arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/evidence/experts__icca_2010_sachs.pdf> accessed on 06 September 2025.

[8] Doug Jones, Redefining the Role and Value of Expert Evidence in International Arbitration, (2023), 17(2) JACCL.1, 33, American College of Construction Lawyers, <https://dougjones.info/content/uploads/2023/08/Redefining-the-Role-and-Value-of-Expert-Evidence.pdf.> accessed on 06 September 2025.

PLC,[9] the English High Court deemed the claimant's expert as unreliable and not independent. Court discovered that Claimant was expert's principal client, and had acted as an expert witness for the bank on actions against monitoring quantity surveyor arising out of the 2008-2009 financial crash.[10]

Justice Coulson, agreed that appointment of an expert in similar disputes can be considered cost effective, but can raise questions over the independence of the expert if appointed beyond a reasonable point, consequently leading to the expert's evidence to be deemed as unreliable and of lesser weightage.[11]

While the English legal system indeed sheds light over their standpoint on repeated collaboration, other adversarial systems may differ over the view.

In an Energy Charter Treaty dispute, *Luxtona Ltd. V. Russian Federation*,[12] the Russian's objected on opposition's expert appointment due to his long history of providing strategic advice and expert reports against Russia on Yukos matters. The Superior Court of Justice, Ontario was not satisfied with this argument. Justice Penny J, stated that the expert's history with the Yukos related entity did not demonstrate a strong ground for lack of independence. He further contradicted Russia's contention by referring to *Fairview Sentry Limited v. PwC, 2017 ONSC 3447* which stated that "*the fact that the expert had become the go to guy for entities or shareholders wishing to make claims against Russia is not*

[9] Governors and Company of the Bank of Ireland and another v. Watts Group PLC, [2017] EWHC 1667 (TCC).
[10] *id.*
[11] Herbert Smith Freehills, 'High Court finds expert unreliable and lacking independence',(Herbert Smith Freehills May,2025),<https://www.herbertsmithfreehills.com/notes/litigation/2017-07/high-court-finds-expert-unreliable-and-lacking-independence > accessed on 06 September 2025.
[12] PCA Case No. 2014-09.

evidence of lack of independence. His accumulated expertise makes him a natural selection as an expert".[13]

B. *Present professional relationship with the appointed party.*

Failure to disclose a relationship with the parties has been a popular choice amongst the aggrieved parties as a ground for impartiality and lack of independence.

In *Elasmex S.A. v. Republica de Honduras*,[14] respondent challenged the appointment of the claimant's expert. He failed to disclose his employment relationship in the claimant company. The tribunal rejected the challenge since expert's relationship was available on the website of the company making disclosure unnecessary.[15]

On the other hand, in *Bernhard Von Pezold v. Republic of Zimbabwe*, [16] tribunal gave little weightage to both the parties' experts due to clear display of apparent biasness arising out of their current employment relationships. The tribunal found that the respondent's expert was a Group CEO of a subsidiary owned by the respondent, and the claimant's expert held the position of the deputy director in the concerned ministry of Zimbabwe, raising questions on their independence.[17]

[13] Fairview Sentry Limited v. PwC, 2017 ONSC 3447.
[14] Elsamex S.A. v. Republica de Honduras, ICSID Case No. ARB/09/04.
[15] Wen-Hsu(Lisa) Tsai, 'Expert's conflicts of interest and the consequences in International Arbitration', (2024), 17, Contemporary Asia Arbitration Journal. 237.
[16] Bernhard Von Pezold v. Republic of Zimbabwe, ICSID Case No. ARB/10/15.
[17] *id.*

4. Tackling Adversarial Biasness through Uniform Approach

A simple solution to the biasness would be appointment of tribunal appointed experts. In fact, there have been attempts towards revitalisation of the use of tribunal appointed experts, although it is unrealistic to think the parties and arbitrators will apostatise on their demonstrated preference for party-appointed experts. [18] Resistance against such inquisitorial approach is common in adversarial jurisdictions.[19]

A. Hot Tubbing

Expert witness conferencing or Hot-tubbing has become a popular method in international arbitration. The phrase 'Hot-Tubbing' is often used to colloquially describe the process because the expert witnesses physically sit together in the witness box at all times.[20]

The aim of the method is to establish clear and direct engagement between the appointed experts and focus on contentious issues risen by difference of opinion between the experts by reducing quantity of evidence, without any supervision or arm-twisting approach by the appointing parties or counsels.

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[18] Doug Jones *Supra* note 2 at 10.

[19] Giovanni De Berti, 'Experts and Expert Witnesses in International Arbitration- Adviser, Advocate or Adjudicator?', (2011), Studio Legale De Berti Jacchia Franchini Forlani 2011 ARB. Y.B. 53. https://www.dejalex.com/wp-content/uploads/2017/12/pubb_11_AYIA.pdf. accessed on 06 September 2025.

[20] Justice Rachel Pepper, 'Hot-Tubbing': The Use of Concurrent Expert Evidence In The Land And Environment Court Of New South Wales And Beyond', Land and Environment Court of New South Wales, (2015), <*https://lec.nsw.gov.au/documents/speeches-and-papers/PepperJ%20Alaska%20Bar%20Convention%20-%20Hot-tubbing%20or%20Concurrent%20Evidence%20paper(Final)%20140515.pdf* >accessed on 06 September 2025.

The method has been found to be beneficial for the arbitral tribunals in narrowing down the issues in a dispute and allows all the dispute to be laid down before the tribunal at the same time, reducing the probability of any adversarial biasness.[21] The procedure also reduces the chances of the first expert obfuscating in an answer since each expert knows that their counterpart can expose any inappropriate answer and propose an appropriate one.[22]

The method encourages the experts to directly engage one on one with each other's evidence to bring out a better clarity and efficiency to an evidentiary process whereby experts can hold each other accountable for potential partisan or unnecessary complicated views.[23]

Hot-Tubbing has become a widely opted method of expert evidence procedure. The Australian jurisdiction have embedded a detailed practice guidelines on the taking of concurrent evidence based on the Hot-Tubbing method in their legislation. [24]

In United Kingdom, the method of Hot-Tubbing was found to be a great medium for communicating directly with judges and allowing points of disagreement to be cleared up faster, rather than explaining it to the counsels.[25]

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[21] *id.*

[22] *id.*

[23] Doug Jones, 'Redefining the Role and Value of Expert Evidence in International Arbitration', (2023), American College of Construction Lawyers, 17(2) JACCL.1, 33, (2023), <https://dougjones.info/content/uploads/2023/08/Redefining-the-Role-and-Value-of-Expert-Evidence.pdf.> accessed on 06 September 2025.

[24] Federal Court of Australia, 2016, Expert Evidence Practice Note (GPN-EXPT).

[25] Dame Hazel Genn, 'Manchester Concurrent Evidence Pilot Interim Report'(2012), UCL Judicial Institute,<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/concurrent-evidence-interim-report.pdf> accessed on 06 September 2025.

B. Adoption of Institutional Guidelines

Lack of uniformity has had an adverse effect in adjudication. Parties often tend not to focus upon expert witness procedure during the constitution of a tribunal, causing chaotic and unstructured adjudication process giving rise to precedented controversies such as 'ships passing in the night'.

Adoption of a uniform guideline or structured framework as a legislative reform or customary practice would be of great assistance, should challenges arise during the course of arbitration.

i) IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules)

The rules are intended to provide an efficient, economical and fair process of taking evidence in the realm of international arbitrations, particularly between parties from different legal traditions and taking of evidence in good faith.

The Rules have proposed the certain techniques in order to respond to the criticisms and complaints related to use the of party-appointed experts. [26]

Pre-hearing meetings is one of the techniques mentioned for cases where a difference of opinion arises between experts. At the discretion of the tribunal, the concerned party-appointed experts shall meet and attempt to reach an

[26] IBA Rules on the Taking of Evidence in International Arbitration, 2020, Preamble, Resolution of the IBA Council, 2020. (IBA)

agreement upon the issues they differ.[27]

Witness Conferencing,[28] the parties have the discretion to request the tribunal to conduct a conference where the party-appointed experts can be questioned at the same time and in confrontation of each other.

Such conferences are beneficial to provide clarity over the expert's stands on an issue and tackles the issue of ships passing in the night.

ii) ICC Techniques for Controlling Time and Costs in Arbitration

The report proposes methods for tailoring arbitration procedures for efficiency. As per the reports the parties should expressly mention the requirement of an expert and inform the tribunal the issues to be addressed,[29] and provide further clarity on the same to avoid ambiguity.[30]

In the interest of the time, parties can limit the number of reports an expert can provide, upon mutual agreement and opting the method as per which the reports are to be exchanged and submitted to the tribunal.[31]

[27] IBA Rules on the Taking of Evidence in International Arbitration, 2020, Article 5.4, Resolution of the IBA Council, 2020. (IBA)
[28] IBA Rules on the Taking of Evidence in International Arbitration, 2020, Article 8.4(f), Resolution of the IBA Council, 2020. (IBA)
[29] ICC Techniques for Controlling Time and Costs in Arbitration, Paragraph 65, Commission on Arbitration and ADR, 2007. (ICC).
[30] ICC Techniques for Controlling Time and Costs in Arbitration, Paragraph 67, Commission on Arbitration and ADR, 2007. (ICC)
[31] ICC Techniques for Controlling Time and Costs in Arbitration, Paragraph 71, Commission on Arbitration and ADR, 2007. (ICC)

iii) The CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration

Protocols are structured exclusively for the method of party-appointed experts, lining itself with IBA Rules and simultaneously expanding on the framework.

The protocol is structured to be used partly and in its entirety at the discretion of the parties, elaborating scope and the duty of an expert. [32] The rules offer guidance for uniformity of expert opinion and a declaration of objectivity and impartiality.[33]

Article 6, similar to other rules provides a framework for the way in which expert evidence should be adduced, including joint meetings between experts to identify issues in dispute, the tests and analyses which should be conducted, the preparation of a joint statement, written opinions, and oral hearing of expert evidence.[34]

iv) Inquisitorial Rules on the Taking of Evidence in International Arbitration, Prague Rules

The rules were officially launched on 14 December 2018, an effort of 31

[32] The CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 4, CIArb, 2007.
[33] The CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 8, CIArb, 2007.
[34] Practical Law Arbitration, 'Expert evidence in international arbitration',(2020), Thomas Reuters Practical Law, <https://www.clearygottlieb.com/-/media/files/expert-evidence-in-international-arbitration-63805309-pdf.pdf> accessed on 06 September 2025.

countries with an aim to establish alternatives to the IBA Rules subjected to taking of evidence.

The provisions of the Prague Rules address the issue by granting the tribunal primary responsibility for the experts involved in arbitration, while allowing considerable involvement of parties throughout the process.[35] Article 6 of the Prague Rules[36] have been articulated in a manner that depicts a tribunal's edge over the Parties during the conduction of joint expert commission by limiting the Parties control over the process, for instance the Parties can suggest appointment of a candidate as an expert but does not bind the tribunal for appointment of the same should it deem fit for the adjudication of the dispute.[37]

The core practice of the Rule is that the tribunal will direct the appointed experts to prepare a joint list of questions, and to prepare a joint report, which would include a list of issues on which they agree, a list of issues that they disagree along with the rationale behind such disagreement and diverging opinion. Such an iterative process ensures involvement of the tribunal early on in the arbitration proceedings and provides considerable assurance that the technical issues will be decided together, the tribunal will understand the expert evidence placed on record, and the tribunal will be aware of what decisions it needs to make on both, the fact evidence and the expert evidence to reach its conclusion. [38]

[35] Inquisitorial Rules of Taking Evidence In International Evidence (Prague Rules), Article 6.
[36] *Id*
[37] Inquisitorial Rules of Taking Evidence In International Evidence (Prague Rules), Article 6.2.
[38] Janet Walker, ' The Prague Rules: fresh prospects for designing a bespoke process' , <https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/3rd-edition/article/the-prague-rules-fresh-prospects-designing-bespoke-process> accessed on 15 May 2026.

5. View and Practice of Indian Judicial System of Expert's Opinion

The Indian judicial system recognises an expert's requirement especially in complex and technical issues or any other cases where the tribunal may lack the expertise. The same was recognised by the court in the case of *G.L. Sultania v. Securities and Exchange Board of India*.[39] The Hon'ble court refused to act as an expert as it consisted of valuation of shares which were deemed a technical and complex problem, and considered that valuation should be best left with an appropriate expert in the field.

In India, the parties have shown more preference towards ad-hoc arbitration over institutional. In Ad-hoc, parties often tend not to focus upon a structured timeline for the stages of the arbitration which makes the process even more time-consuming. Unlike other foreign seated arbitrations, a party appointed expert is involved for a longer duration and plays a crucial influential role in a dispute. It has become a practice where counsels often appoint experts willing to offer their blind support to their cause.

Experts have often experienced arm-twisting tactics by the appointing party's counsels. In many cases experts are appointed as hired guns, as counsels do not wish to lose narrative of the dispute, and willing to fully control the aspects of the dispute.[40]

[39] G.L. Sultania v. Securities and Exchange Board of India, 2007 (5) SCC 133.

[40] Rajat Singla, 'Arbitration Environment in India: From the Users' Perspective', (2021), Australian Dispute Centre Through Leadership, < https://disputescentre.com.au/arbitration-environment-in-india/> accessed on 06 September 2025.

Counsels have shown tendencies to bulldoze an expert by pressuring them to change their evidence in order to align the same with their pleadings.

It has become a common practice for an aggrieved party to aim for setting aside of an award before Hon'ble courts. Even though the grounds for setting aside may be frivolous, due to perpetual backlog of cases in Indian courts the assessment of arbitral awards is delayed making enforcement next to impossible.

The lack of independence or lack of disclosure of an expert is just the artillery required for raising a petition for setting aside on grounds of patent illegality.[41]

To resolve the conflicting opinions of experts and to minimise bias expert evidence tribunal often opt for 'Joint Statements' and 'Hot Tubbing' methods.

In Joint Statement if experts diverge on a technical aspects, the tribunal can direct both to provide a written joint statement explaining their cause for divergence. On the basis of the statement, the tribunal will be in a better position to direct both the experts to find a common ground for resolution. While in Hot Tubbing, experts face the tribunal's questions in order to determine which expert's opinion should be given more weightage upon a technical issue.

6. Conclusion

Post-US presidential elections of 2024 the world had witnessed an exponential

[41] Arbitration and Conciliation act, 1996 (India), s 34.

demand growth in cryptocurrency. Arbitration is already recognised as preferred dispute resolution mechanism involving crypto assets, the differences and are only expected to rise. Pivot to AI, has led to surge of business opportunities for open AI startups in the market and established digital chip manufacturing companies such as Nvidia giving rise to unprecedented disputes between entities. As we enter the era of digital transformation, demand for specialised expertise increases as courts and tribunals realise the importance of expert opinions.

The exponential growth in innovative industries is bound to attract disputes that may require an expert's opinion for just adjudication of differences. It has already been discussed in the previous sections that when parties appoint experts to present their arguments, the experts appointed may be exposed to adversarial biasness through the influencing factors discussed, which once apparent are open to challenge by the aggrieved parties. It has been observed that nations practicing adversarial system have embedded the relevant institutional rules for appointment of experts or adopted practice methods such as Hot Tubbing in their day-to-day judicial practice.

The institutional guidelines offer uniformity to an expert witness procedure to tackle controversy surrounding the notion of hired guns. Though, it will not be beneficial unless guidelines are embedded in legislations through reformation as per the needs of a judicial system. It is evident that one size will not fit all. While in disputes such as *Bridgestone Licensing v. Panama* [42] the tribunal made it clear that experts will not be bound by the duty of impartiality and independence,

[42] Bridgestone Licensing v. Panama, CSID Case No. ARB/16/34.

tribunal in *Italba Corporation v. Oriental Republic of Uruguay* [43] was adamant about the importance of expert's independence and impartiality. Australia has addressed the issues of experts by publishing an Expert Evidence Practice Notes which is annexed with Harmonised Expert Witness Code of Conduct, [44] clearly addressing that appointing parties are not to view experts as hired guns. [45] United Kingdom has reformed its legislation by including standardised Civil Procedural Rules (CPR) in 1998 and the Protocol of the Instructions of Experts to Give Evidence in Civil Claims, stemming from the issues identified in the Wolf Report of 1996. Similar to the practices of UK and Australia, other nations with Adversarial Systems can address the issue of Adversarial biasness by introducing similar practice rules in their domestic laws as per the requirements of the concerned jurisdiction.

Furthermore, application of institutional guidelines on appointment of experts and consideration of expert's opinion will always depend on a case-to-case basis in an arbitral dispute. While it is for the parties to choose efficiency and uniformity in procedure, it is the tribunal's responsibility to take relevant steps to mitigate such issues of adversarial biasness that are likely to arise.

Since Partisan is the very essence and principal advantage of an adversarial legal traditions. However, in cases where an expert's partisan tends to reach 'full red-blood' adversarial approach,[46] the benefits or parties rights are bound to be overshadowed by adversarial biasness causing the arbitration to loose its very

[43] Italba Corporation v. Oriental Republic of Uruguay, Case No. ARB/16/9.
[44] Expert Evidence Practice Notes which is annexed with Harmonised Expert Witness code of Conduct, Federal Court of Australian, (2016).
[45] *id.*
[46] Doug Jones, *Supra* note 2, at 15.

essence of cost efficiency and speedy adjudication.

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