CONSTRUCTIVE RES JUDICATA AND ITS APPLICABILITY TO INDIA SEATED ARBITRATIONS

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1. INTRODUCTION

The Code of Civil Procedure, 1908, ("CPC") is the basic statute providing procedural justice in litigation in India. It brings order to the chaos of litigation and is the substratum of the precise prediction on the part of the lawyer and the litigant as to the course of the trial. It is a self-contained code which has created templates and reasonable expectations as to the procedural rights of the parties in not just civil suits but in other judicial and quasi-judicial forums as well. Within its codified principles it contains the principle of Res Judicata and Constructive Res Judicata which is a critical aspect of procedural justice and which has become a mainstay of civil litigation in India. However, Section 19 of the Arbitration and Conciliation Act, 1996 states that the CPC is not applicable to arbitration proceedings. In light of the above exclusion, this article discusses the applicability of Constructive Res Judicata to arbitrations in India.

2. EXCLUSION OF APPLICABILITY OF CPC TO ARBITRATION

As stated above, Section 19 of the Arbitration & Conciliation Act, 1996 excludes the applicability of CPC to arbitration in India. The intent of this section is to presumably give freedom and flexibility

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to the parties and the Arbitral Tribunals to conduct arbitration proceedings in a manner they deem fit.

The aforesaid exclusion, however, causes two major issues; firstly, it creates a vacuum as far as procedures for conducting arbitration proceedings are concerned, especially with ad hoc arbitral tribunals. Institutional arbitrations have some guidance in the form of procedural rules formulated by the institution itself for the conduct of arbitration proceedings. However, in a country where institutional arbitrations have only recently received a push from all quarters of the legal fraternity, the majority of the arbitral tribunals continue to operate on an ad hoc model and such arbitrations do not have any guidance as far as procedures to be followed by the arbitral tribunal is concerned.

Secondly, the exclusion removes the protection of procedural justice and fairness inherent in the CPC as it presumes that the procedures provided in the CPC are too formal and would restrict the functioning of the arbitral tribunal. This presumption causes an immense disservice to certain provisions embedded within the CPC such as Res Judicata and Constructive Res Judicata. Even the institutional arbitration rules do not contain provisions relating to Res Judicata and Constructive Res Judicata as such principles are technically not just procedural rules but more on the lines of procedural law which have to be mandated by statute or by the Courts. In such a vacuum, observance of certain fundamental principles of CPC for conducting arbitration proceedings is a must.

Against this backdrop, the authors shall explain what Res Judicata and Constructive Res Judicata are and what are their origins. Further, the authors will explain why the principle of Constructive Res Judicata should be applicable to arbitrations, followed by a discussion on how the Courts in India and around the world have dealt with the applicability of the principle to arbitration proceedings.

3. RES JUDICATA FROM COMMON LAW TO CPC

Res Judicata is a principle of Roman Law, which eventually found its place as a fundamental legal principle under the Common Law system of English Law. The principle became applicable to India as well during the British occupation and was codified under Section 11 of the CPC. The Hon'ble Supreme Court, in *Satyadhyan Ghosal and Ors.* v. *Smt. Deorajin Debi and Anr.*,[1] has laid down the following guidelines for the application of the principle of res judicata:

> The principle of res judicata is based on the need of giving finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11[2] of the Code of Civil Procedure; but even where section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

The Hon'ble Supreme Court has also stated that the principle applies to writ jurisdiction as well.[3] More recently the Hon'ble Supreme Court clarified that Res judicata is a doctrine of fundamental importance in our legal system. Even though it finds its place in CPC under Section 11, it is not a mere technical doctrine but is part of the public policy of India as it aims to bring an end

[1] *Satyadhyan Ghosal v Deorajin Debi*, 1960 SCC OnLine SC 15.
[2] The Code of Civil Procedure 1908, s 11 (Code of Civil Procedure).
[3] *Amalgamated Coalfields Ltd & Anr v Janapada Sabha Chhindwara & Ors*, 1964 AIR SC 1013.

to all litigation under a particular issue and provide finality to the adjudication process.[4]

The courts in India have provided similar protection to parties in arbitration as well, wherein they have held that Res Judicata will apply to arbitration proceedings and courts will have the jurisdiction to prima facie verify if valid claims exist when exercising their jurisdiction and appointing an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996.[5] In doing so, they have in effect applied the fundamental law status achieved by the principle of Res Judicata in India and not just a provision under Section 11 of the CPC.

Constructive Res Judicata as a Subset of Res Judicata

Constructive Res Judicata is a subset of the principle of Res Judicata which is codified under Order 2, Rule 2 of the CPC[6] and is extracted hereunder:

> 2. Suit to include the whole claim: (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
> *(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*
> (3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted. *Explanation*: For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action. *Illustration*: A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for

[4] *Canara Bank v NG Subbaraya Setty*, 2018 SCC OnLine SC 427.
[5] *Antique Art Export (P) Ltd v United India Insurance Co Ltd*, 2023 SCC OnLine Del 1091 [70]; *Anil v Rajendra*, (2015) 2 SCC 583.
[6] Code of Civil Procedure, Order 2 Rule 2.

> 1906. A shall not afterwards sue B for the rent due for 1905 or 1907. [*emphasis*]

In essence, this principle states that a party bringing a suit against another is supposed to bring all its claims arising from the cause of action on the basis of which it is filing the suit. Further, it provides that any claim that has not been made in the suit will be presumed to have been abandoned and cannot be brought subsequently. It is based on the principle that where the party had an opportunity to controvert a matter but did not avail itself of that opportunity, it should be deemed that the matter had actually been controverted and decided.

The issue that is attempted to be addressed in this article is whether this well-settled and codified principle of constructive Res Judicata is applicable to arbitration proceedings. The answer to this question will be dealt with in the background of the 144th Law Commission Report of 1992 which *inter alia* discussed the same in the light of diverging opinions in the judgments of various high courts in India.

4. 144TH LAW COMMISSION REPORT ON APPLICABILITY OF ORDER 2, RULE 2 TO ARBITRATIONS

The Law Commission in its 144th Law Commission Report had highlighted the controversy with respect to the application of Order 2, Rule 2[7] or *constructive res judicata* to arbitrations and arbitral proceedings. Divergent views on the issue were taken by different High Courts and Supreme Court in the country, some in favor of the same, while others perceiving the application of the principle of constructive res judicata to arbitral proceedings and tribunals as being draconian, unjust and penal in nature.

[7] ibid.

The Delhi High Court had strictly construed the provisions in CPC and held that Order 2, Rule 2 is not applicable to arbitrations and arbitral proceedings as the same is not a 'court'. It further held that the provision is draconian in nature and it would be unjust to apply the principle to arbitration proceedings.[8] On the other hand, the Gujarat High Court had held that the principle of constructive res judicata would be extendable to arbitrations and arbitral proceedings.[9] Calcutta High Court's views on the applicability of the rule seemed to fluctuate as there were divergent views found as the court in an earlier instance had held the rule to not be applicable,[10] however, in subsequent judgments it changed its position and held that the rule is applicable to arbitral proceedings and arbitrations in appropriate cases.[11]

In the case of *Balmukund Ruia,*[12] one bench of the Calcutta High Court held that if anything this principle ought to apply with greater force to the arbitral proceedings, which is meant for speedy disposal of disputes, and if successive disputes on the same cause of action could be raised, it would defeat the very object of the arbitral proceedings. The claim before the arbitrator is clearly in the nature of a suit and, instead of a civil court adjudicating upon the claim, a separate forum of arbitrators adjudicates upon the same claim. Therefore, for the purpose of (arbitration) Order 2, Rule 2, the principle of constructive res judicata ought to apply naturally to arbitration proceedings.

To conclude, the 144th Law Commission Report remarked that the provision embedded in Order 2, Rule 2 may seem to be stringent and draconian in nature, but such stringent rules are required to prevent multiplicity of suits. It further stated that there is no reason why the principle applicable to ordinary litigation must not be

[8] *Alkarma New Delhi v Delhi Development Authority*, 1981 SCC OnLine Del 125.
[9] *Kothari & Associates Baroda v State of Gujarat*, 1984 SCC OnLine Guj 65.
[10] *Seth Kerorimall v Union of India*, 1964 SCC OnLine Cal 17 [10].
[11] *Jiwanani Engineering Works Ltd v Union of India*, AIR 1978 Cal 228.
[12] *Balmukdnd Ruia v Gopiram Bhotica*, 1919 SCC OnLine Cal 13.

applied to arbitral proceedings and arbitrations as well. The intention of the legislature is that so far as possible, all matters in dispute between the parties relating to the same transaction should be disposed of in the same suit. The Law Commission was of the opinion that this object is relevant equally to arbitrations as well.[13] The Report went on to recommend an amendment to the existing Arbitration (Arbitration Act, 1940) Act and insert a provision in the act, namely section 13A on the following lines:

> 13A. Party to include all claim and all reliefs - Subject to the provisions of the arbitration agreement, the provisions of Order 2 of Rule 2 in the First Schedule to the Code of Civil Procedure, 1908, shall, so far as may be, apply to arbitrations governed by this Act, as they apply to suits to which the Code applies.[14]

The above recommendation was made with the object that it is as much necessary to avoid multiple arbitrations with respect to the same cause of action, as it is to avoid multiple suits on the same cause of action, to which the authors respectfully agree. However, such an amendment was never brought in the 1940 Arbitration Act. As we all know, the Act got repealed and replaced by the Arbitration & Conciliation Act, 1996, which was primarily based on the UNCITRAL Model Law.

It is pertinent to note that the UNCITRAL Model Law does not have any provisions regarding the exclusion of any procedural (CPC) or evidentiary (Indian Evidence Act) statutes of the country to the arbitration proceedings. The exclusion is specific to the statute enacted by India. Hence, what is evident is that not only did the Indian Legislature not include the suggestion of including the principles of Constructive Res Judicata in arbitration, but rather excluded the applicability of the CPC altogether. Hence the obvious conclusion would also be that the principles of Constructive Res Judicata would not be applicable to arbitration

[13] Law Commission of India, *Conflicting Judicial Decisions Pertaining to the Code of Civil Procedure* (Law Com No 140, 1992) para 6.3.10.
[14] ibid [6.3.11].

proceedings governed by the Arbitration and Conciliation Act, 1996. Against this backdrop, the authors discuss below how has the principle of constructive res judicata been dealt with courts in other foreign jurisdictions, specifically regarding its applicability to arbitrations and how has the principle finally been looked at by the Courts in India in the recent past.

5. INTERNATIONAL JURISPRUDENCE ON PRINCIPLES SIMILAR TO RES JUDICATA AND CONSTRUCTIVE RES JUDICATA

The principles of Res Judicata and Constructive Res Judicata are also internationally accepted by various jurisdictions to be applicable to arbitration proceedings. A few of the decisions from various jurisdictions are discussed hereunder to provide a holistic view of the issue and the reason why the same should be applicable to India as well.

In Singapore, the doctrine of res judicata was recognized as a principle in arbitration and an arbitral award constituting the same was upheld by the courts of Singapore in the case of *BTN and another v BTP and Anr.*[15] The Court held that the principle of res judicata is applicable to arbitral tribunals also "*as the nature of a res judicata challenge is the same in both court and arbitral proceedings*".[16] It further held that the "*doctrine of res judicata has long been part of the law of Singapore and its invocation is neither unusual nor should ever be described as "shocking the conscience or wholly offensive to informed members of the public*".[17]

Further, under Spanish law, res judicata and issue preclusion

[15] *BTN and Another v BTP and Another* [2020] SGCA 105 [56].
[16] ibid [71].
[17] Wei Ming Tan, 'Singapore – Court of Appeal Considers Doctrine of Res Judicata in Clarification of Public Policy Ground for Setting aside Awards (BTN v BTP)' (*Singapore International Arbitration Blog*, 3 November 2020) <https://singaporeinternationalarbitration.com/2020/11/04/singapore-court-of-appeal-considers-doctrine-of-res-judicata-in-clarification-of-public-policy-ground-for-setting-aside-awards-btn-v-btp> accessed 24 March 2024.

principles are applicable to arbitration.[18] They are preliminary objections, to be examined prior to consideration of the merits of the case in order to determine whether the court or the arbitral tribunal has jurisdiction over the dispute. Both res judicata and issue preclusion are codified in the 2003 Spanish Arbitration Act (SAA). Article 43 of the Spanish Arbitration Act[19] establishes that final arbitral awards constitute res judicata. The res judicata effect of the final arbitral award has also been recognized by the Spanish Constitutional and Supreme Courts in several decisions.[20] Under Spanish law, issue preclusion principles prevent the parties from raising allegations and claims that could have been raised by the parties in the first proceedings but were not raised.[21]

Under French law**,** res judicata is expressly recognized as a principle applicable to arbitral awards in addition to judgments. The French Civil Procedure Code codifies this principle in Article 1484.[22] It establishes that an arbitral award, once rendered, has res judicata effect with regard to the claims it adjudicates. Further, Article 1506 of the French Code[23] extends this principle to both domestic and international arbitrations. Article 1481 of the French Civil Procedure Code[24] is produced herein:

> *** As soon as it is made, an arbitral award shall be res judicata with regard to the claims adjudicated in that award.
> *** The award may be declared provisionally enforceable.
> The award shall be notified by service (signification) unless the parties agree otherwise.

[18] Issue preclusion is equivalent to Constructive Res Judicata under the Indian Law as enshrined under Order 2 Rule 2 of the Code of Civil Procedure.
[19] Arbitration Act 2003 (ES), art 43.
[20] *See e.g.*, 4 June 2010 [RJ 2669, 2010], 23 June 2010 [RJ 4907, 2010], 30 December 2013 [RJ 345, 2014], among others.
[21] Felix J. Montero, Laura Ruiz, and Perez-Llorca, 'Res Judicata and Issue Preclusion in International Arbitration: An ICC Case Study' (2016) 1 The Paris Journal of International Arbitration <https://www.perezllorca.com/wp-content/uploads/es/actualidadPublicaciones/ArticuloJuridico/Documents/160712-cahiers-res-judicata-and-issue-preclusion-in-internatinal-arbitration-fmm-lrm.pdf> accessed 24 March 2024.
[22] The Code of Civil Procedure 1804 (FR), art 1484.
[23] ibid art 1506.
[24] ibid art 1481.

Further Article 1355 of the French Civil Code also states the following:

> The authority of res judicata arises only in respect of what was the subject of the judgment. The thing requested must be the same; the request is based on the same cause; the claim is between the same parties, and brought by them and against them in the same capacity.[25]

Further, the Paris Court of Appeal in the case *Thalès Air Défense* v. *GIE Euromissile*,[26] with respect to an ICC Arbitration where antitrust claims were not raised during the arbitral proceedings but were raised subsequently on appeal, held that re-litigation of certain issues which could and should have been brought before it but were not brought in the first instance would not be allowed where procedural good faith and honesty require it. The court was successful in preventing Thales from raising antitrust claims in subsequent proceedings on the basis of the (constructive) res judicata principle.[27]

Under English law, Section 58 (1) of the English Arbitration Act 1996[28] provides that awards are final and binding:

> Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.

English courts have for a long time maintained that the doctrine of res judicata is applicable to arbitral awards.[29] The doctrine of res judicata in England stands on two strands namely "cause of action estoppel" and "issue estoppel". Under English Law, issue

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[25] ibid art 1355.
[26] *Thalès Air Defence BV v GIE Euromissile* No 2002/60932.
[27] B. Sena Gunes, 'Res Judicata in International Arbitration: To What Extent Does an Arbitral Award Prevent the Re-Litigation of Issues' (2015) 12(6) Transnational Dispute Management 1.
[28] Arbitration Act 1996 (EN), s 58(1).
[29] *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Company of Zurich* [2003] APP LR 01/29; *Sun Life Insurance Company of Canada v Lincoln National Life Insurance Co* [2004] APP LR 12/10; *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630.

preclusion also applies. This doctrine was first propounded in the case of *Henderson* v. *Henderson*[30] in 1843 and is also known as the abuse of process doctrine.[31] The abuse of process doctrine prevents a party from raising an issue in subsequent proceedings, that the party could and should have raised in the previous proceedings or at the nascent stage itself but did not do so. The doctrine is aimed at preventing a "second bite at the cherry". The court in the case of *Fidelitas Shipping* case[32], expressly recognized that the Henderson Rule also applies to arbitrations.

Supported by the International jurisprudence on the application of the principle of Constructive Res Judicata to arbitrations, the authors submit that similar protection should be available to parties in India seated arbitration as well and that the parties and advocates must be well aware of this issue and should take strong defense in their Written Statements against claims brought by parties which are hit by constructive res judicata. The recent jurisprudence of Indian Courts also supports the above position and is highlighted as hereunder.

Recent Indian Jurisprudence on Order 2, Rule 2 in Arbitration

The Hon'ble Supreme Court of India in *Dolphin Drilling Ltd* v. *ONGC* (2010) 3 SCC 267 has held that the Arbitral Tribunal has the power to decide the objections relating to Order II Rule 2[33] or

[30] *Henderson v Henderson* [1843] 3 Hare 100, 67 ER 31367 ER 313 ("In trying this question I believe I state the rule of the court correctly when I say, that where a given matter becomes the subject of Litigation in, and of adjudication by, a court of competent jurisdiction, *the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies*, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, *but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time*").

[31] Also colloquially referred to as the Henderson Rule.

[32] *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630.

[33] Code of Civil Procedure 1908.

Constructive Res Judicata while dealing with the Claims. Further, in *Indian Oil Corporation Ltd.* v. *SPS Engg Ltd.* (2011) 3 SCC 507 the Hon'ble Supreme Court held that Courts may not have the power to decide whether the claim is barred by res judicata or not, during the stage of appointment of arbitrator under Section 11[34] of the Arbitration and Conciliation Act, 1996. However, the arbitral tribunal is within its powers to examine and decide the issue of res judicata based on pleadings and the award of the arbitral tribunal in the first round and compared with the claims of the Claimant in the second round of arbitration. This was also followed by the Hon'ble High Court of Delhi in *Parsvnath Developers Limited* v. *Rail Land Development Authority* 2018 SCC Online Del 12399.

Finally, the Hon'ble Delhi High Court in *Himachal Sorang Power Private Limited* v. *NCC Infrastructure Holdings Limited* (2019) SCC OnLine Del 7575[35] refused to entertain the request for re-arbitration proceedings by the appellant, applying constructive res judicata and stated that the re-arbitration was barred as a result of the same, thus recognizing the principles of constructive res judicata to arbitral proceedings. The observations of the Court are extracted as hereunder:

> "The Court, inter alia, observes that disputes which fall within the ambit of doctrine of res judicata, their re-agitation would amount to abuse of the process of the Court." [36]
>
> "The Court which has supervisory jurisdiction or even personal jurisdiction over parties has the power to disallow commencement of fresh proceedings on the ground of *res judicata or constructive res judicata*. If persuaded to do so the Court could hold such proceedings to be vexatious and/or oppressive. This bar could be obtained (sic) in respect of an issue of law or fact or even a mixed question of law and fact. The arbitral tribunal could adopt a procedure to deal with "re-arbitration complaint" (depending on the rules or

[34] The Arbitration & Conciliation Act 1996.
[35] *Himachal Sorang Power Private Limited v NCC Infrastructure Holdings Limited* (2019) SCC OnLine Del 7575.
[36] ibid.

> procedure which govern the proceeding) as a preliminary issue."[37]

The court as a result of the application of the principle of constructive res judicata, dismissed the application brought before it.

How to Set Up a Defense of Constructive Res Judicata

Given the support of the recent judgments of the Hon'ble Supreme Court of India & the High Court of Delhi, wherein the arbitral tribunals have been granted the authority to decide on the defense of constructive res judicata taken by Respondents, the authors would like to, very briefly, present the method of setting up of such a defense and the essential elements of such a defense.

a. A plea of bar under Order 2, Rule 2 / Constructive Res Judicata has to be taken in the Statement of Defense filed by the Respondent. Specifically mentioning that the cause of action on the basis of which a particular claim is based has already been the subject matter of arbitration in an earlier proceeding.[38]
b. In support of the defense, pleadings of the Claimant in the earlier proceedings have to be exhibited or at least marked by the Defendant.[39]
c. The Plaintiff has to be given an opportunity to defend as to whether the assertion of the Respondent is correct or not. Accordingly, the Respondent should insist that an issue be framed for adjudication by the arbitral tribunal. Unless an issue is framed in this regard, the arbitral tribunal will not have an opportunity to dismiss the claim.[40]

[37] ibid.
[38] *Alka Gupta v Narender Kumar Gupta* (2010) 10 SCC 141; *Bengal Waterproof Ltd v Bombay Waterproof Mfg Co* (1997) 1 SCC 99.
[39] *Kunjan Nair Sivaraman Nair v Narayanan Nair* (2004) 3 SCC 277; *Bengal Waterproof Ltd v Bombay Waterproof Mfg Co* (1997) 1 SCC 99
[40] *Alka Gupta v Narender Kumar Gupta* (2010) 10 SCC 141.

The aforesaid also aligns with the personal experience of the Authors wherein a defense to certain claims under a road construction contract brought by the Claimant / Contractor in the second reference arbitration proceedings, was defended as being barred under the principles of Constructive Res Judicata. The Respondent / Employer took the defense that Claims 1 & 2 pertain to liquidated damages due to delay and should have been brought in the first reference arbitration proceedings and not the second reference for which the cause of action was the termination of the contract. The Respondent's employer argued that claims 1 & 2 arising from the first cause of action and having not been preferred before the first reference arbitral tribunal are, in essence, deemed to have been waived and cannot be claimed in subsequent proceedings.

6. SUGGESTIONS & CONCLUSIONS

The aforementioned discussion in the paper can be summarized by highlighting the importance of the applicability of Res Judicata & Constructive Res Judicata to arbitral proceedings just as they apply to civil litigation in India. Especially because Arbitration is the preferred form of dispute resolution between business parties who aim to achieve finality with respect to the dispute in question with utmost efficiency. The evils that Arbitration aims to cure would be futile if there is re-arbitration with respect to the same issue or multiple arbitral proceedings on the same question or cause of action. The lack of guidance with respect to the application of principles of Res Judicata or Constructive Res Judicata under UNCITRAL Model Law and the Arbitration and Conciliation Act, 1996 is a cause for concern.

Though we have lately seen that the principle of Order 2, Rule 2[41] and Constructive Res Judicata has come to be applied in at least some instances in India and worldwide, the principle is not devoid

[41] Code of Civil Procedure, Order 2 Rule 2.

of legal uncertainty and ambiguity. Such an important concept which goes on to decide the jurisdiction of an arbitral tribunal and is at the root of many disputes cannot be left at a standstill. Out of abundant caution, it is imperative that there be legal deliberations on it and the same be codified to bring more clarity to its use in arbitral proceedings, carefully laying its scope and extent while doing so. Guidance may also be taken from the suggested amendment of the 144th Law Commission Report codifying Constructive Res Judicata within the Arbitration Act and a similar amendment as proposed, be made in the Arbitration and Conciliation Act, 1996 for utmost clarity.

Further, parties and advocates should be aware of this principle while drafting their Notice Invoking Arbitration or Statement of Claims so as to include all their claims arising out of a particular cause of action and risk forgoing or waiving those claims which have not been made but should have. The principle for effectively setting up of a claim for constructive res judicata as outlined above should be vociferously put forth by parties and advocates wherever applicable to eventually reach a stage that a High Court or Supreme Court of India comprehensively agrees to uphold the dismissal of claims based on defense of Constructive Res Judicata brought by a defendant.