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Instrumentalising Arbitration

Innovation, Interaction and Impact

Foreword by

The Hon'ble Mr Justice BR Gavai

Judge, Supreme Court of India

Articles

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FOREWORD

At the outset, I congratulate the Rajiv Gandhi National University of Law (RGNUL) on the publication of Volume 9, Issue 2 of the RGNUL Student Research Review Journal, on the theme "Instrumentalising Arbitration: Innovation, Interaction and Impact".

In this era of globalization, arbitration has evolved to be the preferred mode of dispute resolution. It is not only efficient and cost-effective, but also puts a quietus to heavily contested disputes in a time-bound manner. In disputes involving the State, arbitration might help cut back any further losses to the public exchequer as well. It is an evolving field of law that is steadily gaining mainstream recognition, and as such, it is important that we analyze various developments taking place therein, especially in the context of India.

It is also important that we recognize that institutionalizing arbitration in India is pertinent for its growth and success. This directly hinges upon the success rates of such arbitration proceedings, which should ideally be carried forward to their logical ends within a reasonable period of time. However, far too often, these proceedings are challenged on insubstantial grounds before the Courts at various stages, resulting in unnecessary delays.

Such issues require close consideration, especially by emerging legal scholars of today. How the system of arbitration can be formalized into a self-sustaining and independent field of its own, in light of the recent amendments, and offer specialized expertise such as in construction, maritime or energy law, needs to be looked into as well.

I am hopeful that Volume 9.2 of the RGNUL Student Research Review Journal contributes greatly to the emerging literature on arbitration in India, by delving into such important questions and concerns. I wish the RSRR team the very best for such future endeavours.

[B.R. Gavai]

EDITORIAL NOTE

The concept of alternative dispute resolution ("ADR") mechanisms or out of the court settlements is not new to India. Arbitration, one of the most popular methods of dispute settlement, was also prevalent in India under different names and forms. Disputes pertaining to land, property and family matters were routinely settled by the village elders or Panchayats.

A series of statues were enacted both prior and post-independence to institutionalize arbitration as a viable mechanism for dispute settlement in India. However, it was only in 1996 with the enactment of The Arbitration & Conciliation Act ("1996 Act"), that India got a comprehensive legislation in place to regulate arbitration. Modelled on the UNICTRAL Model Law on International Commercial Arbitration, the 1996 Act aimed at providing a speedier & cost-effective dispute resolution mechanism, minimizing the judicial intervention, introducing enforceability of arbitral awards and encompassing concepts such as conciliation and international commercial arbitration. Though the 1996 Act came as a groundbreaking development for India, it was soon criticized as its loopholes were felt with time. The main criticisms surrounding the 1996 Act stemmed from the interventionist role of the judiciary in both domestic and international arbitration matters.

In in order to address the lacunae of the 1996 Act, the Act has been amended thrice in the last decade - in 2015, 2019 and 2021. These amendments have brought noteworthy changes to the Indian arbitration landscape in the form of time-bund provisions, mandatory referrals by the judiciary, bolstering the authority of the Arbitral Tribunal, restriction on automatic stay on arbitral awards, among others.

In Volume 9, Issue 2 of the RSRR Journal, the Editorial Board has aimed to cover the developments in the arbitration law landscape

and the challenges that continue to act as roadblocks for India in its path towards becoming a hub of arbitration. An attempt has been made to suggest how the institutionalization of arbitration can be enhanced in India by taking policy measures. In furtherance of its objective and to generate novel legal literature marking this transition, RSRR invited contributions from all stakeholders, including, NGOs, corporations, governments, academic researchers, professors, students among others.

The article on the applicability of constructive res judicata on India seated arbitrations, delves into the conflict between the Code of Civil Procedure, 1908 ("CPC") and the 1996 Act, wherein the former talks about the applicability of res judicata to all civil and criminal matters, while the latter excludes the applicability of the entire CPC itself. The article specifically deals into whether the principle of constructive res judicata, a subset of res judicata, is applicable to arbitral proceedings or not. Constructive res-judicata states that where a party had an opportunity to bring a claim against the other party and it failed to do so, the claim would be presumed to have been abandoned and barred from being brought up in further proceedings. The article provides instances where the Courts have applied this principle to arbitration matters and underscores the need for recognizing these principles in law to ensure certainty and their universal applicability.

The article on the challenges posed by Web3, delves into the new age issues that have arisen with the evolution of Web3 or the decentralized web. The article provides how Web3 technologies and use cases are disrupting major industries that involve financial transactions and human interaction, like finance, marketing, gaming, and the legal industry due to the need of rule of law. In order to tackle these issues, the article argues that the scope of international arbitration should be broadened to encompass issues rising due to Web3. Further, international arbitration should be remodelled in a manner which ensures legal ease and encourages the Web3 stakeholders to approach ADR mechanisms.

The article on the pre-arbitration dispute settlement clause discusses the lack of legal recognition to the pre-arbitration dispute settlement agreements and the diverse positions of courts of law in India regarding their enforceability. While the majority view of the courts has been inclined towards the mandatory adherence of the pre-arbitral clauses, the minority view favours their voluntariness and advocates that the same cannot be enforced. A decision of the Supreme Court is awaited, which clears the contrary stance of courts.

The primary objective behind this theme has been to provide a platform for legal analysis, insightful commentary, and in-depth analysis that can assess the issues plaguing the arbitration law landscape of India and suggest policy measures to enhance the same.

On behalf of the entire Editorial Board of the RGNUL Student Research Review Journal, I am glad to present Volume 9, Issue 2 of the journal.

Kavya Jha,
Editor-in-Chief
RSRR

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CONSTRUCTIVE RES JUDICATA AND ITS APPLICABILITY TO INDIA SEATED ARBITRATIONS

Mr Gaurav Rai and Mrs Tarang Saraogi***

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.

IS INTERNATIONAL ARBITRATION LAW CAPABLE OF DEALING WITH LEGAL ISSUES ARISING OUT OF WEB3?

Mr Tariq Khan and Ms Radhika Gupta***

1. INTRODUCTION

How can disputes arising out of innovation which lacks legal definitions, party identification or proper jurisdiction be resolved? Disputes relating to Web3 are on a steady rise with increasing momentum of creation of platforms and usage by stakeholders of the Web3 ecosystem during this internet evolution.[1] This stage of evolution which includes semantic advancement and introduction to decentralised internet is referred as 'Web 3.0'.[2] The term 'Web3' was coined by Gary Wood, the co-founder of Ethereum in 2014.[3] It is also referred to as the 'Decentralized online ecosystem based on the blockchain' or 'Decentralized web' which aims to eliminate intermediaries and gives users control over their data. This decentralized internet ecosystem is a part of the internet evolution, with its users as its network stakeholders. In the absence of intermediaries, this network would be permissionless, self-governing, verifiable, censorship-resistant, connective and open-for-all. These features also indicate a lack of reliance on centralised rules and regulations created by International Arbitration bodies and governments. It may be of note that Web3 and Web 3.0 are

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[1] Nell Perks, 'Crypto disputes on the rise – a 2024 look at litigation, arbitration and regulation' (*Finextra*, 31 January 2024) <https://www.finextra.com/the-long-read/926/crypto-disputes-on-the-rise--a-2024-look-at-litigation-arbitration-and-regulation> accessed February 21, 2024.

[2] Victoria Shannon, 'A 'more revolutionary' Web' (*The New York Times*, 23 May 2006) <https://www.nytimes.com/2006/05/23/technology/23iht-web.html> accessed 20 February 2024.

[3] 'Introduction to Web3' (*Ethereum*, 1 March 2024) <https://ethereum.org/en/web3/> accessed 21 February 2023.

often used interchangeably, hence, this article would be focusing on Web3, which is powered by blockchain and cryptocurrency. Non-fungible Tokens ("NFTs"), Decentralised Applications, ("DApps"), Decentralised Finance platforms ("DeFi") are use cases built using the blockchain technology. While Artificial Intelligence, Machine Learning ("AI/ML") and Natural Language Processing ("NLP") are also a part of the current internet evolution, their primary role is semantic advancement, their usage in nexus with Web3 is nascent and merely interdependent, not foundational.

Web3 technologies and use cases are disrupting major industries that involve financial transactions and human interaction, like finance, marketing, gaming, and the legal industry due to the need of rule of law.[4] A robust dispute resolution mechanism is an urgent and critical part of this ecosystem, that delineates ways through which on-chain and off-chain issues can be resolved. There has been a significant rise in legal-tech startups that have begun developing Online Dispute Resolution ("ODR") platforms using blockchain or metaverse.[5] The rise in legal-tech seems to be a part of the solution but not the complete cure. Several pertinent issues concerning this nascent area remain unresolved which require legal intervention due to the complexities in the technology and gap in incorporation of principles of the international arbitration regime; issues related to and arising out of Cryptographic assets or Virtual Digital Assets ("VDAs"), NFTs, Smart Contracts, Decentralized Autonomous Organizations ("DAOs"), Wallets, DApps, Decentralised and Centralised Exchanges ("DEX" and "CEX"

[4] Jamilia Grier, 'Legal Compliance Is Crucial For Web3 Mass Adoption' (*Forbes*, 21 December 2022) <https://www.forbes.com/sites/forbestechcouncil/2022/12/21/legal-compliance-is-crucial-for-web3-mass-adoption/> accessed 21 February 2023.

[5] Christine Hall, 'Legal tech startups bring law, order to fragmented industry' (*TechCrunch*, 16 March 2022) <https://techcrunch.com/2022/03/16/legal-tech-startups-bringing-law-order-to-fragmented-industry/> accessed 21 February 2023; Vidhya Sivaramakrishnan, 'From parking tickets to divorces: A legal tech startup digitising mediation' (*YourStory*, 28 July 2022) <https://yourstory.com/2022/07/resolve-disputes-online-india-made-legal-tech-startup-helps-access-justice> accessed 21 February 2023.

respectively) and more such use cases. Part 1 of the article glosses over the issues while highlighting the need for international arbitration which has popularly grown to be known as, Part 2 is an analysis of the existing international arbitration framework and how the principles may apply to the new industry, Part 3 is an attempt to study the present limitations, followed by Part 4 which analyses how to channel the existing framework and broadening it to adapt with Web3. Finally, the conclusion will reflect upon the pressing need for a unified framework that consolidates Web3 principles and establishes a reliable system for dispute resolution.

2. NEED FOR INTERNATIONAL ARBITRATION

Since the new generation of the internet is based on the Read-Write-Own philosophy,[6] the primary parties therein are those who have a direct interest in the Web3 space through ownership over virtual assets i.e. the users, founders, developers, service providers and investors. VDAs such as NFTs, and cryptocurrencies such as Bitcoin or stablecoins like USDT, are assets that represent a value and can be exchanged. This value may differ depending on the characteristics, protocol used to build the asset and use of the asset.[7] They can be used in virtual marketplaces, DeFi, exchanges, games and apps with the help of wallets. These digital wallets store funds and assets, enable transactions and act as a door to Web3 projects. For example, MetaMask wallet can be used to log into Decentraland, a virtual world platform and to purchase VDAs on the platform.[8]

International arbitration is relied upon for its procedural fairness, neutrality, party autonomy, flexibility, privacy, the enforceability of

[6] Him Gajria, 'Web 3.0' (*Medium*, 26 May 2020) <https://medium.com/variablelabs/web-3-0-e0d817ec05c6> accessed 10 March 2024.
[7] 'Demystifying cryptocurrency and digital assets' (*PwC*) <https://www.pwc.com/us/en/tech-effect/emerging-tech/understanding-cryptocurrency-digital-assets.html> accessed 21 February 2023.
[8] 'Buying NFTs' (*Decentraland*, 17 February 2022) <https://docs.decentraland.org/player/blockchain-integration/buying-nfts/> accessed 25 February 2023.

award and cross-border accessibility.[9] These features are consonant with features of blockchain. Blockchain Arbitration is already a phenomenon being used to since Web3 parties may be from different corners of the world and, international arbitration can be useful to resolve disputes that:

a. Occur On-chain – Issues that are caused on the blockchain by acts within the blockchain without involvement of external factors.

b. Occur Off-chain - Disputes where issues arise by acts in real-world involving actors and stakeholders that impact the technology.

c. Hybrid in nature - Issues may be caused by acts within the blockchain with involvement of external factors or acts outside blockchain which may cause dispute the on-chain.

Some of the primary conflicts that have been witnessed or may occur soon are:

Breaches

While blockchain is more secure than traditional systems of data storage,[10] it is not free from vulnerabilities. There is a scope of attacks through wallet-cloning, hacking through majority control of the mining process, also known as 51% Attack.[11] Apart from wallets, there have been breaches with crypto exchanges too. In recent times, the cryptocurrency exchange Bancor was hacked and stole approximately $23.5 million were stolen in digital currencies. The breach, which occurred on July 9, 2018, involved the compromise of a wallet used for smart contract upgrades. Although Bancor was able to freeze the BNT tokens to mitigate

[9] Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) ch 15, 2120-2318.
[10] Nazanin Zahed Benisi, Mehdi Aminian, and Bahman Javadi, 'Blockchain-based decentralized storage networks: A survey' (2020) 162 JNCA <https://www.sciencedirect.com/science/article/abs/pii/S1084804520301302> accessed 25 February 2023.
[11] Jessica Groopman, 'Web 3.0 security risks: What you need to know' (*TechTarget*, 16 February 2023) <www.techtarget.com/searchsecurity/tip/Top-3-Web3-security-and-business-risks> accessed 21 February 2023.

part of the loss, the other tokens remained at large. Bancor has assured that no user wallets were compromised during this incident. The company announced initiatives to enhance cybersecurity across the cryptocurrency industry by forming a "crypto defenders" coalition. This group aims to collaborate on crime-fighting tools, share blacklists, and assist each other during security crises.[12]

Another such instance is the Coinbase Case.[13] Coinbase is an online platform for trading cryptocurrency, recently several wallet users lost millions in cryptocurrency due to scammers who used malicious smart contracts to gain access to user wallets to withdraw their crypto. Due to the user agreement, the users had to resort to Arbitration in the US jurisdiction. Users claimed that there were no warnings given by Coinbase against such activity. Coinbase users preferred US jurisdiction due to issues with the platform's arbitration agreement. The internal process requires users to follow a strict pre-arbitration procedure, which would prima facie appear to be biased to Coinbase. Critically, the arbitration clause has been perceived as one-sided, compelling users to arbitrate disputes while not imposing similar requirements on Coinbase. This has led to legal challenges where courts have sometimes ruled the arbitration agreement as "unconscionable," favouring Coinbase disproportionately.

Scams and Fraud in Cryptocurrency and NFTs

There have been different types of scams and frauds occurring over the Web3 space, some through malicious smart contracts, some

[12] William Suberg, 'Bancor Creates Crime-fighting 'Crypto Defenders' as Scorn Over $12 Mln Hack Escalates' (*Cointelegraph*, 13 July 2018) <https://cointelegraph.com/news/bancor-creates-crime-fighting-crypto-defenders-as-scorn-over-12-mln-hack-escalates > accessed 21 February 2023.

[13] Cyrus Farivar, 'Victims Claim Coinbase Didn't Protect Them From $21 Million Crypto Scam' (*Forbes*, 14 October 2022) <www.forbes.com/sites/cyrusfarivar/2022/10/14/victims-claim-coinbase-didnt-protect-them-from-21-million-crypto-scam/?sh=55884af12469> accessed 21 February 2023.

through emotional manipulation, namely 'Pig butchering'.[14] The U.S. Department of Justice has been active in seizing cryptocurrency linked to "pig butchering" scams, where scammers build trust with victims over time and then persuade them to make large crypto investments in fraudulent schemes. Recently, nearly $9 million in crypto was seized, linked to an organization that exploited victims through romance and investment scams.[15]

Intellectual Property Rights

Metaverse has been a creative space for creators and gamers, however, there have been multiple cases where real-world brands like Nike[16] and Hermès[17] have faced problems with trademark infringement and copyright issues, with their brands being used by artists in NFTs, supposedly misleading the buyers into thinking the NFTs are the product of the actual brand. While the Intellectual Property Rights ("IPRs") are protected in the Web3 space in a manner similar to their protection in the offline space, enforcing these rights is a cumbersome and expensive process without a proper procedural landscape, as seen in the cases mentioned. Despite the rise in trademark registration for brands in the metaverse, and coupled with increasing creators in the space, there is a correlation with increasing number of trademark and copyright

[14] Lily Hay Newman, 'Hacker Lexicon: What Is a Pig Butchering Scam?' (*WIRED*, 2 January 2023) <www.wired.com/story/what-is-pig-butchering-scam/> accessed 21 February 2023.

[15] Department of Justice, 'Justice Department Seizes Over $112M in Funds Linked to Cryptocurrency Investment Schemes' (Press Release Number 23-362, 3 April 2023) <https://www.justice.gov/opa/pr/justice-department-seizes-over-112m-funds-linked-cryptocurrency-investment-schemes> accessed 21 February 2024.

[16] Nike, Inc. v. StockX LLC, 1:22-cv-00983 (NYSDC); Pavitra Priyadarshan, 'Nike V. Stockx: An Analysis of the Trademark Infringement in the Metaverse' (*IPLF*, 29 September 2022) <https://www.ipandlegalfilings.com/nike-v-stockx-an-analysis-of-the-trademark-infringement-in-the-metaverse/> accessed February 21, 2023.

[17] Cam Thompson, 'Hermès Wins Trademark Lawsuit Against MetaBirkins NFTs, Setting Powerful Precedent for NFT Creators' (*CoinDesk*, 8 February 2023) <https://www.coindesk.com/web3/2023/02/08/hermes-wins-trademark-lawsuit-against-metabirkins-nfts-setting-powerful-precedent-for-nftcreators> accessed 21 February 2023.

infringement cases through creation of deepfakes.[18]

3. EXISTING INTERNATIONAL ARBITRATION FRAMEWORK IN WEB3 SPACE

Sources relied upon at each stage of international arbitration have established a comprehensive framework. However, it may not entirely be accommodating of Web3 and its technologies yet in terms of arbitral practice and practices in the usage of technology to resolve disputes.

International Treaties

The Convention on Recognition and Enforcement of Foreign Arbitral Award, New York, 1958 ("New York Convention", 1958)

Arbitration awards are generally enforceable in countries party to the New York Convention ("Convention"), which provides for the recognition and enforcement of foreign arbitral awards. This is particularly important in the Web3 context, where parties may be located in different countries and may have concerns about the enforceability of court judgments across borders.

Enforcement issues can be both on-chain and off-chain depending on the nature of transactions implicating the users and their assets. There must be a valid arbitration agreement for arbitration machinery to be set into motion. Article II (2) of the Convention can be liberally interpreted to include online agreements which are signed through digital signatures. The International Council for Commercial Arbitration (hereinafter "ICCA") advises judges while applying the New York Convention Article II(2) that it "*can be reasonably construed as covering equivalent modern means of communication.*"[19] to facilitate electronic agreements. However, smart

[18] Lily Li, 'Metaverse Law featured in OC Lawyer Magazine' (*Metaverse Law Blog*, 19 January 2024) <https://www.metaverse.law/2024/01/19/metaverse-law-featured-in-oc-lawyer-magazine> accessed 21 February 2024.
[19] *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (with the assistance of PCA, ICCA 2011).

contracts, Ricardian contracts and the involvement of DAO may not fit into this interpretation entirely due to the complex framework for human interpretation and the difference in the legal recognition of a contract.

While due process is protected alongside principles of natural justice and the parties can present their cases, there may be difficulty establishing grounds for challenge and determining who the parties are due to party anonymity; the principle of autonomy extends to jurors as well, which makes enforcement of an award a challenge.[20]

With UNCITRAL Model Law on Electronic Commerce, ("Model Law on Electronic Commerce") the interpretation of Article VII has also expanded, with parties being able to take recourse of the advantages of 'most favourable rule' for suitable conventions, treaties, and domestic law for recognition and enforcement of awards as may be relevant.[21] Other UNCITRAL initiatives for the inclusion of blockchain disputes are the Model Law on Electronic Signatures, the Convention on the Use of Electronic Communications in International Contracts, the Model Law on Electronic Transferable Records, the Rotterdam Rules, and the Model Law on Secured Transactions.[22]

The updated version of the UNCITRAL arbitration rules that were adopted and completed was covered in the 2010 Report of the United Nations Commission on International Trade Law.[23] The rules offer a thorough set of guidelines for how disputes originating from business contracts agreed upon by all the parties should be

[20] Elizabeth Chan and Emily Hay, 'Something Borrowed, Something Blue: The Best of Both Worlds in Metaverse-related Disputes' (2022) 15(2) Contemp. Asia Arb. J. 205.
[21] ibid.
[22] Tonya M Evans, 'The Role of International Rules in Blockchain-Based Cross-Border Commercial Disputes' (2019) 65 Wayne L. Rev. 1. <https://repository.globethics.net/handle/20.500.12424/4006269> accessed 25 February 2023.
[23] UN Commission on International Trade Law, *Report of the United Nations Commission on International Trade Law* (A/65/17, Forty-third session, 21 June-9 July 2010).

handled. Administrative arbitrations and ad hoc arbitrations frequently follow these rules. They include a model arbitration agreement, information on all facets of the arbitration process, and other crucial frameworks and guidelines for conflict settlement.

International Arbitration Rules

ICC and ICC Rules

The International Chamber of Commerce ("ICC") has been proactive in incorporating the usage of blockchain and other Web3 technologies to create more effective and efficient proceedings. For increased efficiency, appendix IV of ICC Rules 2021, under clause(f) provides, "*using of telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court.*"[24] ICC released a commission report 'Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings' in January 2023, wherein a special emphasis has been laid on incorporating AI & ML in arbitration under Article 5.2[25] to make the proceedings less cumbersome by determining the merits of the case and by providing instant and cheaper translations of documents. The limitations and concerns are also addressed to protect the interest and privacy of the parties.

LCIA Rules

London Court of International Arbitration Rules, 2020 provide that the Arbitral Tribunal's power under Article 14.5 (iii) includes the making of any procedural order to expedite the procedure to be adopted in the arbitration by employing technology to enhance the efficiency and expeditious conduct of the arbitration (including

[24] ICC Rules 2021, app IV, cl (f) <https://iccwbo.org/disputeresolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/> accessed February 22, 2023.
[25] ICC Commission on Arbitration and ADR, *Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings* (February 2022).

any hearing).[26]

Domestic Laws

Digital Dispute Resolution Rules ("DDR rules") and the English Courts

DDR rules are given by the United Kingdom Jurisdictional Taskforce ("UKJT") envisioning digital dispute resolution through the on-chain arbitration process. The resolution process can be availed in two manners, either through an automatic dispute resolution process which allows parties to choose a person, panel, or AI agent to take a decision and apply it through a digital asset system, making it binding or through submission to an arbitrator who uses a private key for implementation of their decision on the blockchain. The English courts deal with jurisdictional issues by allowing non-designation of jurisdiction for issues relating to crypto assets as they are located on a distributed network. They also identify the need for enforcement of orders in other jurisdictions outside of England and Wales.[27]

The *Kleros* case[28] sheds light on the importance of on-chain arbitration and the upgradation of the existing domestic legal framework. Herein, a blockchain arbitration protocol-based arbitral award ("Blockchain Arbitral Award") was enforced by Mexican courts. The growth of blockchain arbitration will be greatly impacted by this decision. To guarantee full compatibility with the pre-existing arbitration framework, the Blockchain Arbitral Award was not directly enforced in this case but was

[26] LCIA Arbitration Rules 2020 art 14.6.(iii).
[27] Greg Lascelles and Alan Kenny, 'Litigation & Dispute Resolution Laws and Regulations Report 2022-2023 The English Courts' Approach to Disputes Involving Crypto-Assets' (*International Comparative Legal Guides International Business Reports*) <https://www.cov.com/-/media/files/corporate/publications/2022/02/iclg-litigation--dispute-resolution-2022--the-english-courts-approach-to-disputes-involving-cryptoassets.pdf > accessed February 22, 2023.
[28] Mauricio Virues, 'How to Enforce Blockchain Dispute Resolution in Court? The Kleros Case in Mexico' (*Kleros*, 10 January 2022) <https://blog.kleros.io/how-to-enforce-blockchain-dispute-resolution-in-court-the-kleros-case-in-mexico/> accessed 22 February 2023.

included by reference in a conventional arbitral ruling.[29]

Arbitration Agreements

The Arbitration Clause in Terms of Service Agreements

Arbitration clauses are included in terms of service agreements of several metaverse platforms. It provides the seat of arbitration and the rules to be followed for the procedure. The assent of users to these terms is derived from their response to the click-wraps agreement by selecting "I agree to the terms and conditions."[30] For these agreements to be valid, the arbitration provision has to be within reasonable notice of the user.[31] In some cases there might be browser-wrap agreements, where the mere use of the website constitutes as user's assent to the terms and conditions.[32]

Decentraland, a metaverse platform, has provided a multi-tiered ICC arbitration clause under Article 18 of its terms of use, with Panama as the seat of arbitration, as well as its headquarters.[33] Similarly, Roblox under Article 16 of its terms of use designated the AAA rules and California as its seat of arbitration. Binance under Article 10 of the Terms of Use provides for arbitration under the HKIAC Rules, with the seat as Hong Kong. Jupitice, an Indian legal-tech startup has incorporated Blockchain and AI technology with an arbitration clause in their terms of use as well, by the

[29] Maxime Chevalier, 'Arbitration Tech Toolbox: Is a Mexican Court Decision the First Stone to Bridging the Blockchain Arbitral Order with National Legal Orders?' (*Kluwer Arbitration Blog*, 4 March 2022) <https://arbitrationblog.kluwerarbitration.com/2022/03/04/arbitration-tech-toolbox-is-a-mexican-court-decision-the-first-stone-to-bridging-the-blockchain-arbitral-order-with-national-legal-orders/> accessed February 22, 2023.

[30] Ed Bayley, 'The Clicks That Bind: Ways Users "Agree" to Online Terms of Service' (*Electronic Frontier Foundation*, 16 November 2009) <www.eff.org/wp/clicks-bind-ways-users-agree-online-terms-service> accessed February 25, 2023.

[31] Benjamin Stearns and Carlton Fields, 'Determining Whether "Clickwrap Agreement" Provides "Reasonable Notice" of an Arbitration Agreement Is a Fact-Intensive Inquiry' (*JD Supra*, 14 July 2020) <www.jdsupra.com/legalnews/determining-whether-clickwrap-agreement-36227/> accessed 25 February 2023.

[32] Jason Crawford, 'The Importance of Clicking on "I agree to the terms and conditions"' (*WebsitePolicies*, 9 May 2017).

[33] 'Terms of Use' (*Decentraland*) <https://decentraland.org/terms/> accessed 6 May 2024.

Arbitration and Conciliation Act, of 1996.[34] These examples show an increased reliance on institutional arbitration and ad-hoc arbitration as the way forward.

4. CURRENT LIMITATIONS OF INTERNATIONAL ARBITRATION

International arbitration as the go-to dispute resolution mechanism in Web3 space can be due to its fundamental nature and objectives. It resounds with the ideology behind Web3 for a decentralized space, with user independence/party autonomy; the pinnacle of International Arbitration is the choice.

Correlation of Preferred Seat with Regulation

For effective development and to enable adoption of the new technologies, regulations are awaited. These regulations would be extremely pertinent in deciding the seat of arbitration; as per current trends, arbitration hubs like Hong Kong, London, Paris, Singapore and Geneva are the most preferred seats due to their pro-arbitration legal frameworks.[35] However, many countries with complex legal systems like India are still in the process of formulating fair regulations to address the right issues and provide proper mechanisms and appoint the right authorities to deal with the issues.[36]

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[34] Tariq Khan and Anand Kumar Maurya, 'Arbitration: A Preferred Mode Of Dispute Resolution Mechanism In Metaverse' (*LiveLaw.in*, 22 August 2022) <www.livelaw.in/columns/arbitration-a-preferred-mode-of-dispute-resolution-mechanism-in-metaverse-207171> accessed 22 February 2023.

[35] Abbey Cohen Smutny and Norah Gallagher, '2021 International Arbitration Survey: Adapting arbitration to a changing world' (*White & Case LLP*) <https://www.whitecase.com/publications/insight/2021-international-arbitration-survey> accessed 25 February 2023.

[36] KPMG, *Metaverse and Web: Opportunities in India* (November 2022) <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2022/11/metaverse-and-web-opportunities-in-India.pdf> accessed 25 February 2023; Manish Agarwal, 'An ideal policy framework for India's Web3 industry' (*Livemint*, 19 August 2022) <www.livemint.com/opinion/columns/an-ideal-policy-framework-for-india-s-web3-industry-11660764147066.html> accessed 25 February 2023.

Lack of Understanding of Virtual Spaces

Accessing Metaverse and other Web3 platforms is still a hassle for users.[37] There is an increased use of 'terms of use agreements' and a lack of user awareness regarding their rights, obligations, and legal recourses when they give assent to agreements. Moreover, the determination of the platform is unclear in many such terms, they do not act as sufficient enforcers of agreement.

Lack of Digital Infrastructure

While virtual hearings are gradually becoming a part of legal frameworks worldwide, there is a lack of awareness about the proper virtual tools and the lack of equipment and infrastructure to ensure the smooth functioning of proceedings.[38] Majority of the population in developed countries relies on institutional arbitration while developing countries are still adapting to institutional arbitration and are presently more reliant on ad-hoc proceedings.[39] There is a need to provide prerequisites which consist of what the mode for dispute resolution could be, and these requisites should be in congruence with established protocols to ensure the protection of data.

Arbitrable Cases and Validity of Agreements

One of the major areas of conflict in Web3 has been IPR, an area of ambiguity under international arbitration due to some rights being *right in rem* which are not arbitrable*, and* some being *right in personam* which are arbitrable.[40] Different jurisdictions have a

[37] Parmy Olson, 'Web3 is Useless If It's Not User Friendly' (*Bloomberg*, 12 April 2022) <www.bloomberg.com/news/articles/2022-04-12/web3-is-useless-if-it-s-not-user-friendly?leadSource=uverify%20wall> accessed 25 February 2023.
[38] PRS Legislative Research, *Standing Committee Report Summary: Functioning of Virtual Courts* <https://prsindia.org/policy/report-summaries/functioning-of-virtual-courts> accessed 25 February 2023.
[39] Joseph T McLaughlin, 'Arbitration and Developing Countries' (1979) 13(2) The International Lawyer 211.
[40] Yash Vardhan Garu and Hetvi Mehta, 'Arbitrability of Intellectual Property Rights' Disputes: An Affirmative Step' (*SCC Blog*, 26 December 2022) <www.scconline.com/blog/post/2022/12/26/arbitrability-of-intellec tual-property-rights-disputes-an-affirmative-step/> accessed 25 February 2023.

different stance on the enforcement actions, e.g. Switzerland has a liberal approach allowing IPR cases of infringement as well as the validity of IPR to be arbitrable, but Japan has a restrictive approach, allowing IPR infringement to be arbitrable but not the cases of validity.[41]

Data Theft and Privacy Issues in Virtual Courts, ODR Spaces and Case Management Platforms

Virtual Courts, ODR spaces and case management platforms would contain sensitive and confidential information about the parties and regarding the case. The idea to create a safe decentralised web, with user control over the data is still an ongoing process and is still not full-proof; it would take a significant amount of time to build the safe space as proposed.

5. INNOVATION FOR THE FUTURE OF INTERNATIONAL ARBITRATION

The increasing dialogue around the future of technology and its impact on dispute resolution presents the opportunity to gather insights from global experts on disputes relating to Blockchain, Crypto, AI and Metaverse. Without intervention of technical experts and collaboration with long-term experts in the domains, it would be futile to build mechanisms for dispute resolution. This space considers the "*Code is law*", which does not circumvent the fact that "*Law is the Law*" but creates a scope for understanding and incorporating technological explanations and reasoning to the dispute resolution protocols being developed around these advancements.[42]

[41] Chinmoy Pradip Sharma, 'Resolution of Disputes involving IPR through Arbitration in India – An Analysis of the Legal Position' (*Bar and Bench*, 21 May 2019) <www.barandbench.com/columns/resolution-of-disputes-involving-ipr-through-arbitration-in-india> accessed 25 February 2023.

[42] Oster Jan, 'Code is code and law is law—the law of digitalization and the digitalization of law' (OUP Academic, 3 July 2021) <https://academic.oup.com/ijlit/article-abstract/29/2/101/6313392/> accessed February 25, 2023.

Identity Verification Systems

Disputes arising out of inter-avatar interaction are yet to be identified as arbitrable since there's a lack of a valid contract. These issues can be resolved with amicable and conducive spaces like mediation and negotiation. Internet and its territoriality may not ever be defined properly, thus, usage of metaverse to resolve issues arising therein would be a prudent option. Moreover, providing validity to an avatar with a verified identity could allow ease of enforcing the procedures.[43] Incorporating Know Your Customer ("KYC") measures within the platforms would be a way to meet enforcement agencies in the middle.

Court Adoption and Experimental Models

Placing reliance on the framework provided under the DDR Rules by UKJT, Hon'ble Chief Justice DY Chandrachud spoke at the IVth edition of the International Conference on 'Arbitration in the Era of Globalisation' held in Dubai in 2022, addressed the need to infuse the newer technologies with the traditional arbitration system.[44]

To fast-track the process of adopting arbitration as the primary dispute mechanism, courts would play a significant role by adopting the technologies and promoting arbitration. A separate institute or judicial body could be set up with dedicated fund allocation to deal with these cases in an experimental model, much like a Sandbox.

[43] Ben Chester Cheong, 'Avatars in the metaverse: potential legal issues and remedies' (*Intl. Cybersec. Law Review*, 7 June 2022) <https://link.springer.com/article/10.1365/s43439-022-00056-9> accessed 25 February 2023.

[44] Sohini Chowdhury, 'Smart Contract Arbitration An Effective Alternative To Traditional Arbitration Which Has Now Started To Resemble Traditional Litigation: Justice Chandrachud' (*LiveLaw.in*, 20 March 2022) <www.livelaw.in/top-stories/justice-dy-chandrachud-arbitration-international-conference-litigation-system-smart-contracts-194521> accessed February 22, 2023.

Coalition of Automated Legal Application ("COALA") Model Lw for DAO[45]

To create uniformity in the legal framework for DAOs, COALA devised a Model Law addressing major issues about DAOs which gave an insight into the development of arb-tech and dispute resolution mechanism in Web3. It requires that parties "*refer to or furnish a Conflict Settlement Mechanism*" under Article 4(1)(j) and (k). One of the essential requirements for DAOs to be granted legal personality is that they comply with this commitment, which applies to "DAO, Members and Participants" as well as any affected third parties (Article 4(1) of the Model Law). According to Article 3(9) of the Model Law, a "*Dispute Resolution Mechanism*" is an "*On-Chain alternative dispute resolution system, such as arbitration, expert determination, or an On-Chain alternative court system, which enables anyone to resolve their disputes, controversies, or claims with, arising out of, or in connection with, a DAO.*"[46] The dispute resolution clause would be a part of the DAOs code. One peculiar aspect herein is that minimum standards of due process do not need to be met, this may cause an issue in the long run, but the purpose of this inclusion is to allow the ease for dispute resolution and gradually strengthen the framework.

Alignment with Green Arbitration

The net-Zero movement has gained importance globally, the future is paperless and carbon footprint reduction is key, this can be done by creating a better digital infrastructure for virtual hearings, which would reduce travel, with virtual case management and data storage

[45] Coalition of Automated Legal Applications, *Model Law for Decentralized Autonomous Organizations (DAOs)* (2021) <https://www.lextechinstitute.ch/model-law-for-decentralized-autonomous-organizations-daos/> accessed 22 February 2023.

[46] Sophie Nappert and Elisabeth Zoe Everson, 'The Model Law For Decentralized Autonomous Organizations – Reinventing Due Process' (*Delos Dispute Resolution*, 15 June 2022) <https://delosdr.org/the-model-law-for-decentralized-autonomous-organizations-reinventing-due-process/> accessed 22 February 2023.

platforms, which would facilitate a paper-free proceeding.[47]

6. CONCLUSION

The framework of international arbitration has witnessed many unprecedented situations over the past several years but has also managed to resolve some of the most unique cases. The unprecedented field of Web3 is no different; it requires more attention from the legal fraternity to help build a conducive dispute resolution framework, which can catch up with the speed of the current tech revolution and upcoming advancements. International arbitration as a decentralized dispute resolution mechanism for a decentralized space would lead to much-awaited justice. Re-modelling of international arbitration with reduced legalese, and increased legal ease would establish the Web3 stakeholders' faith in the ADR mechanisms, reducing the additional financial and institutional burden on traditional courts to adapt to the technology. Gradually, the tech adaptation would become a part of the whole legal machinery.

There's a requirement for a unified (not necessarily centralised) framework to help incorporate the principles and technologies of Web3 in the existing framework to be able to understand the inner-working of the technology as well as to be able to deal with issues effectively. The expansion of the scope of international arbitration in Web3 space would help increase the scope of arbitrable issues as well, beyond smart contract disputes, some IPR disputes and commercial disputes, to more industry-specific issues. The unified framework would help create a trustable system for dispute resolution thereby, improving economies by enhancing the ease of doing business and increasing investment in countries with high growth potential in the Web3 space.

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[47] Tariq Khan, 'Green Arbitration: The Uncharted Road Towards Sustainable Arbitration' (*SCC Blog*, 24 August 2022) <https://www.scconline.com/blog/post/2022/08/24/green-arbitration-the-uncharted-road-towards-sustainable-arbitration/> accessed 25 February 2023.

A FREEWAY TO DISPUTE RESOLUTION: PRE-ARBITRATION RESOLUTION CLAUSE?

Ms Swarna Yati[*] and Ms Hunar Kaur[**]

1. INTRODUCTION

Arbitration is a method of alternative dispute resolution, and most contracts nowadays incorporate an arbitration clause to solve any dispute that might arise, without going to court. Arbitration is not the first step that comes into play when a dispute is to be resolved. Certain "pre-conditions" need to be fulfilled before invoking arbitration when the parties have agreed to such conditions in their contract. This is done by employing a pre-arbitration clause in the agreement. When such pre-conditions are met, and even then, the dispute cannot be resolved, a case may be brought before the Arbitral Tribunal for arbitration.

A pre-arbitration clause can be understood as an agreement entered by the parties before the contract's commencement. In any dispute, the parties will recourse to a dispute resolution mechanism, not litigation. This mechanism consists of a multi-forked approach, including negotiation, mediation and conciliation. Such an approach provides a more amicable and efficient solution to a dispute. This mechanism is divided into different layers, and is also known as a multi-tiered dispute resolution, often referred to as MTDRC. Only after the failure of the amicable resolution do the parties approach the courts for litigation.

It is standard procedure to include a multi-tiered dispute resolution

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clause in an arbitration agreement.[1] Such agreements stipulate specific actions that parties must follow before bringing an arbitration clause into play. These procedures often involve time-limited mediation, peaceful settlement through cordial negotiations, and cooling-off periods.

In some instances, the parties may present the case for arbitration without meeting the pre-conditions as mentioned in the terms of the contract. Then a question arises about the admissibility of the dispute and the jurisdiction of the tribunal so constituted. The global view of this issue has been of admissibility and not jurisdiction.

The remedy which the parties enjoy by way of invoking the arbitration clause is restricted due to the existence of the limitation period, which allows the parties to file for arbitration within a stipulated period of time. If the parties fail to file the case for arbitration during that time, the dispute will not be entertained by virtue of being barred by limitation. But this raises the question of whether the time spent trying to solve the dispute by way of alternate measures is included in the limitation period.

2. CURRENT JURISPRUDENCE: A LEGAL QUANDARY

Even though they are frequently included in dispute resolution agreements, pre-arbitration processes in India lack defined legal recognition. The validity of a multi-tiered clause is a topic of intense discussion in India. Regarding the legality and enforceability of such pre-arbitral dispute settlement agreements, courts have adopted a variety of positions. Pre-arbitration actions have been deemed voluntary and non-mandatory by some courts, despite the fact that the majority of courts have rendered them necessary in

[1] Kumar A, "Multi-Tier Dispute Resolution Clause", (*SCC Online*, 21 February, 2022) <https://www.scconline.com/blog/post/2022/02/21/multi-tier-dispute-resolution-clause/> accessed 9 February 2023.

nature.[2]

Reviewing the rulings reveal that the courts have addressed this matter several times, frequently coming to contradictory conclusions. The courts have generally accepted two positions. Pre-arbitration procedures are required and fall under the jurisdiction of tribunals, according to the majority of courts that have given respect to the arbitration clause's plain meaning (based on a case-by-case examination). As a matter of general principle, other courts (the minority view) have described pre-arbitration processes as voluntary and non-mandatory.[3]

In particular, the court held that arbitration under Clause 17(b)[4] under the agreement between the parties in *Quick Heal Technologies Limited* v. *NCS Computech Private Limited and Ors.* refers to a situation where under Clause 17(a), parties have agreed, through a new contract, to guide their disputes to arbitration after the amicable settlement process has failed, rejecting the petitioner's argument that clauses 17(a) and 17(b) of the agreement talk about separate procedures.[5] Therefore, if both parties did not agree to submit their problems to arbitration under Clause 17, Clause 17(b) cannot work independently and cannot be utilised to begin an arbitration

[2] Busar A and Sharma K, "Discussing the Validity of Pre-Conditions for Invocation of Arbitration" (*Koinos* December 13, 2022) <https://indian arbitrationlaw.com/2022/12/13/discussing-the-validity-of-pre-conditions-for-invocation-of-arbitration-proceedings/> accessed 9 February 2023.

[3] Chawla C, "The Muddy Waters of Pre-Arbitration Procedures – Are They Enforceable? Answers from an Indian Perspective" (*Kluwer Arbitration Blog* June 9, 2019) <https://arbitrationblog.kluwerarbitration.com/2019/06/09/the-muddy-waters-of-pre-arbitration-procedures-are-they-enforceable-answers-from-an-indian-perspective/> accessed 9 February 2023.

[4] *Quick Heal Technologies Limited v. NCS Computech Private Limited and Ors.,* Arbitration Petition No. 43 of 2018 [4].

[5] Kashyap D, "The Mandatory Nature Of Pre-Arbitration Clauses And Whether An Arbitration Clause Which Provides Discretion To Parties To Invoke Arbitration, Would Qualify As An Arbitration Clause: Bombay High Court Discusses" (*Mondaq Ltd*, August 5, 2020) <https://www.mondaq.com/india/arbitration--dispute-resolution/972816/the-mandatory-nature-of-pre-arbitration-clauses-and-whether-an-arbitration-clause-which-provides-discretion-to-parties-to-invoke-arbitration-would-qualify-as-an-arbitration-clause-bombay-high-court-discusses> accessed 9 February 2023.

proceeding under Clause 17(a).[6]

Another conundrum that presents itself regarding the pre-arbitration dispute resolution clause is the validity of the jurisdiction of the arbitral tribunals, which the parties often challenge. It might be argued that a jurisdictional flaw that prevents a party from legitimately beginning arbitral proceedings is the failure to comply with statutory pre-arbitration procedural procedures. Despite this, most jurists and academics believe that failure to meet the prerequisites is an issue of admission rather than the jurisdiction of the tribunal.[7] This stance has been elaborated through the cases provided in the present paper.

In recent years, most courts outside of India have hesitated to view pre-conditions as jurisdictional obstacles to the arbitral tribunal. In *The Republic of Sierra Leone* v. *SL Mining Ltd.*[8], the English High Court unequivocally stated that any alleged multi-tiered dispute resolution clause violation is to be regarded as the sole issue of admissibility for the arbitral tribunal instead of jurisdiction.

In Indian Courts, the stance is still unclear as to whether the admissibility, as well as the jurisdiction of the Arbitral Tribunal, can be challenged or not. The Supreme Court, while allowing objection petitions filed under Section 16 of the Arbitration and Conciliation Act,[9] concluded that at any stage, arbitrators could not assume jurisdiction to proceed with the arbitration.[10]

The parties agree to resolve a dispute by adhering to the sub-clauses put up in the arbitration clause (which includes solving the dispute through pre-arbitral procedures) of the agreement they enter into.

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[6] *Quick Heal Technologies Limited v NCS Computech Private Limited and Ors,* Arbitration Petition No. 43 of 2018.

[7] Shrivastava P, "Escalation Clauses - Directory or Mandatory? Dissecting the Position under Indian Law" (*IRCCL* March 1, 2022) <https://www.irccl.in/post/escalation-clauses-directory-or-mandatory-dissecting-the-position-under-indian-law> accessed 9 February 2023.

[8] *Republic of Sierra Leone v SL Mining Ltd,* [2021] EWHC 286 (Comm).

[9] The Arbitration and Conciliation Act, 1996, (Act 26 of 1996).

[10] *SK Jain v State of Haryana & Anr,* (2009) 4 SCC 357.

But the nature and applicability of these clauses can be diluted by the language and structure of the clauses when the parties feel that the possibility of solving a dispute through such arbitral procedures is slim or the dispute cannot be settled through such pre-arbitral procedures within a reasonable time.

3. GLOBAL PERSPECTIVE: A DIFFERENT APPROACH

The pre-conditions mentioned in the agreements aid in amicably resolving a dispute. However, these pre-conditions may even hamper the right to refer the dispute to the arbitral tribunal for its resolution. These proposed, seemingly simple solutions have affected the efficacy of arbitration proceedings.

The non-compliance to the clauses has been used by the parties to challenge the legality of the arbitral tribunal, and in sporadic cases, even the award passed by these tribunals has been annulled.

An attempt at characterising the pre-arbitral conditions and determining whether the same is a matter of jurisdiction or admissibility will help further assess the effect of non-compliance with these requirements. There are two different stances taken when the pre-conditions are not met, one, where it is argued that non-compliance means no jurisdiction of the arbitral tribunal, and if they are complied with, the arbitral tribunal enjoys jurisdiction over the matter. In the second, where no jurisdictional issue is raised. The dispute is admissible even when the preconditions are not complied with.

Still, it only provides for the adjudication of material claims once the subject of adherence to the pre-conditions has been complied with. The award passed by an arbitral tribunal is usually challenged on the grounds of the jurisdiction of the arbitral tribunal.

The US Supreme Court attempted to delineate the issues of admissibility and jurisdiction in the case of *BG Group v. Republic of Argentina* where an arbitral award was challenged on the ground

that the mandatory pre-conditions had not been complied with.[11] The court held that the question of whether an arbitration clause binds the parties is for the courts to decide until there is a provision to the contrary in the arbitration agreement and the constituted arbitral tribunal determines the meaning and import of the pre-conditions, which includes their non-compliance.

The Hong Kong Court of First Instance has made it clear that the issue of compliance with the pre-conditions is of admissibility and not jurisdiction. This stance was upheld in the case of *C v. D* where it was stated that considering pre-conditions as a subject matter of admissibility rather than jurisdiction would be prudent.[12]

It is also a settled position under English Law that this non-compliance issue is of admissibility rather than jurisdiction. This was the position in the case of *Sierra Leone v. SL Mining Limited* where the arbitral award passed by the tribunal was challenged on the ground of jurisdiction. [13]

The relevant text from the judgement is as follows:

> […] if there were no jurisdiction, there would be no jurisdiction to stay or adjourn: a claim should simply be rejected as outside the jurisdiction of the arbitrators (*pro tem*). The Arbitrators concluded in the Award that it was a matter of admissibility and ruled that it was admissible.

Another case endorsing the dispute of whether arbitration is a matter of jurisdiction or admissibility is that of *NWA and others* v. *NVF and others*.[14] In this case, the parties have agreed to settle the dispute through an LCIA mediation before commencing the LCIA arbitration. Still, the claimants here filed for arbitration without resolving the dispute through mediation. The question before the court was to decide whether non-compliance with the pre-condition challenges the admissibility or the jurisdiction of the

[11] *BG Group v Republic of Argentina,* (2014) 134 S.CT. 1198.
[12] *C v D,* [2021] HKCFI 1474.
[13] *Sierra Leone v SL Mining Limited,* [2021] EWHC 286 (COMM).
[14] *NWA & Anor v NVF & Ors*, [2021] EWCH 2666.

tribunal. The court delved into the wording of the arbitration agreement and held that the parties had agreed to solve the dispute through mediation and then through arbitration. The court rejected the defendant's contention that non-compliance is one of jurisdiction. The claimants, in contrast, argued that the failure to invoke mediation before referring the dispute for arbitration affects the tribunal's admissibility. However, the consequence of allowing the above argument would be that in case one of the parties refuse to mediate, the tribunal would never gain jurisdiction, even when the parties have agreed to arbitration.

One of the most criticised decisions in the case of *Emirates Trading Agency LLC* v. *Prime Mineral Exports Ltd*.,[15] which has suggested that these pre-conditions are relevant to the tribunal's jurisdiction, has been distinguished by the courts from that of *Sierra Leone* and *NWA* by stating that the issue of admissibility and jurisdiction was never really considered by the court. But now, the position seems to be settled by the courts.

However, failing to comply with the pre-conditions does not necessarily mean that the arbitral tribunal will never gain jurisdiction. As per the court's observation in *NWA*, the construction of the agreement determines the outcome of the case, and this could be further explained by the case of *Laker Vent Engineering v. Jacobs*,[16] where it was explicitly provided in the arbitration agreement that the failure of the parties to agree to an arbitrator within a specified time frame would allow the dispute to be settled by court proceedings. In such circumstances, where there is a clear intention for the change of forum, the arbitration agreement is deemed to be inoperative.

[15] *Emirate Trading Agency LLC v Prime Mineral Exports*, [2015] 1 WLR 1145.
[16] *Laker Vent Engineering Ltd v Jacobs E&C Ltd,* [2014] EWCH 1058.

4. INDIAN JURISPRUDENCE: A METHODICAL ANALYSIS

The Indian courts have taken varied stances regarding the applicability and adherence to the pre-arbitration dispute resolution clause. Through this discussion, the various views of different Indian courts have been analysed.

Majority View

Even though courts in India and throughout the world have held a variety of opinions, the general consensus favours obligatory adherence to the pre-arbitral stages when they are carefully stipulated. Every term in a contract must be interpreted, if feasible, to give effect to all of its provisions and refrain from rejecting any of them. The courts have given varied opinions in multiple instances but generally concluded that, if the terms of the contract are unambiguous and clearly stated, then, courts often have minimal power to alter its applicability.[17]

The Supreme Court's ruling in *United India Insurance Co. Ltd.* v. *Hyundai Engineering and Construction Co. Ltd.*,[18] comes into play in this situation. According to the applicable arbitration agreement between the parties, no issue was to be submitted to arbitration if the insurance provider contested its liability. The Court determined that failure to comply with this requirement rendered the matter inadmissible to arbitration. The fulfilment of the clauses is a prerequisite to invoking the arbitration provision.[19]

The Rajasthan High Court ruled that in cases where a dispute resolution process has been stipulated in the contract's language,

[17] Jain A and Joshi T, " The Ambiguous State Of Pre-Arbitration Procedures In Multi-Tiered Dispute Resolution Clauses" (*Mondaq Ltd*, November 19, 2021) <https://www.mondaq.com/india/arbitration--dispute-resolution/1132672/the-ambiguous-state-of-pre-arbitration-procedures-in-multi-tiered-dispute-resolution-clauses> accessed 9 February 2023.
[18] *United India Insurance Co Ltd v Hyundai Engineering and Construction Co. Ltd.*, Appeal (Civil), 8146 of 2018.
[19] ibid.

proper implementation of the arbitration provision demands that the parties adhere to it contractually.[20] According to the Court, when the agreement is taken as a whole, the pre-conditions must be strictly adhered to.[21] According to the Supreme Court, the literal interpretation of the provisions was mandatory. It was to be followed unless they had been waived or the person intending to prove them had somehow prevented himself from doing so.

The clauses of the contract for resolution for arbitration also become binding when the word 'shall' is incorporated in the clauses, and the parties are under obligation to resort to dispute resolution in a realistic and genuine manner.[22]

Various countries, including Singapore and England, have also supported this position internationally. The courts acknowledged that if the parties in the contract have stipulated a condition for invoking arbitration in case any dispute arises, it is rendered mandatory. It has been held that these pre-conditions are not merely optional but require pure adherence if stipulated in agreements, and must be complied with.[23]

According to the Singapore Court of Appeal's ruling in *International Research Corp PLC* v. *Lufthansa Systems*,[24] "if the pre-conditions are established with sufficient clarity and detail, then they should be considered as necessary in character." They cannot, however, be mandated to be followed if they are ambiguous or broad in scope.

Minority View

The majority view, however, has been criticised by some of the

[20] *M/s Simpark Infrastructure Pvt Ltd v Jaipur Municipal Corporation* (2012) SCC OnLine Raj 2738.
[21] *M.K Shah Engineers & Contractors v State Of M.P,* (1999 (1) JT (SC) 315.
[22] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd,* [2014] EWHC 2104 (Comm).
[23] Kumar A, "Multi-Tier Dispute Resolution Clause" (*SCC Blog*, February 21, 2022) <https://www.scconline.com/blog/post/2022/02/21/multi-tier-dispute-resolution-clause/> accessed 9 February 2023.
[24] *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55.

courts. The Supreme Court of India[25] ruled that the possibility of the preconditions to arbitration being successful must be taken into account, particularly where they are open-ended and do not offer concrete results, and so the preconditions' attempt to be fulfilled might just be almost null. The court concluded that such discussions and mediations might be reduced to empty formality, thus offering no solution.

In *Ravindra Kumar Verma* v. *BPTP Ltd.*,[26] the Hon'ble Delhi High Court delivered a significant decision that crystallised the idea that pre-arbitral proceedings under dispute resolution clauses are purely directory. For the same, the Court offered a two-pronged justification. First of all, because the time spent in pre-arbitral procedures is not exempt from restriction under the Limitation Act of 1963, doing so might seriously and gravely damage the party seeking to initiate arbitration. Because of this, the arbitration clause may not be enforced until after the deadline for initiating the arbitration has passed. Then, the court provides an example and states that in case there is pre-condition of 'mutual discussion' before invoking the arbitration clause and a notice has been served on the last day of the limitation period, no discussion could be completed and arbitral proceedings could begin on the same day. Thus, if pre-conditions are considered mandatory, then in case the above (or similar) situation arises, the parties would never get a chance to get the dispute resolved through arbitration.[27]

5. LIMITATION PERIOD: AN IMPEDIMENT?

In case the dispute between the parties fails to be solved employing alternate dispute settlement procedures, then the parties may wish to file the suit before the arbitral tribunals for adjudication. The question then revolves around whether there's a particular period within which the dispute has to be filed before the tribunal, and if

[25] *Demerara Distilleries Pvt Ltd v Demerara Distillers Ltd., (*2015) AIR(SCW) 153.
[26] *Ravindra Kumar Verma v M/S BPTP Ltd,* (2015) 147 DRJ 175.
[27] ibid [8(ii)].

there is, what if the parties fail to file the suit within the required time frame?

In most contracts, the limitation time that must pass before a disagreement may be submitted for resolution is mentioned; if it does, the dispute will not be taken into consideration.

A remedy is not available for an infinite duration. There is a specific duration or limit of time within which the remedy could be sought. If the remedy is not sought during this period, the remedy exhausts and thus cannot be availed. The period during which the remedy is available and could be sought is called the limitation period.

The law of limitation is essentially a statute in the civil law system, which prescribes a maximum period, after the happening of an event, in which legal action can be commenced. The occurrence of this event is often called the cause of action, which refers to the bundle of facts that constitute to establish the infringement of a right. In India, the law of limitation is governed by the Limitation Act, 1963 ("Limitation Act"), and Section 3 of the Act bars the remedy of filing of suits, appeals and applications after the prescribed period. Thus, an action cannot be initiated by a party if the prescribed time has passed after the accrual of the cause of action based on which the action has been undertaken (*see* fn. 26).

Arbitration is not an exception to this principle, and the law of limitation also applies to it. Section 43(1) of the Arbitration and Conciliation Act, 1996 states that "*the Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court*".

In complex commercial transactions and arrangements, it is quite common to incorporate a clause in the contract to engage in good faith negotiations and mediations to solve any dispute. Given the nature of the dispute, the stakes involved and the multitude of relationships, a considerable amount of time is spent in these dispute resolution mechanisms. Therefore, the issue arises

regarding whether the time spent in these alternate, amicable dispute-resolution mechanisms falls within the ambit of the limitation period.

The constitution of the arbitral tribunals can be challenged by arguing that the period within which the dispute had to be filed for arbitration has lapsed. In this case, the time has been consumed in settling the dispute through alternative means, and if the limitation period does include the time spent in alternate settlement mechanisms, then the conflict would never be referred to the arbitral tribunal for adjudication.

For the first time, in the *Geo Miller & Co. Pvt. Ltd.* v. *Rajasthan Vidyut Utpadan Nigam Ltd.*[28], the Supreme Court held that the time spent in good faith negotiations might be excluded while computing the limitation period for reference of the dispute for arbitration.[29] The Court held that:

> Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases, the entire negotiation history between the parties must be specifically pleaded and placed on the record. Upon careful consideration of such history, the Court must find out the 'breaking point' at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This 'breaking point' would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment.[30]

[28] *Geo Miller & Co Pvt Ltd v Rajasthan Vidyut Utpadan Nigam Ltd* (2019) SCC Online SC 1137.
[29] Deshmukh I, Unnikrishnan V and Bhansali V, "Exclusion of Time Spent in Pre-Arbitration Negotiations/Settlement Discussions: A Much Needed Carve Out" (*India Corporate Law* January 25, 2022) <https://corporate.cyrilamarchandblogs.com/2019/12/exclusion-time-spent-prearbitration-negotiations-settlement-discussions/> accessed 9 February 2023.
[30] *Geo Miller, supra* note 28 [29].

Following the stance taken by the Supreme Court, the latest judgement of the Delhi High Court held that the limitation period began only after internal dispute resolution mechanisms failed.

In the case of *Welspun Enterprises Ltd.* v. *NCC Ltd.*,[31] the bench of Justices Vibhu Bakhru and Amit Mahajan held that if the pre-arbitration dispute resolution mechanisms are provided in the agreement, arbitration cannot be invoked before exhausting the alternative means. Thus, the limitation period cannot start prior to that.

The court's observations included that the parties are required to make endeavours to resolve differences by mutual negotiations as per the dispute resolution clause in the agreement. The parties in the present case have agreed that if they could not solve the dispute within a month from the date it arose, they would refer it to their respective chief executives. When the chief executives fail to resolve it, only then would the dispute be referred to arbitration. It was held that the parties have agreed to solve the dispute by way of alternate dispute-solving mechanisms. Thus, the period of limitation for referring the dispute for arbitration can only begin sometime after the exhaustion of these mechanisms.

Earlier, the court had taken a different stand with regard to the period of limitation. As per its earlier decision in *Ravinder Kumar Verma* v. *M/S. Bptp Ltd. & Anr.*,[32] the limitation period could not be stopped merely because the conciliation/mediation proceedings are pending between the parties. But the position is evidently settled now.

Notably, the position of law in the countries such as Canada, Austria, Poland, and Hungary were considered to arrive at the current status. The pre-arbitration conditions are excluded from

[31] *Welspun Enterprises Ltd v NCC Ltd.*, (2022) SCC OnLine Del 3296.
[32] *Ravinder Kumar Verma v M/S Bptp Ltd & Anr*, (2015) 147 DRJ 175.

the limitation period in the countries as mentioned earlier.[33] The UK's courts have been empowered to extend the limitation period where the parties contemplate amicable dispute resolution before going for arbitration. It is safe to say that the limitation period begins when alternate measures to settle disputes have been exhausted, and it's time to refer the dispute to the arbitral tribunal. Here, a limit will apply, which is the "limitation period" during which the conflict could be referred and owing to the exhaustion of that limit, no dispute could be referred.

6. CONCLUSION

Procedures like time-limited mediations, amicable settlements, cooling-off periods, and other kinds of non-binding rulings are advantages of pre-arbitration measures for big businesses and companies. But the failure to solve disputes by these alternate means allows for invoking of the arbitration clause to solve the dispute. When one of the parties to a dispute is not satisfied with the award passed by the arbitral tribunal constituted for resolving the dispute, the ground they take to challenge the validity of the award is that since the pre-conditions were not complied with, the jurisdiction of the tribunal does not arise.

But it is a settled position that the issue of non-compliance is that of admissibility and not that of jurisdiction, which means that the tribunal has been empowered to decide the nature of the terms and then to determine whether their non-compliance has any repercussions. Additionally, the use of the arbitration provision is contested on the basis that it is time-barred. However, it is now widely accepted that the time spent seeking to resolve problems by alternative means is beyond the ambit of limitation.

[33] Ayyub A, "Period of Limitation for Referring the Dispute to Arbitration Commences Only after the Failure of Pre-Arbitration Mechanism: Delhi High Court" (*Live Law* October 16, 2022). <https://livelaw-nlul.refread.com/news-updates/delhi-high-court-period-of-limitation-for-referring-the-dispute-to-arbitration-commences-only-after-the-failure-of-pre-arbitration-mechanism-211725>accessed 9 February 2023.

Regardless, it can be asserted that the nature of the pre-arbitration resolution clauses in India is still evolving, and whether they are mandatory or merely suggestive on a case-by-case basis must be decided. It will be fascinating to observe this endeavour of bringing a definitive legislation regarding such clauses by the Supreme Court.