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Editorial Note

BLOCKCHAIN ARBITRATION: IDENTIFYING THE ODDS

By Parthsarthi Srivastava, Siddharth Jain and Riya Singh

The advent of decentralisation through technology has led to the rethinking of various conventional institutions, including the courts and tribunals. The current buzzword-Blockchain lies at the heart of these changes. A Blockchain is a digital ledger that electronically stores information in encrypted 'blocks' which are tied together in a chronological chain and distributed across an online network of nodes. The authenticity of this information is verifiable by a consensus-based mechanism that is generally either Proof-of-Work or Proof-of-Stake.

Therefore, unlike an institutional framework, the authenticity of a piece of information does not depend on it being stored or verified by any trusted institution. Blockchains usually work in tandem with Smart Contracts, which are a set of promises specified in digital form and include protocols within which the parties perform on these promises.[1] This technology has applications across various sectors like accounting, art, transnational currency-based transactions, art sales, administration of governmental benefits, etc.[2]

The intervention of blockchain in the extant mechanisms of dispute resolution can be evidenced by the advent of On-chain Arbitrations. These are software-based platforms that provide for the arbitration of smart contract-based disputes. This is premised on the belief that traditional legal infrastructure cannot address legal challenges presented by crypto-transaction disputes, and therefore on-chain adjudication mechanisms are forms of decentralized adjudication solutions that work on the principles of blockchain itself.[3]

In a typical On-chain arbitration platform, a dispute is digitally arbitrated by a Juror and the award can be executed immediately by changing the substrate smart contract without the involvement of courts for enforcement. For this, the parties need to grant temporary access to their smart-contract and assets worth the claim to the Jurors. Generally, one can become a Juror without set eligibility criteria or requirements of qualification, except that there should be an investment of capital by the Juror. A

[1] Nick Szabo, Smart Contracts: Building Blocks for Digital Markets (1996)

[2] Holly Stebbing, Harriet Jones-Fenleigh, Adam Sanitt, Maja Mazur, Ground-breaking arbitration rules for digital disputes released (2021), https://www.nortonrosefulbright.com/en/inside-disputes/blog/ground-breaking-arbitration-rules-for-digital-disputes-released

[3] Wulf A. Kaal & Craig Calcaterra, Crypto Transaction Dispute Resolution, 73 BUS. LAW. 109, 114-25 (2017)

majority vote amongst the selected jurors determines the outcome of a dispute.

Platforms such as Kleros, JUR, Aragon Network Jurisdiction, Open Court, Open Bazaar, etc currently offer such solutions.[4] Despite there being some major challenges with this technology at its current stage, its acceptability is growing. In 2021, a Mexican Court upheld and enforced the award in a landlord-tenant dispute adjudicated by using Kleros.[5]

However, Blockchain is not a disruptive technology per se that offers a better solution at a much lower cost. It is, instead, a foundational technology that attempts to revamp our existing systems,[6] and its growth is conditioned on our willingness to adapt to a different ecosystem. Therefore, the use-cases of Blockchain as an alternative form of dispute resolution are limited yet evolving. Nevertheless, the impact of blockchain on arbitrations can be interesting to examine given its growing popularity. In this light, we analyse the potential issues concerning blockchain arbitrations that must be resolved in order to impetus the use of such arbitration in foundationally changing the way we resolve disputes.

Inherent Limitations of smart contracts

The legality of Blockchain arbitration is inextricably related to the legality of smart contracts. Yet currently, there is no enforcement mechanism for Smart Contracts. It is executed automatically when a pre-defined condition, established by an oracle, is met or is not met within a certain time or under some other restriction. Many parts of legal contracts, such as those that rely on human judgment and insight, are incapable of being represented by determinable condition-based functions employed in Smart Contracts and may never be feasible.

Confidentiality Concerns

A crucial principle concerning arbitration is the underlying idea of confidentiality. While blockchain affords strong protection against intrusion, blockchain arbitration involves a

[4] OpenLaw, OpenCourt: Legally Enforceable Blockchain-Based Arbitration, CONSENSYS (Oct. 18, 2018), https://media.consensys.net/opencourt-legally-enforceable-blockchain-based-arbitration3d7147dbb56f

[5] Mauricio Virues Carrera, ACCOMMODATING KLEROS AS A DECENTRALISED DISPUTE RESOLUTION TOOL FOR CIVIL JUSTICE SYSTEMS: THEORETICAL MODEL AND CASE OF APPLICATION, IPFS, https://ipfs.kleros.io/ipfs/QmfNrgSVE9bb17KzEVFoGf4KKA1Ekaht7ioLjYzheZ6prE/Accommodating%20Kleros%20as%20a%20Decentralized%20Dispute%20Resolution%20Tool%20for%20Civil%20Justice%20Systems%20-%20Theoretical%20Model%20and%20Case%20of%20Application%20-%20Mauricio%20Virues%20-%20Kleros%20Fellowship%20of%20Justice.pdf

[6] Marco Iansiti and Karim R. Lakhani, The Truth About Blockchain, HLR, 2017, https://hbr.org/2017/01/the-truth-about-blockchain

third party into the realm of dispute resolution, which may invite privacy concerns. Ensuring confidentiality in blockchain arbitration becomes particularly problematic because unlike traditional arbitrations wherein there is certainty that only the chosen arbitrator has access to arbitration, blockchain arbitrations lack transparency and open possibilities of unauthorized access by third parties to confidential documents.[7] While the currently applicable Information Technology Act, 2000 provides a robust mechanism for ensuring data privacy, information regulation on blockchain is an altogether new arena. Neither the Indian Data Protection Bill, 2020 nor the mature regime of General Data Protection Regulation (GDPR) is well-equipped to face the data privacy intricacies in the decentralized functioning of blockchain.

Risk to Principles of Natural Justice

Principles of natural justice entail that a party must be subjected to fair trail. However, blockchain arbitration risks this sacrosanct principle at several frontiers. *First,* owing to submissions solely in a coded manner, the possibility of oral hearing is completely eliminated, which is an integral part of an adjudicatory mechanism and has the possibility of affecting the applicability of judicial mind. *Second,* since blockchain has a strict functionality of eliminating the presence of third parties, procurement of admission of evidence from third parties is also ruled out.[8]

Conflict of jurisdictions and determination of Seat

Despite differences in jurisdictions, the general approach taken by nations for their conflict of jurisdiction rules is based on territoriality or physical notions such as the domicile of defendant, place of business of parties, place of incident, etc. However, in cases of smart contracts, looking at such notions to ascertain national court's jurisdiction becomes counterproductive, since such contracts are negotiated, formed, and executed through distributed ledger.[9] Another issue which stems out from this concern is the question as to what law would be applicable to the dispute. This is so because while parties are advised to explicitly mention the governing law in the smart

[7] Darshan Bhora and Aisiri Raj, Blockchain Arbitration – The Future of Dispute Resolution Mechanisms?, CILJ, (Dec. 16, 2020), http://cilj.co.uk/2020/12/16/blockchain-arbitration-the-future-of-dispute-resolution-mechanisms/

[8] Ibid.

[9] Maria Tena, '7 Regulatory Challenges Facing Blockchain: BBVA' News BBVA (16 January 2017) <https://www.bbva.com/en/7-regulatory-challenges-facing-blockchain/> accessed 18 February 2021.

contract, more often than not they skip legal discussions, and hence, reliance is placed on conflict of law rules. Such conflict of law rules again place reliance on physical determinants, which is not possible with smart contracts.

Determination of seat in blockchain arbitration is another such hinderance. This is so because the New York Convention is based on territoriality, as against blockchain arbitration which is decentralized[10] and hence, the physical factors used in traditional arbitrations to determine seat may not be applicable in blockchain arbitrations. Instead, academicians have suggested the "*Lex Loci Server*" theory, i.e., location of the server for determining seat in blockchain arbitrations. However, this may not be tenable in the long run since many servers from all around the globe could be used in an online arbitration.[11] While the absence of physical seat may be taken as an advantage for ease in scrutiny, an arbitration with no seat may cause issues at the enforcement stage, which has been discussed as follows.

Validity and Enforcement of arbitral awards

In blockchain arbitrations, not only the agreement but even the award is expressed under a cryptographic form. Thus, in this regard, two possible arguments may arise – *first,* with respect to the validity of the award and *second,* with respect to the enforcement of the award.

With respect to the validity requirements, the discussion has been limited to the formal requirements of a valid award. The authors opine that the validity concerns would be largely dependent on whether the domestic laws recognize arbitral awards under the form of code.[12] The New York Convention as well as the Indian Arbitration and Conciliation Act, 1996 ("Arbitration Act") require a valid award to be in writing. However, the Arbitration Act provides some respite by way of the amended section 3, which increases the ambit of "written awards" so as to include those in electronic forms as well. With respect to the enforcement concerns, India has made a reciprocity reservation under the New York Convention,[13]implying that the foreign

[10] Cemre Kadioglu, Sadaff Habib, 'Virtual Hearings to the Rescue: Let's Pause for the Seat?' Kluwer Arbitration, (27 October 2020) <http://arbitrationblog.kluwerarbitration.com/2020/07/13/virtual- hearings-to-the-rescue-lets-pause-for-the-seat/>

[11] Jasna Arsic, 'International Commercial Arbitration on the Internet-Has the Future Come Too Early?' 14 J Int Arb 219 (1997).

[12] Leonardo VP de Oliveira and Sara Hourani, The Resolution of B2B Disputes in Blockchain-Based Arbitration: A Solution for Improving the Parties 260 (2020)

[13] New York convention status and reservation, 19589, Art. 1

awards made in only certain contracting nations can be enforced in India. In blockchain arbitrations, the award is given by the arbitrator in the form of blockchain ledgers, with the copies being supplied to the parties on their computers. Thus, in essence, the award is not given in any specific nation and thus, the award may suffer enforcement concerns because of the reciprocity reservations of the nation.

An ancillary issue stemming out of the enforcement of awards is the evidence of award itself. Sections 36 and 48 of the Arbitration Act require the application for enforcement to be accompanied by the 'original copy' of the award, which might not be possible in blockchain arbitrations where the copy is accessible to all persons having access to that network. Additionally, section 17 of the Indian Registration Act requires a domestic award to be registered in case it affects rights related to immovable property.[14] Consequently, only registered award can be presented before the court for enforcement. This means that giving direct access of the blockchain to the enforcing Court would not be sufficient since such an award also needs to be duly stamped and/or registered first.[15]

Irreversibility

Arbitration Agreements, as parts of smart contracts, are characterised as permanent and irreversible. Presently, there is no easy way to alter a smart contract and this poses certain difficulties for contracting parties. In a classic manual/text-based contract, if the parties have mutually decided to amend the arbitration agreement, the contracting parties can swiftly prepare an addendum or simply modify their course of activity. Smart Contracts do not currently provide this flexibility.

In toto, until a few years back, Arbitration was celebrated as one of the fastest modes of dispute resolution. Yet now, something even faster has been theorized and put to use at places. While constant efforts and ground-breaking outcomes for ensuring speedy justice like blockchain arbitration are welcomed with open arms, it must not be forgotten that justice is too sensitive to be fiddled with, and quintessential elements entailing justice such as the issues discussed above cannot be compromised in an attempt to achieve fast justice.

[14] M. Anasuya Devi v. M. Manik Reddy, (2003) 8 SCC 565.

[15] Ritika Bansal, Enforceability of Awards from Blockchain Arbitrations in India, Kluwer arbitration blog, (Aug. 21, 2019), http://arbitrationblog.kluwerarbitration.com/2019/08/21/enforceability-of-awards-from-blockchain-arbitrations-in-india/

Interview with Professor Sundra Rajoo

Prof. Sundra Rajoo is a Certified International ADR Practitioner (AIADR) and Chartered Arbitrator. He is the Founding President of the Asian Institute of Alternative Dispute Resolution and former Director of the Asian International Arbitration Centre (AIAC) from 2010 - 2018. He is also the past Global President of the Chartered Institute of Arbitrators (2016). Datuk Prof. Sundra has authored and co-authored several books on arbitration, contract and construction law. He recently published the Law, Practice and Procedure of Arbitration in India (Thomson Reuters) and Standard Form of Building Contracts Compared (LexisNexis)

International commercial courts have grown in popularity in recent years. What are your thoughts on this development, and do you see it as a threat (or even a competitor) to international commercial arbitration?

In recent years, international commercial courts have been burgeoning throughout Europe, Asia and the Middle East. A number of jurisdictions have established international commercial courts such as, the Dubai International court models (DIFC), the Abu Dhabi Global Market Courts (ADGM), the Qatar International Court and Dispute Resolution Centre (QICDRC), the Singapore International Commercial Court (SICC), as well as the Astana International Financial Centre (AIFC) Court and the China International Commercial Court (CICC).

This development may be seen to compete with state court proceedings and international arbitration. However, it essentially creates a transnational dispute resolution system adjusted to the investment climate and globalization. The international commercial courts integrate the advantages of both national court and commercial arbitration with a balance on flexibility and judicial obligation. This builds upon the confidence of the investors in respective jurisdictions on the availability of alternative dispute resolution mechanisms and international credibility.

Although some international commercial courts may be restrictive in terms of procedural governance of proceedings as compared to commercial arbitration and subject to right to appeal potentially delaying the dispute resolution process and increasing the parties' cost.

However, some other international commercial courts such as the CICC is

strategically positioned to promote the use of Chinese institutions on Belt and Road Initiatives disputes. As a whole, the establishment of international commercial courts is supplementary to the existing dispute resolution mechanisms. It provides options and wider range of dispute resolution mechanisms for international.

You have had an illustrious career thus far. From being a highly experienced advocate and solicitor at the High Court of Malaya to transforming the AIAC into a pivotal arbitration centre in the Asian region and now being the Founding President of AIADR, what do you believe has been the most challenging role of your career?

I was the director of AIAC between 2010-2018. Since 2010, the AIAC has spearheaded the growth of arbitration and other alternative dispute resolution methods like statutory adjudication, domain name dispute resolution and mediation in Malaysia. It created capacity by promoting various training programmes in sports arbitration, maritime law as well as arbitration and conciliation in the region and beyond.

There was a period of tremendous effort, growth and recognition for AIAC. Its ADR case load pre-2010 was a mere 22 whereas by 2019, it has increased to over 900 plus cases per year. Its developmental programmes were planned for the short, medium and long term with enough programmes set out for each year. The total number of persons who have attended its events since 2010 is in excess of 16,000.

By 2017, it was organising about 50 events a year. AIAC moved into dispute avoidance by offering the first standard form building contracts, a first for an arbitration institution. A special website allowed free editable downloads of the contracts anywhere in the world.

Unfortunately, the considerable international and domestic adverse publicity caused by the events starting from 19 November 2018. The events and subsequent action by the former Attorney General, the Honourable Tommy Thomas, the former Acting Director, Mr. Vinayak Pradhan, the former Government of Malaysia and others have done things which have raised issues about the commitment to the Rule of Law.

The Rule of Law means that one is subject to clearly defined laws and legal principles rather than the irrational and illegal actions of the authorities. In AIAC's case, it means adherence and upholding the sanctity of the host country agreement between Asian-African Legal Consultative Organisation (AALCO) and the Government of Malaysia

as one of the foundational instruments of AIAC.

The momentum created in the decade starting from 2010–2018 may not be sustained if the already announced innovative schemes like the AIAC as the dispute resolution hub outside of China's Belt and Road initiative under ICDPASO and Asian Sports Tribunal to fill the lacuna in resolution of sports disputes in Asia are not implemented. The present momentum created from 2010–2018 can only go so far before it slows down.

However, when one door closes, another opens. In April 2018, I founded the Asian Institute of Alternative Dispute Resolution (AIADR) together with Dato Quek Ngee Meng as the first not-for-profit member-based Asian centre for ADR.

The Institute was launched in April 2018 by His Excellency Prof Dr. Kennedy Gastorn, Secretary General of the Asian-African Legal Consultative Organisation (AALCO). I felt equipped to undertake a similar exercise with developing arbitration regimes to help set out a road map for Asian arbitration. The AIADR though incorporated in Malaysia but it shall be the Global Institute with coverage across Asia and rest of the world. The AIADR is currently undergoing fast-track development and has membership of more than 600 from around the world.

AIADR has growing innovations in the realm of alternative dispute resolution with the launching of Mediation Rules in 2020 and Ad Hoc Arbitration Rules 2021 as well as headquarter office geostrategic position squarely on the Road of China's Belt and Road Initiative, AIADR has the potential of delivering excellence in alternative dispute resolution to be reckoned with in the Asia-Pacific region.

AIADR is established primarily for "Promoting Global Trade and Delivering Excellence in Alternative Dispute Resolution Forums" worldwide other than resolution by Courts, and the following: –

Promoting commerce and industry;

Promoting social cohesion amongst practitioners and non-practitioners in the Alternative Dispute Resolution ("ADR") field; and

Promoting education and research.

In your article titled 'Perspectives on Anti-Arbitration Injunctions' you highlight how common law courts regularly interfere with arbitral proceedings by issuance of anti-arbitration injunctions and this predominantly affects their ability to rule

on their own jurisdiction and conduct proceedings swiftly as per their own will. Recently, as well the Delhi High Court using its power under the constitution imposed a stay on the much talked about Amazon-Future arbitration in SIAC. Why do you feel Common law courts have shown a greater tendency to interfere with arbitral proceedings in comparison to Civil law courts? And do you feel any changes if brought about either in the arbitral statues of countries or in the arbitral institution rules can help regulate this issue?

As I highlighted in my article, judicial intervention in arbitration proceedings by issuing anti-arbitration injunction restraining parties from commencing or continuing with arbitration proceedings is highly controversial and contentious.

Essentially, it is a threat to the principle of kompetenz-kompetenz inconsistent with the legal framework for conduct of an international arbitration. Judicial intervention procured by unscrupulous parties could even aid the evasion or delay to the agreed arbitration mechanism.

However, when the validity of the arbitration agreement is being contested, anti-arbitration injunction may be beneficial when the issue is being dealt with by the court. This could avoid potential challenge to the enforceability of award at the later stage.

Thus, courts need to ensure that certain competing claims are balanced when deciding whether to grant an anti-arbitration injunction such as (1) sanctity of the arbitration process; (2) costs suffered by a party forced to participate in the arbitration; and (3) possibility that it will have to adjudicate upon the validity of the arbitration agreement post rendering of the award.

It follows, naturally, from the pro-arbitration attitude of courts associated with most successful arbitration centres in accordance with safe seat principles, that injunctions to stay arbitrations will only be used sparingly, if at all.

AIADR works with the objective of promoting the practice of ADR and developing it as an emerging profession, especially in the Asian and African continents. Today, we witness the South-East Asian region handling higher case-loads and setting new records for commercial and investment arbitrations. What do you think have been some of the biggest highlights of AIADR in boosting these economies through dispute settlement and what new ways would you suggest for Indian institutional arbitrations to incorporate for effective

dispute resolution mechanism?

AIADR is established primarily to promote global trade and deliver excellence in Alternative Dispute Resolution (ADR) forums.

AIADR has numerous initiatives in creating awareness on the use and understanding of ADR. For instance, the AIADR has conducted over 30 webinars and training courses in 2021 introducing ADR and engage experts for discursive discussion on ADR. These initiatives are readily available to the public.

AIADR also provides a writing platform through bimonthly newsletter and quarterly journal for international ADR practitioners to share their views and ideas on the current developments of ADR. This advances social cohesion between practitioners and non-practitioners in the ADR field.

Most importantly, AIADR also launches its Mediation Rules 2020 and Ad Hoc Arbitration Rules 2021 fit for the usage of domestic and international parties in resolving, settling or preventing disputes in an economical setting and administrative efficiency. In conjunction, the AIADR also actively involved in promoting moot competitions for students who are interested in the application of ADR and educating the young generations on the understanding of ADR.

It is my humble view that nurturing next generations and developing skillsets for ADR practitioners are crucial to the development of quality ADR services. With increasing ADR caseloads recorded, it is thus very important to instil the professional mindset on the practitioners or prospective practitioners on the proper application of ADR knowledge in respect of the law, rules and application.

This would eventually boost the implementation and administration of ADR cases in a more dependable climate and garner confidence of the ADR users. The above initiatives by AIADR could be considered by Indian institutions in creating an effective dispute resolution mechanism.

AIADR is readily open to jointly collaborate with other institutions in promoting common goal of delivering excellence in ADR on a mutual beneficial manner.

In your book titled 'Law, Practice and Procedure of Arbitration in India', you have explored the evolving arbitral regime in India, while comparing it with the international sphere. What are some of the significant precedents in the common law jurisprudence that you feel considerably lack

in the Indian Arbitral regime and are a major reason for its stunted development?

I believe that the Indian arbitral regime is developing well with number of recent initiatives introduced such as the legislative amendments to the Arbitration and Conciliation Act 1996.

In India, arbitrations are slowing moving from ad hoc setting to institutional setting with domestic arbitration institutions setup such as the Mumbai Centre for International Arbitration, Delhi International Arbitration Centre and Hyderabad Arbitration Centre. The reference to institutional arbitration is encouraged through the 2019 amendment.

In order to further enhance the arbitration scene in India or even making India a hub for arbitration, it is my humble view that internationalised process and procedures should be encouraged and adopted with use of good arbitrators and counsels, both domestic and international in the process.

But such experience must be preceded by a good education regime. Education and training on arbitration should also be conducted to raise awareness and nurture young generations. Accessible unified portal could also be created to serve as the main platform for parties whether domestic or international into engaging arbitration in India.

VALIDITY OF ASYMMETRIC DISPUTE RESOLUTION CLAUSES

Amrita Deshmukh, Fifth year law student, Symbiosis Law School, Pune

I.INTRODUCTION

In the recent decades, arbitration has gained popularity over the traditional method of litigation, because of the control that the parties have on the method of resolution. In International Commercial Arbitration (ICA), the basis for adoption of this method is due to the obvious advantages that it poses but also, party autonomy.[16] The parties are at will to choose the type of language, venue and the kind of resolution method along with the terms of the arbitration agreement.[17] Traditionally, arbitration clauses are two-sided, allowing both the parties to invoke arbitration according to the dispute resolution clause. However, with the rise in contractual disputes, in the area of financial transactions, there have been instances wherein one-sided dispute resolution clauses are used known as an asymmetric dispute resolution clause. However, since there is a consensus between parties while entering into such clauses in many jurisdictions such as France, it is accepted as a valid clause,[18] unless proven to the contrary.

An asymmetric resolution clause is often referred to as one-sided clause because in this case one of the parties has the right to refer the dispute to arbitration OR litigation, whereas the other party can only resort to litigation which puts both the parties on unequal footing. Various jurisdictions have varied opinions and laws concerning the enforcement of these clauses. For instance, in China such clauses are banned as they are considered to be against the tenets of international commercial arbitration, however, to the contrary, in Turkey these are acceptable to secure the position of the Creditor and to ensure that he recovers his losses in financial transactions, providing him with a higher negotiating power due to the nature of the Agreement that is present with them.[19] Further, parties are often forced to litigate at the option of one party or arbitrate in unknown forums. Choosing the correct forum an asymmetric clause is important as an invalid clause renders the arbitration as invalid and the arbitral award so passed is at the risk of being set aside and cannot be

[16] Art.18, UNCITRAL Model Law on International Commercial Arbitration (1985); Ballantine Books, Inc. v. Capitol Distributing Co., 302 F.2d 17 (1962); Emmanuel Gaillard, John F Savage, Fouchard Gaillard Goldman on International Commercial Arbitration Kluwer Law International (1999).

[17] Commentary on UNIDROIT Principles of International Commercial Contracts Rome (2010), pp.108-109

[18] In re, Barclays Bank Plc, 09 Civ. 1989 (PAC).

[19] Simon Nesbitt, Henry Quinlan, The Status and Operation of Unilateral or Optional Arbitration Clauses Arbitration International (2006); NB Three Shipping Ltd. v. Harebell Shipping Ltd., [2004] All ER (D) 152 13 (2014); Corte di Cassazione Judgment No. 2096, Case No. Judgment No. 2096 (1970); Contra Pittalis v. Sherefettin, [1986] Q.B. 868 (Eng. C.A.) (1986)

enforced, requiring a fresh arbitration to commence.[20]

The research report is imperative as it shall explore the scope of such asymmetric clauses with the tendency of parties to move towards arbitration, due to the time-consuming litigations. Further, to understand the implications of such clauses and understand the impact of these clauses on parties and the various principles that affect it. The report will explore the treatment of asymmetric clauses in some jurisdictions and, further, the author formulating an unbiased opinion based on the matter and suggestions for improving the treatment of such clauses as its in its preliminary stage.

1. UNDERSTANDING ASYMMETRY IN ARBITRATION

Equality and procedural neutrality[21] are considered as one of the parties is one fundamental features of ICA. Procedural neutrality refers to the Tribunal that has been has set up which must be free from bias and other aspects right from the formulation of the arbitration clause. Under international law, Art. 3.2.7(1) of the UNIDROIT Principles lays down that if these abovementioned principles are compromised, the party which is at the disadvantage can avoid the contract, or a clause. However, when a party wishes to avoid it has to be concerned with the symmetry of clause and affecting the party excessively,[22] but further if such balance is sort be restored the Tribunal shall concern itself with the negotiation procedure, if such clauses are challenged.[23]

Concerning the validity of these clauses, in the case of The Law Debenture Trust,[24] Mauritius Commercial Bank[25] and Pittalis Cases[26], in all these cases asymmetric clauses were found valid as they concerned financing, tenancy and payments for bonds as a subject-matter and this was done to protect the creditor from the default of the debtor. However, there are certain cases such

[20] Gary B. Born International Commercial Arbitration Kluwer Law International 2nd Ed. (2014); Gabriele Kaufmann-Kohler, B. Stucki, International Arbitration in Switzerland: A Handbook for Practitioners Zurich (2004); Norbert Horn, The Arbitration Agreement in Light of Case Law of the UNCITRAL Model Law (Arts. 7 & 8) International Arbitration Law Review (2005).

[21] Gary B. Born International Commercial Arbitration Kluwer Law International 2nd Ed. (2014), p. 1742; Dell Computer Corp v. Union des Consommatueurs, 2007 SCC 34.

[22] UNIDRIOT, Commentary on UNIDROIT Principles of International Commercial Contracts Rome (2010), pp.108-109

[23] Art.3.2.7(1)(a), Art.3.2.7(1)(b) of UNIDROIT Principles; UNIDRIOT, Commentary on UNIDROIT Principles of International Commercial Contracts Rome (2010), p.109

[24] Law Debenture Trust Corp Plc v. Elektrim Finance BV & Ors., [2005] EWCA Civ 1354 (2005)

[25] Mauritius Commercial Bank Ltd v. Hestia Holdings Ltd & Anr. [2013] EWHC 1328 (Comm) (2013)

[26] Pittalis v. Sherefettin [1986] 1 QB 868 (1986)

as the Credit Suisse Case[27], Rothschild[28] and Sony Ericsson[29] cases that rendered such clauses invalid, in the latest case, the Supreme Arbitral Court of Russia found that the dispute resolution clause, which gave only one party the right to choose between a court of competent jurisdiction and international arbitration was invalid since it violated "right to equality of arms". If such clauses are rendered as invalid it can have adverse impact on enforceability when it comes to the *lex loci arbitri* of the parties. Under Art. V(1)(a) of the New York Convention, clearly lays down that "*recognition and enforcement of the award may be refused, at the request of either of the parties against whom it is invoked, if that party furnishes to the competent authority that the said agreement is not valid under the law to which the parties have subjected it. If the asymmetric arbitration agreement is rendered invalid by the arbitral tribunal, then the enforcement of the award can also be refused or invalidated.*" However, on a careful analysis of Consol Glass Ltd.[30] and the Siemens Dutco Case[31], it is seen that the even though there was a one-sided arbitration clause the award was given in favour of the weaker party, meaning that the Tribunal does not favour the stronger party.

In many jurisdictions where they have been an ambiguity in these clauses, such as Turkey. The determination of the valid in the end falls upon the Tribunal which is under the precept of *Kompetenz-Kompetenz* is borne out of the applicable rules and laws,[32] providing the Tribunal with the authority to determine the validity of the same,[33] arbitrators often ruling in their jurisdiction.

To the contrary, the author would like to highlight the other side of the coin. The point of any dispute resolution is that justice is served and in arbitration, intention of the parties is an important aspect when it comes to the interpretation of such clauses.[34] The CISG's scope of application is limited to contracts for the sale of goods wherein both parties have their places of business in Contracting States and applies to the

[27] Danne v. Credit Suisse, Case No. 13-27.264 (2015).
[28] Ms. X v. Banque Privee Edmond de Rothschild, 1e civ., No. 983 (2012)
[29] Russian Telephone Company v. Sony Ericsson Mobile Communications Supreme Commercial Court Presidium 19 June 2012
[30] Consol Glass (Pty) Ltd v The Commissioner for the South African Revenue Service [2020] ZASCA 175 (2020)
[31] BKMI and Siemens v. Dutco, 2 February 2017.
[32] Art. 23(1), LCIA Rules; Art 16(1) UNCITRAL Model Law; Enrique C. Wellbers S.A.I.C. v. Extraktionstechnik Gesellchaft fur Anlagenbau M.B.M.: S/Ordinaino.
[33] Art 23(2), LCIA Rules; Art. 16(2), UNCITRAL Model Law; Emmanuel Gaillard, John F Savage, Fouchard Gaillard Goldman on International Commercial Arbitration Kluwer Law International (1999), ¶416; Skandia International Insurance Company & Mercantile & General Reinsurance Company et. Al., CLOUT Case No.:127 (1994).
[34] Michael Joachim Bonell, The Relevance of Courses of Dealing. Usages and Customs in the Interpretation of International Commercial Contracts in: UNIDROIT, New Directions in International Trade Law Oceana Publications Vol. 2 (1977) p.126;

conclusion and interpretation of the arbitration clause contained in such contracts.[35] The basic principle with respect to common intent of the parties says that statements and conduct of a party must be interpreted according to his intent all the parties in the dispute.[36] When an arbitration agreement is asymmetrical or non-mutual, and only one party is initially obligated to arbitrate, there is nonetheless an exchange of promises about the arbitral process that satisfies traditional consideration requirements.[37]

2. ASYMMETRY A NECESSARY EVIL?

After considering the two sides of asymmetric dispute, it can be assumed from the above that equality, justice and the intention of the parties while entering into these clauses is the cornerstone for the acceptance of these clauses. However, in the opinion of the author, asymmetric clauses are not necessarily a boon to arbitration, as there is a need for symmetry since it considered as a method wherein there exists a win-win situation for the parties as against litigation which is a win-loss situation. Even though the Tribunal deliberates upon the situation, the upper hand is always with the parties involved in the dispute.

Further, there is an issue of simultaneous proceedings in this case, due to the lack of exclusivity that is present under the symmetric disputes. In symmetric clauses, a particular jurisdiction has the exclusive jurisdiction and often times this is not the case in asymmetric as both the parties have the right to refer the dispute in the jurisdiction and exclusivity is often not introduced in these clauses. If the case of *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Incorporation,*[38] the defendant referred the matter to litigation in Greece and the claimant introduced proceedings in England according tot the Brussel Regulation Recast which allows for such non-exclusivity. This led to parallel proceedings in two different jurisdictions on the same matter, which was referred to as "a race to the judgement", these clauses often

[35] Art.1(1), CISG; Gary B. Born International Commercial Arbitration Kluwer Law International 2nd Ed. (2014), p.505; Ingeborg Schwenzer, 'Conformity of the Goods: Physical Features on the Wane?' in Ingeborg Schwenzer and Lisa Spagnolo (eds), State of Play, the 3rd Annual MAA Peter Schlechtriem (2012), p.746; Schmidt-Ahrendts, Nils CISG and Arbitration Belgrade Law Review Vol. 59(3) (2011), ¶1.2; Chateau des Charmes Wines Ltd. v. Sabaté USA Inc., Sabaté S.A., Case No.: 02-15727 (2003); Hibro Compensatoren B.V. v. Trelleborg Industri Aktiebolag Rb Arnhem Case No. Rolnummer 146453 (2007);

[36] Art.8(1) CISG

[37] Supra Note at 4.

[38] Commerzbank Aktiengesellschaft v Liquimar Tankers Management Incorporation [2017] EWHC 161 (Comm), https://www.simmons-simmons.com/en/publications/ck0bcafzkeqpl0b594owdqtzl/100217-problem-asymmetric-jurisdiction-clauses

lead to redundancy in procedure as the both the parties wish to invoke their dispute resolution often out of spite as there is an unequal footing between the parties.

The second problem with such clauses, is the jurisdictional approach. Various jurisdictions have not been sure of the treatment of these clauses. Some have disregarded them completely, others have considered them on case-to-case basis, which poses a hurdle for the parties as they are unsure about the implications of their dispute resolution clause. In the case of Turkey, the judicial system regards exclusivity as an important aspect unlike the EU. However, the approach to these clauses has been uneven and regards the intent of the parties as supreme. In the 11th Civil Chamber decision No. 2009/3257, the clause was asymmetric was held invalid as the language is considered important. The word "may" instead of forceful words such as "must" and "shall" does not portray a correct picture of the intention. On the other hand, 11th Civil Chamber, decision No. 2016/4646 held these clauses as valid stating that the parties have the right to forum selection and the kind of dispute resolution mechanism. This shows that Turkey is open to these clauses.

On the other hand, in India, the validity of these clauses is dicey due to the uneven court judgements. The Delhi High Court,[39] laid down that such clauses are invalid as there is often a lack of mutuality between the parties. However, the Calcutta High Court[40] stated that is a matter of convenience for the parties and the forum, if they wish to include such a clause. In the author's opinion this judgment rendered by the High Court was a sign of international trade and commerce and to open gates for nations that still have a problem in regulating the acceptance of these clauses such as in China. In the Supreme Court case[41] and a Bombay High Court case[42] stated that the right to appoint a sole arbitrator by a single party is permissible without considering the other party's opinion. It has to inconsistency in the treatment of these clauses.

Lastly, the third problem identified by the author is concerning the commercial nature of the transaction. It is seen that in financial transaction such clauses are usually considered as it protects the Creditor and allows him an upper hand. Usually, in other commercial transaction, court have not

[39] *Union of India vs Bharat Engineering Corporation,* ILR 1977 Delhi 57 (1977)
[40] *New India Assurance Co Ltd v Central Bank of India & Ors AIR* 1985 Cal 76
[41] *TRF Ltd v Energy Engineering Projects Ltd*, Civil Appeal No. 5306 of 2017
[42] 26 May 2017, Arbitration Application No. 65 of 2016

accepted the use of asymmetric clauses.

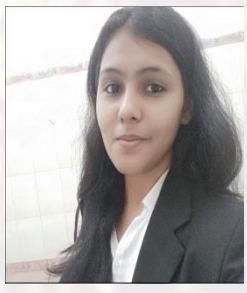
3. SUGGESTIONS AND CONCLUSION

The author would like to make three suggestions to tackle the problems posed by asymmetric clauses. Due to the difference of validity in these clauses in various jurisdictions, it can cause parallel proceedings and avoidance of the clause. Additionally, it will affect enforceability of the award under the NY Convention if there is a contention that the award is invalid. With the increasing popularity, there is a necessity that major arbitration jurisdictions must decide upon a definite approach over the matter. Secondly, unambiguity of the forum possesses a problem. As this is a popular clause now, there must be a mandate about wherein the procedure can be undertaken in a particular forum mandating the necessity in a place.

Thirdly, is to understand the need for correct and precise drafting. The parties must ensure that the clause is drafted in a way to ensure that specific circumstances which may arise in the contract or the jurisdiction, to avoid unambiguity. In the case, of asymmetric clauses, validity of the clause must be considered. Further, the litigation and arbitration clauses must be exclusive of each other to ensure that the validity of the arbitration clause does not lead to no resolution at all which affects the ability to receive and deliver justice.

The suggestions that have been provided must be considered to ensure a streamlined approach towards the enforcement of such clauses and the consequences of such invalidation and approach is uncertain. One should remember that there is a risk of non-enforcement of arbitral award based on asymmetrical arbitration agreement as certain jurisdiction analyse it upon public policy. Therefore, the drafting of asymmetrical arbitration agreement is recommended to be only accompanied by the advice of competent lawyers from relevant jurisdictions of at least the seat of arbitration and the enforcement of arbitral award and to protect the interests of the parties to the dispute.

DISPUTES IN THE CRYPTO WORLD: CAN ARBITRATION FILL THE CRACKS?



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I.INTRODUCTION

Virtual space is becoming the new reality, affecting all aspects of our existence. One of these is the Virtual Currencies or Cryptocurrencies. Recent breakthroughs in Virtual Currencies have promoted their use in several countries, including India. Cryptocurrency trading sites have sprung up all across India. These currencies are rapidly gaining popularity, and some call them the 'Gold of the Millennials.'

The authors through the present article aim to advocate the arbitrability of the cryptocurrency disputes in India. The article analyses the feasibility and advantage of using arbitration to resolve these disputes. Keeping in mind the borderless nature, volatility and subject matter expertise involved, arbitration comes out as the best contender among the other dispute resolution mechanisms.

Finally, delving into the parameters laid down by the Supreme Court to decide the arbitrability of a dispute, the authors aim to put forth the conclusion that the arbitrability of the cryptocurrencies should be promoted.

POTENTIAL DISPUTES IN CRYPTOCURRENCIES

After much argument and discussion around the ban of cryptocurrencies, the Supreme Court's latest verdict arrived like a knight in sparkling armour.[43] This offered the investors optimism and relief. Furthermore, quite recently, the Indian government said in its Union Budget 2022-23 that any cryptocurrency gains will be taxed at 30%.[44] Since, the government has made the profit on cryptocurrencies taxable, it is unlikely that any future decision imposing a ban on cryptocurrency will arrive, now that it has become a source of revenue.

These currencies have a wide range of applications and are traded globally.[45] The hazards associated with any new development should be adequately assessed.[46] Cryptocurrency is one such recent innovation that confronts a number of concerns that might lead to disputes.[47]

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[43] Internet and Mobile Association of India v. Reserve Bank of India, (2020) SCC Online SC 275.

[44] Pranav Mukul , George Mathew & Aashish Aryan, *Out of the shadow: 30% tax on crypto, RBI to issue its digital currency,* THE INDIAN EXPRESS, (Feb 2, 2022, 17:25 PM) https://indianexpress.com/article/business/budget/out-of-the-shadow-30-per-cent-tax-on-crypto-rbi-to-issue-its-digital-currency-7752166/, (last visited Feb 5, 2022).

[45] James Rogers, *Cryptocurrencies and Arbitration — a Match Made in Heaven?*, NORTON ROSE FULBRIGHT, (May 2018), https://www.nortonrosefulbright.com/en/knowledge/publications/cae35319, (last visited Feb 2, 2022).

[46] Wulf A. Kaal and Craig Calcaterra, *Crypto Transaction Dispute Resolution*, 73, THE BUSINESS LAWYER, 109, 152 (2017).

[47]Simon Maynard and Elizabeth Chan, *Decrypting Cryptocurrencies: Why Borderless Currencies May Benefit from Borderless Dispute Resolution,* KLUWERARBITRATION.COM, (Nov 2, 2017),

Primarily the disputes around cryptocurrency are based around the following:

INITIAL COIN OFFERING DISPUTES (ICO)

Based on a similar concept of Initial Public Offering (IPO), the ICO mechanism is used to raise funds for the growth of the company. The investors can buy into the coin offering and hold the cryptocurrency issued by the company. This symbolizes the investor's stake in the company just like an investor holds shares in a company. The only difference here is that instead of shares, the company issues cryptocurrency to the investor.

A recent dispute took place in 2017 in which a lawsuit was initiated against a company named, Tezos pursuant to the ICO project launched by it. The company invited the investors to the ICO, and later duped them. The plaintiffs (investors) stated that they were blindfolded by the respondent (Tezos) and what the plaintiffs thought to be an investment was actually registered as a non-refundable donation.[48]

CRYPTOCURRENCY TRADING PLATFORMS DISPUTES

One of the most prevalent applications of these cryptocurrencies is for the purpose of trading. Just like the stock market, many cryptocurrency trading platforms have come up in multiple jurisdictions to facilitate the trade and exchange of these currencies.

For instance, Kraken, a cryptocurrency trading platform, has recently faced a putative class action lawsuit. The plaintiff alleged a major violation of state laws caused the trading platform to collapse. In May 2017, the plaintiffs placed a substantial selling order for 'Ether' on the respondent's platform. However, at the same time, owing to some disturbance, the platform was exposed to a Distributed Denial of Service (DDoS) attack, resulting in the platform's crash. Due to the crash followed by the inaccessibility, customers couldn't control their investments and their accounts were liquidated at Kraken's discretion.[49] This led the plaintiffs to file a lawsuit claiming $5 million as damages. The respondent was sued for negligence, unjust enrichment, and breach of contract.[50]

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http://arbitrationblog.kluwerarbitration.com/2017/11/02/, (last visited Feb 1, 2022).

[48]Paddy Baker, *Tezos Investors Win $25M Settlement in Court Case over $230M ICO*, COINDESK, (Sept 2020), https://www.coindesk.com/tezos-investors-win-25m-settlement-in-court-case-over-230m-ico, (last visited Feb 1, 2022).

[49]Kristen Peters Watson, *Cryptocurrency Exchange, Kraken, Faces Class Action Lawsuit after Flash Crash*, LEXOLOGY.COM, (Jan 11, 2018), https://www.lexology.com/library/detail.aspx?g=a6d4113c-2f76-4e50-b966-d6d7d70955d0, (last visited Feb 6, 2022).

[50] Ryskamp DA and J.D., *Flash Crash of Cryptocurrency*

SMART CONTRACT

A smart contract is a programme stored on a blockchain that executes itself when a certain set of conditions are fulfilled.[51] They are often referred to as digital contracts which have the potential to execute themselves without the assistance of any third party, and they are triggered as soon as one or more conditions set forth in the contract are completed.[52] A practical use and application of these contracts can be seen from an example. For instance, when a flight is cancelled or delayed for a certain amount of time, the blockchain-based app could get the relevant data from the airline system to automatically return the money to the passengers, thereby executing the smart contract. However, with each new advancement comes a new dispute and so is the case with the smart contracts.[53] In 2016 the Ethereum's Decentralized Autonomous Organization (DAO) hack took place where over 3.6 million Ether were held by the hacker.[54]

WHY CRYPTOCURRENCY DISPUTES SHOULD BE MADE ARBITRABLE?

The most suitable dispute resolution mechanism for any subject matter is chosen based on the characteristics, nature and scope of the subject matter. The authors have placed reliance on Arbitration to be the most effective dispute resolution mechanism and same has been corroborated by the following factors: -

MARKET IS VOLATILE, QUICK DECISIONS ARE WELCOMED

The Financial Stability Report, RBI Circulars and the European Union Parliament all point to the conclusion that the cryptocurrency market is volatile and can fluctuate at any time by turning a person from rags to riches or vice-versa.[55] Moreover, disputes involving such volatile nature should be settled as soon as possible to avoid any losses due to the time taken for the ongoing dispute. Advocating

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Exchange Yields Lawsuits - How Experts Might Be Used EXPERT INSTITUTE, (Aug 15, 2017), https://www.expertinstitute.com/resources/insights/flash-crash-of-cryptocurrency-exchange-yields-lawsuits-how-experts-might-be-used/, (last visited Feb 6, 2022).

[51] Riikka Koulu, *Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement,* 13 SCRIPTED, 40–69 (2016), https://script-ed.org/?p=2669, (last visited Feb 7, 2022)

[52] Rakesh Sharma, *How Are Disputes in Smart Contracts Resolved?* (June 23, 2020) INVESTOPEDIA https://www.investopedia.com/news/how-are-disputes-smart-contracts-resolved/, (last visited Feb 7, 2022).

[53] Dani Alexis Ryskamp, *The Rise of Cryptocurrency Litigation*, EXPERT INSTITUTE, (June 23, 2020), https://www.expertinstitute.com/resources/insights/rise-cryptocurrency-litigation/, (last visited Feb 7, 2022).

[54] David Siegel, *The DAO Attack: Understanding What Happened*, COINDESK, (June 25, 2016), https://www.coindesk.com/understanding-dao-hack-journalists, (last visited Feb 7, 2022).

[55] Noelle Acheson, *Crypto Markets Are Volatile Because They're Free*, COINDESK, (Jun 16, 2021), https://www.coindesk.com/markets/2021/05/23/crypto-long-short-crypto-markets-are-volatile-because-theyre-free/, (last visited Feb 2, 2022).

the efficiency of Arbitration in the present scenario would be the most efficient way of settling the disputes.[56]

BORDERLESS NATURE OF CRYPTO AND ARBITRATION

Penetrating through the spheres of jurisdiction, the cryptocurrency has become a truly borderless innovation that has a wide acceptance across the globe. Such is the nature of arbitration as a dispute resolution mechanism.[57] This form of dispute resolution is not bound to a particular jurisdiction and the award passed under arbitration can be enforced in various jurisdictions. The parties are free to choose their own set of laws and procedures to be applicable.

WIDE ACCEPTANCE AND UNIFORM MECHANISM OF ARBITRATION ACROSS VARIOUS COUNTRIES

Cryptocurrencies are widely accepted across nations and so is the Arbitration as a dispute resolution mechanism. Around 168 nations have endorsed arbitration as a method of resolving disputes, by signing and ratifying the New York Convention.[58] Any award passed under the New York Convention can be easily enforced across jurisdictions. Thus, arbitration should be used to resolve crypto disputes allowing them to establish a uniformity in multiple jurisdictions.

SUBJECT MATTER EXPERT CAN BE ALLOTTED IN ARBITRATION

When the dispute involves complex and ever-changing technical issues, parties tend to choose an expert who knows the intricacies of the subject matter and who can efficiently resolve the dispute. Cryptocurrencies are one of the newest breakthroughs in the world of Virtual Currencies, and subject matter knowledge is limited.[59] Arbitration offers a wide range of expertise in each field, and the parties are free to choose from the pool of arbitrators. This gives the parties confidence that the arbitrator will fully grasp and analyse the issue before making a fair and well-reasoned award.[60]

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[56] Bronwyn E. Howell & Petrus H. Potgieter, *Uncertainty and dispute resolution for blockchain and smart contract institutions*, 17, JOURNAL OF INSTITUTIONAL ECONOMICS 545-549 (2021).

[57] Simon Maynard and Elizabeth Chan, *Decrypting Cryptocurrencies: Why Borderless Currencies May Benefit from Borderless Dispute Resolution*, (Nov 2, 2017), http://arbitrationblog.kluwerarbitration.com/2017/11/02/decrypting-cryptocurrencies-borderless-currencies-may-benefit-borderless-dispute-resolution/, (last visited Feb 6, 2022).

[58] New York Convention on Recognition and Enforcement of Foreign Arbitral Awards,1958.

[59] OrnaRabinovich-Einy& Ethan Katsch, *Blockchain and the Inevitability of Disputes: The Role for Online Dispute Resolution*, 2, JOURNAL OF DISPUTE RESOLUTION, (2019).

[60] Dena Givari, *How Does Arbitration Intersect with the Blockchain Technology that underlies Cryptocurrencies?,* KLUWER ARBITRATION BLOG, (May 5, 2018), http://arbitrationblog.kluwerarbitration.com/2018/0

FLEXIBILITY OF PROCESS AND NEUTRALITY OF JURISDICTION

Unlike the rigid system of the court, arbitration is a tailor-made process which is flexible enough to cater the needs of the parties involved. Disputes involving technological advancement and their ever-changing nature should be resolved in a way that the parties desire.[61]

Inferring from the suitability of arbitrating disputes in cryptocurrency, we can conclude that arbitration would be very advantageous for the technically rowing world. Arbitration of cryptocurrency disputes is not completely novel as some jurisdictions have already started taking this course. Recently, an arbitration was submitted to the International Chamber of Commerce, subjected to the American law, and involved claims for breach of contract, misrepresentation, fraud, defamation and unjust enrichment.[62] Thus, the quest for adopting arbitration as the preferred mode of dispute resolution for cryptocurrencies has already begun.

DOES INDIAN LAW PROHIBIT ARBITRABILITY OF CRYPTOCURRENCY DISPUTES?

The Arbitration and Conciliation Act, 1996 (hereinafter the "**Act**"), does not lay out a map as to which disputes are arbitrable. The understanding of arbitrability of disputes in the Indian context has evolved with time and developed through the various precedents set forth by the Hon'ble Courts from time to time. In the recent Judgment of *Vidya Drolia v. Durga Trading Corpn,*[63] the Supreme Court has made a fine attempt to define the non-arbitrable disputes via a four-fold test. Any dispute falling under the defined categories of the four-fold test shall be declared to be non-arbitrable. The authors will examine the applicability of the four-fold test to the cryptocurrency disputes, and advocate the assertion of arbitrability of such disputes. The four tests are as mentioned below:

a. Disputes involving rights in rem as well as disputes involving rights in personam emerging out of rights in rem.[64]

Right in rem is a right that can be exercised

5/05/, (last visited Feb 7, 2022).

[61] Priya Agarwal and Riya Agarwal, *Cryptocurrency And Dispute Resolution,* THE HNLU CCLS BLOG, (Oct. 17, 2020), https://hnluccls.in/2020/10/17/cryptocurrency-and-dispute-resolution/, (last visited Feb 7, 2022).

[62] *Aceris Law Successfully Resolves ICC Arbitration Involving the Cryptocurrency Industry,* ACERIS LAW LLC, https://www.acerislaw.com/aceris-law-successfully-resolves-icc-arbitration-involving-the-cryptocurrency-industry/, (last visited Feb 7, 2022).

[63] (2021) 2 SCC 1.

[64] *Id.*

against the world at large, whereas in the case of *rights in personam*, it can be exercised against a specific or definitive set of individuals.[65] The use and exchange of cryptocurrencies is a transaction between the individual entities which gives rise to *right in personam*. No element of right *in rem* in such transactions arises. The rights awarded while transacting the cryptocurrencies are enforceable against the individual(s) who is/are a part of the same transaction, thus third party rights are not affected.

b. Disputes requiring either a central adjudication or affecting the public at large.

When a dispute affects any third-party rights, it must be brought before an appropriate forum[66] for a centralized adjudication.[67] Whereas, the nature of cryptocurrency transactions is such that they are carried between certain individual entities. The nature of these transactions is privy and concerns only the parties engaged in such transactions, thereby excluding any third parties from the domain. Only the individuals involved in use and trade of such currencies form a part of the dispute without bearing any influence on the society at large, therefore, requiring no centralized adjudication.

c. Disputes that involve the State's sovereign and inalienable public interest functions.

Such disputes affect not only the parties, but also have a larger impact among the public and the State at large.[68] However, the nature and dispute resolution of cryptocurrencies is nowhere near the domain of sovereign and public interest functions, as it concerns only the individuals involved. Any disputes or differences can be adjudicated privately by mutual consent of the parties. The disputes do not involve the State as the transactions in cryptocurrencies are decentralized in nature having no bearing on the State authorities.

d. Disputes that are non-arbitrable due to a bar placed by a statute or legislation

When statutes create special rights to protect certain subject matter from being dealt privately, then in order to give effect to the legislative intent,[69] disputes relating to such subject matter are decided by a dedicated

[65] Booz Allen & Hamilton Inc v SBI Home Finance Limited &Ors (2011) 5 SCC 532; N. Radhakrishnan v. Maestro Engineers, 2009 (13) SCALE 403; Sukanya Holdings Private Ltd. v. Jayesh H. Pandya and Another, (2003) 5 SCC 351.

[66] Himangni Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706.

[67] A. Ayyasamy v. A. Paramasivam and Others, (2016) 10 SCC 386.

[68] Agricultural Produce Market Committee v. Ashok Harikuni & Another, (2000) 8 SCC 61; Common Cause v. Union of India, (1999) 6 SCC 667.

[69] Suresh Shah v. Hipad Technology India Private Limited, 2020 SCC OnLine SC 1038.

forum.[70] Disputes involving cryptocurrency are not governed by any legislation since the Indian Government is yet to roll out any legislation pertaining to such currencies. Therefore, due to lack of any legislative authority to exercise any restraint, the disputes involving these currencies are freely arbitrable as there is no ban or prohibition on arbitrability of such disputes.

As seen from the above discussion, the cryptocurrencies disputes can be made arbitrable in India as they do not fall under the four-fold test that decides the non-arbitrability of any dispute.

CONCLUSION

The rising popularity of the cryptocurrencies clearly suggests that they have received a red-carpet treatment in the Indian market and therefore, devising a proper mechanism for its dispute resolution should be prioritized. Hence, it is paramount to have a readymade solution procedure beforehand. Such a step will boost the morale of investors who would feel secure about their investments knowing that a legal recourse is available in case of any mishaps or infringement of their legal rights by another private party.

As we carefully analysed, we can promptly nod in affirmation that disputes in cryptocurrencies are well-suited to be arbitrated. Analyzing the characteristics and nature of these currencies it can be well established that choosing arbitration as the preferred mode of dispute resolution would harmonise and promote an effective settlement of dispute.

Abuse of Process in International Investment Arbitration

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INTRODUCTION

The doctrine of abuse of process prohibits the exercise of the right in contradiction to the purpose for which is has been conferred upon as per international law.[71] It is primarily

[70] Shri Vimal Kishor Shah v. Jayesh Dinesh Shah & Others, (2016) 8 SCC 788.

[71] John David Branson, *The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration* 38 Journal of International Arbitration 187, 187 (2021) https://www.squirepattonboggs.com/-

related to the usage of a particular right. While the term abuse has not been defined in any convention as such, it can generally be understood as the utilization of the right in a manner which impedes the efficiency of the process. The said principle is also closely associated with the principle of good faith. Article 26 of the Vienna Convention on the Law of Treaties also states, "every treaty entered into by the parties must be performed in good faith."[72] The abuse of the right can occur at any stage. It can occur while filing the case at that particular court or can occur while providing evidence as well. Law requires the court to treat the piece of evidence as inadmissible when the evidence has been submitted in an abusive manner. Thus, it is an issue of jurisdiction and admissibility.[73]

Practice in Investment Arbitration:

The same is also understood to be included in investment arbitration as generally most rules of international law are also a part of investment arbitration and doctrine of abuse of process is generic in nature. This is more so because the Vienna Convention on the Law of Treaties (VCLT) and customary international law are applicable while interpreting treaties.[74] In the case of *Abaclat v. Argentina*, the tribunal established also stated that "the theory of abuse of rights is an expression of the more general principle of good faith" and that "the principle of good faith is a fundamental principle of international law, as well as investment law."[75]

The ICSID further, in the case of *Phoenix Action v. Czech Republic*, held that it is implied that every rule of law should not be abused.[76] On account of this, tribunals have additional powers to ensure that an abuse of process does not take place. Article 17(1) of the UNCITRAL Rules, 2010 states that a tribunal has the discretion to conduct arbitration proceedings as it deems appropriate.[77] Further, rule 19 of the ICSID Convention Arbitration Rules also state that the tribunal has the power to make orders for

/media/files/insights/publications/2021/03/the-abuse-of-process-doctrine-extended-a-tool-for-right-thinking-people-in-international-arbitration/theabuseofprocessdoctrineextendedatoolforrightthinkingpeopleininternationalarbitration.pdf.

[72] Vienna Convention on Law of Treaties, 23 May, 1969, U.N.T.S 18232, art. 26.

[73] Yuka Fukunaga, *Abuse of Process under International Law and Investment Arbitration* 33 ICSID Review - Foreign Investment Law Journal 181, 184 (2018) https://academic.oup.com/icsidreview/article-abstract/33/1/181/4965903.

[74] *Id.*

[75] Abaclat and others v. Argentine Republic, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 646 (4 August 2011).

[76] Phoenix Action, Ltd v. Czech Republic, ICSID Case No ARB/06/5, Award ¶ 107 (15 April 2009).

[77] UNCITRAL Arbitration Rules, art. 17.

the conduction of the proceedings.[78]

Tribunals, however, have been reluctant while entertaining objections to the principle and do not readily accept the same.[79] For example, in the case of *Lauder v. Czech Republic*, the tribunal held that there is no abuse of process when multiple proceedings have been initiated for the same matter because it did not affect the jurisdiction and authority of the tribunal in any manner.[80] Further in the case of *Flemingo v. Poland*, the tribunal was hesitant in upholding the respondent's objection to jurisdiction based on the abuse of process on account of the institution of multiple proceedings because, "both a controlling shareholder and a controlling shareholder of the former gave notice of separate claims under respective bilateral investment treaties against the same host State for the same subject-matter, and when one of them does not pursue its claim, it cannot by itself constitute an abuse of process."[81]

Nowadays the practice of abuse of process in investment arbitration has become rampant. Some ways parties use the right abusively include:

- Using schemes to secure jurisdiction under an investment treaty, which was done in the case of *ST-AD GmbH v. Republic of Bulgaria*, wherein a German company had bought some shares in a Bulgarian company which had a dispute with Bulgaria. The ICSID tribunal said that the claims were inadmissible as the Germany-Bulgaria BIT violations occurred before the investment had been acquired by the claimant and the claimant was trying to fabricate a dispute on the similar circumstances.[82]
- Gaining benefits inconsistent with the practice of investment arbitration. For example, in an ICC Case, an entity owned by Baden-Württemberg, along with Germany initiated an arbitration proceeding against the French company EDF solely to gain media attention.[83]

This problem has significantly increased because of which methods need to be

[78] Rules of Procedure for Arbitration Proceedings, rule 19.
[79] *Supra* note 3.
[80] *Supra* note 1.
[81] Flemingo Duty Free Shop Private Limited v. The Republic of Poland, UNCITRAL, Award (Redacted) ¶ 347 (12 August 2016).
[82] ST-AD GmbH v. Republic of Bulgaria, UNCITRAL, PCA Case No 2011-06, Award on Jurisdiction (18 July 2013).
[83] Emmanuel Gaillard, *Abuse of Process in International Arbitration* ICSID Review 1, 10 (2017) https://www.shearman.com/-/media/Files/NewsInsights/Publications/2017/01/icsidreviewsiw036full.pdf .

developed in order to combat the rampant problem.

Tools to combat the practice of abuse of process:

1. Lis Pendens

The doctrine of *lis pendens* permits the court to put a stay on the proceedings before it or suspend the same because of a possibility of conflicting decisions and to avoid duplication of costs.[84] The application of this doctrine is based on the assumption that the two fora that have been seized with the dispute have legitimate authority over the dispute. While the application of this doctrine could provide a solution, in practice this doesn't happen. This is because parties often submit a part of their claims to one tribunal and the other part to another tribunal.[85] Thus, the parties can circumvent the application of this doctrine as parallel investment arbitrations could proceed regarding different issues arising from the same dispute.

2. Concentration of the dispute

In international law, the doctrine of res judicata is well established and can be applied if three conditions are satisfied i.e., if the object of the litigation, cause of action and the parties to the litigation are the same. Thus, a successive claim shall be barred in case the subsequent proceeding fulfils the three conditions.[86] However, there is requirement of clarity as to what constitutes 'abuse of process' when multiple parallel proceedings are going on.

A mechanism that could be utilized to resolve the dispute would include the parties to necessarily raise all issues arising out of the same dispute at the same tribunal.[87] This was applied in the case of *Cesareo*, where the claimant's subsequent claim for payment of costs on the basis of the principle of unjust enrichment had been dismissed since in the first proceeding the claimant brought the same claim on the basis of a provision in the French Civil Code.[88]

While this could be termed as a stringent application of the rule, English courts have taken a more flexible approach in this case. In the case of *Henderson v. Henderson*, the court could apply the triple identity test of res judicata flexibly as a rule the prevents parties to bring claims on a dispute that could have been brought earlier. It allows the judge to consider all the facts and circumstances of

[84] Filip De Ly, Audley Sheppard, *ILA Final Report on Lis Pendens and Arbitration* 25 Arb Intl 1,3 (2009) https://academic.oup.com/arbitration/article-abstract/25/1/3/208210?redirectedFrom=PDF.
[85] *Supra* note 12.
[86] CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Final Award ¶ 620 (14 Mar. 2003).
[87] *Supra* note 12.
[88] *Id.*

the case and decide whether the claim should've been brought in the previous proceeding.[89] Thus, it based on the discretion of the judge.

Recently, in an ICC Case, the ICC tribunal held that repeated litigation was unduly repressing the respondent and therefore, the state should be barred from bringing new claims.[90] While the rejection of this practice is still novel to the field of investment arbitration, the same should be accepted completely as this practice mitigates the efficiency of the resolution of the dispute.

In *Grynberg & RSM Production Corporation v. Grenada*, the claimants had brought contractual claims against the government at ICSID. A successive proceeding was brought in the case of *Grynberg v. Grenada*.[91] Article 53 of the ICSID Convention states that, "the award shall be binding on the parties and will not be subject to an appeal."[92] While the conditions required for the application of res judicata were not satisfied, the second ICSID tribunal did conclude that instituting the second arbitration proceeding was an "abusive attempt" to circumvent the binding nature of the first arbitral award.[93]

3. Doctrine of Abuse of Rights

Another mechanism that could be used to combat abuse of process could be the principle of abuse of rights which is based on the idea that a party has a legal right, however, uses it in a manner that is evasive, or for the purpose of causing harm to the other party etc.[94] The first case to apply this doctrine was *Phoenix Action v. Czech Republic*, where the ICSID tribunal dismissed the claim because it found out that the claimant had committed an abuse of right. The tribunal decided that Phoenix Action was trying to transform the existing domestic dispute into an international one and that could not be considered as a *bona fide* usage of the rights and thus could not be qualified as a 'protected investment' under ICSID. The tribunal said that the "rearrangement of assets within the same family" for ICSID to have jurisdiction on the claim led to an abuse of process.[95]

The tribunal rightly stated that-

"If it were accepted that the Tribunal has jurisdiction to decide Phoenix's claim, then

[89] Henderson v. Henderson (1843) 3 Hare 100.
[90] *Supra* note 12.
[91] *Supra* note 1.
[92] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 53.
[93] *Supra* note 1.
[94] Michael Byers, *Abuse of Rights: An Old Principle, A New Age* 47 McGill LJ 389, 389 (2002) https://lawjournal.mcgill.ca/wp-content/uploads/pdf/7097031-47.2.Byers.pdf .
[95] Phoenix Action, Ltd v. The Czech Republic, ICSID Case No ARB/06/5, Award (15 April 2009).

any pre-existing national dispute could be brought to an ICSID tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT."

Thus, this would not come under the ambit of 'protected investment' as this would make the jurisdiction of the ICSID without any limits.

Further, in the case of *Rene´e Rose Levy and Gremcitel SA v. Republic of Peru*, the Levy family owned a number of shares in a local company, Gremcitel which had been given the right to develop tourism in Peru. Just before a resolution was going to passed frustrating the assets of Gremcitel, the Levy family transferred majority of its shares to Rene´e Rose Levy who was the only French National in the family, subsequent to which the Levy family initiated arbitration under ICSID. The tribunal then came to the conclusion that the corporate restructuring done by the Levy family amounted to an abuse of process and refused to admit the case.[96]

However, we see very few tribunals accepting and applying the doctrine of abuse of process. Another tribunal to apply the principle of abuse of process was in the case of *Ampal v. Egypt*, where a total of six arbitrations were proceeding simultaneously. Four of the arbitrations were commercial and the remaining two were investment arbitrations. The tribunal stated:

"While the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise confirmed, it would crystallize in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals."[97]

This appeared as a very tepid and half-hearted acceptance of the doctrine. Article 26 of the ICSID Convention clearly states, "consent of the parties to the arbitration will be 'deemed' to be at the exclusion of any other remedy available." The tribunal relied on Article 26 of the Convention and concluded by stating:

"Once consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum, national or international, and are restricted to pursuing their claim through ICSID."

[96] Rene´e Rose Levy and Gremcitel SA v. Republic of Peru, ICSID Case No ARB/11/17, Award (9 January 2015).

[97] Ampal-American Israel Corp., EGI-FUN (08–10) Investors LLC, et al., v. Arab Republic of Egypt, (ICSID Case No. ARB/12/11) Decision on Jurisdiction, ¶ 103 (1 Feb. 2016).

Conclusion:

There is some hesitancy in accepting the practices of abuse of process in claims for jurisdiction and admissibility. Permitting the abuse to continue and condoning the practice can lead to repression of the opposite party and cause unnecessary expenditure of resources, time and money thereby causing significant harm. This could also give a green light to parties who intend on using this tactic to be successful in the case and could possibly indicate a tacit acceptance of the same. While there have been a few cases where this practice has been condemned and claims have been rejected on the same basis, it still needs to see wholehearted acceptance in investment arbitration.

Tata Capital Finance Ltd. v. Shri Chand Construction and Apartment Pvt. Ltd.

24 November 2021 | FAO (OS) 40/2020 and CM No. 15441/2020 | High Court of Delhi

Principle: Arbitration agreements that give only one party the right to abandon the arbitration lack 'mutuality' and such agreements are invalid.

Facts: In this case the respondent had availed two loans from the appellant for the purchase of property against which they deposited the original property documents as security. After repaying the entire amount they demanded back the property documents for the purpose of reselling the property. However, the appellant failed to provide the same in a timely manner due to which the respondent suffered losses. Following this the respondent filed a suit in the Delhi High Court seeking damages. However, the appellant filed for arbitration under section 8 as per the loan agreement. The loan agreement was worded in a way that gave the appellant the right to abandon arbitration while denying the same to the defendant. This was challenged by the defendant before the Court and they prayed for the agreement to be declared invalid. The single judge that heard the case ruled that the agreement is invalid. Tata Capital Finance Ltd. then appealed the judgement before a division bench of the Delhi High Court.

Judgement: The Court upheld the single judge decision. It observed that the appellant could abandon arbitration if it chooses to enforce the security, as this would revoke the clause of arbitration under the loan agreement. However, the defendant had no such powers under the agreement. Since there was a wide disparity between the rights available to the appellant and the respondent the essential feature of 'mutuality' was absent in the arbitration agreement. Hence, the Court found the arbitration agreement to be invalid.

M.P. Housing and Infrastructure Development Board v. K.P. Dwivedi

3 December 2021 | C.A. No. 6768 of 2021, C.A. No. 6770 of 2021, C.A. No. 6771 of 2021 | Supreme Court of India

Principle: An award or nullity order passed by an arbitration tribunal is final and binding in nature and only an appellate Court can interfere with it.

Facts: The appellant had floated a tender for the construction of houses in Bhopal in 2005 which was awarded to the respondent.

According to the contract the construction work was supposed to be completed in 18 months but it remained incomplete despite repeated extensions. Subsequently, the appellant rescinded the contract in 2008 which was challenged by the respondent before the Deputy Housing Commissioner, Bhopal. A writ was also filed by them in the Madhya Pradesh High Court which directed both parties to resolve the matter through arbitration before the Housing Commissioner, Madhya Pradesh Housing Board. The arbitrator rejected the respondents claims and granted some relief to the appellant. Instead of appealing the order the respondents filed a fresh petition before the Madhya Pradesh Arbitration Tribunal which rejected the application. The respondent then filed an arbitration revision petition before MP High Court which quashed the MP Arbitration Tribunal order and directed it to arbitrate the matter on merits. The appellants then appealed this judgement before the Supreme Court.

Judgement: The Supreme Court held that the respondent at no point in time had challenged Housing Commissioner's award. Further no Court had set aside the order. Therefore, the award had attained finality and was binding on both parties. Subsequent petitions filed by the respondent for those very claims before the MP Arbitration Tribunal was therefore not maintainable and upheld the appeal.

Bharat Heavy Electricals Ltd. v. Sudhir Cranes Pvt. Ltd.

4 January 2022 | Civil Revision Petition No.3790 of 2019| High Court of Judicature at Madras

Principle: Order VI Rule 17 for amendment of pleadings does not apply to Section 34 petitions under Arbitration Act, 1996.

Facts: In this case, Bharat Heavy Electricals Ltd., the revision petitioner, had entered into a contract in 2011 with Sudhir Cranes Pvt. Ltd., the respondent, to supply ten tonnes of mobile cranes. Disputes arose between the two parties due to the non-completion of the contract. The respondent made various claims and the revision petitioner filed claims. Thereafter, the respondent raised a dispute before the Arbitral Tribunal consisting of a sole arbitrator. The sole arbitrator had passed an award dismissing the respondent's claim and the revision petitioner's counterclaim in 2015. After that, both the parties filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act"), and subsequently, the respondent filed an

application seeking an amendment to the original arbitration application.

The learned counsel for the respondent sought amendment in the application and cited several judgments of the Hon'ble Supreme Court relating to amendment of pleadings as contemplated under Order VI Rule 17 of the Code of Civil Procedure, 1908 ("CPC"). In such judgments, the Hon'ble Supreme Court had recognized the application of Order VI Rule 17 of CPC concerning the amendment of an application filed under Section 34 of the Act.

On the other hand, the learned counsel for the revision petitioner submitted that the amendments in the application by the respondent were not only to correct certain errors and mistakes but also to introduce additional grounds. Therefore, it was opposed by the revision petitioner on the ground that such amendments introducing new facts or pleading are not permissible as per Rule 17 of Order VI of the CPC. Amendments are only permissible in law if it is for correcting some error in figures or typographical mistakes. However, in this case, the lower court allowed the application filed by the respondent in 2019 and the revision petitioner moved the High Court of Madras against the order of the lower court.

Judgement: The High Court of Madras in its judgment held that application for amendment of an application under Section 34 of the Act can be accepted only if the new grounds introduced by the amendments do not change the character of the petition. It relied on various Supreme Court judgments where the Court had declared that amendments can only be made if they seek to amplify the grounds that already exist. Considering this, the High Court of Madras dismissed the Civil Revision Petition of the revision petitioner opposing the application of amendments made by the respondent. It found that the amendments were within the scope of the original Arbitral proceeding or without the factual background which did not change the original character of the application filed under Section 34.

I-Pay Clearing Services Private Limited v. ICICI Bank Limited

3 January 2022 | CA 7 OF 2022| Supreme Court of India

Principle: Merely because an application is filed under Section 34(4) of the Arbitration and Conciliation Act 1996 [hereinafter "the Act"] by a party, it is not always obligatory on

part of the Court to remit the matter to the Arbitral Tribunal.

Facts: I-Pay Clearing Services Private Limited [hereinafter "I-PAY"] and ICICI Bank Limited [hereinafter "ICICI"] entered into a Service Provider agreement for provision of technology, management of operations, and processing loyalty-based programs for Hindustan Petroleum Corporation Ltd. [hereinafter "HPCL"]. However, ICICI terminated this agreement and subsequently, a dispute arose, which was referred to a Sole Arbitrator. Justice R.G.Sindhakar (Retd.), who was appointed as Sole Arbitrator, passed an award directing the respondent to pay INR 50 crores with interest at 18% p.a., from the date of the award, i.e., 13 th November, 2017. They were also required to pay a further INR 50,000 towards costs. The respondent filed an application against this award under Section 34(1) of the Act before the Hon'ble High Court of Bombay on the grounds of patent illegality. However, this application was dismissed by the Court on grounds of lack of merit under Section 34(4) of the Act. Subsequently, this matter went in appeal before the Hon'ble Supreme Court of India. I-Pay argued that the Tribunal was right in its findings and claimed that ICICI had abruptly terminated the agreement. This rendered them liable to pay the costs for damages under Section 34(4) since the actions of ICICI amounted to curable defect. According to ICICI Bank however claimed that the Arbitral Award passed by the Sole Arbitrator ignored integral evidence on record. The same, according to them, could not be cured on remittal under Section 34(4).

Judgement:

The apex court dismissed this appeal and upheld the order passed by the Hon'ble High Court of Bombay. The Supreme Court observed that even if there is a prima facie patent illegality in the Arbitral Award, the Court may not accede to the request of a party for giving an opportunity to the Arbitral Tribunal to resume the arbitral proceedings. The discretionary power under Section 34(4) of the Act, is exercised in order to mitigate any gaps in reasoning which may occur while substantiating the evidence on record. It recorded that that the language in this section was similar to the Article 34(4) of the UNCITRAL Model Law on International Commercial Arbitration. It also acknowledged that the quintessence of Section 34(4), as stated in *Kinnari Mullick v Ghanshyam Das Damani*, is to enable the tribunal to eliminate the grounds for setting aside the arbitral award by correcting defects in it.

It distinguished the decisions in *Dyna*

Technologies v. State of Kerala and *Som Datt Builders v. State of Kerala* by emphasising that these were not cases of patent infringement in the award, but rather a lack of justification for a finding that had previously been recorded in the award. On the contrary, there was nothing in the Award that indicated a decision on the legitimacy of the termination in the instance at hand.

The Hon'ble Supreme Court pointed out that the sole arbitrator issued an arbitral award within the time limit set by the High Court. As a result, he could not be claimed to have acted unlawfully. In light of the foregoing, the Supreme Court issued an order quashing and setting aside the High Court's ruling. As a result, the instant appeal was granted.