

SECOND BITE AT THE ARBITRATION APPLE: ANALYSING THE APPLICABILITY AND THE UTILITY OF THE INTERNAL APPEAL MECHANISMS IN COMMERCIAL ARBITRATIONS IN INDIA

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Legal jurisdictions across the world promote the finality of arbitral awards by prohibiting any kind of substantive review of awards. Barring exceptional circumstances, parties in arbitration get only one shot at arbitrating their disputes, the idiomatic ‘single bite at the apple’. However, such conceptions of arbitral finality have come under attack, as the tolerance for error in arbitration has decreased with increasing complexity and monetary stakes of the disputes involved. To this end, there has been a fervent advocacy for the usage of internal appeal mechanisms for ensuring substantive integrity of arbitral awards. Recognising the growing demand, multiple international jurisdictions and leading arbitration institutions have already begun offering sophisticated appeal procedures. The Supreme Court of India in its 2016 Centrotech judgment paved the way for appellate procedures in Indian arbitration by upholding the legal validity of such arrangements. Noting the dearth of literature on the issue in the Indian context, through this paper, we present a comprehensive discussion on internal appeal mechanisms and their application in Indian arbitration. Whilst addressing both the normative and the practical criticisms that have come to be associated with such procedures, we principally argue that internal appellate procedures will not only make the entire process of arbitration fairer, but also more autonomous. We also highlight and offer suggestions for amendments to deal with certain lacunae in the governing statute that may potentially complicate the application of appellate procedures in Indian arbitration. In addition, the paper also doubles up as a practice guide on internal appeal mechanisms as multiple sections offer detailed recommendations for drafting agreements on internal appeal procedures that are cost and time efficient, while simultaneously, are also capable of being tailored according to the specific needs of the parties.

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I. INTRODUCTION

At the core of the globalised world today, lies the ease of business transaction. The inherent nature of business transactions requires speed and low-cost adjudication of disputes.¹ Given the general lethargy of judicial process, a need for the development of an alternative mode of dispute resolution was felt. This need materialised itself in the form of the private institutional machinery of arbitration. Statutory provisions regarding arbitration were enacted for the purpose of alleviating the workload of the Courts and to provide parties with a suitable dispute resolution mechanism which is quick, less expensive and accords the parties flexibility with regard to choosing their own procedure and substantive laws for dispute resolution.²

Traditionally, arbitration has been understood to value speed and finality over the accuracy of the results and hence, does not account for any appeal mechanism.³ The rationale for this is that the losing party would mostly like a second chance if that chance can create inordinate delays.⁴ The U.S. Supreme Court in the *Mitsubishi Motors Corporation* case held parties opting for arbitration, give up their option of a review so as to protect the simplicity and speed of arbitration.⁵ Additionally, Judge Posner in the *Baravati* case opined that once the parties who choose arbitration, cannot subsequently bring their dispute before a court through “a back-door”, by way of appealing the award.⁶

However, support for appellate mechanism can be found in the works of prominent scholars like Mauro Rubino-Sammartano who criticised the general reverence that is shown for the arbitral award and the protection that is accorded to it against any sort of review.⁷ He argued that the provision of non-review ability becomes problematic when there are legitimate flaws in the rendered award, because arbitrators just like judges, are human beings, and hence, fallible.⁸

A more direct historic support for an appellate mechanism in arbitration can be found in commodity trading arbitrations such as Grain and Feed Trade Association Arbitration Rules (“GAFTA”),⁹ Uganda Coffee Trade Federation Arbitration Rules (“UCTF”)¹⁰ *et al.* International commodity arbitration deals with disputes regarding shipment of natural agricultural products from one port to

¹ See Soia Mentschhoff, *Commercial Arbitration*, COLUMBIA LAW REVIEW, Vol. 61, No. 5 850 (May, 1961).

² *Ultracashmere House, Ltd. v. Meyer*, 664F.2d 1176 (11th Cir. 1981).

³ See Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV., 946. (1975).

⁴ *Id.*

⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

⁶ *Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704, 706 (7th Cir. 1994).

⁷ M. Rubin- Sammartano, *The European Court of Arbitration and its Arbitration and Mediation Rules*, 15 JOURNAL OF INTERNATIONAL ARBITRATION, Issue 1 (1998).

⁸ *Id.*

⁹ The Grain and Feed Trade Association Arbitration Rules No. 125, 2016, Rule 10.

¹⁰ Uganda Coffee Trade Federation Arbitration Rules, 1998, Rule 32.

another.¹¹ Appeal is considered to be an indispensable part of commodity trading as an aberrant decision condemning or condoning the quality of goods may cause severe repercussions within the trade circle.

While most legislations allow for *vacatur* of arbitral awards on limited grounds such as misconduct, prejudice, evident bias, *etc.*; this review is to challenge cases where the procedure of arbitration has been compromised.¹² It does not accommodate a merit-based review of the award itself. Herein lies the basic argument of this paper, *i.e.*, establishing an internal appeal mechanism for correction of merit-based errors so as to avoid aberrant decisions which have no guarantee of quality and fairness.¹³ The institution of appellate mechanism will not only attract new parties, who erstwhile deemed arbitration to be too risky but also enhance the quality of the arbitration mechanism and make it more fruitful and effective. Thus, the legal systems worldwide are now shifting their focus to recognise the nature and scope of such an appellate mechanism within arbitration. Most recently, in India in a historic judgement, a three-judge bench of the Supreme Court gave a dictum which upheld the arrangement of “two-tier arbitration” process as legal under the Indian arbitration regime.¹⁴

In this paper, we attempt to further the discussion of appellate arbitration in the Indian context. Since, currently there is a dearth of literature regarding this practise in India, we have relied on global jurisprudence to analyse the applicability and utility of these procedures in Indian arbitration. In order to understand the Indian landscape of the same, in Part II we have reviewed the decision of the Indian Supreme Court which upheld the validity of the internal appeal mechanisms. In Part III, we have reviewed the current landscape of the practice of appellate arbitration by the major arbitration institutions. Part IV attempts to seek the normative grounding for the inclusion of appeal mechanisms in arbitration. In Part V the normative basis is distilled further to establish that the virtue of finality is not compromised if the arbitration process offers an appeal procedure by highlighting the changing perceptions and scenario in modern-day arbitration. Part VI presents a detailed analysis on how appellate review strengthens and improves the overall quality of arbitration. Part VII elucidates on issues such as public policy, costs *etc.* that may arise if the option of appellate arbitration is incorporated in India seated arbitration. Based on the above issues, part VIII will provide recommendations to tackle these problems. The recommendations are based on two categories- first, we analyse the statutory amendments that can be adopted to make the Arbitration and Conciliation Act, 1996 (‘Arbitration Act’) more appeals-friendly. Second, we describe some contractual recommendations

¹¹ William H. Knull & Noah D. Rubins, *Betting The Farm On International Arbitration: Is It Time To Offer An Appeal Option?*, 11 Am. Rev. Int’l Arb. 4 (2000).

¹² *Id.*

¹³ Richard Chernick & Zela Claiborne, *Reimagining Arbitration*, 37 LITIGATION 4, 35 (2011),

¹⁴ Live Law News Network, *Two Tier Arbitration Procedure Permissible Under the Laws of India*, December 16, 2016, available at <http://www.livelaw.in/two-tier-arbitration-procedure-permissible-laws-india-sc/> (Last visited on January 18, 2018).

that the parties can incorporate in the drafting of their contract. Based on the above, in Annexure-I we have drafted certain model clauses that can be used as a working guideline for parties. This paper concludes on the note that the recognition and acceptance of the internal appeal mechanisms will help immensely in achieving the ends of a fairer commercial arbitration in India.

II. INDIA AND THE RISE OF APPELLATE ARBITRATION

India has been witnessing a growing discourse on the need and the practicality of appellate review mechanisms like internal appeal procedures within the arbitration system. The erstwhile Arbitration Act of 1940 envisaged very wide appeal powers. Under the 1940 Act, the final award could be modified or corrected by the Court on appeal.¹⁵ It also allowed the court to remit back the award to the arbitrator for reconsideration on varied grounds such as misconduct or mistake on the part of the arbitrator.¹⁶ Thus, the award rendered at the first instance could be completely set aside by the courts,¹⁷ or revised by both –courts and arbitrators. This Act was subsequently replaced by the Arbitration Act which consolidated all the existing laws on arbitration in India. The present Act sets up a mechanism to challenge an award in the court of law through an application under limited and exhaustive grounds.¹⁸ While the statutory review on merits was done away with, the act remained silent on the validity of contractual provisions for review that parties could *ex ante* agree to resolve any error in the award.

This point of contention was settled recently by the decision of a three-judge bench in the historic case of *Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd.*¹⁹ In this case the arbitration agreement which was entered into by both the parties contained an internal appellate clause. It stipulated that if either of the parties were in disagreement with the first instance arbitral award which was to be rendered by the Indian Council of Arbitration, the aggrieved party had the right to appeal the same in a second arbitration in London. Thus, the dispute arose as to whether the option of a second arbitration appeal was permissible by law. It took a while before the apex court could come to a positive decision on the validity of the impugned appeal procedure. In the first round of consideration, a two judge bench gave a split verdict on the validity of appellate

¹⁵ The Arbitration Act, 1940, § 15.

¹⁶ Law Commission of India, *Report on Arbitration Act, 1940*, Report No. 76, 42, November 9, 1978, available at <http://lawcommissionofindia.nic.in/51-100/Report76.pdf> (Last visited on November 29, 2017) (refer to ¶5.5 for an illustrative list of grounds on which the court could remit the award back to the arbitrators).

¹⁷ The Arbitration Act, 1940, §30.

¹⁸ The Arbitration and Conciliation Act, 1996, §34.

¹⁹ *Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228 : 2016 SCC Online SC 1482 : AIR 2017 SC 185 ('Centrotrade 2016').

review in India.²⁰ Justice S.B. Sinha was vehemently opposed to the idea of allowing substantive review of arbitral awards by an appellate panel. Firstly, he opined that the Arbitration Act only allowed for one kind of challenge to a final award and that was by way of a judicial review on limited grounds.²¹ According to him, §34 of the Arbitration Act was an exhaustive provision and no appeal could be filed as against an award to a separate arbitration panel.²² He held that it is only upon a Court to adjudicate on the legality of an award upon challenge.²³ Secondly, Sinha J. reasoned that parties were not allowed to contract to confer jurisdiction on a forum which did not have the competence to hear the case under the law.²⁴ Per Sinha J. the arbitration agreement had to strictly confine to the procedures established by the Arbitration Act, and thus, opting for an appellate arbitration mechanism would render §34 and §36 redundant as it would have had the effect of conferring authority on a forum other than a court.²⁵ Thus, he held such arbitration contracts to be against public policy and void in the eyes of law, *vide* §23 of the Indian Contract Act, 1872.²⁶ Justice Tarun Chatterjee, on the other hand, decided in favour of internal appeal procedures by holding party autonomy as the bedrock of arbitration.²⁷ He opined that legislative limitations did not apply to curtail the ability of the parties to formulate their own contract with specific arbitration procedures.²⁸ He held that nothing in the present Arbitration Act made internal appeal procedures impermissible and that the parties were free to opt for a two-tier system within India.²⁹ Following the dissenting opinion of the two presiding judges, the matter was referred to a larger bench.

The larger bench of the Supreme Court, consisting of Madan Lokur J., R.K. Agrawal J. and D.Y. Chandrachud J., piece by piece dismantled Sinha J.'s reasoning and ruled in the favour of internal appellate review in India. The Court relied on the UNICTRAL Working Group Report, on which India's law is modelled after, along with various commentaries and precedents and found that there was ample jurisprudential support for an internal appellate arbitration model.³⁰ The Court held that the availability of judicial recourse under §34 of the Arbitration Act did not prohibit parties *ipso facto* from contracting on an appeals process by a panel of arbitrators.³¹ The Court stated that mere absence of an express provision that allows appellate review in the Arbitration Act did not make the mechanism

²⁰ Centrottrade Minerals & Metal Inc. v. Hindustan Copper Ltd., (2006) 11 SCC 245. ('Centrottrade 2006')

²¹ *Id.*, ¶6.

²² *Id.*

²³ *Id.*, ¶19.

²⁴ *Id.*, ¶18.

²⁵ *Id.*, ¶16.

²⁶ *Id.*, ¶18.

²⁷ *Id.*, ¶28.

²⁸ *Id.*, ¶30.

²⁹ *Id.*, ¶32.

³⁰ Centrottrade 2016, ¶17.

³¹ *Id.*, ¶29.

impermissible under the Act.³² The Court gave supremacy to party autonomy by holding it to be the “*grundnorm*” of arbitration.³³ It reasoned that parties were allowed to decide on both procedural and substantive law they want to be subjected to in the arbitration agreement, and since a two-tier arbitration system did not contravene any aspect of the Indian public policy, such mutual agreements would be valid in the eyes of law.³⁴ Thus, this judgement conferred a much-required legal recognition to internal appeal procedures in India. But, the practicality of such a mechanism both in terms of the Arbitration Act and general market practise along with institutional support of the same was not analysed in this judgment. Thus, in this paper we explore the utility and repercussions of adopting an internal appellate mechanism within the Indian legal landscape and address its nuances with respect to current arbitration practices.

III. REVIEW OF CURRENT INSTITUTIONAL APPELLATE REVIEW PRACTICES

Arbitration, both nationally and internationally, is primarily practised in two forms: ad hoc and institutional.³⁵ The availability of these two kinds of arbitrations affords the parties the necessary flexibility which is one of the fundamental features of arbitration.³⁶ In ad hoc arbitration, the parties do not submit themselves to any arbitral organisation but the arbitration is conducted according to the terms and procedures specified in the arbitration agreement by the parties.³⁷ The basis of ad hoc arbitration is continued cooperation amongst the parties.³⁸ The parties have to mutually choose their own procedure, number of arbitrators, applicable law, manner of appointment *et al.* The arbitral tribunal thereafter conducts the proceedings as per the terms and conditions laid down in the contract or in the absence of which, with terms agreed upon by both the parties at the preliminary meetings.³⁹ Ad hoc arbitration can be cheaper, faster and accord the parties much more flexibility.

On the other hand, institutional arbitration is a type of arbitration wherein the arbitration is conducted or organised within an institutional setup of an arbitral organisation.⁴⁰ The arbitral organisation has its own rules, guidelines and procedures such as fee schedule, selection of arbitrators, laws *etc.* which the parties observe during the proceedings. The arbitral institution acts as a medium

³² *Id.*, ¶23.

³³ *Id.*, ¶40.

³⁴ *Id.*, ¶42, ¶46.

³⁵ Gordon Blanke, *Institutional versus Ad Hoc Arbitration: A European Perspective*, ERA FORUM 9 (2008).

³⁶ *Id.*

³⁷ Edlira Aliaj, *Dispute Resolution Through Ad Hoc And Institutional Arbitration*, 2 ACADEMIC JOURNAL OF BUSINESS, ADMINISTRATION, LAW AND SOCIAL SCIENCES 2 (2016).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

of exchange and framework between the arbitrator and the parties.⁴¹ Some of the most prominent arbitral organisations are the American Arbitration Association, the ICC International Court of Arbitration, the International Institute for Conflict Prevention and Resolution *etc.* The primary advantages of an institutional arbitration are that it is uniform, neutral and sometimes more effective and efficient as compared to ad hoc arbitrations wherein the persistent cooperation, required for efficient functioning, is not always achieved.⁴²

While not much data is available about ad hoc arbitration, institutional practice around the world gives us useful insights regarding the modalities of appeal procedures in arbitration. The fundamental ideas based on which such appeals procedures are recognised in these institutes, also present a strong justification for having a second appellate mechanism. For instance, the International Institute for Conflict Prevention and Resolution ('CPR') set up a comprehensive Arbitration Appeals Procedure in 1999. Although it recognises finality as one of the most appealing features of arbitration, CPR agrees that there may be instances where the stakes are so high that the fear of finality on an irrational award can act as a severe deterrent against arbitration.⁴³ It believes that parties would prefer a well-designed private appeal mechanism to a qualified tribunal rather than a judicial review over an arbitral award.⁴⁴ The rationale behind the CPR Appeals Procedure is to prevent a party from being a victim of gross injustice.⁴⁵ CPR, in turn, tries to adopt a balance of rights approach.⁴⁶ While it acknowledges that parties can suffer from arbitration awards that have obvious legal defects, it has concurrently tried to establish a procedure which does not encourage unnecessary appeals from arbitration awards. Thus, CPR has built-in pecuniary deterrents wherein if the appeal is affirmed, the appellant needs to bear all the costs or in other situations the tribunal allocates costs.⁴⁷ Secondly, if the party seeks to go to the court and is unsuccessful, the party needs to reimburse the opponent.⁴⁸ Another leading arbitration institute JAMS (previously known as Judicial Arbitration and Mediation Services) instituted an Optional Appeal Procedure in 2003.⁴⁹ It acknowledges that providing an appellate mechanism can reduce the chances of risks substantially while providing "peace of mind" to the parties concerned.⁵⁰ Most prominently, the American Arbitration Association ('AAA') institutionalised the Optional Appellate Arbitration Rules in 2013, which acknowledges that "parties may desire a more comprehensive appeal of an arbitration award within

⁴¹ *Id.*

⁴² *Id.*

⁴³ CPR Arbitration Appeals Procedure and Commentary, 1999.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Bulman, Kohm & Wheatley, *What's The Appeal of Arbitration? Overturning Arbitration Awards and the New Appellate Rules*, AMERICAN BAR ASSOCIATION (October, 2015).

⁴⁷ CPR Arbitration Appeals Procedure and Commentary, 1999, Rule 12.

⁴⁸ *Id.*, Rule 14.

⁴⁹ JAMS Optional Arbitration Appeal Procedure, 2003.

⁵⁰ *Id.*

the arbitral process.”⁵¹ The AAA seeks to live up to its ideal of a “streamlined, standardized, appellate arbitration procedure that allows for a high-level review of arbitral awards while remaining consistent with the objective of an expedited, cost-effective and just appellate arbitral process.”⁵² Some institutes such as the European Court of Arbitration (‘CEA’) allow for a complete *de novo* hearing at the stage of the second appeal.⁵³ These practices are examples of certain working frameworks which could be adopted by jurisdictions like India which are at its nascent stage of appeal inclusivity in arbitration.

All of these institutes though may have varying rules but there are certain anvils of second appellate mechanisms which are common to all these institutes. Firstly, all these institutes have a specified time limit within which the second appeal procedure needs to conclude. Secondly, they have specified rules as to the grounds of appeal such as a material or prejudicial error *at al.*; thirdly, they have also developed rules with regard to the composition of the arbitral panel, the powers of the same and the status of the first instance award. A detailed summary of such rules as followed by different institutes is given below:

⁵¹ American Arbitration Association, Optional Appellate Arbitration Rules (2013).

⁵² *Id.*, Introduction.

⁵³ *Id.*, Art. 28.4.

Table 1: Internal Appellate Review followed by leading Arbitration Institutes

	American Association of Arbitration (AAA Optional Appeal Rules)	European Court of Arbitration	Conflict and Prevention Resolution	JAMS	World Trade Organisation	GAFTA
Option of an Internal Appellate Review	Yes	Yes	Yes	Yes	Yes	Yes
Date of institution of intra-appellate mechanism	2013	1997	1999	2003	1995	1971
Process for opting for Appeal Tribunal	The parties need to explicitly agree on an appeals provision in their contract or by other means of stipulation.	The parties need to explicitly exclude their right to appeal in their agreement.	The parties need to opt-in to the appeal procedure in their agreement.	The parties need to opt-in to the appeal procedure in their agreement pre or post dispute.	There is an institutional Appellate board to which the parties can directly opt for.	There is an institutional and automatic right to appeal.
Prohibition awards rendered by different Institutions	No	Yes	No	Yes	Yes	Yes

	<p>American Association of Arbitration (AAA Optional Appeal Rules)</p> <p>Three members or one member as per the party's discretion. The parties can decide on the qualifications and rank their arbitrators from the AAA pool based on which the Panel is selected.</p>	<p>European Court of Arbitration</p> <p>Three arbitrators or one arbitrator as per the party's choice. The party has minimum interference in the selection process. The Court decides on the arbitral panel.</p>	<p>Conflict and Prevention Resolution</p> <p>Three or one arbitrator on the panel. The arbitrators are former federal or appellate court judges who are also seasoned arbitrators. The parties have full discretion over the selection process.</p>	<p>JAMS</p> <p>Three or one arbitrators. The selection process is party centric.</p>	<p>World Trade Organisation</p> <p>It has a standing Appellate Body consisting of seven members who hold permanent positions for four years. They are chosen by the WTO and are representatives from member states. At a time a Division of three members hear an appeal.</p>	<p>GAFTA</p> <p>If the original arbitral panel consisted of one arbitrator then the appeal panel shall have three arbitrators. If the first instance arbitral panel consisted of three members then the appeal panel shall have five arbitrators. GAFTA chooses the arbitrators.</p>
<p>Arbitral Tribunal</p> <p>Scope of Appeal</p>	<p>Modification, affirmation or vacation of original award. No remand is allowed.</p>	<p>Modification, affirmation or vacation of original award. No remand is allowed.</p>	<p>Modification, affirmation or vacation of original award. No remand is allowed.</p>	<p>Modification, affirmation or vacation of original award. No remand is allowed.</p>	<p>Modification, repeal or confirm the first instance decision.</p>	<p>Variation, amendment, confirmation or vacation of the original award. The Board can increase or reduce a party's liability or correct any error.</p>

		<p>American Association of Arbitration (AAA Optional Appeal Rules)</p> <p>The parties need to file a Notice for Appeal within 30 days from the previous award.</p>	<p>European Court of Arbitration</p> <p>The party needs to file a request with the Competent International Registrar within 40 days from the first award.</p>	<p>Conflict and Prevention Resolution</p> <p>Thirty days.</p>	<p>JAMS</p> <p>Fourteen days.</p>			<p>GAFTA</p> <p>Within 12 noon of the 30th day of the first arbitral award.</p>
<p>Limitation period for filing an appeal</p>	<p>Any original award which has an error of law that is “material or prejudicial” or if any determination of fact is blatantly erroneous.</p>	<p>It allows for full review of any award. ECA can rehear the matter completely and especially stresses on admissibility with regard to facts and merits.</p>	<p>It only allows appeals from a. “material and prejudicial errors of law of such a nature that the error does not rest upon any appropriate legal basis”; b. “factual findings clearly unsupported by the record”; c. “grounds set forth in Section 10 of the Federal Arbitration Act for vacating an award.”</p>	<p>It allows appeal from all kinds of award. But, the Panel should apply the same standard of review that any first-level appellate court in that particular jurisdiction would apply while hearing an appeal from the trial court decision.</p>	<p>It allows automatic appeal from any award rendered by the WTO. It recognises that there might be multiple appeals from an award and hence allows for third party appeals which follow the same procedure as the original arbitration rules.</p>			<p>It allows for automatic appeal from any award.</p>
<p>Grounds for granting an Appeal</p>								

	American Association of Arbitration (AAA Optional Appeal Rules)	European Court of Arbitration	Conflict and Prevention Resolution	JAMS	World Trade Organisation	GAFTA
Time of completion	Three months.	Six months if there isn't any evidentiary stage or nine months with the rehearing of the evidence.	Six months.	Twenty-one days.	No time limit is specified.	No time limit is specified.
Waiver of Judicial Review	Waives off their right to seek judicial recourse once the appeal procedure is evoked.	No explicit waiver.	No waiver of judicial recourse. But, can't initiate any judicial action while the appeal is underway.	No explicit waiver of judicial recourse. But, cannot go to the Court once the award has been appealed against.	Not specified.	Parties can go to national courts for an appeal. However, the appeal shall be based only on legal merits and the Court can grant leave to apply only under limited circumstances.
Cost Allocation	The Tribunal can direct the losing party to pay any remaining cost or attorney fees of the opposite party.	The Tribunal is empowered to deal with the funds deposited with it along with bank guarantees to benefit the winning party.	If the appeal affirms the original decision, the appellant needs to bar all the costs. If the party subsequently goes to Court and loses, the losing party bears all the Court costs.	All the fees and costs of the appeal need to be submitted prior to the commencement of the appeals procedure.	Not specified.	The Tribunal may award payment of interest and other fees. The losing party shall pay the fees, costs and expenses of the Board of Appeal.

	<p>American Association of Arbitration (AAA Optional Appeal Rules)</p> <p>The decision is based on a majority vote accompanied by a summary and explanation of decisions.</p>	<p>European Court of Arbitration</p> <p>The decision will be based on a majority vote.</p>	<p>Conflict and Prevention Resolution</p> <p>The decision will be based on a majority vote. The decision shall be in writing and entail a brief explanation unless the parties agree otherwise. The dissenting opinion, if any, does not form a part of the award.</p>	<p>JAMS</p> <p>The decision is based on a majority vote consisting of a concise explanation.</p>	<p>World Trade Organisation</p> <p>The decision is based on a consensus of all the members wherein no member has any objection to the decision rendered.</p>	<p>GAFTA</p> <p>The decision is based on a majority vote.</p>
<p>Decision-making Procedure</p>						

IV. NORMATIVE JUSTIFICATION FOR USE OF INTERNAL APPEAL PROCEDURES IN ARBITRATION

Arbitration in the twenty-first century has grown out of the ‘alternative’ tag to become a mainstream method of dispute resolution with it being considered not only at par with traditional methods but also as better in many aspects.⁵⁴ However, with in-

⁵⁴ GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 31 (2nd ed., 2014).

creased acceptance, have come criticisms which question the legitimacy of arbitration as a method of dispute resolution.⁵⁵ In questioning the legitimacy, critics pay special focus to the lack of procedures like an appeal for ensuring substantive fairness.⁵⁶

Arbitration systems around the world have struggled with the issue of non-review ability of arbitral awards. These issues arise because a review of award arguably leads to subrogation of two fundamental principles of arbitration: finality of awards and party autonomy.⁵⁷ Though states recognise the importance of the aforementioned principles in maintaining the integrity of the arbitration process, they have also taken into account that arbitrators and parties cannot be given unbridled authority to manage arbitration.⁵⁸ The need for state intervention becomes imperative in a scenario where arbitration may result in unconscionable or unfair award. Thus, to avoid such a scenario, almost all the jurisdictions provide their respective judiciaries with supervisory control over arbitration.⁵⁹ Most jurisdictions follow the standard set by the UNCITRAL Model Law whereunder judicial supervisory control extends only to the issues of procedural irregularity and public policy.⁶⁰ However, depending on the specific public policy requirements in each jurisdiction, the extent of such supervisory control may vary.

In jurisdictions like that of the UK and New Zealand, the judiciaries are vested with the power to review the arbitral awards on questions of law.⁶¹ In contravention to the principle of finality, these jurisdictions justify such appeals on the ground of fairness.⁶² The legislative intent behind retaining appeals on questions of law in the UK Arbitration Act of 1996 was to promote arbitral fairness by ensuring uniform and consistent application of the law.⁶³ Another reason that is cited for the existence of statutory merit-based appeal against arbitral awards is that such appeals help in the development of the *corpus juris* in the relevant fields

⁵⁵ See generally Stephen W. Schill, *Conceptions of Legitimacy of International Arbitration* in PRACTICING VIRTUE: INSIDE INTERNATIONAL ARBITRATION (David D. Caron et al., 2015).

⁵⁶ Diane A. Desierto, *Rawlsian Fairness and International Arbitration*, 4 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 36 953 (2015).

⁵⁷ See *infra* discussion under Part V.

⁵⁸ Robert E. Lutz, *International Arbitration and Judicial Intervention*, 10 Loy. L.A. Int'l & Comp. L. Rev. 621 (1988).

⁵⁹ Rukmani Das & Anisha Keyal, *Judicial Intervention in International Arbitration*, 2 NUJS LAW REVIEW 585, 586 (2009).

⁶⁰ Hossien Abedian, *Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review*, 28 JOURNAL OF INTERNATIONAL ARBITRATION 6, 594 (2011).

⁶¹ Andrew Cannon, *Appeals on a Point of Law in the English Courts*, January 27, 2018 available at <http://arbitrationblog.kluwerarbitration.com/2012/01/27/appeals-on-a-point-of-law-in-the-english-courts-further-restrictions/> (Last visited on July 18, 2018); John G. Walton, *Appeals on Questions of Law - a New Zealand Perspective*, April 20, 2018, available at <http://johnwalton.co.nz/musings/appeals-on-questions-of-law---a-new-zealand-perspective> (Last visited on August 12).

⁶² See Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?*, 5 JOURNAL OF INTERNATIONAL ARBITRATION 30 2 (2013).

⁶³ Taner Dedezade, *Are You In? Or Are You Out? An Analysis of Section 69 of the English Arbitration Act 1996: Appeals on a Question of Law*, INTERNATIONAL ARBITRATION LAW REVIEW 9 58 (2006).

of law.⁶⁴ This, in turn, ensures that subsequent disputes pertaining to same subject matter are fairly dealt with.

Similar deviations exist in several US federal jurisdictions and Switzerland where ‘manifest disregard of law’ is observed as an additional ground for setting aside the award.⁶⁵ The justification provided for such a ground is that it is important that the substantive law that has been agreed by the parties is uniformly applied.⁶⁶ It has been interpreted by the courts that a manifest disregard of the applicable law constitutes an excess of arbitrator’s authority, a recognised ground for annulment of arbitral awards.⁶⁷ Another way in which awards have been reviewed on merits in the U.S. is by the contractual expansion of judiciary’s power to review the award.⁶⁸ Under such expanded judicial review, the parties contract to vest the judiciary with authority to review awards like a normal judgement post the pronouncement.⁶⁹ The justification for expanded review comes from the concept of the party autonomy. It is argued that it is not up to the judiciary to decline jurisdiction in cases where the jurisdiction actually existed but was previously barred by arbitration agreement.⁷⁰ By agreeing to expanded review, parties waive off such bar.⁷¹

Indian arbitration has similarly struggled to achieve fairness in face of the obligation to observe arbitral finality. The annulment proceeding under Indian arbitration law is set out in §34 of the Arbitration Act.⁷² At the time of enactment of the Act, the annulment provision under it was adopted almost *verbatim* from the Model Law.⁷³ However, the judiciary refused to observe the pro-arbitration standard set out in the Model Law and started coming up with creative interpretations to set aside awards that did not comply with the notions of fairness as espoused by the Indian judiciary. To this end, the judiciary had expanded the scope

⁶⁴ *Id.*

⁶⁵ See Jason P. Steed, *Appealing Arbitration Awards and the Circuit Split over “Manifest Disregard of the Law”*, May 10, 2016, available at <http://apps.americanbar.org/litigation/committees/appellate/articles/spring2016-0516-appealing-arbitration-awards-circuit-split-manifest-disregard-law.html> (Last visited on August 9, 2018).

⁶⁶ Paul Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract*, 81 St. John’s L. Rev., 104 (2007).

⁶⁷ See, e.g., *Sutherland Global Services v. Adam Technologies*, 2016 WL 494155 (2d Cir. 2016) SAIL v. J.C. Budharaja, (1999) 8 SCC 122, AIR 1999 SC 3275, ¶33; *Associated Engineering Co. v. Government of A.P.*, (1991) 4 SCC 93, AIR 1992 SC 232 1991, ¶26 (Indian courts too have adopted similar line of reasoning in terms of justifying the ground of patent illegality u/§ 34 of the Arbitration Act)

⁶⁸ See generally Synthia Murray, *Contractual Expansion of the Scope of Judicial Review of Arbitration Awards under the Federal Arbitration Act*, 76 St. John’s L. Rev. 633 (2002).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² The Arbitration and Conciliation Act, 1996, §34.

⁷³ *ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705, AIR 2003 SC 2629, ¶23 (‘Saw Pipes’) (Submission by Senior Counsel Dushyant Dave); K.L. Mohanpuria, *An Overview of Arbitration and Conciliation Ordinance, 1996*, available at <http://iced.cag.gov.in/wp-content/uploads/B-02/Day%204%20session%203-4.pdf> (Last visited on August 12, 2018).

of public policy, a statutorily provided ground, to such an extent that it had become possible for awards to be virtually reviewed on merits.⁷⁴ The breaking point came when in the *Saw Pipes* case, the Supreme Court widely interpreted the term ‘public policy’ to include numerous grounds to challenge the arbitration awards in addition to the ones statutorily provided.⁷⁵ The Supreme Court relied on the *Saw Pipes* judgement in the *Western GECO* case to further denigrate arbitral finality by holding that judicial discretion in determining the correctness of an award extends to the limit where it is possible for the court to scrutinise even the inferences drawn by the arbitrators.⁷⁶ The *Saw Pipes* and the accompanying cases which relied on the wide definition of ‘public policy’ were severely criticised for opening up the Pandora’s box for judicial inference in arbitration proceedings.⁷⁷ Adverse impact on the finality of awards was significant as per the judgement, literally, any arbitration could have been relitigated in courts. Though subsequent judgements and a set of amendments in 2015 have attempted at narrowing down the scope of public policy, the retained scope for review still remains comparatively wide to allow merit-based determination in case the award is based on unfair considerations.⁷⁸

The above examples clearly show that a certain degree of guarantee towards fairness of arbitral awards is desirable. While finality is an important consideration for parties entering into an arbitration contract, it cannot be said that fairness is not. It would not be logical to presume that parties would be willing to risk unfair awards at the cost of finality. In this doctrinal sense, fairness that is achieved by internal appeal procedures is not antithetical to the designs of arbitration. The inclusion of such a procedure most certainly will involve a trade-off with certain other features like economy and expediency of the process but that is a cost-benefit analysis that users of such procedures will have to ultimately engage in. Most importantly, the inclusion of such a procedure is completely optional and within the domain of party autonomy. It is also in concurrence with the principle of flexibility which is the primary reason why parties today opt for arbitration

⁷⁴ *Saw Pipes*, ¶33; O.P. Malhotra, *The Scope of Public Policy under the Arbitration and Conciliation Act, 1996*, 19 STUDENTS BAR REVIEW 2 23 (2007).

⁷⁵ *Oil & Natural Gas Corporation v. Saw Pipes Ltd.*, (2003) 5 SCC 705, AIR 2003 SC 2629.

⁷⁶ *Oil and Natural Gas Corporation v. Western Geco International Ltd.*, (2014) 9 SCC 263, ¶40

(“if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified”).

⁷⁷ See, e.g., Fali S. Nariman, *Legal Reforms in Infrastructure*, as cited in Sumeet Kachwaha, *The Arbitration Law in India: A Critical Analysis*, 1 INT. ARB. LR. 13 15 (2007) ([*Saw Pipes*] virtually set at naught the entire Arbitration and Conciliation Act of 1996 [...] The Division Bench decision of the two Judges of the Court has altered the entire road-map of Arbitration Law and put the clock back to where we started under the old 1940 Act); *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181, ¶64 (We are not unmindful that the decision of this Court in *ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705 had invited considerable adverse comments).

⁷⁸ The Arbitration and Conciliation Act, 1996, §34 amended vide The Arbitration and Conciliation (Amendment) Act, 2015 (w.e.f. October 23, 2015) (grounds like morality, fundamental policy, patent illegality etc. still exist under the amended act).

over other forms of dispute resolution. The argument of imposition of community standard of fairness on private transaction, usually made for judicial review of awards,⁷⁹ cannot be made for internal appeal procedures as the standard of fairness in these procedures will ultimately be decided by the parties themselves. In this sense, internal appeal procedures also provide a better alternative to the judicial scrutiny of awards for correction of errors in award.

V. RECONCILIATION OF THE COMPETING OBJECTIVES OF FINALITY AND INTERNAL APPEAL PROCEDURES

Arbitral finality has often been hailed as one of the most defining attributes of arbitration.⁸⁰ Importance of finality in arbitration can be gauged from the fact that almost all the major jurisdictions,⁸¹ arbitration institutes⁸² and model laws⁸³ expressly provide for a final and binding award. The principle of finality entails that there be only a limited avenue for recourse against the award and in a way that does not engage in merits-based determination of the validity of the award.⁸⁴ The limited review, in turn, ensures that the arbitration as a procedure remains largely an independent and more importantly an efficient system of justice dispensation.

In this context, it can easily be understood how the erosion of arbitral finality can turn out to be the biggest criticism of the internal appeal procedures.⁸⁵ However, this appeal of finality in arbitration is not universal. While the finality of an award may be advantageous in most scenarios, it can be equally disadvantageous when the award is based on erroneous considerations. as there usually

⁷⁹ See Diane A. Desierto, *Rawlsian Fairness and International Arbitration*, 5 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 36 951 (2015).

⁸⁰ See BORN, *supra* note 54, 77; Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

⁸¹ See, e.g., The Arbitration Act, 1996, §58 (United Kingdom), International Arbitration Act, 1994, §19B (Singapore), The Arbitration and Conciliation Act, 1996, §35 (India), *etc.*

⁸² International Centre for Dispute Resolution ('ICDR') International Arbitration Rules, 2014, Art. 30; The International Chamber of Commerce ('ICC') Arbitration Rules, 2017, Art. 35(6); The Stockholm Chamber of Commerce ('SCC') Arbitration Rules, 2017, Art. 46(6); UNCITRAL Arbitration Rules ('UNCITRAL Rules'), art. 34(2); The London Court of International Arbitration ('LCIA') Arbitration Rule, 2014, Article 26.8.

⁸³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), 1958, Art. V; United Nations Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration (as Amended in 2006), 1985, Art. 35(1).

⁸⁴ Alexis Mourre & Luca G. Brozolo, *Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back*, 2 JOURNAL OF INTERNATIONAL ARBITRATION 23 (2006).

⁸⁵ See, e.g., John E. Bulman, Katherine E. Kohm & Benton T. Wheatly, *What's the Appeal of Arbitration? Overturning Arbitration Awards and the New Appellate Rules*, October, 2015, available at https://www.americanbar.org/content/dam/aba/directories/construction_industry_knowledge_base/meetings/2015-fall/fm15-wc-paper.authcheckdam.pdf (Last visited on August 3, 2018); Japaridze, *infra* note 139, 30.

are no means for redressal of merit-based errors.⁸⁶ Thus, there exists a tension between the concept of finality and procedures like appeal that provide for substantive fairness.⁸⁷ This conflict between the principles of finality and fairness is widely acknowledged. Both the principles are often understood to exist in a state of competition such that one can only be achieved by letting go of the other to some extent.⁸⁸

Therefore, to make a credible case for procedures like the internal appeal procedures, it becomes imperative to address its conflict with the principle of finality. This part addresses the said conflict, firstly by establishing that finality has a limited appeal in arbitration, and secondly, by establishing that the appellate arbitration procedures are not really an affront to the principle of arbitral finality.

A. ABSOLUTE FINALITY AS LIABILITY IN CERTAIN ARBITRATIONS

The allure of finality in arbitration cannot be denied. For arbitration to be an effective dispute resolution procedure, it needs to deliver a final and binding resolution. However, to argue that finality as a principle is so fundamental in arbitration that it cannot be temporarily compromised to make way for procedures providing substantive fairness is, at best, specious. Finality as a feature is conspicuously absent from Redfern and Hunter's list of main advantages of resolving disputes via arbitration.⁸⁹ Similar absence is also noted in a widely discussed survey that ranked features of arbitration on the basis of their perceived attractiveness.⁹⁰ While features like neutrality, expert adjudication and confidentiality topped the list, cost and time, the associated benefits of finality, were ranked at the bottom end of the spectrum.⁹¹ The most recent edition of the same survey further evinces the diminishing role of finality in arbitration as only sixteen percent of the respondents placed finality in the category of top three attractive features of arbitration.⁹²

⁸⁶ BORN, *supra* note 54, 82.

⁸⁷ See Platt, *supra* note 62.

⁸⁸ See Joerg Risse, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, 3 ARBITRATION INTERNATIONAL 23 (2013) (the author considers quality, a facet of fairness, as an alternative to efficiency, a facet of finality).

⁸⁹ NIGEL BLACKABY, CONSTANTINE PARTASIDES, et al., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 28-30 (6th ed., 2015).

⁹⁰ QUEEN MARY SCHOOL OF INTERNATIONAL ARBITRATION, UNIVERSITY OF LONDON & PRICEWATERHOUSECOOPERS, *International Arbitration Survey: Corporate choices in International Arbitration* 6 (2013), available at <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration.PDF> (Last visited on January 13, 2018) ('QMSIA Survey 2013').

⁹¹ *Id.*

⁹² QUEEN MARY SCHOOL OF INTERNATIONAL ARBITRATION, UNIVERSITY OF LONDON & PRICEWATERHOUSECOOPERS, *2018 International Arbitration Survey: The Evolution of International Arbitration* 7 (2018), available at <https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> (Last visited on August 20, 2018) ('QMSIA Survey 2018').

The above findings can be reasoned since, at times, finality, and the consequent lack of an error correction mechanism, may seem undesirable in arbitration. This is especially true for high cost transactions like international commercial arbitrations ('ICA'). The benefits of finality *i.e.*, efficiency in terms of cost and time are inconsequential and difficult to achieve in international arbitration as the majority caseload comprises of complex and technical disputes,⁹³ where, both the stakes involved and the prospective benefits are too high for parties to shy away from spending resources.⁹⁴ Finality has been similarly held to have an impeding role in many specialised international arbitrations like trading arbitrations,⁹⁵ class action arbitrations,⁹⁶ WTO arbitrations,⁹⁷ merger and acquisition arbitrations⁹⁸ *etc.* For the sake of exposition of the present argument, the perverse nature of absolute finality in commodities trading arbitrations serves as a perfect case study.

Dispute resolution in the commodity trading industry has had a long history of non-final initial awards.⁹⁹ This tradition of non-final initial awards has evolved as a result of idiosyncrasies of the dispute resolution process in the industry. The arbitration process in here is generally characterised by an expedited, cost-effective and informal process.¹⁰⁰ The entire dispute resolution process is rooted more in the commercial realm than the legal.¹⁰¹ The commercial grounding entails that the cases are argued mostly by the parties themselves or trade representatives, with there usually being limitations on representation through lawyers.¹⁰² Even the arbitrators who sit in judgement in these arbitrations are drawn from the trading community itself.¹⁰³ Pursuant to such non-legal nature of the dispute resolution process, the cases often turn on the logic and sensibilities of commerce rather

⁹³ Howard Kennedy LLP, *International Commercial Arbitration: An Introduction*, January 20, 2016, available at https://www.howardkenedy.com/media/504595/howardkenedy_internationalarbitrationbrochure_06_web.pdf (Last visited on January 20, 2018).

⁹⁴ BORN, *supra* note 54, 87 ("Disputes of this character often require very substantial written submissions, factual and expert evidence, and lengthy hearings, with the attendant costs; parties not only expect and tolerate these expenses, but are concerned if disputes of this magnitude do not attract commensurate litigation efforts").

⁹⁵ Clive Schmitthoff, *Finality of arbitral awards and judicial review* in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 235 (Julian Lew, 1st ed., 1987).

⁹⁶ See generally *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (The court observed that it would be unwise on the part of a party to agree to a final class action arbitration without securing a meaningful means of review).

⁹⁷ Noemi Gal-Or, *The Concept of Appeal in International Dispute Settlement*, 1 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 43-45 (2008).

⁹⁸ Christopher Drahozal & Stephen Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses*, 2 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 450 (2010).

⁹⁹ Knull & Rubins, *supra* note 11, 41.

¹⁰⁰ Richard Faint, *Commodity and Maritime Arbitration in London: How the Grain Trade Approaches the Problem*, 306 (2000) available at <http://www.charterwise.co.uk/wp-content/uploads/2014/05/Commodity-Maritime-Arbitration-in-London-How-the-grain-trade-approaches-the-problem.pdf> (Last visited on January 18, 2018).

¹⁰¹ Michael Swangard, *Commodity Arbitration*, in ARBITRATION IN ENGLAND, WITH CHAPTERS ON SCOTLAND AND IRELAND, 106 (Julian Lew & Harris Bor et al., 1st ed., 2013).

¹⁰² *Id.*; See, e.g., GAFTA Arbitration Rules 125, 2016, Rule 17.2.

¹⁰³ See, e.g., GAFTA Arbitration Rules 125, 2016, Rule 10; FOSEA Rules of Arbitration and Appeal, 2012, Rule 7.

than that of law.¹⁰⁴ Hence, it is common place to find defeated parties protest about the inconsistency in the application of the law.¹⁰⁵ However, the legal accuracy in these proceedings cannot be increased by appointing legal experts as representatives and arbitrators, as the impression within the community is that the industry experts are irreplaceable in these roles due to pre-dominant commercial nature of the disputes.¹⁰⁶ Therefore, to placate grievances that may arise from the informal commercial proceedings, the first instance awards are, in most cases, not accorded the garb of finality. The parties are usually provided with an appeal mechanism where the dispute is heard in a more law focused and formal setting as compared to the first instance.¹⁰⁷ Thus, as explained by the present example, finality may not always be a desirable feature in arbitration. On the contrary, absolute finality may actually be counterproductive in many arbitrations based on the designs similar to trading arbitrations, where legal precision is traded-off for expediency, efficiency, and expertise.

. The mistaken belief that finality has a universal appeal primarily stems from the ignorance of the dynamic nature of arbitration as a system of dispute resolution. Arbitration, unlike judiciary, is not a one-shoe-fits-all system of dispute resolution.¹⁰⁸ The features required in an arbitration is a subjective choice and depends largely on the nature of the procedure and the expectations of the parties in that arbitration. It has been pointed out that finality may be characterised as a virtue only in cases where either there is a guarantee that the arbitrators will not make mistake or in cases where stakes are so low that the parties are willing to forego the risk of an erred award for the sake of efficiency.¹⁰⁹ Arbitrations like ICA fail on both the counts as the complexity and technicality of such arbitrations guarantees that infallibility of arbitrators cannot be guaranteed,¹¹⁰ and the significantly high stakes, or, as it is called in the corporate parlance, the ‘bet-the-farm’¹¹¹ stakes make the risk of an erroneous award intolerable in high stake arbitrations. This widely acknowledged¹¹² characterisation further indicates that finality can be equally as undesirable in a lot of international arbitrations as it is appealing in many others.

¹⁰⁴ Swangard, *supra* note 101.

¹⁰⁵ Erin E. Gleason, *International Arbitral Appeals: What Are We So Afraid Of?*, 7 PEPP. DISP. RESOL. L.J. Iss. 29 (2007).

¹⁰⁶ Y. Chernykh; *The Last Citadel: The Restricted Role of Lawyers in Soft Commodity Arbitration*, TDM 2 (2017).

¹⁰⁷ Swangard, *supra* note 101, 107.

¹⁰⁸ Veijo Heiskanen, *Key to Efficiency in International Arbitration*, May 29, 2015 available at <http://kluerarbitrationblog.com/2015/05/29/key-to-efficiency-in-international-arbitration/?print=print> (Last visited on August 7, 2018).

¹⁰⁹ Knull & Rubins, *supra* note 11, 532-533.

¹¹⁰ See BORN, *supra* note 54, 3113 (“Human fallibility guarantees that all arbitral awards, like all national court judgments and academic treatises, will have mistakes, omissions, or ambiguities”).

¹¹¹ See *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

¹¹² See Justice Barry Leone & Cenobar Parker, *Merit Appeals in International Arbitration: Undermining Arbitration or Facilitating True Party Autonomy*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 29 (Arthur Rovine, 2015).

B. APPELLATE ARBITRATION IN CONSONANCE WITH ARBITRAL FINALITY

The previous part supports the internal appellate review procedure in arbitration by focusing on the limitations of finality, a concept which forms the fundamental basis of criticisms of appellate procedures. This part attempts to resolve the conflict between the principle of finality and appellate procedures by establishing harmony between them at a conceptual level. The word ‘final’ has generally not been defined in the statutes and rules, but it is understood to mean that there shall lie no appeal or review on merits once the resolution of the dispute is pronounced in the form of an award.¹¹³ After such pronouncement of the award, the estoppel of *res judicata* applies as between the parties and in respect to the cause of action and the relief sought.¹¹⁴ Thus, *prima facie*, it appears that appellate arbitration serves to frustrate the principle of finality as it causes the award to be reviewed on the basis of merit. But, on further analysis, it becomes clear that such frustration only exists in principle as in practicality, the arbitral finality stands despite the internal appeal.

First and foremost, the distinction between the nature of awards at each stage in appellate arbitration needs to be realised. In appellate arbitration, the finality of the award rendered by the first instance arbitration is qualified. The finality of such first instance award is subject to any predetermined avenue of recourse that may still be available within the realm of arbitration, post the pronouncement of the award.¹¹⁵ If such first instance award is internally appealed, the independent existence of the award vanishes and it is subsumed by the award that is pronounced by the appellate panel.¹¹⁶ In cases involving internal appeal clause, it is only when the appeal is not filed and the time provided for filing such appeal lapses, that the award of the first instance becomes final.¹¹⁷ In contrast, the finality of awards at the appellate instance is absolute with the only recourse available being the statutory review on the grounds of procedure and public policy.¹¹⁸

Equipped with the above distinction, the non-finality of the appealable award can be further explained by drawing parallels with the other forms of multi-tier dispute resolution methods and non-binding arbitrations. Multi-tier

¹¹³ BLACKABY, PARTASIDES, et al., *supra* note 89, 29.

¹¹⁴ *Id.*, 559.

¹¹⁵ *M.A. and Sons v. Madras Oil and Seeds Exchange Ltd.*, 1964 SCC OnLine Mad 235 : AIR 1965 Mad 392, ¶ 11 (“that the award shall be final and binding on the parties and persons claiming under them respectively naturally, has to be construed as subject to any right of appeal, which might be provided for either by the contract itself, or by any by-law governing the parties”).

¹¹⁶ *ANS Private Limited v Jayesh R. Ajmera*, 2014 Indlaw MUM 1630, ¶6 (“It is, however, a peculiar incidence of a two-tier procedure of an arbitration reference that when the reference goes through both the tiers, the award of the first arbitral tribunal clearly merges with the award of the appellate tribunal”).

¹¹⁷ Mateus Carreteiro, *Appellate Arbitral Rules in International Commercial Arbitration*, 2 JOURNAL OF INTERNATIONAL ARBITRATION 33 200 (2016).

¹¹⁸ *Id.*

dispute resolution ('MTDR') involves non-binding dispute resolution methods like negotiation or mediation instead of arbitration as the first stage, followed by a binding arbitration later.¹¹⁹ Non-binding arbitrations, on the other hand, use a formal process like arbitration, but awards rendered therein are devoid of any legal force.¹²⁰

The initial stage in appellate arbitration is both structurally as well as functionally similar to initial stages of MTDRs and non-binding arbitrations. Structurally, arbitrations with internal appeal are similar to the designs of non-binding arbitration and MTDR's first stage in the sense that all of them render results which are *per se* legally unenforceable. In fact, the structure of combined stages in arbitration with internal appeal can be seen to exist in form of a non-binding arbitration followed by a binding arbitration. Further, just like the procedure involved in these methods, the initial stage of appellate arbitration too historically has had the characteristics of being expedited, inexpensive and informal,¹²¹ such that the focus is largely on the efficiency rather than the accuracy of the result. In terms of function, just like the initial stage in MTDR or non-binding arbitration, the first arbitration stage in appellate arbitration is usually incorporated to act like a "spring-board for discussion"¹²² based on which parties can decide the future course of dispute settlement. The non-final nature of these stages facilitates an amicable¹²³ decision-making process by allowing parties to take stock of their legal standing, should the dispute go for binding adjudication.¹²⁴

Regarding the doubts that have been expressed over the party's autonomy to agree on such non-final awards,¹²⁵ it must be pointed out that historically, parties have been allowed to have non-final awards. For example, the Geneva Convention does not mandate that an award be enforced just because it had been rendered by a competent arbitral tribunal.¹²⁶ Under the Convention, awards are to

¹¹⁹ See generally Michael Pryles, *Multi-Tiered Dispute Resolution Clauses*, 2 JOURNAL OF INTERNATIONAL ARBITRATION INTERNATIONAL 18 (2001).

¹²⁰ See generally Steven Bennett, *Non-Binding Arbitration: An Introduction*, 2 DISPUTE RESOLUTION JOURNAL 61 (2006).

¹²¹ See JOHN TACKABERRY & ARTHUR MARRIOTT, BERNSTEIN'S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE 276 (4th ed., 2003) ("Fundamental and ancient feature of trade arbitration is the two-tier system whereby the first arbitration is held speedily and relatively informally").

¹²² JULIAN LEW, LOUKAS MISTELIS, et al., *Comparative International Commercial Arbitration* 10 (2003).

¹²³ See George Vlavianos & Vasilis Pappas, *Multi-Tier Dispute Resolution Clauses as Jurisdictional Conditions Precedent to Arbitration*, GLOBAL ARBITRATION REVIEW, available at <https://globalarbitrationreview.com/chapter/1142626/multi-tier-dispute-resolution-clauses-as-jurisdictional-conditions-precedent-to-arbitration> (Last visited on January 22, 2018) ("[it] provides a contractual 'cooling-off period' during which the parties can reassess and evaluate whether to strike a compromise outside of the antagonistic and contentious arbitral context, which may yield more fruitful and beneficial settlement discussions").

¹²⁴ Arbitration based first stage can be better than mediation, negotiation or conciliation based first stage as it provides closest representation of the rights and liability that parties may accrue in the final and binding determination.

¹²⁵ See, e.g., Reinmar Wolff, *Party Autonomy to Agree on Non-Final Arbitration?*, 26 ASA BULLETIN 3.

¹²⁶ See BORN, *supra* note 54, 3606.

be enforced only if they were envisaged to be ‘final’.¹²⁷ Similarly, in India, there stands a long line of arbitral jurisprudence which allows parties to agree to have a non-final arbitration award.¹²⁸ Moreover, the assumption that finality of a ‘concluded arbitration’ is frustrated by an appeal is illogical as the first instance arbitration is only one part of a multi-tiered process which concludes either when the appellate proceedings are dealt with or when the option of appeal is not exercised and the time limit for appeal lapses. Appeal as a process cannot be understood to mean institution of a new proceeding in abrogation of the previous one. Rather, appeals are generally understood to be incontinuation of the initial proceeding which was always understood to be non-final and subject to appeal.¹²⁹ Therefore, it is argued that in cases of internal appeal, there is no abrogation of arbitral finality in practical terms as the first-instance awards are purposely designed to not to be final ordinarily.¹³⁰

Finally, if finality as a concept is to be considered in a broader sense, cost and time savings, the features of arbitration which get affected by internal appeal the most, have always been incidental benefits of arbitral finality. The actual objective of finality has always been to maintain the independence of arbitration by limiting judicial intervention.¹³¹ The internal appellate mechanism does conform to the said objective, as the process renders a final and binding award within the system of arbitration itself. Further, the awards from the appellate stage of arbitration, just like the awards from ‘normal’ arbitration, can be reviewed only under limited circumstances. If anything, the internal appeal may actually help the finality of the award by preventing its frustration later at the stage of statutory review as it lends the award additional legitimacy which may lead to judges being less inclined to strike it down.¹³² Thus, in our opinion, the claims that internal appeal mechanisms subvert the principle of finality exist only in principle and have no practical merit.

¹²⁷ European Convention on International Commercial Arbitration (‘Geneva Convention’), 1961, Art. I(2)(d).

¹²⁸ See, e.g., *Union of India v. A.L. Rallia Ram*, AIR 1963 SC 1685 (“The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement”); *Bhajahari Saha Banikya v. Behary Lal Basak*, ILR (1906) 33 Cal 881 (“the award is, in fact, a final adjudication... unless possibly the parties have intended that the award shall not be final and conclusive”).

¹²⁹ See, e.g., *Teknow Consultants and Engineers (P) Ltd. v. Bharat Heavy Electricals Ltd.*, 2017 SCC OnLine NCLT 10798 : 2017 Indlaw NCLT 1431 (“it is well settled that the pendency of an Appeal under Section 37 of the Arbitration Act is a continuation of the arbitration proceedings”).

¹³⁰ See generally Robert N. Dobbins, *The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity*, 1 HASTINGS BUSINESS LAW JOURNAL 1 (2005) (detailed discussion on the benefits of creating tiered dispute resolution clauses with non-final initial stages).

¹³¹ Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality through Functional Analysis*, 1 Georgia Law Review 37 150 (2002).

¹³² Knull & Rubins, *supra* note 11, 15.

VI. APPELLATE REVIEW AS A VALUE ADDING FEATURE

Yet another reason for which appellate arbitration procedures have received criticism is that these procedures change the fundamental nature of arbitration by unduly ‘judicialising’ it.¹³³ Judicialisation, in context of arbitration, is generally understood as the incorporation of judicial procedures and legal nitty-gritties like recourse to appeal, which were previously non-existent in arbitration.¹³⁴ Internal appeal procedures being a major facet of the so-called judicialisation of arbitration, have been similarly criticised for making arbitration excessively complex, expensive and time-consuming procedure.¹³⁵ With help of several suitable examples, this part presents an argument to the contrary by establishing appellate arbitration as a feature that has the potential to make arbitration more appealing.

In the preceding part, it was discussed how finality is losing its charm in high stake arbitrations. The loss of appeal for finality stems, in part, from the demand for the review of awards. In a survey conducted on alternative dispute resolution systems, it was found that fifty four percent of the corporate respondents didn’t opt for arbitration because it was difficult to appeal the arbitral awards.¹³⁶ In a comparatively recent survey on dispute resolution practices, similar sentiments were reflected.¹³⁷ More respondents in the survey preferred litigation over arbitration for the reason that it lacked the option of appeal. So one clear and instant value addition that comes to fore from these surveys is that appellate review may bring into fold parties that previously stayed away from arbitration due to lack of appellate review. Though this reason is in itself a great incentive to allow the option of appeal in arbitration, the following discussion will nonetheless put forth certain additional but equally important reasons to view appellate review as a value-adding feature in arbitration.

A. FAIRER AWARDS

The current discourse on arbitration clearly favours the features of cost savings and time savings *i.e.*, finality over the quality or the fairness of the award. Arbitration is branded more as a quicker and economical form of dispute

¹³³ See generally Thomas J. Stipanowich, *Arbitration: The New Litigation*, UNIVERSITY OF ILLINOIS LAW REVIEW No. 1 (2010).

¹³⁴ *Id.*

¹³⁵ BORN, *supra* note 54, 3162.

¹³⁶ SCHEINMAN INSTITUTE ON CONFLICT RESOLUTION, DAVID LIPSKY & RONALD SEEBER, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* 26 (January, 1998) available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1003&context=icrpubs> (Last visited on January 26, 2018).

¹³⁷ Thomas Stipanowich & Ryan Lamare, Living with ‘ADR’: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations, 19 HARVARD NEGOTIATION LAW REVIEW 1 19 (2013).

resolution than as fairer.¹³⁸ Many commentators have even gone to the extent of labelling fairness in its ‘philosophical and judicial’ sense as incompatible and undesirable in arbitration.¹³⁹ Appellate review clauses clearly fall foul of such characterisation. Contrary to such characterisation, fairness in form of the review of the award is actually desirable. Granted that it may lead to the subversion of certain other desirable features like economy in terms of time and cost, review procedures bring other desirable features like accuracy, certainty and quality to the platter. Moreover, by virtue of party autonomy, the parties are absolutely free to pick and choose from the platter, the features according to their needs and expectations.

In 1985, Belgium enacted a law that had in effect made arbitral awards rendered in arbitration between two non-Belgian parties irrevocable by prohibiting motions relating to vacation of the award.¹⁴⁰ The law was enacted to promote finality and enforcement in a bid to make Belgium an attractive destination for international arbitrations.¹⁴¹ However, the *laissez-faire* approach backfired as not only parties apprehensive about there being no recourse against erroneous awards skipped Belgium as the seat for arbitration but also the country itself got black-listed by many arbitral tribunals.¹⁴² Although Belgium consequently repealed the law, it still serves as a good example to show that some sort of assurance as to the fairness of award is always desired.

However, it has been pointed out that enough procedural measures exist to ensure fairness in arbitration as it is, and the pursuit of ensuring substantive fairness by incorporating judiciary like appeal procedures will only serve to complicate arbitration and make it lengthier and more expensive.¹⁴³ While this may be true in many kinds of arbitration, especially ones involving small claims, it cannot be held to be universally applicable. As discussed above, the appellate mechanism and by extension substantive fairness measures can also be desirable in many other kinds of arbitration.

For example, in cases where mid-arbitration additional claims based on new issues arise, which cause a fundamental change in the nature of the dispute,¹⁴⁴ an added security cover in form appellate arbitration becomes extremely appealing. The ability to choose the experts of the fields as the adjudicators

¹³⁸ For example, the Department of Justice of various national and international jurisdictions, invariably, while promoting arbitration as a cheaper and quicker method of dispute resolution, also issue warnings on features like lack of review on merit, lack of proper method for evidence discovery and production etc. See, e.g., DoJ Canada (<http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/06.html#iv>), Judicial Branch of California (<http://www.courts.ca.gov/3074.htm>).

¹³⁹ Nana Japaridze, *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration*, 4 HOFSTRA LAW REVIEW 36 32 (2008).

¹⁴⁰ Belgian Code Judiciaire, 1985, Art. 1717(4) (Belgium).

¹⁴¹ Van Den Berg & Albert Jan, *Should the Setting Aside of the Arbitral Award be Abolished?*, 2 ICSID REVIEW 29 277 (2014).

¹⁴² *Id.*

¹⁴³ See generally Japaridze, *supra* note 139.

¹⁴⁴ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

of the case is considered as one of the major benefits of arbitration over litigation where the adjudicators are usually generalist.¹⁴⁵ But in scenarios where the nature of the dispute changes mid-arbitration and goes out of the realm of the arbitrator's expertise, the chance of error in the award will naturally increase. For example, in the *Mitsubishi* case, had the arbitrators been already chosen before the anti-trust claims came up, it would have been difficult for the arbitrators not having expertise in anti-trust law to adjudicate upon the disputes. The antitrust law has very specific jurisprudence involving 'economic and econometric analysis' which may be difficult for arbitrators not well versed in it to understand.¹⁴⁶ In any case, it can be safely assumed that the quality of award rendered by an arbitrator who is not expert in the field will have greater chance of being less accurate than that rendered by the experts in the field.

There also exists a school of thought which advocates measures like appeal clause to ensure the uniform application of the law.¹⁴⁷ It often happens that parties in comparable situations receive different awards by different arbitrators.¹⁴⁸ This different treatment leads to inconsistency in awards which breeds uncertainty in arbitration. Based on this consideration, the Departmental Advisory Committee ('DAC') formed by the UK Government and headed by Lord Steyn and Lord Saville advised providing for appeals based on questions of law under the then proposed English arbitration bill of 1996. The DAC was of the opinion that "if the parties had agreed on a given system of law, the parties should be entitled to expect that the law would be applied properly by their chosen arbitrator. Failure to apply the law properly would do a disservice to the parties and would not achieve the result contemplated in the arbitration agreement."¹⁴⁹ On similar lines, the WTO too employs a standing appellate body, which apart from reviewing cases on questions of law, also ensures that laws are uniformly and consistently applied so as to promote certainty among parties to the dispute.¹⁵⁰

In transnational disputes, the problem of uniformity of application of law becomes even acuter as notions of commonly invoked principles like good faith and public policy differ from one state to another.¹⁵¹ Hence, an arbitrator trained under a particular system may not be able to relate to the way these abstract

¹⁴⁵ BORN, *supra* note 54, 69.

¹⁴⁶ See generally Michael Baye & Joshua Wright, *Is antitrust too complicated for generalist judges? The impact of economic complexity and judicial training on appeals*, 1 THE JOURNAL OF LAW AND ECONOMICS 54 (2011).

¹⁴⁷ See, e.g., William Park, *Why do Courts Review Awards?*, 11 INTERNATIONAL ARBITRATION REPORT 16 602 (2001).

¹⁴⁸ Alexis Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 4 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 16, 1017 (2001).

¹⁴⁹ Dedezade, *supra* note 63, 58.

¹⁵⁰ David Jackyk, *The Integration of Article 25 Arbitration in WTO Dispute Settlement: The Past, Present and Future*, AUSTRALIAN INTERNATIONAL LAW JOURNAL 15 254 (2008).

¹⁵¹ Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT'L INT'L L. & POL. 1109 (2011-2012).

notions are perceived in another system. Appellate arbitration clauses may help to reduce the risk of aberrational awards in disputes involving the application of such foreign laws by giving parties the opportunity to raise issues of such misapplication of law in front of an appellate panel with expertise on the application of the transnational law and thereby increasing the possibility that such errors will be identified and corrected.

Further, the possibility of appraisal of awards by an appellate panel will also promote due diligence in arbitrators. In an industry based on reputation, no arbitrator would want his/her award to be struck down.¹⁵² The inclusion of a merit-based review will make arbitrators to ensure proper application of laws and presence of sound interpretations, as modification or vacation of an award on these grounds may cast serious aspersions on the competence of the arbitrator.¹⁵³ Important points of facts and law which may be reviewed at appellate stage will be considered in more detail at the first instance itself.¹⁵⁴ Like judges, the arbitrators too will be incentivised to give awards accompanied with proper and detailed reasoning to dissuade non-prevailing parties from appealing in confusion.¹⁵⁵ Thus, an internal review will cause the arbitrators to adopt fairer *modus operandi*, which will help promote overall fairness in arbitration.

In a nutshell, incorporation of review procedures may lead to change in certain traditional characteristics of arbitration,¹⁵⁶ but at the same time, it cannot be denied that internal appeal feature will add value to arbitration for many clients who right now deem arbitration too risky for the want of measures that ensure substantive fairness of the award.

B. DECREASED JUDICIAL INTERFERENCE AND INCREASED ARBITRAL INDEPENDENCE

One of the principal benefits of arbitration is that it provides a platform for resolving disputes to parties who wish to avoid a judicial scrutiny of the dispute.¹⁵⁷ Apart from its notoriety for lethargy,¹⁵⁸ parties may base the decision for bypassing judiciary for other important reasons like flexibility, neutrality, expert determination, and confidentiality.¹⁵⁹ However, arbitration is not an entirely

¹⁵² Steven Shavell, *The Appeals Process as a Means of Error Correction*, 2 THE JOURNAL OF LEGAL STUDIES, vol. 24, 424 (1995)

¹⁵³ Ten Cate, *supra* note 151, 1153.

¹⁵⁴ *Id.*, 1149.

¹⁵⁵ *Id.*

¹⁵⁶ See *infra* discussion under Part VIII, where certain ways and methods are discussed by using which these negative effects may be minimised.

¹⁵⁷ BLACKABY, PARTASIDES, et al., *supra* note 89, 28.

¹⁵⁸ The World Bank, Inessa Love, *Settling Out of Court: How Effective is Alternative Dispute Resolution?* 1 (October, 2011), available at <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Setting-out-of-court.pdf> (Last visited on February 3, 2018).

¹⁵⁹ BLACKABY, PARTASIDES, et al., *supra* note 89, 29.

independent alternative as the courts generally tend to hold a varying degree of supervisory role in almost all the jurisdictions.¹⁶⁰ Such supervision is naturally a source of concern for parties who choose arbitration mainly to avoid judicial determination. In this regard, internal appeal clauses can help to an extent in making arbitration a more independent system of dispute resolution by providing a new avenue for redressal of issues with arbitral awards to parties who previously had to reluctantly go to courts for the lack of better alternatives.

Traditionally, in event of there being a flaw in the award, the parties need to apply to a court or other similar national authorities at the seat of arbitration for remedy.¹⁶¹ Depending on the *lex arbitri* of the jurisdiction in question, these authorities have power to modify, remand or in most cases to vacate the award.¹⁶² In ‘conventional’ arbitration there is very limited scope for error correction as the arbitral tribunal becomes *functus officio* post the pronouncement of the award.¹⁶³ Thus, to resolve issues with the awards the parties have no choice but to approach the national authorities. The involvement of national authorities may be problematic to most parties, especially in international arbitration, as it effectively means the end of virtues like confidentiality, neutrality, flexibility and expert determination, which generally are reasons why arbitration is chosen over judicial adjudication in the first place.¹⁶⁴

Unlike the arbitral tribunals, the national judiciaries are generally not bound by the confidentiality clause in the agreement. While few jurisdictions recognise the need for confidentiality in court proceedings concerning arbitrations,¹⁶⁵ most of them refuse to observe such practice.¹⁶⁶ On the contrary, few jurisdictions have even ruled confidentiality of proceedings incompatible in the interest of public policy.¹⁶⁷ Thus, once the award is entered for review in the court, most of its content and its reasoning is made available in the public domain. This obviously entails serious ramifications for not only the losing party but also for the winning party as due to the result of such practice, propriety information may become available to competitors, consumers, suppliers and other concerned stakeholders from whom the information was to be kept from.¹⁶⁸ Thus, parties with disputes involving sensitive and propriety information may have to continue with

¹⁶⁰ Das & Keyal, *supra* note 59.

¹⁶¹ BLACKABY, PARTASIDES, et al., *supra* note 89, 577.

¹⁶² *Id.*

¹⁶³ *Id.*, 509.

¹⁶⁴ See QMSIA Survey 2018, *supra* note 92.

¹⁶⁵ See, e.g., UMS Holding Ltd v. Great Station Properties SA [2017] EWHC 2398 (UK); French Code of Civil Procedure, 2011, Art. 1464 (“subject to legal requirements, and unless otherwise agreed by the parties, arbitral proceedings shall be confidential”) (France).

¹⁶⁶ See, e.g., 3 Esso Australia Resources Ltd and others v. The Hon Sidney James Plowman, and others, 10 Commonwealth Law Reports 183(1995) (Australia); United States v. Panhandle Eastern Corporation, 118 F.R.D. 346 (D.Del.1988) (United States).

¹⁶⁷ See, e.g., Sierra Club of Canada v. Canada, [2002] 2 S.C.R. 522 (Canada).

¹⁶⁸ Knull & Rubins, *supra* note 11, 26.

erroneous award simply for the lack of options to correct defects otherwise without compromising confidentiality.

Similarly, in case of international arbitration, judicial review of an award defeats the notion of neutrality, one of the prime reason for which the parties in international arbitration opt for arbitration.¹⁶⁹ Like confidentiality, neutrality of forum is a concern for both the victorious as well as the defeated party in arbitration as a biased forum may overturn a correctly decided award and at the same time, it may refuse to set aside an erroneous award in favour of the national party. Nationality bias is not a mere apprehension that a foreign party might presume in other party's national jurisdiction. There have been cases of egregious bias in not only the judiciaries of developing countries,¹⁷⁰ but also in the judiciaries of developed jurisdictions like the United States.¹⁷¹ Justified or not, the apprehension of bias must be addressed as justice should not only be done; it must also be seen to be done.¹⁷² Unfortunately, there exists no neutral international body to deal with disputes arising out of international arbitral awards,¹⁷³ and parties conventionally have no recourse but to go to the national judiciaries where the appearance of the bias cannot be helped with.

Lastly, judicial review of arbitral disputes may also be unappealing to parties in arbitration simply because of the inefficiency of courts in many jurisdictions.¹⁷⁴ While such inefficiency serves well for recalcitrant parties looking for ways to delay the enforcement of the award,¹⁷⁵ it really is a liability for parties who would genuinely wish to know their final standing *vis-à-vis* the arbitral dispute

¹⁶⁹ BORN, *supra* note 54, 2061.

¹⁷⁰ See, e.g., Saipem S.p.A. v. The People's Republic of Bangladesh, Award, ICSID Case No. ARB/05/07.

¹⁷¹ See generally STATE OF CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE AND SUPREME COURT CASES, *Judicial Misconduct Involving Bias: Ethnicity, Nationality, Race, Gender & Sexual Orientation* (May, 2015), available at http://www.courts.ca.gov/documents/BTB23_FRI_How_to_Improve_2.pdf (Last visited on February 3, 2018).

¹⁷² R v Sussex Justices, Ex parte McCarthy ([1924] 1 KB 256. (UK).

¹⁷³ Though there has been fervent advocacy for the same. See, e.g., Howard Holtzmann, A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards, in THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE 109 (Martin Hunter, Arthur Marriot et al., 1995); Stephen M. Schwebel, The Creation and Operation of an International Court of Arbitral Awards, in THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE 109 (Martin Hunter, Arthur Marriot et al., 1995); John Templeman, Towards a Truly International Court of Arbitration, 3 JOURNAL OF INTERNATIONAL ARBITRATION 30 197-220 (2013); Mauro Rubino-Sammartano, Comments on the 7th Geneva Global Arbitration Forum, 1 JOURNAL OF INTERNATIONAL ARBITRATION 16 93 – 100 (1999); Knull & Rubins, *supra* note 11.

¹⁷⁴ Love, *supra* note 158; See also Law Commission of India, *Amendments to the Arbitration and Conciliation Act, 1996*, Report No. 246, 15 (August 5, 2014), available at <http://lawcommissionofindia.nic.in/51-100/Report76.pdf> (Last visited on November 29, 2017) (“the judicial system is over-burdened with work and is not sufficiently efficient to dispose cases, especially commercial cases, with the speed and dispatch that is required”)

¹⁷⁵ Fali S. Nariman *introduction* to JUSTICE S.B. MALIK, COMMENTARY ON THE ARBITRATION AND CONCILIATION ACT (Justice J.D. Kapoor, 7th ed., 2015).

so as to be able to move on with their business. Further, the national courts which exercise the jurisdiction over arbitral disputes are more often than not courts of general expertise.¹⁷⁶ This may impair their ability to render an effective award in highly technical arbitral disputes.

Thus, the appeal of internal review clauses in each of the above scenarios can be easily understood. Appellate tribunal being bound by the rules of arbitration as chosen by parties will have to provide for confidentiality if a confidentiality clause is present in the arbitration agreement.¹⁷⁷ Such appellate tribunal will also provide an avenue for recourse to foreign parties to the dispute who might have apprehension about nationality bias in the municipal courts of the jurisdiction.¹⁷⁸ Similarly, parties will have the flexibility to craft an appellate mechanism suited to their needs and expectations.¹⁷⁹ Discretion under such flexibility ranges right from the choice of the substantive law to the choice of the arbitrator most suited for issues in the appellate dispute.¹⁸⁰

Internal appeal clauses might also be an appealing avenue for parties who would wish for review based on grounds, in addition to the ones present for judicial review. Usually, parties opt for expansion of grounds for review by contractually granting increased power to the courts to review awards on such additional grounds.¹⁸¹ But of late, such practices have come under fire from national courts as more and more jurisdictions have moved towards banning such contracts which bind the courts to entertain suits which it has no jurisdiction to entertain.¹⁸² Hence, for parties seeking increased control over the quality of arbitral award, an internal appeal might be a better way to go about it as even if the courts accept such increased jurisdiction, the problems with the judicial review that have been mentioned above will continue to persist. In fact, one of the landmark judgements in the US arbitral jurisprudence, the same judgement that prohibited parties from contractually expanding court's jurisdiction to review awards has indicated that internal appeal mechanism might be more suited to such a need.¹⁸³

C. INCREASED ARBITRAL EFFICIENCY

Efficiency in terms of time and cost is one of the priority concerns for the parties engaging in the arbitration of disputes.¹⁸⁴ In this context, the criticism of

¹⁷⁶ Park, *supra* note 147, 602.

¹⁷⁷ BORN, *supra* note 54, 30.

¹⁷⁸ *Id.*, 39.

¹⁷⁹ *Id.*, 30.

¹⁸⁰ *Id.*

¹⁸¹ See Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 8 147 (1997).

¹⁸² See *Hall Street Associates, LLC v. Mattel, Inc.*, 128 S.Ct. 1396 (2008).

¹⁸³ See, e.g., *Chicago Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7th Cir. 1991) (“Federal courts do not review the soundness of arbitration awards... If the parties want, they can contract for an appellate arbitration panel to review the arbitrator’s award”).

¹⁸⁴ Born, *supra* note 54, 86.

internal appeal procedures regarding efficiency can be understood, as *prima facie*, these procedures do appear to cause delay and additional expense. However, on careful analysis, it becomes clear that majority of the commentators who criticise appellate review for promoting inefficiency take into account the efficiency of only the pre-award phase and not the post-award phase, where the most of the delay is experienced.¹⁸⁵ This part addresses such criticisms and though counter-intuitive, it argues that incorporation of internal appeal procedures will promote efficiency in the pre-award phase of certain arbitrations and the post-award phase of almost all the arbitrations.

1. Efficiency in the pre-award phase

In the pre-award phase, parties with huge claims seeking fairness indisputes cannot be helped with, as the usual complexity of these large stake cases ensures that any sort of review mechanism will only add to the time and costs involved. Disputes involving average claims, on the other hand, stand to derive more profits in terms of efficiency by incorporation of internal review procedures. In a bid to ensure fairness of the award, parties usually employ a three-member panel as it reduces the risk of an unappealable aberrational award ('usual system').¹⁸⁶ But since under the appeals system, the parties can have a security net in form of internal review, they can employ sole arbitrators at first instance instead, with a three-member tribunal or a sole arbitrator at the appellate stage ('proposed system'). Not only are sole arbitrators deemed more suitable for average claim disputes,¹⁸⁷ but are also very efficient generally.¹⁸⁸ When compared with arbitrations with multiple-member tribunals, arbitrations with sole arbitrators cost less.¹⁸⁹ In a five million USD case in ICC, a sole member panel costs an average of 85,000 USD as compared to a three-member panel which costs whopping 265,000 USD.¹⁹⁰ Thus appointment of sole member panel can result into significant cost reductions in average claim arbitrations. In case the parties are dissatisfied with the sole arbitrator's award they can request an internal review from an appellate panel.

While the proposed system with sole arbitrator at appellate stage will still cost less than the usual system, questions may be raised regarding the practicality of appointment of three-member at the appellate stage as the overall cost will go up in case of appeals. Here, the parties will have to engage in the cost-benefit analysis of adopting the proposed system vis-à-vis the usual system. In case, appeal against sole arbitrator's award is preferred to a three-member tribunal, the parties will have to pay for an extra arbitrator overall. But in cases where the appeal is not preferred, the parties will have to pay for two less arbitrators.

¹⁸⁵ See, e.g., Japaridze, *supra* note 139.

¹⁸⁶ *Id.*, 239.

¹⁸⁷ LEW, MISTELIS, *et al.*, *supra* note 122, 226.

¹⁸⁸ Born, *supra* note 54, 237.

¹⁸⁹ *Id.*

¹⁹⁰ As ascertained by using per ICC Cost Calculator.

The proposed system may be best suited to international arbitrations. More often than not, parties will have to pay less as the statistics show that the rate of voluntary compliance with awards in international arbitration is exceptionally high.¹⁹¹ The parties in international arbitrations are usually corporate entities who might be engaged in a continuing business relationship with the other disputing party. Such parties will not arbitrarily invoke appellate clauses to delay the enforcement of the award as that may lead to a long-lasting unfavourable impression within the business community.¹⁹² This should, to an extent, allay the concerns that if the appeal is provided, the defeated party is necessarily going to avail of it and thereby increasing the overall cost of proceedings.

Even in the terms of time involved, arbitrations with sole arbitrator are better than arbitrations presided over by multiple arbitrators.¹⁹³ In giving up a multiple member panel for a sole arbitrator, parties will save considerable time that is lost in coordinating the proceedings with the busy schedule of each individual arbitrator. Moreover, the risk of party-appointed arbitrator resorting to dilatory tactics to delay the award also goes away with the appointment of a sole arbitrator.¹⁹⁴ The time saved as a result of the appointment of sole arbitrator further contributes to cost savings as a quicker process means a lesser number of billable attorney hours. Also, the possibility of scrutiny of the award will ensure the diligence of arbitrator and hence better-quality awards at the first instance itself.¹⁹⁵ Such awards will also be less prone to appeals which in turn will make sure that parties don't have to pay the additional cost of review. Thus, the internal review will ensure arbitration proceedings which, apart from being fairer, will also be more efficient as compared to before.

2. Efficiency in the post-award phase

In the post-award scenario, most of the resistance comes in form of challenge to the validity of the award and against the enforcement of the award.¹⁹⁶ Challenges to the validity of award are usually based on grounds of procedural defects, bias, natural justice issues, public policy, patent illegality and in certain jurisdictions merit-based grounds like questions of law.¹⁹⁷ As discussed above,¹⁹⁸ internal review procedures provide avenues to parties for resolving the

¹⁹¹ Loukas Mistelis & Crina Baltag, *Special Section on the 2008 Survey on Corporate Attitudes towards Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices*, 19 *The American Review of International Arbitration* 339 (2008).

¹⁹² *Id.*

¹⁹³ LEW, MISTELIS, *et al.*, *supra* note 122, 226.

¹⁹⁴ *Id.*

¹⁹⁵ See discussion under Part VI.B.

¹⁹⁶ See Brian King and Rahim Moloo, *Enforcement after the arbitration: Strategic considerations and forum choice*, in *FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT* 445 (Franco Ferrari, 1st ed., 2013).

¹⁹⁷ BLACKABY, PARTASIDES, *et al.*, *supra* note 89, 581.

¹⁹⁸ See discussion under Part VI.B.

aforementioned issues efficiently within the realm of arbitration itself as opposed to the traditional way of raising the challenges in court. In jurisdictions like India, where the judicial system is notorious for egregious delays,¹⁹⁹ internal review procedures can prove to be a boon as most institutions providing for appeal clause aim to resolve issues at appellate stage in less than twelve months.²⁰⁰ Moreover, public policy may also be in favour of settling disputes regarding quality of arbitral award within the domain of arbitration itself as it would mean lesser number of cases and thereby increased efficiency for judiciaries like India, which are clogged till brim with pending cases.²⁰¹

Additionally, the process of addressing issues regarding the validity of the award further helps by making enforcement proceedings more efficient. Most of the times when awards face problem at the stage of enforcement, it is because of the lower quality of such awards.²⁰² It has been held that better quality awards are in general more enforceable as they usually provide lesser reasons to courts for striking them down.²⁰³ Awards that go through internal appellate procedures are usually treated for any procedural and sometimes even for substantive defects. Hence, the awards from the appellate stage have been generally held to be of higher quality²⁰⁴ and therefore more enforceable. Moreover, the option of appeal also usually placates the disgruntled non-prevailing party who might raise issues in courts otherwise for lack of better forum and hence cause delay at the stage of enforcement. The enforceability rate of ICC awards serves as a good testimony to the positive effect of review of awards. After the process of arbitration in ICC, a draft award is made which is sent to court where it is scrutinised for defects in form procedure and substance.²⁰⁵ Only after the approval from the court on the form and advice on substance is received, the final award is made. As a result, ICC awards have become one of the most readily and regularly enforced arbitration awards in the world.²⁰⁶

Thus, contrary to popular perception, careful application of appeal clauses and internal review may actually increase the efficiency of arbitration. In cases where inefficiency caused by internal review cannot be avoided in pre-award

¹⁹⁹ For example, the SC of India took more than 10 years to arrive at a final decision in the *Centrotrade* case.

²⁰⁰ See discussion under Part III.

²⁰¹ NITI AAYOG, BIBEK DEBROY & SUPARNA JAIN, *Strengthening Arbitration and its Enforcement in India – Resolve in India* (October, 2016), available at <http://niti.gov.in/content/strengthening-arbitration-and-its-enforcement-india-%E2%80%93-resolve-india> (Last visited on February 8, 2016).

²⁰² Gustav Flecke-Giammarco, *The ICC: Scrutiny Process and Enhanced Enforceability of Arbitral Awards*, 3 JOURNAL OF ARBITRATION STUDIES 24 (2014).

²⁰³ *Id.*

²⁰⁴ Carreteiro, *supra* note 117, 213.

²⁰⁵ ICC Arbitration Rules, 2017, Art. 34.

²⁰⁶ Flecke-Giammarco, *supra* note 202, 74; See also Mumbai Centre of International Arbitration's 'sanity check' feature which aims at correcting defects in awards to increase its enforceability, available at <http://www.mondaq.com/india/x/538594/Arbitration+Dispute+Resolution/An+Overview+Of+Indias+First+Institutional+Mechanism+Mumbai+Centre+Of+International+Arbitration+MCIA> (Last visited on February 7, 2018).

phase, it will be compensated to a large extent by the increased quality of award and the efficiency that parties may achieve as a result in post-award proceedings.

VII. PROBABLE ISSUES WITH APPELLATE REVIEW IN INDIA SEATED ARBITRATIONS

A. *INEFFICIENCY*

As has already been discussed before, one of the main features of arbitration is efficiency which is achieved through cost-effective measures and timely resolution of disputes.²⁰⁷ But, of late, efficiency has become Achilles' heel for arbitration due to its significantly increased cost and time consumption. A recent study reported that 100% corporate consumers believe that international arbitration "takes too long", while 69% strongly agreed that it also costs too much.²⁰⁸ This concern may get further aggravated if an appeals procedure is added to the arbitration process. This section will review the issue of increased cost and time if an internal appellate procedure is adopted.

1. Cost

As the popularity of arbitration has grown, the costs and fees associated with arbitration have also increased exponentially.²⁰⁹ It has been noted that in certain cases the costs run up to millions which makes arbitration costlier than litigation.²¹⁰ Sometimes, the costs even exceed the amount disputed between parties, thereby making arbitration economically cumbersome. Advancement in evidentiary proceedings, such as witness testimony and growing involvement of experts lead to an increment in costs.²¹¹ Eighty percent of the costs of institutional arbitration comprise of counsel and arbitrator fees.²¹² Additionally, the parties also need to bear the logistical fees including, accommodation, travelling and sometimes even translation costs, which has led to the deeming of arbitration as a "luxury justice".²¹³ Hence, in the study conducted by Queens Mary College, in 2015, it was reported that an overwhelming majority of respondents (sixty eight

²⁰⁷ David J. Cairns, *Oral Advocacy and Time Control in International Arbitration* in *ARBITRATION ADVOCACY IN CHANGING TIMES* 181 (A.J. Van den Berg, 2011).

²⁰⁸ Lucy Reed, *More on Corporate Criticism of International Arbitration*, July 16, 2010, available at <http://arbitrationblog.kluwerarbitration.com/2010/07/16/more-on-corporate-criticism-of-international-arbitration/> (last visited on February 2, 2018).

²⁰⁹ John Yukio Gotanda, *Awarding Costs and Attorney's Fees in International Commercial Arbitrations*, available at <https://www.cisg.law.pace.edu/cisg/biblio/gotanda.html> (Last visited on February 4, 2018).

²¹⁰ See ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 248 (2004).

²¹¹ Guy Robin, *The Advantages and Disadvantages of International Commercial Arbitration*, 2014 *Int'l Bus. L.J.* 152 (2014).

²¹² *Id.*

²¹³ *Id.*

percent) from the corporate counsel pool described cost to be the worst attribute of international arbitration.²¹⁴

In India, most corporate consumers opt out of arbitration because of the exorbitant costs which according to these companies comprises mainly of arbitrators' fees, law firm and counsel fees.²¹⁵ The "arbitrary, unilateral and disproportionate fixation of fees by arbitrators" has been one of the main complaints against the adoption of arbitration in India.²¹⁶ The sizeable number of sittings increases the costs incurred per sitting which, without a ceiling increase the cost of arbitration exponentially.²¹⁷ Once a fee is stipulated, the parties feel a compulsion on them to agree to such fees. This is owing to the apprehension that refusal of one party especially if the other party has agreed, may cause prejudice or bias in the mind of the arbitrator.²¹⁸ In addition to the arbitrator's fees, other expenses such as institutional fees, lawyers' fees, witness, venue, proceedings *etc.* all of these increase the cost.²¹⁹ This offsets the amount that the parties save on court fees by choosing arbitration over litigation.²²⁰ Therefore, in some instances, arbitration proves to be more expensive than litigation, as parties need to not only pay for their legal representation but also for the arbitrators who will adjudicate their disputes.²²¹

In the above context, adoption of an internal appellate review increases the cost substantially. Since appeal involves rehearing the dispute; an internal review will effectively lead to two arbitrations and hence, double the cost of the procedure.²²² The appellate arbitral panel generally consists of three arbitrators,²²³ thus increasing the cost in addition to the single arbitrator at first instance. The institutionalisation of an appeals mechanism makes the entire process of arbitration costlier and less preferable in the commercial space wherein companies are already engaged in disputes involving a fortune.

²¹⁴ Queen Mary School of International Arbitration & University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, 2015, available at <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> (Last Visited on February 2, 2018) ('QMSIA Survey 2015').

²¹⁵ PricewaterhouseCooper, *Corporate Attitudes & Practices towards Arbitration in India*, 2013, available at <https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf> (Last Visited on February 3, 2018) ('PwC Study').

²¹⁶ Law Commission of India, *Amendments to the Arbitration and Conciliation Act, 1996*, Report No. 246, 10248, (August 2014), available at <http://lawcommissionofindia.nic.in/reports/report246.pdf> (Last Visited on February 3, 2018).

²¹⁷ *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523, ¶10.

²¹⁸ *Id.*

²¹⁹ Law Commission of India, *Amendments to the Arbitration and Conciliation Act, 1996*, Report No. 246, 11248, (August 2014), available at lawcommissionofindia.nic.in/reports/report246.pdf (Last visited on February 3, 2018).

²²⁰ *Id.*

²²¹ Andrew I. Okekeifere, *Commercial Arbitration as the Most Effective Dispute Resolution Method*, 15 J. INT'L ARB. 86, Int'l Arb. 81 (1998).

²²² Jonathan DeBoos, *Arbitration Awards: Is Review on the Merits Desirable*, 3 CONST. L. INT'L., INTL. 31 (2008).

²²³ See discussion under Part III.

2. Time

The second problem which plagues ICA is the issue of time. Traditionally, arbitration was chosen by most consumers because it was a swift and quick method of dispute resolution. However, as arbitration procedures grew more complex and sophisticated, the time taken to solve the disputes also became longer despite institutions stipulating time frames for the conclusion of the arbitration procedure.²²⁴ Most of these time limits can be eroded as they are supplemented with provisions which provide for exceeding the time limits so specified.²²⁵ Thus, parties habitually deploy delaying tactics to exhaust the financial resources of the opposing party that leads to additional costs which the other party might not be able to bear.²²⁶ Another potential cost of arbitration is the time spent at the arbitration hearings and choosing the arbitral panels. Time is also consumed in the process of document production and discovery.²²⁷ Hence, the pre-arbitration stage becomes very cumbersome and lengthy. The drawn-out duration of proceedings can also be attributed to the involvement of multiple arbitral sources which includes experts, counsels, arbitral institutions and witnesses.²²⁸ In a 2015 survey, it was reported that thirty six percent of the respondents (corporate counsels) mentioned “lack of speed” as the major deterrents to arbitration.²²⁹ In the same study, it was found that lack of sanctions during the arbitration process led to inefficiency by the counsels.²³⁰ At the same time, the desire to appoint apposite arbitrators was stalled due to lack of understanding of the arbitrators’ efficiency. These two factors combined leads to a substantial delay in the entire process.²³¹ Thus, the parties become disillusioned with the process of arbitration. On the other hand, the mandatory time limit also undermines the doctrine of party autonomy in arbitration and erodes the choice of the flexibility of procedure.²³² It may also lead to arbitrators not giving due attention to complex issues.²³³ A study conducted in India revealed that nine percent of the respondent companies had to undergo arbitration which lasted more than three years.²³⁴ Even if the parties choose ad hoc arbitration, the choice of experienced arbitrators is limited. This causes a significant delay as there exists a lack of availability of these seasoned arbitrators.²³⁵

²²⁴ See Robin, *supra* note 211, 153.

²²⁵ See, e.g., The Arbitration and Conciliation Act, 1996, §29A.

²²⁶ Robin, *supra* note 211, 153.

²²⁷ William K. II Slate, *Cost and Time Effectiveness of Arbitration*, 3 CONTEMP. ASIA ARB. J., 182, 186, 190 (2010).

²²⁸ *Id.*

²²⁹ QMSIA Survey 2015, *supra* note 214.

²³⁰ *Id.*

²³¹ *Id.*

²³² See Andrew de Lotbiniere McDougall, Sabbarwal & Thadikkaran, *Mandatory Time Limit For Rendering Awards Under Indian Law: How Good Intentions Can Lead To Bad Outcomes*, IJAL Vol. 5, Issue 2 188, 191 (2017).

²³³ *Id.*, 192.

²³⁴ PricewaterhouseCooper, *Corporate Attitudes & Practices towards Arbitration in India*, 2013, available at <https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf> (Last Visited on February 3, 2018) (‘PwC Study’).

²³⁵ *Id.*

Thus, the issue of a time-consuming arbitral process may adversely affect the preference for adoption of an internal appellate mechanism. Most institutions providing for appellate procedure extend the time over and above the first instance arbitration. A review on merits would, therefore, lengthen an already lengthy and time-consuming process as the parties need to start from scratch including choosing an arbitral panel for the second time. Even if the contracts afford a judicial review, the Courts will take substantially longer to adjudicate the matter and it can stretch on for years and even decades.²³⁶ The option of an appeal can be abused, as now the parties will view the first instance award as a necessary step in gaining insight about the actual strength of their legal positions and the probable value of their claims.²³⁷ Thus, the appeal stage will be taken to be the point of serious discussions. Adoption of an appellate review would extend the time-frame which will hamper the dynamics of negotiations severely.²³⁸ Hence, this will undermine the efficiency of arbitration as a whole.

It is evident that enormous costs and substantial delays have endangered the success of ICA thereby leading parties to venture into other alternate methods of dispute resolution like mediation.²³⁹ The study conducted by Queen Mary School of International Arbitration, London, reported that the primary objection to the appellate mechanism in commercial arbitration stemmed from the aforementioned concerns.²⁴⁰ Similarly, in India, most corporate counsels described the extra cost and time involved in appellate arbitration as a disincentivising feature.²⁴¹ Nonetheless, the central goal of arbitration has been to render fair, reasoned and enforceable awards.²⁴² Thus, having an appellate option becomes necessary when there has been any kind of short-coming in the application or understanding of law or fact by the arbitrator in rendering the arbitral award.²⁴³

In this context, the main challenge of present-day arbitration has been to render an accurate or reasoned award in an efficient, prompt and cost-effective manner. In light of the *Centrotrade* judgement,²⁴⁴ India needs to come up with a robust and comprehensive appellate arbitration framework which can help alleviate these grievances. There are several ways in which the issue of potential inefficiency that may be caused by review provision can be handled in India.

²³⁶ Priya Sampath, *The Need for a Transnational Appellate Arbitral Review Body*, LL.M. THESIS AND ESSAYS, PAPER85 (January 1, 2007), available at http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1088&context=stu_llm (Last Visited on February 3, 2018).) (LL.M Thesis, University of Georgia School of Law).

²³⁷ Ten Cate, *supra* note 151, 1109.

²³⁸ *Id.*

²³⁹ S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U S. I.L & POL'Y 11, 12 (2014).

²⁴⁰ See QMSIA Survey 2015, *supra* note 214.

²⁴¹ PwC Study, *supra* note 234.

²⁴² See Strong, *supra* note 239.

²⁴³ BLACKABY, PARTASIDES, et al., *supra* note 89, 570.

²⁴⁴ *Centrotrade* 2016.

Firstly, India is one of the few jurisdictions which have a strict time limit within which the arbitration process needs to be concluded.²⁴⁵ A similar time-frame needs to be established for the appellate process as well. Major arbitration institutes like AAA, CPR, ECA and JAMS have specific time limits within which the appeal decision needs to be rendered from the date of filing the notice of appeal.²⁴⁶ There should also be time schedules specified for each procedure of the appeals process starting from filing documents to evidentiary hearings. Keeping in mind that party autonomy and flexibility of procedures are the central tenets of arbitration, there should be provisions to extend the time if the parties can show sufficient cause.²⁴⁷ There should also be a limitation period within which appeals can be filed, failing which the first instance award becomes final and binding.

Secondly, in order to control time and costs, the scope of appeal needs to be specified. Either the institutes can specify their own grounds²⁴⁸ or the parties in their contracts can determine the grounds for appeal in the appeals clause. An appeal should strictly be a review on merits,²⁴⁹ where both questions of law and facts can be agitated but with appropriate safeguards which prevent a *de novo* proceedings or a second hearing.²⁵⁰ Thus, the scope of appeal should be limited to modification, vacation or affirmation of the previous award and not to remand the case back to the first tribunal. There should also be no new findings of facts or new evidence which can be brought at the appeals stage. Oral hearings take up most of the time. Therefore, the appellate stage should exclude the stage of oral hearings and base their proceedings on the previous hearings and the appellate briefs.²⁵¹ The focus of the grounds for appeal could be on gross errors of law, prejudicial findings and factual findings which are completely unsupported by records.²⁵² This could substantially reduce costs and time.

Thirdly, in order to curb arbitrator fees, the parties should be allowed to choose whether or not they want a single arbitrator or multiple arbitrators in the appellate tribunal as per their discretion. Fourthly, the appellate award should also follow the principle of “cost following the event” wherein the losing party bears most of the costs.²⁵³ There should be economic deterrents within the institution

²⁴⁵ Arbitration and Conciliation Act (Amendment) Act 2015, §29 A. (While extensions are usually granted on the lapse of the time limit, its presence helps the parties and arbitrators to plan out the arbitration proceedings and provides psychological motivation for concluding the proceedings in a time-bound manner).

²⁴⁶ See discussion under Part III.

²⁴⁷ Arbitration and Conciliation Act (Amendment) Act 2015, §29 A.

²⁴⁸ See discussion under Part III.

²⁴⁹ Vikrant Narayan Vasudeva, *Contemplating the ‘Appeal Option’ in Arbitration*, KLRI JOURNAL OF LAW AND LEGISLATION, VOL. 7, No.2 185, 189 (2017).

²⁵⁰ *Id.*

²⁵¹ *Id.*, 190.

²⁵² *Id.*

²⁵³ John Yukio Gotanda, *Awarding Costs and Attorney’s Fees in International Commercial Arbitrations*, available at- <https://www.cisg.law.pace.edu/cisg/biblio/gotanda.html> (Last visited on February 2, 2018).

rules²⁵⁴ or the contract to prevent frivolous appeals. Fifthly, in order to reduce the time taken to choose the appellate arbitral panel, the institutes can give them a limited choice of arbitrators to choose from their own vetted pool. This selection needs to be completed within a prescribed time limit failing which the institutes can appoint the arbitrators as per their discretion. Sixthly, to reduce cost and time, the institutes or the parties can agree on an express waiver of judicial review of the arbitral award at least while the appeal is underway. Once appealed, no judicial action can lie in a national court to affirm or vacate an award. Thus, the parties need not spend money on the litigation over and above the amount spent on arbitration. All of these, in our view, will have a considerable impact on the costs and the time taken to render a decision under arbitration.

B. SUPERIORITY OF APPELLATE TRIBUNAL

One of the most fundamental practices in securing the ends of party autonomy is the ability of the parties to choose their own arbitrators. As early as 1907, the Hague Convention for the Pacific Settlement of International Disputes described international arbitration as a system wherein the parties have the benefit of having their disputes adjudicated upon by “judges of their own choice”.²⁵⁵ Hence, it is often said that “arbitration is only as good as the arbitrators” thereby, making the choice of persons in the arbitral panel one of the most important steps in arbitration.²⁵⁶ However, since the selection of arbitrators does not follow a defined procedure, these appointments often lead to “arbitral disappointments.”²⁵⁷ In this context, the appellate tribunal’s competence to render a better quality or a superior award has come under question.²⁵⁸

In arbitration, of late,, there has been a rise of “generalist” arbitrators wherein the arbitrators have a good functional understanding of wide arrays of issues but may not have expected degree of expertise on the subject matter at hand.²⁵⁹ They are preoccupied with procedures over substance. Thus, there is an increased risk of them rendering abnormal decisions which do not comply with a specific industry’s standards and jargons.²⁶⁰ These are the same pool of arbitrators who form the appellate tribunal as well, therefore, leading consumers to question the veracity and correctness of the tribunal in rendering final decisions. Since most appellate arbitrations are two-tier, there is no option of challenging the appellate panel’s decision creating further discontentment amongst consumers.

²⁵⁴ See discussion under Part III.

²⁵⁵ *Convention for the Pacific Settlement of International Disputes 1907*, Art. 37, available at- <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf> (Last visited on February 2, 2018).

²⁵⁶ DAVID HACKING, *INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION*, CHAPTER 11 (2011).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Chernick & Claiborne, *supra* note 13, 35.

²⁶⁰ *Id.*

It is often argued that the appellate tribunal is not superior to the first instance arbitral tribunal, as the parties could very easily have the “superior qualities” of the appellate tribunal at the first instance itself.²⁶¹ Appeals are generally foreseeable from awards rendered by sole arbitrators or arbitrators who have a very limited legal knowledge and lack of understanding of the appropriate industry.²⁶² Hence, the appellate tribunal constituted of more seasoned arbitrators are equipped to correct such fallacious awards better. But, in reality, this problem can be tackled at the first instance itself, wherein the parties can make careful considerations while choosing the arbitrator. This will help them to bypass the procedure of appeal which leads to more delay and costs.²⁶³ Thus, arguably, this renders the entire procedure of an internal appeal redundant and unnecessary.

However, it is important to note here that, as discussed earlier, an appellate tribunal improves the arbitral process. The stakes involved in these international commercial disputes are huge; therefore, the fear of an erroneous award with no means of correction is too much of a risk to bear.²⁶⁴ Thus, while reduction of costs and speed remain an essential consideration, accuracy is considered to be far more important.²⁶⁵ The internal appeal, on the other, hand helps bring a perception of legitimacy within the system as it treats any error- incompetence to corruption – that may have transpired at any stage.²⁶⁶

Thus, there is a need to strengthen the appellate panel in order to make it more competent and superior to the first instance tribunal. Knowledge of requisite law and previous experience are the most desirous attribute of an international arbitrator.²⁶⁷ Hence, the first step in tackling the above problem is appointing arbitrators who are experts and well-versed in law, industry standards and more specifically in the areas to which the issues at appellate stage pertain to. According to a recent study, sixty eight percent of the companies prefer retired Supreme Court or High court judges as arbitrators due to their established reputation in the arbitration community and regional or industrial expertise.²⁶⁸ Thus, the appellate tribunal should consist of apposite arbitrators with the preferred skill set. Some commentators suggest that instead of parties deciding the composition of the appellate panel, the institutes should decide them unilaterally, which would help ensure an independent, neutral and better panel than the first instance.²⁶⁹ But, such a practise would severely undermine the central tenet of arbitration: party autonomy and flexibility to customise procedures and hence may not be preferable by parties. Secondly, in certain high stakes arbitration, it would be advisable to

²⁶¹ Carreteiro, *supra* note 117, 212.

²⁶² *Id.*

²⁶³ *Id.*, 213.

²⁶⁴ See generally Knull & Rubins, *supra* note 11.

²⁶⁵ *Id.*

²⁶⁶ Carreteiro, *supra* note 117, 209.

²⁶⁷ PwC study, *supra* note 234.

²⁶⁸ *Id.*

²⁶⁹ Ten Cate, *supra* note 151, 1109.

have a three-panelled appellate tribunal. A tripartite appellate tribunal guarantees the parties “a breadth and depth of legal and subject-matter expertise” over a sole arbitrator of the first instance.²⁷⁰ Thus, a multiple member appellate tribunal and appointment of expert witnesses ensures more discourse and a thorough examination of all technical and legal issues of the dispute.²⁷¹

C. EFFECT ON ARBITRATORS

Commercial consumers of arbitration can either opt for institutional arbitration wherein they choose an arbitration institution to administer arbitration²⁷² or ad-hoc arbitration wherein the parties contract privately and choose their own procedures and arbitration processes.²⁷³ The reputation, discipline, and effectiveness of arbitrators are decided by the marketplace, unlike judges who are subjected to a separate institutionalised judicial system.²⁷⁴ Moreover, the arbitrators and their facilities are paid for by the parties and not by the public treasury as is the case for judges.²⁷⁵ Thus, the success of arbitrators depends on the parties and the extent of enforceable awards rendered by them. In this context, if an appellate mechanism is introduced, it may lead to immense competition amongst the arbitrators and institutions who may try to actively undercut other institute’s award in order to undermine their legitimacy and attract more clients. Moreover, the competition may introduce bias, or in the very least, the appearance of it, whenever the first instance award is struck down by an appellate panel.

This can be curbed to an extent by disallowing a free-standing option while appealing to institutes. Meaning that, parties will not be allowed to appeal to a particular institute if they had not followed that specific institution’s procedures for the first instance arbitration. Thus, this can help prevent competition and the allegations of bias. Secondly, the provisions relating to challenging the appointment and replacement of arbitrators which apply to the first instance arbitral panel must also apply to the appellate tribunal. This will provide the parties with recourse to challenge bias in the panel. Thirdly, the institutions and parties should be careful, that the same arbitrator who rendered the first award should not be a part of the appellate panel as there is a great risk of prejudice and bias if such an appointment occurs.

²⁷⁰ Knull & Rubins, *supra* note 11.

²⁷¹ *Id.*

²⁷² See discussion under Part III.

²⁷³ Khaitan & Co., *Two Tier Arbitration Clauses*, March 4 2017, available at <http://www.internationalawoffice.com/Newsletters/ArbitrationADR/India/KhaitanCo/TwoTierArbitrationClauses> (Last visited on February 5, 2018).

²⁷⁴ Chernick & Claiborne, *supra* note 13, 35.

²⁷⁵ *Id.*

*D. PUBLIC POLICY ISSUES REGARDING THE
DETERRENT EFFECT ON SEEKING DISPUTE
RESOLUTION IN CERTAIN CASES*

Incorporation of a second stage in arbitration for the purpose of internal review may fall foul of the public policy in so far as it is used as a tool to deter parties from seeking dispute resolution. Such a situation may perhaps arise in a dispute with parties having unequal bargaining power. It might so happen that unscrupulous parties with higher bargaining power may insert appellate arbitration clauses in the contract in a bid to discourage invocation of arbitration by parties with lower bargaining power, who may not have enough resources to carry on for two rounds of arbitration. Public policy grievance with appellate arbitration may further get aggravated in cases such as that of employment disputes arbitration where these mechanism may be inserted via a pre-dispute adhesive contract.

Public policy challenges against arbitration of disputes with unequal bargaining power are usually based on the charge of ‘unconscionability’ and presence of internal review procedure may further lend credence to such a charge. A test of unconscionability in the context of employment dispute was discussed in the leading Indian contract case of *Brojo Nath Ganguly v. Central Inland Waterways*.²⁷⁶ The Court in *Brojo Nath* held that contracts like adhesion contracts will be held unconscionable if it appears that the terms of the contract were so highly unreasonable and unfair that a reasonable party with any meaningful choice would have never voluntarily assented to those terms.²⁷⁷

Perhaps, a more structured version of the *Brojo Nath* test, and one which is more applicable in kind of arbitration disputes being discussed here, comes from the American judicial system. The Supreme Court of California, in the seminal case of *Graham v Scissor-Tail*,²⁷⁸ laid down a two-fold test for determining unconscionability of mandatory arbitration clauses. The first prong of the test focuses on the procedure in which the contract is obtained *i.e.*, whether the weaker party had a meaningful opportunity to negotiate the arbitration contract or it was an adhesion contract.²⁷⁹ If on such determination it is found out that contract was obtained by way of adhesion, the court can employ the conclusive second prong of the test which aims at substantive evaluation. Undersubstantive evaluation, if it is found that the contract does not meet the “reasonable expectations of the weaker party” or “on the grounds of equity” the agreement is deemed unduly oppressive, such contract will not be enforced by the court.²⁸⁰

²⁷⁶ *Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly*, (1986) 3 SCC 156 : 1986 Indlaw SC 645.

²⁷⁷ *Id.*, ¶ 104.

²⁷⁸ *Graham v. Scissor Tail, Inc.*, 28 Cal. 3d 807 (Cal. 1981). (California, U.S.A.).

²⁷⁹ *Id.*, 817-820.

²⁸⁰ *Id.*

If contracts are to be evaluated on the aforementioned parameters, it will not be a chore for the weaker party to establish unconscionability of pre-dispute adhesive arbitration contracts which include internal review clauses. As mentioned before, the inclusion of internal review may lead to increased cost and time consumption in dispute resolution. It seems unreasonable for weaker parties to opt such a system of dispute resolution out of their free will. Similarly, it will be equally difficult for the party with higher bargaining power, who insisted on insertion of appellate review clause, to rebut the appearance of unconscionability. As discussed previously, internal review clauses are most suited to disputes involving significantly high claims where both the parties have enough resources to sustain the increased costs and time in the interest of potentially better-quality awards. Weaker parties can, thus, easily make a successful case for an ulterior motive behind the inclusion of internal appeal as the prospect of costly and lengthy dispute resolution process may induce a reasonable party to not to follow through the recourse or force them to settle.

In light of potential public policy issues and the incessant litigation that might ensue as a result, arbitration proceedings face regulations in case of disputes where inequity in terms of bargaining power exists. Inserting an appellate review clause may not augur well for arbitrations as far as compliance with these regulations is concerned. For example, the AAA/ICDR prohibits appeals from arbitrations based on adhesive agreements in consumer disputes.²⁸¹ Considering the number of avenues that weaker parties can avail to attack such arbitration agreements or the awards rendered in furtherance of such agreements, the apprehension of tedious ensuing litigations seems very reasonable.²⁸² Based on similar considerations, Carbonneau suggests a complete prohibition on internal appeal in any sort of employment and consumer dispute arbitration.²⁸³ Few nations have even gone further and banned pre-dispute arbitration agreement itself from being used in employment and consumer contracts.²⁸⁴ In India, the situation is even more problematic (or fair, depending on the perspective) as few judicial authorities have ruled employment and consumer disputes as non-arbitrable,²⁸⁵ while few oth-

²⁸¹ AAA/ICDR Optional Appellate Arbitration Rules, 2103, available at <https://www.adr.org/sites/default/files/AAA%20ICDR%20Optional%20Appellate%20Arbitration%20Rules.pdf> (Last visited on February 8, 2018) (“These Appellate Rules do not apply to disputes where the arbitration clause is contained in an agreement between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices”)

²⁸² For example, Under the Arbitration and Conciliation Act, 1996 the agreement and the award can be set aside under §16 and under §34 respectively).

²⁸³ THOMAS CARBONNEAU, *TOWARDS A NEW FEDERAL POLICY ON ARBITRATION*, 220 (2014).

²⁸⁴ See Jonnette Hamilton, *Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?*, MCGILL LAW JOURNAL 53, 693 (2013) ; See also George Friedman, *The Proposed Arbitration Fairness Act* (March 23, 2015), available at <https://www.arbresolutions.com/the-proposed-arbitration-fairness-act-still-a-well-intended-but-potentially-dangerous-overreaction-to-a-legitimate-concern/> (Last visited on February 8, 2018).

²⁸⁵ See, e.g., *Kingfisher Airlines v. Prithvi Malhotra*, 2013(7) Bom C.R. 738 (Holding that employment disputes covered under the Industrial Disputes Act, 1947 are non-arbitrable under the

ers have opened the awards opposed to public policy for scrutiny under the writ jurisdiction of the High Courts.²⁸⁶

Hence, it is advised to the parties looking to avoid long-drawn suits in Indian judiciary, to refrain from using adhesive pre-dispute employment arbitration contracts generally and internal review clauses in such contracts altogether.

E. AUTOMATIC ENFORCEMENT OF THE DOMESTIC AWARDS AS DECREES

The most legally tenable issue that appellate awards may face in India, comes from the enforcement procedure of awards rendered under Part I of the Arbitration Act. Unlike foreign awards which are administered by part II of the Act, domestic awards do not need the satisfaction of the court for enforcement.²⁸⁷ Under the scheme of the Arbitration Act, for a domestic award to be enforced as a decree of the court, only the following conditions are required to be fulfilled:

- i. That, the award should not have been set aside under §34 of the Act.²⁸⁸
- ii. That, if an application to set aside the award under §34 has not been made, the time for making such an application should have expired.²⁸⁹

If the above two conditions are met, then at the expiry of three months' time from the date of the pronouncement of the award, such award becomes an executable decree.

This process of automatic enforcement is problematic in cases where an appeal to the appellate tribunal is filed post three months' time as it would tantamount to arbitrators sitting in judgement over a deemed decree of the court. In the *Centrotrade* case, Justice Sinha held that such a scenario where a private adjudicator sits in judgement over a decree of the court would be perverse to the fundamental legislative policy of India.²⁹⁰ Supreme Court in its final decision did not discuss this issue. However, if one is to logically reconcile the issue with the judgement rendered by the court, the most plausible construction to come out of such reconciliation would be that §36 applies only to the final awards and first

Arbitration Act); *Aftab Singh v. Emaar Mgf Land Ltd.*, 2017 SCC OnLine NCDRC 1614 (The NCDRC held that consumer disputes are not arbitrable).

²⁸⁶ *Engg. Mazdoor Sabha v. Hind Cycles Ltd.*, AIR 1963 SC 874 (“Therefore, even if the arbitrator appointed under section 10A is not a Tribunal under Art. 136 in a proper case, a writ may lie against his award under Art. 226”).

²⁸⁷ *C.f.* The Arbitration and Conciliation Act, 1996, §49 (Foreign arbitral awards are enforced only after the satisfaction of the court regarding its enforceability).

²⁸⁸ The Arbitration and Conciliation Act, 1996, §34.

²⁸⁹ The Arbitration and Conciliation Act, 1996, §36(1).

²⁹⁰ *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2006) 11 SCC 245, ¶14.7.

instance award, being non-final or final in a limited way, should not be considered for the process of enforcement.

Though such a reading solves the issue mentioned by Justice Sinha, it creates another set of problems too. In a scenario where both the arbitrating parties are satisfied with the first instance award, the above reading will force the parties to exercise the option of internal review as such first instance award will not be enforceable. One might argue that finality of the first instance award is qualified and for the purpose of enforcement, the award may become final if the parties agree to deem such an award as final or when the time limit for internally appealing the award expires. Though the argument is sound, it works only when parties provide a time limit for appealing. For example, in cases like *Centrotrade* where parties had not agreed on a fixed time limit for appealing, if the recalcitrant non-prevailing party disagrees to deem the first-instance awards as final and refuses to apply for internal appeal too, the prevailing party will have no choice but to apply for internal appeal itself in order to get an award that can be enforced. Thus, designating first-instance awards not fit for enforcement may potentially cause injustice to prevailing parties in certain scenarios.

Hence, even though Supreme Court has not clarified its stance on this issue, parties should refrain from any such potentially problematic construction, and consider the first instance awards as enforceable like the decree of courts if they are not appealed within the expiry of three months. Such advice also entails the warning that any award rendered in furtherance of an appeal filed after expiry of three months' time may be set aside on grounds of public policy for reasons cited by Justice Sinha. The parties and the institutions providing for review procedures may also want to consider a timeline shorter than ninety days as limitation period for internally appealing the award, as a timeline longer than that will not only unnecessarily delay the conclusion of arbitration but may also cause the awards appealed after ninety days to be set aside. Further, it is also suggested that to avoid unnecessary potential litigation during the pendency of the appellate arbitration, parties should seek a stay on the operation of domestic awards under §36²⁹¹ and on enforcement proceedings, if any instituted, in case of foreign awards under §48.²⁹²

F. MULTIPLE REVIEW PROCEEDINGS

Poorly drafted appellate arbitration agreements can expose parties to the possibility of multiple simultaneous proceedings in different appellate forums. The lack of basic procedures such as one to prevent parties from approaching courts before exhausting all remedies within the realm of arbitration itself bears the testimony to the fact that Indian Arbitration law was not framed keeping in

²⁹¹ The Arbitration and Conciliation Act, 1996, §36(2).

²⁹² The Arbitration and Conciliation Act, 1996, §48(1)(e).

mind the possibility of appellate arbitration.²⁹³ There is nothing in the act that can prevent parties from bypassing the appellate review and approaching the court under §34 instead. This lacuna in law may be exploited by resourceful parties to financially ‘bleed’ the weaker parties by carrying on proceedings in multiple forums. Considering that the proceedings under §34 of the arbitration are not in the nature of review or appeal, where defects in otherwise correct awards can be addressed,²⁹⁴ the loophole may also be used to set aside awards which could have been corrected had they been taken up for the internal appeal.

Supreme Court’s stance on multiplicity of proceedings and temporal inefficiency can be adduced from recent patents dispute case of *Aloys Wobben v. Yogesh Mehra*.²⁹⁵ The court held that parties who could resort to multiple fora for claiming a remedy similar in nature, exclude the option of going to other forums once they initiate the suit in one of the valid forums. In regards to arbitration, a more specific view comes from a 1969 case of *Tractoroexport v. Tarapore & Company*²⁹⁶ which was decided on the schemes of the 1940 Arbitration act.²⁹⁷ On an issue of granting anti-arbitration injunction so that a suit could be filed on the same issue, the court held as follows:²⁹⁸

“If the venue of the arbitration proceedings had been in India and if the provisions of the Arbitration Act of 1940, had been applicable, the suit and the arbitration proceedings could not have been allowed to go on simultaneously and either the suit would have been stayed under Section 34 or if it was not stayed, and the arbitrators were notified about the pendency of the suit, they would have had to stay the arbitration proceedings because under Section 35 such proceedings would become invalid if there was identity between the subject-matter of the reference and the suit”

In case of appeals against the arbitral award, the courts should ideally give precedence to any method of appeal that parties may have agreed upon in their arbitration agreement. Internationally, to prevent a multiplicity of proceedings, arbitral institutions include as a pre-condition of stay on any statutory annulment or review proceedings that parties might have instituted in a court.²⁹⁹ In India, parties can only request for an adjournment of setting aside proceedings under §34(4) as, under the Indian Arbitration law, there is no specific provision to

²⁹³ *C.f.*, Arbitration Act, 1996, §70(2)(b) (In UK, where historically grain trade associations practiced tiered arbitration, the Arbitration Law mandates that challenge to courts be made only when all avenues of such challenge in arbitration has been exhausted).

²⁹⁴ *DDA v. Bhardwaj Bros.*, 2014 SCC OnLine Del 1581 : AIR 2014 Del 147.

²⁹⁵ *Aloys Wobben v. Yogesh Mehra*, (2014) 15 SCC 360.

²⁹⁶ *V.O. Tractoroexport v. Tarapore & Co.*, (1969) 3 SCC 562.

²⁹⁷ *The Arbitration Act, 1940.*

²⁹⁸ *V.O. Tractoroexport v. Tarapore & Co.*, (1969) 3 SCC 562 ¶27.

²⁹⁹ *See, e.g.*, AAA Arbitral Rules, 2013, A-2(a); CPR Appellate Arbitration Procedure, Rule 2.3.

stay the setting aside proceedings.³⁰⁰ The issue can also be tackled contractually to an extent by incorporation of a clause that prevents parties from approaching the court for setting aside until the option of internal review is exercised.

VIII. RECOMMENDATIONS

A. *RECOMMENDATIONS FOR AMENDMENT IN THE ARBITRATION AND CONCILIATION ACT, 1996*

Unlike the British Arbitration Law,³⁰¹ which recognises the procedure of internal review or the Dutch Arbitration Law,³⁰² which has a whole chapter devoted to the administration of internal appeals, the Indian Arbitration Act was not framed keeping in mind the possibility of an internal review. As a result, the Indian Arbitration Act is totally unprepared for handling the vagaries of internal appeal. One poorly drafted appeal may reveal an area on which the act does not legislate upon, which in turn, may expose parties to the possibility of a long-drawn litigation. Thus, in order to make the Indian Arbitration Act more suitable to internal appeal procedures, amendments would be required in provisions relating to finality of awards, the time duration for the proceedings, challenge procedures and the enforcement procedure. In this regard, we suggest amendments in following sections of the Arbitration and Conciliation Act, 1996.

1. Section 2

In light of the distinction created between final and non-final awards by the Supreme Court in the *Centrotrade* case,³⁰³ we propose to amend the Act to recognise this distinction so that any potential ambiguity can be avoided. §2(c)³⁰⁴ of the Act currently stands as follows:

“(c) “arbitral award” includes an interim award;”.

We propose to amend the above section to as follows:

“(c) “arbitral award” means, unless otherwise specified, final arbitral award. It includes an interim award;”.

³⁰⁰ Provisions of staying the suits from general laws like Civil Procedure Code cannot be used due to prohibition under section 5 of the Arbitration Act.

³⁰¹ Arbitration Act, 1996, §70(2)(b) (United Kingdom).

³⁰² Dutch Code of Civil Procedure, Art. 1061 (Netherlands).

³⁰³ *Centrotrade Minerals and Metal Inc.v. Hindustan Copper Ltd.*, (2017) 2 SCC 228 : 2016 SCC OnLine SC 1482 : AIR 2017 SC 185, ¶34.

³⁰⁴ The Arbitration and Conciliation Act, 1996, §2(c).

2. Section 29A

The 2015 amendment³⁰⁵ to the Arbitration Act has introduced a new time regime under which arbitration proceedings need to be completed within a twelve month timeline,³⁰⁶ which is extendable by six months by mutual agreement of the parties.³⁰⁷ Post the exhaustion of this time, the mandate of the tribunal comes to an end unless an extension based on sufficient cause³⁰⁸ is received by way of application to the court.³⁰⁹ Concerns have been raised on the negative implication of this section on the party autonomy to set procedure according to the needs of the case.³¹⁰ The provision which mandates parties to seek permission from the court not only results in an additional opportunity for court intervention but may also result in loss of confidentiality.³¹¹ Even the twelve month time for completion of arbitral proceedings is not viewed as a very practical timeline.³¹²

With major arbitral institutions taking as much as twelve months to complete one round of arbitration,³¹³ it seems impossible to reconcile the additional time taken by appellate arbitration within the framework of §29A. While an expedited appellate procedure may be concluded within the additional six month time that parties can provide by a mutual agreement,³¹⁴ the conclusion of a regular appeal, especially when it is a *de novo* appeal, seems impossible within this timeline. Thus, amendments are required to make the section more suitable to the possibility of appellate arbitration.

The relevant parts of the section currently stand as follows:

³⁰⁵ The Arbitration and Conciliation (Amendment) Act, 2015.

³⁰⁶ The Arbitration and Conciliation Act, 1996, §29A (1).

³⁰⁷ The Arbitration and Conciliation Act, 1996, §29A (3).

³⁰⁸ The Arbitration and Conciliation Act, 1996, §29A (5).

³⁰⁹ The Arbitration and Conciliation Act, 1996, §29A (6).

³¹⁰ Ruchika Darira, *Section 29A of the Amended Indian Arbitration and Conciliation Act, 1996*, May 10, 2017, available at <http://www.mondaq.com/india/x/592764/Arbitration+Dispute+Resolution/Section+29A+Of+The+Amended+Indian+Arbitration+And+Conciliation+Act+1996> (Last visited on February 10, 2018).

³¹¹ Andrew de Lotbinière McDougall, Dipen Sabharwal, et al., *Mandatory Time Limit for Rendering Awards Under Indian Law: How Good Intentions Can Lead to Bad Outcomes*, 2 INDIAN JOURNAL OF ARBITRATION LAW 5 (2017).

³¹² *Id.*

³¹³ See generally MICRONOMICS ECONOMIC RESEARCH AND CONSULTING, ROY WEINSTEIN, CULLEN EDES, et al., *Efficiency and Economic Benefit of Dispute Resolution through Arbitration when Compared with U.S. District Court Proceeding*, (March, 2017), available at http://www.micronomics.com/articles/Efficiency_Economic_Benefits_Dispute_Resolution_through_Arbitration_Compared_with_US_District_Court_Proceedings.pdf (Last visited on February 10, 2018) (According to the report the average duration of an arbitration proceeding is about 11.6 months).

³¹⁴ This solution involves problems of its own as a recalcitrant party may not agree to the extension of the time limit.

“[29A. **Time limit for arbitral award.**—(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation.—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

- (3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.
- (4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

- (5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.”

One way to make this section more suitable to appellate arbitration would be to insert the phrase “like pending internal review” post “sufficient cause” in §29A (5) as an example. However, this would mean that parties will have to apply to the court for the extension and that may risk the confidentiality of the procedure. A better way to go about it is to make appellate arbitration an exceptional case and such that it is viewed as a distinct procedure on which the rules of this section similarly apply. To effect this, the section needs to be amended as follows:

“[29A. **Time limit for arbitral award.**—(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation.1.—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on

the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

Explanation 2.—For the purpose of this sub-section, internal review proceedings are to be treated as fresh arbitration proceedings on which the provisions of this section will similarly apply”

The incorporation of said explanation will give parties a time of twelve plus six months to complete appellate arbitration, which in our view should be more than enough in almost all the cases. Moreover, this amendment will help preserve the confidentiality of the proceedings as the parties will not be required to apply to a court for the extension.

3. Section 34

As mentioned before,³¹⁵ in regard to annulment action, there is nothing in the Indian Arbitration Act *per se* to prevent parties from approaching the court while they may still have alternative remedies within the realm of arbitration itself. Apart from other considerations, the government has been promoting arbitration in order to reduce the huge backlog of cases that Indian judiciary has been dealing with. In this light, the Indian public policy would be in favour of an out-of-court settlement wherever it is possible. Moreover, the lack of provisions to restrain parties from approaching the court also causes the risk of a multiplicity of proceedings.³¹⁶ Although the courts will give primacy to a clause in arbitration to prevent pre-mature statutory appeals,³¹⁷ a statutory obligation to exhaust remedies within arbitration will help in scenarios where such a clause may be absent. Such express provision will also help to restraint eager courts from giving into anti-arbitration predilections in asserting jurisdiction when simultaneous jurisdiction exists with a non-judicial forum. Thus, to prevent parties from taking the statutory recourse to set aside an arbitral award while they may still have contractual recourse, suitable amendments are required in §34 of the Act. The relevant parts of the section stand as follows:

“34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).”

On the lines of the English Arbitration law,³¹⁸ we propose to amend the part as follows:

³¹⁵ See discussion under Part VII.F.

³¹⁶ *Id.*

³¹⁷ See, e.g., McDonalds Pvt. Ltd. v. Vikram Bakshi, 232(2016) DLT 394, ¶¶61-63.

³¹⁸ The Arbitration Act, 1996, §70(2)

“34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

An application may not be brought if the applicant or appellant has not first exhausted—

- (a) any available arbitral process of appeal or review, and
- (b) any available recourse under section 33 (correction of the award).³¹⁹

This amendment in sub-section 1 will also entail corresponding amendments in sub-section 3 which lays down the time limit within which recourse application can be made. Currently, the relevant portion of sub-section stands as follows:

“(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:”

We propose to amend the sub-section as follows:

“(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal or, if there has been arbitral process of appeal or review, from the date when the applicant or appellant was notified of the result of that process:”

4. Section 35

Pursuant to the Supreme Court’s judgement in *Centrotrade*, the distinction created between the final and non-final awards should also be statutorily recognised to avoid any ambiguity. Just like §2(c), §35 also needs to be amended to recognise this distinction. Currently, §35 stands as follows:

³¹⁹ Currently, the Arbitration Act has no provision to restrain the parties from approaching the court under section 34 in regards to errors that can be corrected under section 33 of the Act.

“**35. Finality of arbitral awards.**—Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.”

In accordance with the *dicta* in the *Ralia Ram* case,³²⁰ we propose to amend the section as follows:

“**35. Finality of arbitral awards.**—Subject to this Part, unless otherwise agreed by the parties, an arbitral award shall be final and binding on the parties and persons claiming under them respectively.”

5. Section 36

Under Arbitration Act wherein domestic awards automatically become enforceable like a decree of the court, it is possible that a party may move for execution of the first award after ninety days of pronouncement even when an appellate arbitral appeal is pending, or, the time for filing such an appeal has not lapsed. Although, if the proposed amendment in §2(c) is brought into effect, then the non-final arbitral awards may not be enforceable anymore. Under §36, the precondition for an award to become enforceable is the expiry of the time for making an application to set aside the arbitral award under §34. By virtue of the proposed amendment in §2(c), the only award for the purpose of enforcement under this section will be the final arbitral award. Nonetheless, for the sake of better clarity, the section may be amended to prevent pre-mature enforcement of arbitral awards.

Currently, the relevant part of the section stands as follows:

“**36. Enforcement.**—(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.”

We propose to amend the section as follows:

“**36. Enforcement.**—(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code

³²⁰ Union of India v. A.L. Rallia Ram, AIR 1963 SC 1685 (“The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement”).

of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

Explanation.— An arbitral award shall not become enforceable if an arbitral appeal is pending against the award or, if the time for making such an appeal has not expired, or if any other criteria, that parties may have prescribed to make the award non-final, continues to be operative.’

B. RECOMMENDATIONS FOR DRAFTING AN EFFECTIVE APPELLATE ARBITRATION CLAUSE

Arbitration is not a one-shoe-fits-all system of dispute resolution.³²¹ The party autonomy to craft procedure according to the particular needs of the case forms the bedrock of arbitration.³²² Such autonomy over the choice of procedure should also be extended to the proceedings at appellate level as the expectation of the party regarding the nature and the extent of review may differ on a case to case basis. Provided parties have such autonomy to craft their procedure, we suggest certain contractual recommendations to maximise the utility of appellate clauses, both in institutional and *ad hoc* arbitration, such that there is a minimum implication on the overall efficiency of the arbitration proceedings.³²³

1. Jurisdiction

Ordinarily, due to the principle of *Kompetenz-Kompetenz*, any question regarding the issue of the jurisdiction of the appellate tribunal will be decided by the tribunal itself.³²⁴ This may lead to delay in the enforcement of an enforceable award rendered at the first instance. It may happen during the enforcement proceeding that an opposing party may raise the issue of the unutilised option of appeal despite the expiry of the time for making such an appeal. In such a scenario, the Court will not be able to continue with the enforcement proceedings as it would be up to the arbitrators at the appellate panel to decide whether the limitation period for filing an appeal has been triggered. This will entail the unnecessary formation of an appellate panel and delay in time till they take to decide the issue of the jurisdiction.

³²¹ Heiskanen, *supra* note 108.

³²² See Sunday A. Fagbemi, *The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality*, JOURNAL OF SUSTAINABLE DEVELOPMENT LAW AND POLICY 6, 222 (2015).

³²³ It is suggested that parties change the parameters provided in recommendations pertaining to composition of arbitral tribunal, time limit *etc.* as per their convenience depending on the specifics of the case.

³²⁴ See, e.g., The Arbitration and Conciliation Act, 1996, §16(1) (Grants the power to arbitration tribunal to rule on its jurisdiction).

While this may help the recalcitrant party to delay the enforcement of the award, the winning party's chances of efficiently enforcing the award may suffer. Hence, at the time of drafting the contract, wherever it is allowed, it might be in the interest of both the parties to limit the ability of the appellate tribunal to have a say in regard to its jurisdiction and the maintainability of the appellate proceedings post the expiry of the limitation period. Any dispute relating to ability to arbitrate then may be taken to courts as preliminary issue in interest of economic and temporal efficiency.³²⁵

2. Scope of Appeal

As discussed in detail in various preceding parts, loss of efficiency in arbitration due to appellate review is one of the biggest concerns that parties face while incorporating such clauses. Hence, it is important to adopt a procedure for appeal that ensures not only fairness but also the overall efficiency. One way this can be done is by limiting the scope of review for the appellate proceedings.

While there should be a full review on grounds of procedural defects, review on substantive grounds should be limited. Though few institutes like CEA provide for *de novo* review where the entire arbitration is carried out again,³²⁶ most institutes do limit appeals mostly to the questions of law and facts.³²⁷ Except in certain high-stakes cases where highly technical and complex issues are to be determined, *de novo* appeals are usually undesirable as it leads to an unnecessary proliferation of the cost and time involved.³²⁸ On the other hand, appeals that are limited to issues of facts and law will suffice the need for error correction without causing much harm to the efficiency of the arbitral procedure.³²⁹

Hence, we recommend limiting the scope of appeal only to the issues of facts and law. Going one step further, we also recommend limiting the scope of appeal only to the issues of law in types of arbitration which do not depend extensively on the fact-based determination. Conversely, appeals based on facts also should mandatorily be provided in arbitration disputes like construction, elections, employment, insurance, labour and patent disputes which heavily depend on fact determination.³³⁰ Further, if parties wish they can set a monetary threshold for the amount in the award for invoking appellate arbitration. This will ensure that valuable time is not lost in re-arbitrating small claims.

³²⁵ See *Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.*, (2000) 8 SCC 159, ¶13, 19;

³²⁶ Arbitration Rules of The European Court of Arbitration, 2015, Art. 28.4.

³²⁷ See, e.g., AAA Optional Appellate Arbitration Rules, 2013, A-10.

³²⁸ Carreteiro, *supra* note 117, 207.

³²⁹ *Id.*

³³⁰ Paul B. Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, in AAA HANDBOOK ON COMMERCIAL ARBITRATION (AAA, 2nd ed., 2010.) (In said arbitrations it has been held that fact determination place a decisive role hence an appeal based on facts becomes more imperative).

3. Nature of Remedy

On appeal, the usual remedies include modification, affirmation, reversal, vacation, and substitution.³³¹ On modification, the appellate tribunal may change certain parts of the award which it deems erroneous.³³² On affirmation or vacation, the appellate panel merely confirms or denies the operation of the award rendered at the first instance.³³³ On reversal, the appellate tribunal may reverse the award where the error in the first instance can be corrected simply by switching the position of parties *vis-à-vis* the award, without requiring modification in the content of the award.³³⁴ On remand, the award goes back to the original appellate tribunal with suggested corrections.³³⁵ The appellate arbitral tribunal may wield authority to grant any one or a combination of the aforementioned remedies.

We advise against the use of remand as a remedy as it may be inefficient when compared to the other two remedies. An appellate tribunal that has the authority to identify the error should also be given authority to accordingly modify or substitute the award. Further, the use of remand as a remedy may run into trouble with *lex arbitri* of jurisdictions as many jurisdictions require arbitral tribunal to declare themselves *functus officio* post the pronouncement of the award.³³⁶ Recognising the problem with the remedy of remand, almost all the major arbitral institutions have prohibited remanding of cases as away of error correction.³³⁷ In case of modification and reversal, we also recommend parties to include a clause to declare such modified or reversed award to have substituted the first instance award. Such modified or reversed award should also be declared to be the final award and the only ones for the consideration of enforcement proceedings.

4. Time Limit

Yet another way in which the problem of increased cost and time can be tackled is by fixing time limits within which review proceedings need to be completed. It would be unwise to give arbitrators a free rein on time in appellate proceedings, especially when parties limit the scope of the review for the sake of efficiency. In average claim dispute with simple issues of facts or law which require no evidentiary rehearing, we recommend a short timeline. In case there is a hearing of evidence, a longer duration may be provided.

Regarding high claim disputes which ideally would require a three-member arbitral tribunal, we recommend the adoption of expedited procedures

³³¹ See Table 1: 'Scope of Appeal'.

³³² See generally BLACKABY et al., *supra* note 89, *Chapter 24: Challenge of Arbitral Awards*, 569.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ See, e.g., The Arbitration and Conciliation Act, 1996, §32 (1).

³³⁷ See discussion under Part III.

for the determination of simpler issues. In case of more technical and complex dispute, the parties may consider increasing the timeline to one year. In any case, an appeal based on limited grounds should never be allowed to take more than one year for completion.

5. Composition of Arbitral Tribunal

The quality of the award rendered by the appellate panel will largely depend on the composition of the arbitral tribunal. As discussed before, the expectations regarding the quality of the award will obviously be higher at the appellate level, which, again will obviously depend on the quality of arbitrators among other things. Hence, we recommend against the usual way of appointment of the arbitrator where the parties appoint one arbitrator each, who in turn jointly appoint the third arbitrator. Commentators note that in such an appointment process, party appointed arbitrators try to look out for the appointing party's interest and the third arbitrator is the only neutral arbitrator.³³⁸ It must also be worth considering for the parties to not appoint arbitrators from the first-instance panel as it has been pointed out that it may lead to allegations of bias.³³⁹

In this light, we recommend appointing a more neutral panel at appellate level as it would enable a delivery of more objective award. Change in the policy of unilateral appointment may help in promoting objectivity within the appellate arbitral tribunal. In case of institutional arbitration, to inject a sense of objectivity in the appellate award, almost all the major arbitral institutions restrict party autonomy to a degree in choosing the arbitrators at the appellate stage.³⁴⁰ While few institutions like CEA totally restrict the autonomy of parties to choose appellate arbitrators, most other provide parties with some say in the appointment.³⁴¹ The latter category of institutions provides the choice generally in the form of a selected pool of arbitrators who they deem to have expertise in the issues at the appellate stage.³⁴² Arbitrators are then appointed from the list either by the choice of the parties or by the choice of the institution if parties fail to arrive at any decision.

We recommend the latter approach of appointment of appellate arbitrators where parties are involved to an extent in the process of the appointment. In fact, we advocate a tweaked version of the said approach where the appointment process begins with parties prescribing the qualifications and area of expertise that they expect in the arbitrators at the appellate stage. The arbitral tribunal then, based on the requirements prescribed by the parties, should provide a list of

³³⁸ Carreteiro, *supra* note 117, 213.

³³⁹ *Id.*, 202.

³⁴⁰ See discussion under Part III.

³⁴¹ *Id.*

³⁴² See, e.g., AAA Optional Appellate Arbitration Rules, 2013, A-5 (“The appeal tribunal shall be selected from the AAA’s Appellate Panel, or, if an international dispute, from its International Appellate Panel”)

arbitrators from which parties finally appoint the arbitrator. This method will provide a reasonably neutral arbitral tribunal and at the same time will have minimum implication on the autonomy of the parties. Parties in ad hoc tribunal, devoid of such assistance in appointing appellate tribunal, will have to appoint the arbitrators on their own. However, the recommendations for not appointing arbitrators from previous panel remains similarly applicable.

Regarding the numerical composition of the tribunal, we recommend the appointment of a sole arbitrator at the appellate level in case of average claims dispute consisting of simple issues of facts and law. In cases of complex issues of law and facts and those involving large claims, we recommend the appointment of a three-member panel at the appellate level.

6. Disincentives against frivolous appeals

It is very much a possibility that appeal clauses may be used by losing parties to delay the enforcement of soundly rendered awards. Losing parties, invariably, look for avenues to either overturn the awards or delay the enforcement of the award. This tendency may lead to defeated parties unnecessarily appealing the award as a last-ditch effort to receive a favourable outcome or delay an unfavourable outcome.³⁴³ Hence, at the stage of drafting, parties might want to consider adding clauses to disincentivise non-meritorious and frivolous appeals.

There are multiple ways in which such disincentives can be introduced in the appellate arbitration clause. One way suggested by Knull and Rubins is to include the English legal system's rule of cost-shifting.³⁴⁴ Under this clause, if the appellate award is affirmed at the appellate stage, the party instituting the appeal will need to pay all the reasonable legal costs that the other party might have incurred as result of frivolous or vexatious appeal.³⁴⁵ Parties can also agree to a clause empowering the arbitral tribunal to award additional penalties in case it deems the appeal to be based on frivolous contentions.

IX. CONCLUSION

It is a common adage in arbitration that finality is a virtue only if the award is correct. The risk of being bound by an erroneous award has driven many parties away from resolving their dispute through arbitration. Corporate entities and parties with high stake claims have especially been apprehensive about the lack of error correction mechanism in an otherwise efficient way of dispute resolution. It is to address these apprehensions that internal appeal mechanisms have evolved in arbitration. The case for allowing internal appellate procedures

³⁴³ BLACKABY, PARTASIDES, et al., *supra* note 89, 569.

³⁴⁴ Knull & Rubins, *supra* note 11, 575.

³⁴⁵ *Id.*

in arbitration rests mainly on following two grounds: (i) it will make arbitration a fairer system of dispute resolution (ii) parties should have the autonomy to agree on such procedures should they need it.

Present day arbitration consumers, most of who are financially well endowed, clearly recognise flexibility, party autonomy, accuracy and precision as a higher priority. Thus, internal review procedures are desirable in order to nurture the authenticity and integrity of arbitration as a whole. In context of the larger debate of the crisis of legitimacy in arbitration,³⁴⁶ the conceptualisation of fairness in forms like internal appeal mechanisms has become the need of the hour. The absence of any safeguard within the arbitration regime to secure an error free award severely undermines its status as a viable dispute resolution mechanism. Moreover, arbitration as a private transaction necessarily needs to accord the parties the right to choose their own procedures and mechanisms that promote their joint interest and helps them achieve a fair award. Hence, if parties seek to make their award fairer and more accurate, they should have the ability to choose a system of internal review according to their own prerogative.

However, our advocacy for the use of internal appeal mechanism comes with the acceptance that these procedures tend to have an impact on the economy of cost and time. For this reason, we suggest that these procedures should be used primarily in high stake commercial arbitrations like international commercial arbitrations where economy is a consideration secondary to the quality of adjudication.³⁴⁷ The suggestions given in the paper may be utilised to minimise the said adverse impact to a large extent. Although, for stakeholder to whom Arbitration is more than anything a time and cost wise efficient system, internal review procedures, even with minimised adverse effects, will still seem unnecessary or counterproductive. But what ultimately matters is that arbitration regime recognises and accounts for the dynamic needs and motivation of the consumer base as internal review procedures are definitely in demand. Major arbitration institutes all over the world now provide for procedures akin to internal review for parties to choose. Similarly, jurisdictions around the world have begun providing for a supportive legal framework for internal appeal procedures.

The *Centrotrade* judgement of the Supreme Court of India evinces the growing recognition for internal appeal procedures. However, this recognition is merely the first step in achieving a more just and fair arbitration regime in India. After judiciary, the responsibility lies with the legislators. The current Indian arbitration legislation never envisaged the possibility for an internal appeal procedure. Therefore, the provisions of the legislation are outdated and inadequate to accommodate such a procedure. Provisions which specifically relate to time, finality of award, appeal to national courts, *et al.* need to be reconsidered so as to align them for a possibility of internal appellate review. In pursuance of the same,

³⁴⁶ See generally Schill, *supra* note 55.

³⁴⁷ See QMSIA Survey 2018, *supra* note 92.

the procedures followed by other countries and institutions worldwide provide for a sound guideline for India to follow and adopt. Similarly, arbitration institutions and other stakeholders involved in drafting of arbitration rules need to come up with rules for appellate review and supplement the legislative framework when it comes up. Finally, responsibility also lies with the arbitration community and academia to help reduce the unnecessary skepticism against the internal appeal procedures. By way of this paper we seek to further the said objective by providing analytical discussion on host of theoretical and practical issues that lead to skepticism towards internal review procedures. We hope that this article further adds to the recognition of utility and applicability of internal review procedures and contributes to discourse on its usage especially in Indian context where academic discussion on the issue is largely non-existent.

ANNEXURE-I

In the light of the recommendations suggested in the paper, we propose a model appellate arbitration clause that the parties in an ad-hoc arbitration³⁴⁸ may incorporate in their standard arbitration agreement. Ad hoc arbitration rules are generally based on UNCITRAL model law or institutional rules which conform to the applicable *lex arbitri*.³⁴⁹ However, currently, there are no nationally or internationally recognised model appellate arbitration rules and none of the major Indian arbitral institutions provide for a dedicated body of rules for appellate arbitration that parties can adopt for ad-hoc arbitration. Moreover, the Indian law on arbitration, as it stands, is not well suited to handle the modalities of the appellate arbitration and hence a poorly drafted contract may complicate the process further and put the parties at risk of tedious litigation. Thus, these model clauses may serve as guidelines for the parties in case of ad hoc arbitration to develop an effective arbitration agreement for appellate review.

RULES FOR APPELLATE ARBITRATION

A. AGREEMENT OF PARTIES

A-1. In the event of dispute, controversy or claim arising out of the first instance award,³⁵⁰ either party will have the right to appeal to a second arbitration panel in accordance with the rules prescribed under this agreement.

³⁴⁸ If the parties opt for an institutional arbitration, they will be subjected to the appeal procedures as stipulated under the arbitral organisation's rules.

³⁴⁹ Landolt & Koch, *Institutional or Ad hoc Arbitration?*, October, 2017, available at <http://www.landoltandkoch.com/ressources/institutional-or-ad-hoc-arbitration/> (Last visited on August 3, 2018).

³⁵⁰ For an efficacious review there needs to be reasoned award from the first instance arbitration. Hence, it is imperative for the parties opting for option of appeal to stipulate in the arbitration agreement that the first instance award be reasoned and in writing.

A-2. The appeal will be limited only to *[questions of fact/questions of law/ questions of law and fact]*.³⁵¹

A-3. The results of this second arbitration will be final and binding on both the parties. Judgment upon the award may be entered in any court having jurisdiction.

B. STATUS OF THE FIRST INSTANCE AWARD

The parties hereby agree that the first instance award shall not be considered final for submission to court for the purpose of modification, enforcement, correction or vacation unless:

The time limit of *[___]* calendar days, pursuant to the rule C.1. of this agreement, lapses, or,

The first instance award is mutually agreed on by both parties claiming under it.

C. PROCEDURE FOR APPELLATE PROCEEDINGS

C.1. Notice of Appeal- In the event of any dispute, controversy or claim arising out of the first instance award, the complaining Party shall notify the other party by way of a Notice of Appeal regarding the dispute within *[___]* calendar days³⁵²; post exhaustion of which the right of the parties to appeal will be treated as forfeited.

C.2. Submissions- The submission at the appellate stage will be limited to written submissions unless either of the party requests for oral submissions. Request for oral submission must be made within *[__]* calendar days from the filing of Notice of Appeal.

C.3. Statements of Claims & Defence - The Claimants and the Defendants need to make their statements at hearing/written proceedings in accordance with the rules prescribed for first instance award.

³⁵¹ See Part IX.B.2 for a discussion on scope of appeal. See also Table 1: 'Grounds for granting an appeal', for other standards that may be adopted as ground for appeal.

³⁵² Ideally notice period should not be of more than 30 days as it may lead to unnecessary delay in enforcement of award. See Table 1: 'Limitation period for filing an appeal', for a review of notice period prescribed under various arbitral rules.

C.3. Time Limit: The award shall be made within a period of [___] from the service date of last brief.³⁵³

D. COMPOSITION AND SELECTION OF APPELLATE ARBITRAL TRIBUNAL

The appellate arbitration proceedings shall be conducted by [one/three]³⁵⁴ arbitrator[s].

D.1. Single-member Appellate Arbitral Tribunal- In case of a single member arbitral tribunal, the parties shall mutually decide on a single neutral arbitrator. If the parties fail to appoint the arbitrator within [__] calendar days from the date of filing of Notice of Appeal, the procedure under Section 11 of the Arbitration and Conciliation Act, 1996 will apply.

D.2. Three-member Appellate Arbitral Tribunal- In case of a three-member arbitral tribunal, the parties shall individually appoint an arbitrator each. The two arbitrators so appointed will thereafter mutually decide upon a third neutral arbitrator. If the parties/arbitrators fail to appoint the arbitrator(s) within [__] calendar days, the procedure under §11 of the Arbitration and Conciliation Act, 1996 will apply.

E. POWERS OF APPELLATE ARBITRAL TRIBUNAL

E.1. Decision- affirm, modify or substitute the first instance award. The Tribunal cannot remand the dispute to the original Tribunal or order a de novo hearing.

E.2. Ex-parte Award- If without showing sufficient cause either of the parties fail to present their case, refuses to participate or unilaterally withdraw from the appeals process, the Tribunal will have the jurisdiction to issue the award in absentia. Such award will be final and binding on both the parties.

E.3. Jurisdiction- The Appellate Arbitral Tribunal has the power to decide on any dispute relating to its jurisdiction except in cases where the time limit for filing an appeal has lapsed.³⁵⁵

E.4. Adverse Costs- Tribunal has the authority to impose reasonable adverse costs on the Claimant if in its opinion that the appeal is vexatious or frivolous.

³⁵³ See Discussion under Part VIII.B.4 on time limits. See also Table 1: 'Time Limit', for general trends regarding time limit for completion of appellate arbitral proceedings.

³⁵⁴ See Discussion under Part VIII.B.5 on composition of arbitral tribunal. See also Table 1: 'Arbitral tribunal', for general trends regarding number of arbitrators appointed at appellate stage.

³⁵⁵ See Discussion under Part VIII.B.1 for the relevance of the clause.

F. ARBITRAL AWARD

F.1. Form & Contents of Award- The Appellate Arbitral Tribunal's award shall be a reasoned award and include a concise summary of the decision unless the parties agree otherwise.

F.2. Finality- The award rendered by the Appellate Arbitral Tribunal will replace or merge with the first instance award, as the case may be. The award so rendered will be final and binding on the parties thereto.