Abhay Raj & Ajay Raj, *Striking at the 'One-Kick-At-The-Can' Character of Arbitration Through the Appellate Arbitration Mechanism,* 9(2) NLUJ L. Rev. 76 (2023).

STRIKING AT THE 'ONE-KICK-AT-THE-CAN' CHARACTER OF ARBITRATION THROUGH THE APPELLATE ARBITRATION MECHANISM

~Abhay Raj & Ajay Raj[*]

ABSTRACT

Should things go south, arbitration is a distinctive dispute resolution mechanism as opposed to litigation for the former's feature of the finality of arbitral awards. By design, a court review of arbitral awards is permitted only on overly limited grounds pertaining to enforcement or set-aside applications. This leave parties with no recourse at the 'one-kick-at-the-can' character of arbitration, particularly when there exist obvious errors in arbitral awards. For instance, a party could not appeal against an apparent error committed by the arbitral tribunal in the calculation of damages. If an appellate arbitration

[*] Ajay is an Associate at an Indian law firm. He holds a B.B.A., LL.B. (Hons.) degree from Symbiosis Law School, Pune. Abhay Raj is an undergraduate law student at O.P. Jindal Global University, Sonepat, India.

mechanism would have existed, these errors, inter alia, could have been (perhaps) rectified by the appellate tribunal upon request of either party. A few national systems (e.g., United States, United Kingdom, France) and arbitral institutions (e.g., the Conflict Prevention and Resolution Appeal Procedure, the JAMS Arbitration Procedure, the European Court of Arbitration Rules) have, however, attempted to cure this lacuna. This article intends to identify if there is a need for an appellate arbitration mechanism. It encourages a discourse on devising an efficacious appellate arbitration mechanism, taking guidance from the existing appellate review mechanis.

TABLE OF CONTENTS

I. INTRODUCTION

'*For the reasons set out above, the Arbitral Tribunal rejects Claimant's (or Respondent's) claims and* […].' A similar statement ensues after a time consuming and complex arbitration. It is undisputed that this statement is made after extensive deliberation by the arbitral tribunal, where they considered *inter alia* the submissions made by the parties, evidence, and parties' witnesses. However, the award containing this statement is circumscribed by the widely-accepted principle of international arbitration — finality of the arbitral award[1] — which restricts the competence of courts to review the arbitral award.

It is only in exceptional circumstances, such as non-compliance with the arbitration agreement, deprivation of the parties' right to be heard, incapacity of a party, or violation of public policy, among others,[2] that a party may raise a challenge before a national court to annul the arbitral award. In so doing, the courts cannot probe into the merits of the dispute, since substantive review of arbitral awards remains virtually absent in arbitration laws.[3] The rationale behind such absence was delineated in *Hall Street Associates L.L.C. v. Mattel Inc.*,[4] wherein it was held that expanding the scope of judicial review would be in dissonance with the tenet of finality; in

---

[1] GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 8 (2nd ed. Kluwer Law International 2012).

[2] Arbitration and Conciliation Act, 1996, § 34, No. 26, Acts of Parliament, 1996 (India); Arbitration Act 1996, § 67 and 68, Ch. 23 (UK).

[3] Hans Smit, *Contractual Modifications of the Arbitral Process*, 113(4) PENN STATE LAW REVIEW 995 (2009); Born, *supra* note 1.

[4] Hall Street Associates L.L.C. v. Mattel Inc., 552 U.S. 576 (2008).

turn, contravening the intent behind resorting to arbitration—for its features like confidentiality and neutrality.[5]

The absence of an appeal process leaves parties without recourse to challenge such errors. For instance, parties cannot appeal against errors made by the arbitral tribunal in calculating damages. The existence of an appellate arbitration mechanism could potentially rectify such errors upon request, as will be discussed below. For that purpose, in Part I, the commercial need of an appellate arbitration mechanism in international commercial arbitration is discussed, and thereafter, whether the appellate mechanism will be beneficial or not is elaborated upon in Part III.

Further, this article addresses the following concerns. *First*, visibly the New York Convention is the preeminent tool for the enforcement of arbitral awards, with 168 contracting parties, including the hubs of arbitration such as the United Kingdom, Singapore, and Paris, among others.[6] Thus, for an appellate arbitral award to be enforceable, it should interact with the Convention affirmatively. This question is addressed in Part IV. *Second*, the potential criticisms to the appellate mechanism *inter alia* the legitimacy discourse (achievement of high error correction in appeals), the threshold for review and the procedure for constituting the appellate tribunal are charted. With the criticisms and recommendations in Part V,

---

[5] Born, *Supra* note 1; Carreteiro Mateus Aimoré, *Appellate Arbitral Rules in International Commercial Arbitration*, 33(2) J. INT'L ARB. 185 (2016).

[6] New York Arbitration Convention, *Contracting States*, NEW YORK CONVENTION https://www.newyorkconvention.org/countries.

an attempt is made to improve the overall efficacy of appellate arbitration, thereby leading us to conclude in Part VI.

II. THE COMMERCIAL REQUIREMENT FOR HAVING AN APPELLATE ARBITRATION MECHANISM

Commercially, i.e., in the interests of the parties, there are compelling arguments in favor of having a mechanism for substantive review of arbitral awards. To clarify, consider that in a complex arbitration, damages worth $24 million have been claimed by the Claimant against the Respondent. The arbitral tribunal granted damages worth $9.12 million (i.e., 38% of the claimed amount) to the Claimant. A brief perusal of the award however shows that the tribunal has committed an 'obvious error'[7] (herein, obvious error manifests (mis)application of the evidence or the law) in granting the damages.

Rather, there emanates two possibilities; *one*, either damages worth $16.8 million (i.e., 70% of the claimed amount) should have been awarded; or *two*, less or no damages should have been awarded. In such a case, the rights of the either party gets prejudiced. Strictly speaking, at present, neither of them has a remedy of appeal as the courts cannot embark on an assessment of the merits of the case. This is not a mere hypothetical situation. A similar situation arose in *Westerbeke Corp v. Daihatsu Motor Co Ltd.,* wherein the Second Circuit Court concluded that *"our standard of review*

[7] James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15(9) AM. REV. INT'L ARB. 25 (2004).

constrains us to affirm an arbitrator's judgment even if a court is convinced he committed serious error."[8]

What recourse do either party have in such a situation? The answer is to suffer the atrocities of a likely obvious/serious error committed by the arbitral tribunal. However, this should not be the ideal case, and it is at this juncture that an appellate arbitration mechanism becomes pertinent. An appellate arbitration mechanism provides the parties with an opportunity to conduct another arbitration proceeding in order to resolve the error if any. Both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") and the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") do not recognise appellate arbitration procedure.[9] However, in the existing scholarship, the concept of arbitration appeal has been explored in numerous ways.

An attempt has been made to discern the pros and cons of this concept. For example, on the one hand, it has been put forth that arbitration appeals are "*costly and time-consuming two-tiered proceedings that begin with private procedures but give way to public do-overs*."[10] In this sequel, it has also been argued that having such a mechanism goes against the interests of

---

[8] Westerbeke Corp. v. Daihatsu Motor Co. Ltd., 304 F3d 200 (7th Circ 2000).
[9] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, *entry into* force June 7, 1959, art. V; United Nations Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration (as Amended in 2006), June 21, 1985, art. 35(1).
[10] Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis*, 37 GA. L. REV. 123, 181-182 (2002).

neutrality, cost, duration, and finality of the award.[11] On the other hand, concerns have been raised for ensuring a *fair* resolution of dispute rather than a *final* resolution.[12] The indelible principle of party autonomy also vouches for appeals in arbitration.[13] Both the viewpoints are equally forceful.

The exigency to settle the debate is also evident from a recent survey,[14] where the arbitration community self-engaged in answering the issues on appellate arbitration.[15] The survey raised the following concerns broadly:

(i) Whether a right to appeal against an arbitral award is desirable;[16]

(ii) Whether the respondents would prefer an internal right of appeal offered by an arbitral institution to an appeal to a national court. If yes, what are the desired features of such an internal mechanism?[17]

---

[11] JAN PAULSSON, THE IDEA OF ARBITRATION 291 (Oxford University Press 2013).
[12] Caroline Larson, *Substantive Fairness in International Commercial Arbitration: Achievable through an Arbitral Appeal Process*, 84(2) INT'L J. ARB. MED. D. MGMT. 104 (2018).
[13] GAILLARD E ET. AL., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 726 (Kluwer Law International 1999).
[14] Bryan Cave Leighton Paisner, *A Right of Appeal in International Arbitration – A Second Bite of the Cherry: Sweet or Sour?*, ANNUAL ARBITRATION SURVEY (May 2020) https://www.bclplaw.com/images/content/1/8/v2/186066/BCLP-Annual-Arbitration-Survey-2020.pdf.
[15] *Id.*
[16] Paisner, *supra* note 14.
[17] *Id.*

The results of the survey are enthralling. About 50% of the respondents had, in their experience, encountered an 'obviously wrong' decision given by a tribunal. Notwithstanding the foregoing, 71% of the respondents claimed that they do not intent to pledge the tenet of the finality of arbitral awards with appellate arbitration mechanism. Not only this, but they also claimed that a decision to have appellate mechanisms will make arbitration a less favourable dispute resolution mechanism. Similarly, 62% stated that the arbitration process would become lengthy and 60% felt that it would make arbitration an expensive affair.

In contrast, 51% claimed that without an appellate process, an incorrect decision would cause serious deprivation to the parties. Several other revelations were made in this survey - for example, 88% of the respondents desire the appellate arbitration process, if developed, to be winded up within a period of 6 months.[18] Owing to the varied opinions in the arbitration community, it is now imperative to settle the debate.

III. THE PURPOSE OF AN APPELLATE ARBITRATION MECHANISM

Over time, several scholars have remarked on the advantages and disadvantages of the appellate arbitration mechanism. However, in my opinion, it is arduous to establish the same without having the mechanism in existence. Thus, to understand the purpose of an appellate arbitration

[18] *Id.*

mechanism from a more practical viewpoint, this article takes a cue from the existing mechanisms or the reforms that have been proposed.

A. POTENTIAL APPELLATE REVIEW MECHANISM REFORM IN INVESTOR-STATE DISPUTE SETTLEMENT

Since 2017, the UNCITRAL Working Group III commenced reforming the Investor-State Dispute Settlement ("**ISDS**").[19] They made two systematic reform proposals: (i) the creation of an appellate review mechanism; and (ii) the formation of a multilateral investment court.[20]

Before delving into the arguments for ISDS reform, a caveat is essential. Essentially, investment arbitration and international arbitration are two substantially different models. This is because international arbitration is transposed as a 'dispute resolution model,' while investment arbitration is a 'public value model.'[21] Nevertheless, like international arbitration, similar concerns pertaining to an ISDS appeal mechanism have been raised. For example, legitimacy concerns (cost, duration, lack of consistency, and others) and the need to ensure an efficacious investment arbitration procedure persists. Thus, it is imperative to juxtapose the benefits that could be achieved in investment arbitration *vis-à-vis* international arbitration.

---

[19] Margie-Lys Jaime, *Could an Appellate Review Mechanism "Fix" the ISDS System?*, KLUWER ARBITRATION BLOG (Feb 2021) http://arbitrationblog.kluwerarbitration.com/2021/02/11/could-an-appellate-review-mechanism-fix-the-isds-system/.

[20] *Id.*

[21] Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 INT'L LAW AND POLITICS 1109, 1114-1123 (2012).

i. Lack of Consistency and Uniformity

As commentators have noted, as the investment arbitral tribunals are not bound by the precedents, inconsistent decisions have been rendered.[22] In contrast to domestic court systems and other types of arbitration, investment arbitration grants tribunals greater leeway in their decision-making process, without the obligation to establish binding precedents that would serve as guiding principles for future cases. This heightened flexibility has the potential to result in varying understandings of legal principles and produce inconsistent outcomes in similar cases. An appeal mechanism could however provide for **consistency** in the decisions of the tribunals. Indeed, in commercial arbitration, the concept of 'binding' precedential value system does not apply as commercial disputes do not add to law-making.

However, as Kauffman-Kohler has observed, the concept of 'persuasive precedent' applies in commercial arbitrations.[23] Moreover, it has been suggested that a demarcation should be drawn between the decisions that entail a rule – which may be used in resolving future disputes – as opposed to a specific factual matrix dispute.[24] To demonstrate the implications of lack of consistency in international arbitration, reliance must

---

[22] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, October 14, 1966, Art. 53(1).

[23] Gabrielle Kauffmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse*, 23(3) ARB INT'L 357, 374 (2007).

[24] Francois Perret, *Is there a Need for Consistency in International Commercial Arbitration?, in* PRECEDENT IN INTERNATIONAL ARBITRATION (Emmanuel Gaillard, Yas Banifatemi (eds.), Int'l Arb Inst 2008).

be placed on the façade of *Putrabali v. Rena*,[25] which is viewed as an autonomous decision with essentially no forum of justice in respect to the enforcement of an international arbitral award as an 'international decision of justice.'

In yet another illustration concerning the determination of the proper law of an arbitration agreement, the inconsistency is highlighted. The England and Wales Court of Appeal ("**EWCA**") in *Sulamérica v. Enesa* (2012) had concluded the three-stage test to determine the governing law of the Arbitration Agreement.[26] It enunciated that the courts or tribunals must inquire into (1) express choice-of-law, (2) implied choice-of-law, and (3) 'closest and most real connection' test.[27] This decision has been recognised by several jurisdictions including Singapore,[28] the hub of arbitration.[29]

However, in 2020, the EWCA itself in *Kabab-Ji v. Kout Food* increasingly focused on the first stage i.e., the express choice-of-law, wherein the Court embarked on assessing the implied intentions of the parties.[30] This clearly indicates the lack of consistency in international

---

[25] Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices 05-18.053 Cour de cassation 2007.
[26] Sulamérica Cia Nacional De Seguros S.A. and Ors. v. Enesa Engenharia, S.A. [2012] EWCA Civ 638.
[27] *Id.*
[28] BNA v. BNB, [2019] SGCA 84.
[29] Jane Croft, *Singapore takes top arbitration slot along with London for the first time*, FINANCIAL TIMES (May 6, 2021) https://www.ft.com/content/7942f589-8b73-4e51-aad9-7780e9fab2c0.
[30] Martin Kwan, *Kabab-Ji: Determining the Governing Law for the Arbitration Agreement Under English Law, The Emerging Focus on the Express Choice of the Parties,* KLUWER ARBITRATION

arbitration. Consequently, there is a lack of uniformity as well in international arbitration.[31] An appeal mechanism by conclusively reviewing the dispute could allow the arbitration regime to be more consistent and uniform.

ii. Accuracy

The second aspect of appeals in the ISDS is **accuracy**. Proponents have argued that in investment arbitration, an appeal procedure could succeed in eliminating error in the award.[32] Accuracy *alias* fairness is an essential tenet for international arbitration too.[33] Thus, to eliminate errors and to have an efficacious resolution of the dispute, an appeal mechanism is required.

Furthermore, from the ISDS experience, an issue that often remains a controversial point to debate upon is investor's bias. This is because of the limited pool of investors. In a similar vein, arbitrator's bias is a prevalent concept. For example, although there is strict scrutiny for appointing the party-nominated arbitrators, biasness has not been curtailed. Evidence of the debate on the subject matter of bias is the recent decision of the UK Supreme Court in *Halliburton v. Chubb*,[34] where it was held that

---

BLOG, http://arbitrationblog.kluwerarbitration.com/2020/02/24/kabab-ji-determining-the-governing-law-for-the-arbitration-agreement-under-english-law-the-emerging-focus-on-the-express-choice-of-the-parties/.

[31] William H. Knull III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?,* 11 AM. REV. INT'L ARB. 531 (2000).

[32] *Id.,* at 531.

[33] Larson, *supra* note 12, at 106.

[34] Halliburton Company v. Chubb Bermuda Insurance Ltd., [2020] UKSC 48.

there exists a duty of disclosure for arbitrators in English law. To eliminate **biasness,** which transposes as a serious risk to the error in an award, and to swiftly pave the way for **efficiency** is the third objective behind the proposal of an appeal mechanism in investment arbitration.[35]

B. JURISDICTIONAL TOUR D'HORIZON

'Commercial expediency' and the intrinsic tenet of 'finality' over 'legal accuracy' has always remained a comprehensive issue of debate in the English arbitration regime. However, the legislation, while enacting the 1996 Act, intended that right to appeal should not be abolished, and instead, should be limited.[36] In this manner, a compromise could be established between party autonomy that confers parties the discretion to adopt a procedure that suits their needs and a need for adjudication on obvious errors.[37]

In consonance with the above-laid view, the English experience offers a limited review of the awards on a *question of law* pursuant to Section 69 of the Arbitration Act, 1996.[38] It is further imperative to recognise that the head of Section 69 is entitled as 'a right of appeal on a question of law';

---

[35] Audley Sheppard & Hugo Warner, A*ppeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?*, TRANSNATIONAL DISPUTE MANAGEMENT 2 (2005).
[36] Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness Over Finality?,* 30(5) J. INT'L ARB. 531, 535 (2013).
[37] *Id.,* at 536.
[38] Arbitration Act 1996, § 69, Ch. 34 (UK).

however, a mixed question of fact and law, where investigation of fact is essential can be considered.[39]

In the author's opinion, while the cogency of the English framework is not established, it certainly aims to achieve a compromise between finality and accuracy by coining a new term of **relative finality**, which can be transposed as a tool for having 'realistic' finality by reducing the number of challenges for setting aside the award under the very limited grounds. Similarly, internal arbitral appeals, as a phenomenon of arbitration jurisprudence, is not an isolated concept in other jurisdictions as well. For instance, jurisdictions such as Austria, South Africa, and France provides for appellate arbitral review of the awards.[40] A further insight reveals that Spain, in its 2011 Spanish Arbitration Rules, provides for an internal appellate full review on merits of the case.[41]

C. THE OPTIONAL APPELLATE RULES

A cue, for this article, can be taken from the existing optional appellate rules. Indeed, the American Arbitration Association ("**AAA Rules**"), the Conflict Prevention and Resolution Appeal Procedure ("**CPR Procedure**"), the JAMS Arbitration Procedure ("**JAMS Procedure**"), and the European Court of Arbitration Rules ("**ECA Rules**") are based on the

---

[39] Northwest Host Construction Ltd. v. Co-operative Wholesale Society Ltd., [1998] EWHC Tech 339.

[40] Erin E. Gleason, *International Arbitration Appeals: What Are We So Afraid Of?,* 7(2) PEPPERDINE DIS. RES. J. 269, 287 (2007).

[41] The Spanish Arbitration Rules, 2011, art. 39.4, 39.5, Act 60/2003 of 23 Dec. on Arbitration (2013) (Spain).

idea of providing a *"basic procedural framework with stand-alone procedural supplements, which the parties could adopt on an 'opt-in' basis."*[42]

CPR Procedure, *for example*, provides that without an appellate process, the arbitration, in itself, leads to additional costs for the reason that party, to avoid probabilities of error, tries to appoint a larger tribunal.[43] At the same time, it also provides that intervention of court uncertainties such as confidentiality, the autonomy of the parties, and unnecessary delays and costs make arbitration jurisprudence a paradox.

The author acknowledges that one of the primary concerns against the appellate procedure is duration and costs. However, interestingly, the optional appellate rules provide for a robust mechanism for ensuring integrity and efficiency. As will be discussed, the appellate arbitration rules serve two purposes: (i) **minimalistic pervasion of the court uncertainties**, and (ii) the **integrity** of the proceedings by ensuring timely adjudication of the appellate dispute.

D. THE CAS REGIME

Finally, it becomes exigent to appraise the archetype of **transparency** in the international dispute resolution jurisprudence through its *de novo* internal appellate procedure, i.e., the CAS regime. The CAS Appeal Division provides for a full review in case of an appeal on the point

---

[42] William Park, *The value of rules and risks of discretion: arbitration's protean nature*, ARB. INT'L BUSINESS DISP. 528, 533 (2012).

[43] *International Institution for Conflict Prevention and Resolution,* RATIONALE (1999) https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure.

of the law or the facts from the first instance decision.[44] The idiosyncratic feature of CAS is that it serves two purposes: (i) full review of a **procedural error** on point of the law or the facts, and (ii) prevents the **sanctity of the due process**, which would otherwise be violated due to the first instance decision.[45]

Considering the pattern set above, the author, in summary, appeals in favour of the appellate arbitration mechanism. The three main arguments advanced against arbitral appeals are (i) finality, (ii) the difference between litigation and arbitration where arbitration is considered as 'get it right' in the first instance, and (iii) the potential inefficiency of an appeal mechanism.[46]

Firstly, in high-stake disputes, a party may be dubious of the commission of an error by the tribunal. As we know, *"[c]ritics … express concerns about the quality of legal reasoning in arbitration, even though conventional wisdom … suggests that international arbitral awards reflect relatively robust reasoning that is often on a par with that of decisions rendered by commercial courts*."[47] It will be pertinent to draw an analogy to claim that if concerns can be raised for legal reasoning, the same can concern merits as well. At this juncture, it is only

---

[44] The Code of Sports-related Arbitration, January 1, 2019, art. R57; Platt, *supra* note 36, at 556.

[45] *Id.*, at 556; Hoch v. Fédération Internationale de Ski & International Olympic Committee CAS 2008/A/1513 (2009).

[46] Noam Zamir & Peretz Segal, A*ppeal in International Arbitration – an efficient and affordable arbitral appeal mechanism*, 35(1) ARB. INT'L 79, 84 (2019).

[47] S.I. Strong, *Empirical Research on Legal Reasoning in Commercial Disputes – Then and Now*, KLUWER ARBITRATION BLOG, http://arbitrationblog.kluwerarbitration.com/2018/02/03/legal-reasoning-international-commercial-arbitration/.

relevant to demonstrate that in the CPR Survey, almost half of the respondents claimed that the arbitration without an appeal mechanism becomes too risky.[48] In such cases, it becomes indispensable to have an appeal mechanism in place. One may also consider the limited review of award for procedural fairness by almost all the jurisdictions.[49]

Secondly, arguably, the minimalistic intervention of litigation in international arbitration regime could form one of the most cogent reasons for devising an appellate mechanism. The consensual nature of international commercial arbitration would lose its essence if at a later stage, for the purposes of setting aside the award, the parties resort to the pool of uncertainties posed by litigation, such as lack of confidentiality, etc.

Thirdly, ardent critics of this mechanism may argue that the due process paranoia has a strong effect in international arbitration. The author believes that the sanctity of these principles would be preserved for two reasons. *One*, the concept of due process has been interpreted wrongly on the ground that increase in duration and cost would undermine the process. However, for example, international arbitrators often ameliorate proceedings by exercising their procedural discretion to sanction the unreasonable procedural requests of extension of the period of the parties, which, as a result, might lead to delays and costs.

---

[48] Thomas Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. OF INT'L ARB 297 (2014).
[49] Larson, *supra* note 12, at 108.

A question which emanates here is whether the sanction would be in dissonance with the 'due process paranoia'. The answer herein lies in the negative since in order to conduct proactive arbitral proceedings, a possible due process violation challenge should be no ground to deny the essential procedural grants.[50] Instead, a 'requisite mix of fairness and firmness' needs to be utilised.[51] Analogously, an appeal mechanism would be a product of 'fairness and firmness' and not a threat of violation of the due process of law.

To conclude, the concept of 'efficiency' is certainly misinterpreted for incorporating only time and cost. In contrast, as per the iron triangle, efficiency is a fusion of time, cost, and quality.[52] Here, quality can be understood as an award free of errors and which is enforceable.

IV. INTERACTION OF THE APPELLATE ARBITRATION WITH THE NEW YORK CONVENTION

The last word, in the preceding section, is 'enforceable'. Most obviously, the aforementioned advantages would be of no use if the appellate arbitral award is unenforceable. While this issue has received

[50] Klaus Peter Berger & J. Ole Jensen, *Due Process paranoia and the procedural judgment rule: a safe harbor for procedural management decisions by international arbitrators*, 32(2) ARB. INT'L 415 (2016).
[51] *Id.*, at 435.
[52] Jennifer Kirby, *Efficiency in International Arbitration: Whose Duty is it?,* 32(6) J. INT'L ARB. 689, 690 (2015).

attention in investment arbitration,[53] it has paradoxically remained a niche area in commercial arbitration.

To answer that question, *firstly*, a determination of the current legal regime that governs the existing appeal mechanisms in the arbitration is imperative. Generally speaking, the enforcement of foreign awards is governed by the New York Convention (**"NYC"**) and the setting aside is governed by the national laws.[54] Having said that, the three existing appeal mechanisms are (i) appeals in national arbitration law, (ii) the optional appellate rules, or (iii) the internal appeal mechanisms.

i. **Appeals in national arbitration law:** Assuming that the appeal mechanism in international commercial arbitration is governed by the national arbitration law, the enforcement would be subject to NYC. Is this assumption tenable? For instance, in Britain, section 69 of the English Arbitration Act, 1996 allows an appeal on a question of law.[55] In Australia, as well, a limited right of appeal is available in its domestic arbitration law.[56] Generally, these awards are enforceable in

[53] Albert Jan Van den Berg, *Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions,* 34(1) ARB. INT'L 156 (2019).
[54] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, *entry into* force June 7, 1959, art. V(1)(e); Berg, *supra* note 53, at 168.
[55] The Arbitration Act 1996, § 69, Ch. 23 (UK).
[56] The Commercial Arbitration Act, 2010, § 34, No. 61 (Australia). *See also* Westport Insurance Corp. v. Gordian Runoff Ltd., (2011) H.C.A. 37 (Gordian).

their jurisdiction.[57] However, in other jurisdictions, finality is still supreme.[58] Will the award be enforceable?

ii. **Optional appellate rules:** The optional appellate rules recognize the issue of setting aside and enforcement of the arbitral award. For instance, the AAA Rules provided that once an award is rendered, the state laws would govern the setting aside of the award on the very limited grounds.[59] Similarly, the enforcement of the award can be made as per the states own set of laws, herein, the NYC.[60] However, will the award be enforceable rendered in consonance with the AAA Rules in the UK, which does not recognize it?

iii. **Internal appeal mechanisms:** As provided, the Spanish Arbitration Act provides for internal appeals.[61] The Act provides for enforcement of the award; however, it does not recognize the enforcement of the first-instance award. By contrast, the 2011 Arbitration Rules of Paris, which also recognizes provisional enforcement of the first instance award.[62] Then, will there be a provision for interim enforcement of the first instance award under the NYC?

---

[57] *Id.*
[58] Kirby, *supra* note 52, at 127.
[59] Hamilton v. Navient Solutions LLC, (2019) U.S. Dist. Lexis 23312 (US).
[60] *Id.*
[61] The Spanish Arbitration Rules, 2011, art. 39.4, 39.5, Act 60/2003 of 23 Dec. on Arbitration (2013) (Spain).
[62] The Chambre Arbitrale de Paris Rules, 2011, art. 43-48.

Thus, taking the cue from the interaction of investment arbitration appellate mechanism with the NYC as provided by Professor Albert Berg,[63] the *third* purpose of this part is as follows:

A. ARBITRAL AWARD

As per the *lex arbitri*, i.e., the national law of the place of arbitration, the arbitrator's discretion to decide the content of the arbitral award varies.[64] Surprisingly, there is no straitjacket definition of an arbitral award. Typically, an arbitral award refers to the recording of the merits of the arbitration. Thus, at this point, it is imperative to distinguish between an arbitral award and an arbitration result. *For example*, in the *Centrotrade* decision, the court held that an appeal would lie from the 'arbitration result' given by the first-instance tribunal.[65] The second consideration is *finality* as provided in the UK's case of *K v. S*, where the court held that for the decision to be an arbitral award, the decision should be the final determination by the tribunal.[66] On the contrary, in cases of an arbitral appeal, it is obvious that the decision of the first-instance tribunal is not

[63] Berg, *Supra* note 53.
[64] BERNARDO M. CREMADES, *The Arbitral Award, in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION (Lawrence W. Newman, Richard D. Hill (eds.), Juris 2014).
[65] M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd., 2020 SCC OnLine SC 479.
[66] K v. S, [2019] EWHC 2386 (UK).

final. Thus, in an appellate arbitration mechanism, one should be careful enough to demarcate between an arbitral award and a decision.[67]

B. PUBLIC POLICY

The NYC provides that *"[t]he recognition or enforcement of the award would be contrary to the public policy of that country*.".[68] A bare perusal of the provision reveals that public policy challenges are to be interpreted as per the public policy of the enforcing state. Interestingly, the idiosyncratic feature of the national laws of arbitration is that they interpret the threshold of public policy differently. However, such an interpretation has not acted as an impediment to enforcement for two reasons: *one*, domestic public policy is interpreted narrowly, and *two*, with respect to the foreign award, states have adopted a fusion of domestic and international public policy since the international public policy is looked through the state's standards.[69]

Would an appellate award fall under this challenge? An Indian example would be relevant here. India deciphered that vis-à-vis a two-tier mechanism, the public policy challenge would not stand.[70] This is for two

---

[67] BERND EHLE, *Criteria Qualifying a Decision as an Arbitral Award*, *in* THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, COMMENTARY 34-5 (Reinmar Wolff (eds.), 2012).

[68] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, *entry into* force June 7, 1959, art. V(2)(b).

[69] Margaret Moses, *Public Policy: National, International and Transnational*, KLUWER ARBITRATION BLOG, https://arbitrationblog.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational/.

[70] M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd., 2020 SCC OnLine SC 479.

reasons: *one*, respect to party autonomy,[71] *two*, it is a narrow concept concerned with 'fundamental notions of a particular legal system', i.e., morality, justice, etc.[72] While it is appreciated reasoning, *alternatively*, an attempt should be made to include it in future models, or the parties should choose the jurisdictions for appellate arbitration wisely.

C. BINDING AWARD

Would enforcement of the first-instance award while appeal pending be enforceable? Article V(1)(e) of the NYC provides that the enforcement of an award may be refused if "*the award has not become binding on the parties*."[73] Professor Albert provides for two interpretations of the term: one, an autonomous interpretation where leave is required by the courts for enforcement as per the agreement, and pending appeal, such request would not be granted; and *two*, in failure to reach an agreement, the award would become binding only if there is no appeal on merits.[74]

In an Ontario's Court decision of *Popack v. Lipszyc*, where a new claim was brought for a reduction in the award, the court noted that as soon as the award is pronounced, it becomes binding on the parties.[75] However, the court based this decision on the fact that the arbitration agreement did

---

[71] *Id.*
[72] RICHARD KREINDLER, *Standards of Procedural International Public Policy*, *in* INTERNATIONAL ARBITRATION AND PUBLIC POLICY (Devin Bray, Heather L. Bray (eds.), Juris 2014).
[73] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, *entry into* force June 7, 1959, art. V(1)(e).
[74] Berg, *Supra* note 53, at 184.
[75] Popack v. Lipszyc, (2018) ONCA 635 (Ontario).

not permit any appeal or review.[76] An English decision also evidences that a 'final, binding and conclusive award is not necessarily immune from challenge'.[77] Thus, for placing procedural safeguards in international commercial arbitration, these two interpretations are of relevance. In other words, provisional enforcement of the first-instance award would not be tenable.

D. WAIVER OF THE GROUNDS UNDER THE NYC

Can the party's contract to waive the grounds of enforcement under the NYC for the appellate award? Surprisingly, this issue has received less attention. We know that Article V of the NYC is demarcated in a two-fold manner: (i) the five procedural grounds which 'may be refused at the request of the party against whom it is invoked', and (ii) the defences of non-arbitrability and public policy, for which no reference is made in terms of if a party may refuse the grounds.[78] In light of this, it can be construed that the parties can contract for a waiver of the five grounds under the garb of party autonomy but not the fundamental notions of public policy and non-arbitrability.[79] Thus, it is textually possible for the parties to waive the defences for the five procedural grounds and not the mandatory rules.

---

[76] *Id.*
[77] Shell Egypt West Manzala GmbH and Shell Egypt West Qantara GmbH v. Dana Gas Egypt Limited (formerly Centurion Petroleum Corporation), [2009] EWHC 2097 (UK).
[78] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, *entry into* force June 7, 1959, art. V.
[79] Albert Jan van den Berg, *Enforcement of Annulled Awards?*, 9(2) ICC INT'L CT. ARB. BULL. 15 (1998).

Here, it is imperative to analyse the wordings 'right to any form of appeal, review or recourse' as provided by the London Court of International Arbitration Rules ("**LCIA Rules**"), among others. However, as has been argued, the same is wrongly worded. To corroborate, one may take the cue from the International Chambers of Commerce Rules ("**ICC Rules**") which provides that generally, the parties would be deemed to have waived their right in case the parties agree otherwise.[80] In summary, the author submits that an amelioration of the mechanism in interaction with NYC is imperative because although it would not act as an impediment to enforcement, it is complex and multifaceted.

V. THE CRITICISMS AND IMPROVEMENTS

For achieving the advantages and abiding by the purpose of the mechanism charted in Part II, it is clear that detailed scrutiny of the criticisms is indispensable too. Thus, this part aims to offer a comprehensive viewpoint on the criticisms and how to tackle them.

A. THE THRESHOLD FOR REVIEW

Paradoxically, the threshold for review of the arbitral awards has remained a matter of concern. The existing regime has adopted different thresholds for review. The existing thresholds for appellate review of arbitral awards, which vary across (i) national arbitration laws, (ii)

[80] The International Chambers of Commerce Arbitration Rules, March 1, 2017, art. 34(6).

institutional rules, (iii) optional appellate mechanisms, and (iv) the CAS rules are as follows:

i. **Appeals in the national arbitration laws**: The English Arbitration Act, 1966 under Section 69 and 70 provides for a review on the questions of law.[81] In a similar vein, the Commercial Arbitration Act (Australia), 2017 also provides for a review on the questions of law.[82] What is intriguing here is the threshold adopted for granting the leave for appeals. This includes public interest, obvious errors, substantial prejudice to the rights, and the criteria of just and proper determination of the question.[83]

ii. **Institutional appellate review:** The Spanish Arbitration Act provides for a full review on the merits.[84] In case the appreciation of evidence is necessary, it encapsulates that as well.[85] The same is the situation for the Paris provision of appeal.[86]

iii. **Optional appellate rules:** The AAA Rules and the CPR Procedure provide for a review on both the law and the facts;

---

[81] The Arbitration Act, 1996, § 69, Ch. 23 (UK).
[82] The Commercial Arbitration Act, 2010, § 34, No. 61 (Australia).
[83] *Id.*
[84] The Spanish Arbitration Rules, 2011, art. 39.4, 39.5, Act 60/2003 of Arbitration (2013) (Spain).
[85] *Id.*
[86] Rowan, *supra* note 36.

however, the error should be material and prejudicial.[87] In contrast, the ECA Rules offer a full review of the award on the facts, the merits, and the admissibility, and the JAMS Procedure provides a review based on the standards applied in a trial court decision, i.e., litigation.[88]

iv. **The CAS rules:** In this, the archetype of transparency, the CAS provides for a full review of the law and the facts.[89]

As can be seen from the above-mentioned existing thresholds, the threshold for reviewing the underlying award has high deference. If this is the case, then what difference lies between the deference provided by judicial appeals or arbitration appeals? As Carreterio advances, the judicial appeal transposes as the 'legitimacy of the process' while the appellate arbitration mechanism considers both the 'substantive correctness' and 'legitimacy of the process'.[90] With this reasoning, one may also consider the general purpose of appeals in arbitration: *one*, having a mechanism contrary to the limited review of awards; and *two*, error correction for fairness.[91]

---

[87] American Arbitration Association Appellate Rules, November 1, 2013, rule A-10; Conflict Prevention and Resolution Appeal Procedure, rule 8.2.

[88] European Court of Arbitration Rules, rule 28.4; JAMS Comprehensive Arbitration Rules and Procedures, June 2021, rule (D).

[89] The Code on Sports-related Arbitration, January 1, 2019, art. R57.

[90] Carreteiro, *supra* note 6, at 206, citing SCHREUER-MALINTPPI-REINISCH-SINCLAIR, THE ICSID CONVENTION: A COMMENTARY (2009) 890.

[91] Ajay Raj, *Appellate Arbitration Mechanism in India: An (Un)baked Reform, Arbitration and Corporate Law Review,* ARBITRATION AND CORPORATE LAW REVIEW, https://www.arbitrationcorporatelawreview.com/post/appellate-arbitration-mechanism-in-india-an-un-baked-reform.

So, what should be the threshold of admitting the appeal for error correction? An error may be of law, facts, apparent errors, ministerial errors, or contingent errors.[92] However, considering these would infringe the efficiency and increase the employment of dilatory tactics in the mechanism. Moreover, the high deference in case of appellate arbitration should not be misconstrued with the limited grounds of court review.[93] The UK and Australia regime also provide that the obvious error should cause *substantial* prejudice to the party.[94] Therefore, even if there is an obvious error, but the same is of minuscule amount, no challenge should lie.

An improvement in light of the above arguments, therefore, could be an adoption of a fusion of the AAA Rules/CPR Procedure with the UK/Australian regime. With this, two purposes will be served: *one*, a full review on the merits such as in ECA could lead to a completely different award due to rehearing and application of different standards. This goes against the objective of achieving efficiency and not complexity. *Two*, there would be no intervention of judicial standards as in the case of JAMS Procedure.

B. CONSTITUTION OF THE TRIBUNAL

The rules for the constitution of the tribunal have been provided in the existing scholarship. For instance, the ECA Rules provide that the

---

[92] Cecilia M. Di Ciy, *Dealing with Mistakes Contained in Arbitral Awards*, 12(1) AMERICAN REV. OF INT'L ARB. (2002).
[93] Carreteiro, *supra* note 6, at 206; Gleason, *supra* note 39.
[94] The Arbitration Act, 1996, § 69, Ch. 23 (UK); The Commercial Arbitration Act, 2010, § 34, No. 61 (Australia).

members of the first-instance tribunal should not adjudicate as there will be a threat to impartiality and independence of the arbitrators.[95] It has also been provided that the appointment should be of an experienced and impartial tribunal for error correction and for this reason, the tribunal should not be constituted by parties.[96] However, the threshold for challenges to an arbitrator in appeals is not discussed.

It is the author's argument that the standard of assessing the impartiality should be on the understanding of the World Trade Organisation's ("**WTO**") dispute settlement and not on the threshold of justifiable doubts as provided by the IBA Guidelines on Conflict of Interest.[97] This is because the inclusion of justifiable doubts standard in the appellate mechanism could potentially 'exclude capable and highly-qualified arbitrators from an already small pool of experts.'[98] On the contrary, the threshold provided by Article 17 of the WTO's Dispute Settlement Understanding ("**DSU**") should be applied in appellate commercial arbitration.[99] The DSU aims to 'eliminate conflict of interest and ensure that

[95] The European Court of Arbitration Rules, rule 28.5.
[96] Carreteiro, *supra* note 6, at 204.
[97] The London Court of International Arbitration Rules, October 1, 2024, art. 5.4; The IBA Guidelines on Conflict of Interest in International Arbitration, October 23, 2014, part II.
[98] Joshi, *The Threshold for Challenges in ICSID Arbitration: Interpreting the 'Manifest Lack' Standard,* KLUWER ARBITRATION BLOG, http://arbitrationblog.kluwerarbitration.com/2020/05/07/the-threshold-for-challenges-in-icsid-arbitration-interpreting-the-manifest-lack-standard/.
[99] Understanding on Rules and Procedures Governing the Settlement of the Disputes, WTO Agreement, January 1, 1995, art. 17.

highly qualified individuals with requisite experience are appointed.[100] In other words, the challenges should be based on evidence and not on the objective standard applied by international commercial arbitration.

C. CORRECTION OF ERROR AS A POLICY EXERCISE AND LEGAL REASONING

Caroline has noticed 'error correction as a systematic, policy-based exercise' by the appellate courts, and juxtaposes it with the arbitration.[101] In doing so, it is provided that arbitration is not bound by systematic constraints, and resultantly, arbitrators, using their discretion, their level of understanding, and their expertise or legal background, decide the error which needs correction.[102] However, with this, achieving the high error correction objectives remain a dark concept because, in the lack of a definitive rule, appellate review result would be a product of the speculations made by the tribunal,[103] and may or may not result in substantive fairness.

Further, as had been previously argued, due to the discretionary application of conventional wisdom, the reasoning provided in an award is sometimes not in coherence with the objectives of fairness. In this case, it becomes difficult to identify if the case contains an obvious error. Precisely because arbitral tribunals are mandated to include findings and conclusion in the award, and this underlying reasoning may, at times, render an

---

[100] Riddhi, *supra* note 98.
[101] Caroline, *supra* note 12, at 118.
[102] *Id.*, at 118-122.
[103] Irene, *supra* note 22, at 1138.

incorrect or unconvincing decision.[104] Thus, a straitjacket formula to decide wrongly decided cases should be incorporated into the model. *Prima facie*, a decision can be based on the UK and the Australian regime depicted in this article, which clarifies the threshold for obtaining the leave of the court for appeal: (i) substantial injustice, (ii) just and proper to determine the question, (iii) issue that was earlier not determined, among others.

In achieving the same objective, a duty also lies on the arbitrators of the second-instance tribunal to base their decisions on sound principles and reasoning. Without this, the parties would be still in a conundrum regarding the legitimacy and error correction. Not only this, but an application can be also filed for the remission of the second-instance tribunal award (which is the now the arbitral award) on the ground of inadequate reasons.[105] For this, I consider three options which are alternatives to each other, preferable:

First, on a logical conclusion, the parties resorting to the appellate mechanism are convinced that there would be no error in the second-instance tribunal award. Thus, in a similar line, the new model should incorporate a statement, for example, in case an application for the remission of the award is filed on inadequate reasons, it would be rejected outrightly except in cases where substantial prejudice appears. Professor

---

[104] Stephen Hochman, *Judicial Review to Correct Arbitral Error – An Option to Consider* 13(1) OHIO STATE JOURNAL ON DISPUTE RESOLUTION 106 (1997).

[105] *See* Jordan Tan & Andrew Foo, *Challenging Arbitral Awards before the Singapore Courts for a Tribunal's Failure to Give Reasons (Part 2 of 2)*, KLUWER ARBITRATION BLOG, http://arbitrationblog.kluwerarbitration.com/2018/03/14/challenging-arbitral-awards-singapore-courts-tribunals-failure-give-reasons-part-2-2/.

Albert has also noticed that in case of an annulment action 'two rounds of dispute settlement would seem to suffice.'[106] Therefore, to not allow dilatory tactics of the parties, the award of an appellate body should not be challengeable in any manner.

Second, a 'one-size-fits-all' standard for the requisite reasoning conception can be devised. This practice has been adopted by the courts of New Zealand.[107] Thus, a standard of requisite bases on which the decision has been given should be explicitly laid down to leave no room for confusion. This would ultimately prevent the dilatory tactics of the losing party.

D. INSTITUTIONAL REVIEW

Carreterio argues that there is a potential of the interaction of two contradictory institutional rules. For this, an argument is advanced in light of the contradiction of ICC's institutional scrutiny of the award and the appellate award by AAA.[108] On similar lines, a potential contradiction may arise in cases where the first-instance award is conducted by, for example, Singapore Arbitration Law, and the second-instance award by the LCIA Rules. Now, although the domestic policy is interpreted narrowly, a peculiar possibility for contradiction lies between the two.

---

[106] Albert, *supra* note 52.
[107] Jordan Tan & Andrew Foo, *Challenging Arbitral Awards before the Singapore Courts for a Tribunal's Failure to Give Reasons (Part 1 of 2)*, KLUWER ARBITRATION BLOG, http://arbitrationblog.kluwerarbitration.com/2018/03/12/challenging-arbitral-awards-singapore-courts-tribunals-failure-give-reasons-part-1-2/.
[108] Carreteiro, *supra* note 6, at 209.

As a result, what would have been enforceable in the first instance after correction as per the Singapore Law itself would not be subject to challenge in Singapore due to the standards applied in light of the LCIA Rules.[109] For improving this quagmire, one may place reliance on the institutional review of the awards, through which the same rules would apply in both the instances.[110]

E. VIRTUAL HEARINGS

At the outset, it has been proposed that skype or conference call should be used for appellate arbitration which will save travel costs.[111] The author concurs this proposal. The said proposition also finds approval in the ICC Rules which provides for video or telephonic hearings.[112] Resultantly, a balance could be created between duration and costs.

F. TIME-LIMITS

Factually, the existing appellate arbitration regime provides for an efficacious framework for striking a balance between expeditious adjudication in appeals and the intrinsic tenets of arbitration so as to preserve its sanctity. The concerns over time-limits are three-fold: (i) time limit to file an appeal and cross-appeal; (ii) completion of the appellate process; and (iii) the time limit for drafting the award.

---

[109] Raj, *supra* note 91.
[110] Rowan, *supra* note 36, at 548-552.
[111] Zamir, *supra* note 46, at 91.
[112] The International Chambers of Commerce Arbitration Rules, January 1, 2012, appendix IV.

For the *first* consideration, a robust strategic framework is offered by the JAMS, AAA, and the CPR Procedure. For instance, the AAA Rules and the CPR Procedure contemplates the time limit of 30 days to file an appeal from the first instance award, and the JAMS Procedure sets the time limit of 14 days.[113] In line with Article 34 of the Model Law, the said period should commence from the date the party had received the underlying award.[114] Similarly, a cross-appeal mechanism is provided by the optional appellate rules which provide that in case the appellee finds that the losing party is employing dilatory tactics by filing an appeal, a cross-appeal may be filed within seven days after the commencement of appellate arbitration.[115]

For the *second* consideration, again, the optional appellate rules provide an efficient mechanism. A cue can therefore be taken from them. For instance, the AAA Rules provide for a time limit of three months to complete the process, the JAMS Procedure as 21 days, while the ECA Rules contemplates a period of six months and in case appraisal of evidence is imperative, the time limit is nine months.[116]

---

[113] American Arbitration Association Rules 2013, *opened for signature* October 1, 2013, rule A-3(a)(i); JAMS Comprehensive Arbitration Rules and Procedures, June 2021, rule (b)(i); Conflict Prevention and Resolution Procedure, 2007, November 1, 2007, rule 2.

[114] The UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, art. 34.

[115] American Arbitration Association Rules 2013, *opened for signature* October 1, 2013, rule A-3(c); JAMS Comprehensive Arbitration Rules and Procedures, June 2021, rule B(ii); Conflict Prevention and Resolution Procedure, 2007, November 1, 2007, rule 2.2.

[116] American Arbitration Association Rules 2013, *opened for signature* October 1, 2013, introduction; JAMS Comprehensive Arbitration Rules and Procedures, June 2021, 2003, introduction; European Court of Arbitration Rules, rule 28.7.

Finally, for the *third* consideration, the time limit for drafting the award should be restricted for a particular period of time. A cue can be taken from the ICC's institutional scrutiny time limit for reduction of arbitrator's salary after the period is over.[117] Compliance with these strict deadlines would ensure a compromise between the tenet of expeditious adjudication and the aim to achieve error correction akin fairness.

VI. CONCLUSION

It has been twenty years when the concept of appellate arbitration first appeared.[118] Regrettably, the fruits of fairness, the objective of attractiveness, and ensuring minimalistic intervention of the courts, among others, have not been achieved yet. Part III of the article, through an illustrative trajectory, assess the possible objectives that the appellate mechanism could achieve. The cogency of these objectives has been established through the existing regime of appeals in other arbitration and national court forums. However, nothing comes without paying a high price. Throughout the article, a demarcation has been made between finality and the advantages of the appellate arbitration mechanism.

Nevertheless, it is also imperative to not completely rule out that finality concerns have a cogent stand in the enforcement of the award. For this reason, the article attempts to anatomize whether the existing appellate

---

[117] ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, 2016, ¶¶ 92, 94.

[118] Rowan, *supra* note 36, at 540, citing G. Hartwell, *Settling Disputes on a Shrinking Planet*, 7 GENEVA GLOBAL ARB. FORUM (1998).

arbitration mechanism, which may take the form of a model in future interactions with NYC. Through this engagement, it is clear that ideally no prejudice would be caused to the enforcement of a second-instance arbitral award despite the fact that their interaction is complex or rather multifaceted.

Subsequently, the article in part V attempts to devise a robust framework for striking off the 'one-kick-at-the-can' character of international arbitration with relatively no review of the awards except the limited review before the national courts. While in the existing scholarship, a few of the criticisms have been targeted, this article draws an analogy with the *legitimacy* discourse and an *operative* discourse of the appellate arbitral awards. For instance, the threshold for hearing the challenges of impartiality in appellate arbitration, a case for virtual hearing in light of the contemporary standards, the dilapidated concept of policy-based exercise, and time-limits, etc.

It is important to note, as has been demonstrated, that the objectives of achieving high error correction and fairness might face technical challenges in the future. However, the concept of appellate arbitration in practice is not an established concept, and for this reason, it is not possible to rule out these minuscule requirements in long run at this juncture. In summary, this article has not sought to assess the appellate arbitration mechanism from a case *for* appellate arbitration, but rather, to demonstrate how the appellate arbitration mechanism would in practice achieve the fictional objectives through the existing regime of appeals. A

final point. The spirit of arbitration should be preserved if the parties agree on having appeals in arbitration