II. CONFLICTS OF INTEREST PLANTED BY PARTIES FOR DERAILING ARBITRAL PROCEEDINGS

- Vivek Krishnani and Rajat Sinha[*]

ABSTRACT

A common, yet less discussed, issue is that of strategic challenges to arbitrator appointments that are aimed solely at delaying the issuance of the arbitral award or even the grant of the relevant remedy post that. This is because any challenge or motion against an arbitrator is capable of not only disrupting the arbitral process but also permanently affecting a time-sensitive remedy. For the purpose of giving birth to potential challenges, some parties tactically employ certain methods for planting a conflict of interest for the tribunal or one of its members and at the same time, retain their right to challenge arbitrator appointments. In this paper, the authors have discussed such methods and conducted an analysis to lay down certain approaches for identifying these dilatory tactics, which can be a difficult task. Eventually, an assessment of the approaches has led the authors to their concluding remarks.

[*] Vivek Krishnani is a fifth-year student of B.B.A. LL.B. (Hons.), and Rajat Sinha is a fifth-year student of B.A. LL.B. (Hons.) at National Law University, Jodhpur.

I. INTRODUCTION

The arbitral process depends on the integrity, independence, and impartiality of the arbitrators in a given proceeding. Thus, while a good faith challenge to an arbitrator's appointment is considered as an essential and fundamental right of all parties,[1] sometimes the parties challenge the arbitrators merely to derail arbitral proceedings in bad faith.[2]

A party's tactics to delay ongoing proceedings are often motivated by the parties' inclination to frustrate a time-sensitive remedy, particularly when their case is weak,[3] or to reverse an unwanted decision.[4] Such legal tactics, which could be termed as 'dilatory tactics,'[5] are made possible because the standard to challenge an arbitrator is quite low and one doesn't need to prove actual corruption or bias.[6] In fact, even the appearance of bias is sufficient in this regard.[7] Thus, such tactics allow a weaker party in a given case to significantly delay the outcome of the dispute.

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[1] Herike Rice Mills v. State of Punjab, 1997 SCC OnLine P&H 1367 [hereinafter *Herike Rice Mills*].
[2] Günther J. Horvath, *Guerrilla Tactics in Arbitration, an Ethical Battle: Is There Need for a Universal Code of Ethics?*, in NIKOLAUS PITKOWITZ, ALEXANDRE PETSCHE, ET AL. (EDS.), AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 303 (2011) [hereinafter *Horvath*].
[3] Patrick M. M. Lane, *Dilatory Tactics: Arbitral Discretion* in J VAN DEN BERG, PERMANENT COURT OF ARBITRATION AND INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (EDS), IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION (Kluwer Law International, 1999) [hereinafter *Lane*].
[4] *Id.*
[5] Horvath, *supra* note 2.
[6] Lane, *supra* note 3.
[7] Perenco Ecuador Ltd v. Ecuador, Decision on Challenge to Arbitrator of 8 December 2009, PCA Case No. IR-2009/1, ¶43.

Indian courts have expressed concerns with respect to dilatory tactics in arbitration[8] and this issue is no longer *res integra*. Additionally, the Rules of Domestic Commercial Arbitration and Conciliation formulated by the Indian Council of Arbitration provide that parties to a dispute "shall avoid any kind of dilatory tactics and shall make maximum/best/all possible efforts for an expeditious resolution of the dispute."[9] Furthermore, this has been extensively discussed by the academia as well.[10] However, this paper analyses specific delay-causing strategies wherein parties plant conflicts of interest for arbitrators with the underlying purpose of delaying the issuance of the award of the tribunal.

To put this in context, we may refer to the case of *V. Balakrishnan v. Capital First Limited*,[11] which was heard by the Telangana High Court. In this case, the Respondent had appointed an arbitrator who belonged to the same firm as their legal representative and this relationship was disclosed neither by the party nor by the arbitrator.[12] After around four years, the Court found that the Respondent abused its power to appoint an arbitrator by nominating an ineligible arbitrator who evidently had a conflict of interest.[13]

The facts of the foregoing case highlight how a party created a conflict of interest and managed to significantly delay the effective outcome

[8] *See e.g.* Denel v. Lord Gordon Slynn, (2010) 4 Arb LR 264 [hereinafter *Denel*].
[9] Indian Council of Arbitration, Rules of Domestic Commercial Arbitration and Conciliation, ICA Code of Conduct, §3.9.
[10] *See e.g.* Gourav Mohanty & Shruti Raina, *Use of Costs on Indemnity Basis to Combat Dilatory Tactics in Arbitration- Advocating the Hong Kong Approach*, 3(1) INDIAN JOURNAL OF ARBITRATION LAW 101-128 (2014) ["**Mohanty & Raina**"].
[11] V. Balakrishnan v. Capital First Limited, 2019 SCC OnLine TS 1290 [hereinafter *V. Balakrishnan*].
[12] *Id.*, ¶49.
[13] *Id.*, ¶57.

of the arbitration by appointing an arbitrator who belonged to the same firm as their legal representative and not disclosing this relationship.

The authors wish to highlight that arbitral parties have, besides appointing ineligible arbitrators, indulged in creation of conflicts of interest by using other methods. However, such methods have not been a subject of discussion in judgments rendered by Indian courts even though they severely impact arbitral practice. This segment of the paper seeks to highlight some of these strategies which are often ignored and not extensively written about, *viz.* subsequent appointments, initiation of unilateral contact with an arbitrator and creation of 'issue conflicts' by parties without waiving the right to challenge the arbitrator's appointment (emphasis added).

II. SUBSEQUENT APPOINTMENTS MADE BY PARTIES

This segment analyses two of the most common appointments made by arbitral parties that are capable of creating conflict of interest for an otherwise properly constituted tribunal.

A. Creation of Conflict of Interest by Change in a Party's Legal Representatives

Subsequent appointment or change in the composition of legal representatives after the constitution of an arbitral tribunal could have the effect of creating a conflict of interest with an appointed arbitrator. To understand this better, in this segment, we discuss pertinent decisions rendered by the International Centre for Settlement of Investment Disputes ("ICSID") and how their approaches are relevant for commercial arbitrations as well. It may be stated that the authors have, in this segment, resorted to the

analysis of ICSID decisions owing to the unavailability of Indian cases or commercial arbitration awards in this respect. Such an analysis may be relevant even in the context of Indian domestic arbitration because the ICSID awards discussed in this segment apply the relevant International Bar Association ("IBA") Guidelines, which have been embraced by India[14] as well.

1. ICSID Jurisprudence with respect to Legal Representatives

At the outset, reference may be made to the Order Concerning the Participation of Counsel in *Hrvatska v. Slovenia* ("Hrvatska").[15] In this case, one of the parties had altered its legal team during the proceedings in a manner which created a potential conflict of the arbitrator with one of the lawyers.

In this regard, the tribunal had noted that while parties are generally entitled to select their legal team,[16] "a party cannot amend the composition of its team in such a manner that it creates apprehensions of lack of impartiality or independence of an arbitrator."[17] This observation was based on Article 56(1) of the ICSID Convention and it was stated by the Tribunal, in no ambiguous terms, that "the overriding principle is that of the immutability of properly constituted tribunals."[18]

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[14] Bharat Broadband v. United Telecoms Ltd., AIR 2019 SC 2434 [hereinafter *Bharat Broadband*]; HRD Corporation v. GAIL Ltd., (2018) 12 SCC 471 [hereinafter *HRD Corporation*].
[15] Hrvatska Elektroprivreda, D.D. v. The Republic of Slovenia, Order Concerning the Participation of Counsel (6 May 2008), ICSID Case No. ARB/05/24.
[16] *Id.* ¶24.
[17] *Id.* ¶26.
[18] *Id.* ¶25.

Subsequently, in another ICSID case, namely *Rompetrol v. Romania*,[19] a tribunal discussed the findings in the *Hrvatska* case. The Tribunal opined that the principle of immutability of properly constituted tribunals, read with the right to have an impartial and independent tribunal, does not, as a general rule, take priority over a party's right to present its case.[20] In fact, it was stated that "it would be the tribunal's duty to find a way of bringing them into balance, not to assign priority to either over the other."[21] That being said, the Tribunal acknowledged that the decision in *Hrvatska* was heavily based on the fact that there was a "late announcement of the new appointment" and concluded that it makes for a good precedent for cases involving failure to make disclosure of potential conflict of interest in a timely manner.[22] Therefore, the principle of "immutability of properly constituted tribunals" is certainly a dominant principle with respect to subsequent appointment of legal representatives as per ICSID jurisprudence.

2. Extension of the ICSID Approach to Commercial Arbitration

While the principle of "immutability of properly constituted tribunals" is specifically provided for in the ICSID convention only, to extend this to commercial arbitration, the authors rely on the IBA Guidelines on Party Representation in International Arbitration ["Party Representation Guidelines"].[23] These Guidelines have been recognised as reflective of best

[19] The Rompetrol Group N.V. v. Romania, Decision of the Tribunal on the Participation of a Counsel, ICSID Case No. ARB/06/3 [hereinafter *Rompetrol v. Romania*].
[20] *Id.* ¶21.
[21] *Id.*
[22] *Id.* ¶25.
[23] International Bar Association, *IBA Guidelines on Party Representation in International Arbitration* [hereinafter *Party Representation Guidelines*].

practice in international arbitration.[24] Pertinently, Guidelines 5 and 6 provide that after the constitution of a tribunal, if a party appoints a representative whose relationship with an arbitrator might create a conflict of interest, the tribunal may order exclusion of such party representative.[25]

Additionally, rules of some popular arbitral institutions indicate towards the need to preserve properly constituted tribunals, specifically, in such cases. For instance, Article 18.4 of the LCIA Rules provides that any intended change in a party's legal representatives may be disallowed if such a change could compromise the composition of the Arbitral Tribunal.[26] Therefore, the principle of immutability of properly constituted tribunals may be applied to commercial arbitration as well.

B. Subsequent Appointment of Expert Witness

The Party Representation Guidelines explicitly exclude an "expert" from the ambit of "party representative."[27] This may *prima facie* suggest that the Guideline with respect to subsequent appointment of legal representatives may not be extended to the appointment of experts. However, the authors opine that the Party Representation Guidelines provide sufficient basis for disallowing subsequent appointment of those experts who create a conflict of interest for an arbitrator. This is because these Guidelines direct party representatives to, generally, "not engage in activities designed to

[24] Tom Cummins, *The IBA Guidelines on Party Representation in International Arbitration - Levelling the Playing Field?*, 30(3) ARBITRATION INTERNATIONAL 429–456 (2014).
[25] Party Representation Guidelines, *supra* note 23, Guidelines 5-6.
[26] London Court of International Arbitration (LCIA) Arbitration Rules, 2014, Article 18.4 [hereinafter *LCIA Arbitration Rules*].
[27] Party Representation Guidelines, *supra* note 23, Definitions.

produce unnecessary delay."[28] This general requirement may be construed as requiring a party representative to refrain from appointment of an expert who has a problematic relationship with one of the arbitrators because such an appointment is capable of frustrating the formation of the tribunal or delaying the issuance of the award.

An instance that explains how parties could plant a conflict of interest specifically through appointment of an expert witness can be found in the case of *Bridgestone v. Panama*.[29] The case concerned the question of removal of an expert witness owing to his potential bias in the matter. Admittedly, the Tribunal noted that it is "quite common for lawyers to have their preferred experts"[30] and did not rule in favour of the exclusion of the party-appointed expert.[31] However, it extensively discussed[32] the issue of such a conflict which evidences that subsequent appointment of an expert, much like that of a legal representative, is capable of creating a conflict of interest and derailing the arbitral proceedings.

III. SUBSEQUENTLY ENTERING INTO A THIRD-PARTY FUNDING AGREEMENT

While third-party funding ("TPF") in arbitration is not explicitly allowed by any law, third party litigation funding has been found to be permissible by the Supreme Court in *Bar Council of India v. AK Balaji*.[33]

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[28] Party Representation Guidelines, *supra* note 23, Preamble.
[29] Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama, Tribunal's Ruling on Claimants' Application to Remove the Respondent's Expert as to Panamanian Law, ICSID Case No. ARB/16/34.
[30] *Id.*
[31] *Id.* ¶39.
[32] *Id.*, ¶¶22-39.
[33] Bar Council of India v. AK Balaji, AIR 2018 SC 1382, ¶35.

Specifically with respect to arbitration, the *High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* has noted that TPF is one of the measures that contributes towards the growth of jurisdictions as arbitration hubs.[34] Additionally, TPF has become more desirable since the outbreak of COVID-19, which has impacted the financial capability of many businesses to pursue arbitral proceedings or continue with the existing ones for resolution of their disputes.[35]

In this light, it may be noted that TPF, although having its own benefits, has raised multiple issues in arbitral practice. One such issue is that TPF gives rise to potential conflicts of interest where an arbitrator, his colleagues, or his law firm have a relationship with the third-party funder.[36] This has also been recognised by the IBA Guidelines on Conflict of Interest in International Arbitration ["Conflict-of-Interest Guidelines"], which have been relied upon in Indian cases as well.[37] Pertinently, as per these Guidelines, third-party funders "may be considered to be the equivalent of the party" because they have a "direct economic interest" in the award.[38] Pertinently, because of this, if an arbitral party signs a TPF agreement after

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[34] Justice B.N. Srikrishna et al., *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (30 July 2017) GOVT. OF INDIA, available at: https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf, 43.

[35] Krrishan Singhania & Alok Vajpeyi, *Third Party Funding of Arbitration Disputes in India – Regulation Required*, CONSTRUCTION TIMES (29 September 2020), available at: https://constructiontimes.co.in/third-party-funding-of-arbitration-disputes-in-india-regulation-required/.

[36] Ashurst, *Third Party Funding in International Arbitration*, ASHURST QUICKGUIDES (21 February 2020), available at: https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/.

[37] Bharat Broadband, *supra* note 14; HRD Corporation, *supra* note 14.

[38] International Bar Association, *Guidelines on Conflict of Interest in International Arbitration*, Explanation to General Standard 6(b) [hereinafter *Conflict-of-Interest Guidelines*].

the constitution of the tribunal, it is capable of creating a conflict of interest and derailing the arbitral proceedings.

IV. INITIATION OF UNILATERAL CONTACT WITH ONE OF THE ARBITRATORS

Another reported tactic for creating a conflict of interest is that of initiating unilateral contact with one of the arbitrators. This is strongly discouraged in arbitration practice worldwide[39] owing to the consequences that could result. In this respect we may discuss the *Mission Insurance* case, which was widely reported owing to its controversial factual situation.[40] Therein, an arbitrator was found spending two nights in a hotel room with one of the lawyers, the client of whom eventually succeeded in the case.[41] This contact between a party and an arbitrator, in the absence of the other party, led to the frustration of the proceedings because the challenge to the arbitrator's independence and impartiality was upheld.[42]

It may be noted that situations like the one in the *Mission Insurance* case demonstrate a close personal friendship between an arbitrator and a counsel of a party and, consequently, fall within the Orange List[43] of the Conflict-of-Interest Guidelines. Situations within the Orange List may give rise to doubts as to the arbitrator's impartiality or independence and

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[39] *See e.g.* LCIA Arbitration Rules, *supra* note 26, Annexure, ¶6.
[40] Richard B. Schmitt, *Suite Sharing*, WALL STREET JOURNAL (14 February 1990) *cited in* William W. Park, *Arbitrator Bias*, SCHOLARLY COMMONS AT BOSTON UNIVERSITY SCHOOL OF LAW, available at: https://scholarship.law.bu.edu/faculty_scholarship/15?utm_source=scholarship.law.bu.edu%2Ffaculty_scholarship%2F15&utm_medium=PDF&utm_campaign=PDFCoverPages, 13.
[41] *Id.*
[42] *Id.*
[43] Conflict-of-Interest Guidelines, *supra* note 38, Entry 3.3.6.

therefore, a disclosure is warranted in such situations.[44] In fact, failure to disclose would create a conflict of interest that gives rise to a potential challenge.[45]

V. CREATION OF ISSUE CONFLICTS

The authors, herein, highlight another peculiar method of planting conflicts of interest, namely, creating issue conflicts.

It may be stated that an "issue conflict" means that the arbitrator has a predisposition with respect to an issue being considered in the arbitration and the same raises justifiable doubts as to the arbitrator's independence and impartiality.[46] Generally, an arbitrator's publicly expressed opinions by way of academic articles, awards rendered, etc., are scrutinised for identifying potential issue conflicts.[47] In this regard, the Conflict-of-Interest Rules distinguish between those opinions which are intended specifically towards the case at hand and those which are expressed on the general legal issue which is being considered in the case. While the former amounts to an Orange-List conflict[48] and warrants a disclosure, the latter merely falls within the Green List[49] and a disclosure is not necessary for the same.[50]

The authors wish to highlight that, in practice, arbitral parties create issue conflicts after the appointment of arbitrators by raising new issues

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[44] *Id.*, *Practical Application of the General Standards*, ¶3.
[45] *Id.*
[46] Hernando Díaz-Candia, *"Issue Conflict" in Arbitration as Apparently [un]seen in 2011 by a U.S. Court in STMicroelectronics vs. Credit Suisse Securities*, 5(1) ARBITRAJE: REVISTA DE ARBITRAJE COMERCIAL Y DE INVERSIONES 287, 287-288 (2012).
[47] *Id.*
[48] Conflict-of-Interest Guidelines, *supra* note 38, Entry 3.5.2.
[49] *Id.* Entry 4.1.1.
[50] *Id.*, *Practical Application of the General Standards*, ¶6.

which can create the possibility of a challenge. To understand how parties could create issue conflicts and plant a conflict of interest, we may look into the *CC Devas* case,[51] where this question was indirectly addressed by President Tomka. In that case, the Respondent wished to rely on the concept of "essential security interests" for its submissions on merits. Pertinently, in its preliminary submissions, the Respondent argued that the challenged arbitrators had strong predispositions with respect to issue concerning "essential security interests."[52] Thereafter, the Presiding Arbitrator noted that the intention of the respondent to raise this particular issue after the arbitrator's appointment "seemed credible, [and] not just a pretext to mount the present challenge" [emphasis added].[53] This, in itself, suggests that parties may, as a dilatory tactic, create issue conflicts by raising irrelevant issues after the constitution of the tribunal.[54]

VI. DEALING WITH SCENARIOS POTENTIALLY INVOLVING THE USE OF DILATORY TACTICS

In the previous segments, the specific kinds of conflicts of interest planted by parties to derail arbitral proceedings have been discussed. To deal with such alleged dilatory tactics, the authors opine that, primarily, two approaches might assist an adjudicator: *first*, a general approach that could be applied to all cases; and *second*, application of tests that are specific to the nature of the issue.

[51] CC/Devas (Mauritius) Ltd. v. India, PCA Case No. 2013-09, ¶¶57-58.
[52] *Id.* ¶55.
[53] *Id.* ¶57.

A. The General Approach

Essentially, the general approach requires the balancing of some broad countervailing interests. Indian law, like most others, recognises a party's fundamental right to challenge an arbitrator's appointment in good faith[55] and at the same time, discourages dilatory tactics[56] and emphasises on a speedy resolution.[57] When a party creates a conflict of interest and retains their right to challenge the arbitrator, allowing such retention will create the possibility of a challenge against the arbitrator(s) and significantly delay the proceedings. Accordingly, in such cases, one party argues that the right to challenge an arbitrator's appointment is fundamental and must not be waived, while the other party argues that non-waiver of this right might hamper efficiency and speedy resolution.

For balancing these considerations against one another, an adjudicator would essentially delve into the facts and circumstances of the given case. This is a general approach and since Indian courts have never directly addressed the issue of planting of conflicts of interest as dilatory tactics, this general approach is all that can be discerned from Indian case law. This approach, evidently, creates too much room for subjectivity and discretion and is therefore, capable of causing uncertainty.

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[54] CHIARA GIORGETTI, CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 239 [Brill, 2015].
[55] Arbitration & Conciliation Act, 1996, §12; Herike Rice Mills, *supra* note 1.
[56] Denel, *supra* note 8.

B. Specific Tests

Specific tests infuse some objectivity in the task of identifying whether a conflict of interest has been created deliberately or the party has in good faith reserved their right to challenge. This approach involves tracing down the specific facets of the broader principles which stand in conflict in a particular case. For instance, in the *Hrvatska* case, while there was a conflict between the fundamental right to be heard and the need to preserve the integrity of the tribunal, the Tribunal identified the conflict between more specific facets, i.e., the right to be represented by the counsel of one's choice and protecting the immutability of properly constituted tribunals for ensuring speedy resolution.[58]

For another illustration, we may look at subsequent appointment of experts and the test in *R v. Mohan* which is specifically applicable to such cases. As per this test, a court or tribunal needs to balance the potential risks and benefits of admitting the expert and his testimony.[59] This test, if applied to the issue being discussed here, would require that the weight and relevance of an expert's testimony be assessed in light of the degree of the potential conflict of interest. Similarly, in respect of the alleged creation of issue conflicts, relevance of the issue raised would be a specific test, as previously discussed.

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[57] Government of Maharashtra v. M/s Borse Brothers v. Engineers and Contractors, Civil Appeal No. 995 of 2021 (SUPREME COURT OF INDIA).
[58] Rompetrol v. Romania, *supra* note 19, ¶16.
[59] R v. Mohan, [1994] 2 SCR 9 (Canada).

Such tests are more specific to the kind of conflict being discussed and are capable of increasing the extent of objectivity and certainty in the adjudication of a challenge.

VII. CONCLUSION

In the Indian context, the issue of creation of conflicts of interest has been adequately addressed neither by the Arbitration and Conciliation Act nor by the administrative rules of prominent arbitral institutions in India. While the arbitration laws of other jurisdictions also have similar limitations, this issue is being recognized as a concern in the international context. This is evidenced by the likes of LCIA Rules[60] and the ICSID Convention,[61] which both seek to avoid creation of conflicts of interest after the constitution of an arbitral tribunal. In this light, the authors recommend that arbitral tribunals in India must draw inspiration from these widely accepted instruments and approach such issues in a manner that upholds the cardinal principles of arbitration.

To effectively deal with issues of parties' creation of conflicts of interest, tribunals are recommended to follow a four-step approach.

First, in the initial phase of arbitral proceedings itself, the tribunal must elaborately lay down the code of conduct that the parties must abide by. It would be in the interest of the efficient conduct of proceedings should the parties and the tribunal reach an agreement at the outset regarding what

[60] LCIA Arbitration Rules, *supra* note 26, Article 18.4.
[61] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1966, 575 UNTS 159, Article 56(1).

conduct is unacceptable and the consequences of non-compliance with the parties' code of conduct.[62]

Second, during the proceedings, whenever the tribunal anticipates a dilatory tactic of the kind discussed in this article, it must clearly warn the suspected party about the potential consequences of such tactics. Additionally, the tribunal may consider applying the specific tests for the relevant kind of conflict being anticipated, as discussed in the preceding segment.

Third, after sufficient warnings have been provided to the suspected party, the tribunal may grant relevant interim measures to the other party for the preservation of the claimed remedy from the vices of a potential delay. Considering the purpose of creation of conflicts is generally to frustrate the claimed remedy, such interim measures would go a long way in protecting the other party's rights in such situations.[63]

Fourth, in the event that the tribunal has been unable to mitigate the losses caused by the *mala fide* tactics, it may impose costs on the party responsible for such tactics[64] and compensate the other party. In this regard, it must be noted that the tribunals are empowered to take into account the conduct of the parties as per almost all Indian institutional rules.[65] Pertinently, such measures have been strongly advocated for dealing with

[62] Horvath, *supra* note 2, 304-305.
[63] Nishith Desai Associates, *Interim Reliefs in Arbitral Proceedings: Powerplay Between Courts and Tribunals*, NISHITH DESAI ASSOCIATES (31 January 2020), available at: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Interim_Reliefs_in_Arbitral_Proceedings.pdf.
[64] Mohanty & Raina, *supra* note 10.

such tactics in other jurisdictions as well. For instance, in *Jaks Island Circle Sdn Bhd v. Star Media Group Bhd*, the Malaysian High Court found a party's failure to proceed diligently with the arbitration to be relevant while assessing the damages to be awarded.[66]

Additionally, even if there have been no or insignificant resultant losses, the tribunal must consider explicitly criticising the counsels representing the suspected party for their unprofessional conduct. Such criticism, which affects the perception of the counsel among other counsels and business parties,[67] has often found place in Indian judgments[68] and is certainly capable of deterring future indulgence in such dilatory tactics.

The authors firmly believe that arbitral tribunals and counsels shall greatly benefit from the foregoing approach and tackle the bad-faith creation of conflicts of interest by arbitral parties.

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[65] *See e.g.* Delhi International Arbitration Centre (Arbitration Proceedings) Rules 2018, Article 33.4(C); Mumbai Centre for International Arbitration Rules 2016, Article 32; Nani Palkhivala Arbitration Centre Rules 2005, Explanation 3(a) to Article 24(r).

[66] Foo Joon Liang & Raina Lee Pay Wen, *Failure to Proceed Diligently with Arbitration Relevant in Assessment of Damages*, KLUWER ARBITRATION BLOG (28 January 2020), available at: http://arbitrationblog.kluwerarbitration.com/2020/01/28/failure-to-proceed-diligently-with-arbitration-relevant-in-assessment-of-damages/.

[67] Lucy Ferguson Reed, '*Chapter 2, §2.04: Sanctions Available for Arbitratorsto Curtail Guerrilla Tactics*', in GÜNTHER J. HORVATH & STEPHAN WILSKE (EDS), GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION 101 (Kluwer Law International, 2013).

[68] V. C. Rangadurai v. D. Gopalan and Ors., 1979 SCR (1) 1054, ¶35; V. Balakrishnan, *supra* note 11, ¶52.