ESG AND ARBITRATION: A CASE FOR THE SETTLEMENT OF ESG CLAUSE-RELATED DISPUTES BY ARBITRATION IN INDIA

Aishwarya S & Theertha Aiyappa[1]

Abstract

Public interest on Environmental, Social and Governance considerations ("ESG") has been steadily increasing over the years. This scrutiny is significantly focused on corporations and their activities. Consequently, corporations are under increased pressure from stakeholders and governments to ensure that they abide by ESG obligations and set standards. Due to this rising scrutiny, a plethora of ESG-related issues relating to disclosure and ratings, disputes arising out of commercial contracts, etc., are also on the rise. In this article, the authors will be focusing on ESG-related disputes arising out of commercial contracts. These disputes are addressed through arbitration worldwide. The choice of arbitration as the dispute resolution forum can be attributed to factors such as its procedural flexibility, neutrality, party autonomy and usage of experts. In this context, the authors posit that arbitration is one of the better-suited dispute resolution mechanisms to resolve ESG clause-related disputes in India. In furtherance of the same, the arbitrability of a few indicators of ESG in India will be analysed. Thereafter, the limitations and advantages of arbitration will be examined to assess the overall viability of using arbitration to resolve ESG clause-related disputes in India. Finally, the authors suggest certain guidelines for the efficient usage of arbitration to resolve ESG clause-related disputes.

Keywords: ESG (Environmental, Social and Governance), Arbitration, ESG-clauses, Arbitration and Conciliation Act 1996, Public Interest.

[1] Students at National University of Advanced Legal Studies, Kochi.

INTRODUCTION

The term ESG contains three letters, each denoting separate considerations, i.e., Environmental, Social and Governance. These considerations are generally used to screen corporations for investments and to assess the sustainability of economic activity. They help to guide decision-making for the allocation of resources to ensure sustainability and long-term financial performance.[2] Though *prima facie* it only relates to ethical and corporate social responsibility concerns, the scope and influence of ESG is broad and ever-evolving. For instance, in 2019, the environmental group Milieudefensie alleged that Royal Dutch Shell PLC's action causing climate change violated its duty of care under Dutch law and human rights obligations.[3] Here, the Hague District Court did not accept Shell's contention that there was no legal standard which applied an emission cap on them and in 2021, it ordered Shell to reduce its emissions. Moreover, on a perusal of its financial relevance, ESG assets have grown to be worth trillions of dollars. Bloomberg reports[4] have asserted that ESG assets may hit $53 trillion by 2025, which is a third of global assets under management. ESG, as a broader theme, also includes the concept of ESG clauses, which are inserted in contracts between corporations to enable 'risk allocation'[5] or embedded in a corporate's framework to measure its progress in attaining ESG-related goals.

The environmental criterion in ESG essentially considers what impact a corporation has on the environment. It focuses on its policies regarding pollution, climate change, energy consumption, resource management, etc.[6] This is of importance as stakeholders of a corporation place great value in its safeguards and attitude towards environmental protection, especially in recent years.[7]

The social considerations look into the social impact of a corporation, its work and policies, social development goals, etc.[8] They include the rules and standards set by corporations concerning employer-employee relations, wages, employee development and training, human rights, working conditions, health and safety, diversity and inclusion, etc.[9]

---

2 *The Rising Importance of ESG and its Impact on International Arbitration,* Herbert Smith Freehills (July 27, 2021).

3 Vereniging Milieudefensie v. Royal Dutch Shell PLC, C/09/571932 / HA ZA 19-379.

4 *ESG Assets may Hit $53 Trillion by 2025, a Third of Global AUM*, Bloomberg, (Feb. 23, 2021).

5 *ESG-A Guide for General Counsel*, Corrs Chambers Westgarth, 21 (Nov. 2021).

6 Markopoulos, E. et al., *A Democratic, Green Ocean Management Framework for Environmental, Social and Governance (ESG) Compliance*, UCL Discovery (Apr. 23, 2020).

7 *The Importance of ESG and its Effect on International Arbitration,* The Alp Review, 2 (July 2022).

8 Gauthier Vannieuwenhuyse, *Exploring the Suitability of Arbitration for Settling ESG and Human Rights Disputes*, 40(1) J. Int. Arbitr. 1, 7 (2023).

9 *See supra* note 4.

The governance criterion focuses on the rules of a corporation relating to its leadership, shareholder rights, internal control, business ethics, executive compensation, corruption, bribery, etc.[10] Governance standards ensure that a corporation uses transparent methods, upholds integrity when selecting its leadership, and is accountable to shareholders.[11]

Though the ESG considerations have been in use for more than a decade, their importance has increased in corporate policies and investment decisions.[12] In recent years, public interest and pressure on ESG-related matters and compliance with ESG norms have surged. This has forced corporates, governments and stakeholders to take an active interest in such issues and produce real change in terms of ESG impact.[13] Consequentially, the number of ESG-related disputes being brought before judicial and quasi-judicial fora has also been on a rise.[14]

ESG disputes can be of various types. They can arise out of obligations imposed on parties through binding agreements, including international treaties and conventions such as the Paris Agreement on Climate Change[15], regional instruments like the Sustainable Finance Disclosures Regulation[16], which regulates greenwashing, investment activities that cause environmental degradation or social injustice, etc. National laws can also impose ESG obligations on parties. For instance, the UK Listing Rules and the Disclosure Guidance and Transparency Rules[17] sets targets concerning governance aspects like board composition. Disputes also emerge from ESG clauses inserted in contracts that impose obligations on parties, which, if not complied with, may result in a claim.[18] As aforementioned, this article will focus on ESG claims arising out of ESG clauses in commercial contracts. Disputes arising from ESG clauses can have huge implications for the concerned parties. In principle, since such disputes occur from breach of contractual obligations, their consequences can include legal action or regulatory action, financial penalties, reputational damage, loss of business, etc.

---

10 *See supra* note 1.

11 *Id.*

12 Laura Reichen, *Berlin Dispute Resolution Days 2022: ESG – Dawn of A New Era of Disputes in International Arbitration?*, Kluwer Arbitration Blog (Nov. 30, 2022).

13 Emily Hay, *ESG Clauses and Dispute Risks*, Kluwer Arbitration Blog (Dec. 11, 2022).

14 Commission on Arbitration and ADR, *Resolving Climate Change Related Disputes through Arbitration and ADR*, International Chamber of Commerce 8 (Nov. 2019).

15 UNFCCC Conference of the Parties 21, *Adoption of the Paris Agreement*, UN Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015).

16 Regulation 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector, 2019 OJ L317.

17 *PS22/3: Diversity and Inclusion on Company Boards and Executive Management,* Financial Conduct Authority, (Apr. 2022).

18 *See supra* note 5 at 3.

The authors explore the feasibility of arbitration as a dispute resolution forum for issues arising from ESG clauses. The introduction relating to ESG considerations and clauses, the kinds and rise of ESG disputes have been covered in Part I. Part II delves into what ESG clauses constitute and their relationship with commercial arbitration. It analyses real-world cases wherein arbitration is used to resolve such disputes. Part III examines the arbitrability of ESG disputes in India. Part IV then establishes why arbitration should be used as the preferred method to resolve such disputes. It examines the benefits and limitations of arbitration in ESG clause-related disputes, with specific reference to India. Part V concludes by suggesting guidelines that can be used to assist in establishing arbitration as the preferred method for settling these disputes.

RESOLUTION OF ESG CLAUSE-RELATED DISPUTES VIA ARBITRATION

A. Usage of arbitration to settle disputes arising from ESG clauses

i. *ESG Clauses*

ESG clauses are inserted in contracts and contain assurances or targets on ESG issues or disclosure and reporting obligations.[19] They can be inserted in commercial contracts, sales and supply agreements, mergers and acquisition contracts, etc. They ensure the compliance of corporations and other relevant parties to ESG standards and commitments. As ESG issues are taking precedence on the global stage, many contracts now contain environmental, health, and safety clauses to ensure that the contracting parties comply with the applicable ESG policies of a corporation or a country.[20]

ii. *Arbitration of ESG clauses*

The complex and novel nature of ESG clauses is likely to give rise to disputes regarding their interpretation and application.[21] Arbitration has been acknowledged as an appropriate forum to resolve B2B climate-related[22], environmental[23] and human rights disputes.[24] Arbitration, by nature, inherently has many factors that makes it an ideal mechanism for the resolution of ESG-related disputes. These factors include but are not limited to the availability

[19] *See supra* note 10.

[20] *Alternative Dispute Resolution: Significance of ESG in Arbitration*, Thailand Arbitration Center (Oct. 26, 2022).

[21] *See supra* note 10.

[22] *See supra* note 11 at 13.

[23] *Id*.

[24] *Hague Rules on Business and Human Rights Arbitration*, Centre for International Legal Cooperation (Dec. 2019).

of arbitrators with the relevant expertise, enforcement of arbitral awards in cross border cases and procedural flexibility of arbitration forums. Moreover, international commercial arbitration is also the preferred method to resolve cross-border disputes, as a major portion of these contracts operates globally.[25] Thus, disputes arising from such ESG clauses can be determined by arbitration, provided that they contain arbitration clauses.[26]

B. How arbitration is being used to settle ESG clause-related disputes

There has been a growing trend of utilisation of both investor-state and commercial arbitration to resolve ESG-related disputes. *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia*[27], and *Perenco Ecuador Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*[28] are examples of environmental disputes resolved via investor-state arbitration. The recent Trade and Cooperation Agreement[29] between the EU and UK concluded in 2020 contains provisions for environmental protection, combating climate change and social and labour rights. The forum for dispute settlement under this Agreement is arbitration. The recent case of *OMV Aktiengesellschaft v. Ministry of Environment, Water and Forests of Romania (II)*[30] is another example of commercial arbitration being used to settle disputes related to the environment. With specific reference to disputes arising from ESG clauses, multiple efforts have been made to promote the resolution of the same via arbitration. However, the authors acknowledge the limitation of available data in this area due to the confidential nature of arbitration.

The ICC Commission Report titled '*Resolving Climate Change Related Disputes through Arbitration and ADR*' recognises that arbitration is well-established in resolving environmental disputes.[31] It highlighted an increase in the number of environmental protection cases registered with the ICC and with other arbitral institutions.[32] It was reasoned that arbitration is preferred over other dispute settlement mechanisms for climate (environmental) related issues

---

[25] Holly Stebbing and India Furse, *ESG Disputes in International Arbitration*, Norton Rose Fulbright, 25-26 (Nov. 2022).

[26] Jack Terceño et al., *The Rising Significance of ESG and the Role of Arbitration*, Freshfields Bruckhaus Deringer LLP, 5-6 (Feb. 2022).

[27] Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40.

[28] Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos Del Ecuador (Petroecuador), ICSID Case No. ARB/08/6.

[29] Trade and Cooperation Agreement, UK-EU, December 30, 2020, Treaty Series No. 8 (2021).

[30] Lacey Yong, *Romania Faces Environmental Claim at ICC*, Global Arbitration Review (April 25, 2017).

[31] *See supra* note 11 at 16.

[32] *Id.*

as it assures a neutral tribunal, greater flexibility in procedure, expertise and accessibility, cross-border recognition and enforcement of awards.

Several ESG guidelines and draft clauses have been released by national and international working projects, committees, etc., that suggest arbitration as one of the methods for the resolution of ESG-related disputes, a few of which are discussed below.

The *Chancery Lane Project*, a collaborative initiative of international legal and industry professionals, brought out a Net Zero Toolkit.[33] The toolkit comprises practical contract clauses to be incorporated into commercial contracts to combat climate change. Some of these clauses have recognised arbitration as the preferred dispute resolution forum.[34] It highlighted arbitration as a beneficially placed forum that could adapt to the resolution of climate change disputes by allowing for the choice of specified governing laws and the appointment of arbitrators and experts with climate change and scientific expertise.

The *Model Contract Clauses* launched by the American Bar Association help buyers and suppliers protect the human rights of workers in international supply.[35] These clauses emphasise the use of arbitration to resolve disputes.[36]

The *2013 Bangladesh Accord on Fire and Building Safety* is an independent, legally binding agreement between brands and trade unions in Bangladesh. It is aimed at ensuring a safe and healthy garment and textile industry. The Accord contains an arbitration clause for dispute resolution[37] and has been utilised by at least two cases initiated by trade unions alleging breaches of agreement by fashion retailers.[38]

The *Hague Rules on Business and Human Rights Arbitration* also offer model arbitration clauses to be included in contracts to settle human rights disputes by arbitration.[39]

These examples indicate the usage of arbitration for diverse areas in the context of ESG clause-related disputes. Additionally, arbitration forums have

---

33 *Net Zero Toolkit*, Chancery Lane Project (Oct. 2021).
34 *Id.*
35 Working Group, *Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0*, American Bar Association (2019).
36 *Id.*
37 Accord on Fire & Building Safety in Bangladesh (May 2018).
38 *See supra* note 1.
39 *See supra* note 21.

taken the initiative to amend their rules and make them more accommodating to deal specifically with ESG-related issues.[40]

ARBITRABILITY OF ESG DISPUTES IN INDIA

The Arbitration and Conciliation Act 1996 recognises that certain disputes are not capable of being resolved through arbitration. It is provided for under Sec. 34(2)(b)(i) and Sec. 48(2) of the said Act, where the court may set aside an award when it is found that the subject matter of the dispute is not capable of settlement by arbitration. However, the Act does not specify what kind of disputes are non-arbitrable. [41] It has been laid down by the Supreme Court in *Vidya Drolia and others v. Durga Trading Corpn.* that non-arbitrability can be implied if the relevant statute expressly bars the parties from approaching any other forum.[42] Therefore, arbitration can be considered as an option for the parties to resort to, provided they have a valid arbitration agreement[43] and the relevant statute does not expressly bar arbitration as a resolution mechanism. Thus, parties can use arbitration for ESG clause-related disputes in their agreements, provided they keep in mind the arbitrability of the subject matter of the ESG clause.

ESG disputes have not been directly resolved through arbitration in India. However, they have been dealt with individually under the heads of E, S, and G. Due to the exhaustive nature of the available ESG considerations, the authors will cover a few of them based on the available data.

A. Arbitrability of Social Considerations

The social indicators of a company mainly encompass labour disputes involving employer and employees, employee gender diversity, customer satisfaction, corporate sexual harassment policies, human rights, fair labour practices, etc.[44] The arbitrability of disputes arising out of employer-employee agreements and customer satisfaction will be examined.

The adjudicatory bodies of labour disputes in India are the Labour Court, Industrial Tribunal and National Tribunal or National Industrial Tribunal.[45]

---

[40] *Climate Change Justice and Human Rights Task Force Report on Achieving Justice and Human Rights in an Era of Climate Disruption*, International Bar Association, 144 (2014).

[41] Kingshuk Banerjee, *Non-arbitrable Disputes-The Law in India*, International Bar Association (June 3, 2021).

[42] Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : 2020 SCC OnLine SC 1018, paras 41-42.

[43] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament 1996, §7.

[44] Natalie Runyon, *Measuring the "S" in ESG through the Investors' Lens of People well-being*, Thomson Reuters (Nov. 21, 2022).

[45] Industrial Disputes Act, 1947, No. 14, Acts of Parliament 1947, §10.

However, there have been cases where disputes arising out of employer-employee agreements have been referred to arbitration based on the arbitration clause present in the agreement under the Industrial Disputes Act, 1947 (hereinafter "ID Act"). Though there are differences in opinions regarding the arbitrability of such disputes,[46] the main case for consideration is that of *Rajesh Korat v. Innoviti*.[47] It allowed the application for arbitration; however, it was held that the procedure to be followed was to be in conformity with the ID Act and not the Arbitration and Conciliation Act 1996.

The issue of the public and social interest involved in labour disputes must also be taken into consideration.[48] In the case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*[49], it was held that the characterisation of a claim is based on whether it is a *right in rem* or *right in personam,* and the one involving *right in rem* is non-arbitrable. Therefore, employer-employee agreements cannot be completely classified as private in nature since a few disputes involve a right in rem and public interest. However, the ID Act prescribes that such agreements shall have to be sent to the government, which shall publish them in the Official Gazette within one month.[50] This is to ensure that those who are not parties to the arbitration agreement but are concerned with the industrial dispute being arbitrated are notified of the arbitration so that it does not remain private in nature.[51]

Section 10A of the ID Act also allows parties to refer their dispute to arbitration based on the arbitration agreement before referring it to a Labour Court or Tribunals. Such a reference will be to persons, including presiding officers of a Labour Court or Tribunal.[52] Thus, at this stage, the arbitrability of the dispute concerning public impact can be decided. Secondly, the non-demarcation between arbitrable and non-arbitrable disputes under the Arbitration and Conciliation Act provides flexibility to determine the ambit of disputes to be arbitrated by relying on other statutes.[53]

The aspect of *right in rem* is also relevant for discussion in cases of customer satisfaction. This aspect will be examined from the lens of consumer rights under the Consumer Protection Act, 2019 (hereinafter "CPA"). In the case of *Emaar MGF v Aftab Singh*[54], the Supreme Court held that consumer

---

46 Kingfisher Airlines Ltd. v. Prithvi Malhotra, 2012 SCC OnLine Bom 1704.

47 Rajesh Korat v. Innoviti Embedded Solutions (P) Ltd., 2017 SCC OnLine Kar 4975.

48 Ojaswa Pathak & Mayank Kataria, *Establishing Industrial Self-Governance in India: Reforming the Labour Arbitration Regime*, 15 NUALS L.J. 219, 29 (2020).

49 Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532.

50 *See supra* note 37 at §10A(3).

51 Moorco (India) Ltd. v. State of T.N., 1992 SCC OnLine Mad 42 : (1994) 68 FLR 157.

52 *See supra* note 37 at §10A.

53 Smaran Sitaram Shetty, *Arbitration of Labor Disputes in India: Towards a Public Policy Theory of Arbitrability*, Kluwer Arbitration Blog (Nov. 26, 2017).

54 Emaar MGF Land Ltd. v. Aftab Singh, (2019) 12 SCC 751.

disputes are non-arbitrable due to the test of *right-in-rem* and *right-in-personam*. However, the authors opine that this blanket restriction is flawed.[55] The CPA provides for consumer complaints by one consumer under Section 35(1)(a)[56] and more than one consumer under Section 35(1)(c)[57] of the CPA. Though the latter category involves the *right-in-rem* and interests of third parties, which are not generally arbitrable[58], the first category of individual complaints can still be arbitrated, barring those involving general grievances. In addition, mediation is considered as a form of an alternative dispute resolution mechanism for consumer disputes.[59] This suggests that consumer disputes are not exclusively restricted to the jurisdiction of Consumer Courts. Though the authors do acknowledge the limitations of arbitrating these disputes, it can still be explored as an option to adjudicate consumer disputes, especially the ones involving private interest.

B. Arbitrability of Governance Considerations

Governance considerations range from corruption and fraud to bribery and shareholders' rights.[60] The authors will be focusing on the arbitrability of disputes arising from Shareholders' Agreement ("SHA").

The disputes pertaining to the governance of a company are dealt with in a parallel structure of tribunals under the Companies Act 2013. Though the National Company Law Tribunals ("NCLT") are quasi-judicial authorities, they have the power to refer parties to arbitration.[61] It is emphasised that the interplay of shareholder rights and arbitration has been gaining importance.[62] In this context, confusion may arise if an arbitration clause is required in the Articles of Association ("AoA") to refer the parties to arbitration arising out of SHA. In the case of *Umesh Kumar Baveja v. IL&FS Transportation Network,* despite the subject company itself being party to the SHA, the Court found that it is the Articles that govern the relationship between the parties and that since they did not contain any arbitration provision, the parties could not be referred to arbitration.[63] However, the parties' intention should be given utmost importance. Where the SHA demonstrates an intention to refer all disputes arising

---

55 Pavitra Naidu & Shreya Jain, *Arbitration of Consumer Disputes in India: A Need for Reform*, IndiaCorpLaw (Mar. 18, 2021).

56 The Consumer Protection Act, 2019, No. 35, Acts of Parliament 2019, § 35(1)(a).

57 *Id.* at §35(1)(c).

58 Stavros Brekoulakis, *Third Parties in International Commercial Arbitration*, The Center for Transnational Litigation, Arbitration and Commercial Law (July 4, 2011).

59 *See supra* note 48 at §37.

60 *Defining the 'G' in ESG Governance Factors at the Heart of Sustainable Business*, World Economic Forum (June 2022).

61 Richa Kar v. Actoserba Active Wholesale (P) Ltd., 2019 SCC OnLine NCLAT 532; Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament 2016, § 60(1).

62 Avani Agarwal & Aditi Ramakrishnan, *Mandatory Shareholder Arbitration: Moving the Debate to India*, Kluwer Arbitration Blog (Sept. 1, 2019).

63 Umesh Kumar Baveja v. IL&FS Transportation Network Ltd., 2013 SCC OnLine Del 6436.

from it to arbitration, the failure to incorporate it in AoA should not hinder the court from referring the dispute to arbitration.[64]

C. Arbitrability of Environmental Disputes

There is not much available data on the arbitrability of environment-related disputes in India due to limitations such as confidentiality of arbitration. However, India has been making efforts to resolve environmental disputes through ADR mechanisms.[65] For instance, though this is an example of investment-treaty arbitration, the *Indus Waters Kishenganga (Pakistan v. India)* case was resolved through arbitration by the PCA.[66] The authors will be analysing how arbitrability of environment-related disputes is beneficial for the parties in the subsequent part.

BENEFITS AND LIMITATIONS OF USING ARBITRATION TO RESOLVE ESG CLAUSE-RELATED DISPUTES IN INDIA

The arbitrability of ESG disputes in India is already in practice. However, it needs to be streamlined to make it an effective process. To this end, the authors seek to analyse the advantages and limitations of arbitration to resolve ESG clause-related disputes.

A. Limitations of arbitration to settle ESG disputes in India

Arbitration has been used to settle "ESG-related disputes" across the world. However, it is relevant to assess if arbitration is accommodative to resolve "ESG clause-related disputes" in India. In this regard, the following are a few limitations which need to be addressed to make it a better mode of resolution mechanism:

Lack of transparency: The lack of transparency in arbitration is inevitably closely linked with its confidentiality. Though it is not entirely confidential, it is still a private process. However, this is being addressed by arbitral institutions by taking measures to make their proceedings more transparent. For instance, under ICC's Note to Parties and Arbitral Tribunal on the Conduct of Arbitration under the ICC Rules of Arbitration, publication and dissemination of certain information is allowed unless parties have objected to the

---

[64] Ravitej Chilumuri & Aaditya Gambhir, *Invocation of Arbitration Clauses in Shareholder Agreements for Disputes under Articles of Association,* 13(4) NUJS L. Rev., 9 (2020).

[65] Abdul Haseeb Ansari, Muhamad Hassan Bin Ahmad and Sodiq Omoola, *Alternative Dispute Resolution in Environmental and Natural Resource Disputes*, 59(1) JILI 26 (2017).

[66] *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Permanent Court of Arbitration (Dec. 21, 2013).

same.[67] Additionally, with specific reference to public interest, national jurisprudence in many countries has recognised public interest as an exception to confidentiality.[68]

Public Interest v. Private nature of arbitration: A pressing challenge in using arbitration to resolve ESG disputes is to balance the private nature of arbitration and the public interest concerning ESG.[69] It is especially relevant in the context of environment and human rights disputes. The problem that arises here is that the private process of arbitration leads to the concealment of the actions of the infringing parties to the public, who may have a vested interest.[70] To resolve this limitation, the authors suggest a balanced approach where there is a classification between ESG disputes of public and private nature. For instance, in India, the arbitrability of fraud depends on the gravity of the fraudulent activity. The key distinction for arbitrability of disputes involving fraud is based on whether it is a mere allegation of "fraud simpliciter" and "serious allegation of fraud.[71] In this case, the former type of dispute is arbitrable. Further clarity has been offered in the case of *Avitel Post Studioz Ltd. v. HSBC PI Holdings,* which laid down two conditions to determine serious allegation of fraud: (i) absence of an arbitration agreement and (ii) allegations of fraudulent conduct made against the "state or its instrumentalities".[72] A caveat to note is that the second condition involves matters of public law and will not be arbitrable.[73] Though this may be a limitation, it offers clarity by demarcating between the two types of disputes involving the private and the public interest. Therefore, the parties can assess whether such disputes are arbitrable or not based on the aforementioned conditions.

Power Imbalance between parties: Another limitation of arbitration is the potential imbalance which may arise between parties in terms of power and resources.[74] The privilege of powerful and well-resourced parties may get "amplified" over less well-equipped parties.[75] This may arise, for instance, in employer-employee agreements, where the employer usually has power over the employees, and the parties may not be on an equal footing. The authors are not in a position to comment on the aspect of power. However, in terms of

---

[67] *Note to Parties and Arbitral Tribunals on the Conduct of Arbitration*, International Court of Arbitration (Jan. 1, 2021).

[68] Plowman v. Esso Australia Resources Ltd, Case No. 7371 of 1992 (Sup. Ct. of Victoria); Ali Shipping Corpn. v. Shipyard Trogir, (1999) 1 WLR 314; Supplementary Rules for Class Arbitrations of the American Arbitration Association (AAA), Rule 10.

[69] *See supra* note 50.

[70] *See supra* note 5.

[71] A. Ayyaswamy v. A.Paramasivam, (2016) 10 SCC 386.

[72] Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713.

[73] Sarah Ayreen Mir, *The Tests for Determining Arbitrability of Fraud in India: Clearing the Mist*, Kluwer Arbitration Blog (Oct. 6, 2020).

[74] *See supra* note 5 at 18.

[75] *Id*; Ulla Gläßer and Claudia Kück, *The Hague Rules on Business and Human Rights – A Balancing Act*, 18 Ger. Arb. J. 124, 127 (2020).

resources, parties may consider third-party funding.[76] Though third-party funding is highly disputed due to the involvement of a third party in the arbitration process[77], the parties can draft the clauses accordingly by adding a "third-party funder" clause in their arbitration agreement.

Third-Party Participation: Arbitration of ESG disputes arising out of commercial contracts does not usually allow for third-party participation. This may pose a challenge, especially in the context of the impact on human rights.[78] The affected parties may be direct or indirect; in such cases, consolidation or joinder can be explored as an option to involve third-party participation.[79] If a third party can establish that it has a direct relationship with the signatory to the arbitration agreement, paired with the rise in regulations, it may be important for arbitration to be able to incorporate third-party interests. In addition, a commonality of the subject matter and where the combined reference of such parties would meet the ends of justice, third parties may be joined to the arbitration.[80] This is not a major limitation in the context of an ESG-clause-specific dispute since it is purely a contractual arrangement. In cases where there is an indirect impact, for instance, in environmental disputes, the parties can ascertain the arbitrability of the dispute and approach the suitable forum.

Though these limitations need to be acknowledged, they can be resolved to cater to the needs of the parties.

B. Advantages of using arbitration as the dispute resolution forum

Despite the aforementioned limitations, there are various advantages of using arbitration as a dispute resolution forum to resolve ESG clause-related disputes over litigation.[81] Emphasis is made on the advantages of arbitration to resolve environmental disputes in India since this area is relatively less explored.

Procedural Flexibility: The procedural flexibility of arbitration forums allows parties to set rules best suited to their specific needs.[82] In ESG disputes specifically, arbitration allows for the possibility of obtaining interim

---

[76] Kaira Pinheiro & Dishay Chitalia, *Third-party Funding in International Arbitration: Devising a Legal Framework for India*, 14(2) NUJS L. Rev. (2021).

[77] *Id.*

[78] *See supra* note 5 at 16.

[79] Jayesh H et al, Joinder of Parties in Arbitration Proceedings, International Bar Association.

[80] Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.

[81] *Arbitration vs. Litigation: The Differences,* Thomson Reuters (Oct. 4, 2022).

[82] Nigel Blackaby et al., Redfern And Hunter On International Arbitration, 7th edn., 2022.

measures,[83] which are useful in cases concerning serious violations of human rights, permanent or impending environmental damage, etc.[84]

Arbitrators and Experts: Arbitration offers the benefit of providing parties with the opportunity to avail arbitrators who are experts or specialists in the matters under contention.[85] This becomes particularly relevant while dealing with ESG-related concepts and clauses, which may be unique and complex and require special technical knowledge and expertise.[86] The rules of arbitral institutions like the PCAs provide for establishing a list of scientific and technical arbitrators and experts to deal with complex issues.[87] Contrarily, experts appointed in Tribunals such as the National Green Tribunal (hereinafter "NGT"), which is currently used as a forum to settle environmental disputes in India, have been criticised for their lack of required expertise.[88]

Time Efficiency: Arbitration is a time-effective process compared to litigation in courts, which can be expensive and long drawn out.[89] In India, the enormous time delays involved are one of the principal weaknesses of the judicial system.[90] Additionally, the time factor is relevant, in particular to environmental disputes which could require immediate action. For these purposes, arbitration also has the added advantage of providing an expedited procedure.[91]

Neutrality and Appointment of Arbitrators: Courts and tribunals (the current method of ESG dispute resolution) in India are criticised for their lack of transparency and independence in matters such as the appointment of members[92] and penalisation of government authorities.[93] However, in arbitration, the arbitrators are selected by the parties themselves, ensuring neutrality.

---

[83] *See supra* note 35 at § 9 and 17.

[84] Montserrat Manzano and Ana Toimil, *The Role of Arbitration in ESG Disputes*, Von Wobeser (Nov. 12, 2021).

[85] *See supra* note 17.

[86] *See supra* note 76.

[87] Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, June 19, 2001, arts. 8(3) and 27(5).

[88] Raghuveer Nath Dixit and Armin Rosencranz, *Evaluating the National Green Tribunal after Nearly a Decade: Ten Challenges to Overcome*, 9 NLIU L. Rev. 1, 32 (2019).

[89] For example, the Survey on Costs and Disputes Funding in Africa released by African Arbitration Academy identified costs and the time take to resolve disputes as some the main reasons for including arbitration clauses in contractual agreements.

[90] Pratik Datta and Suyash Rai, *How to Start Resolving the Indian Judiciary's Long-Running Case Backlog*, Carnegie Endowment for International Peace, (Sept. 9, 2021).

[91] ICC Rules of Arbitration, 2021, Appendix VI, art. 30; UNCITRAL Arbitration Rules, Sept. 9, 2021, art. 1(5).

[92] For example, under arts. 7 and 7A of the Industrial Disputes Act, 1947, members of the Labour Courts and Tribunals are appointed by the appropriate governments; *See supra* note 80 at 30.

[93] *See supra* note 80 at 15.

Enforceability: Arbitration is the preferred method of dispute resolution of cross-border disputes, as arbitral tribunal decisions are enforceable in a majority of countries with the acceptance of the New York Convention (hereinafter "NYC").[94] India, too, is a signatory of the NYC.[95] Thus, in cross-border disputes, parties can choose foreign seats and places of arbitration whose rules are best suited to govern their ESG disputes. Enforcement of awards is ensured even in such situations. This is particularly beneficial in the Indian context, wherein there is scope for development for enforcement of contracts[96] and implementation of decisions.[97]

Access to Justice: Criticisms have been raised against tribunals like the NGT concerning their ability to provide access to justice due to their limited number of locations.[98] In arbitration, parties can select their place of arbitration. Thus, it provides them with better access to justice. Additionally, delays in appointments and the resignation of members of Tribunals have led to an increase in the pressure on that system.[99] Arbitration forums do not suffer from such deficiencies as arbitrators are appointed by parties on a case-to-case basis. Thus, they can help in reducing such burdens.

Though there are limitations to using arbitration to settle ESG clause-related disputes, the same can be resolved and addressed by the parties as discussed in Part IV(A). Combined with the aforementioned advantages, arbitration is a relatively better forum for resolving such disputes.

CONCLUSION AND WAY FORWARD

Arbitration has been suggested as one of the better resolution mechanisms to settle ESG clause-related disputes in India. To this end, the authors seek to provide a few suggestions that would help promote the use of arbitration as a forum for settlement of such disputes. The authors have two key suggestions relating to (i) the Drafting of ESG clauses by the parties and (ii) the Role of arbitral tribunals and government in facilitating arbitration as one of the preferred methods to resolve ESG disputes. The authors acknowledge that the following suggestions are not free of implementation challenges, and they will be addressed to a limited extent.

---

94 *See supra* note 17.

95 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 UNTS 3.

96 In 2020 edition of the World Bank's Ease of Doing Business rankings, India ranked 163 (out of 190 countries) on contract enforcement.

97 *See supra* note 80 at 19 and 38.

98 *Id.* at 28.

99 *Ibid.*

Drafting of clauses

The parties need to ensure tailoring of ESG clauses to meet the parties' interests both in ad-hoc and institutional arbitration. Institutional arbitration is administered by a specialist arbitral institution under its own rules of arbitration.[100] In the case of ad-hoc arbitration, it encompasses all arbitrations that are not institutional.[101] Hence, the clauses will have to be drafted, bearing in mind the type of arbitration opted for.

In addition, the clauses must also be specific and straightforward so that the extent of the dispute can be determined in case of breach of such clauses.[102] This becomes more relevant with an arbitration clause since the determination of the arbitrability of disputes is still evolving in India. The specific nature of clauses will help to distinguish between arbitrable and non-arbitrable disputes. For instance, certain matters concerning public interest are generally non-arbitrable. Though at the time of drafting, it will be difficult to foresee all possible disputes, the parties may factor in the arbitrability of a dispute. It is also suggested that the parties' choice of law while drafting the arbitration clause(s) enable enforcement of awards in any of the jurisdictions under the NYC.

Role of arbitral institutions and Government (specific to India)

The role of arbitral institutions comes into play when the parties opt for settlement of ESG dispute, and by extension of ESG clause-related disputes, by specifying the relevant arbitral institution in the arbitration agreement. In this context, it is suggested that the government should work in tandem with these arbitral institutions for the promotion of the usage of arbitration to settle ESG disputes. In furtherance of the same, they can issue guidelines to the effect that arbitration be used as one of the effective methods to resolve ESG disputes and bring out appropriate draft clauses. In addition, the State can also promote an arbitration-friendly environment by providing these arbitral institutions with the necessary financial and infrastructural support.[103] There is a need for the development of institutional arbitration in India to be more accommodative to settle ESG disputes. In this regard, the 2019 Amendment is a welcome step in this direction.[104] According to the said amendment, the Arbitral Council of India has been set up to oversee the gradation and functioning of arbitral

---

[100] Ulrich G. Schroeter, *Ad Hoc Or Institutional Arbitration- A Clear Cut Distinction? A Closer Look at Borderline Cases*, 10(2) Contemp. Asia Arb. J. 141, 145 (2017).

[101] *Id.* at 146.

[102] Stéphanie De Smedt et al., *Enforcing ESG Obligations in Supply Contracts*, Loyens L. Loeff (Feb. 28, 2023).

[103] Li Eric, *Institutional Arbitration*, Jusmundi (23 May 2022).

[104] Zisha Rizvi, *The Shift Towards Institutional Arbitration: Critically Examining the Arbitration (Amendment) Act 2019* (1 March 2020).

institutions in India. This will help in the growth and functioning of arbitral institutions in India.

Institutions like the Mumbai Centre for International Arbitration (MCIA), the Indian Council of Arbitration (ICA), etc., can also include model ESG clauses in their rules. They can be inspired by the Swiss Arbitration Centre, which has formulated "Supplemental Swiss Rules for Corporate Law Disputes", which account for the specifics of corporate law disputes while ensuring that disputes are resolved efficiently and in compliance with statutory requirements.[105] It allows Swiss companies to include arbitration clauses for corporate law disputes in their articles of association.[106] The arbitral institutions in India are also suggested to come up with tailor-made rules depending on the area of the ESG dispute.

With the growing global adoption of ESG principles, there is a rising need for efficient dispute resolution procedures for ESG related conflicts. The use of arbitration for ESG clause-related dispute resolution in India is a necessary step to promote sustainable development and good corporate governance. The innate advantages of arbitration are particularly well-suited to the complex and nuanced nature of ESG clause-related disputes. By incorporating arbitration into India's dispute resolution framework, the country can position itself as a leading destination for investors and businesses seeking to resolve ESG disputes in a fair, efficient, and cost-effective manner. By the implementation of these guidelines and suggestions, the authors hope that arbitration will be effectively used to resolve disputes arising out of ESG clauses in India.

[105] Dr.Christopher Boog and Dr.Stefan Leimgruber, *Swiss Arbitration Centre Introduces Supplemental Swiss Rules for Corporate Law Disputes*, SCHELLENBERG WITTMER (October 27, 2022).

[106] *Ibid*.