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## Conceptualizing a Framework of Institutionalized Appellate Arbitration in International Commercial Arbitration

Axay Satagopan

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## CONCEPTUALIZING A FRAMEWORK OF INSTITUTIONALIZED APPELLATE ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION

Axay Satagopan\*

**ABSTRACT:** *The absence of the option to prefer substantive appeals from arbitral adjudication is a conspicuous systemic peculiarity of the arbitral process. While this absence has for the most part been accepted without question or resistance as being an axiomatic entailment of the arbitral process, the last two decades have witnessed an increasing amount of criticism directed at it, both from scholarship as well as the business community. The criticism has been especially emphatic, in relation to international commercial arbitrations, a sizeable proportion of which pertain to complex and high stake disputes. Moreover, there has been a concurrent increase in the demand from commercial parties for the provision of the option to subject arbitral awards to substantive review. In response to this, some major ADR Institutions such as CPR, JAMS and recently, the AAA have introduced provisions within their respective frameworks in respect of the optional substantive review of arbitral awards. These developments necessitate a reevaluation of the integrality of the systemic absence of substantive appeals to arbitration. More important is the appraisal of the conduciveness of such absence to the interests of parties desirous of arbitrating their disputes. This in turn requires a cogitation of the arguments advanced both in support of and in opposition to the institutionalization of arbitral appeals, i.e. introducing them at the State level and not only at the level of ADR Institutions, to determine two things: firstly, whether the benefits therefrom would significantly outweigh the potential drawbacks thereof, and secondly, whether the effects of such drawbacks can be offset, if not altogether eliminated. The present article answers both the abovementioned questions in the affirmative. Further, it*

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*conceptualizes a model of appellate arbitration tailored specifically to adequately address the possible drawbacks of institutionalizing arbitral appeals. This model, which I have christened the “Novel Appellate Arbitration Model” or NAAM has been structured in a manner as to facilitate meaningful error correction, while at the same time largely preserving the ‘classical advantages’ of arbitration such as finality, speed, neutrality and inexpensiveness.*

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## I. INTRODUCTION

The appellate process is indisputably one of the most axiomatic and sacrosanct systemic features of judicial, as well as quasi-judicial, adjudicatory frameworks.<sup>1</sup> Its permanence and utility have remained virtually unchallenged notwithstanding the transmogrification of the legal and adjudicatory landscape over the ages.<sup>2</sup> The appellate process serves, among

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\* Law-Clerk & Research Assistant, to Justice A.K. Goel, Supreme Court of India.

B.A.,LL.B. (*Hons.*), 2017 at the National University of Juridical Sciences, Calcutta. I would like to thank Thomas Stipanowich, Prof. of law at Pepperdine University and Sukhsimranjit Singh, Associate Prof. of law at Pepperdine University, for their valuable inputs in relation to this article. The views expressed in this article are in their entirety, attributable to me, and do not represent the views of the Supreme Court of India, or Justice A.K. Goel.

<sup>1</sup> See Irving Wilner, *Civil Appeals: Are They Useful In The Administration of Justice?*, 56 GEO. L. J. 417, 417 (1967) (noting that the right of appeal of a non-prevailing party has been accepted in a matter of fact manner); Robert Martineau, *The Appellate Process in Civil Cases: A Proposed Model*, 63(2) MARQUETTE. L. REV. 163, 165 (1979) (“For most persons that question [i.e. whether a system of appellate review is necessary] is almost rhetorical, there being no doubt that appellate review is essential to the proper functioning of a judicial system.”); Harlon Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L. J. 62, 62 (1985) (referring to the right to appeal as “sacrosanct,” and noting that the right to appeal at least once is almost universal); Steven Shavell, *On the Design of the Appeals Process: The Optimal Use of Discretionary Review versus Direct Appeal* 39(1) J. LEGAL STUD. 63, 83 (2010) (noting that litigants disappointed with initial judicial outcomes enjoy some right of appeal “[i]n virtually all state-sanctioned legal systems in the world, including those of administrative agencies.”) *Id.*

<sup>2</sup> See Wilner, *supra* note 1, at 417 (“In an age which has seen the growth of entirely new fields of law, a rapidly growing fusion of law and equity, and a nearly thorough overhaul of civil procedure, the permanence of civil appeals has remained remarkably unchallenged . . . it has successfully avoided any inquiry into its utility or theory.”); Martineau, *supra* note 1, at 165; Dalton, *supra* note 1, at 66 (noting that most of the literature on the appeals process deals with the mechanisms thereof and its intricacies, but not the need for, or legitimacy of the process itself).

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others, two essential functions—error correction and lawmaking,<sup>3</sup> which functions, in turn, are purposed with delivering and safeguarding justice. For this reason, the appellate process has been christened by one author, not inaptly, to be one of the most important “technological and normative girders sustaining our legal edifice.”<sup>4</sup> In a similar vein, the American Bar Association (ABA) has referred to the appellate process as a fundamental element of procedural fairness.<sup>5</sup>

However, the importance of the appellate process notwithstanding, the arbitral frameworks of most jurisdictions do not provide award debtors, with an option to appeal arbitral awards.<sup>6</sup> Likewise, the rules of most ADR

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<sup>3</sup> See e.g., Irene Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT’L L. & POL. 1109, 1110 (2012) (“In court systems . . . appellate review fulfills two principal functions: error correction and law making.”); Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SOUTH. METHODIST U. L. REV. 469, 469–470 (1998) (“The first function of an appeals process is to correct errors by the initial decision maker . . . The second function attributed to the appeals process is lawmaking.”); Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 316 (2009) (“Appellate courts serve two primary institutional functions—the correction of error in the initial proceedings, and the development of the law.”) (footnotes omitted); David Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L.A. L. REV. 299, 299, 302 (1984) (“They [appellate courts] have two fundamental tasks. First, they must set forth principles of law to guide the lower courts, legislatures and individuals . . . [T]his role will be called the ‘guidance’ function [law-making function] . . . The second function of appellate courts is one of assuring correctness . . . [T]his role will be referred to as the ‘correctness’ function.”) (internal citations omitted); Shavell, *supra* note 1, at 426 (noting that error correction and “harmonization of law” (lawmaking) as two of the functions of the appeals process.) Here, error correction refers to the correction of errors (legal and/or factual) in the decision of the previous adjudicator, while lawmaking (or the various other descriptions thereof) refers to the refinement of shaping and refinement of substantive law, through *inter alia*, the creation of judge-made law, the interpretation of written as well as unwritten sources of law, the application of law to facts, and the appraisal of the continuing validity of earlier case law. These two functions generally operate concurrently, but are not symbiotic.

<sup>4</sup> See Wildner, *supra* note 1, at 147.

<sup>5</sup> See Dalton, *supra* note 1, at 66 (citing ABA COMM. ON STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO APPELLATE COURTS §3.10 Commentary at 12 (1977)).

<sup>6</sup> The grounds of challenge of international arbitral awards, are posited by Article V of the New York Convention. Article V, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 10 June 1958, *United Nations Treaty Series*, vol. 330, No. 4739 [hereinafter New York Convention]. While the exact standard of review varies from one jurisdiction to another, most jurisdictions that have ratified the NY Convention have incorporated only those grounds into their respective arbitral frameworks and do not provide an option to appeal an arbitral award on substantive points. See Thomas E. Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT’L ARB 213, 213 (2005) (“The consensus among likeminded national legal systems regarding standards for the court supervision of arbitral awards excludes the judicial review of the merits of awards.”). A notable exception to this is the United Kingdom, in which appeals from arbitral awards even on the merits of the award and the application of law by the arbitral tribunal. See Arbitration Act

institutions proscribe the appeal of arbitral awards rendered within their portals.<sup>7</sup> This is not to say that arbitral awards cannot be challenged;<sup>8</sup> challenges to arbitral awards, though permissible, are typically available only in respect of procedural improprieties of the arbitral process and/or the contrariety of the award to the public policy of the country in which it is sought,<sup>9</sup> the latter being a mere vestigial ground in most countries—with challenges under it being mostly unsuccessful.<sup>10</sup> For this reason, challenging awards under the present situation has been described, not inaccurately, as being a Sisyphean task.<sup>11</sup>

However, this conspicuous absence of an appellate mechanism in arbitral frameworks—a systemic peculiarity of the arbitral process, which has largely been tolerated as an axiomatic tradeoff inherent to the arbitral process,<sup>12</sup> and

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1996, § 69 (1996). Interestingly however, many parliamentarians felt during the consultation of the initial draft of the Arbitration Bill, that the right of substantive appeal of the award ought to be abolished. See Michael O'Reilly & R. Holmes, *Appeals from Arbitral Awards: Should Section 69 be Repealed?* 69(1) ARBITRATION 1, 9 (2003) (noting that the option of substantive appeal of arbitral awards afforded by Section 69 of the English Arbitration Act had little tangible value).

<sup>7</sup> The four ADR Institutions (ADRI) within the portals of which a large majority of arbitration cases are determined—namely, the International Chamber of Commerce (ICC), the London Court of International Arbitration, the Singapore International Arbitration Court (SIAC) and the International Institute of Conflict & Dispute Resolution (ICDR)—expressly preclude appeals from arbitral awards. In this regard, see ICC Rules Arb. Art. 34, ¶6; ICDR Rules Art. 30, ¶1; LCIA Rules Art. 26.9; SIAC Rules Art. 28.9.

<sup>8</sup> The terms “appeal” and “challenge” ought to be distinguished. While the term “appeal” connotes a review on the substance, i.e. the merits of the award being appealed, the term “challenge” connotes a review on grounds other than the merits of the award being challenged. See REDFERN & HUNTER, ON INTERNATIONAL ARBITRATION 569 (Nigel Blackaby et.al. 5th eds. 2009) (“Grounds of challenge are rarely concerned with review of the merits of the tribunal’s decision, thus distinguishing challenge from an appeal.”). While many commentators use the terms interchangeably, the present article, for the sake of clarity, distinguishes between the two.

<sup>9</sup> New York Convention, *supra* note 6, at Art. V. For a detailed exposition of the current grounds of review of arbitral awards, and an appraisal of their adequacy in securing meaningful error correction, see Part III.B.2 and III.C below.

<sup>10</sup> Daniel M. Kolkey, *Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations*, 22 Int'l Law. 693, 698 (1988) (“[I]n the international commercial context, the possibility of vacating an arbitral award on public policy . . . grounds is extremely limited.”); Albert Berg, *Why Are Some Awards Not Enforceable?* in ICCA CONGRESS SERIES NO. 12: NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 291, 309 (Albert Jan van den Berg ed., 2004) (noting that the public policy defense rarely leads to a refusal to enforce arbitral awards.).

<sup>11</sup> Christian Garza & Christopher Kratovil, *Contracting for Private Appellate Review of Arbitration Awards* 19(2) APP. ADVOC. 17, 23 (2007).

<sup>12</sup> Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 241 (1999) (“It has long been considered axiomatic in arbitration that parties who agree to submit their disputes to arbitrators engage in a sort of quid pro quo: in exchange for reduced

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even lauded by some authors, to be one of the “inestimable advantages of arbitration,”<sup>13</sup> has increasingly been the recipient of criticisms in recent discourse—being described among other things as one of the downsides of international arbitration,<sup>14</sup> and as a “bitter pill.”<sup>15</sup> Further, multiple authors have opined that the absence of meaningful appeals from arbitral awards is

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costs and speedier resolution, parties agree to limit their right to appeal.”); Kevin Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act*, 46 ST. LOUIS L.J. 509, 549 (2002) (“A long-standing platitude of arbitration is that parties agreeing to settle their dispute by arbitration enter into a quid pro quo: a limited right of appeal of the award in exchange for a cheap and quick resolution of the dispute.”); Brad Galbraith, Note: *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the “Manifest Disregard” of the Law Standard*, 27 IND. L. REV. 241, 263 (1993) (“When a party agrees to arbitration, that party gains the benefits of arbitration, but sacrifices some of the benefits of adjudication, such as the appellate process.”); ALAN SCOTT RAU ET AL., *ARBITRATION* 134 (2d ed. 2002) (noting that by agreeing to arbitrate, parties gain the benefits of arbitration, but also sacrifice some of the benefits of litigation, including a full appellate process); Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards* 8 AM. REV. INT’L ARB. 147, 147 (1997) (noting that parties to arbitration have tacitly acquiesced to the lack of an appellate process).

<sup>13</sup> Smit, *supra* note 12, at 147; *see also* Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?* 30(5) J. INT’L ARB. 531, 531 (2013) (noting that the lack of arbitral appeals is one of the most important reasons occasioning parties to commercial contracts to take recourse to arbitration to resolve disputes in which they are parties); Sarah R. Cole, *Revisiting the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214, 217 (2007) (noting that the absence of arbitral appeals had initially largely been perceived as beneficial to the efficiency of the arbitral process).

<sup>14</sup> Joseph Kelly, *Is that your final answer? Appeals of Arbitration Awards*, FROSTBROWNTODD (Aug. 13, 2011), <http://www.frostbrowntodd.com/resources-1459.html> (“One of those downsides [of arbitration] is the inability to obtain a meaningful review of an arbitrator’s decision.”).

<sup>15</sup> Kheri Mbiro, *The Case for Optional Appellate Arbitration Rules*, BREAKTHROUGH ATTORNEYS (Sept. 14, 2015), <http://breakthroughattorneys.com/case-optional-appellate-arbitration-rules/>.

problematic, especially with respect to high stake disputes,<sup>16</sup> and have observed such absence as increasingly being perceived to be so.<sup>17</sup>

In fact, the United States Supreme Court recently remarked, in a decision regarding the absence of appellate review of arbitral awards in the American arbitral framework, “[w]e find it hard to believe that [the] defendants would bet the company [in a form of adjudication] with no effective means of review.”<sup>18</sup> Further, multiple authors have urged the introduction of arbitral appeals;<sup>19</sup> and over the last two decades, a few major ADR institutions have

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<sup>16</sup> See e.g. Christopher Drahozal, *Why Arbitrate? Substantive versus Procedural Theories of Private Judging*, 22 AM. REV. INT’L ARB. 163, 178 (2011) (listing the absence of arbitral appeals as a reason behind parties’ decisions to not arbitrate disputes that involve high stakes); KATHERINE VESSENE, PROTECTING YOUR PRACTICE 314 (2010) (noting that the lack of a meaningful appellate review of arbitral decisions is one of the biggest problems of arbitration); Cole, *supra* note 13, at 218 (noting that parties to disputes become increasingly risk-averse as their stakes therein increase, and begin to desire the option to appeal arbitral awards as a way to constrain the uncertainty inherent in a single-tier or a limited multi-tier system of adjudication and thus ensure more predictable results); Margaret Moses, *Can Parties tell Courts what to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429, 429 (2004) (“Because an arbitration award is not easily overturned, parties sometimes harbor fears that a maverick arbitrator will render an egregious award, which cannot be challenged even though wrong on the facts and the law.”).

<sup>17</sup> See e.g., Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171 (2003); Eric Van Ginkel, “*Expanded*” *Judicial Review Revisited: Kyocera Overturns Lapine*, 4 PEPP. DISP. RESOL. L.J. 47, 53 (2003) (noting that recent years have seen “growing concern” about the “risks presented by arbitration’s limited scope of review.”); Diane A. Desierto, *Rawlsian Fairness and International Arbitration*, 36 U. PA. J. INT’L L. 939, 953 (2015) (noting that the absence of full scale substantive appeals of arbitral awards has been criticized as an example of the unfairness of the arbitral process); Leanne Montgomery, *Expanded Judicial Review of Commercial Arbitration Awards-Bargaining For the Best of Both Worlds*, 68 U. CIN. L. REV. 529, 529 (“[I]n recent years, business people and their lawyers, viewing arbitration awards as essentially unreviewable, have become wary of arbitration. The business community has become concerned that if arbitrators render an erroneous decision, the aggrieved party may be left without an effective legal remedy.”) (internal citations omitted); Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 17, 20 (2015) (noting that a majority of the respondents viewed the difficulty of appeal as a barrier to arbitration use); L. Tyrone Holt, *Whither Arbitration? What Can Be Done to Improve Arbitration and Keep Out Litigation’s Ill Effects*, 7 DEPAUL BUS. & COM. L.J. 455, 477 (2009) (“The prospect of such a limited scope of review leads some parties to conclude that arbitration is too risky. They are concerned that they will be saddled with a rogue award and have little ability to contest it.”)

<sup>18</sup> AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011).

<sup>19</sup> For a list of relevant authorship, see note 63 below; the expression ‘arbitral appeal’ as used throughout this essay refers to appeals from arbitral awards on substantive grounds.



incorporated the option to substantively appeal arbitral awards within their respective frameworks.<sup>20</sup>

Moreover, there is a growing body of evidence, which suggests that the business community, which conventional wisdom has reputed as averse to institutionalizing arbitral appeals, is becoming slowly, though steadily, more open to, if not actively desirous of the institutionalization of arbitral appeals.<sup>21</sup> Thus, the limited review of arbitral awards, which has for the most part, largely been perceived as beneficial to the efficiency of the arbitral process, has increasingly been the recipient of criticism, evincing a paradigm shift in the perceptions of the arbitral community, in its respect.

This shift is ascribable to two things—*firstly*, the increasing complexity of the disputes, for the resolution of which arbitration is resorted to,<sup>22</sup> which has increased the possibility of the commission of errors,<sup>23</sup> and *secondly*, the increase in the stakes entailed by such disputes,<sup>24</sup> to the extent that it would

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<sup>20</sup> The first ADRI to incorporate substantive arbitral appeals within its framework was the CPR (International Institute for Conflict Prevention & Resolution) in 1999. It was followed by JAMS in 2003. The Arbitration & Mediation Institute of New Zealand (AMINZ) introduced arbitral appeals in 2009. The latest ADRI to introduce arbitral appeals was the AAA, in 2013. The European Court of Justice, though not strictly an ADRI, had allowed arbitral appeals right from its inception. Joan C. Grafstein, *Yes, You Can Appeal An Arbitration Award*, LAW360 (Jan. 28, 2015), [https://www.jamsadr.com/files/uploads/documents/grafstein\\_appeal-arbitration-award\\_law360\\_2015-01-28.pdf](https://www.jamsadr.com/files/uploads/documents/grafstein_appeal-arbitration-award_law360_2015-01-28.pdf).

<sup>21</sup> For a perusal and examination of relevant studies explicating the attitudes and perceptions of the business community towards the institutionalization of arbitral appeals, see Part II below.

<sup>22</sup> See William Knull & Noah Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 541 (2000) (“[I]nternational cases presented to international arbitration tribunals are becoming increasingly complex, both technically and financially, increasing the likelihood of error.”); Tom Cullinan, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements* 51 VAND. L. REV. 395, 400 (1998) (“The increasing complexity and volume of arbitration cases have forced many parties to consider adopting additional procedural safeguards to protect against unpredictable results.”); This increase in the complexity of disputes is attributable primarily to the increasing complexity of commercial transactions and the underlying relationships, globalization, the consequent increasing diminishment of trade barriers, and the proliferation of commerce. See *Faces of Dispute Resolution*, FINANCIER WORLDWIDE 6 (2012) (“As the world of international business has expanded and international relationships have become more varied and complex the practice of international dispute resolution has intensified along with it.”); see generally, KATHERINE L. LYNCH, *THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION* (2003).

<sup>23</sup> See text accompanying note 68 below.

<sup>24</sup> See Knull & Rubins, *supra* note 22 at 537 (“international arbitrations often and increasingly involve very large sums of money.”); Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 348 (1995) (“Increasing numbers of more complex commercial disputes, involving larger amounts in controversy,

be callously imprudent for the parties thereto, to rest their fate on a single tier mechanism, which lacks a review process. This, in turn, has necessitated a reevaluation of the tenability of the systemic absence of substantive appellate review in arbitration, to determine the consistency and conduciveness thereof with the interests of the international business community.

This article endeavors to undertake precisely this reevaluation. To this end, it shall cogitate the multifarious arguments, which have been advanced both in support of, as well as in opposition of, the statutory enablement of appeals of arbitral awards on substantive issues. This will be done by determining: *firstly*, whether the benefits of such enablement outweigh the drawbacks thereof to a significant extent, and *secondly*, if the answer to the first inquiry is in the affirmative, the specifics of the implementation of such an appellate process, and its minutiae as to minimize the drawbacks, which are or may be likely to ensue from the institutionalization of arbitral appeals.<sup>25</sup>

It is argued over the course of this article that the benefits of the institutionalization of arbitral appeals do significantly outweigh its possible drawbacks, and further, that the more consequential drawbacks thereof can be addressed by evolving a model of arbitral appeals, the parameters of the appellate review entailed by which are tailored, in a manner that can adequately mitigate or offset the effects of such drawbacks.<sup>26</sup> One such Model is evolved in this article itself—which has been christened the “Novel Appellate Arbitration Model,” or the NAAM, for short. The NAAM provides for arbitral appeals through appellate arbitration,<sup>27</sup> and has been structured in a manner that will facilitate meaningful error correction while preserving the

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are being routinely submitted to arbitration.”); Michael D. Goldhaber, *2011 Arbitration Scorecard: High Stakes*, CORP. COUNS. (July 5, 2011) (Noting that between 2009 and early 2011, there were 113 pending international arbitrations *known* to have amounts in controversy in excess of \$1 billion). Major ADRIs have consistently reported yearly increments in the number and size of disputes they administer. See Sebastian Perry, *The GAR 30 Unveiled*, GLOBAL ARB. REV. (Mar. 12, 2012); *Raising the Stakes in International Arbitration*, QUIN EMANUEL URQUHART & SULLIVAN, LLP at Lexology (Aug. 17, 2012), <http://documents.lexology.com/6a393141-1590-4d3f-a749-bb5cc4da5415.pdf>.

<sup>25</sup> It is imperative to clarify at the outset that this article advocates for the *institutionalization* of arbitral appeals, but not for the *standardization* thereof. For a detailed explication of the difference between the two concepts, and their relation to this article, see Part IV.B below.

<sup>26</sup> Examples of such parameters are—the availability of appellate review, the standard of review to which the awards appealed are subjected, gateway safeguard measures purposed with precluding vexatious or exploitative resorts to arbitral appeals etc.

<sup>27</sup> At this juncture, it is imperative to clarify the import of two expressions, which shall be used throughout the article – ‘arbitral appeal’ and ‘appellate arbitration.’ The difference between the two expressions, though ostensibly one of semantics, is in fact, one of substantive import. The expression ‘arbitral appeal’ refers to an appeal from an arbitral award, while the expression ‘appellate arbitration’ refers to an appeal from an arbitral award through a second arbitral tribunal. Therefore, the two aforementioned expressions, their phraseological similarity notwithstanding, are not synonymous.

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‘classical advantages’ of arbitration such as finality, speed, neutrality and inexpensiveness.

To this end, the article shall be divided into seven parts. Part II entails a perusal of the attitudes of the business community in respect of the institutionalization of arbitral appeals, as discernible from the multifarious empirical studies, which have thus far been produced in respect thereof. Part III exposits the various arguments that have been advanced, both in support of and in opposition to the institutionalization of arbitral appeals and appraise their relative merits, to determine whether the case *for* such institutionalization is stronger than the case *against* it. Part IV introduces the NAAM, and elaborates upon the specifics thereof. Part V deals with the impact of the availment of appellate arbitration under the NAAM on the further possibility of appeals to the national courts at the enforcement stage and Part VI concludes the article. Two pertinent observations need to be made about the present article, at this juncture. *Firstly*, unlike the existing literature in respect of arbitral appeals, which advocate one of two things—the expansion (either mandatorily or contractually) of the grounds of judicial review to include substantive appeals, or the introduction of arbitral appeals at the ADRI level, this article advocates for the institutionalization of arbitral appeals (more specifically appellate arbitration) into the national arbitral legislative frameworks of States.<sup>28</sup> *Secondly*, the proposals contained in this article, and the entailments of the NAAM, are intended to be broadly applicable, and can be incorporated into any jurisdiction, subject to such modifications, as may be necessary, to cater to the individual peculiarities thereof.

## II. ATTITUDES OF BUSINESSPERSONS IN RESPECT OF ARBITRAL APPEALS

It is imperative, before plunging into the of cynosure of the discourse, with the exposition of which this article is purposed, to ascertain the attitudes of the business community and their general counsel,<sup>29</sup> the two classes of

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<sup>28</sup> At first blush, such incorporation might seem to be contrary to the States’ obligations under the New York Convention. However, as will be exposted in greater detail, it is not a violation, due to the inapplicability of the New York Convention in Part III.A.2 below.

<sup>29</sup> The perceptions of corporate in-house counsel are significant to consider, given their role in determining the manner in which corporations conduct their disputes. Corporate counsel decide whether disputes are handled proactively or reactively. Further, they decide whether ADR processes are used to achieve certainty in disputes, deliver constructive ways of managing conflict, and above

persons, most intimately associated with and affected by the arbitral frameworks and their entailments—the “consumers” of arbitration—in respect of the institutionalization of arbitral appeals. Since arbitration operates at the confluence of commerce and the law,<sup>30</sup> a foray into the perceptions of the consumers of arbitration—entities to primarily serve whose interests arbitration is resorted—is the ideal prolegomenon for the present discourse. However, the estimation sought to be made here is fraught with difficulty, owing to two factors, which are—*firstly*, the scarcity of data pertinent to such estimation, and *secondly*, the largely conflicting nature of such data, and the difficulty that attempts to reconcile them entail.

As such, most of the data available in this regard or for that matter in respect of arbitration in general is anecdotal.<sup>31</sup> Such data, though not altogether redundant or devoid of utility,<sup>32</sup> lacks sufficient evidentiary value to constitute a valid basis upon the sole reliance on which estimations can be made or conclusions premised.<sup>33</sup> This stems from the indeterminacy of the extendibility, qualitatively and quantitatively, of the experiences that constitute such anecdotes, in respect of a greater number of similar matters or situations and the not negligible possibility of erroneous or biased perception,

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all, minimize in legal costs and management time. See HERBERT SMITH, *THE INSIDE TRACK—HOW BLUE CHIPS ARE USING ADR* (Nov. 2007), [https://sites.hks.harvard.edu/m-rcbg/CSRI/ga/smith\\_adr.pdf](https://sites.hks.harvard.edu/m-rcbg/CSRI/ga/smith_adr.pdf) [hereinafter HS REPORT]; Stipanowich & Lamare, *supra* note 17 at 4–5 (“Given their relative significance as participants in conflict of many different kinds and their importance as clients of leading law firms, corporate counsel were uniquely placed to help bring about a sea change in the culture of conflict.”); see also S. I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20(2) AM. REV. INT’L ARB. 119, 1 (2009) (“[A]rbitrators and lawyers have [] indicated that a good advocate makes a material difference in the outcome of a dispute.”).

<sup>30</sup> See Alan W. Shilston, *The Evolution of Modern Commercial Arbitration*, 4(2) J. INT’L ARB. 45 (1987).

<sup>31</sup> Christopher R. Drahozal, *Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration*, 20(1) J. INT’L ARB. 23, 23 (2003).

<sup>32</sup> Drahozal *Of Rabbits & Rhinoceri*, *supra* note 31, at 23–24 (noting that anecdotes have value, inasmuch as they provide a data point, further, that, experienced practitioners may be able to predict with reasonable accuracy the likelihood of the occurrence of the events or circumstances, and to which broader class or type the anecdotes belong.); see also Quentin Bochar, *Anecdotal Evidence Has Role To Play In Determining Grizzly Numbers*, EDMONTON J. (Mar. 5, 2009) (noting that while anecdotal evidence ought not to be used as the sole basis to make determinations, neither should it be summarily dismissed, as the cogitation of it may lead to the formulation of new and better hypotheses.).

<sup>33</sup> See Michael Heise, *The Importance of Being Empirical*, 26 PEPP L. REV. 807, 808 (1999) (noting that anecdotal evidence is constitutes a risky foundation, upon which to form generalizations that can be extrapolated in respect of a larger group of similarly positioned actors.); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?* 140 U. PA. L. REV. 1147, 1161 (1992).

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and/or reporting errors, both intentional and unintentional.<sup>34</sup> Therefore, anecdotal evidence can neither replace empirical evidence nor negate the need for it; it can at best be used to supplement it.<sup>35</sup> Unfortunately however, the empirical data available in this regard (or that matter, in relation to arbitration in general) is sparse,<sup>36</sup> not sufficiently representative inasmuch as most and virtually all of it pertains to institutional arbitrations,<sup>37</sup> and is not based on sufficiently diverse geographic sources.<sup>38</sup> Furthermore, much of this data has

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<sup>34</sup> This indeterminacy is ascribable to the absence of evidence or information as to the typicality, frequency or normalcy of the experiences constituting the narrative, as well as the possibility of the information contained in the anecdote being either erroneous, or distorted – due to embellishments, misperceptions, observer biases etc. See, e.g., Drahozal, *Of Rabbits & Rhinoceri*, *supra* note 31 at 23 (“The problem with anecdotes, of course, is that it is difficult to evaluate whether the event described is typical or atypical, frequent or infrequent, ordinary or extreme.”); David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L. J. 797,799-801 (1998) (noting *inter alia* that 1. Most anecdotes provide no evidence of typicality or frequency but nonetheless entail a claim of universality, either implicitly or explicitly, 2. Anecdotes do not “provide mechanism[s] for assessing such truthfulness, typicality, or frequency,” without information about which, it is “hazardous to generalize from what may well be an isolated or aberrant observation,” 3. Anecdotal evidence is suspect because it cannot and/or does not distinguish causation from correlation, and further does not factor the possibilities of reporting errors, self-deception, observer bias or intentional fraud.); Saks, *supra* note 33, at 1159–1161 (“Such [anecdotal] evidence permits only the loosest and weakest of inferences about matters a field is trying to understand. Anecdotes do not permit one to determine either the frequency of occurrence of something or its causes and effects.”).

<sup>35</sup> See Drahozal, *Of Rabbits and Rhinoceri*, *supra* note 31, at 24.

<sup>36</sup> This sparsity, both qualitatively as well as quantitatively is ascribable primarily to two factors – firstly, the confidential nature of arbitral proceedings and the documents and records appertaining thereto, which precludes the adduction of data upon which to base findings; secondly, the prohibitive expense, in terms both of cost and time, to gather data, analyze it, and subsequently generate further data on the basis of the data initially gathered. See Christopher Drahozal, *Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration*, 22(2) ARB. INT’L. 291, 291–93, 295 (2006).

<sup>37</sup> This is because most of the information available is about institutional arbitration. Information regarding *ad hoc* arbitrations conducted is virtually non-existent. Institutional statistics do not offer a complete picture of international arbitration because they exclude *ad hoc* arbitration. Therefore, the available data—and consequently, assessments made on the basis thereof cannot necessarily be extrapolated to arbitrations in general. See Rémy Gerbay, *Is The End Nigh Again? An Empirical Assessment of the ‘Judicialization’ Of International Arbitration*, 25 AM. REV. INT’L ARB. 223, 225 (2014). Some evidence exists that a majority of arbitrations, especially those involving medium/high stakes take place under the auspices of ADR institutions. Drahozal, *Arbitration by the Numbers*, *supra* note 36, at 295-96; see also CIARB COSTS OF INTERNATIONAL ARBITRATION SURVEY 7 (2011) (noting in a 2011 Report that institutional arbitrations represent 62% of all arbitrations, with *ad hoc* arbitrations constituting the remaining 38%).

<sup>38</sup> Much of the data on arbitration tends to be from sources based out of developed jurisdictions, such as the United States, the United Kingdom, and deal with disputes and/or contracts, which have a strong nexus therewith. See Drahozal, *Why Arbitrate*, *supra* note 16, at 164.

been derived, not observationally but from surveys,<sup>39</sup> that too, not of sufficiently large sample sizes.<sup>40</sup> Consequently, the statistical significance of the results obtained from data adduced so far is doubtful,<sup>41</sup> and assessments made on the basis thereof are inadvertently both personal and impressionistic.<sup>42</sup> Nonetheless, the exercise undertaken by this Part is not entirely devoid of utility, inasmuch its limitations notwithstanding, it can, at the very least, facilitate an estimation of the attitudes of the business community that is more reliable than conventional wisdom, which is entirely untested and therefore unreliable. This exercise is also essential, inasmuch as none of the extant literature on the examination of the desirability of the institutionalization of arbitral appeals,<sup>43</sup> has undertaken this estimation with requisite detail notwithstanding its importance.

Over the course of the years, multiple studies have been conducted, in relation to arbitration, in respect of its various facets. Five of these studies address directly or indirectly, the perception of the business community in respect of arbitral appeals, the large-scale absence thereof in most jurisdictions and ADR institutions, and the possible enablement thereof. Some of them indicate—that the business community is largely against the institutionalization of arbitral appeals, some that the business community to be divided on the issue, and others, that the business community is not only not against the institutionalization of arbitral appeals, but also that a significant percentage thereof is actively in favor of it.

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<sup>39</sup> The fact that much of the information is gathered from surveys further presents problems in respect of its veracity, compared to information gathered observationally. See Drahozal, *Arbitration by the Numbers*, *supra* note 36, at 296–97; see also HOWELL JACKSON ET AL. *ANALYTICAL METHODS FOR LAWYERS* (2003); HANS ZEISEL & DAVID KAYE, *PROVE IT WITH FIGURES: EMPIRICAL METHODS IN LAW AND LITIGATION* (1997).

<sup>40</sup> The sample size again is an indicator of the representativeness of the surveys. Surveys having smaller sample sizes are likely to be less representative, than those having larger sample sizes—and observations and conclusions drawn from the former are less capable of extrapolation, and are thus, of lesser significance. See generally, JACKSON, *supra* note 39; ZEISEL & KAYE, *supra* note 39.

<sup>41</sup> See Curtis von Kann, *A Report Card on the Quality of Commercial Arbitration: Assessing and Improving Delivery of the benefits Customers Seek*, 7 DEPAUL BUS. & COM. L.J. 499, 505 (2008). (“Surveys of users of commercial arbitration (typically consisting of questionnaires completed by general counsel or outside counsel) have been published, but the statistical significance of the results is unclear.”).

<sup>42</sup> *Id.* at 509.

<sup>43</sup> See text accompanying note 63 below for the list of extant literature in this regard. All of the works listed in note 63 have undertaken a rather isolated and theoretical approach to the issue, while ignoring altogether (perhaps unintentionally) the opinions of those persons most affected by the very issue, opting instead to approach it from a purely legal light.

One of the earliest studies in this respect—a survey by David Lipsky and Donald Seeber,<sup>44</sup> revealed that 54.3% of 606 respondents, who were corporate lawyers from some of America’s largest corporations, opted not to arbitrate their disputes, mainly due to the difficulty entailed in appealing arbitral awards.<sup>45</sup> Such difficulty, revealed the survey—was the second biggest impediment, to their choosing to resolve their disputes through arbitration.<sup>46</sup> This perception is reflected even in the 2011 survey of the same Fortune 1000 companies, with 52.4% of the respondents ascribing their decisions to not arbitrate their disputes to the difficulty entailed in appealing arbitral awards.<sup>47</sup> Another study by Christian Buhring-Uhle found, on polling about fifty American/European lawyers, arbitration commentators, and corporate executives, that about a third of the respondents perceived the absence of arbitral appeals as not being an advantage of arbitration.<sup>48</sup> Further, the International Institute of Conflict Prevention and Resolution, a leading ADR Institution observed that there has been an increase in the demand from commercial parties, for the provision of the option to provide substantive appeals from arbitral awards, which eventually engendered it to provide optional appellate arbitration from 1999, with some other major ADRI soon following suit<sup>49</sup>.

However, a survey conducted by the School of International Arbitration, at the Queen Mary University of London in 2006 that examined the attitudes of in-house counsel at major international corporations towards arbitration revealed that 91% of the respondents thereto were opposed to the idea of arbitral appeals.<sup>50</sup> A third of the respondents of the Bühring-Uhle

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<sup>44</sup> See DAVID B. LIPSKY & RONALD L. SEEBER, CORNELL/PERC INST. ON CONFLICT RESOL., THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS (1998); see also David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR* 1(1) U. PA. J. LAB. & EMP. L. 133, 148 (1998).

<sup>45</sup> LIPSKY & SEEBER *supra* note 44, at 26; Stipanowich & Lamare, *supra* note 17, at 53.

<sup>46</sup> LIPSKY & SEEBER *supra* note 44, at 26; Stipanowich & Lamare, *supra* note 17, at 53.

<sup>47</sup> See Stipanowich & Lamare, *supra* note 17, at 37; DOUGLAS SHONZ ET. AL., RAND INSTITUTE FOR CIVIL JUSTICE, BUSINESS TO BUSINESS ARBITRATION IN THE UNITED STATES: PERCEPTIONS OF CORPORATE COUNSEL 20–21 (2011).

<sup>48</sup> See CHRISTIAN BUHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 107–08 (1996).

<sup>49</sup> See CPR, *Appellate Arbitration Procedure*, CPRADR.ORG, <https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure> (last visited Oct. 30, 2017) (“CPR Rules”).

<sup>50</sup> *International Arbitration: Corporate Attitudes and Practice*, QUEEN MARY UNIVERSITY OF LONDON & PRICEWATERHOUSE COOPERS 15 (2006), <http://www.arbitration.qmul.ac.uk/docs/123295.pdf> [hereinafter 2006 QMUL REPORT].

study perceived the absence of arbitral appeals to be a “highly relevant” advantage to private dispute resolution.<sup>51</sup> The results of these studies, especially the former—the 2006 QMUL REPORT are hard to digest without some difficulty. That parties to high stake disputes, which kind of parties constitute a substantial and increasing percentage of parties who resort to arbitration to resolve disputes—runs brazenly against the not unreasonable perception—that such parties would, considering the highly cataclysmic, and potentially ruinous implications of an erroneous award against them, would desire a safeguard mechanism to facilitate meaningful error correction. In fact, one author explicitly impugned the veracity of some of the claims made by the 2006 QMUL Report—especially its claim as being representative of perceptions of corporate counsel in general.<sup>52</sup> In any event, a later survey conducted by the School of International Arbitration, at the Queen Mary University of London in 2015, yielded results that were significantly different from those yielded by the 2006 QMUL Report.<sup>53</sup> In response to the question therein on whether arbitral awards ought to be appealable, 23% of the respondents thereto answered yes,<sup>54</sup> while 17% of the respondents ranked the absence of arbitral appeals as being the worst characteristics of international arbitration.<sup>55</sup> Of those, around 52% opined that an appeal mechanism in commercial arbitration should be internalized, rather than being conducted through external forums, such as domestic courts or an international court.<sup>56</sup> 26% preferred appeals through a second arbitral tribunal,<sup>57</sup> and the remaining 26% preferred appeals being conducted within the portals of arbitral institutions.<sup>58</sup> Thus, even if the statistics obtained by the 2006 QMUL Report were to be taken as unassailable, the 2015 statistics evidence a fairly strong

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<sup>51</sup> See BÜHRING-UHLE, *supra* note 48, at 404.

<sup>52</sup> Michael McIlwrath, *Ignoring the Elephant in the Room: International Arbitration – Corporate Attitudes and Practices 2008* 74 ARBITRATION 424, 425 (2008) (observing that, “to say this struck a note of personal discord would be an understatement,” further noting that his own informal poll failed to find a single corporate counsel that agreed with the data presented in the Report).

<sup>53</sup> *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, QUEEN MARY UNIVERSITY OF LONDON IN ASSN. WITH WHITE & CASE (2015), <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>, [hereinafter 2015 QMUL REPORT].

<sup>54</sup> *Id.* at 8.

<sup>55</sup> *Id.* at 7.

<sup>56</sup> *Id.* at 9.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*



perceptual shift on part of the business community in favor of arbitral appeals.

Studies and reports aside, the mere fact of four ADRI's thus far having introduced arbitral appeals can itself be construed as a sign of an increasing demand therefor, in turn necessitating the provision of an appellate option.<sup>59</sup> This is because ADRI's are "demand-based" services, and modify their procedures to correspond better with the demands of the arbitral community.<sup>60</sup>

While a precise quantitation of the attitudes held in respect of arbitral appeals is innately difficult to perform, given the constraints intrinsic to empirical appraisals, and the systemic limitations attributable specifically to surveys as a mechanism to facilitate such appraisals,<sup>61</sup> it would be fair to state, upon a cogitation of the reports perused so far, that the resistance of the business community towards arbitral appeals is slowly and perhaps steadily melting. Even though the studies, taken as a cumulative whole, indicate that a majority of the business community continues to favor the absence of arbitral appeals, the increment in the section thereof, which is becoming amenable to and perhaps even actively desirous of the institutionalization of arbitral appeals is highly consequential to note, in a discourse of the present kind.

### III. NEED FOR ARBITRAL APPEAL IN INTERNATIONAL COMMERCIAL ARBITRATION

As had been noted earlier, the absence of arbitral appeals, which has for the most part been perceived as an axiomatic concomitant of arbitral finality, the latter being arguably one of the most vital overarching systemic underpinnings of arbitration,<sup>62</sup> has become increasingly questioned over the past two decades. The idea of arbitral appeals has been espoused by multiple authors, who while at substantive variance with each other in respect of the specifics of its implementation (such as the structure or mode of the appellate

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<sup>59</sup> See *Korean Comm. Arb. Board: An Interview with Gary Born*, KOREAN ARB. REV. 50, 52 (2014), [https://www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/Publications/Documents/Korean-Commercial-Arbitration-Board-Interview-Gary-Born.pdf](https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/Korean-Commercial-Arbitration-Board-Interview-Gary-Born.pdf).

<sup>60</sup> *Interview with Gary Born*, *supra* note 59, at 52.

<sup>61</sup> See Drahozal, *Arbitration by the Numbers*, *supra* note 36 at 296-97; see also JACKSON, *supra* note 39; ZEISEL & KAYE, *supra* note 39.

<sup>62</sup> See Gabriel Kaufmann-Kohler, *Enforcement of Awards – A Few Introductory Thoughts*, ICCA CONGRESS SERIES NO 12 NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 287, 287 (Albert Berg ed.) (2004).

process and the scope and extent of appellate review) have unanimously urged the enablement of appeals from arbitral awards.<sup>63</sup> This Part will cogitate the arguments presented by the existing scholarship, both in support of and in opposition to the institutionalization of arbitral appeals to ascertain whether the benefits of such institutionalization significantly outweigh the drawbacks which may ensue therefrom.

A. *Case For Arbitral Appeals*

1. *Possibility Of Egregious Errors In High Stake Disputes*

Adjudication is by no means an infallible process; every form of adjudication is susceptible to yield erroneous results.<sup>64</sup> Studies conducted in respect of the reversals by appellate courts of appealed decisions of lower courts indicate that a significant percentage of the lower courts' decisions are reversed—either partly or wholly.<sup>65</sup> If such reversals can at all be construed

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<sup>63</sup> See, e.g., William Knull & Noah Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?* 11 AM. REV. INT'L ARB. 531 (2000); Ten Cate, *supra* note 3; Paul B. Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using An Appellate Arbitrator*, in AAA HANDBOOK ON COMMERCIAL ARBITRATION 485 (Thomas Carbonneau et. al. eds., 2010); O'Reilly & Holmes, *supra* note 6, at 8-9; Garza & Kratovil, *supra* note 11; Hayford & Peebles, *supra* note 24, at 405; Carbonneau, *supra* note 6, at 260; Thomas Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation" (Symposium Keynote Presentation)* 7 DEPAUL BUS. & COM. L.J. 383, 429-30 (2009); Holt, *Whither Arbitration?* *supra* note 15, at 477-78; Mateus Aimoré Carreteiro, *Appellate Arbitral Rules in International Commercial Arbitration*, 33 J. INT'L ARB. 185 (2016); Christopher D. Kratovil, *Judicial Review of Arbitration Awards in The Fifth Circuit*, 38 ST. MARY'S L.J. 471, 492-500.

<sup>64</sup> See RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (2014) (noting that adjudicative errors are inevitable); ANDY BAIN & DAVID CARSON, *PROFESSIONAL RISK AND WORKING WITH PEOPLE: DECISION-MAKING IN HEALTH, SOCIAL CARE AND CRIMINAL JUSTICE* 191-206 (2008) (noting that the possibility of error is both inherent to, and inescapable in every form of decision making – including judicial adjudication); Cynthia Gray, *The Line between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245, 1246 (2004) ("Making mistakes is part of being human and is inevitable in the context in which most judicial decision-making takes place."); see also, Richard Lippke, *Adjudication Error, Finality, and Asymmetry in the Criminal Law*, 26 CAN. J. L. & JUR. 377 (2013) (discussing the possibility of erroneous decision making in the context of criminal law.). In regards to finality, it is interesting to note the observations of Justice Robert J. Jackson about the Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953).

<sup>65</sup> See JENNIFER B. BOWIE, DONALD R. SONGER & JOHN SZMER, *THE VIEW FROM THE BENCH AND CHAMBERS: EXAMINING JUDICIAL PROCESS AND DECISION MAKING ON THE U.S. COURTS OF APPEALS* (2014) (noting that federal appellate courts reverse the decisions of 42% of the lower courts')

as indicators of the existence of adjudicatory errors in the reversed decisions, it is evident from the rates of such reversals, that the adjudication in the civil courts entails a not insignificant possibility of erroneous adjudication. Arbitration is no exception to erroneous adjudication, and arbitrators are not inherently any less susceptible to committing errors than civil court judges.<sup>66</sup> In fact—given the extremely complicated nature of many of the disputes—with the resolution of which arbitrations are tasked,<sup>67</sup> the chances of erroneous adjudication are arguably likely to be higher.<sup>68</sup> While arbitrators selected to resolve such disputes are generally persons, who are practitioners or experts in the respective sectors to which the disputes being arbitrated,<sup>69</sup> which admittedly might lessen the possibility of errors, and while neither arbitration nor arbitrators are inherently lawless,<sup>70</sup> the possibility of error remains. This

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decisions, on civil matters); Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and nontried cases: Further exploitation of Anti-Plaintiff Appellate Outcomes* 1 J. EMPIRICAL LEGAL STUD. 659 (2004).

<sup>66</sup> See, e.g., *Glass, Molders, Pottery, Plastics and Allied Workers International Union v. Excelsior Foundry Company* 56 F.3d 844, 847 (7th Cir. 1995) (“Arbitrators are no more infallible than judges. They make mistakes and overlook contingencies and leave much to implication and assumption”) (Posner J.).

<sup>67</sup> Disputes in many sectors, for the resolution of disputes in which arbitration is resorted to, can be extremely complicated. See, e.g., Inka Hanefield, *Arbitration in Banking and Finance*, 9 N.Y.U. J. L. & BUS. 917, 925 (noting that disputes in the banking and financial sectors often tend to involve a large number of legal relationships, which are each governed by individual contracts and framework agreements, the Assessment of the interaction of which can prove to be a challenging task.); see also *supra* text accompanying note 22 (noting that the complexity of the disputes being subjected to arbitration has demonstrably increased over the last few decades).

<sup>68</sup> See Ten Cate, *supra* note 3, at 1132 (“The complexity of the factual and legal issues presented by high-stakes disputes about cross-border transactions may make mistakes more likely”); Knull & Rubins, *supra* note 63, at 541 (“The international cases presented to international arbitration tribunals are increasingly complex, both technically and financially, increasing the likelihood of error”).

<sup>69</sup> See Christopher Drahozal, *Why Arbitrate?*, *supra* note 16, at 174 (noting that one of the reasons behind parties’ choice to arbitrate their disputes is their ability to select experts in the subject matter with which the dispute is concerned); MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 97 (2008) (“Parties also like being able to choose arbitrators with specific subject matter expertise”); See Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR* 40 TEXAS INT’L L. J. 449 (2005) (“one of the pillars of the process is the premise that arbitrators may themselves be ‘experts,’ chosen to bring to the table their own familiarity with the subject matter and free to draw on this background”); Shavell, *supra* note 1, at 424 (“parties can reduce the chance of error by choosing an arbitrator who is knowledgeable about the issue in dispute and who is known for the soundness of his past decisions”).

<sup>70</sup> Some authors have expressed concerns over the possibility of arbitration being used as a subterfuge to derogate from mandatory public law requirements, of arbitrators not applying or not following the law while determining arbitral disputes and other forms of arbitral “lawlessness.” See e.g. Stephen Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration* 83 MINN. L. REV.

possibility of error is tolerable in disputes, the amounts in controversy of which are relatively small, i.e., smaller-stake disputes, due to the relatively lower damage potential of adjudicatory errors, when committed in such disputes to the award-debtors thereof. Therefore, in such disputes, the desire for speed and finality can and often do significantly outweigh the risk of error. However, the same cannot be said in respect of disputes, the amounts in controversy of which are considerably higher, i.e., high-stake disputes, where the damage potential of adjudicatory errors is infinitely higher, such that even a single mistake by the arbitral tribunal could prove cataclysmic—possibly even ruinous for the award debtor.<sup>71</sup> In such disputes therefore, the risk of error preemption and protection could significantly outweigh the desire for speed and finality.

Granted, parties, in choosing arbitration, and selecting arbitrators can be said to have consented to the possibility of the commission of an error by such arbitrators.<sup>72</sup> However, such consent can reasonably be said to extend only in respect of errors that fall within the foreseeable range of errors committable by the arbitrators, and not those errors that are bizarre, maverick, or due to the arbitrator's negligence or manifest disregard of the law.<sup>73</sup> Arbitral appeals are necessary to safeguard against such errors.

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703, 719 (1999) (“[A]rbitrators often do not apply the law.”); Charles Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law* 71 *FORDHAM L. REV.* 761, 783 (2002) (“Arbitrators bring their own ‘law’ with them, and they take it with them when they leave.”). The veracity of assertions of this kind is sought to be established by averring to the economic incentives to purposefully ignore the requirements of mandatory public law, compounded by the lack of penalties to deter the same. See, e.g., Andrew Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules* 49 *DUKE L. J.* 1279, 1282 (2000) (“[A]rbitrators are unlikely to enforce mandatory rules when the parties seek to contract around them . . . in order to develop a reputation as . . . desirable arbitrator[s]. Because arbitrators who ignore mandatory rules face little or no sanction that might offset the incentive to please the parties to the transaction, it should be no surprise that they ignore mandatory rules in favor of the substantive rules contained in the arbitration agreement”). However, available empirical evidence indicates arbitral misconduct of this sort is far from prevalent. See Christopher Drahozal, *Is Arbitration Lawless?* 40 *LOY. L. A. L. REV.* 187, 190-191 (2006) (concluding that while there is some evidence that arbitrators do not treat statutory issues in as much detail as courts, there is little other evidence that arbitrators definitively differ from judges in their attitudes or practices toward legal issues). See also Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR* 40 *TEXAS INT’L L. J.* 449, 514-515 (2005) (noting that arbitrators are generally expected to act in such a manner as will maximize the likelihood that their awards will be enforceable in all jurisdictions where review is likely, where vacated or unrecognized awards are considered to be indicators of recklessness or irresponsibility which can reduce their market credibility).

<sup>71</sup> Ten Cate, *supra* note 3, at 1130-33.

<sup>72</sup> See *supra* text accompanying note 12.

<sup>73</sup> Knull & Rubins, *supra* note 63, at 535; Younger, *supra* note 12, at 241. However, it is not an easy task to precisely define what constitutes “foreseeable range of errors.”

## 2. *Inadequacy of the Existing Standard of Arbitral Review*

The review of arbitral awards in most jurisdictions is in the form of enforcement stage judicial review.<sup>74</sup> The standards in respect of which are governed by the provisions of the New York Convention, which has a strong pro-enforcement bias,<sup>75</sup> and contemplates only a very narrow sphere of grounds on which awards can be reviewed.<sup>76</sup> Article V of the New York Convention deals with the grounds under which Courts where the awards are brought for enforcement can refuse to recognize such awards.<sup>77</sup> It provides seven such grounds: party incapacity or invalidity of the arbitration agreement, inadequacy of the notice given to a party or its inability to present its case, the rendition of an award that has adjudicated matters, which fall outside the scope of the arbitral tribunal's designated jurisdiction, irregularity and/or impropriety of the composition of the arbitral tribunal, non-arbitrability of the subject matter of the dispute arbitrated, and contravention by the award of the public policy of the country where enforcement is sought.<sup>78</sup> While the

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<sup>74</sup> Hans Smit, *Contractual Modifications of the Arbitral Process*, 113 PENN ST. L. REV. 995, 997 (2009).

<sup>75</sup> See REDFERN & HUNTER, *supra* note 8, at 457 (noting that the “pro-enforcement bias” of the New York Convention has been faithfully observed in most countries); *see also* Michael Hwang & Yeo Chuan Tat, *Recognition and Enforcement of Arbitral Awards*, in ASIAN LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 412 (Michael Pryles & Michael J. Moser ed.) (noting that the pro-enforcement bias of the New York Convention is a “key principle” thereof.); Albert Jan van den Berg, *The New York Convention of 1958*, T.M.C. ASSER INSTITUTE, 246 (1981) (observing that a pro-enforcement bias is clearly manifested in the provisions of the New York Convention); MOSES, *supra* note 69, at 3.

<sup>76</sup> See REDFERN & HUNTER, *supra* note 8, at 445 (“The intention of the New York Convention and of the Model Law is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively.”); Berg, *supra* note 75, at 267–68 (“As far as the grounds for refusal of enforcement of the award as enumerated in Article V [of the New York Convention] are concerned, it means that they are to be construed narrowly.”); Hwang & Tat, *supra* note 75, at 413.

<sup>77</sup> Berg, *supra* note 75.

<sup>78</sup> New York Convention, *supra* note 6, at Art. V. The New York Convention states: “1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

exact standards of review surely vary from one jurisdiction to another, most jurisdictions, which have ratified the New York Convention have incorporated only the grounds provided under Art. V into their respective arbitral frameworks, in respect of international commercial arbitration, evidencing a significant degree of convergence in the standards adopted in this respect.<sup>79</sup>

A perusal of these grounds reveals that they enable an arbitral award to be challenged only in respect of procedural improprieties of the arbitral process and the contrariety of the award passed to the public policy of the country in which its enforcement is sought. None of these grounds contemplate a review on substantive grounds, either in respect of the interpretation and/or application of the law by the arbitral tribunal, or in

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(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

<sup>79</sup> See Lawrence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L. J. 1, 57-58 (1995) (noting the substantial convergence in modern arbitration laws with respect to the standards for judicial recourse from the arbitral awards.); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure* 36 VAND. J. TRANSNAT'L L. 1313, 1320-1321 (observing that arbitral frameworks of signatories to the NY Convention have become or are becoming increasingly “harmonized” and “interchangeable,” ascribing the same to the adoption, by States of the NY Convention, and the UNCITRAL Model Rules.); see Mark D. Wasco, *When Less is More: The International Split over Expanded Judicial Review in Arbitration*, 62 RUTGERS L. REV. 599, 606 (2010) (“[W]ith the adoption of the NY Convention and the subsequent expansion in the number of signatory countries, the laws that govern vital aspects of international arbitration have become fairly uniform across the globe.”); see also accompanying text, *supra* note 6.

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respect of the adjudication by the tribunal of the merits of the case before it.<sup>80</sup> This is in stark contrast to the multiple checks, which are built into the litigation model, which serve to minimize the possibility of misidentification of the relevant law by the trial judge or serious misapplication of the relevant law by the judge and/or juries, as the case may be.<sup>81</sup> In fact, the standard of review afforded to arbitral awards under the New York Convention is so stringent and deferential, that to use the words of one author, “only a true failure in procedural fairness may lead to a viable appeal.”<sup>82</sup> Another author has described this standard of review as being a mechanical affirmation of arbitral awards, a perfunctory “rubber stamping” thereof.<sup>83</sup> Thus, in arbitration, the “decisional sovereignty of the arbitrator is sometimes close to a divine right.”<sup>84</sup> This is problematic, given that in cases of international transactions, parties are oftentimes forced to resort to arbitration to resolve disputes, inasmuch as arbitration clauses are among the standard clauses which are used by most parties,<sup>85</sup> and also because even otherwise, the

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<sup>80</sup> See MOSES, *supra* note 69, at 212 (noting that none of the grounds, with the possible exception of vacating an award as being contrary to public policy allow for vacating an award “based on merits”); see also ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION 78 (2011) (noting that courts before which arbitral awards are brought for enforcement do not have the authority to substitute their decisions on the merits for the decisions of the arbitral tribunals, which had passed such award, even if such arbitral tribunals have committed errors of fact and/or law); FOUCHARD, GAILLARD & GOLDMAN, ON INTERNATIONAL COMMERCIAL ARBITRATION 997–98 (1999) (noting that the principle that arbitral awards are not reviewable on merits is “very broadly recognized.”); Alexis Moure & Luca G. Radicati di Brozolo, *Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back*, 23(2) J. INT’L ARB. 171, 171 (2006) (referring to the prohibition of the review of arbitral awards on their merits as “one of the cornerstones of the principle of finality.”).

<sup>81</sup> See Hayford & Peebles, *supra* note 24, at 405.

<sup>82</sup> Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 397 (2009).

<sup>83</sup> See, e.g., F. Shabnam Nouraie, *Arbitration Nation: While Arbitration Grows, Judicial Review of Arbitral Awards May Be Shrinking*, J. DISP. RESOL. 205, 216 (2010).

<sup>84</sup> Thomas E. Carbonneau, *The Revolution in Law through Arbitration*, 56 CLEV. ST. L. REV. 233, 266; see also LIPSKY & SEEBER, *supra* note 44, at 14 (noting that many of the respondents had indicated that their resort to arbitration was consequent primarily to such resort being required by a contractual obligation and not because of any perceived benefits of the arbitral process); Stipanowich & Lamare, *supra* note 17, at 16.

<sup>85</sup> In fact, quite a few studies have revealed that an overwhelming majority, as many as 97% of the users of arbitration ascribe their resort to arbitration first and foremost not due to the presence of systemic advantages, but due to contractual obligation to arbitrate the disputes to resolve them. This is a rather poor indicator of the rhetoric of arbitration being speedier, and faster etc. See LIPSKY & SEEBER, *supra* note 44; see also Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People: A Forced-Rank Analysis*, 30 INT’L BUS. L. 203 (2002).

alternative, i.e. litigation in the national courts is problem riddled – both in terms of lack of sufficient neutrality and relative difficulty of enforcement.<sup>86</sup> Thus, parties are effectively forced to resort to a single tiered mechanism with no scope of error review or correction, if where they may have legitimate suspicions as to the existence of errors in the arbitral awards.<sup>87</sup> This becomes even more problematic with respect to awards pertaining to high stake disputes, where the tolerability of the possibility of errors is significantly lower.<sup>88</sup>

Another crippling inadequacy of the existing standard of judicial scrutiny is that the invalidation of an award, consequent to an arbitral appeal does not itself resolve the dispute. When a court annuls an arbitral award, the dispute is left undecided and the litigants are sent back to square one, oftentimes after a significant investment of time, money, and effort in trying to resolve the dispute.<sup>89</sup> For these reasons, existing standards of award review are not consistent with the interests of the business world and ought to be re-appraised. While the shift away from arbitration to other forms of ADR, the recourse to which is increasingly becoming an attractive option,<sup>90</sup> is neither imminent nor feasible at present, due to the absence of certain systemic attributes of arbitration such as the binding nature of arbitral awards, in other forms of ADR, the resentment that is likely to ensue from the continued forced

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<sup>86</sup> Foreign arbitral awards are easier to enforce than decisions passed by foreign courts, because of the obligation entailed by the New York Convention in respect of the enforcement of the former. *See, e.g.,* JULIAN D. M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 7 (2003); CHRISTIAN BUHRING-UHLE ET AL., *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 66 (2006); MOSES, *supra* note 69, at 3.

<sup>87</sup> *See* Michael McIlwrath, *Professionalizing Arbitration: A Response to the New York Times Articles on Privatizing Justice*, KLUWER ARB. BLOG (Nov. 14, 2015).

<sup>88</sup> *See Id.*

<sup>89</sup> *See* Anibal Sabater, *Optional Appellate Arbitration Rules: Are They Good For Your Case?* CHAFFETZ LINDSEY LLP (Sept. 2015), <http://cwww.chaffetzlindsey.com/optional-appellate-arbitration-rules-are-they-good-for-your-case/>.

<sup>90</sup> *See, e.g.,* Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 HARV. NEGOT. L. REV. 61 (2015) (noting that mediation is increasingly replacing arbitration as the preferred mechanism of dispute resolution). Multiple other works suggest the gradual loss of preference of arbitration as the primary ADR method employable by commercial parties. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 335-36 (2007).



resort to unsatisfactory arbitral process is not conducive to the health of the international arbitral system.<sup>91</sup>

## B. Case Against Arbitral Appeals

### 1. Antithetical To Arbitral Finality

One of the contentions, also perhaps the one most emphatically and strenuously advanced,<sup>92</sup> opposing the institutionalization of arbitral appeals, is that it would be antithetical to arbitral finality—i.e. the principle that arbitral awards constitute final and binding adjudications of the disputes, susceptible to be invalidated only on bare minimal grounds. Arbitral finality is one of the overarching systemic underpinnings of arbitration,<sup>93</sup> which has enamored arbitration as the preferred or primary mode of dispute resolution to parties to commercial transactions;<sup>94</sup> the continued feasibility of arbitration as the primary or even preferred mode of dispute resolution in a state is thus contingent upon the sustained ability of the legal framework of that state in respect of arbitration to secure arbitral finality, and thus ensure that arbitral

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<sup>91</sup> See Knull & Rubins, *supra* note 63, at 533 (noting that parties forced to resort to arbitration to resolve their disputes, because of the indispensable elements of neutrality and enforceability, despite their discomfort with the lack of appeal may end up frustrated with results they may see as unjust).

<sup>92</sup> See Knull & Rubins, *supra* note 63, at 536 (noting that the argument of finality is the “biggest outcry” of those who oppose the institutionalization of arbitral appeals.).

<sup>93</sup> The other major systemic underpinnings being *inter alia*, expeditiousness, cost effectiveness, neutrality, flexibility. See text accompanying note 139 below.

<sup>94</sup> See e.g. JULIAN LEW, LOUKAS MISTELIS et al. COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 1-15, 688 (2003); Jean-Claude Najjar, *Inside Out: A User's Perspective on Challenges in International Arbitration* 25(4) ARB. INT'L. 516 (2009); Marrow, *supra* note 63 at 486 (recognizing arbitral finality to be a clear benefit of the arbitral process.); Ten Cate, *supra* note 3 at 1123 (“It has become a bedrock principle of international commercial arbitration that courts do not second guess the substantive correctness of arbitral awards.”); Garima Arya & Tania Sebastian, *Critical Appraisal of 'Patent Illegality' as a Ground for setting aside an Arbitral Award in India* 24(2) BOND L. REV. 157 (2012) (referring to finality of arbitral awards as a “plinth” on which the law of arbitration rests); Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. DISP. RESOL. 91, 93 (2000) (“Finality of arbitration awards is one of the substantial virtues of the arbitral system.”); Margaret Tofalides & Clare Arthurs, *Mission Impossible? Challenging arbitration awards in England*, IBA ARB. NEWSLETTER 53-55 (2012) (referring to finality as one of arbitration’s unique selling points); Mourre & Radicati di Brozolo, *supra* note 80, at 171 (noting that arbitral finality is not only an essential expectation of parties, but also indispensable to ensure an effective and independent dispute settlement mechanism.).

awards are not reduced into mere pyrrhic victories.<sup>95</sup> This has occasioned the preclusion of review of arbitral awards for errors of fact or law.<sup>96</sup> This argument is generally sought to be further supported by statements, founded in “conventional wisdom” – that arbitral finality is one of the primary reasons, which occasions the resort by parties to arbitration, and that the abrogation thereof, which would result from the permissibility of increased scope of review of arbitral awards would undermine the arbitral process and render nugatory, the parties’ purpose in electing to arbitrate the dispute by resulting in the reduction of arbitration into a mere prelude to litigation,<sup>97</sup> and reduce arbitral tribunals into “junior varsity courts” of sorts.<sup>98</sup> Given that parties to arbitration already have an additional quality control mechanism at the front end—the ability to select adjudicators of their choice—an advantage parties to litigation do not have, they already have ample opportunity to provide for quality control at the “front end” of arbitration, and therefore, must not be allowed to cause an additional incurrence of time and expense, by “back-end” appellate proceedings, if they had not invested themselves in taking adequate steps at the “front-end,” to begin with.<sup>99</sup> Parties have, by

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<sup>95</sup> See Gabriel Kaufmann-Kohler, *Enforcement of Awards – A Few Introductory Thoughts*, in ICCA CONGRESS SERIES NO 12 NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 287, 287 (Albert Berg ed.) (2004); William W. Park, *Why Courts Review Arbitral Awards*, 16 INT’L ARB. REP. 21, 21 (2001).

<sup>96</sup> See Smit, *supra* note 12, at 149 (“Exclusion of judicial review of arbitral awards for errors of fact or law is one of the foundations on which the social desirability and acceptance of arbitration is firmly built.”); Moure & Radicati di Brozolo, *supra* note 80, at 172 (referring to the prohibition of the review of arbitral awards on merits as the “cornerstone” of arbitral finality); GAILLARD & GOLDMAN, *supra* note 80 at 673.

<sup>97</sup> See Smit, *supra* note 12 at 149; Carbonneau, *supra* note 6 at 401; Karon Sasser, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 CUMB. L. REV 337, 365 (2001); Kevin A. Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act*, 46 ST. LOUIS U. L. J. 509, 511 (2002) (“[E]xpansion of judicial review will threaten the integrity of the arbitration process because the additional costs and delays inherent in the court system will lead to arbitration becoming just another rung on the ladder of federal court litigation.”); Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality through Functional Analysis* 37 GA. L. REV. 123, 132 (2002) (“substantive review of arbitration awards would render arbitration a meaningless precursor to litigation”); Cullinan, *supra* note 22, at 397 (“if arbitration awards were subject to greater (in other words, non-deferential) judicial review, arbitration would become a mere stepping-stone to litigation.”).

<sup>98</sup> See *National Wrecking Co. v. International Bhd. of Teamsters, Local 731*, 990 F.2d 957, 970 (7th Cir. 1993) (observing that arbitral tribunals are not “junior varsity trial courts.”).

<sup>99</sup> See JAN PAULSSON, *THE IDEA OF ARBITRATION* 292 (2013) (observing that parties must “avoid the inherently inferior tribunal in the first place” as opposed to later attempting to appeal awards they find unsatisfactory.); Carreteiro, *supra* note 63, at 212 (“It is not necessary to bear the burden of a whole appellate process if the solution may be easily reached before the arbitration itself starts”).

agreeing to arbitrate, consented to forego their rights to substantive appeal;<sup>100</sup> they ought not to be allowed to subsequently alter their positions, merely because they are dissatisfied with the results of their choice.<sup>101</sup>

## 2. Adequacy of the Existing Standard of Judicial Scrutiny

The second argument in opposition to the institutionalization of arbitral appeals is that the extant minimalist standard of post award judicial review of arbitral awards—an essential concomitant of the very strong pro-enforcement bias of the New York Convention,<sup>102</sup>—is an adequate standard of review of arbitral awards, and that it best equilibrates the two competing interests, the reconciliation of which is imperative for the effective functioning of arbitral framework.<sup>103</sup> The alteration of the existent standard of review therefore would upset this delicate balance that has been secured after much effort, and undo the efforts of equilibration invested in that direction.<sup>104</sup>

Further, some authors have attempted to rebut the contention advanced in support of the institutionalization of arbitral appeals, that the existing standard of review of arbitral awards is inadequate.<sup>105</sup> Such authors have cautioned against the appraisal of the fairness of the existing arbitral frameworks with

<sup>100</sup> See text accompanying note 12.

<sup>101</sup> See Hans Smit, *supra* note 12 at 147 (“[T]he parties’ ability to choose, directly or indirectly, the arbitrators who are to adjudicate their dispute renders it entirely reasonable that they be required to stand by the judgment of the arbitrators they selected.”).

<sup>102</sup> This minimalism must manifest both in the letter of the law, such as, through the prescription, in national statutes pertaining to arbitration, of limited grounds of post-award judicial intervention, as well as in the attitude of national courts towards arbitration in that they must adopt a strongly pro-enforcement approach, refusing enforcement only in exceptional circumstances, and not otherwise. See e.g., *Eco Swiss China Time Ltd v. Benetton International NV* (2000) 5 C.M.L.R. 816 (“It is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances.”) See also Pierre Mayer & Audley Sheppard, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* 19 ARB. INT’L 249, 253 (2003); Catherine Rogers, *The Vocation of the International Arbitrator* 20 AM. U. INT’L L. REV. 957, 1020 (2005) (noting that the prospect of excessive State interference poses a threat not only to the ‘professional autonomy’ of international arbitrators, but also to the health of the entire arbitral system.).

<sup>103</sup> See Clive M. Schmitthoff, *Finality of Arbitral Awards and Judicial Review*, CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION (Julian D. M. Lew ed.) 230, 230 (2013); See also Part III.B.2.

<sup>104</sup> *Id.*

<sup>105</sup> See Nana Japaridze, *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration*, 36 HOFSTRA L. REV. 1415, 1416 (2008); Desierto *supra* note 17, at 948-950.

reference to parallel standards applicable in litigations,<sup>106</sup> as such appraisal would likely engender in the appraiser a perception that the arbitral framework is incapable of producing fair results, due solely to the relative lack of its regulatory prolixity, such prolixity being perceived as a reliable or appropriate indicator of the adjudicatory quality of an adjudicatory mechanism.<sup>107</sup> Instead, such appraisal must be done on a stand-alone basis, because arbitration involves compromises on procedural stringency—such compromises, having been effectuated to ensure speedier resolution of the disputes, as compared to litigation.<sup>108</sup> In other words, the mere non-commensuration and non-equivalence of the arbitral standards to the corresponding parallel standards in litigation ought not to be treated as evidence of the inability of arbitration to produce fair results.

The argument proceeds therefore, that where the existing arbitral framework, with its attendant rules and limitations, enables the securement through arbitration, of a sufficiently satisfactory quality of justice and fairness, a further imposition of additional judicial standards of fairness in respect of such framework will constitute a debilitating disservice to the arbitral community to cater to whose needs arbitration was developed—by occasioning the transformation of the arbitral mechanism away from its teleological design.<sup>109</sup> As such, there has only been scant, if any discontent expressed on a sufficiently large scale by the business community at large, with the absence of institutionalized appellate review of arbitral awards, and this in and of itself can be reasonably construed as a fairly certain indicator of the perception of the business community of status quo to be fair.<sup>110</sup> Thus, it

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<sup>106</sup> See Nana Japaridze, *supra* note 105, at 1428; Desierto, *supra* note 17, at 948 (“[T]he critiques on the seeming “unfairness” of international arbitration apparently arise from expectations wed to a more judicial or structurally adjudicative paradigm of international dispute resolution.”).

<sup>107</sup> See Desierto, *supra* note 17, at 948–49.

<sup>108</sup> See *Id.* at 951.

<sup>109</sup> See *Id.* (noting that the imposition of expectations based on the paradigms of court-based litigation on arbitration would result in the transformation of the arbitral mechanism away from its actual teleological design.); Japaridze, *supra* note 105, at 1428.

<sup>110</sup> See Robert Pietrowski, *Evidence in International Arbitration*, 22 ARB. INT’L 373, 379 (2006) (“the increasing use of international arbitration, coupled with the relative infrequency of challenges of arbitral awards, suggests that in fact international arbitration is widely perceived as an inherently fair process.”).

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is contended, the extant standard of review of arbitral awards under the New York Convention is adequate and ought not to be further expanded.<sup>111</sup>

### 3. Entails Further Judicialization Of The Arbitral Process

Concerns of the excessive “judicialization” and “overlawyering” of the arbitral process have become a recurring topic in contemporary discourse.<sup>112</sup> This ominous expression judicialization has been defined in two senses: *firstly*, as the incorporation of the systemic attributes native to conventional litigation into the arbitral process and *secondly*, the increased judicial control, oversight and intervention in the arbitral process.<sup>113</sup> A considerable amount

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<sup>111</sup> ICCA, ICCA’s Guide to the Interpretation of the 1958 New York Convention, 39-41 (2011), [http://www.arbitration-icca.org/media/1/13890217974630/judges\\_guide\\_english\\_composite\\_final\\_jan2014.pdf](http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf).

<sup>112</sup> See e.g. Thomas Stipanowich, *Rethinking American Arbitration*, 63(3) IND. L. J. 445 (1988) (“many in the business community feel that the most significant problem with modern arbitration is the increasing formalization of the process brought about by the legal profession”); Mauro Rubino-Samntartano & Mark Kantor, *Is Full Armor Absolutely Necessary to the Arbitration Process* 17 AM. REV. INT’L. ARB. 615, 615-616 (2006) (referring to contemporary arbitral proceedings as having become “overlawyered” and “too long to be acceptable and too sophisticated, to the point that the substance of the dispute often lies buried below a thicket of procedural arguments”); Vijay Bhatia & Christopher Candlin, *International Commercial Arbitration Practice: A Discourse Analytical Study* 74(3) ARBITRATION 272, 272 (2008) (“[I]t has been recently observed that arbitration as a non-legal practice is being increasingly influenced by litigation practice, a development which seems to be contrary to the spirit of arbitration to resolve disputes outside of the courts.”); Christopher Drahozal, *Business Courts and the future of Arbitration* 10 CARDOZO J. CONFLICT RESOL. 492, 492 (2009) (“[A] commonly expressed sentiment...is that arbitration is becoming too formal—with too much discovery, too many motions and the like.”) (internal citations omitted); Dirk-Reiner Martens & Heiner Kahlert, “*Back to the Roots of Arbitration*”, KLUWER ARB. BLOG (Sept.10, 2015), <http://kluwerarbitrationblog.com/2015/10/26/back-to-the-roots-of-arbitration/> (noting that on an average arbitrations have become significantly more expensive and time-consuming, due to increased levels of sophistication of the arbitral process especially from the side of parties’ counsel); Holt, *supra* note 17, at 456 (“Parties, counsel, and authors alike have criticized arbitration for becoming too much like litigation.”); Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, AAA HANDBOOK ON ARBITRATION PRACTICE 41 (2010) (noting that 72% of the respondents to a survey as to whether arbitration was noticeably becoming judicialized answered the question strongly in the affirmative.); REDFERN & HUNTER, *supra* note 8 at 1.118 (“In recent years, there has been an almost endless discussion about the increasing ‘judicialisation’ of international arbitration.”)

<sup>113</sup> Gunther Horvath, *The Judicialization of International Arbitration* in LIBER AMICORUM, ERIC BERGSTEN: INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 251 (2011); INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARD “JUDICIALIZATION” AND CONFORMITY? (Richard B. Lillich & Charles N. Brower eds.) ix (1994) (defining judicialization to mean “both that arbitrations tend to be conducted more frequently with the procedural intricacy and formality more native to litigation in national courts and that they

of scholarship has credited this increasing arbitral judicialization with bringing arbitration into disfavor,<sup>114</sup> with some going so far as to ascribe to it a “flight” from arbitration.<sup>115</sup> This argument, extrapolated in respect of arbitral appeals, proceeds in essence—that the institutionalization thereof would constitute judicialization or rather, the *further* judicialization of the arbitral process, which defeats one of the primary reasons to resort to arbitration in the first place, i.e. to resolve disputes largely outside the overly judicialized framework of court-room litigation.<sup>116</sup> The thrust of the argument is that in light of arbitration becoming increasingly akin to litigation, and therefore losing its classical advantages,<sup>117</sup> the further protraction of the arbitral process, as would result from the addition of an appellate layer would only further abrogate the utility of the arbitral process as an extra-judicial mechanism of dispute resolution, and parties who have specifically chosen arbitration to avail its classical advantages, having not consented to such judicialization, ought not be forced to burden themselves with the consequences thereof.<sup>118</sup>

#### 4. *Redundancy Of Appeals In The Arbitral System*

Advanced in respect of arbitral appeals done through appellate arbitration, the argument of the systemic redundancy of such an appellate mechanism in arbitral frameworks can be said to proceed in two prongs: *firstly*, that many of the systemic attributes of the appellate mechanism, to which are imputable the superior quality of appellate decision making in

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are more often subjected to judicial intervention and control”); Charles N. Brower, *W(h)ither International Commercial Arbitration?*, 24(2) ARB. INT’L 181, 183.

<sup>114</sup> See Horvath, *supra* note 113, at 252.

<sup>115</sup> See Eisenberg & Miller, *supra* note 90, at 335-36 (2007) (noting that commercial parties are increasing shifting away from using arbitration clauses). *Contra* Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 114 (2008) (noting that empirical evidence does not in fact suggest there to be any such “flight” from arbitration).

<sup>116</sup> See Schmitz, *supra* note 97 at 183 (“[S]ubstantive judicial review of arbitration judicializes the process, thereby eroding the cost and time savings that have been among the primary benefits of arbitration.”); Edward R. Leahy & Carlos J. Bianchi, *The Changing Face of International Arbitration*, 17 J. Int’l Arb. 19, 50 (2000).

<sup>117</sup> See WILLIAM J. BERRY, APPROPRIATE DISPUTE RESOLUTION 121 (2017).

<sup>118</sup> See Leahy & Bianchi, *supra* note 116, at 50; Cullinan, *supra* note 22, at 395 (“[Opponents of arbitral judicialization] assert that the judicialization process will strip arbitration of its most important characteristics—speed, efficiency and low costs. [Such opponents] observe that parties freely choose arbitration because of these characteristics and that they should not be forced to burden themselves with the consequences of judicialization.”)

conventional courts, are already existent in a single tier of arbitration, and *secondly*, that other such systemic attributes of the appellate mechanism are entirely absent in the arbitral process.<sup>119</sup> Consequently, proceeds the argument—institutionalized, arbitral appeals would be a redundancy,<sup>120</sup> which would increase the overall expenses and time incurred in resolving the dispute without the provision of any additional countervailing adjudicative benefits.

The superior quality of appellate decision making in conventional litigation,<sup>121</sup> can be ascribed to a plethora of factors, such as the greater bench strength of appellate courts, as compared to that of the courts of the first instance, the hierarchy of courts, the purported increased competency of appellate judges as compared to trial court judges, etc.<sup>122</sup> Some of these factors, which contribute to the superior quality of appellate adjudication are already extant even in arbitrations of the first instance. For example, the benefit of the increased number of adjudicators and the attendant reduced possibility of erroneous decision making, typically available only at the appellate stage in conventional litigation,<sup>123</sup> is available even at the first instance in most arbitrations that pertain to high-stake disputes, since arbitral tribunals for such disputes are typically constituted by three arbitrators.<sup>124</sup>

<sup>119</sup> See Ten Cate, *supra* note 3, at 1139–40; PAULSSON, *supra* note 99, at 292.

<sup>120</sup> Cate, *supra* note 3, at 1139. See Wasco, *supra* note 79, at 620–21 (“There is no guarantee that the addition of an appeal process will give any more protection against ‘maverick’ decisions. . . . [It] will add an extra layer of expense, time, and review while still subjecting parties to the same possibility of poor decision-making.”).

<sup>121</sup> The expression “conventional litigation” as used in this article refers to litigation as undertaken to resolve disputes before judicial bodies—specifically, ordinary courts of law, as distinguishable from dispute resolution undertaken before non-judicial bodies, such as arbitral tribunals, which are “alternative” methods of dispute resolution.

<sup>122</sup> See Oldfather, *supra* note 3, at 331 (“A potential source of a competence differential between trial and appellate courts stems from the possibility that appellate courts enjoy certain advantages that are products of institutional architecture.”). See also Ten Cate, *supra* note 3, 1143 (“Court systems are structured so as to ensure that appellate courts can engage in more careful deliberation on legal issues than trial courts.”); Shavell, *supra* note 1, at 383–88 (observing that the difference in the competences of judges at different levels of the hierarchy is the product of optimal design, that since it would be less expensive to have a few appellate courts with more competent judges, while having relatively less competent judges in lower courts, than to have highly competent judges at all levels); Benjamin Kaplan, *Do Intermediate Appellate Courts Have A Lawmaking Function?*, 70 MASS. L. REV. 10 (1985) (“[D]ifferent tiers of courts possess different decision-making skills and that this distinction recognizes the particular competence of each.”).

<sup>123</sup> In most jurisdictions, matters are heard at first instance by a single judge of the Court. Only where the decision of the single judge is impugned, is such decision subjected to review, by appellate courts, which are manned by benches comprising of more than one judge.

<sup>124</sup> See MOSES, *supra* note 69, at 117; Cate, *supra* note 3, at 1140.

Likewise, since in many arbitrations, parties have the right to appoint arbitrators of their choice,<sup>125</sup> whom they presumably deem to be competent, the benefits of additional competence, attributed to appellate judges, compared to lower court judges, are found even in arbitrations of the first instance, and thus, arbitrators constituting appellate arbitral tribunals would not necessarily be innately any more qualified or competent than the arbitrators who had rendered the arbitral award of the first instance. Thus, the decision of such appellate tribunals might not necessarily be inherently more likely to be correct than the decisions of the arbitral tribunals of the first instance.<sup>126</sup>

Contrariwise, some of the other factors to which the superior decision-making quality of appellate adjudication can be attributed are not applicable in respect of appellate arbitrations. For example, unlike court systems, which are hierarchized, in the sense that decisions rendered by courts, which are “higher” up in the hierarchy, such as appellate courts, are perceived to be more “correct” or “legitimate” than the decisions rendered by courts that are “lower” down in the hierarchy, multi-tiered arbitral mechanisms, which include a tier of appellate arbitration are not similarly hierarchized<sup>127</sup>. Thus, decisions of appellate tribunals are not inherently more “correct” or

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<sup>125</sup> See REDFERN & HUNTER, *supra* note 8, at 372; MOSES, *supra* note 69 at 2; Shavell, *supra* note 1 at 424; Curtis E. von Kann, *supra* note 41, at 500; Smit, *supra* note 12, at 147. Further, arbitration rules of all ADRs permit the parties to choose their arbitrator, either by agreement, or by each designating an arbitrator of its choice and by permitting the arbitrators so designated to choose the chairman. See e.g., AAA Int’l Dispute Resolution Procedures. Art. 12 (2014); ICC Arbitration Rules Art. 13 (2017).

<sup>126</sup> See Ten Cate, *supra* note 3, at 1157.

<sup>127</sup> The entire doctrine of precedent, which is one of the most reverential underpinnings of court systems, is based on this very notion that the decisions of courts, which are hierarchically higher are more “correct” and are therefore binding on courts, which are hierarchically lower. See Ten Cate, *supra* note 3, at 1140 (“[C]ourt systems have also put structural features and procedural practices in place that provide credibility to the notion that decisions by intermediate appellate courts are ‘better’ than the ones they purport to correct.”). In fact, many authors regard the relationship between the higher courts and the lower courts to be one of principal and agent. See e.g., Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819, 820–22 (2003); Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 674–75 (1994). Other authors, however, discount such a characterization as being inaccurate. See e.g., Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 561–62 (2011); Jonathan Remy Nash & Rafael L. Pardo, *Rethinking the Principal-Agent Theory of Judging*, 99 IOWA L. REV. 331, 337 (2013).



“legitimate” than the awards rendered by arbitral tribunals of the first instance.<sup>128</sup>

For these reasons, it is urged that the institutionalization of appellate arbitration would not truly provide the increased quality control that such institutionalization is purported to secure and that it would yet, increase the overall expenses and time incurred in resolving the dispute, and that therefore, such institutionalization would be a redundancy not worth effectuating.

### 5. Increase in Costs and Time

The quintessential time-cost increase argument proceeds on the basis that the addition of another tier of review to the arbitral process (whether by a conventional court, as is the case with judicial appellate review, or by an arbitral tribunal of three arbitrators, as is the case with appellate arbitration) would significantly raise the costs and time attendant to the overall dispute resolution process.<sup>129</sup> Since the expenses incurred in connection to even a single tier of arbitration have increased significantly,<sup>130</sup> the addition of another additional layer of review to a process, even a single layer of which is expensive would be highly problematic and in turn, once again, defeat the purpose behind the parties’ resort to arbitration.

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<sup>128</sup> See Ten Cate, *supra* note 3, at 1157 (“The absence of hierarchy in commercial arbitration already renders the concept of error correction problematic.”); Lea Brilmayer, *Wobble, or the Death of Error*, 59 S. CAL. L. REV. 363, 381 (1986); Wasco, *supra* note 79, at 620–21 (observing that there is no reason to believe that the decisions of appellate arbitral tribunals are likely to be more correct than the decisions of the arbitral tribunals of first instance); Carreiro, *supra* note 63, at 211 (“It is hard to see how an appellate tribunal could offer . . . a determination which trumps the decision of the first arbitral tribunal.”); PAULSSON, *supra* note 99, at 292.

<sup>129</sup> See Smit, *supra* note 74, at 189; Kristen M. Blankley, *Be More Specific! Can Writing a Detailed Arbitration Agreement Expand Judicial Review under the Federal Arbitration Act?*, 2 SETON HALL CIR. REV. 391, 427 (2006). “Adding a level of appellate arbitral review will add another level of expense to the proceedings.” *Id.* at 427 n.205.

<sup>130</sup> See Martens & Kahlert, *supra* note 112; Curtis E. von Kann, *Not So Quick, Not So Cheap*, JAMS (Sept. 20, 2004), <https://www.jamsadr.com/publications/2004/not-so-quick-not-so-cheap>; Park, *supra* note 95, at 30 (noting that it is generally admitted that arbitration has become increasingly expensive); Stipanowich, *supra* note 63, at 6–7 (noting that the increased costs associated with arbitration have become a leading cause of complaint among users of arbitration); *International Arbitration: Corporate Attitudes and Practice*, *supra* note 50, at 7 (noting the perception among the respondents that arbitration is increasingly becoming as expensive as litigation).

### 6. *Possibility of Frivolous Appeals – The “Poor Loser Syndrome”*

Another possible downside of allowing substantive appeals is the possibility of frivolous appeals, i.e. appeals by award debtors, who are dissatisfied with the arbitral award who despite having no legitimate or bona fide belief as to the erroneousness of such award, institute appeals on weak or even meritless claims on the assumption that they have nothing to lose.<sup>131</sup> This phenomenon, which has been aptly dubbed by some authors as the “Poor Loser Syndrome,”<sup>132</sup> is especially problematic entailment as it could delay to a considerable extent—sometimes spanning multiple years—the enforcement of arbitral awards that do not in fact have errors that would warrant their review. It is thus urged that the enablement and the institutionalization of arbitral appeals would provide parties with an added incentive to appeal arbitral awards.<sup>133</sup>

#### C. *Critical Analysis*

Having perused the case both for and against the institutionalization of arbitral appeals, it is apt to determine whether the benefits from such institutionalization outweigh the adversities likely to ensue therefrom. To make such a determination it is imperative to *firstly* balance the relative merits of arguments advanced in support of and in opposition to the institutionalization of arbitral appeals, and to *secondly* determine the sufficiency of their respective rebuttals.

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<sup>131</sup> See Kate Kennedy, *Manifest Disregard in Arbitration Awards: A Manifestation of Appeals Versus A Disregard For Just Resolutions*, 16 J.L. & POL’Y 417, 443 (2008); Annie Chen, *The Doctrine of Manifest Disregard of The Law After Hall Street: Implications For Judicial Review of International Arbitrations in U.S. Courts*, 32 FORDHAM INT’L. L.J. 1872, 1883; Ronald E. Wood, *Arbitration and the Poor Loser Syndrome*, L.A. L., Sept. 2007, at 48; See also Cullinan, *supra* note 22, at 397.

<sup>132</sup> Kennedy, *supra* note 131, at 443.

<sup>133</sup> See, e.g., Younger, *supra* note 12, at 261 (“Appeals from arbitration awards are already quite common, despite their slim prospects for success. Appeals are likely to be more frequent if they are more freely allowed.”); See also Christopher D. Kratovil, *Judicial Review of Arbitration Awards in the Fifth Circuit*, 38 ST. MARY’S L.J. 471, 471-72 (2007) (noting that queries by award debtors in respect of options available to them to circumvent the arbitral award are one of the most frequent inquiries directed at appellate lawyers).

1. *Fairness versus Finality*

The first argument against arbitral appeals, the argument of finality, has become so steeped in arbitral culture that any suggestion in contravention of it is almost taboo.<sup>134</sup> However, the extensive body of academic literature in support of its indefeasibility notwithstanding, the finality argument is flawed on multiple levels.

For one, it assumes that finality is *necessarily* the primary concern of the disputants. This assumption is both myopic and flawed; unassailable finality of arbitral awards is not universally desirable because its desirability, not to mention utility, is determined by the parties' primary interest in resorting to arbitration.<sup>135</sup> While it might indeed be an asset to parties whose primary concern in relation to arbitration is with the speed of the dispute resolution,<sup>136</sup> it would be a liability to those parties that are more concerned with the substantive correctness of the arbitral award; to such parties finality is either a subservient or non-existent concern.<sup>137</sup> This is the case with a considerable percentage of parties to extremely high stake disputes. Even to parties to whom the speed and efficiency of the arbitral process are essential, finality is often not the primary or even an overriding concern but only a side-benefit.<sup>138</sup>

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<sup>134</sup> See Mauro Rubino-Sammartano, *The Fall of A Taboo* 20 J. INT'L ARB. 387, 387 (2003) ("Some arbitration circles have created the myth that the review of arbitral awards is taboo, which nobody, not even another arbitrator, should dare to question.")

<sup>135</sup> See Di Jiang-Schuerger, *Perfect Arbitration = Arbitration + Litigation?* 4 HARV. NEGOT. L. REV. 231, 246 (1999) ("[The] finality of an arbitral award may be either a benefit or a drawback of arbitration, depending on the parties' interests."); EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 27-28 (2006).

<sup>136</sup> See BRUNET, ET AL., *supra* note 135 at 27.

<sup>137</sup> *Id.* at 27-28 ("Finality can mean little for parties who want arbitration to reach an accurate outcome dominated by substantive legal principles. Such parties may be willing to accept outcome uncertainty and higher arbitration costs in order to receive a potentially delayed outcome that accurately applies the law to the facts."); Jian-Schuerger, *supra* note 135, at 246 (noting that some parties "would rather have the assurance that any possible legal or factual mistakes can be brought to a court for correction"); Knull & Rubins, *supra* note 63, at 564 (observing that "given the stakes often involved in transnational investment and other contracts, finality and speed may be decidedly secondary to neutrality, enforceability, and technical expertise, among others"). In fact, former AAA President Robert Coulson remarked, "We don't sell arbitration by and large on the basis of speed and economy." See also James Lyons, *Arbitration: The Slower, More Expensive Alternative?*, AM. LAW. Jan-Feb 1985; Stipanowich, *supra* note 112, at 474 (observing that the respondents to surveys conducted by AAA and Harvard Business School in 1965 did not always consider speed to be of paramount importance, particularly in large commercial cases).

<sup>138</sup> See, e.g., BRUNET ET AL., *supra* note 135, at 27-28; Martin Hunter, *International Commercial Dispute Resolution: The Challenge of the Twenty First Century*, 16 ARB. INT'L 379, 382 (2000)

In fact, multiple studies evidence that parties to arbitrations attach an insurmountable importance to the fairness of arbitral decision making, sometimes even more than finality,<sup>139</sup> where the expression “fairness” is generally associated with procedural due process concerns.<sup>140</sup> However, such a restricted conception of fairness is at best, only an incomplete conception of fairness with limited utility, inasmuch as it does not extend to matters that are substantive, but is restricted purely to procedural matters.<sup>141</sup>

The processual condonation of egregiously erroneous awards can result in the loss of its appeal as the preferred mode of resolving contractual and transactional disputes.<sup>142</sup> This is especially so in light of the increasing unattainability of some of the traditional systemic advantages of arbitration,<sup>143</sup>

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(asserting that the “general preference for arbitration in international transactions has nothing to do with the advantages of speed and cost savings”).

<sup>139</sup> See Naimark & Keer, *supra* note 85, at 204-08 (noting from the results of their study that the respondents had ranked the fairness of arbitral awards as a more important attribute of arbitration than finality; the respondents had ranked fairness as being the first most important attribute of arbitration, finality having been ranked third); Desierto, *supra* note 17, at 946 (“Parties to an international arbitration remain primarily concerned with the resolution of a concrete dispute, under a fair process.”); Park, *supra* note 95, at 27 (“The parties have no less interest in correct decisions than in efficient proceedings.”); *Corporate Choices in International Arbitration: Industry Perspectives*, SCHOOL OF INTERNATIONAL ARBITRATION, CENTRE FOR COMMERCIAL LAW, QUEEN MARY UNIVERSITY OF LONDON, 6-7 <http://www.pwc.com/gx/en/arbitrationdispute-resolution/assets/pwc-international-arbitration-study.pdf> (last visited Oct. 31, 2017) (“frequent users of arbitration explained that, regardless of whether they are claimant or respondent, ‘fairness’ – above all other considerations – is what companies look for in a dispute resolution mechanism.”); Hossein Abedian, *Judicial Review of Arbitral Awards in International Arbitration*, 28 J. INT’L. ARB. 553, 554 (2011) (“[T]he integrity of the arbitral proceedings, just as finality of the arbitral award, is the shared pre-contractual expectation of the parties”); Chen, *supra* note 131, at 1883.

<sup>140</sup> See Desierto, *supra* note 17, at 948 n.23.

<sup>141</sup> *Id.* at 943-44 (noting that multiple authors have impugned the purported fairness of arbitration, broadly in three main respects, namely, evidentiary procedures of the arbitral process, the veracity and reliability of arbitral decision making and the substantive outcomes resulting from arbitral dispute resolution).

<sup>142</sup> See Nouraie, *supra* note 83, at 217 (“If parties cannot be assured that clearly unreasonable awards will be reviewable, arbitration may lose its appeal”); Park, *supra* note 95, at 25 (“If arbitration loses its moorings as a truth-seeking process, nostalgia for a golden age of simplicity will yield to a clarion call for reinvention of an adjudicatory process aimed at discovering what happened, finding relevant legal norms and properly construing contract language.”).

<sup>143</sup> Von Kann, *supra* note 41, at 500-501 (listing the “classical advantages” of the arbitral process). Von Kann formulated into a list —the ten principal reasons, traditionally cited for resorting to arbitration for the resolution of disputes: (1) the ability to choose the decision-maker; (2) the ability to adapt the process to the needs of each individual case; (3) flexibility in the adjudicative process; (4) privacy of the adjudicative process; (5) accessibility of the decision-maker; (6) efficient, user-friendly

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like speed, inexpensiveness, etc., which historically enamored it to businessmen as the preferred method of resolving their contractual and transactional disputes,<sup>144</sup> which attributes have increasingly come to be perceived as empty rhetoric.<sup>145</sup>

Secondly, the mere enablement of arbitral appeals does not significantly abrogate arbitral finality.<sup>146</sup> Admittedly, increased judicial review of arbitral awards is a significant threat to arbitral finality.<sup>147</sup> However, the review of awards *sans* the involvement of courts—i.e. extra judicially, would not pose nearly as much of a threat to finality. In such extra-judicial forms of arbitral appeals, as in the case of appellate review of awards performed by a second arbitral tribunal, the effect of the additional layer of review on finality is sufficiently minimal to be regarded for all practical purposes as being negligible. In fact, the enablement of arbitral appeals, coupled with a concomitant waiver of the right to make further appeals in national courts at the enforcement stage could actually make the overall process of dispute resolution faster than it presently is in many cases.<sup>148</sup> Therefore, provided that the appellate option is restricted only to cases where the resort thereto is absolutely necessary to ensure the deliverance of justice, and the scope of appellate review is sufficiently minimal as to not engender a large scale displacement of the arbitral awards of the first instance, the institutionalization of arbitral appeals would not result in the abrogation of arbitral finality.

The near-reflexive resort to the finality argument as an axiomatic justification for the lacunae extant in arbitration and to stymie criticisms with

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case administration; (7) fair and just results; (8) finality of the award (9) lower cost than litigation; and (10) quicker results than litigation. *Id.*

<sup>144</sup> Japaridze, *supra* note 105, at 1416 (2008). Many authors believe that arbitration is moving away at an alarming rate, from the ideal of simplicity, the very ideal, which constituted its bedrock. See Michael McIlwrath & Roland Schroeder, *The View From an International Arbitration Customer: In Dire Need of Early Resolution*, 74 ARBITRATION 3, 11 (2008) (“Arbitration has slipped from its promise of a better, more efficient, dispute resolution process.”); Von Kann, *supra* note 41, at 500 (“In the last few years, commercial arbitration, once the darling of the business community, has lost some of its allure.”).

<sup>145</sup> See Andrew Okekeifere, *Commercial Arbitration As The Most Effective Dispute Resolution Method: Still a Fact or Now a Myth?* 15 J. INT’L. ARB. 81, 81 (1998) (noting that while the rhetoric of arbitration being “very fast, easy and cheap” was largely true at its incipient stages, over the last few decades, arbitral proceedings have taken on features “that have in very radical ways robbed it of, or drastically affected, some of the very popular advantages it had over the other forms of dispute resolution.”)

<sup>146</sup> See Knull & Rubins, *supra* note 63, at 536, 542–43.

<sup>147</sup> See *Id.*

<sup>148</sup> See Part III. C. 3 & Part IV. E below.

respect to the systemic underpinnings of arbitration smacks of intellectual dishonesty.<sup>149</sup> Finality indubitably is an essential attribute to any form of adjudication and arbitration is no exception nonetheless, unexceptionable finality should neither be pursued nor sanctioned by an arbitral framework, especially at the risk of compromising the quality of decision making thereunder to an unreasonable extent. There is not greater value in protecting a poor or erroneous arbitral award than there is in protecting a poor or erroneous judicial decision; neither has attributes of sanctity. As Lord Atkin remarked several years ago, albeit in a different context, “[f]inality is a good thing but justice is better.”<sup>150</sup> Therefore, its allure and integrality to the arbitral process notwithstanding, finality ought not to be used as a sufficient pretext to diminish the quality of the decision making in the arbitral process, especially when the potential consequences of such diminishment could be detrimental to the perception and/or the utility of the arbitral process. For these reasons, as Alan Scott Rau remarked, it would be “extraordinarily officious—indeed perverse—to insist on imposing the putative benefits of finality,” as an unexceptionable virtue on parties.<sup>151</sup>

## 2. *Inadequacy of Existing Standards of Review of Arbitral Awards*

One of the points of contention with respect to the desirability of the institutionalization of arbitral appeals is the proper extent of review of arbitral awards to equilibrate two competing and ostensibly irreconcilable goals of arbitral frameworks, which are—*firstly*, the preservation of the finality of arbitral awards and *secondly*, that such preservation is not at the expense of the securement of justice. Multiple authors have recognized the existence of an underlying tension between these two goals present in the arbitral landscape and the consistent difficulty in actualizing an indisputable balance between them;<sup>152</sup> one author even went so far as to conclude that a perfect

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<sup>149</sup> See Rau, *supra* note 69, at 454-56.

<sup>150</sup> Ras Behari Lal v. King-Emperor (1933) 50 TLR 1, (1933) 60 IA 354.

<sup>151</sup> See Rau, *supra* note 69, at 456-57.

<sup>152</sup> “International arbitration policies are founded upon two basic interests: preserving the finality of arbitral awards and maintaining a just system.” See, e.g., Jessica L. Glander, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80 MARQ. L. REV. 625, 626 (1997). “In arbitration, there is always the never ending conflict between two irreconcilable principles—the high principle that justice must be done though the heavens may fall and the low principle that commends a quick resolution of all disputes.” Fali S. Nariman, *Arbitration & ADR in India*, ALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS (Rao & Sheffield eds.) (2012). Ginkel, *supra* note 17 (recognizing the tension that exists between the

equilibration of the two would be an impossible task.<sup>153</sup> Proponents of the institutionalization of arbitral appeals have criticized the current standard of review to which arbitral awards can be subjected as being inadequate due to its inability to correct substantive errors.<sup>154</sup>

However, opponents of the institutionalization of arbitral appeals have attempted to rebut this criticism by stating that such an estimation as to the inadequacy of the extant standards of review is flawed, in that it is overly reliant on the standard of review available in litigation appeals, and that the fairness of the arbitral process should be evaluated without reference to parallel standards, as are applicable in conventional litigation.<sup>155</sup>

The latter argument while facially attractive, fails to recognize the fact that truly *in-vacuo* evaluation of the fairness of arbitral frameworks is not truly possible. Due in no small part to the existence of certain key systemic similarities between the various methods of dispute resolution, including conventional litigation and arbitration—which similarities constitute the lowest common denominators thereof, many of the parameters used to evaluate the efficacy of the ability of conventional litigation to produce fair results, i.e., the fairness of conventional litigation, would necessarily overlap with those employed to appraise the ability of arbitral frameworks to do the same. Parameters such as the stringency of the fact-finding process, the rigorousness of the application of the law, the reported error percentages of appealed decisions on the basis of the number of successful appeals,<sup>156</sup> among others, would necessarily be employed in respect of any appraisal of the systemic ability of any system of dispute resolution to produce fair results.<sup>157</sup> Therefore, at least some of these parameters must necessarily serve as a frame of reference, in cogitation of which the parameters for the appraisal of fairness of arbitral frameworks can be formulated. In any case, the mere fact of the employment of certain parameters in the evaluation of the fairness of

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benefit of the finality of the award and the perceived absence of much needed quality control over arbitrators as they are asked to interpret increasingly more complex legal issues).

<sup>153</sup> Park, *supra* note 95, at 22 (observing that no system will be able to “perfectly reconcile these rival goals of finality and fairness,” but that the availability of middle ground provides judicial review for “grosser” forms of procedural injustice).

<sup>154</sup> See *supra* Part III. A. 2.

<sup>155</sup> See *supra* Part III. B. 2.

<sup>157</sup> To some extent, this overlap stems from the fact that arbitration, while an “alternative” dispute resolution mechanism at its earliest level, contains features rudimentarily similar to those found in litigation—both arbitration and litigation are adversarial methods of adjudication, and even if their overarching purposes and their finer workings might differ, there are bound to be similarities ascribable to their rudimentary commonalities.

conventional litigation does not denude the applicability or the utility of such parameters, with respect to the evaluation of the fairness of the arbitral process.

As for the purported sufficiency of the absence of considerable expressed discontent with the continued systemic absence of arbitral appeals to conclude that the extant standard of review of arbitral awards needs no modification—it is worth noting that such an absence of expressed discontent is more likely to be the product of inertia than party satisfaction with the extant standard. As such, the mere fact of the continued existence of a system or an attribute thereof constitutes evidence of its optimality. Even if one were to believe otherwise, the reality, as is evidenced by the analysis undertaken in Part II, is that the business community—which is the key entity, around whose needs arbitration revolves, is becoming increasingly open to the idea of the provision of arbitral appeals.<sup>158</sup> Given the entrenchment of the absence of arbitral appeals in most arbitral frameworks,<sup>159</sup> this increasing receptivity to a rather fundamental change evidences the perceptions of the business community as to the sub-optimality of the extant system.

As for the contention that the possibility of parties to adopt “front-end” quality control measures, in selecting arbitrators of their choice,<sup>160</sup> ought to preclude them from being allowed to employ additional “back-end” quality control measures, such as by taking recourse to arbitral appeals, it is specious at best and would only be persuasive if the adoption of a “front-end” safeguard in and of itself, would guarantee infallible results.<sup>161</sup> However, that is not the case, since every form of adjudication is susceptible to erroneous decision-making.<sup>162</sup> For these reasons, the argument that the extant standard of review to which arbitral awards can presently be subjected is adequate, is not well founded and should be rejected.

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<sup>158</sup> See *supra* Part II.

<sup>159</sup> See text accompanying notes 7 and 8.

<sup>160</sup> See *supra* Part III. B. 1.

<sup>161</sup> Knull & Rubins, *supra* note 22, at 531 (“Finality would, indeed, be a great virtue of arbitration—provided the parties could be assured the arbitrator will always make the right decision.”); Blankley, *supra* note 128, at 393. (“[F]inality would always be an asset if arbitrators, unlike distinguished judges, never made mistakes.”).

<sup>162</sup> See *supra* text accompanying note 63.



### 3. *Addressing the Judicialization Argument*

As noted above, opponents of institutionalizing arbitral appeals have impugned it as constituting “judicialization” of arbitration, which they claim is occasioning a shift in preference of commercial parties away from arbitration.<sup>163</sup> The empirical evidence available in this respect, however, evidences this fear to be hyperbolic inasmuch as the judicialization averred to is mostly qualitatively of the kind it is purported to be; even to the extent that it is, such judicialization is ascribable to the increasingly complex nature of disputes for the resolution of which arbitration is resorted.<sup>164</sup> But perhaps more important to the present discourse is the determination of whether such judicialization—through the institutionalization of arbitral appeals—is in fact as deleterious as it is made out to be.

As noted earlier, judicialization is defined in two senses, which are: *firstly*, the incorporation of the systemic attributes native to conventional litigation into the arbitral process and *secondly*, the increased judicial involvement—be it in the form of control, oversight or intervention in the arbitral process.<sup>165</sup> The institutionalization of arbitral appeals would without a doubt result in judicialization in the former sense, irrespective of the mechanism of substantive arbitral appeals, which is characteristically absent in arbitrations, but is one of the most sacrosanct and axiomatic entailments of litigation.<sup>166</sup> However, such institutionalization would result in judicialization, in the latter sense only where arbitral appeals are provided by courts—i.e. in the case of judicial appellate review because it would entail additional judicial oversight of the arbitral process. Where arbitral appeals are performed through appellate arbitration, there is no such increase in the extent of judicial involvement in the arbitral process; hence, appellate arbitration does not judicialize arbitration in the second sense. It is now essential to consider whether the judicialization of the arbitral process due to

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<sup>163</sup> See *supra* Part III. B. 3.

<sup>164</sup> See Gerbay, *supra* note 37 (2014) (noting that the empirical evidence adduced thus far does not support the assumption that international arbitration has recently become more judicialized); see also Christopher R. Drahozal, *Business Courts and the Future of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 491, 492 (2009) (noting upon an appraisal of empirical evidence, the introduction of business courts is not likely to have a perceptible impact on the resort to arbitration).

<sup>165</sup> Horvath, *supra* note 113, at 251; Brower, *supra* note 113, at 183.

<sup>166</sup> Wilner, *supra* note 1, at 417; Martineau, *supra* note 1, at 165; Dalton, *supra* note 1, at 62; Shavell, *supra* note 1, at 379-80.

the institutionalization of arbitral appeals is in fact as deleterious as the opponents of the institutionalization forcefully urge.

It would be disingenuous to deny the existence of various deleterious effects increased judicial involvement in the arbitral process would entail.<sup>167</sup> It would eviscerate some of the key attributes of arbitration, which likely occasioned the resort to it in the first place.<sup>168</sup> Judicialization of this kind is therefore indubitably detrimental to the arbitral process. However, judicialization of the second kind is not inherently or necessarily detrimental to the arbitral process., Although the adoption of attributes characteristic to litigation into the arbitral process indubitably would be detrimental in certain contexts such as, the introduction of extensive discovery, pre-trial motions, or a multi-tiered appellate mechanism, the adoption of such attributes could very well be beneficial in other contexts. The introduction of institutionalized substantive appeals is one such context, of such beneficial judicialization—if such appeals are provided through appellate arbitration.

As for the possibility of the institutionalization of arbitral appeals prolonging the arbitral process, the opposite is in fact more likely to be true with appellate arbitration. This is because, the permissibility of institutionalized appellate arbitration would itself operate to prevent parties from seeking to annul arbitral awards before national courts, at least to a certain degree,<sup>169</sup> and the time required for appellate arbitral review (subject to strict timelines) would be far less than the time required for comparable judicial appellate review, or for that matter, judicial review even solely on narrow standards provided under the New York Convention, owing to the processual inexpediencies intrinsic to litigation—such as the requirement to schedule hearing dates, the filing of and arguing lengthy briefs and memos, and the overall time taken by the Court to reach its decision.<sup>170</sup> Thus, the institutionalization of internalized arbitral appeals, specifically appellate arbitration, would enable the appeal of arbitral awards on substantive grounds while avoiding the drawbacks associated with the inefficiencies of the negative variety of judicialization.

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<sup>167</sup> See Part III. B. 1.

<sup>168</sup> See text accompanying notes 105-07.

<sup>169</sup> See Carreiro, *supra* note 63, at 214; Knull & Rubins, *supra* note 22, at 562.

<sup>170</sup> See Part IV.A *infra*.

#### 4. *Justifiability of Time & Cost Increase*

Another major concern of opponents to the institutionalization of arbitral appeal is the resultant increase in expenses incurred.<sup>171</sup> Admittedly, the addition of another tier, in the form of arbitral appeals to the single tier which characterizes arbitration would entail a significant cost increment. The arguments proposed in this regard are hyperboles,<sup>172</sup> and beside the point.<sup>173</sup> Further, given the stakes at hand, the potential cost savings, which shall be entailed in procedural costs, would ultimately mean little measured against potentially significant error in relation to high-stakes disputes.<sup>174</sup> In fact, the high stakes of such disputes drastically reduce the significance of such increases in time and costs.<sup>175</sup>

In any event, concerns regarding the potential ballooning of costs consequent to the introduction of arbitral appeals are addressable by effectuating measures which reduce the number of arbitral appeals that take place. Some measures in this respect include limiting the kinds of cases, awards from which are eligible to be subjected to arbitral appeal on the basis of the financial stakes of the disputes to resolve which the impugned arbitral award was passed, limiting the net costs permitted to be incurred by parties, in respect of the proceedings of the arbitral appeal, requiring the party which loses the arbitral appeal to pay the costs of the appellate proceedings incurred by the party, which wins the appeal etc.<sup>176</sup> As for the compensation payable for the delay that resorting to arbitral appeals, the party initiating the appeal can be required to pay interest on the amount due from the original award for the duration of the appellate proceeding if it loses the appeal or does secure a significantly changed award through appeal. Such measures can sufficiently reduce the deleterious effects of increased expense, and thus offset this purported disadvantage.

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<sup>171</sup> See Part III. B. 5.

<sup>172</sup> Goldman, *supra* note 17, at 184.

<sup>173</sup> Rau, *supra* note 69, at 456.

<sup>174</sup> Knull & Rubins, *supra* note 22, at 540.

<sup>175</sup> *Id.* at 540-41.

<sup>176</sup> All of these measures have been incorporated in the NAAM. See Part IV. B.

### 5. *Fivolous Appeals Can Be Curtailed*

Another argument advanced in opposition to the institutionalization of arbitral appeals is the possibility of it enabling or incentivizing award-debtors afflicted with the “Poor Loser Syndrome” to arbitral appeals as a dilatory tactic—even in the absence of a legitimate belief as to the erroneousness of the award.<sup>177</sup> This concern while legitimate is fairly easy to address.

For one, there is some evidence indicating that an overwhelming majority of the parties to arbitrations voluntarily comply with the arbitral awards.<sup>178</sup> There is little, if any, reason to believe that this would change merely upon the institutionalization of arbitral appeals. However, even if this were not the case, potentially exploitative resorts to arbitral appeals can be prevented by incorporating sufficiently prohibitive and deterrent requirements into the appellate mechanism as to disincentivize parties from appealing awards, to prolong or delay the enforcement thereof where they are not under a *bona fide* and reasonable apprehension of having received an erroneous award. Examples of such requirements would include—firstly, preconditioning the resort to the arbitral appeals upon the deposition in escrow by the party desirous to appeal the award rendered by the arbitral tribunal of the first instance of the entire amount awarded in such award in escrow, as is required by the European Court of Arbitration,<sup>179</sup> or where such deposition is

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<sup>177</sup> See Part III. B. 5.

<sup>178</sup> As with the empirical evidence considered in Part II, the empirical evidence in this respect is not completely unanimous, nor are the conclusions drawn exact to a mathematical precision. See CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 262–64 (2005); THE SCHOOL OF INTERNATIONAL ARBITRATION OF QUEEN MARY UNIVERSITY OF LONDON, *supra* note 50, at 8 (noting that the respondents reported that over ninety percent of the arbitral awards were voluntarily complied with); Frédéric Eisemann, *Arbitration Under The International Chamber of Commerce Rules*, 15 INT’L. COMP. L.Q. 726, 734–35 (1966) (noting that nine out of ten arbitral awards are voluntarily complied with); EMILIYA ONYEMA, INTERNATIONAL COMMERCIAL ARBITRATION AND THE ARBITRATOR’S CONTRACT 38 (2010) (noting that losing parties usually comply with arbitral awards); MOSES, *supra* note 69, at 202 (stating that “[i]n many instances, a losing party will voluntarily comply with an arbitration award . . .”); TREVOR COOK & ALEJANDRO I. GARCIA, INTERNATIONAL INTELLECTUAL PROPERTY ARBITRATION 26 (2010) (stating, “the great majority of arbitral awards are voluntarily complied with . . .”).

<sup>179</sup> Arbitration Rules of the European Court of Arbitration Rule 21.2 (2015). However, one author has noted that such a requirement might prove to be problematic, as it would deprive parties lacking sufficient funds of their access to the appellate framework. Carreteiro, *supra* note 63, at 208 (stating, “[w]hile the approach is interesting and has some merit, parties should be careful with such approach because it has the potential of leaving a party with no access to the appeal system. In cases of betting-the-farm disputes, conditioning an appeal on the deposit of the amount originally awarded might be

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impracticable, upon the provision of a guarantee on demand to be issued by a prime bank selected by the parties, secondly, by requiring the losing party to shoulder the cost of appeals,<sup>180</sup> thirdly, by imposing sanctions on parties found to have frivolously resorted to the appellate process. In addition to such deterrent requirements, it is also expedient to incorporate into the appellate mechanism, a restrictive gateway, to act as a sieve—and dismiss frivolous appeals at the outset and thus prevent the incurrence of time and expenses in respect thereof. This can be done by preceding the appellate review proper, with a summary review—where appeals which lack merit *prima facie* can be dismissed at the outset.

To provide in this manner, for limited institutionalized arbitral appeals would be a far superior alternative to the outright preclusion of arbitral appeals. To altogether preclude arbitral appeals, merely to safeguard against the possibility of its resort by parties without legitimate grievances would result in the deprivation of a valuable redressal mechanism of parties, with legitimate grievances with their awards.

#### 6. *Arbitral Appeals Are Not Redundancies*

The argument regarding the redundancy of appellate arbitration is perhaps the hardest to rebut of the arguments made opposing the institutionalization of arbitral appeals, especially the subsidiary argument that it is difficult to justify that decisions of appellate arbitral tribunals would be more correct or legitimate than those taken by the arbitral tribunals of first instance.<sup>181</sup> The rebuttal to this argument is feeble at best—the presence of such an appellate mechanism lends arbitration a semblance of added legitimacy as a symbolism of justice being done. As Viscount Hewart remarked in an antediluvian decision, “[j]ustice must not only be done, but also appear to have been done.”<sup>182</sup> This increase in perceived legitimacy could be valuable to

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incompatible with the initial intentions of the parties.”). However the complained of effect is addressable by structuring such pre-payment requirement to include satisfaction through the provision of a third party guarantee, so as not to preclude access to appellate arbitration by an award debtor, solely to lack of ability to mobilize funds. See Part IV. E. 3.

<sup>180</sup> See Goldman, *supra* note 17, at 184 (noting that the inclusion of contractual provisions, which require the award debtor to, on losing the appeal preferred by it from the award of first instance, pay the costs of the appeal and related attorney expenses would force award debtors to think twice before choosing to appeal.); Stephen Hochman, *Judicial Review to Correct Arbitral Error—an Option to Consider*, 13 OHIO ST. J. DISP. RESOL. 103, 115–16 (1997).

<sup>181</sup> See *infra* Part III. B. 4.

<sup>182</sup> R v. Sussex Justices, ex p McCarthy [1924] 1 K.B. 245 (per Viscount Hewart).

arbitration's proponents, as its critics increasingly express serious doubts about the system.<sup>183</sup> Concededly, the presence of purely symbolic reasons without additional value does not justify the alteration of the system. However, the benefits of institutionalizing arbitral appeals are not purely symbolic, as explicated above, there has been an increase in the demand for such arbitral appeals.<sup>184</sup> Further, considering that the benefits likely to ensue from the institutionalization of arbitral appeals significantly outweigh the drawbacks likely to ensue therefrom, it would be incorrect to characterize institutionalized arbitral appeals as a redundancy.<sup>185</sup>

### 7. *The Final Verdict*

While multiple arguments have been advanced in opposition to the institutionalization of, or for that matter, the enablement of arbitral appeals, some of which have merit, most of them are rebuttable. The drawbacks purported by such arguments, to be inevitable consequences of the institutionalization of arbitral appeals do not outweigh the benefits of such institutionalization, nor are their effects so deleterious as to conclusively establish the institutionalization of arbitral appeals to be unsound.

Further, the effects of such drawbacks, even to the limited extent that they might possibly be problematic, can be mitigated or altogether offset by regulating various aspects of the appellate process, such as: regulating the availability, regulating the standard of review to which appealed awards are subjected, and providing gateway safeguard measures to preclude exploitative resorts to the appellate process, among other things. To dismiss the suggestion of institutionalizing arbitral appeals merely because of its potential drawbacks is unjustified. When faced with the choice between the complete preclusion of a remedy, in respect of all parties, which may potentially take recourse to it, and permitting the remedy—subject however, to preconditions, that would be sufficiently prohibitive of the exploitative resort to such remedy, —the superior alternative is the latter.

A point, attention to which must be drawn at this juncture is that many of the purportedly inevitable drawbacks of the institutionalization of arbitral appeals are not drawbacks of arbitral appeals *per se*, but rather drawbacks of

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<sup>183</sup> See Karen A. Lorang, *Mitigating Arbitration's Externalities: A Call for Tailored Judicial Review*, 59 UCLA L. REV. 218, 241 (2011); Carreteiro, *supra* note 63, at 209 (stating, “appeals bring a perception of legitimacy, because it cures whatever might have gone wrong in an arbitration, be it incompetence or corruption or anything in between that creates . . . a runaway tribunal”).

<sup>184</sup> See Part II, and text accompanying and corresponding to notes 53, and 67.

<sup>185</sup> Part III. C. 6. See also Part IV.

arbitral appeals facilitated by courts, i.e. arbitral appeals through judicial review. Therefore, such drawbacks are entailments not of the provision of an appellate option in respect of arbitrations, but of a particular *medium*—in this case, the judiciary—through which the appellate option can be provided. Fortunately, neither is judicial review the sole mechanism to facilitate arbitral appeals, nor is the judiciary a necessary medium through which arbitral appeals must be undertaken.<sup>186</sup> Arbitral appeals can be performed without at all involving the judiciary, as in the case of an internalized appellate arbitration mechanism. By providing an internalized appellate process, a large number of the purported drawbacks of institutionalized arbitral appeals are completely eliminated or otherwise substantially mitigated.<sup>187</sup> Therefore, not only is the institutionalization of arbitral appeals not as problematic as those in opposition thereto have made it out to be, but to the contrary, it is arguably an imperative requirement at this point, for the reasons explicated above.

#### IV. STRUCTURE OF APPELLATE ARBITRAL REVIEW

Having established the need for arbitral appeals, the next issue to be addressed is how arbitral appeals ought to be implemented. As noted in the introduction, the idea of introducing arbitral appeals is not new and certainly not unprecedented.<sup>188</sup> However, scholars are divided on which among the various available mechanisms is the most viable, particularly in respect of securing the goals enumerated in Part III. C. Four primary mechanisms have been suggested for the introduction of arbitral appeals: first, the enablement of substantive review even by ordinary courts, as in the United Kingdom;<sup>189</sup> second, by contractual increase in grounds for review, also by ordinary courts; third, by vesting power of review with a second panel of arbitrators, i.e. appellate arbitration;<sup>190</sup> and *fourth*, the creation of an international court of

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<sup>186</sup> Broadly speaking, there are three major mediums through which arbitral appeals can be provided. For a more detailed perusal thereof, and an appraisal of their respective strengths and weaknesses, see Part IV.A *infra*.

<sup>187</sup> See Carbonneau, *supra* note 6, at 260 (stating, “[g]iven the need for arbitral autonomy, the best recourse appears to be to internalize substantive appeal in the arbitral process. The law could mandate such recourse in certain types of arbitrations or require that parties agree to the procedure or waive its application”).

<sup>188</sup> See text accompanying *supra* note 7.

<sup>189</sup> See Arbitration Act 1996, c. 23 § 69 (Eng., Wales, & N. Ir.); *supra* text accompanying note 6.

<sup>190</sup> See cases cited *supra* note 63.

arbitration that shall have inherent jurisdiction over arbitral awards.<sup>191</sup> For the reasons exposted below, the most feasible of these four proposed models is that of appellate arbitration.

A. *Advantages of Appellate Arbitration over Judicial Appellate Review*

Arbitral appeals through litigation can occur in two circumstances: through the statutory expansion of the grounds of judicial review of arbitral awards to include review for substantive correctness of facts and law (as is the case in the United Kingdom),<sup>192</sup> or, if allowed by the arbitral framework of the particular State, through the contractual expansion of the grounds of judicial review to include substantive review. Both of these mechanisms entail disadvantages that are separate from the systemic disadvantages of litigation itself as a method of arbitral appeals.

Appellate review through appellate arbitration has at least five significant advantages over judicial appellate review. First, unlike courts, which are characterized by dockets flushed with pending cases that prolong the time period required to dispose individual cases, appellate arbitral tribunals have no such dockets, and direct their entire attention towards the resolution of the singular dispute, or set of inter-related disputes, before them.<sup>193</sup> Thus, despite arbitration arguably losing some of its innate systemic expeditiousness that had enamored it to commercial parties in its emergent stages,<sup>194</sup> appellate arbitration, by virtue of the absence of abundant and seemingly everlasting

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<sup>191</sup> See Mauro Rubino-Sammartano, *An International Arbitral Court of Appeal as an Alternative to Long Attacks and Recognition Proceedings*, 6 J. OF INT'L ARB. 181 (1989); Schwebel, *The Creation and Operation of an International Court of Arbitral Awards*, INTERNATIONALISATION INT'L ARB. 115 (1995); H. H. Holtzman, *A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*, THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: LCIA CENTENARY CONFERENCE 109 (Martin Hunter ed., Illustrated ed. 1995).

<sup>192</sup> Similar to arbitral review in the United Kingdom. See *supra* text accompanying note 6.

<sup>193</sup> This is because appellate arbitral tribunals (or for that matter arbitral tribunals or panels in general) are *typically* constituted pursuant to contractual relationships, or under the appropriate Rules of ADR Institutions and are not permanent bodies, like Courts. While there are exceptions to this rule, as in the case of the Court of Arbitration of Sports ("CAS") which is a permanent arbitral tribunal, based out of Lausanne, Switzerland, vested by its inceptive enactment—the CAS Code, 2017, "resolving legal disputes in the field of sport through arbitration and mediation," this is not the case with arbitral tribunals in general. See CAS Code, 2017 at [http://www.tas-cas.org/fileadmin/user\\_upload/Code\\_2017\\_FINAL\\_en.pdf](http://www.tas-cas.org/fileadmin/user_upload/Code_2017_FINAL_en.pdf)

<sup>194</sup> See *supra* text accompanying note 137.



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dockets typical in courts,<sup>195</sup> has a definitive advantage over litigation in terms of speed.<sup>196</sup> Second, appellate arbitration, being an instance of arbitration, protects the privacy and the confidentiality of the parties.<sup>197</sup> While the degree of confidentiality afforded to arbitration varies, sometimes significantly between different countries, it is considerably certain that the information pertaining to the dispute or the arbitration is generally less susceptible to public revelation or access in arbitration than with litigation,<sup>198</sup> since arbitral proceedings, the records presented therein, and other information pertaining to the dispute or the arbitration are required to be confidential, either by statute, institutional rules,<sup>199</sup> or custom,<sup>200</sup> often augmented by contracts which specifically delineate the exact contours of such confidentiality.<sup>201</sup>

<sup>195</sup> The courts of most countries are often flush with cases to the point that the backlog can often take multiple years to be satisfactorily resolved.

<sup>196</sup> See Holt, *supra* note 17, at 477-478. “A post-award appellate arbitration] would increase an arbitration’s expense and duration, but it would also provide the review some parties desire. The speed of such an appeal would likely be much greater than anything that could be had in civil litigation.” *Supra*.

<sup>197</sup> See text accompanying note 217, *infra*.

<sup>198</sup> See Knull & Rubins, *supra* note 22, at 539; Marrow, *supra* note 63, at 12 (noting that appellate arbitration reduces the risk of confidential information becoming exposed to the public). In litigation, parties would be required to turnover to the Court, information that appertains to various aspects of the parties, the dispute, the arbitral proceedings, the arbitral award etc., much of which might be proprietary, sensitive, highly classified, and/or potentially injurious to their perception by the public, such disclosures being required by the law. See Stephen Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 16 J. DISP. RESOL. 89, 90 (2001).

<sup>199</sup> See, e.g., ICC Rs. Art. 22(3), LCIA Rs. Art. 30, SIAC Rs. Art. 35; HKIAC Rs. Art. 42; DIAC Rs. Art. 41 etc. Most of these provisions bar the disclosure of information pertaining to the arbitration to limited circumstances such as with the prior consent of the parties.

<sup>200</sup> See, e.g., *Dolling-Baker v. Merrett*, 1 W.L.R. 1205, 1213 (A.C. 1990) (stating, “[a]s between parties to an arbitration . . . their very nature is such that there must . . . be some implied obligation on both parties not to disclose or use for any other purpose, any documents prepared for and used in the arbitration”). *Hassneh Insurance Company of Israel v. Mew*, 2 Lloyd’s Rep. 243, 246 (Q.B. 1993) (indicating an obligation of confidentiality attaching to documents “can exist only because it is implied in the agreement to arbitrate . . .”). See also Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT’L L. REV. 969, 975-87 (2001). However, it is imperative to note the difference between the terms “confidentiality” and “privacy.” See Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 11 ARB. INT’L 321 (1995). Post 1990, in many jurisdictions, while the privacy of arbitration has remained intact, its confidentiality has been largely diluted—as far as its customary existence goes—with courts refusing to acknowledge an implicit obligation of confidentiality. See Dan Bodle & Tracey Summerell, *Ensuring Appropriate Confidentiality in Arbitration: Guidance for Arbitrators and Parties Alike*, LEXOLOGY (July 20, 2017).

<sup>201</sup> See Von Kann, *supra* note 41, at 499; Schmitz, *supra* note 97, at 158.

Therefore, appellate arbitration “does not introduce a public component into what is inherently a private and confidential process.”<sup>202</sup> Given the premium placed on confidentiality, as a key attribute of arbitration, by a significant proportion of commercial parties,<sup>203</sup> this is a massive advantage for appellate arbitration. Third, appellate arbitrations, unlike judicial appellate review, would be conducted by neutral third parties;<sup>204</sup> while it certainly is fathomable for conventional courts to have neutral judges, many business entities tend to

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<sup>202</sup> See Kratovil, *supra* note 63, at 498.

<sup>203</sup> See PHILIPPE FOUCARD & BERTHOLD GOLDMAN, GAILLARD & GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 773 (1999) (noting “[i]t is generally considered that the arbitral award, like the existence of the arbitral proceedings, is confidential. The confidentiality of both the proceedings and the award is of course one of the attractions of arbitration in the eyes of arbitration users.”); Lipsky & Seeber, *supra* note 44, at 139 (observing that forty-three percent of the respondents listed confidentiality as one of the reasons, which occasioned the usage by their corporations of arbitration); REDFERN & HUNTER, *supra* note 8 (sating, “[t]he privacy of arbitral proceedings and the confidentiality that surrounds the process are a powerful attraction to companies and institutions that may become involved (often against their will) in legal proceedings.”); Hans Bagner, *Confidentiality—A Fundamental Principle in International Commercial Arbitration?* 18 J. INT’L ARB. 243, 243 (2001) (stating, “[c]onfidentiality and privacy have been widely assumed to be fundamental principles for international commercial arbitration”); Belinda McRae, *Survey: Arbitral Institutions Can Do More to Foster Legitimacy*, LEGITIMACY: MYTHS, REALITIES, CHALLENGES 667 (Albert Jan van den Berg ed., vol. 18, 2015).

<sup>204</sup> That arbitrators selected be neutral, in the sense of not being biased, is explicitly required under the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”), which in turn has been adopted and incorporated, by multiple jurisdictions into their respective arbitral frameworks. Art. 12 of the Model Law imposes a continuing obligation upon prospective arbitrators, as to the prior disclosure of “any circumstances likely to give rise to justifiable doubts as to his impartiality or independence,” and Art. 34(2)(a)(iv) of the Model Law posits the failure to comply with the aforesaid requirement, as a ground to warrant the setting aside of the arbitral award, if passed with the involvement of the tainted arbitrator. In this regard, *see* Art. 12 and Art. 34(2)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (With Amendments as adopted in 2006), available at [https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf); For a list of countries, which have adopted the Model Law, *see* [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html); *see also*, Marilyn B. Cane & Patricia A. Shub, *The Arbitrator’s Manual*, 9(3) J. INT’L ARB. 62, 84 (1992) (“Aside from an actual conflict of interest, even an appearance of conflict might render a decision suspect. It cannot be emphasized enough that arbitrators must be free in fact and in appearance from all bias and prejudice.”) *See also*, Shearson/American Express v. McMahon, 482 U.S. 220, 107 S. Ct. 2332 (1987), in which the United States Supreme Court stated: “This rule of arbitration rests on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.” Lindsay Melworm, *Biased: Prove It: Addressing Arbitrator Bias and the Merits of Implementing Broad Disclosure Standards*, 22 CARDOZO J. INT’L & COMP. L. 431 (2014); Chan Leng Sun, *Arbitrators’ Conflict of Interest: Bias by Any Name*, 19 SINGAPORE ACAD. L.J. 245 (2007).

be reluctant to entrust national courts with the resolution of their disputes.<sup>205</sup> Since adjudicatory neutrality is one of the most prized attributes of the arbitral process,<sup>206</sup> the use of neutral third parties serves as another advantage of appellate arbitration over judicial appellate review. Fourth and most importantly, from a policy perspective, resolution through appellate arbitration does not entail cost externalizations upon the public, which are entailed by conventional litigation unlike court systems, the operation of whose machinery is funded primarily with tax payer money,<sup>207</sup> as the costs of arbitral proceedings are borne entirely by the parties, for the resolution of disputes between whom such proceedings were commenced.<sup>208</sup> This is an especially consequential advantage, for two reasons: *firstly*, since there is little, if not no moral or pragmatic justification to expend public funds to sustain and/or support litigation involving wealthy individuals and/or mega-corporations, particularly where such litigation involves disputes of marginal social utility,<sup>209</sup> and *secondly*, the lack of cost-allocation of the appeal to the

<sup>205</sup> See International Arbitration, *supra* note 50, at 7 (observing that businesses involved in multi-million and multi-billion dollar cross-border deals do not, generally speaking, feel comfortable leaving dispute resolution in the hands of local courts or local arbitration centers).

<sup>206</sup> See Julian Lew, *Achieving the Dream: Autonomous Arbitration*, in ARBITRATION INSIGHTS: TWENTY YEARS OF THE ANNUAL LECTURE OF THE SCHOOL OF INTERNATIONAL ARBITRATION 463 (Julian Lew & Loukas A. Mistelis eds., 2007) (noting that international arbitration before neutral arbitrators, in a third country, with non-national or international procedures being followed, has become the essential mechanism to resolve all kinds of international business disputes.); BUHRING-UHLE, *supra* note 48 (noting that adjudicatory neutrality was one of the two most important systemic attributes of the arbitral process, as opined by the respondents to the survey); Scott Donahey, *The Independence and Neutrality of Arbitrators*, 9 J. INT'L ARB. 31 (1992).

<sup>207</sup> See, e.g., L. Ali Khan, *Arbitral Autonomy*, 74 LA. L. REV. 1, 12 (2013) (“For the most part, taxpayers rather than litigants bear the cost of judicial and administrative services available for the resolution of civil disputes.”); Shavell, *supra* note 1, at 65 (stating, “appellants do not bear the full social costs of appeal—they do not pay the opposing appellees’ costs or the costs of the judicial system.”); Ware, *supra* note 190, at 95 (stating, “[w]hile litigation is subsidized by the taxpayer, the parties must pay the full costs of arbitration”).

<sup>208</sup> See Richard Reuben, *Personal Autonomy and Vacatur after Hall Street*, 113 PENN. ST. L. REV. 1103, 1139 (2009) (stating, “[p]rivate review does not implicate society’s efficiency interests in the courts, and the proper allocation of judicial resources, because courts (and the public) are not required to bear the burden of this party choice. The parties alone pay those costs.”); Khan, *supra* note 198, at 13 (noting that “by choosing arbitration, parties shift the cost of dispute resolution from taxpayers to themselves. On a shared basis, parties pay all costs related to arbitration”); Stipanowich, *supra* note 112, at 440 (stating, “[t]he use of consensual arbitration also represents cost savings to the public. Cases which would otherwise have burdened the court system are effectively channeled into a private process of dispute resolution”).

<sup>209</sup> See Khan *supra* note 198, at 12; Jan Paulsson, *The Public Interest in International Arbitration*, 106 AM. SOC’Y. INT’L. L. PROC. 300 (2012) (“There can be no such general interest in the findings of fact

appellants is arguably one of the causes of the uninhibited willingness by award-debtors to resort to appeals.<sup>210</sup> To shift the expenses of arbitral appeals onto the parties would likely deter frivolous recourses to arbitral appeals, and would limit appeals to those possessing a genuine belief as regards the erroneous nature of the award rendered by the arbitrators of first instance. Thus, appellate arbitration provides for an opportunity for a second look at awards while avoiding the uncertainties associated with litigation as well as the multiple systemic lacunae inextricably entrenched in conventional litigation.<sup>211</sup>

1. *Advantages of Appellate Arbitration over Appellate Review by an International Court of Arbitration*

Some authors have urged the introduction of courts, both at the international level and at the domestic level, exclusively concerned with arbitral appeals,<sup>212</sup> either as the sole avenue for arbitral appeals or in conjunction with appellate arbitration as an additional tier.<sup>213</sup> However, that recommendation is manifestly problematic for two reasons: *firstly*, such a court would be also be annexed with the same systemic shortcomings attendant to conventional litigation, and *secondly*, the establishment of such a court vested with inherent appellate jurisdiction over arbitral awards would be in contrariety to the rudimentary principle of arbitration being conferred by

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of a particular tribunal in a particular case. They may be wrong, even badly wrong, but that is likely to be of interest only to the parties.”) REDFERN & HUNTER, *supra* note 8, at 434.

<sup>210</sup> See Shavell, *supra* note 1, at 75 (noting that the lack of such cost-allocation generates a tendency to use the appeals process too often). This in turn also catalyzes the poor loser syndrome adverted to earlier. In this regard, see the discussion on the Poor Loser Syndrome, in Part III.B.6 *supra*;

<sup>211</sup> Pierre Mayer, *Seeking the Middle Ground of Court Control: A Reply to I.N. Duncan Wallace*, 7 *ARB. INT’L* 311, 316 (2014) (“It would be perfectly possible to organize a system of arbitral appeals which would not present the disadvantages referred to, and which would give the same additional assurance of quality of justice that is sought by creating appellate jurisdictions.”) Stipanowich, *supra* note 63, at 429–30 (“Appellate arbitration procedures afford parties the opportunity of a ‘second look’ at an arbitration award in a controlled setting while avoiding the delays and legal uncertainties associated with expanded judicial review.”) See Carbonneau, *supra* note 6, at 260.

<sup>212</sup> See Rubino-Sammartano, *supra* note 185; Schwebel, *supra* note 191; Holtzman, *supra* note 191.

<sup>213</sup> See Rubino-Sammartano, *supra* note 134, at 390 (“The review of the merits by an appellate arbitral tribunal might be seen as the first stage in the implementation of the principle that the merits should be reviewed, even in arbitration . . . . [T]he creation of an international arbitral court of appeal is the second stage in this process.”)

the mutual consent of the parties to an arbitration agreement.<sup>214</sup> Thus, it follows that arbitral appeals through an overarching international court of arbitration runs counter to the concept of party autonomy in arbitration.<sup>215</sup>

For these reasons, “contracting for private appellate proceedings offers several distinct advantages over contracting for expanded judicial review of arbitral awards” or establishing an international court of arbitration,<sup>216</sup> and it is the closest analogue to judicial decision-making without the attendant uncertainty or disadvantages.<sup>217</sup> The NAAM, as its nomenclature reveals, adopts appellate arbitrations as the method of providing arbitral appeals.

### B. Availability of The Option of Appellate Arbitral Review

The purpose behind implementing appellate arbitration is to allow parties, who are reasonably apprehensive of having received an erroneous award, to subject the award to a review where the stakes are sufficiently high, as to render it an act of imprudent governance to leave the determination of the dispute to a single tiered adjudication without scope for error correction; in such cases, parties have a legitimate reason to desire to subject the award impugned, to an appeal on substantive grounds.<sup>218</sup> It thus follows that the

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<sup>214</sup> Geoffrey Hartwell, *A Possible Appeal Process for Arbitration*, <http://geoffrey.beresfordhartwell.com/appeal.htm> (noting that international or national courts with inherent jurisdiction to hear appeals from arbitration would be contrary to the voluntariness of independent Dispute Resolution).

<sup>215</sup> Hartwell, *supra* note 198.

<sup>216</sup> See Garza & Kratovil *supra* note 11, at 20.

<sup>217</sup> See Stipanowich, *supra* note 63 at 429 (providing, “[f]or those seeking a close analogue to judicial review, however, an appellate arbitration procedure may be the most suitable alternative”); *Korean Comm. Arb. Board*, *supra* note 59, at 53 (indicating “[a]s an alternative forum for review of the award, an institutional appellate body offers the significant advantage of avoiding at once both review by national courts, and their inevitable divergent positions”); Carbonneau, *supra* note 6 at 260.

<sup>218</sup> See Cate *supra* note 3, at 1110-11; Reuben *supra* note 208, at 1139 (stating, “[p]arties may have legitimate reasons for desiring substantive judicial review of an arbitration award, such as when the economic or other stakes are particularly high.”); Ginkel, *supra* note 17, at 194 (stating, “in more cases than before, the amount potentially in controversy is so high that the commercial risk of submitting a case to the judgment of just one panel of neutrals may appear to the parties to be too high.”); Erin Gleason, *International Arbitral Appeals: What Are We So Afraid Of?*, 7(2) PEPP. DISP. RESOL. L. J. 269, 272 (2007) (stating, “[m]any of the disputes arising from [international commercial] transactions present stakes too high to forbid opportunities for correction of flawed results”); Knull & Rubins, *supra* note 22, at 532 (referring to cases where “the amount in dispute is so large that the absence of a mechanism to correct an erroneous result is unacceptable, even if the likelihood of such a result seems, ex ante, to be low”).

basis on which the availability of the recourse to appellate arbitration to an award debtor ought to be determined is the stake of such award debtor in the dispute as measured by the amount in controversy therein. At this point, two thresholds need to be defined – the first threshold and the second threshold, where the second threshold is quantitatively higher than the first threshold. These thresholds, the quantitation of the exact numerical values of which is beyond the scope of this article,<sup>219</sup> represent values which constitute sufficiently high stakes, as to legitimize the desire of the parties to the dispute being arbitrated, to subject arbitral awards to appellate arbitration.

From awards passed, the disputes corresponding to which entailed amounts in controversy, which are quantitatively below the first threshold, no appeal ought to be preferable. This is because the parties' stakes in such disputes are not sufficiently high for an erroneous award to be significantly damaging or ruinous to the award debtor to necessitate or justify use of an appellate process. To permit appellate arbitrations from awards below this threshold would defeat the very purpose of restricting the resort to appellate arbitration, only from awards passed, the stakes corresponding, to the disputes of which were in excess of the threshold delineated above. This rule is thus a mandatory rule.<sup>220</sup>

From awards passed, the disputes corresponding to which entailed amounts in controversy, which are quantitatively above the first threshold, but below the second threshold, appeals ought to be preferable, where the parties have expressly conferred on each other, the right to such appeal, either while drafting the original contract or subsequently, after the commencement of the dispute but before the award becomes final and binding. Thus, appellate arbitration in respect of these awards is on an opt-in basis. The rationale behind proposing an opt-in availability for these awards is that these disputes entail stakes high enough for a State to provide the possibility of an additional “back-end” safeguard option, but not high enough to necessitate the State to pro-actively intervene.

From awards passed, the disputes corresponding to which entailed amounts in controversy, which are quantitatively above the second threshold, appeals ought to be preferable, unless such preference has been explicitly precluded by the parties by contract. Thus, appellate arbitration in respect of

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<sup>219</sup> This is a matter, the determination of which must be by policy makers, with the assistance of economists and users and practitioners of arbitration.

<sup>220</sup> A mandatory rule is one, from which parties cannot derogate, irrespective of their wishes or contractual provisions to the contrary. See e.g. Christopher R. Drahozal, *Contracting Around RUA*, 3(3) PEPP. DISP. RESOL. J. 420–21 (2003).

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these awards is on an opt-out basis. The rationale behind proposing an opt-out availability for these awards is that these disputes entail stakes high enough for a State to not only provide the possibility of an additional “back-end” safeguard option, but to proactively intervene. The rules in respect of the second and third kinds of awards are default rules,<sup>221</sup> and therefore, parties can derogate from them.

Thus, where the amount in controversy, the first and the second thresholds are respectively abbreviated as  $A_iC$ ,  $T_1$  and  $T_2$  respectively, the position proposed with respect to the availability of appellate arbitration can succinctly be summarized thus:

T YPE	QUANTUM OF $A_iC$	AVAILABILITY OF APPELLATE ARBITRATION
1	$A_iC < T_1$	Not available, irrespective of contractual provision
2	$T_2 > A_iC > T_1$	Available, only if contractually permitted
3	$A_iC > T_2$	Compulsorily available, unless contractually waived

This aspect of the NAAM – the determination of the eligibility of awards to be subjectable to appellate arbitration is a significant deviation from the corresponding requirements in respect thereof, in other ADRI that provide parties with the option of appellate arbitration. While none of those ADRI expressly proscribe a provision in arbitration agreements, which restrict the permissibility of the recourse to arbitral appeals to awards, the values of which exceed a stipulated threshold, they do not as such require or even encourage such a qualification.

This begs the question—why has the NAAM adopted such a stake-based model of eligibility of awards to be subjectable to appellate arbitration? Why not simply allow parties to determine for themselves to contractually determine for themselves the criteria, if any, that ought to be imposed to

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<sup>221</sup> A default rule is one, which as its nomenclature indicates, is a default provision, but which can be derogated by parties. Drahozal, *supra* note 220 at 420; Default rules generally are preferable to mandatory rules because they preserve the concept of freedom of contract, allowing parties to opt out of them in favor of rules they prefer. See Goldman, *supra* note 17, at 184; see also Sarah R. Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L. J. 1199, 1251. Mandatory rules are only desirable when society seeks to protect parties to the arbitral agreement or third persons affected by it. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87, 88 (1989).

determine the eligibility of awards to be subjectable to appellate arbitration? The answer is fairly straightforward: parties, though the most affected by the dispute resolution process, oftentimes do not design the process to be at its peak optimality, in respect of their interests.

In fact, arbitration clauses are rarely drafted with the degree of detail necessary for them to comprehensively encompass every, or for that matter, even a significant proportion of potential disputes, or delineate with sufficient clarity, various aspects of the dispute resolution process. This is in turn attributable to two factors—firstly, that arbitration clauses are often drafted by generalist transactional attorneys, whose relative inexperience with actual arbitrations tends to preclude them from drafting, sufficiently comprehensive arbitration clauses.<sup>222</sup> Secondly, arbitration clauses are not accorded much attention,<sup>223</sup> as they are often drafted amid negotiations alongside the substantive terms of complex transactions, when no dispute is on the horizon,<sup>224</sup> and also because the parties, intent on concluding the deal, are reluctant to dwell on the subject of relational conflict.<sup>225</sup> In fact, in a state of over-prioritizing the conclusion of the deal, parties tend to be susceptible to the “False Consensus Bias”—the belief by the negotiating parties of having reached complete consensus, only to subsequently realize the variance that existed, in their respective understandings of the contract.<sup>226</sup> All these factors

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<sup>222</sup> Holt, *supra* note 17, at 457; Stipanowich, *Arbitration and Choice*, *supra* note 63, at 389 (observing that many transactional lawyers have little or no experience in mediation, arbitration, or other forms of dispute resolution.); John M. Townsend, *Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins*, 58(1) DISP. RESOL. J. 28, 30 (2003).

<sup>223</sup> Kolkey, *supra* note 10, at 693 (noting that parties to international commercial transactions do not devote much thought to the drafting of the arbitration clause, or the implications likely to stem therefrom, while reaching an agreement pertaining to such transactions); Cate, *supra* note 3, at 1155 (stating, “many parties do not give the nuts and bolts of arbitration extensive thought at the time they agree to it”); Stipanowich, *supra* note 63, at 390 (stating, “[w]hile negotiating and drafting business contracts, lawyers and clients often . . . tend to give relatively little attention to provisions for managing conflict between contracting partners”); Smit, *supra* note 12, at 151-52 (noting that the drafters of the arbitration agreements are generally unlikely or unable to give the requisite degree of consideration to questions such as the availability of and the appropriate scope of appellate arbitral review); Rau, *supra* note 69, at 461 (stating, “at the drafting stage, little enough thought is given to the contours of any possible future arbitration”).

<sup>224</sup> Cate, *supra* note 3 at 1155; Stipanowich, *supra* note 63 at 390.

<sup>225</sup> Stipanowich, *supra* note 63 at 390.

<sup>226</sup> Lawrence Solan, Terri Rosenblatt & Daniel Osherson, *False Consensus Bias in Contract Interpretation*, 108(5) COLUM. L. REV. 1268, 1269 (2008); *see generally*, NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX (1965) (providing a general overview of certain aspects of linguistic usage which can occasion false consensus); NOAM CHOMSKY, NEW HORIZONS IN THE STUDY OF LANGUAGE AND MIND (2000).



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evidence the need for parties to be provided with some sort of default rule, which would serve to ensure that parties have at least a modicum of protection—albeit protection, which parties can derogate from, if they choose.<sup>227</sup> Thus, appellate arbitrations under the NAAM will be *institutionalized* but not *standardized* to become the ordinary course of action for parties.<sup>228</sup>

But this leaves one question unanswered—why should States even intervene in the arbitral process beyond merely facilitating the enforcement of the arbitral awards pursuant to their obligations under the New York Convention, given that arbitration is, at its core, a contractual method of dispute resolution? The answer to this question is unexpectedly straightforward, yet hardly recognized. While it is indisputably true that arbitration is “predominantly a private affair,” it does not exist in a vacuum, and the results of the arbitral processes can entail externalities on society,<sup>229</sup>

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<sup>227</sup> However, the likelihood of such derogation is slim, in light of a well-documented reality of contractual transactions—that parties tend to not derogate from default rules, even in the face of the possibility of better rules being identified and articulated, with only a marginal increase in associated drafting costs. See e.g., GLUDITTA CORDERO-MOSS, INTERNATIONAL COMMERCIAL ARBITRATION: DIFFERENT FORMS AND THEIR FEATURES 73 (2013) (providing, “[w]hile parties may in principle derogate from such default rules, the reality of contract drafting is often that the default rule becomes the applicable rule”); Omri Ben Sharhar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FL. ST. U. L. REV. 651, 651 (noting that parties often do not opt out of default rules, even when better rules can be easily identified and articulated at a negligible drafting cost).

<sup>228</sup> The difference between the two expressions, i.e. “institutionalization” and “standardization” is crucial to note. To institutionalize appellate arbitration merely means to make appellate arbitration available as a recognized, systemic part of the arbitral process—an option, which, as has been noted, is largely absent. To standardize appellate arbitration on the other hand means to make it the ordinary course of action pursuable by parties, and to enable it unexceptionably. This article advocates only for the institutionalization of appellate arbitration, and not the standardization thereof.

<sup>229</sup> See Rogers, *supra* note 102, at 992-93 (noting the shortsightedness of viewing arbitration as a purely private process —“public-private distinction tends to rely on rudimentary dissimilarities that preclude more nuanced appreciation of the true nature of either aspect, let alone their overlap, cross-referencing, and blurring at the margins”); Thomas E. Carbonneau, *The Ballad of Trans-border Arbitration*, 56 U. MIAMI L. REV. 773, 806 (2002) (noting that arbitrators, by virtue of their number and the frequency of their decisions, have an enormous impact upon the character of society); Westport Ins. Corp. & ORS v. Gordian Runoff Ltd. [2011] HCA 37 (noting “[the] performance of the arbitral function is purely a private matter of contract”). These external consequences can be especially harmful when an erroneous decision is made while arbitrating statutory rights. See e.g., Margaret L. Moses, *Arbitration Law: Who’s in Charge?*, 40 SETON HALL L. REV. 147, 181 (2010) (stating, “when arbitrators are deciding claims under public law, there is a high potential for negative externalities. For example, if an arbitrator makes a wrong decision under antitrust laws, that decision may negatively affect not only claimants but also the right of everyone else affected by the anti-competitive behavior”); Lorang, *supra* note 179, at 241; see also D. Brian King & Rahim Moloo, *International Arbitrators as Lawmakers*, 46 N.Y.U. J. INT’L L. & POL. 875 (2014).

protection from the negative kinds of which is an amply compelling reason to justify, if not necessitate State intervention or protection, at least, in respect of high stake disputes. Given the public interest in law enforcement, “dispute resolution methods that dilute enforcement and permit violators to escape liability are contrary to the public good,”<sup>230</sup> especially when such dilution could entail large scale negative externalities.<sup>231</sup> The fact that arbitration is a predominantly private dispute resolution process ought not to preclude or for that matter even dissuade the State from endeavoring to actualize reformative measures, which would add value to a considerable number of parties, which take recourse to arbitration to resolve disputes.<sup>232</sup> By incorporating the postulations of the NAAM into their respective National Legislations, States would provide an additional layer of protection to arbitrations, but without further involving their respective National Courts in the arbitral process and without expending significant resources.<sup>233</sup> Given the tendency of parties to a contract to not derogate from default rules,<sup>234</sup> this would effectively engender the institutionalization of appellate arbitrations. At first blush, this approach might seem to be paternalistic and concededly, it is in fact paternalistic, but not without adequate justification.

### C. *Scope of Review of Appellate Arbitration*

The next aspect of the NAAM that requires to be posited is the scope of review of the appellate arbitration. Would the ideal scope of review be bare and minimalist or would a more penetrating review be beneficial? As has already been observed the subjection of arbitral awards to overly broad review definitely would vitiate the benefits secured by the resort to arbitration.<sup>235</sup> However, the employment of a standard of review which is a mere façade or

<sup>230</sup> Katherine van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 1035 (1999).

<sup>231</sup> The failure of large businesses are externalities which could have ruinous consequences for the economy of a State. Where the businesses are considerably large, economies of other States may be impacted as well. Therefore, the fates and performances of several economies are intimately connected with that of the former State.

<sup>233</sup> This is because the costs associated with appellate arbitration are entirely borne by the parties to the arbitration. See *supra* text accompanying note 200.

<sup>234</sup> See *supra* text accompanying note 210.

<sup>235</sup> See Thomas S. Meriwether, *Limiting Judicial Review of Arbitral Awards Under the Federal Arbitration Act: Striking the Right Balance*, 44 HOUS. L. REV. 739, 740 (2007); Nouria, *supra* note 83, at 217.

a perfunctory “rubber stamp,” and which does not provide meaningful error correction of the arbitral awards which are manifestly unreasonable, would result in such review being a mere otiosity. Thus, the scope of appellate review must be that it effectively equilibrates the interests of the finality of arbitral awards and meaningful error correction.<sup>236</sup> To that end, it must be sufficiently minimal in order not to abrogate the entailment of arbitral finality, but on the other hand, not so deferential, as to defeat the very purpose of introducing such review.

Some authors have contended that appeals must exist only in respect of issues of law, as opposed to a *de novo* review, that permitting a *de novo* review would be in undermine or defeat the purpose of arbitration.<sup>237</sup> While it is not unreasonable to urge that such review be restricted solely to issues of law is specious for two reasons: *firstly*, the distinction between questions of fact and law, while delineable in theory, is not as easy to observe in practice;<sup>238</sup> and *secondly*, even if such distinction was observable in actual practice, the restriction of appellate review under every circumstance, only to questions of law would result in the appellate review becoming an otiosity—in as much as the very purpose of providing such review from arbitral awards is solely for

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<sup>236</sup> See Cate, *supra* note 3, at 1204 (stating, “[t]o be sustainable, any appeals system must strike a sensible balance between accuracy, diligence, and efficiency. In arbitration, appellate review will be successful only if it is carefully tailored to meet the particular combination of the goals the relevant community seeks to achieve”); Knull & Rubins, *supra* note 22, at 534 (stating, “[t]he trick is to create an appeal procedure that does minimal harm to the economy and predictability gains that arbitration would normally offer”).

<sup>237</sup> See *e.g.*, Marrow *supra* note 63, at 491.

<sup>238</sup> See Oldfather, *supra* note 3, at 314 (stating, “the line between questions of fact and questions of law is to a significant degree illusory”); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 349 (William N. Eskridge & Philip P. Frickey eds., 1994) (“Some critics have concluded that ‘law’ cannot be distinguished analytically from ‘fact’”); DANIEL J. MEADOR ET AL., APPELLATE COURTS 223 (2006) (observing that while the distinction between questions of law and questions of fact is relatively clear cut in a few cases, they are hard to observe, in many instances); Charles E. Clark & Ferdinand F. Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 197, 211 n.93 (1937) (noting that there does not seem to be any hard and fast distinction between questions of fact and questions of law and that such distinction is largely one of degree); Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 11 (1922) (noting that there are no generic differences between questions of law and questions of fact). This is all the more true in cases of highly complex contracts, which are typical the types of disputes being arbitrated. See Cate, *supra* note 3, at 1159-60 (noting “it is often hard to draw the line between law and facts in cases involving the interpretation and application of complex agreements”); Randall H. Warner, *All Mixed Up About Contract*, 5 VA. L. & BUS. REV. 81 (2010).

error correction, since arbitral appeals lack a lawmaking function,<sup>239</sup> and errors, even substantial ones may arise both in relation to questions of law, questions of fact, and questions of mixed law and fact.

This is not to say that the review of questions which are purely of fact ought to be allowable in every appellate arbitration. Rather, where there is sufficient justification for a party to want a review on questions of fact, such review ought to be permissible on a *limited and highly selective* basis.<sup>240</sup>

Conversely, a former President of the European Court of Justice has gone to the extent of positing that arbitral appeals must necessarily entail a review on merits and such review ought to be seen as integral to the arbitral process.<sup>241</sup> This view represents the other extreme—and also needs to be rejected inasmuch as it would occasion a considerable increase in costs and time associated with the arbitral process, even for the resolution of disputes, from awards pertaining to which there is insufficient justification to resort to appellate arbitration.<sup>242</sup> As stated earlier, it is the *institutionalization* of appellate arbitrations that is desirable, rather than the *standardization* thereof.<sup>243</sup> Moreover, as has been noted, it is difficult to justify how, if at all, it can be reasonably stated that the decisions of appellate arbitral tribunals are more inherently more correct or legitimate than those of the arbitral tribunals of the first instance to permit *de novo* review of every award appealed would be unjustified, and further, it would render the arbitrations of the first instance entirely nugatory.<sup>244</sup>

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<sup>239</sup> As has been noted earlier, arbitral appeals do not have a lawmaking function by virtue of the fact that the arbitral proceedings are confidential, and because arbitral awards lack any precedential value—either in respect of other arbitral tribunals, or ordinary courts. See Richard Posner & William Landes, *Adjudication As A Private Good*, 8(2) J. LEGAL STUD. 235, 248, 249, & 252 (1979) (noting the absence of a law-making function in arbitrations, and arbitral appeals.) Shavell, *supra* note 2 at 425 (“[P]arties and their arbitrators generally are not concerned with lawmaking.”); Irene Cate *supra* note 3 at 1142; Oldfather, *Universal de Novo Review*, *supra* note 3 at 318–19; REDFERN & HUNTER, *supra* note 8 (noting that the absence of a lawmaking function in international commercial arbitration is one of the primary reasons States deny arbitral awards the opportunity to be subjected to judicial review.)

<sup>240</sup> As to what constitutes sufficient justification for this purpose, see discussion *supra* Part IV. B. 2.

<sup>241</sup> See Mauro Rubino-Sammartano, *Is Arbitration Losing Ground?*, 14.3 AM. REV. INT’L ARB. 341, 343 (2003) (stating, “the [arbitral] award must be reviewed not only for errors in law but also as to the merits, and that a full review, by rehearing the case, is not just to be tolerated but is to be seen as an important part of the arbitral process”). The phraseology of this passage suggests that Rubino-Sammartano advocates for the *standardization* or *normalization* of arbitral appeals.

<sup>242</sup> See Rubino-Sammartano, *supra* note 241.

<sup>243</sup> See discussion *supra* Part IV.C.

<sup>244</sup> See discussion *supra* Part III. C. 6.

The scope of appellate review provided by arbitral institutions, which have an option of appellate arbitration are varied. For instance, CPR provides three grounds in its appellate arbitration rules on which arbitral awards can be appealed: (1) the presence of material and prejudicial errors of law that lack “any appropriate legal basis,”<sup>245</sup> (2) factual findings that are “clearly unsupported by the record,”<sup>246</sup> and (3) the grounds for *vacatur* posited under the American Federal Arbitration Act.<sup>247</sup> JAMS provides the “same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision.”<sup>248</sup> The ECA Rules provide for a “full review of the dispute” including a review of “admissibility, the facts, and the merits” of the dispute.<sup>249</sup> AMINZ provides for a review only for questions of law,<sup>250</sup> and the AAA provides two grounds on which arbitral awards can be appealed, which are—the presence of errors of law which are “material and prejudicial” and determinations of fact which are “clearly erroneous.”<sup>251</sup>

Which among these standards, if any, best equilibrates the need for meaningful error correction in appellate arbitration and the requirement of non-abrogation of arbitral finality? The grounds provided by CPR call for a very high threshold of erroneousness, to which errors purported to exist in the award being appealed, must be proven to amount, for the appealed award to be overturned.<sup>252</sup> On the other hand, the standard adopted by the JAMS standard suffers from the problem of uncertainty, inasmuch as it lacks a concrete standard of review, making it difficult for the parties invoking appellate arbitration to properly assess whether pursuing an arbitral appeal would even be worthwhile.<sup>253</sup> In addition, as previously explained, the ECA

<sup>245</sup> See International Institute for Conflict Prevention & Resolution Appellate Arbitration Procedure, available at: <https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure> (“CPR Rules”) Rule 8.2(a).

<sup>246</sup> See *Id.*, Rule 8.2(b).

<sup>247</sup> See *Id.*, Rule 8.2.

<sup>248</sup> See Rule D, JAMS Comprehensive Arbitration Rules & Procedures Rules (“JAMS Rules”) available at: JAMS Comprehensive Arbitration Rules & Procedures rules ([https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_comprehensive\\_arbitration\\_rules-2014.pdf](https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf))

<sup>249</sup> See ECA Rules, Art. 28(1)

<sup>250</sup> See AMINZ Rules, Art. 4.1.

<sup>251</sup> See AAA Optional Appellate Arbitration Rules, Art. 10.

<sup>252</sup> This is evinced from the phraseology of the grounds—the requirement that the error not have any appropriate legal basis, for instance.

<sup>253</sup> Rich Birke, How Likely Am I to Win? Risk, Uncertainty & the Turkey Illusion, JAMS ADR BLOG (Sept. 15, 2015).

standard of *de novo* review in appellate arbitration is neither viable nor desirable as the ordinary standard of review, adopted in respect of appellate arbitration.<sup>254</sup> Lastly, the standard of review adopted by the AAA, in its phrasing, is largely similar to that of the CPR, except in one small respect: its standard of review does not require an award to contain errors of law lacking “any appropriate basis” for the initial award to be susceptible to be overturned.<sup>255</sup> Thus, the standard of review adopted by the AAA is the most workable among the standards of review adopted by ADRI in respect of appellate arbitral review. However, even the standard of review adopted by the AAA suffers from two consequential shortcomings; *firstly*, it lacks a gateway “sieve” to safeguard against frivolous appeals and *secondly*, it does not include the review on the grounds available under the New York Convention, which allows parties dissatisfied with the award rendered by the appellate tribunal to appeal the appellate arbitral award to national courts, under the grounds provided under the New York Convention.<sup>256</sup>

The NAAM shall rectify both these lacunae—to which end, the NAAM shall consist of a *two-tier* process for appellate review. The *first* tier shall be a *prima facie* review—a review for errors apparent on the face of the record. The *second* tier shall be a detailed review of the merits of the case, and under limited circumstances, as shall be delineated below, which necessitate a reappraisal of facts and/or evidence. Furthermore, the NAAM shall adopt a new standard of appellate arbitral review, which refines the AAA’s standard of appellate arbitral review.

### 1. *The First Step: A Prima Facie Review*

This step involves a summary review of sorts, of the arbitral record, to examine it for errors apparent on its face. An error apparent on the face of the record is one, the establishment of the existence of which does not require a detailed perusal of the totality of evidence and/or records that were adduced

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<sup>254</sup> Birke, *supra* note 253.

<sup>255</sup> David McLean, *US arbitral institutions and their rules*, LATHAN & WATKINS LLP, <https://m.lw.com/thoughtLeadership/us-arbitral-institutions-and-their-rules> (last accessed on Nov. 6, 2017).

<sup>256</sup> Jon Berkelhammer, *Arbitration: A Comparison of the Pros and Cons*, ELLIS & WINTERS LLP, <http://www.elliswinters.com/updates/arbitration-a-comparison-of-the-pros-and-cons> (last accessed on Nov. 2, 2015).

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in respect of the arbitral proceedings,<sup>257</sup> or a recourse to protracted argumentation, reasoning or evidentiary support.<sup>258</sup> Where the record, on perusal evinces a flaw which ought to be corrected, then the appeal may proceed to the second step, but not otherwise.<sup>259</sup> The rationale for requiring a preliminary step is to screen out cases that do not involve substantial determinations of rights *inter se* the parties as well as those that only involve mere technicalities.<sup>260</sup> The purpose of appellate arbitration being solely to safeguard against intolerably heavy losses, those losses that do not entail sufficiently high “damage potential” ought not to be subjectable to appeal.<sup>261</sup>

Further, a summary dismissal of the appeal under such *prima facie* review shall constitute a final adjudication, for the purpose of Part V—in that it precludes further judicial appeal otherwise than on public policy grounds. However, this *prima facie* test can be waived by the parties, if they expressly agree to directly to the detailed review stage. The rationale behind allowing such a waiver is party autonomy. If the parties expressly consent to skip the *prima facie* review, and proceed directly to the detailed review, their agreement to that effect ought to be enforced.

## 2. *The Second Step: The Detailed Review*

Awards, which are determined to contain *prima facie* errors shall be subjectable to the detailed review—which is a review of the matter of the dispute on its merits. Under the appellate arbitration entailed by the NAAM, the awards appealed shall be reviewable for errors in respect of questions of fact, question of law and mixed questions of law and fact. However, for an

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<sup>257</sup> The concept of “error apparent on the face of the record” is native to the administrative laws of England and India, it is used to determine the permissibility of judicial review of administrative decisions. See *Champsey Bhara & Co. v. Jivraj Balloo Spg. & Wvg. Co. Ltd.*, A.I.R. PC 66, 68 (1928); *Durga Prosad Chamaria v. Sewkissendas Bhattar*, A.I.R. P.C. 337 (1949); *Union of India v. A. L. Rallia Ram*, A.I.R. 1685 (1963); *Kelantan Government v. Duff Development Co. Ltd.* All E.R. 349, 360 (1923); *In re King and Duveen*, 2 K.B. 32 (1913); *F. R. Absalom Ltd. v. Great Western (London) Garden Village Society Ltd.*, All E.R. 616 (1934).

<sup>258</sup> See *Syed Yakoob v. K. S. Radhakrishnan*, A.I.R. S.C. 477 (1964); *New Gujarat Cotton Mills Ltd. v. Labour Appellate Tribunal*, A.I.R. (1957) Bom 111; *Satyanarayanan Laxminarayanan Hegde v. Mallikarjun Bhavnappa Tirumale* A.I.R. (1960) S.C. 137; *Smith v. East Elloe*, 1 All E.R. 855 (HL) (1956) (stating that the error must bear the brand of illegality on its forehead).

<sup>259</sup> See discussion *supra* note 234.

<sup>260</sup> Emmanuel Gaillard, *Prima Facie Review of Existence, Validity of Arbitration Agreement*, N.Y. L. J. 7 (2005).

<sup>261</sup> This is also purposed with ensuring that parties do not merely appeal for the sake of delaying enforcement in the absence of a legitimate belief of having received an erroneous award. Gaillard, *supra* note 260.

error to, by virtue of its existence warrant the setting aside of the initial arbitral award, it must possess the following three attributes, which are—*firstly*, materiality, *secondly*, non-triviality, and *thirdly*, irrationality. For an error to be classifiable as *material*, it must be an error, the existence of which, in the arbitral award affects the rights of one or more of the parties to the arbitration agreement. Errors on matters that are purely technical, and which have no bearing on the overall outcome of the decision shall be considered immaterial. For an error to be classifiable as *non-trivial*, it must be an error, the existence of which in the award resulted in the delivery of an award, the quantum of which is at least 15 per cent in excess of what it would have been in the absence of such error. The rationale behind the non-triviality requirement is to preclude parties from appealing awards merely to secure minor and/or inconsequential gains, and thereby delay the enforcement of the award. For an error to be classified as irrational, its commission must have been the product of unsound reasoning. However, the unsoundness of such reasoning does not have to amount to such an extent or degree that no reasonable person seized with the task of arriving at a decision on the matter—to which the impugned reasoning pertains would on cogitating the evidence adduced before him/her in respect of that matter, arrive at the same conclusion, as was arrived at by the impugned reasoning. Thus, the irrationality of the reasoning does not have to amount to the *Wednesbury* standard of unreasonableness to be assailable, for the purposes of the NAAM.<sup>262</sup> In addition, the appellate arbitral tribunal will be empowered to review the award appealed on the grounds available under the New York Convention, other grounds provided under the relevant national arbitral legislation, and for breach of mandatory laws of the country where the award ought to be enforced. Thus, the appellate arbitral review under the NAAM is sufficiently thorough and comprehensive to obviate the need or justification for further review by national courts at the enforcement stage.

However, two issues still remain to be addressed: *firstly*, the extent of the re-appraisal of the evidence adduced over the course of the initial arbitration, and *secondly*, the permissibility of the introduction of new evidence to the

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<sup>262</sup> See *Associated Provincial Picture Houses v. Wednesbury Corporation* 1 K.B. 223 (1947). The *Wednesbury* standard of unreasonableness is a standard of judicial review in administrative law, of the discretion of administrative authority. The decision of an administrative authority is *Wednesbury* unreasonable, if it is so absurd that no reasonable person could have arrived at the conclusion arrived at by the authority, in respect of the impugned matter. This doctrine was restated in *Council of Civil Service Unions v. Minister for the Civil Service* U.H.K.L 6 (1984), where Lord Diplock, speaking for the House of Lords articulated the *Wednesbury* standard of unreasonableness as “so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind could have arrived at it.”



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appellate arbitral tribunal. For the former, the appraisal of evidence would be only to the extent as to determine the rationality of the conclusions reached as to the law under most circumstances. However, where it is evident that the arbitral tribunal of the first instance had not properly established the facts of the matter—then and only then would the appellate arbitral tribunal be allowed to establish the facts right from scratch. As for the second issue—the introduction of new evidence would entirely be contingent on the consent of all the involved parties to such introduction and not otherwise.

D. *Procedure Of Appellate Arbitration*

1. *Appointment of Arbitrators*

The arbitrators who shall constitute the appellate arbitral tribunal in appellate arbitrations must be appointed by the parties in a manner such that the parties involved to have equal representation in the arbitral tribunal. Ideally, each of the parties or where multiple parties are involved, factions of parties should select an arbitrator and the two arbitrators thus chosen should select the third arbitrator, who ideally would be either a former or sitting judge of a court of at least the appellate level.<sup>263</sup>

2. *Time Limits*

If the award debtor to the initial arbitration is dissatisfied with the arbitral award rendered by the arbitral tribunal of the first instance, it must submit a written notice stating the fact of its dissatisfaction and requesting that the appellate arbitral process be commenced within a period of seven calendar days from the day the arbitral award sought to be appealed was rendered. Cross-appeals may also be filed within seven calendar days from the day on which the notice of the requested the appeal was received by the other party.

The *prima facie* review ought to be completed within fourteen calendar days from the date on which the appellate arbitral proceedings commence, which date in turn must be not later than thirty calendar days after the request for appellate arbitration has been communicated by the party desirous of appealing the first arbitral award to the other party, where the detailed review does not involve a detailed re-examination of facts and/or evidence and forty-

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<sup>263</sup> The presence of a judge, especially one who has served or is serving on an appellate court could prove beneficial in respect of the determination of questions of law.

five calendar days, where the detailed review does involve such re-examination.

### 3. *Requirements of Security*

Under the NAAM, the subjection of arbitral awards to appellate arbitration shall be preconditioned upon the provision by the initiating party, of the amount entailed by the award desired to be appealed, in full in escrow. This requirement draws from the requirement to this effect under the ECA Rules.<sup>264</sup> Alternatively, where it is not practicable for the imitating party to furnish the requisite sums, it can furnish a bank guarantee promising the payment of the sum on the day the appellate arbitral tribunal makes its ruling, as in the case of the ECA Rules.<sup>265</sup>

### 4. *Cost Limits*

The NAAM posits two requirements regarding the cost of appellate arbitral proceedings, which are: cost *limiting*, i.e., the requirement that the total cost of the proceedings be restricted to a hard ceiling expressible as a percentage of the amount in controversy,<sup>266</sup> and cost *shifting*, the requirement that the cost of the appellate proceedings be borne by the party which initiates the appeal, if the original award were to be fully affirmed and it thus were to lose the appeal.<sup>267</sup> The latter measure serves an additional function of

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<sup>264</sup> See ECA Rules Art 28(3).

<sup>265</sup> See ECA Rules Art 28(3).

<sup>266</sup> The quantitation of the exact percentage value to be adopted and the determination whether there ought to be permissible variations of such percentage value in respect of different classes of matters being appealed (where such categorization is logically possible and necessary) are tasks the performance of which lie beyond the scope of the present article.

<sup>267</sup> See Knull & Rubins, *supra* note 22, at 561 (suggesting the use of cost shifting); Among the ADRIs, CPR requires the losing party to bear the costs of the appeal). See CPR Rules, Rule 12 Where the original award does not get fully affirmed, and where there are substantial substantive modifications made therein, by the appellate arbitral award, then the appellate arbitral tribunal shall apportion the costs to be borne by the respective parties, as for instance, is provided to be done, under the CPR Rules. See Art. The CPR has provided the following rationale in explanation of this Rule: "On the one hand, CPR wishes to allay the concerns of attorneys and clients regarding the rare arbitration award that blatantly fails to apply the law or for which there is scant support in the record. On the other hand, CPR does not wish to encourage widespread appeals from arbitration awards." See International Institute for Conflict Prevention & Resolution Appellate Arbitration Procedure, available at: <https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure>.

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preventing the proliferation of non-meritorious or vexatious appeals by parties afflicted with the Poor Loser Syndrome.

#### V. IMPACT OF AVAILING APPELLATE ARBITRATION ON OBTAINING JUDICIAL REVIEW

The next question to be addressed is the relationship between the appellate arbitration and judicial review as sanctioned under the NY Convention—whether the appeal to an appellate tribunal ought to preclude judicial review of the matters considered by the tribunal, or whether the appellate arbitration ought to be merely an additional layer prior to judicial review. It has been argued that the mere availability of one remedy ought not to operate to preclude an alternative, equally viable remedy, in this case, the appellate arbitration or judicial review.<sup>268</sup> While this is true, the decision to choose between the two remedies is different from the decision to choose both the remedies, and parties, who have taken recourse to one ought not to be allowed to add an additional layer at will without justification.

By proceeding to appellate arbitration under the NAAM, parties already get a second bite of the proverbial apple. While such second bite is, as has been explicated earlier, both necessary, and justified in specific cases, a third bite of the proverbial apple certainly is not, especially considering the standard of appellate arbitral review is sufficiently thorough and comprehensive, as to afford an adequate opportunity of error correction to the appellant party, thereby obviating the need for further review. To permit the resort to a series of successive appeals of the kind available in litigation in arbitration would denude the very essence of the arbitral process.

#### VI. CONCLUSION

From the discussion undertaken in this article, it is amply evident that the absence of arbitral appeals in arbitral frameworks is an almost paradigmatic double edged sword, which almost diminishes the legitimacy of international arbitration.<sup>269</sup> It is thus imperative both for States and ADR Institutions to recognize this and enable an option for substantive appeal of erroneous arbitral awards in the manner contemplated and with the safeguards

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<sup>268</sup> See Ginkel, *supra* note 17, at 201 (stating, “[e]ven if the option of arbitral appeal to another panel of arbitrators has merit and may be a good idea for contracting parties to adopt in the right circumstances, it cannot be said that simply because this option is available to the contracting parties, the law ought to prohibit arbitral appeal to the courts.”).

<sup>269</sup> See *e.g.*, Gleason, *supra* note 218, at 271-72.

prescribed hereinabove. The general reluctance to alter what for the most part continues to be perceived by a majority of customers and practitioners of arbitration as a crucial and unquestionable benefit of the arbitral process ought to be momentarily kept aside to objectively appraise the need for an appellate mechanism. The main purpose of an adjudicatory framework being for its operation – including the anticipation thereof – to engender productive activity, restrain harmful conduct, and avoid undue expense,<sup>270</sup> it is only logical that such changes be interpolated into it, which further that purpose.

Malleability is an integral attribute of any arbitral framework, which endeavors to provide impetus to, and ensure the continued viability of arbitration as a preferred mechanism of international commercial dispute resolution.<sup>271</sup> It is thus imperative for an arbitral framework to continually alter itself and sometimes its most revered underpinnings, if doing so would enhance its conduciveness to the business community, and their interests in relation to the resolution of disputes.

Potential improvements to the arbitral process ought not to be stymied by inertia to change. Arbitration must not be treated as a “cruel goddess,” which may only be worshipped,<sup>272</sup> but as a fount, which expands to better serve various public and private interests. This article has demonstrated that the institutionalization of appellate arbitration would not only not entail many of the deleterious effects that those in opposition urge to be inevitable consequences thereof but that it would entail benefits which sufficiently justify its actualization. Thus, the recommendations made in this article ought to be cognized by the international arbitral community, and States, upon reflection thereof, ought to with suitable quickness effectuate the postulations of the NAAM into their respective national arbitral frameworks.

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<sup>270</sup> See Louis Kaplow, *Information and the Aim of Adjudication*, 67(6) STAN. L. REV. 1303, 1305 (2015).

<sup>271</sup> “Similarly, arbitration is constantly reinventing itself to adapt to each particular case and legal culture, while retaining a vital core which aims at final and impartial resolution of controversies outside national judicial systems.” See William W. Park, *Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion*, 19 ARB. INT’L 279, 3 (2003).

<sup>272</sup> See Mauro Rubino-Sammartano, *The Fall of a Taboo supra* note 134, at 391-92.

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