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Strengthening the Socially Informed Model of Arbitration under the Industrial Relations Code, 2020: A Constructive Critique

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INTRODUCTION

The legislative intent to prevent an exercise of labour-defeating managerial instinct is evident in the scheme of the Industrial Relations Code, 2020 (hereinafter 'the Code'), and its predecessor, the Industrial Disputes Act, 1947 (hereinafter 'Disputes Act');[1] both of which, intend to foster a practical sense of peaceful co-existence. The judiciary especially, has taken note of the socially beneficial nature of the Disputes Act,[2] and has categorically struck down the arbitrability of industrial disputes on a two-pronged basis, *first*: beyond its prescription of voluntary arbitration under Section 10A which is seldom used, the Disputes Act explicitly states, "*Nothing in the Arbitration and Conciliation Act, 1940, shall apply to arbitrations under this section*".[3] *Second*, dispute resolution through arbitration under the Arbitration & Conciliation Act, 1996 (hereinafter 'Arbitration Act') deprives workers of the sympathetic rule of law promoted by the legislature through the establishment of specialised tribunals, and the prescription of a socially informed model of arbitration under the Disputes Act.[4]

Despite the virtual extinction of arbitration under the erstwhile regime,[5] the legislature continues to include arbitration as a voluntary dispute resolution mechanism under Section 42 of the Code. However, the introduction of the negotiating council/union's role in the

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[1]*The Life Corporation of India v DJ Bahadur & Ors* AIR (1980) SC 2181; *Bangalore Water Supply v R Rajappa* & Ors. (1978) 3 SCR 207.
[2]ibid.
[3]Industrial Disputes Act, 1947 s 10A (5) [hereinafter "Disputes Act"].
[4]*Bangalore Water Supply* (n1).
[5] Debi S Saini, 'Labour Court Administration in India' (Labour Adjudication in India, International Labour Organization—South Asian Advisory Team (ILO-SAAT), 1997).

context of arbitration,[6] and a few procedural changes,[7] substantiate the legislature's intent to promote the use of arbitration under the Code. The Code even takes after the Disputes Act to prescribe a socially informed model of arbitration inclined to protect the interests of the workers,[8] and overrides the application of the Arbitration Act.[9] However, the essay hypothesises that Section 42 proves to be an inadequate vessel to execute the legislature's intent to promote arbitration. Therefore, the Code risks the repetition of the failure of arbitration under Section 10A of the Disputes Act.[10]

On that backdrop, part II of this essay comparatively analyses the Disputes Act and the Code; particularly in the context of what constitutes an industrial dispute, and the conditions required to be fulfilled for the parties to refer their industrial dispute to voluntary arbitration. Unlike the Disputes Act, the Code theoretically enables the parties to refer their industrial dispute to arbitration under Section 42, even after it has been referred to the tribunals established under the Code.[11] However, the absence of a provision facilitating reference to arbitration under Section 42, fails to effectuate the legislature's intent to promote accessibility to arbitration. Therefore, part II suggests the inclusion of a referral provision by demonstrating through judicial analysis: the ill effects of its absence under the Disputes Act. Part II concludes by propounding the potential interaction facilitated by the suggested provision's mandate.

Part III critiques the shallow manner in which the Draft Rules on the Industrial Relations Code, 2020 (hereinafter 'Draft Rules') ensure mutual agreement in the appointment of arbitrator(s) in their prescribed format of an arbitration agreement.[12] To effectively ensure mutual agreement regarding appointment of arbitrators, part III advocates for, *first*, descriptive arbitrator appointment clauses, and *second*, the chronological advancement of the stage of appointment of arbitrator(s) to Section 42(5), to enable oversight of the appropriate government. Part III concludes by accommodating the proposed scheme of appointment within the mandate of Section 42 under the Code, and Form III of the Draft Rules.

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[6]Code, s 42 (5).
[7]Disputes Act, s 10A.
[8]*General Manager v Shri Summit Mullick*, Writ Petition No 2613/2001, (The Bombay High Court).
[9]Code, 2020 s 42(8); Disputes Act, s 10A (5).
[10]Debi S Saini (n5).
[11] Code, s 42(1); Disputes Act s 10A(1)
[12]Draft Rules on Industrial Relations Code, 2020 Rule 17, Form III. [hereinafter "Draft Rules"]

Part IV tackles the archaic institution of the "umpire", attached to an even-numbered tribunal under Section 42(2) of the Code. It argues that the intoxicating presence of an umpire incentivises the two arbitrators to act as "arbitrator-advocates"; which is systemically detrimental to the neutrality of odd-numbered tribunals, and the reliability of arbitration as an industrial dispute resolution mechanism under the Code. Part V concludes the discussion with a gist of the arguments made in favour of strengthening arbitration under the Code.

A CASE IN FAVOUR OF INCREASING ACCESSIBILITY TO ARBITRATION UNDER THE CODE: A PROVISION FACILITATING REFERENCE TO SECTION 42

The definition of an industrial dispute is exhaustively covered in both the Disputes Act,[13] and the Code;[14] what differentiates an industrial dispute from other disputes is: *first*, an industrial dispute cannot arise between actors who are not employers or workers.[15] *Second*, disputes or differences between the parties arise exclusively out of matters concerning employment, non-employment, and conditions of labour.[16] Therefore, to remedy the asymmetry in bargaining power in an employer-worker relationship, which becomes especially concerning due to the strain that comes with an industrial dispute, the Disputes Act and the Code both provide specialised adjudicatory mechanisms to promote a sympathetic rule of law.[17] The legislations' socially beneficial intent also informs their version of arbitration,[18] which incorporates safeguards to address the asymmetry in an employer-worker relationship.[19]

Both, the Disputes Act and the Code allow for voluntary arbitration under Section 10A, and Section 42 respectively. To refer their industrial dispute to arbitration under Section 10A of the Disputes Act, the parties must first demonstrate their willingness through a written agreement,[20] and at least apprehend the existence of a dispute.[21] Additionally, the Disputes Act bars access to arbitration in case a dispute has already been referred to a Labour Court,

[13]Disputes Act s 2 (k).
[14]Code, s 2 (q).
[15]ibid.
[16]ibid.
[17]ibid (n 8) para 21; Code, s 44, 46.
[18]ibid para 16.
[19]ibid.
[20]Code, s 42(1).
[21]ibid.

Tribunal or National Tribunal.[22] A welcome deviation from the Disputes Act: the Code does not restrict reference to arbitration "*at any time before the dispute has been referred under section 10 to a Labour Court or Tribunal or National Tribunal*"[23]. Thereby, substantiating the legislature's pro-arbitration stance *vis-à-vis* Section 42 of the Code, which only requires the apprehension/existence of an industrial dispute, and a prior written agreement for the parties to refer their dispute to arbitration under the Code.

THE LEGISLATURE'S INCOMPLETE PRO-ARBITRATION STANCE

Theoretically, this omission would enable the parties to refer their dispute to voluntary arbitration under Section 42, even after a dispute has been referred to an Industrial Tribunal or a National Industrial Tribunal established under the Code.[24] However, the Supreme Court in Jai Bhagwan v. Management of the Ambala Central Cooperative Bank Ltd.,[25] observed that the tribunals established under the Disputes Act do not have the authority to deny or surrender their jurisdiction over an industrial dispute referred to them.[26] Therefore, the absence of a provision facilitating reference to arbitration under Section 42 before the industrial tribunals, reduces accessibility to arbitration under the Code. Akin to the Disputes Act, the absence of a referral provision would force the parties generally, and employer(s) specifically, to resort to Sections 8 and 11 of the Arbitration Act in a futile attempt to resolve their industrial dispute through arbitration.[27]

The judiciary has, for the most part, correctly denied applications in favour of arbitration under the Arbitration Act to resolve an industrial dispute. However, the judiciary's interactions with Arbitration Act applications: *first,* under Section 8 to refer the industrial dispute to arbitration under the Arbitration Act, and *second*, under Section 11 to appoint arbitrators to arbitrate upon an industrial dispute under Arbitration Act, have dramatically reduced the utility of voluntary arbitration as an industrial dispute resolution mechanism under the Disputes Act.

TWO HITS AND A MISS: THE PROGRESSIVELY SHRINKING UTILITY OF ARBITRATION UNDER THE DISPUTES ACT

[22]Disputes Act, s 10A(1).
[23]ibid.
[24]Code, s 44, 46.
[25]AIR 1984 SC 286.
[26]ibid.
[27]Arbitration & Conciliation Act, 1996 s 8, 11 [hereinafter, "Arbitration Act"].

In Kingfisher Airlines v. Captain Prithvi Malhotra & Others (hereinafter 'Kingfisher'),[28] the Bombay High Court observed that the CGIT-Labour Court had struck down the management's section 8 Arbitration Act application on the anvil of Section 10A(5) of the Disputes Act, which explicitly overrides the application of the Arbitration Act. Unsatisfied, the management approached the Bombay High Court through a writ petition, and contended that the undisputed presence of an arbitration agreement would warrant the reference of the industrial dispute to arbitration. Armed with the Supreme Court's reductive understanding of arbitrability in Booz Allen & Hamilton v. SBI Home Finance Ltd. & Ors.(hereinafter 'Booz Allen'),[29] the Bombay High Court adjudicated upon the management's plea to refer an industrial dispute to arbitration under Section 8 of the Arbitration Act. To further strengthen their argument, the management referred to the test of arbitrability prescribed in *Booz Allen*,[30] and furthered that the current industrial dispute is *in personam*, and hence arbitrable. However, the Court contextualised *Booz Allen's* test, which authoritatively linked arbitrability to the nature of relief claimed, and observed that "*even an action-in-personam, if reserved for resolution by a public forum as a matter of public policy would become non-arbitrable*"[31].

This assertion was followed by an exhaustive examination of the scheme of the Disputes Act. The Court found that the Disputes Act intended to sympathetically resolve industrial disputes, as evidenced by: *first,* the specialised adjudicatory bodies established under it,[32] and *second*, the socially informed model of arbitration under Section 10A.[33] Therefore, the Disputes Act being a socially beneficial legislation, acts against arbitrability of industrial disputes by necessary implication.[34] Coupled with Section 10A(5), which explicitly overrides the application of the Arbitration Act, the Bombay High Court upheld the CGIT-Labour Court's refusal to refer the industrial dispute to arbitration under the Arbitration Act. In *Kingfisher*, the Court acknowledged the socially informed model of arbitration under Section 10A of the Disputes Act. However, in absence of a provision facilitating reference to it, Section 10A's presence could only be used to buttress the socially beneficial nature of the Disputes Act against arbitrability of labour disputes under the Arbitration Act.

[28]2011 SCC OnLine Bom 1999 ["Kingfisher"].
[29](2011) 5 SCC 552 [hereinafter, 'Booz Allen'].
[30]ibid para 35.
[31]*Kingfisher* (n28) para 14.
[32]ibid para 16.
[33]ibid para 19.
[34]ibid para 22.

The Karnataka High Court confronted a similar issue in Rajesh Korat v. Management Innoviti Embedded (hereinafter 'Rajesh Korat'),[35] wherein a single employee was troubled due to the non-cooperative attitude of the employer's management. Following repeated, failed attempts at conciliation by a conciliation officer, the employee invoked the jurisdiction of the Labour Court, which subsequently acceded to the management's request of referral of the industrial dispute to arbitration *via* a Section 8 Arbitration Act application. Aggrieved by the order, the worker approached the Karnataka High Court, which equated arbitrability of labour disputes to that of tenancy disputes due to the asymmetry in bargaining power underlying both the situations. Since tenancy disputes were rendered explicitly inarbitrable as per *Booz Allen*,[36] the Court denied any merit to the management's arguments, which aimed to myopically restrict *Booz Allen's* applicability to the *in personam* nature of the dispute in context. However, unlike the Bombay High Court in *Kingfisher*, the Karnataka High Court failed to utilise the unique nature of Section 10Ato buttress the socially beneficial nature of the Disputes Act and only referred to Section 10A (5), presumably incentivised by its overriding effect on the Arbitration Act.[37]

The Delhi High Court in Saksham Impex Pvt. Ltd. v. Akshat Kumar Anchan (hereinafter 'Saksham Impex') adjudicated upon a case with almost identical circumstances to *Rajesh Korat*.[38] While the management in *Rajesh Korat* resorted to Section 8 of the Arbitration Act, *Saksham Impex* saw the Delhi High Court deliberate upon the management's Section 11 application under the Arbitration Act. However, the Delhi High Court allowed the management's Section 11 application to appoint an arbitrator under the Arbitration Act to arbitrate upon an industrial dispute. Consequently, turning a Nelsonian eye to the socially beneficial nature of the Disputes Act,[39] and Section 10A(5)'s overriding effect on the Arbitration Act. The petitioners contended that the issue of arbitrability would require a factual determination, entailing undue broadening of the scope of Section 11(6A) of the Arbitration Act, which, as validated by Vidya Drolia v. Durga Trading Corporation (hereinafter 'Vidya Drolia'),[40] confines the court to the "*examination of the existence of an arbitration agreement*"[41].

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[35]2017 SCC OnLine Kar 4975 [hereinafter, 'Rajesh Korat'].
[36]*Booz Allen* (n29) para 36.
[37]*Rajesh Korat* (n35) para 16.
[38]2021 SCC Online Del 3999 [hereinafter, 'Saksham Impex'].
[39]ibid (n1).
[40](2021) 2 SCC 1 [hereinafter, 'Vidya Drolia'].
[41]ibid para 205; *Mayawati Trading (P) Ltd v Pradyuat Deb Burman*(2019) 8 SCC 714.

The Delhi High Court unfortunately conceded to this shallow invocation of *Vidya Drolia*, overlooking the Supreme Court's validation of a prior decision in Emaar MGF Land v. Aftab Singh (hereinafter 'Emaar MGF').[42] In *Emaar MGF*, the Supreme Court observed that the legislative intent to promote arbitration cannot be broadened enough to disrupt the settled law on arbitrability, as the same would defeat the beneficial mandate of an "*entire regime of special legislation where such disputes are not arbitrable*"[43]. This oversight of the Delhi High Court in *Saksham Impex* cannot be justified by stating that the dispute in question was not an industrial one; as the dispute was pending hearing before a conciliation officer, whose functions are always specified in context of industrial disputes under the Disputes Act.[44] Therefore, the Delhi High Court defeated the socially beneficial intent behind the enactment of Section 4 of the Disputes Act,[45] by neglecting the existence of Section 10A in general, and Section 10A(5)'s overriding effect on the Arbitration Act in particular.

The judiciary's interaction with applications under the Arbitration Act reveal two distressing patterns which substantiate the need for a provision facilitating reference to the Code's Arbitration. The first pattern highlights a trend of the progressively worsening judicial neglect of Section 10A, and the second pattern helps identify the intoxicating effect of adjudication on the workmen's perception of arbitration.

Section 10A: A Paper Tiger Caged in Judicial Amnesia

In absence of a statutory provision which made Section 10A more accessible by facilitating reference to it, the judiciary's interaction with Section 10A was consequential only to the extent it was used to keep the application of the Arbitration Act at bay. The judicial utility of Section 10A was variable, and progressively diminished to the extent that it was no longer referred to in *Saksham Impex*.

In *Kingfisher* (2012), the Bombay High Court took note of both: *first*, the socially engineered model of arbitration under the Disputes Act to act against arbitrability by necessary implication; *second,* the overriding effect of Section 10A(5) on the Arbitration Act, to prevent reference of an industrial dispute to arbitration under the Arbitration Act. The Karnataka High Court in *Rajesh Korat* (2017), viewed Section 10A through a motivated

[42](2019) 12 SCC 751.
[43]*Vidya Drolia* (n40) para 43.
[44]Disputes Act, s 4 (1).
[45]ibid (n1).

perception. Insofar as, it overlooked the social considerations informing Section 10A's model of arbitration, but utilised the overriding effect of Section 10A(5) on the Arbitration Act to deny the referral of the industrial dispute to arbitration under the Arbitration Act. Both these decisions were independently successful in upholding the public policy aspects behind the enactment of the Disputes Act.[46] However, in *Saksham Impex* (2021), the Delhi High Court's neglect of the existence of Section 10A in general, and Section 10A(5) in particular, proved fatal to the legislature's socially beneficial intent behind the enactment of the Disputes Act.

Judicial Demonisation of Arbitration in the Eyes of Workmen

Employers trying to enforce arbitration agreements under the Arbitration Act to bypass the socially beneficial Disputes Act, solidifies the appellation of arbitration as an employer's method of choice to defeat the sympathetic rule of law promoted by the legislature,[47] and upheld by the judiciary.[48] In absence of a provision facilitating reference to Section 10A of the Disputes Act, employers invoking the Arbitration Act to resolve an industrial dispute through arbitration, inevitably entails the weakening of arbitration's viability as an industrial dispute resolution mechanism under the Disputes Act, as perceived through the workman's psyche.

First, if the court denies the employer's Arbitration Act application in favour of arbitration by highlighting public policy concerns,[49] it judicially validates the demonisation of the procedure of arbitration. Thereby, claiming the reputation of the specially engineered model of arbitration under Section 10A of the Disputes Act and Section 42 of the Code,[50] as collateral damage. *Second*, in case the Court allows the application in favour of arbitration under the Arbitration Act,[51] the workmen are rendered susceptible to the ill effects of asymmetry in bargaining power; an event the legislature explicitly tried to prevent by excluding the application of the Arbitration Act.[52] *Third*, an auxiliary dissonance arises due to adjudication itself, as arbitration under the Disputes Act and the Code is a self-contained

[46]Smaran Sitaram Shetty, 'Arbitrability of Labour Disputes in India: Towards a Public Policy Theory of Arbitrability' (*Kluwer Arbitration Blog*, 26 Nov 2017)<http://arbitrationblog.kluwerarbitration.com/2017/11/26/arbitration-labor-disputes-india-towards-public-policy-theory-arbitrability/> accessed 21September 2021.
[47]ibid (n1).
[48]ibid (n28, 35).
[49]ibid.
[50]Disputes Act, s 10A; Code, s 42.
[51]*Saksham Impex* (n38) para 9.
[52]Disputes Act, s 10A (5); Code, s 42 (8).

procedure,[53] and does not contemplate any interaction with the judicial system. Therefore, the judiciary's interaction with employers' invocation of the Arbitration Act to resolve an industrial dispute through arbitration, further entrenches the judiciary as a stand-alone, neutral forum as compared to arbitration which is subject to prior judicial deliberation.

Operation of a Provision Facilitating Reference to Section 42 of the Code

The absence of a provision which can enable access to Section 42, once an industrial dispute has been raised in a labour tribunal, risks the repetition of the detrimental interaction facilitated by the Disputes Act. Additionally, the presence of a referral provision under the Code, shall also limit the number of appeals to the judiciary, as legislative certainty would reduce avenues for the tribunals to discuss arbitrability under the Arbitration Act. Such legislative certainty would enable a merits-based assessment of arbitration as an industrial dispute resolution method, as opposed to its virtual extinction due to the statutory lacunae of the Disputes Act,[54] and the judiciary's interaction with issues incidental thereto.

However, a provision facilitating reference to arbitration under Section 42 would need to be consistent with the scheme that informs the model of arbitration under the Code. Presuming that an industrial dispute was raised in the labour tribunals, the condition for the existence/apprehension of an industrial dispute is satisfied.[55] Additionally, Section 42(1) prescribes the need for a written agreement of the parties for them to refer their industrial dispute to arbitration. Upon ascertaining the existence of an arbitration agreement in the form as specified by the rules enacted by the Appropriate Government (hereinafter 'AG'),[56] the tribunal shall forward a copy of such an agreement to the AG and the conciliation officer as per Section 42(4). Consequently, the AG shall examine whether the parties referring the dispute to arbitration represent the majority of each party;[57] the presence of a negotiation union/council may streamline this examination.[58] Following the ascertainment of majority, the arbitration commences.

A referral provision can improve accessibility to arbitration under Section 42 of the Code. Thereby, leaving lesser scope for the judicial reduction of Section 42 to a mere tool against

[53]ibid.
[54]Debi S Saini (n5).
[55]Code, s 42 (1).
[56]ibid s 42 (3); Draft Rules, Rule 17, Form III.
[57]Code, s 42 (5).
[58]ibid, s 14, 42 (5).

arbitrability of labour disputes under the Arbitration Act,[59] and prevent the demonisation of arbitration for the primary stakeholders of the process: workmen. However, even in the presence of a provision facilitating reference to Section 42, certain core aspects of arbitration under the Code, including the manner of appointment of arbitrator(s),[60] and the existence of archaic entities like the umpire under Section 42(2), need a thorough examination.

A CASE FOR DESCRIPTIVE ARBITRATOR(S) APPOINTMENT CLAUSES AS OPPOSED TO BLANKET ASSURANCES OF MUTUAL AGREEMENT

The Code, by virtue of Section 10A, acknowledges the parties' autonomy to opt for either odd or even numbered arbitral tribunals.[61] However, with that exception, the pre-arbitration phase of voluntary arbitration under the Code is statutorily regulated. For the parties to successfully refer their industrial dispute to voluntary arbitration under Section 42(3) mandates compliance with a specific form of an arbitration agreement.[62] Though this prescription is in line with the regime's intent to further an exhaustive, socially informed model of arbitration;[63] shortcomings of the procedure are crystallised in absence of appropriate measures to combat the asymmetry in bargaining power.

Shortcomings of the Written Agreement's Method of Ensuring Mutual Agreement in the Appointment of Arbitrator(s)

In context of Section 42(3)'s reference to a specific form of arbitration agreement, the Draft Rules prescribe Form III, detailing the contents of the arbitration agreement. The portion of Form III, which deals with the appointment of arbitrator(s) is a shallow assurance of mutual agreement, which reads, "*It is hereby agreed between the parties to refer the following dispute to the arbitration of* [*here specify the name(s) and address(es) of the arbitrator(s)]*", thereby, allowing employers to capitalise on the legislative assumption of mutual agreement, and unilaterally appoint arbitrator(s), bypassing actual mutual agreement. Further, requiring the details of the appointed arbitrator(s) beforehand in the form itself, entrenches their

[59]ibid; (n28, 35).
[60]Draft Rules, Rule 17, Form III.
[61]Disputes Act, s 10A (1), (2); Code, s 42 (1),(2).
[62]Draft Rules, Rule 17, Form III; Tamil Nadu Industrial Dispute Rules 1958, Rule 26, Form D.
[63]Code, s 42 (8).

unilateral appointment; as, unlike Section 13 of the Arbitration Act,[64] the Code does not contemplate interplay with adjudicatory mechanisms, which could adjudicate upon any disagreement regarding the appointment of arbitrators. Therefore, a dissonance arises between the Code's intention to further an exhaustive model of socially informed arbitration,[65] and the way it handles the appointment of arbitrator(s).This dissonance can be combatted by legislatively accommodating the workers' say in the appointment of arbitrator(s);also preventing the probability of a legislatively unintended cram down of the arbitrator'(s') nomination on the workers.

Descriptive Appointment Clauses to Ensure Mutual Agreement

A possible solution comes in the form of descriptive appointment clauses,[66] as opposed to a possibly ineffective, blanket statement, which assumes mutual agreement in an employer-worker relationship characterised by its asymmetry in bargaining power. Descriptive appointment clauses could detail the participation of both the parties, and the timelines that may be adhered to, in furtherance of appointment of arbitrator(s). A model descriptive appointment clause reads:

"*The arbitral tribunal will comprise of a single arbitrator to be appointed by mutual consent of the Parties within 7 (seven) days of the request of the notice to start arbitration proceedings. If either party does not respond to the request for mutual appointment of arbitrator within the aforesaid 7 (seven) days, the party issuing such a request may nominate such an arbitrator, subject to such nomination not being in contravention of IBA Guidelines on Conflict of Interest*".[67]

Form III is flexible enough to allow the parties to decide the time within which their dispute should be resolved,[68] therefore, accommodating timelines governing the appointment of an arbitrator is not far-fetched. Legislatively accommodating the involvement of the workers could alleviate the distrust placed upon arbitrator(s). In absence of a forum to adjudicate upon deadlocks however, the presence of a descriptive appointment clause can only have a

[64]Arbitration Act, s 13.
[65]ibid.
[66]Ajar Rab, 'Appointment of Sole Arbitrator: Can a Modified Asymmetrical Arbitration Clause Avoid Court Appointment' (*Kluwer Arbitration Blog*, 8 January2020)<http://arbitrationblog.kluwerarbitration.com/2020/01/08/appointment-of-sole-arbitrator-can-a-modified-asymmetrical-arbitration-clause-avoid-court-appointment/> accessed 27 September 2021.
[67]ibid.
[68]Draft Rules, Rule 17, Form III.

persuasive effect on the appointed arbitrator(s), who ideally, shall aspire to a level of neutrality reflective of the procedure leading to their appointment.[69]

Enabling Oversight of the Appropriate Government to Ensure Adherence to the Descriptive Appointment Clause

The proposed solution can be fortified by chronologically advancing the appointment of arbitrators to the stage of Section 42(5)'s examination of majority representation by the AG. In addition to ascertaining the majority of the parties making reference to arbitration under Section 42(5), the AG shall also examine adherence to the descriptive appointment clause before publishing a notification as contemplated under Section 42(5). Advancement of the stage of arbitrator'(s') appointment only requires the inclusion of the descriptive arbitrator appointment clause, and the omission of the details of the appointed arbitrator(s) from the arbitration agreement prescribed in Form III[70] Thereby, enabling the AG to oversee the adherence of the parties to the descriptive appointment clause, and ensure a higher level of probability regarding the mutual agreement of the parties. Unlike the Disputes Act, the Code does not prescribe any timelines to publish the notification under Section 42(5), which gives enough leeway to accommodate the AG's oversight over the appointment procedure.

Owing to the reassuring presence of the AG, the workers' representatives would be able to actually benefit from the intent behind a descriptive appointment clause. Further, an employer dominates the method of dispute resolution at a stage as early as the incorporation of the employer-worker relationship, as opposed to the workers who can only afford to prioritise dispute resolution when it starts affecting their livelihood. Therefore, the proposed solution also combats the effects of informational asymmetry in an employer-worker relationship, by advancing the appointment of arbitrator(s) to a stage after the dispute arises. Since the publication of an arbitration agreement is no longer mandated,[71] and bound by a timeline,[72] the parties can utilise the calm period to mutually appoint arbitrator(s) as per the descriptive appointment clause.

[69]Ajar Rab (n66).
[70]Draft Rules, Rule 17, Form III.
[71]Code, s 42 (3); Disputes Act, s10A (3).
[72]ibid.

THE UMPIRE STRIKES SYSTEMICALLY: ARBITRATOR-ADVOCATES AND THE DILUTION OF IMPARTIALITY

The scepticism against even-numbered arbitral tribunals primarily stems from the increased likelihood of the difference in opinion of the two arbitrators leading to deadlocks, which can halt the arbitral process.[73]Informed with the practical concerns prevalent in the functioning of even-numbered tribunals, Section 10 of the Arbitration Act expressly bars such composition.[74] However, the Code marks a stark departure from the statutorily settled position of even-numbered tribunals in India, and not only makes explicit allowance for even-numbered tribunals,[75] but also mandates the entry into reference of an umpire to remedy the problem of deadlocks.[76] Weighing the practical operation of the "two-arbitrator plus umpire" model against the intention of the legislature to create a reliable model of socially informed arbitration, reveals the legislative oversight which led to this model's survival in the Code.

Operation of the "Two Arbitrator-Umpire" Model of Arbitration

Even after the acknowledgement of stakeholder's concerns regarding the exact definition of umpire,[77] the Code abstains from providing an explicit distinction between arbitrators and umpires; rather, it subsumes the latter in the broader definition of "arbitrator" under Section 2(c) of the Code.[78] Contextualising the functions of an umpire *vis á vis* Section 42(2) highlights a difference, insofar as, Section 42(2) renders an umpire's entry into reference, contingent on an event wherein the two "*arbitrators are equally divided in their opinion*"[79]. Thus, the umpire does not enter into reference simultaneously with the two arbitrators,[80] but only when the two arbitrators confront a deadlock.

This distinction becomes pertinent in light of the Indian regime's definition of "entering into reference",[81] which denotes the taking up of the conduct of the proceeding by the arbitrator(s),[82] and the application of the arbitrator(s)' mind in furtherance of the resolution of

[73]Régis Bonnan, 'Even-Numbered Arbitral Tribunals' (2019) 8 India Journal of Arbitration Law 49.
[74]Arbitration Act s 10.
[75]VC Deshpande, 'Practice Versus the Law in Arbitration', (1989) 6 Journal of International Arbitration 55.
[76]Code s 42 (2).
[77]Standing Committee on Labour, *Industrial Relations Code* (Report no 8, 2020) paras 16.1- 16.5.
[78]Code, s 2(c).
[79]Code, s 42 (2).
[80]VC Deshpande (n75).
[81]ibid.
[82]*Milkfood Ltd v GMC Ice Cream (P) Ltd*(2004) 7 SCC 288.

the dispute.[83] Therefore, the two arbitrators and the umpire do not constitute the same tribunal, nor can the umpire be considered an arbitrator in the same manner as the arbitrators initially entering into reference to adjudicate upon the industrial dispute.[84] As soon as the two arbitrators disagree, the umpire enters into reference, and becomes the sole arbitrator whose award "*shall prevail and shall be deemed to be the arbitration award for the purposes of this Code*"[85]. Therefore, the two-member arbitral tribunal becomes *functus officio*;[86] that is, the entry into reference of the umpire, impairs the two arbitrators' capacity to deliver a binding award.

Arbitrator Advocates: Risky Gimmicks of an Archaic Model

The Code places no explicit bar on arbitrators continuing to be in reference on the entry into reference of the umpire; at this stage, the arbitrators have a tendency to dilute their roles, and sacrifice their neutrality as adjudicators, and advocate for their respective appointers, thereby becoming "arbitrator-advocates".[87] Once the umpire has entered into reference, it becomes more expeditious for the two arbitrators possessing contextual knowledge and evidentiary material to present the case, in order to avoid do-over of arbitral proceedings.[88] They are free to advance arguments on behalf of their appointers, and have requisite power to bind their appointers to procedural matters, and even settlements.[89]

Further, it is desirable for the arbitrators in an even-numbered tribunal to issue a notice of disagreement at the initial stages of the proceedings, before the hearing of evidences has commenced.[90] Constructively allowing the umpire to be present in the arbitral proceedings along with the two arbitrators, although expedient, and cost-effective, does not allow simultaneous entering into reference by both: the two arbitrators and the umpire. Thus, the umpire alone constitutes the tribunal, and the arbitrators instinctively deem fit to assume the roles of arbitrator-advocates. In spite of its obvious appeal, the arbitrator-advocate model has the potential to systemically affect the impartiality expected of the broader ecosystem of labour arbitration.

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[83]*Ramnath Aggarwala v Goenka & Co* AIR (1973) Cal 253.
[84]Régis Bonnan(n73).
[85]VC Deshpande (n75).
[86]ibid.
[87]Régis Bonnan (n73).
[88]VC Deshpande (n75).
[89]Ronald Bernstein, 'Handbook of Arbitration Practice' (1988) 4 Arbitration International 80.
[90]ibid.

Injecting the Poison of Bias in the Pool of Arbitrators

Owing to the documented widespread use of even-numbered tribunals before their prohibition,[91] the arbitrator-advocate model possesses the potential to divide the pool of arbitrators into employer/worker favouring. A pool constituting arbitrators possessing bias against either the employer or the worker would lead to a higher probability of a lop-sided composition in a three-member tribunal, and a patently biased composition in a single-member tribunal. Over the course of time, due to the parties' experience with biased odd-numbered tribunals, they would naturally prefer a two-member tribunal due to the neutrality affirming, intoxicating presence of an umpire. Thereby, introducing a systemic crack of bias, acting against the viability of odd numbered tribunals in particular, and the reliability of arbitration in general. In light of these observations, it is suggested that the Code borrows from the Arbitration Act's abolition of even-numbered tribunals broadly, and umpires specifically.

CONCLUDING REMARKS

Recently in Tamil Nadu, Renault Nissan and its worker union have referred their wage related disputes to arbitration under Section 10A of the Disputes Act.[92] Though the same can be used as evidence against assertions of the virtual extinction of arbitration as an industrial dispute resolution mechanism[93]; the promotion of arbitration in Tamil Nadu is a documented phenomenon, complemented by state-specific reforms.[94] However, the legislature aspires to centralise the intent to promote arbitration as an industrial dispute resolution mechanism in the new regime. As, *first*, Section 42 has reduced avenues for judicial sabotage of an arbitral award by omitting the requirement of publication of the arbitration agreement.[95] This becomes relevant in light of Karnal Leather Karamchari Sanghatan v. Liberty Footwear Co.,[96] where the Supreme Court struck down an award rendered pursuant to an arbitration under Section 10A of the Disputes Act, due to prior non-publication of the arbitration

[91]Fali S Nariman, 'Even Number of Arbitrators Article 10 of the UNCITRAL Model Law: India, Arbitration International' (1999) 15 Arbitration International 405.
[92]'TN notifies Renault Nissan industrial dispute arbitration' (*Business Standard*, 13 June 2021). <https://www.business-standard.com/article/companies/tn-notifies-renault-nissan-industrial-dispute-arbitration-121061300323_1.html> accessed 8 October, 2021.
[93]Debi S Saini (n5).
[94]P Lansing and S Kuruvilla, 'Industrial dispute resolution in India in theory and practice.' (1986) 9 Loyola of Los Angeles International and Comparative Law Review 345, 369.
[95]Disputes Act, s 10A (3).
[96]AIR (1990) SC 247.

agreement. *Second*, the legislature has utilised Negotiating Unions/Councils in context of Section 42[97], which streamlines the process and improves the quality of worker representation in arbitration.

However, this legislative intent does not permeate crucial procedural aspects of Section 42 of the Code. For example, the absence of a referral provision reduces accessibility favouring changes in the Code to a paper tiger. Therefore, the essay suggests the adoption of a provision that can facilitate reference to arbitration under Section 42 of the Code, even after an industrial dispute has been referred to a Labour Tribunal, thereby effectuating the legislature's intent to improve access to arbitration. Additionally, to strengthen the sympathetic model of arbitration furthered by the Code, the essay suggests the adoption of descriptive appointment clauses, which can ensure mutual agreement regarding the appointed arbitrator(s). Finally, to ensure impartiality of arbitrators, and increase reliability of arbitration under Section 42 of the Code, the essay makes a case against the attachment of an umpire to a two-member arbitral tribunal. Incorporating the suggested changes would align the legislature's socially beneficial intent with the interaction facilitated by the Code's mandate.

[97]Code, s 14.