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Functional Approach to Arbitrability of Public-Private Partnership Disputes for Reconfiguration of Sovereignty

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ABSTRACT

The tension between private contractual rights and the State's sovereign powers is a recurring issue in Public-Private Partnership (PPP) disputes, and the question of whether such disputes may be resolved through international commercial arbitration is complex. This paper supports a rights-based, non-categorical approach to arbitrability that transcends the traditional dichotomy between the public and private spheres and evaluates instead the nature of the dispute and of the State's conduct. It argues that most conflicts between PPP parties concerning payment, construction and performance are arbitrable, while conflicts involving inalienable sovereign powers remain exclusive to national courts. The analysis draws on Indian jurisprudence, in particular the four-fold test in Vidya Drolia and the recent Racing Promotions judgment, and compares the frameworks in the United Kingdom, Georgia, Nigeria, China and Latin America. It also examines jurisdictional questions relating to sovereign immunity, State consent and the separability doctrine, together with emerging developments such as the arbitration-insolvency interface under India's Insolvency and Bankruptcy Code, a proposed misuse doctrine to deter procedural delay, and specialist regulators. Finally, the paper calls for an open and accountable arbitral process that protects public funds while preserving commercial certainty in the pursuit of India's infrastructure development goals.

Keywords: Public-Private Partnership, arbitration, infrastructure, public interest, sovereignty.

Every arbitrability debate is ultimately a question of how to allow arbitral tribunals to adjudicate PPP contractual disputes without allowing them to rewrite public policy.

I. INTRODUCTION

Infrastructure is the backbone of a country's economy. India, a developing nation, aims to become a \$10 trillion economy by 2035.¹ To this end, the country has adopted a systematic

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¹ PIB, 'India will Become a 10 Trillion Dollar Economy Before 2035: Union Minister Shri Suresh Prabhu' (PIB, 6 September 2018) <<https://www.pib.gov.in/PressReleasePage.aspx?PRID=1545153>> accessed 26 April 2026.

approach to delivering high-priority public utilities under the Public-Private Partnership ("PPP") programme. According to an Asian Development Bank report, 1,265 PPP projects were implemented between 1990 and 2022, totalling about \$295.56 billion in investment.² The World Bank Group further reports that, for the first time, private participation in infrastructure (PPI) investment exceeded the \$100 billion threshold in the aftermath of the COVID-19 pandemic.³ Taken together, this data highlights the growth of PPP projects, which in turn demands a refined dispute-resolution framework.

Such arrangements raise the issue of overlapping boundaries between private commercial contracts and public administrative law. Private players usually favour international commercial arbitration for its speed and perceived impartiality. States, however, often regard it as an intrusion upon their sovereign powers where public funds are involved, and invoke the need to protect the public interest. As a result, the arbitrability of PPP agreements gives rise to a tension over whether a dispute may lawfully be resolved by a private tribunal. This paper argues in favour of international commercial arbitration as the most viable option, drawing on Indian jurisprudence and comparative analysis with jurisdictions such as the United Kingdom, China and Georgia. It also explores emerging trends in PPP disputes. Throughout, the primary concern remains accountability for taxpayers' money.

II. ARBITRABILITY AND CONTRACTS UNDER PUBLIC LAW

The debate over the arbitrability of PPP disputes turns largely on how far States may subject the exercise of public authority to private adjudication without impairing sovereign functions. This problem is framed as "objective arbitrability", which concerns whether a dispute may lawfully be settled by arbitration even where both parties agree to it.⁴ Under the New York Convention, this question is remitted to national law through the public-policy and non-arbitrability exceptions, allowing the State to reserve particular domains, such as taxation, insolvency and antitrust, for public courts alone.⁵ In some civil-law jurisdictions, the State classifies certain contracts as "contracts under public law" and assigns them to designated administrative courts. In Georgia, concession and PPP agreements are often treated as public contracts, falling within the jurisdiction of administrative courts under the General Administrative Code, when the State

² Asian Development Bank, 'A Snapshot of the Public-Private Partnership Monitor: India' (ADB, 6 September 2024) <<https://www.adb.org/sites/default/files/publication/994856/public-private-partnership-monitor-india-brochure.pdf>> accessed 26 April 2026.

³ Deblina Saha and others, 'Private Participation in Infrastructure (PPI) 2024 Annual Report' (World Bank Group 2025) <<https://ppi.worldbank.org/content/dam/PPI/documents/PPI-2024-Annual-Report-Interactive.pdf>> accessed 26 April 2026.

⁴ Gary Born, *International Commercial Arbitration*, vol 1 (3rd edn, Kluwer Law International 2021) 1028.

⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention) arts II(1), V(2)(a).

exercises special powers such as unilaterally modifying terms or pursuing public-interest objectives, because those powers derive from the State's authority. In such systems, arbitration is generally available for purely civil or commercial contracts, unless the legislature has expressly carved out arbitration for PPP disputes.⁶ To bypass administrative courts and submit PPP disputes to national or international commercial arbitration, Article 35.4 of the 2018 PPP legislation was enacted.⁷

Today, there is no clear distinction between public and private roles in PPP contracts, as the State acts as both regulator and business partner. In Latin America, PPP projects comprise multiple interlinked contracts, including concessions and financing arrangements. The State pursues sensitive public policies, such as infrastructure development and tariff and subsidy policies, while also making long-term commitments to investors.⁸ Argentina, Brazil and Mexico have each enacted special PPP laws under which PPP contracts fall outside the ordinary administrative-law system yet remain within public-law limits, with careful definition of which disputes are technical, judicial or arbitrable.⁹ In China, the courts look not merely at the label of a PPP contract but at its essence. Where the State uses a build-operate-transfer ("BOT") agreement to exercise regulatory powers, such as controlling land or issuing licences, administrative courts treat the exercise as regulatory. In the dispute between the Bazhong Municipal People's Government and a private company, however, the court held that the private company had entered into a BOT franchise agreement for profit, thereby constituting a civil and commercial dispute. Accordingly, where disputes arise over payment, timeline delays or quality, arbitration is permitted even if the contract is formally a public-law contract.¹⁰ This approach shows that PPP disputes may involve both regulatory and commercial issues, depending on their nature.

Gary Born argues that the State should prefer arbitration for every dispute unless there are strong reasons not to, namely where arbitration would (i) cancel or control the State's sovereign regulatory powers in a way that affects the public at large, or (ii) interfere with the responsibilities of public authorities.¹¹ For example, where a PPP dispute arises and the

⁶ Giorgi Ustiashvili, 'Arbitrability of Public-Private Partnership Disputes in Georgia' (2022) 16(3) *Revista Romana de Arbitraj* 59, 61.

⁷ *ibid* 65.

⁸ Pablo Debuchy and Alex Kamath, 'Trends and Challenges in Public-Private Partnerships Dispute Resolution in Latin America' in Bjorn Arp and Rodrigo Polanco (eds), *International Arbitration in Times of Economic Nationalism* (Kluwer Law International 2022) 171, 173-77.

⁹ *ibid* 180-84.

¹⁰ Xuehua Wang, Yuan Xing and others, 'Annual Review on Commercial Arbitration in China (2018)' in *Commercial Dispute Resolution in China: An Annual Review and Preview (2018)* (2018) 1, 24-28.

¹¹ Born (n 4) 1033-34.

company seeks damages because the State has failed to fulfil its obligations, the dispute is arbitrable, concerning rights in personam. But where the claim concerns tariff regulation, it is a public-law matter that must go to court, being a right in rem and thus non-arbitrable. To decide whether a PPP dispute should go to arbitration, a practical test is required rather than a merely formal label. First, one must ask whether the State's power derives from its position as a contracting party or from the exercise of sovereign authority. Second, one must examine the remedy sought. Third, one must consider the consequences if an arbitral tribunal were to decide such disputes.¹² Following these steps, PPP disputes may be sent to arbitration where the State acts as a market participant.

III. SOVEREIGN PARTIES, CONSENT, AND JURISDICTIONAL CHALLENGES

The involvement of a State or a State-Owned Entity (SOE) in a PPP contract presents major jurisdictional hurdles, centred primarily on the interplay among sovereign immunity, the authority to consent, and the conflict between domestic legislation and international obligations.¹³ Because consent is the most important feature of the international arbitral process, a party cannot be required to submit to a forum to which it has not agreed. Verifying a State's valid submission to a tribunal's jurisdiction is therefore the first and most vital step in any PPP dispute.¹⁴

Sovereign immunity creates a two-fold challenge. First, there is immunity from the jurisdiction of courts or arbitral tribunals. Second, there is immunity from the enforcement or execution of an award. Under modern international law, when a State agrees to resolve disputes through arbitration, it is generally taken to have waived its immunity from jurisdiction and, in doing so, to accept that the arbitration will be supervised by the courts at the seat under the applicable procedural law, that is, the *lex arbitri*.¹⁵ But this waiver of immunity from jurisdiction does not automatically waive immunity from execution. Even where a State agrees to arbitration or submits to a court's authority, that will not necessarily permit its assets to be seized to enforce an award. Courts therefore usually require a clear and specific waiver before considering enforcement measures, especially where the assets are sovereign rather than commercial.¹⁶

¹² *ibid* 1033-39; Debuchy and Kamath (n 8) 173-76; Wang and Xing (n 10) 10-11.

¹³ Julian DM Lew, Loukas A Mistelis and Stefan M Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) [27].

¹⁴ See (n 1); Lew, Mistelis and Kroll (n 13) [27]-[28].

¹⁵ Lew, Mistelis and Kroll (n 13) [27]-[40]; Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) [11.144].

¹⁶ Blackaby and others (n 15) [11.146].

Courts have, however, sometimes taken a broader view. In *Creighton Ltd. v. Government of the State of Qatar*, the French Cour de cassation held that when a State agrees to arbitration under the International Chamber of Commerce ("ICC") Rules, it may be understood to have implicitly waived its immunity from execution.¹⁷ The reasoning was that the ICC Rules require parties to carry out arbitral awards without delay, and that by accepting those rules the State effectively agrees to comply with the award; it cannot later rely on immunity to avoid enforcement altogether. Even under this approach, however, courts remain cautious. Execution is generally permitted only against assets used for commercial purposes, whereas property linked to sovereign or public functions, such as diplomatic premises or military assets, remains protected. Conversely, in *Liberian Eastern Timber Corporation v. Liberia*, the United States court permitted enforcement of an International Centre for Settlement of Investment Disputes ("ICSID") award, yet refused to allow execution against shipping fees and embassy bank accounts on the ground of sovereign immunity.¹⁸ This protection of diplomatic assets was affirmed in *Ambassade de la Fédération de Russie en France v. Compagnie NOGA*, where the French court ruled that a general contractual waiver of immunity from execution does not extend to diplomatic assets, which are governed by the distinct regime of the Vienna Convention on Diplomatic Relations.¹⁹

A further aspect that recurs frequently concerns jurisdictional challenges to the legal capacity or authority of particular State agencies or officials to bind the sovereign to an arbitration agreement. Private parties are well advised to verify this authority, because the domestic laws of various countries, such as Saudi Arabia, Iran and Venezuela, may require specific ministerial or cabinet approval for such agreements.²⁰ In the landmark case of *Dallah Real Estate & Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*, the UK Supreme Court refused to enforce an award because the entity that signed the agreement, the Awami Hajj Trust, was not a State organ; the Government was therefore not a party to the arbitration agreement.²¹ Similarly, in the Pyramids case, *Southern Pacific Properties (Middle East) Ltd. v. Egypt*, the Paris Cour d'Appel initially set aside an award on the basis that a

¹⁷ *Creighton Ltd v Government of the State of Qatar* (2000) XXV YB Comm Arb 458 (Cour de cassation).

¹⁸ *Liberian Eastern Timber Corp v Republic of Liberia* (1987) 26 ILM 647.

¹⁹ *Ambassade de la Federation de Russie en France v Compagnie NOGA d'Importation et d'Exportation SA* (2001) XXVI YB Comm Arb 273 (Cour d'Appel de Paris).

²⁰ Blackaby and others (n 15) [2.36].

²¹ *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 [11].

Minister's signature followed by the words "approved, agreed and ratified" did not necessarily bind the State itself as a contracting party.²²

A recurring challenge involves States attempting to invoke their own domestic legislation, such as administrative or civil laws or constitutional provisions, as a shield to invalidate their prior consent to arbitrate. A growing international consensus, reflected in Article 177(2) of the Swiss Federal Code on Private International Law, expressly prevents a State or State-controlled enterprise from relying on its domestic law to contest its capacity or the arbitrability of a dispute once it has agreed to arbitrate.²³ Tribunals often regard such attempts as a violation of international public policy or a denial of justice. In *Benteler v. Belgium*, the tribunal held that a State that signs an arbitration agreement acts contrary to international public policy if it later relies on its internal legal system to claim that the obligation is incompatible with its law.²⁴ Furthermore, in *Saipem v. Bangladesh*, an ICSID tribunal held the host State liable for judicial expropriation after its national courts retroactively revoked an arbitral tribunal's authority on domestic procedural grounds.²⁵

The principle of separability likewise ensures that arbitration clauses survive even where the State later nationalises the project or declares the main contract void, as seen in *Texaco Overseas Petroleum Co. v. Libya*, where the tribunal rejected Libya's argument that its nationalisation of oil concessions rendered the underlying arbitration clauses invalid.²⁶ In common-law jurisdictions such as India, the focus has shifted towards defining the inalienable sovereign functions that are inherently non-arbitrable. In *Vidya Drolia & Ors. v. Durga Trading Corporation* ("*Vidya Drolia*"), the Supreme Court established a four-fold test identifying that matters involving the sovereign power of the State, such as criminal law, taxation or specific regulatory powers, are reserved for national courts.²⁷ More recently, the 2025 judgment in *Racing Promotions Private Limited v. Dr Harish & Ors.* ("*Racing Promotions*") clarified that, in PPP contracts, courts cannot rewrite financial terms or dictate economic policy under the guise of "public interest" unless there is overt fraud or illegality, thereby protecting the commercial character of the partnership from unnecessary judicial interference.²⁸

²² *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* (1984) 23 ILM 1048 (Cour d'Appel de Paris).

²³ Swiss Federal Code on Private International Law 1987, art 177(2).

²⁴ *Benteler v Belgium* (1989) Rev Arb 339.

²⁵ *Saipem SpA v People's Republic of Bangladesh* ICSID Case No ARB/05/07, Decision on Jurisdiction (21 March 2007).

²⁶ *Texaco Overseas Petroleum Co v Government of the Libyan Arab Republic* (1979) IV YB Comm Arb 177.

²⁷ *Vidya Drolia v Durga Trading Corporation* (2021) 2 SCC 1.

²⁸ *Racing Promotions Private Limited v Dr Harish* 2025 SCC OnLine SC 375 : 2025 INSC 252.

IV. PPP ARBITRABILITY IN INDIA

Before *Vidya Drolia*, the question of arbitrability was marked by significant ambiguity. In 2011, the Supreme Court in *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors.* laid down the foundational test.²⁹ It established that disputes involving rights in rem are non-arbitrable, whereas rights in personam are arbitrable. The judgment was frequently criticised as too generic and lacking specificity. As a result, in many PPP disputes courts declined to refer parties to arbitration, as in *N. Radhakrishnan v. Maestro Engineers*.³⁰

To resolve this uncertainty, the Supreme Court delivered *Vidya Drolia* in 2020, holding that courts should apply a rights-based approach rather than blanket exclusions in determining whether disputes may be arbitrated. The Court set out four questions, namely whether the dispute (i) relates to rights in rem, (ii) affects third-party rights, (iii) concerns sovereign or public functions that are inalienable, or (iv) is non-arbitrable by statute.³¹ Disputes concerning rights in personam are ordinarily arbitrable; only matters such as criminal law, family status and insolvency must be decided by public courts.³² For PPP contracts, most disputes relate to construction deadlines, payment terms and performance standards, and are therefore arbitrable.³³ Where a dispute involves public rights or policies, it cannot be arbitrated under the *Vidya Drolia* test.³⁴

Recently, in *Racing Promotions*, the Supreme Court held that courts in Public Interest Litigation (PIL) cases cannot unilaterally rewrite the financial and operational terms of a PPP contract solely on public-interest grounds, and overturned the Madras High Court's decision, absent illegality, fraud or a constitutional infirmity in the main contract. The matter concerned a Chennai-based Formula 4 event with State involvement. The Court referred the dispute over commercial risks, ticketing and fee-sharing to arbitration rather than to open-ended judicial review.³⁵ At the same time, in *Union of India v. Competition Commission of India & Ors.*, the Delhi High Court made clear that matters relating to antitrust and abuse of dominance fall within the purview of a specialist regulator, namely the Competition Commission of India (CCI). Arbitrators may apply competition-law principles in PPP disputes but cannot impose public remedies or determine infringement, that authority lying with the CCI.³⁶

²⁹ *Booz Allen & Hamilton Inc v SBI Home Finance Ltd* (2011) 5 SCC 532.

³⁰ *N Radhakrishnan v Maestro Engineers* (2010) 1 SCC 72.

³¹ *Vidya Drolia* (n 27) [76].

³² *ibid* [77].

³³ *Debuchy and Kamath* (n 8) 172-77.

³⁴ *See* (n 31).

³⁵ *Racing Promotions* (n 28) [23].

³⁶ *Union of India v Competition Commission of India* 2012 SCC OnLine Del 1114 [16].

Despite the Court's pro-arbitration stance in *Racing Promotions*, the executive effected a notable policy reversal. In 2024, the Ministry of Finance issued guidelines adding a policy layer to PPP and government contracts. They favour committees and mediation for high-value contracts, confine arbitration to special cases, and advise against foreign arbitration seats for purely domestic projects. The guidelines cite high costs, long delays and the lack of finality of arbitral awards, and generally restrict arbitration to disputes valued below Rs. 10 crore.³⁷ These guidelines do not amend the Arbitration and Conciliation Act, 1996 ("Arbitration Act"), but reflect how the Government chooses to consent to arbitration. Overall, India's approach to PPP disputes is carefully balanced through the *Vidya Drolia* test, which provides a rights-based standard,³⁸ while *Racing Promotions* protects the sanctity of contracts.³⁹ PPP disputes may therefore be arbitrated, but sovereign functions remain with the courts. Law firms and corporate counsel accordingly need to draft PPP clauses that do not redesign public policy.

V. COMPARATIVE APPROACHES TO PPP ARBITRABILITY

Across jurisdictions, PPP arbitration rests on two broad models. In the first group, States permit PPP disputes to be resolved through commercial arbitration, chiefly to attract investors and reduce sovereign risk. A leading example is Nigeria, where severe infrastructure deficits are addressed through Special Purpose Vehicles governed by the Infrastructure Concession Regulatory Commission Act, 2005, with dispute resolution left to contractual clauses; in practice, PPPs almost always use multi-step clauses culminating in arbitration.⁴⁰ This is because investors in projects such as the Murtala Muhammed Airport 2 terminal and toll-road concessions face significant political and enforcement risks, and prefer enforceable tribunal decisions to litigation in the Nigerian courts.⁴¹ Georgia adopts a similar approach. Its 2018 legislation is largely hybrid, with commercial disputes arbitrable and public-law contracts referred to administrative courts, making projects more bankable while keeping the administrative-court system intact.⁴² In the United Kingdom, PPP contracts are based mainly on the Private Finance Initiative (PFI) and New Engineering Contract (NEC) models, using adjudication, mediation and arbitration. The courts encourage these methods, referring only

³⁷ Ministry of Finance, Department of Expenditure, Procurement Policy Division, 'Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement' (Office Memorandum No F 1/2/2024-PPD, 3 June 2024).

³⁸ See (n 31).

³⁹ See (n 28).

⁴⁰ MT Adekilekun, OA Olatunji, CC Gan and MM Akanbi, 'Public-Private Partnership Initiative in Nigeria and Its Dispute Resolution Mechanism: An Appraisal' (2013) 40 JMCL 67, 71.

⁴¹ *ibid* 75-82.

⁴² See (n 9).

complex project disputes to specialist neutrals and intervening chiefly for enforcement or limited review.⁴³

The second model is found mainly in Latin America, where PPP arbitration is permitted but tightly controlled owing to past corruption scandals such as the Lava Jato and Odebrecht affairs, exposure to investor-State dispute settlement (ISDS) and a strong tradition of public-law oversight. A survey of Argentina, Brazil, Mexico, Paraguay and Peru shows that all five have modern PPP frameworks, beginning with negotiation, technical panels and dispute boards and ending in arbitration, while each reserves certain sensitive disputes for its own domestic courts.⁴⁴ In Argentina, the law permits arbitration, even at foreign seats, for high-value PPP disputes, but separates them into three categories: arbitrable, justiciable and technical. Technical issues must first be referred to expert panels, and disputes over the public interest must be referred to the courts.⁴⁵ In Brazil, PPP legislation favours Brazilian seats and the Portuguese language within Brazilian territory, reflecting a concern not to cede control over public interests to foreign fora.⁴⁶ In Mexico, the 2012 legislation allows arbitration for contractual-performance issues but expressly excludes disputes over the revocation of concessions and acts of State, which are reserved for the federal courts.⁴⁷ Across regions, this shows that States prefer disputes to be handled in a controlled manner rather than through open-ended arbitration.⁴⁸

Some countries take a mixed approach. In China, the courts divide PPP disputes into administrative and civil categories, allowing arbitration for issues such as payment delays and technical matters, but requiring disputes concerning State regulatory action, such as licensing or tariff regulation, to be brought before the administrative courts.⁴⁹ From this comparison two tendencies emerge. First, some countries clearly define boundaries in their PPP laws and include multi-step mechanisms, as in Nigeria, Georgia and the United Kingdom.⁵⁰ Second, others employ vague or overly broad exclusions because PPP disputes risk becoming politicised, as in Latin America.⁵¹ The aim should be for PPP arbitrability to rest on a functional, rights-based test, supplemented by accountability, so that arbitral awards remain answerable to the public.

⁴³ Lew, Mistelis and Kroll (n 13) 161-62.

⁴⁴ Debuchy and Kamath (n 8) 171-202.

⁴⁵ *ibid* 179-83.

⁴⁶ *ibid* 184-88.

⁴⁷ *ibid* 188-92.

⁴⁸ *ibid* 196-200.

⁴⁹ See (n 10).

⁵⁰ See (n 8); Adekilekun and others (n 40).

⁵¹ Debuchy and Kamath (n 8) 199-201.

VI. RECONCILING PUBLIC INTEREST: ENFORCEMENT AND TRANSPARENCY

Arbitration has traditionally been seen as a private process based purely on contract. This understanding has begun to change in the context of public-private partnerships. PPPs involve essential infrastructure, often funded from the public purse. When arbitration takes place in such conditions, it is increasingly viewed as performing a broader governance role, so that tribunals deciding such disputes are not merely resolving a breach of contract but also examining whether the State's actions were lawful and reasonable.⁵² It is often argued to be problematic that unelected private arbitrators may make decisions significantly affecting a State's population and public funds without any accountability to the public.

The central concern here is the "democratic deficit". PPPs often relate to public services such as water supply, electricity, roads, transport and railways, which directly affect ordinary citizens as taxpayers. When disputes over these matters are resolved through closed-door proceedings, a conflict arises between the need for a neutral dispute-resolution forum and the public's right to know how public funds are being used. To address this, the legal framework is slowly moving away from strict commercial confidentiality towards greater transparency.⁵³ Transparency is increasingly seen as essential to the legal and public acceptance of arbitral awards, as reflected in instruments such as the UNCITRAL Transparency Rules and the Mauritius Convention, which proceed on the premise that, for an award to be truly final and respected, the arbitral process must be open and accessible.⁵⁴ As a result, arbitration in PPP disputes is gradually shifting from a form of "private justice" towards a more public-facing system that promotes accountability to the State's citizens.

At the same time, tribunals must respect the State's ability to govern its own affairs, and often rely for this purpose on the principle of subsidiarity.⁵⁵ This principle holds that decisions should ordinarily be made by the authorities closest to the people affected. In PPP disputes, tribunals must therefore be cautious in reviewing government action. Where a State takes decisions on sensitive matters such as public health, environmental protection or social policy, tribunals generally avoid substituting their own views for the government's choices and instead allow it a measure of flexibility, recognising that local authorities are better placed to understand domestic needs and policy priorities. Rather than second-guessing every regulatory decision,

⁵² Joshua Paine, 'Standard of Review: Investment Arbitration' (2018) Max Planck Encyclopedia of International Procedural Law.

⁵³ Born (n 4) 1205.

⁵⁴ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014); United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) (adopted 10 December 2014).

⁵⁵ See (n 52).

tribunals are more inclined to intervene only where the State's actions are clearly arbitrary or in bad faith. As observed in *S.D. Myers Inc. v. Canada*, international law extends a "high measure of deference" to domestic authorities to regulate within their own borders.⁵⁶ The tribunal in *Philip Morris Brands Sàrl v. Uruguay* elaborated on this, stating that an arbitral tribunal is not a "court of appeal" for government policy and that the boundary is crossed only where a State's actions are "arbitrary or capricious". By applying this deferential standard of review, tribunals respect the State's governance role while acting as an independent check against manifest unfairness.⁵⁷

A vital bridge between the finality of private arbitration and the oversight of public policy is the "second look" doctrine. This doctrine allows the arbitral process to remain efficient and private at first instance, provided that national courts reserve the right to review the award at the enforcement stage.⁵⁸ Following the reasoning of the U.S. Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the theory holds that courts should defer to arbitrators to handle public-law issues such as antitrust or corruption, because the court will have a "second look" to ensure that legitimate public interests were not ignored.⁵⁹ In the European Union, the *Eco Swiss China Time Ltd. v. Benetton International NV* judgment similarly elevated competition law to a matter of "public policy", so that an award may be annulled if it fails to respect mandatory public rules.⁶⁰ This doctrine allows arbitration to remain a viable choice even for parties who lack confidence in one another's domestic courts.

Finally, resolving the tensions in PPP arbitration requires recognising the concept of "international public policy", which includes basic global standards such as zero tolerance for corruption.⁶¹ The fallout of the Odebrecht scandal shows how difficult this can be in practice.⁶² When a contract is found to be tainted by corruption, tribunals usually declare it void, but this often harms innocent parties, such as lenders and subcontractors who had no role in the wrongdoing. To address this, scholars suggest a more balanced approach through systemic integration, whereby tribunals punish corruption while also protecting legal certainty and the interests of genuine stakeholders. In this way, PPP arbitration can remain fair, practical and reliable for global infrastructure projects.

⁵⁶ *SD Myers Inc v Government of Canada*, UNCITRAL (NAFTA), Partial Award (Merits) (13 November 2000).

⁵⁷ *Philip Morris Brands Sarl v Oriental Republic of Uruguay* ICSID Case No ARB/10/7, Award (8 July 2016).

⁵⁸ Born (n 4) 1208.

⁵⁹ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc* 473 US 614 (1985).

⁶⁰ Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055.

⁶¹ Blackaby and others (n 15).

⁶² See (n 9).

VII. EMERGING TRENDS IN PPP DISPUTES

The landscape of PPP dispute resolution is shifting from purely private-law analysis towards one that also engages with the public interest, as noted above.⁶³ To ensure that arbitral awards remain legitimate and enforceable, tribunals must adopt innovative methods that balance contractual obligations against the State's structural duties.⁶⁴ Several concepts now under discussion in relation to PPP arbitrability are set out below.

A. The three-step matrix for review-resistant reasoning

One emerging trend is the adoption of a "public-interest-sensitive" reasoning framework to insulate awards from domestic-court challenge.⁶⁵ This proposes a distinct methodological standard for tribunals: a three-step matrix comprising identification, justification and proportionality. First, tribunals must expressly identify the specific public interests at play, such as the continuity of essential services, and list the binding mandatory norms of the host State.⁶⁶ Second, the tribunal must scrutinise and justify the State's actions by evaluating them against a legality-and-necessity standard, confirming that the measure was a proper exercise of public authority rather than a mere contractual breach.⁶⁷ Finally, the award must be proportionate, striking a fair balance by granting relief in a way that respects the purpose of the contract while recognising that the State cannot be compelled to compromise its core public duties.⁶⁸ The importance of this approach is underscored by the French Conseil d'État in the *Fosmax LNG* case, where the court partially quashed an award because the tribunal had applied private-law rules to an administrative contract, ignoring a mandatory public-law rule permitting a developer to carry out works at a contractor's expense during a breach.⁶⁹

B. Arbitration-insolvency interface

One of the key problems in ongoing legal reform is the conflict between India's insolvency process and the enforcement of arbitral awards.⁷⁰ Under Section 14 of the Insolvency and Bankruptcy Code, 2016 ("IBC"), an automatic moratorium comes into force as soon as a

⁶³ Giovanna Martins de Santana, 'Public Interest in International Commercial Arbitration Involving States and State Entities' (MIDS Master Thesis, University of Geneva 2025) 1-2.

⁶⁴ *ibid* 3.

⁶⁵ *ibid* 40.

⁶⁶ *ibid* 42.

⁶⁷ *ibid* 40-41.

⁶⁸ *ibid* 41, 44.

⁶⁹ *Societe Fosmax LNG*, Conseil d'Etat (Ass), 9 November 2016, no 388806, ECLI:FR:CEASS:2016:388806.20161109.

⁷⁰ Ashutosh K Srivastava and Nuha Rahman, 'India's Evolving Arbitration Execution Framework: Practical Implications of Proposed 2025-26 Amendments' (SKV Law Offices, 16 March 2026) <<https://skvlawoffices.com/indias-evolving-arbitration-execution-framework-practical-implications-of-proposed-2025-26-amendments/>> accessed 18 April 2026.

company enters insolvency, halting all enforcement of arbitral awards. As a result, creditors are left waiting for long periods, effectively defeating the promise of swift resolution under the Arbitration Act.⁷¹ To address this, the law should allow limited carve-outs from the moratorium, permitting narrowly tailored enforcement measures, such as security orders, provided they do not reduce or drain the company's assets. A few targeted reforms could further reduce friction between the two regimes.

First, the law could introduce a fast-track approval process for the National Company Law Tribunal ("NCLT"), requiring it to decide within 30 days whether those parts of an arbitral award that do not affect the company's value may be enforced. Second, the IBC should clearly recognise interim protective measures granted by arbitral tribunals under Section 17 of the Arbitration Act, especially where such measures are intended to preserve assets or prevent value erosion during insolvency. Third, a formal mechanism for coordination and information-sharing between arbitral tribunals and insolvency professionals would improve the assessment of claims and reduce unnecessary delay. Without such changes, the continuing clash between arbitration law and insolvency law will create uncertainty and weaken investor confidence when businesses face financial distress.

C. The misuse doctrine as a deterrent

Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Private Ltd. highlighted the difficulty of execution in India, where repeated appeals by State entities can cause delays so severe that accumulated interest eventually surpasses the principal claim.⁷² To address this, scholars and practitioners have proposed a "misuse doctrine". Drawing on intellectual-property principles, this doctrine would impose a higher burden of proof on parties who use the appeal process to cause unreasonable delay.⁷³ A practical deterrent would require the immediate deposit of the full award amount into escrow before any appeal beyond the first stage is heard. This mitigates the risk of undue delay and discourages the use of the judicial system as a stalling tactic.⁷⁴

D. Specialised expert adjudication

There is a growing trend towards using sector-specific regulators, such as India's Central Electricity Regulatory Commission (CERC), to resolve disputes. These bodies combine

⁷¹ *ibid*; Insolvency and Bankruptcy Code 2016, s 14.

⁷² *Delhi Metro Rail Corporation Ltd v Delhi Airport Metro Express Private Ltd* (2024) 6 SCC 357; Anirudh Mehra, 'Dispute Resolution in Public-Private Partnership: The Role of Arbitration' (2024) 12(4) *Journal of Research in Humanities and Social Science* 166, 208.

⁷³ *ibid* 214.

⁷⁴ *ibid* 216.

technical, financial and legal expertise.⁷⁵ Unlike ad hoc arbitration, such statutory bodies operate under strict timelines, often 120 to 180 days, which yield more predictable and time-bound outcomes.⁷⁶ In *Uttar Pradesh Power Corporation Ltd. v. NTPC Ltd.*, the Supreme Court held that highly technical matters, such as tariff determination, require expertise beyond legal principles and should be entrusted to specialised commissions with minimal judicial interference.⁷⁷ Similarly, in *U.P. State Electricity Board v. Banaras Electric Light & Power Co. Ltd.*, the Court emphasised that the technicalities of infrastructure necessitate expert adjudication rather than traditional civil-court litigation. This move towards statutory expert bodies offers a promising alternative to the procedural complexities and delays often associated with current arbitration systems.⁷⁸

VIII. CONCLUSION

The evolution of PPP disputes in India calls for a necessary shift in approach. The distinction between public and private law should give way to a functional approach that reconfigures the boundaries of sovereignty. As this paper has argued, international commercial arbitration is the most viable option, provided it is supported by a rights-based test as established in *Vidya Drolia* and refined by *Racing Promotions*, because it prioritises the commercial character of the PPP contract while preserving the State's sovereign functions. Jurisdictions such as the United Kingdom, Georgia and Nigeria employ multi-step dispute-resolution mechanisms, whereas the Latin American experience illustrates the risks inherent in PPP projects. To ensure that India's arbitral framework remains both legitimate and effective, it is important to move beyond rigid procedures and to establish a reasoned framework that takes account of the public interest.

The clash between the Arbitration Act and the IBC remains a major gap. The automatic moratorium under the IBC prevents the enforcement of arbitral awards and thereby delays resolution. Lawmakers should allow limited exceptions to the moratorium so that arbitral outcomes remain enforceable. Furthermore, by adopting a functional approach that balances the "second look" doctrine with transparency, and by introducing a misuse doctrine to curb delaying tactics, India can make PPP arbitration an effective mechanism. Ultimately, this would strengthen the protection of public funds and support the rapid expansion of infrastructure under the PPP programme, advancing India's ambition to become a \$10 trillion economy by 2035.

⁷⁵ *ibid* 176.

⁷⁶ Electricity Act 2003, ss 61-64.

⁷⁷ *Uttar Pradesh Power Corporation Ltd v NTPC Ltd* (2011) 12 SCC 400.

⁷⁸ *UP State Electricity Board v Banaras Electric Light & Power Co Ltd* (2001) 5 SCC 323.