Inoperative Awards

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***Abstract*— This paper explores the concept of inoperative awards within the framework of international arbitration. An inoperative award arises when an arbitration agreement loses its legal effect due to factors such as procedural irregularities, lapse of time, or the dissolution of designated arbitral institutions. The distinction between inoperative, dormant, and null and void awards is examined, highlighting the legal and practical challenges each presents. Case studies—including Indian and German legal precedents—demonstrate how courts interpret and address such issues. The paper further analyzes the implications of inoperative awards on cross-border business transactions and investor confidence, emphasizing the need for clarity, standardization, and proactive measures by arbitral institutions and legal practitioners. It concludes with recommendations to enhance enforcement and maintain trust in arbitration as a reliable dispute resolution mechanism.**

Index Terms— Inoperative Award, arbitration agreement, international arbitration, enforceability, procedural irregularities, dormant awards, investor confidence, cross-border disputes

I. INTRODUCTION (HEADING 1)

Inoperative awards refer to cases where the arbitration agreement has ceased to have an effect by the time the court is asked to refer the parties to arbitration[1]. For example, if there has already been an arbitral award or a court decision with res judicata affect concerning the same subject matter and parties.

Inoperative awards in the context of arbitration agreements. When it comes to arbitration, the term "inoperative" refers to situations where the arbitration agreement has ceased to have effect. An arbitration clause becomes inoperative when it no longer has legal force or effect. Examples of scenarios leading to an inoperative arbitration agreement include Failure by the parties to comply with a time limit specified in the agreement. An implied revocation of the arbitration agreement due to the party's conduct. Other circumstances rendering the agreement ineffective.

The term "null and void" typically refers to cases where the arbitration agreement is invalid from the outset (e.g., due to lack of consent, fraud, or duress). The words "null" and "void" have the same meaning, as evidenced by the use of a single word in French and Spanish versions of the New York Convention.[2] They refer to the cases where the arbitration agreement is affected by some invalidity right from the beginning. In contrast, "inoperative" focuses on situations where the agreement ceases to be effective during the course of

[1] Tom Webster,Annulment of Awards for Arbitral Bias, 9 DISP.RESOL.INT'L5(2015)
[2] Leonard V.Quigley, Convention on foreign Arbitral Awards,58 A.B.A J.821 (1972)

proceedings. The expression "incapable of being performed" relates to practical aspects of arbitration proceedings. It applies when, for some reason, it becomes impossible to establish an arbitral tribunal (e.g., vague wording of the arbitration clause). Legal experts and authorities have provided varying interpretations of these terms, leading to some lack of uniformity.[3] Courts generally interpret contracts in favour of arbitration, emphasising the pro-arbitration stance. Courts strive to uphold the sanctity of such agreements while considering a practical feasibility.

A dormant award is an arbitration award that has been issued, but is not currently being enforced. Unlike an inoperative award, a dormant award is still considered valid and legally binding. Like the award might stipulate certain conditions that need to be met before enforcement can occur, such as payment of a specific fee. If a party appeals the award, it becomes dormant while the appeal is pending. A party might choose to delay enforcement for strategic reasons, such as waiting for the other party's financial situation to change. A dormant award can be revived and enforced at a later date. The specific process for revival depends on the jurisdiction and the terms of the award itself. The key difference lies in the legal validity of the award. An inoperative award is no longer legally binding, while a dormant award remains valid but unenforced for the time being.

Another example of arbitration agreements becoming inoperative resulted from the dissolution of the East Berlin Arbitration Court attached to the Chamber of Foreign Trade of the GDR[4] in the aftermath of German unification. The East Berlin Arbitration Court was an institution that facilitated the resolution of commercial disputes within the framework of the GDR. It operated as a specialised tribunal for handling arbitration cases related to trade and commerce. Its jurisdiction extended to matters involving both domestic and international parties. The Chamber of Foreign Trade was a key economic organisation in the GDR. It played a crucial role in managing foreign trade relations, promoting exports, and facilitating commercial transactions. The East Berlin Arbitration Court was attached to this chamber, making it an integral part of the GDR's Following the fall of the Berlin Wall and the subsequent reunification of Germany in 1990, significant changes occurred. The dissolution of the GDR led to the integration of East and West Germany into a single nation. As part of this process, institutions associated with the GDR underwent transformation or ceased to exist. The dissolution of the East Berlin Arbitration Court had implications for existing arbitration agreements. Agreements that had designated this court as the forum for dispute resolution became inoperative due to its closure. Parties who had previously relied on this court for arbitration had to seek alternative venues or mechanisms. After German reunification, the legal framework for arbitration underwent changes. Germany adopted the UNCITRAL Model Law on International Commercial Arbitration as part of its Code of Civil Procedure. These modifications aimed to enhance Germany's attractiveness as an arbitration venue and align its practices with global standards.

In summary, the dissolution of the East Berlin Arbitration Court exemplifies how historical events, such as the fall of the Berlin Wall and German reunification, can impact the efficacy of arbitration agreements. As legal systems evolve, parties must adapt to new realities and seek alternative avenues for resolving disputes.

In the case of Branch Manager, Bajaj Allianz Life Insurance Company Ltd and Others v. Dalbir Kaur[5], the Supreme Court of India addressed the issue of an inoperative award. The dispute arose from an insurance policy. The parties had an arbitration agreement, and the matter was referred to arbitration. The arbitral tribunal rendered an award in favour of the insured party. However, the insurer challenged the award before the court.The insurer argued that the award was inoperative due to certain irregularities during the arbitration

[3] Stefan Pislevik, I now pronounce you null or void : manner of determination and the applicable law under the New York Convention, 37,721-734, 2021

[4] Volker G. Heinz is a German attorney and notary public, Berlin and an English Barrister-at-Law, London Arthur L. Marriott is an English solicitor; both authors practise in London with Wilmer, Cutler & Pickering published in International Business Lawyer April 1992, pages 209 - 211

[5] Civil Appeal No. 3397 of 2020

proceedings. They claimed that the tribunal had exceeded its jurisdiction. The Supreme Court held that the award was not inoperative. It emphasised that mere irregularities or errors in the arbitral process do not render an award inoperative. The court upheld the award, emphasising the pro-arbitration stance. This case underscores the importance of respecting arbitral awards. Courts should be cautious in interfering with awards unless there are compelling reasons.

In summary, the Bajaj Allianz case reaffirms the principle that an award is not automatically inoperative due to procedural irregularities. It highlights the need to uphold the sanctity of arbitration agreements and awards in India.

Kammergericht Berlin[6] decision, which sheds light on an interesting aspect of arbitration clauses.

In this case, the parties had an arbitration agreement that referred to "arbitration in accordance with the Arbitration Rules of the German Central Chamber of Commerce" ("Schiedsregeln der deutschen zentralen Handelskammer"). By using this language, the parties made it clear that they intended to submit their disputes to arbitral proceedings administered by an arbitration institution set up by the German Chambers of Industry and Commerce.

The key takeaway here is that even when an arbitration institution is not explicitly named, the reference to a broader organisation or chamber can be interpreted as an intention to submit to a specific arbitration institution. In this instance, it was understood to refer to the German Institution of Arbitration ("DIS" – Deutsche Institution für Schiedsgerichtsbarkeit).

This decision highlights the importance of precision in drafting arbitration clauses and the need to consider the implications of general references to arbitration rules or institutions.

The scenario involving a non-existent arbitral institution could potentially relate to an inoperative award. If the arbitration clause becomes unenforceable due to the named arbitral institution not existing, the entire arbitration process might be disrupted. This could lead to an inoperative award in several ways:

- No Tribunal: Without a designated institution to administer the arbitration and appoint arbitrators, the tribunal itself might not be properly constituted. An award issued by an improperly constituted tribunal could be challenged as inoperative.
- Procedural Irregularities: The lack of a designated institution could create uncertainty about the applicable arbitration rules and procedures. This uncertainty could lead to procedural irregularities during the arbitration, potentially rendering the award inoperative.
- Public Policy Concerns: If the parties are left without a clear arbitration framework due to the non-existent institution, it might raise concerns about fairness and access to justice. This could be seen as a public policy concern that could impact the enforceability of the award.

It's important to note that the specific outcome would depend on the Kammergericht's decision. They might choose an alternative approach that salvages the arbitration agreement, such as severability or institutional gap fill. In those scenarios, the award might still be valid and enforceable.

However, the possibility of the arbitration clause being deemed unenforceable due to the non-existent institution does introduce the potential for an inoperative award.

II. Research Objective

To explore legal frameworks, practical challenges, and the best practices related to inoperative awards in international arbitration, aiming to enhance efficiency and confidence in the arbitral process

[6] Mr. Franz Sedelmayer v. The Russian Federation, Decision of the Kammergericht Berlin, Case No. 25 W 15/03

III. Research Methodology

The methodology adopted for the research is doctrinal, involving the study of primary sources including domestic and international regulations, Conventions and domestic legislation, policies, and case laws. Secondary sources include books written by erudite authors, encyclopaedias, articles from legal databases and other reliable internet sources. The researcher adopts uniform citation rules suggested in the 20th edition of Bluebook.

IV. Research Hypothesis

Effective measures to address inoperative awards can enhance the efficiency of international arbitration and bolster investor confidence However, whether it proves effective or disproves its adequacy remains a critical question.

V. Research Question

1. How do different legal systems handle inoperative awards? What provisions exist for enforcing dormant awards?
2. What impact do inoperative awards have on cross border business transactions and investor confidence?
3. How can arbitral institutions and practitioners proactively address inoperative awards?

VI. Scope of the study

The "scope" of an inoperative award delineates the extent to which it lacks legal enforceability. When an arbitration award becomes inoperative, it essentially becomes a mere document devoid of legal effect. This scope of inoperativeness can vary, offering different implications for the enforceability of the award. In instances of full inoperativeness, the entirety of the award is deemed unenforceable, precluding any of its provisions from being legally upheld. Conversely, partial inoperativeness may occur when specific aspects of the award are affected by procedural irregularities, while other parts remain valid. Additionally, indirect inoperativeness may arise when an award is technically enforceable but practically inoperable due to challenges in enforcing it against a losing party lacking assets in a jurisdiction where enforcement is feasible. The specific scope of inoperativeness hinges on factors such as the severity of the underlying reasons for invalidity and the presence of severability clauses within the arbitration agreement. Regardless of the scope, parties facing an inoperative award encounter significant challenge, necessitating alternative dispute resolution methods such as renegotiation or resorting to litigation in national courts. Understanding the scope of inoperative awards equips parties in international arbitration with insights to assess risks effectively and adopt proactive measures to mitigate the possibility of such occurrences.

VII. The Impact on cross-border business transactions and Investor confidence

Dormant awards undermine the purpose of dispute resolution. Parties invest time and resources in arbitration, and an unenforced award erodes confidence. Lack of uniformity in interpreting terms like “inoperative” and “incapable of being performed” can create uncertainty in cross-border transactions[7]. Firstly, when the business transactions, an award remains unenforced or dormant, it creates legal uncertainty for parties involved in cross-border transactions. Businesses rely on efficient dispute resolution mechanisms to safeguard

[7] Louis Del Duca, Enforcement of Foreign Arbitration Agreements and Awards: Application of the New York Convention in the United States, 10-2014

their interests. Inoperative awards disrupt this certainty. Secondly, Inoperative awards strain contractual relationships such where the parties may hesitate to engage in future transactions if they perceive that arbitration outcomes are not effectively enforced. Thirdly, the time, effort, and financial resources invested in arbitration become futile if the award remains dormant. This discourages businesses from choosing arbitration as a preferred method of dispute resolution. On the other hand, Investor Confidence has considered the enforceability of arbitral awards when making investment decisions. Inoperative awards raise concerns about the reliability of the dispute resolution process. Secondly, its deterrent effect If investors perceive that their rights may not be adequately protected through arbitration, they might avoid cross-border investments altogether. This impacts economic growth and international trade. Thirdly, the jurisdictions known for ineffective enforcement of awards may suffer reputational damage. Investors prefer stable and predictable legal systems. For Mitigating Measures, harmonizing legal approaches to inoperative awards globally can enhance investor confidence. Investors and businesses need to understand the risks associated with inoperative awards. Arbitral institutions can play a role in educating stakeholders and some Streamlined procedures for enforcing awards are essential. Practitioners should actively pursue enforcement promptly after issuance. To maintain transparent reporting on enforcement statistics and successful outcomes can boost investor trust.

VIII. Proactive Measures by Arbitral Institutions and Practitioners

The proactive measures that both arbitral institutions and practitioners can take to enhance the effectiveness and efficiency of arbitration proceedings.[8] These steps aim to address potential issues and promote a smoother arbitration process:

- Standardised Clauses (Institutions): Arbitral institutions can develop and promote standardised arbitration clauses that act as templates for parties entering into contracts. These clauses should clearly define key aspects like: Applicable arbitration rules (e.g., those of the institution itself, or a designated body like the UNCITRAL Arbitration Rules) Appointing authority for arbitrators (the institution itself, or an alternative dispute resolution provider) Seat of arbitration (the location where the arbitration will be conducted) Language of the proceedings Standardised clauses promote clarity and consistency, reducing ambiguity that could lead to challenges later.
- Specificity (Practitioners): When drafting arbitration clauses, legal practitioners should ensure specificity. This means avoiding vague references like "a recognized arbitral institution" and instead naming a specific institution or relevant rules. Practitioners should also avoid ambiguities in procedural terms like "timely response" by defining deadlines or referencing relevant rules for determining timeliness.
- Meeting Deadlines: Both parties involved in arbitration, with guidance from their lawyers, must strictly adhere to deadlines set by the arbitral tribunal. These deadlines might include timeframes for submitting evidence, responding to requests for information, and filing briefs. Delays can be seen as procedural irregularities, potentially jeopardising the enforceability of the award.
- Cost Management: Early discussions about arbitration costs and potential cost escalation can help avoid disputes later in the process. Legal practitioners should advise their clients on the potential fee structure adopted by the arbitral institution and any additional costs associated with legal representation, witnesses, and expert testimony. Open communication about costs upfront can prevent delays or challenges related to cost disagreements.

[8] Julian D M Lew, Loukas A Mistelis, Stefan M Kroll, Comparative International Commercial Arbitration, Kluwer Law International, 2007

- Case Management (Institutions): Arbitral institutions can implement case management procedures to actively track the progress of ongoing arbitrations. This might involve assigning a case manager to oversee the process, scheduling regular meetings with the parties and the tribunal, and monitoring adherence to deadlines. Proactive case management allows the institution to identify potential delays or procedural issues early and take corrective measures to prevent them from derailing the arbitration.
- Early Intervention (Practitioners): Legal practitioners representing parties in arbitration should closely monitor the progress of the case. They should proactively address any concerns they have about procedural compliance or potential challenges to the award's enforceability. Early intervention can help rectify any issues before they snowball into inoperability.

- Information Resources (Institutions): Arbitral institutions can play a crucial role in educating parties and practitioners about the importance of procedural compliance in international arbitration. This can be achieved by developing informative resources such as brochures, online guides, or workshops that explain the potential consequences of non-compliance and the step's parties can take to ensure a smooth arbitration process.
- Client Communication (Practitioners): Legal practitioners have a duty to clearly explain to their clients the potential implications of procedural irregularities in arbitration. This includes educating them about the risk of inoperative awards and the importance of adhering to timelines and requirements set forth by the arbitral tribunal.

- Mediation Services (Institutions): Some arbitral institutions offer mediation or other alternative dispute resolution (ADR) services alongside arbitration. These services can be a valuable tool for parties seeking to resolve their dispute amicably before or during the arbitration process. By reaching a mutually agreeable solution, parties can avoid the complexities and risks associated with a full arbitration, including the possibility of an inoperative award.
- Settlement Discussions (Practitioners): Legal practitioners should actively encourage and facilitate settlement discussions between the parties throughout the arbitration process. Exploring settlement options can help parties reach a solution that is faster, more cost-effective, and less susceptible to challenges compared to a formal award.

- Enforcement Guidance (Institutions): Once an award is issued, arbitral institutions can provide resources and guidance to the prevailing party in the process of enforcing the award in different jurisdictions. This might involve information on specific legal requirements, available enforcement mechanisms, and potential challenges that could arise in the enforcement process.
- Strategic Enforcement Planning (Practitioners): Legal practitioners should work collaboratively with their clients to develop a strategic plan for enforcing the award. This plan should consider factors like Identifying the location of the losing party's assets is critical. Enforcement procedures and legal requirements can vary significantly depending on the jurisdiction. Practitioners should anticipate potential challenges, the other party might rise to resist enforcement, such as public policy concerns or procedural irregularities during the arbitration. Enforcing an award can be time-consuming and expensive. Practitioners should work with their clients to weigh the potential benefits of recovered funds against the costs associated with enforcement proceedings. In some cases, exploring post-award ADR options like mediation or negotiation can be a quicker and more cost-effective way to resolve the dispute and secure payment. Many jurisdictions have time limits for enforcing arbitration awards. Practitioners should be aware of these deadlines and act promptly to initiate enforcement proceedings.

Depending on the jurisdiction and the risk of asset dissipation by the losing party, practitioners might advise clients to seek security measures like freezing assets to ensure successful enforcement. Engaging qualified local counsel in the jurisdiction where enforcement is sought can be crucial. Local lawyers can provide expert guidance on navigating the specific legal framework and procedures for enforcement. By providing comprehensive post-award assistance, both arbitral institutions and legal practitioners can significantly enhance the effectiveness of international arbitration and ensure that parties can benefit from their hard-won awards.

IX. CONCLUSION

The challenge of inoperative awards in international arbitration compels both arbitral institutions and practitioners to take proactive steps. By working together, they can craft clear and concise arbitration clauses, ensure all parties meet deadlines, and monitor progress throughout the process. Educational initiatives and open communication are key to fostering compliance. Encouraging amicable solutions and providing post-award assistance further bolster the system's effectiveness. Through these collaborative efforts, the international arbitration community can solidify its reputation for efficiency and fairness, offering a reliable framework for resolving international disputes.

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[3] Stefan Pislevik, *I Now Pronounce You Null or Void: Manner of Determination and the Applicable Law Under the New York Convention*, 37 Int'l J.L. 721 (2021).

[4] Volker G. Heinz & Arthur L. Marriott, *International Arbitration – Developments and Challenges*, Int'l Bus. Law., Apr. 1992, at 209. *Branch Manager, Bajaj Allianz Life Insurance Co. Ltd. v. Dalbir Kaur*, Civil Appeal No. 3397 of 2020 (India).

[5] *Sedelmayer v. Russian Federation*, Kammergericht Berlin, Case No. 25 W 15/03 (Ger.).

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