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## **Charting a Functionalist Business-Centred Approach to Sustainable Development Goal 16.3 through Business-to-Business Arbitration**

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## Charting a Functionalist Business-Centred Approach to Sustainable Development Goal 16.3 through Business-to-Business Arbitration

### Abstract

The aim of this article is to establish a link between business-to-business arbitration and sustainable development, and to demonstrate the potential impact of a functionalist business-centred approach to this relationship. While the United Nations Sustainable Development Agenda 2030 acknowledges the importance of civil access to justice for sustainable development, it does not fully define access to justice, thereby leaving open to interpretation what types of alternative dispute resolution mechanisms Agenda 2030 envisages, and which parties should have access to them. Building on Cappelletti and Garth's work on waves of access to justice, the article proposes a 'functionalist business-centred approach' to access to justice. Using legal functionalism, this article argues for a novel interpretation of access to justice in the sustainable development discourse that would expressly include business-to-business arbitration as a civil justice institution on the premise that without business-to-business arbitration, access to justice as a sustainable development goal as expressed in SDG 16.3 cannot be fully actualised.

**Keywords – access to justice, arbitration, development, rule of law, sustainable, sustainable development goals (SDGs)**

### I. INTRODUCTION

The aim of this article is to establish a link between business-to-business arbitration (B2B) and sustainable development, and to demonstrate the potential impact of a functionalist business-centred approach to this relationship. Building on Cappelletti and Garth's work on waves of access to justice (A2J),<sup>1</sup> this article identifies the role of B2B arbitration in sustainable development as a new wave for reform. In 2019, four years after the adoption of the United Nations (UN) Agenda 2030,<sup>2</sup> the United Nations Inter-agency and Expert Group on Sustainable Development Goals (IAEG-SDGs) conducted a Comprehensive Review of the global indicator framework and decided to include civil A2J as an additional indicator for monitoring progress towards the sustainable development goals (SDGs).<sup>3</sup> The UN expressly acknowledged that the presence of indicators tracking progress on two distinct aspects of criminal justice and the absence of such indicators on civil justice in SDG 16.3 which seeks to 'promote the rule of law ... and ensure equal access to justice for all' created a gap in accurate data monitoring, a gap which needed to be plugged. The rationale for this express acknowledgement in SDG 16 lay in the need, *inter alia*, to assess the 'overall accessibility of

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<sup>1</sup> Mauro Cappelletti and Bryant Garth, (eds.), *Access to Justice* (Giuffrè; Sijthoff and Noordhoff, 1978); Mauro Cappelletti and Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective* 27 Buffalo Law Review, no. 2 (1978), 181; Mauro Cappelletti and Bryant Garth (eds.), *Access to Justice and the Welfare State* (EUI, 1981).

<sup>2</sup> United Nations General Assembly, *Transforming our World: the 2030 Agenda for Sustainable Development UN Doc. A/RES/70/1* adopted by the seventieth session of the United Nations General Assembly on 25 September 2015.

<sup>3</sup> United Nations Economic and Social Council, *Report of the Inter-Agency and Expert Group on Sustainable Development Goal Indicators* (UN Doc. E/CN.3/2020/2) 15.

civil justice institutions and processes, barriers, and reasons for exclusion of some people<sup>4</sup> and a recognition of the role that a more holistic view of access to justice may play in attaining sustainable development by the target end date.

This expansion of access to justice in Agenda 2030 to include civil justice mechanisms is welcome. Indeed, it reflects the recognition of the critical role effective justice systems play in upholding the rule of law and attaining sustainable development. However, Agenda 2030 does not fully define A2J, thereby leaving open to interpretation what types of mechanisms it envisages, and which parties should have access to them. This article therefore argues for a novel interpretation of A2J in the sustainable development discourse that would expressly include B2B arbitration as a civil justice institution on the premise that without B2B arbitration, access to justice as a sustainable development goal cannot be fully actualised. In doing so, the article makes two inter-related claims. Firstly, the article claims that B2B arbitration contributes to the functionalist aims of the SDGs. Recognising A2J broadly within Agenda 2030 to encompass both criminal and civil justice mechanisms, and explicitly extending this recognition to include B2B arbitration, aligns with the functionalist objectives of A2J and the broad articulation of the linkages between access to justice and development adopted by the SDGs. B2B access to justice furthers the goal of sustainable development by encouraging States to improve the functioning of formal and informal dispute resolution mechanisms by embracing more flexible forms of dispute settlement while also equipping the population in their demand for effective civil justice systems. The second claim the article makes is that empowering businesses to exercise their A2J right adds value to achieving Agenda 2030 by the target end date. Explicitly extending A2J to businesses in this way recognises the critical contribution that businesses make to the global economy, the indispensable role that they play in attaining sustainable development and their instrumentality for achieving the SDGs.<sup>5</sup> Businesses are important stakeholders in driving the SDGs not just due to their economic contributions, but also because of the impacts of their activities on employees, consumers, communities, and the environment. To make their contributions and to be empowered to fulfil their responsibilities towards other stakeholders however, they need a legal environment in which they can thrive. An essential component of this legal environment includes the existence of effective justice systems and access to justice forums in which they can efficiently resolve their disputes.

The potential significance of B2B arbitration for sustainable development has gone understudied in two distinct ways. First, the literature on access to justice has focussed mainly on aspects of the criminal justice system including legal aid for vulnerable groups

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<sup>4</sup> IAEG-SDGs, *2020 Comprehensive Review Proposals Submitted to the 51st session of the United Nations Statistical Commission for its Consideration*, available at: <<https://unstats.un.org/sdgs/iaeg-sdgs/2020-comprev/UNSC-proposal/>>, accessed August 25, 2024.

<sup>5</sup> Organisation for Economic Co-operation and Development, “The Role of the Business Sector with Respect to the SDGs,” in *Industrial Policy for the Sustainable Development Goal: Increasing the Private Sector’s Contribution* (OECD Publishing, Paris 2021) 27; Namit Agarwal, Uwe Gneiting and Ruth Mhlanga, *Raising the Bar: Rethinking the Role of Business in the Sustainable Development Goals*, (Oxfam Discussion Papers, February 2017), available at: <[https://www-cdn.oxfam.org/s3fs-public/dp-raising-the-bar-business-sdgs-130217-en\\_0.pdf](https://www-cdn.oxfam.org/s3fs-public/dp-raising-the-bar-business-sdgs-130217-en_0.pdf)>, accessed September 26, 2022; Jason Miklian, *The Role of Business in Sustainable Development and Peacebuilding: Observing Interaction Effects* 21 *Business and Politics*, no. 4 (2019), 569.

with fewer authors discussing the importance of civil A2J.<sup>6</sup> Although criminal justice is critical to the maintenance of social order, civil disputes are also frequent legal problems and if left unresolved, may contribute to social instability and undermine inclusive growth.<sup>7</sup> Additionally, where the literature does discuss civil access to justice, it does so largely from the perspective of litigation and formal courts as the fulcrum upon which access to justice rests.<sup>8</sup> In comparison, there is less focus on access to justice in the context of alternative dispute resolution (ADR) mechanisms including B2B arbitration. Although a few works address access to justice in commercial and investment arbitration, they do so outside of the confines of the SDGs.<sup>9</sup> This article therefore turns the spotlight onto the potential of B2B arbitration to contribute to Agenda 2030 and argues that B2B arbitration should be explicitly recognised by the SDGs as contributing to long-lasting sustainable development.

Second, discussions on access to justice focus largely on its existence as a right for natural persons and communities, usually in the context of human rights and capacity development,<sup>10</sup> and human rights protection.<sup>11</sup> Indeed, there are increasingly more sophisticated regulatory and policy frameworks on regional and global scales aimed at the protection of human rights with components of access to justice at their core.<sup>12</sup> In contrast, less attention has been given to civil access to justice for juristic persons in their distinct capacity as legal entities. While acknowledging that access to justice in these contexts and for women,<sup>13</sup> persons living in poverty,<sup>14</sup> and the vulnerable<sup>15</sup> are acute problems in comparison to access to civil justice in business settings, there is a need to also shed light on civil access to justice particularly in the context of B2B arbitration, which becomes relevant to issues that occur very frequently in peoples' lives in their capacity as businesspersons with potentially significant impacts on their civil rights and obligations.

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<sup>6</sup> Organisation for Economic Co-operation and Development and Open Society Foundations, *Legal Needs Surveys and Access to Justice*, 3 available at: <[https://www.oecd-ilibrary.org/governance/legal-needs-surveys-and-access-to-justice\\_g2g9a36c-en](https://www.oecd-ilibrary.org/governance/legal-needs-surveys-and-access-to-justice_g2g9a36c-en)>, accessed January 20, 2024; Imane Chaara, Jean-Benoit Falisse and Julien Moriceau, *Does Legal Aid Improve Access to Justice in 'Fragile' Settings? Evidence from Burundi*, 59 *Journal of Peace Research*, no. 6 (2022), 810.

<sup>7</sup> Organisation for Economic Co-operation and Development, *Equal Access to Justice for Inclusive Growth: Putting People at the Centre* (OECD Publishing: Paris, 2019).

<sup>8</sup> A. Gillespie and S. Weare, "Funding Access to Justice," in A. Gillespie and S. Weare (eds.), *The English Legal System* (9th ed., Oxford University Press, 2023), p. 376; Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2010), p. 115.

<sup>9</sup> Leonardo VP de Oliveira and Sara Hourani (eds.), *Access to Justice in Arbitration: Concept, Context and Practice* (Kluwer Law International, 2021).

<sup>10</sup> United Nations Development Program, *Programming for Justice: Access for All – A Practitioner's Guide to a Human-Right-Based Approach to Access to Justice* (Bangkok: UNDP 2005) 5.

<sup>11</sup> F. Francioni, "The Rights of Access to Justice under Customary Law" in F. Francioni (ed.), *Access to Justice as a Human Right* (Oxford University Press, 2007), p. 24.

<sup>12</sup> See for example, African Charter on Human and Peoples' Rights 1981.

<sup>13</sup> See for example, Council of Europe, *Women's Access to Justice: Delivering on the Istanbul Convention and other European Gender Equality Standards in the Eastern Partnership Countries (2019-2022)*, available at: <https://www.coe.int/en/web/genderequality/strengthening-access-to-justice-for-women-victims-of-violence-2019-2021->>, accessed August 25, 2022.

<sup>14</sup> See for example, I. van de Meene and B. van Rooij, *Access to Justice and Legal Empowerment: Making the Poor Central in Legal Development Cooperation* (Leiden University Press, 2008).

<sup>15</sup> See for example, N. Creutzfeldt, C. Gill, M. Cornelis, and R. McPherson, *Access to Justice for Vulnerable and Energy-Poor Consumers: Just Energy?* (Hart Publishing, 2021).

With this in mind, this article breaks new ground by proposing a ‘functionalist business-centred approach’ to A2J which expressly formalises the functional role of B2B arbitration in the definition of SDG 16.3 for actualising Agenda 2030. This ‘functionalist business-centred approach’ hinges on the functional approach to law prevalent in comparative law studies, which concerns itself with the law’s operative role in society and the assessment of institutions based on the social utility of the functions they perform.<sup>16</sup> By adopting of the functional conception of law/legal functionalism, this article assists in promoting a fuller understanding of law’s role in society. On this premise, the functionalist business-centred approach examines B2B arbitration through the lens of its function as a legal method of accessing justice in accordance with Raz’s classification scheme for law’s social functions.<sup>17</sup> Following the direct function classification of law for ‘Providing Facilities for Private Arrangements between Individuals’ and ‘The Provision of Services and the Redistribution of Goods’, the article highlights the legal function of B2B arbitration as an alternative means of privately resolving disputes and how the functionality of B2B arbitration as a civil justice institution may assist in the actualisation of sustainable development. The article contends that there is value in adopting the functionalist business-centred approach in the interpretation of SDG 16.3 given the objective of B2B arbitration to provide more effective and flexible access to justice for businesses while supporting the establishment of a legal architecture oriented towards sustainable economic growth.

In view of this, the rest of the article is structured as follows. In part II, the article examines the meaning of A2J and establishes a conceptual framework for it. This conceptualisation enables its operationalisation beyond litigation and the criminal justice system for the purposes of laying the foundation of the multidimensional nature of access to justice. In part III, I argue that B2B arbitration can assist in the service of sustainable development and demonstrate that B2B arbitration constitutes an important part of access to justice and because of its popular use for the resolution of business disputes, the discourse on Agenda 2030 cannot be complete without it. Part IV discusses the ‘functionalist business-centred approach’ to access to justice through B2B arbitration in more detail. This part sets out what the value of operationalising SDG 16.3 to include B2B arbitration will be for sustainable development. Part V concludes the article on the note that an expansion to the discourse on access to justice is required to assist in the attainment of the objective of meeting today’s needs without compromising the ability of future generations to meet their own.<sup>18</sup>

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<sup>16</sup> K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, (3rd ed., Oxford: Oxford University Press, 1998), p. 32; R. Michaels, “The Functional Method of Comparative Law” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, (2nd ed., Oxford: Oxford University Press, 2019), p. 345; Roscoe Pound, *Jurisprudence* (West Publishing Company, 1959), p. 1; F. Cohen, *The Legal Conscience: Selected Papers* (Yale University Press, 1960), p. 79.

<sup>17</sup> Joseph Raz, “On the Functions of Law” in A.W. Brian Simpson (ed.), *Oxford Essays in Jurisprudence, Second Series* (Clarendon Press, Oxford, 1973), pp. 278-304; Robert S. Summers and Charles G. Howard, *Law, Its Nature, Functions and Limits* (2nd ed., Prentice-Hall, 1972).

<sup>18</sup> G. Harlem Brundtland, *Our Common Future: Report of the World Commission on Environment and Development* (Geneva: United Nations General Assembly Document A/42/427, 1987).

## II. DEVELOPMENT OF ACCESS TO JUSTICE

Notwithstanding the importance that international law places on access to justice as a cornerstone for protecting, respecting and fulfilling human rights,<sup>19</sup> there is no single universally accepted definition of the concept of access to justice. Much of the existing literature is directed at issues such as the elements of A2J, who should have access to justice, and for what purpose.<sup>20</sup> According to Francioni, access to justice is the ‘individual's right to obtain the protection of the law and the availability of legal remedies before a court or other equivalent mechanism of judicial or quasi-judicial protection.’<sup>21</sup> Friedman argues that peoples’ perception of access to justice usually revolves around the issue of ‘whether there is a realistic and practical way of turning this claim into reality, and of pursuing this complaint.’<sup>22</sup> This view is reinforced by the World Justice Project which equates access to justice to ‘the ability of all people to seek and obtain effective remedies through accessible, affordable, impartial, efficient, effective and culturally competent institutions of justice’.<sup>23</sup>

Access to justice is recognised as constituting a legal right in itself and as encompassing various core human rights (including the right to a fair trial and the right to an effective remedy) with its foundation in the idea that the processes, structures and institutions for enforcing legal rights must be practically and equally accessible to every citizen.<sup>24</sup> It is guaranteed in global and regional human rights conventions which contain obligations not only that states protect the right of access to justice and its exercise but also that they harmonise domestic law to remove any obstacles that may hinder compliance with treaty obligations. For example, state parties to the ICCPR have undertaken to ensure that any person whose rights or freedoms are violated shall have an effective remedy by having their rights determined by competent authorities provided for by the legal system of the state.<sup>25</sup> States, as duty bearers, have a fundamental duty to facilitate the expression of legitimate claims by individual right holders and ensure that everyone has the practical capacity to

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<sup>19</sup> C. Wallgren-Lindholm, “ADR and Business” in Jean-Claude Goldsmith, A. Ingen-Housz and Gerald H. Pointon (eds.), *ADR in Business and Issues across Countries and Cultures* (Kluwer Law International, 2006), p. 3.

<sup>19</sup> A. Nylund, “Access to Justice: Is ADR a Help of Hindrance?” in Laura Ervo and Anna Nylund (eds.), *The Future of Civil Litigation – Access to Courts and Court-Annexed Mediation in the Nordic Countries* (Springer Cham, 2014), pp. 325-344; Damilola Olawuyi, *Aguan Biogas Project and the Government of the United Kingdom: Legal and International Human Rights Assessment* 4 Queen Mary Law Journal, no. 3 (2013), 48.

<sup>20</sup> Lawrence M. Friedman, *Access to Justice: Some Historical Comments* 37 Fordham Urban Law Journal (2010), 3; Nourit Zimmerman and Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective* 37 Fordham Urban Law Journal (2010), 473.

<sup>21</sup> F. Francioni, “Access to Justice, Denial of Justice, and International Investment Law” in Dupuy Pierre-Marie, Petersmann Ernst-Ulrich and Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009), p. 63.

<sup>22</sup> *ibid.*

<sup>23</sup> Mark David Agrast et al, *WJP Rule of Law Index® 2012-2013* (Washington, D.C.: The World Justice Project), 27 available at: <<https://worldjusticeproject.org/sites/default/files/wjproli2012-web.pdf>>, accessed August 7, 2022.

<sup>24</sup> Nathy Rass-Masson and Virginie Rouas, *Effective Access to Justice* (Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, European Union, 2017), p. 22.

<sup>25</sup> Article 2(3).

enforce their rights.<sup>26</sup> Regardless of the different perspectives taken to define access to justice, the consensus appears to be that access to justice is both a theoretical and practical concept which has morphed into a law reform movement for legal and social change.<sup>27</sup>

In the context of sustainable development, ‘law and justice’ had not been expressly included in universally agreed documents such as the United Nations Millennium Declaration<sup>28</sup> even though access to justice has long been established as a core element of the rule of law.<sup>29</sup> However, following high profile campaigns, justice and access to justice are now, by specific inclusion in SDG 16, internationally acknowledged as a multidimensional and independent SDG critical to advancing inclusive economic growth, reducing inequalities and building well-functioning institutions.<sup>30</sup> Overall, SDG 16 calls for the promotion of peaceful, inclusive and just societies for sustainable development while highlighting the need for effective and inclusive institutions at all levels. In comparison to the Millennium Development Goals (MDGs) which recognised the importance of the rule of law, democracy and dispute settlement but did not attach any specific goals to them, Agenda 2030 specifically identified access to justice as a development goal and recognized the critical role that it plays in attaining sustainable development.<sup>31</sup> Consequently therefore, access to justice is a newly established sustainable development goal and a principle of the rule of law with substantive and procedural aspects including access to understandable legal information, legal representation and to appropriate non-legal support.<sup>32</sup> It is noteworthy that the SDGs do not constitute law<sup>33</sup> and are non-legally binding economic, social, and environmental pathways adopted by all UN member states to achieve a sustainable world by 2030.<sup>34</sup> They are standards to be fulfilled by national governments and relevant stakeholders subject to domestic adaptation and implementation. Nevertheless, the SDGs constitute globally accepted concrete aspirations for attaining sustainable development which has been succinctly described as development that ‘meets the needs of the present without compromising the ability of future generations to meet their own needs.’<sup>35</sup>

The UN draws attention to the need to consider access to justice in the sustainable development discourse by setting it as a subgoal in SDG 16, with SDG 16.3 specifically

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<sup>26</sup> Organisation for Economic Co-operation and Development, *Building a Business Case for Access to Justice* (An OECD White Paper in collaboration with the World Justice Project), p. 3.

<sup>27</sup> Mauro Cappelletti and Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective* 27 Buffalo Law Review, no. 2 (1978), 181.

<sup>28</sup> (A/RES/55/2) Resolution adopted by the General Assembly and signed on 18 September 2000. The Millennium Development Goals (MDGs) were derived from this Declaration.

<sup>29</sup> Lord T Bingham, *The Rule of Law* (Penguin Books, 2010), p. 8.

<sup>30</sup> *President of the General Assembly’s High-level event on the Contributions of Human Rights and the Rule of Law in the Post-2015 Development Agenda*, Background Note, 9–10 June 2014.

<sup>31</sup> Julinda Beqiraj, *Future Perfect: Measuring Access to Justice in the Post-2015 Development Framework*, Public Law (2016), 546.

<sup>32</sup> United Nations General Assembly, “Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels” (Sixty-seventh session A/RES/67/1, 30 November 2012) paras 14-16.

<sup>33</sup> Duncan French, *The Global Goals: Formalism Foregone, Contested Legality and ‘Re-Imagings’ of International Law*, Ethiopian Yearbook of International Law (2017), 165.

<sup>34</sup> Julinda Beqiraj (2006), *supra* note 31, at 549.

<sup>35</sup> Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report, Oslo, 20 March 1987) para 27.

addressing access to justice as one of the targets towards attaining the ultimate goals of ending poverty, protecting the planet and attaining peace and prosperity for all.<sup>36</sup> A critical aspect of SDG 16.3 is the intrinsic link between access to justice and the rule of law with access to justice seen as an essential element of the rule of law and justice.<sup>37</sup> Without people's ability to enforce their rights when infringed upon through functional institutions of a justice system, there can be no rule of law. Access to justice is therefore an important element of the rule of law,<sup>38</sup> in the absence of which people are unable to have their voices heard or exercise their rights.<sup>39</sup> For access to justice to be fully operational therefore and for the rule of law to be firmly established, natural and juristic persons need to see that the institutions of the state – not least those of the justice system – are there to efficiently serve them. At a minimum, achieving that requires providing adequate legal measures for protecting rights and redressing wrongs, and the existence of efficient and impartial courts and tribunals that guarantee fair and efficient trials.

The World Bank sees access to justice as an important element of development, arguing that given the status of justice as a public service, a 'lack of access to justice is itself a central dimension of poverty'.<sup>40</sup> The Bank emphasised that a functioning justice system is an important part of 'a capable and accountable state'<sup>41</sup> which provides better public services where people expect to live in a fair society. These expectations include ensuring that there is effective implementation of laws, and that the justice system functions as broadly and accessibly as possible. As B2B arbitration is an important strand of access to justice, the discourse and efforts targeted at attaining sustainable development through SDG 16.3 ought to expressly acknowledge the role that B2B arbitration can play in the service of sustainable development.

Historically however, access to justice was traditionally and functionally used as a term synonymous with access to courts and the criminal justice system<sup>42</sup> attendant with effective remedies, due process, fair trial, affordability, language and geographical accessibility or simply with judicial protection and redress.<sup>43</sup> In the first wave, the interpretation and operationalisation of access to justice was frequently limited to formal courts and the criminal

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<sup>36</sup> United Nations General Assembly, *supra* note 1.

<sup>37</sup> Leanne McKay, *Toward a Rule of Law Culture: Exploring Effective Responses to Justice and Security Challenges - A Practical Guide* (United States Institute of Peace, Washington 2015), p. 249.

<sup>38</sup> Hazel Genn, *What is Civil Justice for? Reform, ADR, and Access to Justice?*, 24 *Yale Journal of Law and the Humanities* (2012), 397 at 401.

<sup>39</sup> William Lucy, *Access to Justice and the Rule of Law*, 40 *Oxford Journal of Legal Studies*, no. 2 (2020), 377.

<sup>40</sup> International Bank for Reconstruction and Development, *The World Bank: New Directions in Justice Reform – A Companion Piece to the Updated Strategy and Implementation Plan on Strengthening Governance, Tackling Corruption* (Washington, May 2012) 1, available at: <<http://documents.worldbank.org/curated/en/928641468338516754/pdf/706400REPLACEM0Justice0Reform0Final.pdf>>, accessed August 22, 2022.

<sup>41</sup> *Ibid.*

<sup>42</sup> *R v Secretary of State for the Home Department ex parte Leech (no 2)* [1994] QB 198 at 210A; *R v Lord Chancellor ex parte Witham* [1998] QB 575; Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 1 *Fordham Urban Law Journal* [2010], 3.

<sup>43</sup> European Union Agency for Fundamental Rights, *Access to Justice in Europe: An Overview of Challenges and Opportunities* (Luxembourg: Publications Office of the European Union 2011) 3, available at: <<https://fra.europa.eu/en/publication/2011/access-justice-europe-overview-challenges-and-opportunities>>, accessed August 7, 2022.

justice system. Access to justice was often interpreted as the fundamental right to protect one's rights through a court of law guaranteed by national constitutions and international charters including the United Nations Universal Declaration of Human Rights<sup>44</sup> and the Convention on International Access to Justice.<sup>45</sup> In developing justice mechanisms and measuring their functionality, governments and organisations have historically prioritised access to justice for criminal justice delivery<sup>46</sup> especially in the legal aid discourse. For example, in seeking to surmount access to justice challenges in England and Wales, the Ministry of Justice viewed criminal access to justice as more important and agreed to promote access to criminal justice only by raising criminal legal aid fees in contrast to civil legal aid.<sup>47</sup>

Similarly, Agenda 2030 was initially adopted in 2015 with only two indicators tracking progress on aspects of the criminal justice system in relation to victims of violent crime (SDG 16.3.1) and suspected perpetrators (SDG 16.3.2). This was despite growing evidence that most legal needs, although variable between countries, were civil rather than criminal in nature and they were having a strong impact on citizens' rights and entitlements,<sup>48</sup> with about 49 per cent of people (approximately 1.4 billion) unable to meet their legal needs.<sup>49</sup> The civil problems include money-related problems, land and property disputes, consumer law and employment issues<sup>50</sup> encountered largely by individuals of low and moderate incomes which, left unresolved, create and perpetuate poverty and social inequality leading to marginalisation and social exclusion<sup>51</sup> thereby highlighting the social function of A2J.

Since the 1970s however, after the conclusion of the pioneering Florence Access to Justice Project by Cappelletti and Garth,<sup>52</sup> A2J has evolved beyond the first wave into a multidimensional concept with a broadened meaning traversing both the criminal and civil

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<sup>44</sup> United Nations General Assembly Resolution 217 proclaimed on 10 December 1948 in Paris, France.

<sup>45</sup> Convention on International Access to Justice no. 26112 concluded at the Hague on 25 October 1980.

<sup>46</sup> Organisation for Economic Co-operation and Development and Open Society Foundations, *Understanding Effective Access to Justice*, Workshop Background Paper held 3-4 November 2016 at OECD Conference Centre Paris 2, available at: <<https://www.oecd.org/gov/Understanding-effective-access-justice-workshop-paper-final.pdf>>, accessed January 20, 2024.

<sup>47</sup> The Bar Council, *Access Denied: The State of the Justice System in England and Wales in 2022* (November 2022) 2, available at: <<https://www.barcouncil.org.uk/static/88a28ac3-5866-4d73-99ecb9b05c03c815/2beb064f-0c2c-4408-aa037090e489c45e/Bar-Council-Access-denied-November-2022.pdf>>, accessed January 28, 2024.

<sup>48</sup> Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Bloomsbury Publishing, 1999), pp. 21-66; Ben van Velthoven and Marijke Ter Voert, *Paths to Justice in the Netherlands: Looking for Signs of Social Exclusion* (Leiden University, 2004) 5, available at: <<https://scholarlypublications.universiteitleiden.nl/handle/1887/15793>>, accessed August 20, 2024.

<sup>49</sup> World Justice Project, *Measuring the Justice Gap: A People-Centered Assessment of Unmet Justice Needs around the World* (Task Force on Justice, background paper, April 2019), p. 14.

<sup>50</sup> Pascoe Pleasence, Nigel J Balmer and Rebecca L Sandefur, *Paths to Justice: A Past, Present and Future* (UCL Centre for Empirical Legal Studies 2013) 62, available at: <<https://www.nuffieldfoundation.org/sites/default/files/files/PTJ%20Roadmap%20NUFFIELD%20Published.pdf>>, accessed January 20, 2024.

<sup>51</sup> Ab Currie, *A National Survey of the Civil Justice Problems of Low- and Moderate-Income Canadians: Incidence and Patterns*, 3 International Journal of the Legal Profession (2006), 217 at 218; Legal and Advice Services: *A Pathway out of Social Exclusion* (Joint Report by Lord Chancellor's Department and Law Centres Federation 2001) 1.

<sup>52</sup> A four-year comparative research project condensed into a four-volume treatise – M. Cappelletti and B. Garth, (eds.), *Access to Justice* (Giuffrè, Sijthoff and Noordhoff, 1978).

justice systems and its meaning keeps evolving.<sup>53</sup> The concept has become widely understood to extend beyond the formal courts and criminal justice system to the civil justice system with the recognition of a wider variety of mechanisms through independent and impartial tribunals established by law.<sup>54</sup> The access to justice system does not necessarily mean courts and litigation alone and for there to be meaningful access to justice, there must be some element of fairness and equity in a system to guarantee the exercise and protection of basic rights.<sup>55</sup> Several international treaties including article 2 of the International Covenant on Civil and Political Rights (ICCPR)<sup>56</sup> emphasize the civil and non-court aspect of access to justice, imposing an all-encompassing duty of access to justice by recognising not just the institutions set up by States but also those set up by private institutions and/or parties including ADR for the purpose of enforcing rights and delivering effective remedies.<sup>57</sup> In addition, the United Nations Guiding Principles on Business and Human Rights (UNGPs) specifically acknowledge non-judicial resolution mechanisms including B2B arbitration as playing an essential role in complementing and supplementing the courts in the dispensation of justice. In its status as the first authoritative global standard aimed at preventing and addressing the risk of adverse human rights impacts from business activities, ensuring access to effective remedy (Pillar III) forms one of UNGPs' three pillars for *inter alia*, 'contributing to a socially sustainable globalization'. Specifically, in paragraph 27, the UNGPs recognise that even the best and most well-resourced judicial systems may not always be effective enough to address all alleged abuses. Similarly, not all abuses can be solely remedied by judicial means neither are judicial remedies always desirable for certain grievances.<sup>58</sup>

With judicial procedures in civil proceedings sometimes spanning years with attendant high opportunity costs,<sup>59</sup> and little flexibility in evidential and procedural rules, as well as the potential straining of working business relationships between parties due to the adversarial nature of litigation,<sup>60</sup> the presumption that courts are functionally and operationally the principal forum for justice delivery continued to be eroded.<sup>61</sup> ADR mechanisms have continued to develop as a complementary mechanism to the court system and have gained popularity as alternative justice institutions for promoting civil A2J alongside the courts. This may have contributed to the shift in Agenda 2030 which contained no indicator focusing on

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<sup>53</sup> Estelle Hurter, *Access to Justice: To Dream the Impossible Dream?*, 44 International Law Journal of Southern Africa, no. 3 (2011), 408.

<sup>54</sup> F. Francioni, "The Rights of Access to Justice under Customary Law" in Francesco Francioni (ed.), *Access to Justice as a Human Right* (Oxford University Press, 2007), p. 3.

<sup>55</sup> Organisation for Economic Co-operation and Development, "Designing People-Centred Legal and Justice Services" in *Equal Access to Justice for Inclusive Growth* (OECD Publishing, Paris 2019), p. 102.

<sup>56</sup> 1966, 999 UNTS 171. Multilateral treaty adopted by the United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966 and in force from 23 March 1976.

<sup>57</sup> Other UN instruments that safeguard access to justice include United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) 1998.

<sup>58</sup> *Ibid*, 30.

<sup>59</sup> John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press, 2014), p. 1.

<sup>60</sup> Susan Blake and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press, 2011), p. 6.

<sup>61</sup> Lorna McGregor, *Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR* 26 European Journal of International Law, no. 3 (2015), 607 at 608.

civil access to justice until 2020 when the IAEG-SDGs proposed the inclusion of an indicator measuring the overall accessibility of civil justice institutions and processes.<sup>62</sup> Indeed, the UN recognised the need for a shift from the traditional understanding of A2J and the complementarity of ADR when it addressed civil access to justice through SDG indicator 16.3.3 which seeks to measure the ‘proportion of the population who have experienced a dispute in the past two years and who accessed a formal or informal dispute resolution mechanism, by type of mechanism’. In doing so, the UN sought to close an important gap in the global monitoring framework for the implementation of the SDGs through measuring whether people who have civil legal problems can obtain legal advice, assistance, or representation, and ultimately resolve their problems via institutions other than the courts.

It is in the context of the weaknesses of the court system that ADR mechanisms have grown as additional measures through which access to justice may be exercised in civil suits.<sup>63</sup> These mechanisms were identified by authors including Cappelletti and Garth as a way through which a civil justice system may become more efficient by diversifying and progressively reforming the mechanisms for resolving disputes.<sup>64</sup> This diversification recognises that courts should not necessarily be the dominant institutions for the resolution of civil disputes because non-judicial alternatives may be more appropriate for the effective interpretation of rights and responsibilities.<sup>65</sup> The ability of parties to effectively reach a consensual resolution of their disputes in relatively less adversarial circumstances constitutes part of a framework for justice acknowledged by international organisations and designed by the state as core to ensuring the maintenance of law and order in society.<sup>66</sup> It is on this premise, for example, that key developments in the English civil justice system including the ‘Practice Note: Commercial Court: Alternative Dispute Resolution’ and the subsequent Woolf Report which precipitated a review of the rules and procedures of the civil courts, recognised the importance and functionality of ADR in promoting access to justice and encouraged the use of ADR prior to, and during litigation.<sup>67</sup> Indeed, statistics have indicated a preference for ADR mechanisms and assessed them as operationally better at exercising the right of access to justice. For example, 76 per cent of respondents surveyed across Europe said that they were dissatisfied with the duration of proceedings when they used the courts to resolve a dispute in contrast to when they utilised other mechanisms.<sup>68</sup>

Despite the recognised benefits and preference, the growth of ADR has led some critics to question whether ADR is a lesser form of justice and whether it truly provides access to

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<sup>62</sup> IAEG-SDGs, *supra* note 4.

<sup>63</sup> Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (5th ed., Oxford University Press 2018), p. 3.

<sup>64</sup> Mauro Cappelletti and Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 *Buffalo Law Review*, no. 2 (1978), 181.

<sup>65</sup> *Ibid.*, 222.

<sup>66</sup> European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to Access to Justice* (Luxembourg: Publications Office of the European Union 2016), pp. 50-53.

<sup>67</sup> Access to Justice Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (1995) commissioned in April 1994 by Lord Mackay of Clashfern; Lord Woolf, *Access to Justice Final Report* (Crown Copyright 1996), p. 2.

<sup>68</sup> European Commission, *Business-to-Business Alternative Dispute Resolution in the EU* (Flash Eurobarometer 347, November 2012), p. 22.

justice. For example, in their assessment of the Lok Adalat (a form of ADR) in India, Galanter and Krishnan argue that the challenges posed by the design and functionality of the system far outweighed its benefits, and that it thereby failed in delivering access to justice.<sup>69</sup> Similarly, some critics challenge the diversion of disputes away from courts as public bodies, as well as the risk of exposure of the parties to power imbalances and inequality of arms in the resolution of disputes.<sup>70</sup> There is also a fear that costly ADR mechanisms deny access to justice to certain categories of the population. This contention may be apt in the context of B2B arbitration for example, where despite its popularity and recognition as the most viable, effective and practical ADR mechanism for business disputes,<sup>71</sup> users find it to be expensive and providing little accessibility for potential parties.<sup>72</sup>

Nevertheless, the value that ADR mechanisms bring to more effective justice delivery and for a fuller operationalisation of A2J is widely acknowledged. While recognising that the courts represent the main institution dealing with disputes of a civil nature, states continue to evolve in their attempts to expand their frontiers in promoting A2J. Irrespective of this evolution in understanding of A2J, this article argues for a further expansion of the conceptualisation of civil A2J for attaining sustainable development as set out in Agenda 2030, specifically as this relates to B2B arbitration. The functionality of B2B arbitration as a preferable ADR mechanism for civil disputes lends credence to the argument this article makes that without B2B arbitration, SDG 16.3 cannot be attained by the target end date and even beyond. Beyond the global acceptance of the contribution that civil access to justice makes to sustainable development, it is important that B2B arbitration is recognised as a civil justice institution and for the critical role that it plays for attaining SDG 16.3 itself. The significance of this is made even more manifest given the role that access to justice plays in the actualisation of the other SDGs in Agenda 2030, without which attaining sustainable development would be made more difficult.

The express inclusion of civil access to justice in Agenda 2030 therefore opens up avenues for a novel exploration of B2B arbitration as a civil justice institution for accessing justice, and the role that B2B arbitration can play in making Agenda 2030 a reality by the target end date. As B2B arbitration becomes more popular as a dispute resolution mechanism for its ability to provide arbitrator expertise, multi-jurisdictional enforcement, and more efficient justice delivery to meet business expediencies, it is imperative to evaluate B2B arbitration further in the context of furthering SDG 16.3.

In this context therefore, this part of the article has demonstrated that the understanding of the concept of A2J in SDG 16.3 can and should be expressly expanded to include B2B arbitration as an important component of achieving sustainable development. For the ultimate purpose of

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<sup>69</sup> Marc Galanter and Jayanth K. Krishnan, ““*Bread for the Poor*”: Access to Justice and the Rights of the Needy in India” 55 *Hastings Law Journal* (2004), 789 at 829.

<sup>70</sup> Lorna McGregor (2015), *supra* note 61, at 609.

<sup>71</sup> Kaj Hober and Annette Magansson, *The Special State of Agreements to Arbitrate - The Separability Doctrine: Mandatory Stay of Litigation* 2 *Dispute Resolution International* (2008), 56 at 57.

<sup>72</sup> School of International Arbitration, Queen Mary University of London and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration* 5, available at: <<http://www.arbitration.qmul.ac.uk/research/2018/>>, accessed August 20, 2023.

charting a holistic path to actualising Agenda 2030 by the target end date, the next part of the article examines B2B arbitration more fully as a mechanism for accessing justice and actualising sustainable development. It argues that the UN’s vision for sustainable development cannot be achieved without B2B arbitration playing a key role in the process.

### III. ROLE OF B2B ARBITRATION IN SUSTAINABLE DEVELOPMENT

The value of a further expansion of the meaning of A2J to include B2B arbitration in the context of SDG 16.3 is multidimensional. In its capacity as a dispute resolution mechanism, B2B arbitration functions simultaneously as an independent institution reliant on the private agreement of parties as well as an institution dependent on the underlying support and supervision of the courts.<sup>73</sup> It exists within the framework of the law and is available as a complement to litigation<sup>74</sup> while relying on the courts to enforce its outcomes, where necessary. Similar to other ADR mechanisms, B2B arbitration functions in what has famously been described as ‘the shadow of the law’<sup>75</sup> and constitutes part of a network of ADR mechanisms designed to address the shortcomings in civil procedure and to facilitate access to justice.<sup>76</sup> B2B arbitration is known to facilitate access to justice especially because of the principle of party autonomy which provides great flexibility in justice delivery and makes it amenable to further promoting the overall actualisation of Agenda 2030.

The role of B2B arbitration in the access to justice law reform movement has long been established. In their pioneering work based on a broad international analysis, Cappelletti and Garth identified three ‘waves’ of the access to justice law reform movement with specific reference to the welfare state experience in the United States of America.<sup>77</sup> They identified a third wave of the reform movement – the ‘Access-to-Justice Approach’ – which focused primarily on non-judicial alternatives to dispute resolution, and the effectiveness of court procedural reforms for access to justice.<sup>78</sup> As discussed in part II above, they acknowledged that in some disputes, the effective vindication of rights may be best achieved by mechanisms other than litigation and the courts should not necessarily be the dominant institutions for the resolution of civil disputes.<sup>79</sup> This argument is validated in cases such as in family law disputes where the use of mediation is increasingly becoming the primary form of dispute resolution<sup>80</sup> especially when parties were willing participants and of relatively equal strength.

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<sup>73</sup> *Coppee Levalin NV v Ken-Ren Fertilisers and Chemicals* [1994] 2 Lloyd’s Rep 109 (HL) at 116 *per* Lord Mustill.

<sup>74</sup> Lord Neuberger, *Equity, ADR, Arbitration and the Law: Different Dimensions of Justice*, Keating lecture, (Lincoln’s Inn, 2010), para 6; Anna K. C. Koo, *The Role of the English Courts in Alternative Dispute Resolution*, 38 *Legal Studies*, no. 4 (2018) 666, 677.

<sup>75</sup> Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce* 88 *Yale Law Journal* [1979], 950.

<sup>76</sup> Mauro Cappelletti and Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 *Buffalo Law Review*, no. 2 (1978), 181.

<sup>77</sup> Mauro Cappelletti and Bryant Garth, “Access to Justice and the Welfare State: An Introduction” in Mauro Cappelletti and Bryant Garth (eds.), *Access to Justice and the Welfare State* (EUI, 1981), p. 1.

<sup>78</sup> Mauro Cappelletti and Bryant Garth (1978) *supra* note 76, at 222.

<sup>79</sup> *Ibid.*

<sup>80</sup> Jaime Lindsey, *Reimagining the Court of Protection: Access to Justice in Mental Capacity Law* (Cambridge University Press, 2022), p. 98.

Even though B2B arbitration was not as popular at the time of publication in 1978, Cappelletti and Garth predicted that arbitration would play a significant role in fostering access to justice outside of the court system.<sup>81</sup> While recognising arbitration as a potentially expensive process with its main criticism laying in comments akin to arbitration being increasingly ‘judicialised’,<sup>82</sup> the authors argued that in comparison to litigation, arbitration had a better potential of benefiting weaker parties by reducing cost barriers to accessing justice through measures such as fixed tariffs for bringing small claims. This is the case, for instance, in consumer contracts where consumer confidence and protection are seen as a priority by the state leading to the enactment of laws including the Alternative Dispute Resolution for Consumer Disputes Regulations 2015 in England and Wales. Here, traders are required to signpost consumers to certified ADR (including arbitration) providers in regulated and non-regulated sectors who, in turn, charge consumers little or no fee to resolve their disputes.<sup>83</sup>

It is noteworthy that B2B arbitration is recognised as an access to justice mechanism under the European Convention on Human Rights (ECHR).<sup>84</sup> For example, article 6(1) of the ECHR which guarantees the right to a fair trial has been interpreted to mean that B2B arbitration is not a breach of the right of access to justice.<sup>85</sup> In *Case of Regent Company v Ukraine*,<sup>86</sup> the court dismissed the respondent’s preliminary objection seeking an order that article 6 does not apply to arbitration proceedings. The court held that the non-enforcement of a final arbitration award, made in favour of a company, constituted a violation of article 6 (1) of the ECHR while reiterating the law that article 6 does not preclude the setting up of arbitration tribunals for the settlement of disputes between private entities. Similarly, in *Merck Canada Inc. v Accord Healthcare Ltd and others*,<sup>87</sup> the Court of Justice of the European Union (CJEU) deemed an arbitral tribunal to be within the meaning of ‘court or tribunal’ for the purposes of Article 267 Treaty on the Functioning of the European Union<sup>88</sup> (TFEU) so that arbitral tribunals may refer cases to the CJEU for preliminary rulings. This decision reinforces the applicability of article 47 of the EU Charter of Fundamental Rights<sup>89</sup> which guarantees the right to an effective remedy and fair trial before a tribunal to arbitration proceedings. Similarly, the courts in some EU jurisdictions have recognised the applicability of access to justice principles in arbitration.<sup>90</sup>

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<sup>81</sup> Mauro Cappelletti and Bryant Garth (1978) *supra* note 76, at 232-233.

<sup>82</sup> *Northern Regional Health Authority v Derek Crouch Construction Company Ltd* [1984] 1 QB 644.

<sup>83</sup> An example is the Financial Ombudsman Service in the United Kingdom. See FCA, ‘How to Complain’ available at: <<https://www.financial-ombudsman.org.uk/consumers/how-to-complain>>, accessed July 22, 2024.

<sup>84</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (the European Human Rights Convention) (Rane, 4 November 1950; TS 71 (1953); Cmd 8969). See also United Kingdom Human Rights Act 1998, Sch. 1, art. 6.

<sup>85</sup> *Deweert v Belgium* Application No 6903/75, [1980] ECHR 1 (27 February 1980) considered in *Placito v Slater* [2003] EWCA Civ 1863; [2004] 1 WLR 1605.

<sup>86</sup> Application No 773/03, 3 April 2008 para 54.

<sup>87</sup> *Case C-555/13*, 20 February 2014.

<sup>88</sup> Treaty on the Functioning of the European Union of 13 December 2007 entering into force on 1 December 2009.

<sup>89</sup> Charter of Fundamental Rights of the European Union (2012/C 326/02).

<sup>90</sup> Paris, 1e ch., Nov. 17, 2011, n° 09/24158 [‘[T]he right of access to justice implies that a person cannot be deprived of the concrete faculty to have its claims decided by a judge; any restriction to the right of access to

Consequently, a further shift towards expanding the meaning of access to justice as encapsulated in SDG 16.3 is feasible and will assist in the service of sustainable development. B2B arbitration is famously used for the resolution of business and cross border disputes and the preference for it continues to increase as a result of the rise in trade and investment across state lines between parties from different jurisdictions.<sup>91</sup> 97% of respondents in a study indicated that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis or in conjunction with ADR.<sup>92</sup> B2B arbitration remains the most viable and effective ADR mechanism for commercial disputes<sup>93</sup> and the reasons parties continue to select it as their preferred ADR mechanism support the objectives of Agenda 2030 in the following ways:

### **i. Supporting rule of law**

B2B arbitration has long been a partner of the courts in sustaining the rule of law which SDG 16 wholly seeks through its concerted attempt to safeguard certain fundamental rule of law values in its provision of an alternative to litigation.<sup>94</sup> This is reflected, for example, in article 18 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law 2006,<sup>95</sup> which seeks to harmonise arbitration practice worldwide and which many jurisdictions have either wholly or partially adopted to create their own arbitration-friendly domestic arbitration laws.<sup>96</sup> Article 18, dubbed the ‘Magna Carta’ of arbitration,<sup>97</sup> requires parties to be treated with equality and for each party to be given a full opportunity of presenting its case. These requirements are echoed in article 34(2)(a)(ii) of the same Model Law and article V(1)(b) of the New York Convention<sup>98</sup> which set out the limited grounds for setting aside arbitral awards. Rules such as these, widely accepted and enforced across jurisdictions, reinforce arbitration’s recognition of the need to uphold the rule of law. B2B arbitration has therefore provided a transnational justice system<sup>99</sup> with the awards made by transnational tribunals largely held as sacrosanct in major trading countries. The growing

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justice must be proportionate to requirements of the sound administration of justice; arbitral tribunals are not exempt from the application of these principles].

<sup>91</sup> W. Michael Reisman, W. Laurence Craig, William Park and Jan Paulsson, *International Commercial Arbitration* (2nd ed., Foundation Press, 2015), p. 3.

<sup>92</sup> School of International Arbitration, *supra* note 72.

<sup>93</sup> Kaj Hober and Annette Magansson, *The Special State of Agreements to Arbitrate - The Separability Doctrine: Mandatory Stay of Litigation*, 2 *Dispute Resolution International*, (2008), 56 at 57.

<sup>94</sup> Sundaresh Menon, *Arbitration’s Blade: International Arbitration and the Rule of Law*, 38 *Journal of International Arbitration*, no. 1 (2021) 1 at 2.

<sup>95</sup> UNCITRAL Model Law on International Commercial Arbitration, 1985 UN doc. A/40/17 as adopted on 21 June 1985 and amended in 2006.

<sup>96</sup> For example, Argentinian Ley de Arbitraje Comercial Internacional (International Commercial Arbitration Act) 2018; Ghanaian Alternative Dispute Resolution Act 2010.

<sup>97</sup> Howard M. Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law International, 1999) 550 noted by the Court in *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95, 139.

<sup>98</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations Treaty Series (1959), vol. 330, p. 38, no. 4739.

<sup>99</sup> Emmanuel Gaillard, “The Present – Commercial Arbitration as a Transnational System of Justice” in Albert Jan van den Berg (ed.), *Arbitration: The Next Fifty Years* (Kluwer Law International, 2012), p. 66.

popularity of B2B arbitration as the preferred ADR choice<sup>100</sup> for the resolution of transnational business disputes therefore attests to its success as a civil justice institution and an enterprise in promoting the rule of law.

## ii. Certainty of contract

In its capacity as a private contract, and the significance that the law places on certainty and predictability in commercial contracts,<sup>101</sup> B2B arbitration promotes certainty of contract so that a valid agreement between two or more businesspersons to arbitrate future disputes will be enforceable in many courts around the world<sup>102</sup> and any awards made are readily enforceable in at least 169 jurisdictions.<sup>103</sup> In cases where the parties' commitment to arbitrate their dispute is not in doubt, many courts in jurisdictions with domestic arbitration legislations based on the UNCITRAL Model Law take a pro-arbitration stance so that arbitration agreements and awards are readily enforced and more broadly interpreted to give effect to parties' agreement.. This is especially so due to the principle of party autonomy which gives parties the freedom to select the laws and jurisdictions that serve their purposes best while circumventing seemingly inefficient ones. As a result, a few jurisdictions have been tagged 'arbitration-friendly' and 'business friendly' given their tendency to take a pro-arbitration approach towards issues including contract enforcement where arbitration has been validly chosen as the preferred dispute resolution mechanism.<sup>104</sup> An example is the UK Supreme Court's decision in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* which reiterated the certainty and enforceability of arbitration agreements.<sup>105</sup> The Singaporean courts took a similar pro-arbitration stance in *C v D* where the court provided welcome certainty that arbitration agreements will be upheld, even where there are questions regarding compliance with pre-conditions to arbitration.<sup>106</sup> To the extent that B2B arbitration supports the existence of a just society as highlighted in SDG 16 through certainty of contract and contract enforcement, it is evident that the operationalisation of B2B arbitration as an effective dispute resolution framework can contribute to the attainment of this goal.<sup>107</sup>

## iii. Finality of awards and multi-jurisdictional enforcement

Other recognisable benefits of B2B arbitration make a strong case for expressly expanding the discourse on access to justice in SDG 16.3 to expressly include B2B arbitration. These include the final and binding nature of the awards it produces with the opportunity for

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<sup>100</sup> 90 per cent of respondents identified international arbitration as the preferred method of resolving cross border disputes. See School of International Arbitration, *supra* note 72, at 5.

<sup>101</sup> *JTI Polska sp z oo v Jakubowski* [2023] UKSC 19 para 39; *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 UKHL 12, para 23.

<sup>102</sup> English Arbitration Act 1996, s 9; *Fiona Trust Corp v Privalov & Ors* [2007] 4 All ER 951; *Mozambique v Prinvest* [2023] UKSC 32.

<sup>103</sup> New York Arbitration Convention, *Contracting States*, available at: <<https://www.newyorkconvention.org/countries>>, accessed October 10, 2023.

<sup>104</sup> Global Arbitration Review, *GAR – CIARB Seat Index* (15 November 2018), available at: <<https://globalarbitrationreview.com/survey/gar-ciarb-seat-index/2020>>, accessed July 10, 2023.

<sup>105</sup> [2020] UKSC 38.

<sup>106</sup> [2021] HKCFI 1474.

<sup>107</sup> Organisation for Economic Cooperation and Development, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs* (OECD Paris, 2002) 3.

judicial review of awards restricted to a limited number of grounds under national arbitration laws<sup>108</sup> and the New York Convention which provides a uniform multijurisdictional mechanism for the enforcement of international arbitration agreements and awards. Some of the effects of these benefits are the possible significant savings in time and resources both for the parties and in the interest of the public who need courts to function optimally in aid of SDG 16 and Agenda 2030 as a whole. The complementarity of arbitration with litigation for the purposes of decongesting the courts and promoting a timely resolution of civil disputes amenable to it also provides support to this argument.<sup>109</sup>

The value of B2B arbitration for sustainable development is made more prominent in the context of the barriers to accessing justice through litigation. These barriers have been broadly categorised into cultural, institutional and social barriers.<sup>110</sup> Among others, non-recognition of problems as being legal in nature, the complexity of the legal process, and the resources of aggrieved persons have been found to account for some of the factors that hinder access to justice.<sup>111</sup> An examination of the literature in this context appears to focus on natural persons and the existing barriers to litigation as a mechanism for accessing justice and solutions thereto, so much so that a promotion of ADR is often prescribed as a principal strategy for reducing barriers to accessing justice.<sup>112</sup> This is notwithstanding the fact that B2B arbitration is often identified as part of the available justice institutions for obtaining a solution to civil justice problems.

While far from perfect, it is agreed that B2B arbitration suffers fewer ills than the litigation of commercial disputes.<sup>113</sup> Cheaper and quicker access to justice through arbitration is not always the case in some contexts. For example, an arbitral award delivered in January 2017 in *Federal Republic of Nigeria v Process & Industrial Developments Limited* was still subject to several contested proceedings as of October 2023 in jurisdictions including England and Nigeria.<sup>114</sup> The first instalment for professional fees, expenses and cost of arbitration just for the claimant in this case is said to have been more than US\$1million.<sup>115</sup> Financial barriers to accessing justice through B2B arbitration therefore pose as an argument against pursuing the objective of this article. In fact, the cost of B2B arbitration has been found to be on the rise with two-thirds of respondents in a survey describing cost as ‘...arbitration’s worst feature’<sup>116</sup>

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<sup>108</sup> English Arbitration Act 1996, ss. 67-71; Nigerian Arbitration and Mediation Act 2023, ss. 55-58; *Soleimany v Soleimany* [1999] QB 785.

<sup>109</sup> Nigel Blackaby, Constantine Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration*, (7th ed., Oxford University Press, 2022), p. 1.

<sup>110</sup> Julinda Beqiraj and Lawrence McNamara, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014).

<sup>111</sup> Organisation for Economic Co-operation and Development, *Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All* (OECD – Open Society Foundations, 2016), available at: <[https://globalprotectioncluster.org/sites/default/files/2022-09/2016.oecd\\_osf\\_delivering-access-to-justice-for-all\\_0.pdf](https://globalprotectioncluster.org/sites/default/files/2022-09/2016.oecd_osf_delivering-access-to-justice-for-all_0.pdf)>, accessed September 22, 2022.

<sup>112</sup> Julinda Beqiraj and Lawrence McNamara (2014), *supra* note 110, at 28.

<sup>113</sup> Gary B. Born, *International Arbitration: Law and Practice* (Kluwer Law International BV, The Netherlands 2012), p. 9; Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press, 2007), p. 39.

<sup>114</sup> [2023] EWHC 2638 (Comm).

<sup>115</sup> *Ibid* para 277.

<sup>116</sup> School of International Arbitration, *supra* note 72.

leading to the potential growth of other ADR mechanisms like mediation as less costly alternatives. Nevertheless, B2B arbitration remains the most viable, effective and practical alternative to litigation for resolving international commercial disputes.<sup>117</sup>

As demonstrated above, access to justice is a widely construed concept and Agenda 2030 seeks to ‘ensure equal access to justice for *all*’. Indeed, the SDGs adopt a broad articulation of the linkages between access to justice and development and the importance of the SDGs allows for a broad interpretation of access to justice allowing for a fully and express integration of B2B arbitration into SDG 16.3 in the service of sustainable development. It is evident that B2B arbitration operates as a fundamental civil access to justice institution and should therefore not be ignored in the sustainable development discourse. In part IV, the article outlines how B2B arbitration works in aid of access to justice and sustainable development as a whole from a functionalist perspective. The proposal is for a ‘functionalist business-centred approach’ to A2J in a manner that the UN’s SDG commitment to access to justice in SDG 16.3 expressly recognises B2B arbitration as a credible civil justice institution for actualising Agenda 2030. The article demonstrates that Agenda 2030 requires B2B arbitration for it to be fully functional and there is value in expressly recognising and operationalising B2B arbitration for accessing justice in aid of sustainable development.

#### **IV. FUNCTIONALIST BUSINESS-CENTRED APPROACH TO ACCESS TO JUSTICE THROUGH B2B ARBITRATION**

As discussed in part I of this article, the functionalist business-centred approach derives from legal functionalism which considers law as a social institution primarily concerned with fulfilling specific societal functions. In its capacity as a tool for serving the needs of society rather than an autonomous system of rules, legal functionalism views law from the lens of the primary purposes it serves to make a society function, one of which is the resolution of disputes. This sociological perspective derives from Roscoe Pound’s view that law cannot be divorced from its societal context,<sup>118</sup> a view further advocated by Llewellyn<sup>119</sup> and Durkheim.<sup>120</sup> As law is a product of society and a reflection of the ever-changing legal and social fabric, it should respond to contextual changes including advancements to dispute resolution mechanisms in aid of sustainable development. By offering innovative substantive and procedural frameworks for settling disputes, law helps to maintain peace and order in society. As discussed in part II of this article, B2B arbitration is founded in law and evolved as an alternative to litigation in response to the limitations encountered before formal courts. On this premise, this article views B2B arbitration in the context of its innate function as a legally recognised mechanism popularly utilised in the private sector for resolving civil disputes, with its existence founded on its design to provide an alternative to litigation for promoting access to justice as stipulated in Agenda 2030.

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<sup>117</sup> Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, (6th ed., Oxford University Press 2015), 1.

<sup>118</sup> Roscoe Pound, *Social Control through Law* (Yale University Press, 1942) 62.

<sup>119</sup> Karl Llewellyn. *The Normative, the Legal and the Law Jobs: The Problem of Juristic Method*, 49 *Yale Law Journal* [1940] 1355.

<sup>120</sup> Emile Durkheim (translated by George Simpson), *The Division of Labour in Society* (New York: Collier Macmillan, 1963).

Agenda 2030 recognises the private sector – ‘ranging from microenterprises to cooperatives to multinationals’<sup>121</sup> – as an important partner in the achievement of the SDGs. Agenda 2030 acknowledges the important role of the private sector in sustainable development when it ‘calls on all businesses to apply their creativity and innovation to solving sustainable development challenges’.<sup>122</sup> Indeed, the role of business for sustainable development is widely acknowledged with business and industry recognised by the UN as one of the nine major groups through which sustainable development may be achieved.<sup>123</sup> The development referred to here ranges on a broad spectrum from trade and commerce, to technology, and economic development. Beyond the opportunities for increasing corporate profits for their shareholders, businesses have been recognised as critical drivers of productivity, employment and economic development.<sup>124</sup> Given the recognisable significance that Agenda 2030 attaches to businesses in its drive for sustainable development, it is imperative that there should be commensurate attention on their needs alongside any obligatory commitments they have been asked to make to promote the attainment of Agenda 2030 by the target end date. Limited access to justice is a threat to sustainable development and this is so even for businesses who have been identified as critical partners in driving economic growth and sustainable development. It is therefore in this context that this article proposes the ‘functionalist business-centred approach’ to civil access to justice which expressly recognises the central role that B2B arbitration plays in the service of sustainable development and the benefits of supporting businesses and like persons to operationalise their right of access to justice through B2B arbitration as a civil justice institution.

As evidenced to the UN General Assembly at the SDG Summit in September 2023 – the half way point to the deadline set for achieving Agenda 2030 – only 15 per cent of the SDGs are on track and the need for solutions is more urgent than ever.<sup>125</sup> The Summit of the Future: Multilateral Solutions for a Better Tomorrow held in September 2024 set to re-strategize on how the world could work together to meet the targets in Agenda 2030, sought ideas on how better to respond to current and future challenges. High level reviews and the follow up mechanisms are set for 2027 and 2028.<sup>126</sup> Similarly, the Hague Declaration on Equal Access to Justice for All by 2030 adopted in February 2019 emphasised the need to ‘transform justice institutions and services through a broader range of justice providers’ as one of its five

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<sup>121</sup> A/RES/70/1, para. 41. See also United Nations, *Addis Ababa Action Agenda of the Third International Conference on Financing for Development* (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015.

<sup>122</sup> Agenda 2030 para 67.

<sup>123</sup> United Nations High Level Political Forum on Sustainable Development, *Major Groups and other Stakeholders*, available at: <<https://hlpf.un.org/mgos/business-and-industry>>, accessed August 20, 2024.

<sup>124</sup> Michael Blowfield and Catherine Dolan, *Business as a Development Agent: Evidence of Possibility and Improbability*, 35 *Third World Quarterly*, no. 1 (2014), 22.

<sup>125</sup> World Meteorological Organization, *Climate Change Undermines Nearly All Sustainable Development Goals* (Geneva, 14 September 2023), available at: <<https://wmo.int/news/media-centre/climate-change-undermines-nearly-all-sustainable-development-goals>>, accessed May 1, 2023.

<sup>126</sup> United Nations, ‘Summit of the Future Outcome Document’ (September 2024), available at: <<https://www.un.org/en/summit-of-the-future>>, accessed October 1, 2024.

significant priorities towards moving ‘from justice for the few to justice for the many’.<sup>127</sup> This is in addition to the annual meeting held by the High-Level Political Forum under the auspices of the UN Economic and Social Council which brings together high-level representatives of governments and stakeholders to review progress on Agenda 2030 and recommend new actions that may assist to achieve the SDGs and Agenda 2030. Recognising B2B arbitration as part of A2J can help in the measures by the various arms of the UN to promote access to justice as set out in Agenda 2030.

This article therefore relies on Raz’s classification scheme for law’s functions to provide facilities for private arrangements and to provide services in responding to the UN’s search for ideas for promoting the rule of law and access to justice. I argue for an express declaration by the UN in its sustainable development agenda to agree to take a broad and business-friendly approach to the meaning of access to justice and the expression of this right for businesses in proportionate measure. While acknowledging that the SDGs are not hard law but commitments by Heads of State and Government, this article argues that in their capacity as ‘high-level political guidance on transformative and accelerate actions’, a commitment to interpret civil access to justice in SDG 16.3 as broadly as possible to expressly include B2B arbitration is a step in the right direction for achieving sustainable development as envisioned by the UN’s Agenda 2030. I argue that for sustainable development, the value of expressly recognising and operationalising B2B arbitration in SDG 16.3 is four-fold as demonstrated in the following sub-parts.

#### **i. Economic growth**

Legal functionalism explains and analyses the law based on the functions that law and legal rules serve. As set out in the preamble, one of the functions of Agenda 2030 is to create an enabling environment which ensures ‘inclusive and sustainable economic growth’ for all. Specifically, the expected function of SDG 16.3 is to provide access to justice – criminal and civil – for all. Now, this article has established that B2B arbitration fulfils the function of providing civil access to justice. The question that follows is whether its operationalisation can feed into the ultimate objective of Agenda 2030 to promote economic growth.

The magnitude of business contribution to economic growth and sustainable development is recognisable with growing interest in business participation towards attaining sustainable development.<sup>128</sup> In 2017, the overall business sector is said to have contributed 72 per cent of gross domestic product (GDP) across major Organisation for Economic Co-operation and Development (OECD) economies, a contribution which has tripled since 1960 on average in proportion to overall economic growth.<sup>129</sup> In addition, small and medium-sized enterprises

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<sup>127</sup> Pathfinders for Peaceful, Just and Inclusive Societies, *Hague Declaration on Equal Access to Justice for All by 2030* (7 February 2019) available at: <<https://www.sdg16.plus/resources/hague-declaration-on-equal-access-to-justice-for-all-by-2030/>>, accessed October 25, 2023.

<sup>128</sup> Javier Delgado-Ceballos, Natalia Ortiz-De-Mandojana and Ivan Montiel, *Connecting the Sustainable Development Goals to Firm-Level Sustainability and ESG Factors: The Need for Double Materiality*, 26 *Business Research Quarterly*, no. 1 (2023) 2.

<sup>129</sup> J. Manyika, M. Birshan, S. Smit, L. Woetzel, K. Russel, and L. Purcell, *A New Look at How Corporations Impact the Economy and Households* (McKinsey Global Institute Discussion Paper, June 2021), p. 1.

(SMEs) account for the majority of businesses worldwide, contributing more than 40 per cent of GDP in emerging economies, 50 per cent of worldwide employment<sup>130</sup> and constituting engines of economic growth and social development. For their part, multinational enterprises (MNEs) contribute an estimated 28 per cent to global GDP while being responsible for more than half of world exports.<sup>131</sup> Meanwhile, in its Corporate Tax Statistics report published in 2022, the OECD found that the share of corporate tax revenues in total tax revenues was 15 per cent on average across 115 jurisdictions assessed in 2019.<sup>132</sup> The revenues from corporate income tax is a significant source of tax revenues for governments to fund essential public services, especially in developing and emerging market economies. As the accessibility and efficiency of justice services directly affect the way legal persons make business decisions to invest and enter other contractual relationships, it is critical to recognise the potential economic impact of expanding the discourse on access to justice to include B2B arbitration.

Fundamentally, B2B arbitration fulfils the economic aspect of sustainable development by taking centre stage in certain jurisdictions (seats) as a driver of foreign investment and economic growth.<sup>133</sup> This is so as repeatedly hosting international arbitrations builds a jurisdiction's reputation as a modern, neutral and reliable place to do business, supportive of commerce and respectful of the rule of law.<sup>134</sup> Studies show that B2B arbitration has increased global GDP by approximately 13 per cent<sup>135</sup> with many jurisdictions continuously striving to get a share of the global arbitration market.<sup>136</sup> A study by The Commonwealth found that the absence of modern dispute resolution frameworks, especially B2B arbitration for business communities, accounts for a large part of risk in the loss of foreign investment and trade revenue in many commonwealth countries.<sup>137</sup> With a vision to boost trade, foster

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<sup>130</sup> World Bank, *Small and Medium Enterprises (SMEs) Finance: Improving SMEs' Access to Finance and Finding Innovative Solutions to Unlock Sources of Capital*, available at: <<https://www.worldbank.org/en/topic/smefinance>>, accessed August 15, 2023.

<sup>131</sup> Organization for Economic Co-operation and Development, *Multinational Enterprises in the Global Economy* (May 2018) 6, available at: <<https://www.oecd.org/industry/ind/MNEs-in-the-global-economy-policy-note.pdf>>, accessed August 15, 2023.

<sup>132</sup> Organisation for Economic Co-operation and Development, *Corporate Tax Statistics* (4th ed., OECD, 2022), p. 3.

<sup>133</sup> The predicted total impact of arbitration on the economy of Toronto, Canada was found to be \$256.3 million in 2012. See Charles River Associates, *Arbitration in Toronto: An Economic Study* (Charles River Associates, 6 September 2012 CRA Project No. M11680-03), available at: <<http://www.crai.co.uk/publication/arbitration-toronto-economic-study>>, accessed May 18, 2024.

<sup>134</sup> Fernando Dias Simoes, *Commercial Arbitration between China and the Portuguese-Speaking World* (Kluwer Law International, 2014), p. 64.

<sup>135</sup> Jordi Paniagua, *The Economic Impact of International Commercial Arbitration*, paper presented at the 3<sup>rd</sup> Regional Integration Arbitration Conference (Sydney, 17 March 2021) 4, available at: <<https://events.development.asia/system/files/materials/2021/03/202103-jordi-paniagua-presentation.pdf>>, accessed November 18, 2022.

<sup>136</sup> For example, Dubai has grown into a world-class centre for international trade and business and not just from the discovery of oil but from a diversification of its economy, with a GDP growth of 4.6 per cent in the first nine months of 2022. See Government of Dubai, *Dubai 9-month GDP Grows by 4.6 Per Cent*, available at: <<https://mediaoffice.ae/en/news/2022/December/12-12/hamdan-bin-mohammed>>, accessed August 20, 2023. This brought with it an increase in dispute resolution offerings in the Middle East leading to the establishment of various seats of arbitration including the Dubai International Arbitration Centre which has attracted parties who would otherwise have relied on seats in Paris, London, Geneva and elsewhere.

<sup>137</sup> The Commonwealth Office of Civil and Criminal Justice Reform, *A Study of International Commercial Arbitration in the Commonwealth* (18 August 2020), available at:

economic growth and sustainable development, The Commonwealth found that a dispute resolution framework that is accessible and affordable for the prompt resolution of disputes, and one that maintains business relationships has the potential for driving intra-Commonwealth trade to \$2 trillion by Agenda 2030's target end date. The Commonwealth therefore views B2B arbitration as one such ADR framework for achieving one of its primary objectives and makes recommendations for policy and regulatory changes to promote the use of arbitration within the bloc.<sup>138</sup> In addition, Hale found that ratifying the New York Convention has the effect of increasing a country's foreign trade by about half as much as joining the World Trade Organization especially in jurisdictions with weak or low-quality judicial institutions.<sup>139</sup>

The potential economic impact of expanding the interpretation of SDG 16.3 to expressly include B2B arbitration is therefore apparent. With government and stakeholders committing to interpret SDG 16.3 in the widest possible terms, they invariably commit to economic growth and prosperity for sustainable development. Moreover, as B2B arbitration provides a more effective avenue towards access to justice in a considerably less time-consuming manner, its contribution to the diversion of potentially wasted resources on delays encountered in resolution by litigation to more economically beneficial uses will be significant.

## ii. Adaptability for dispute resolution

As discussed, the function and legal purpose of B2B arbitration is to operate as an alternative legal framework for private dispute resolution. Since its early days as a 'simple and relatively informal process' for resolving price and/or quality of goods disputes between merchants, B2B arbitration has evolved from 'a system of justice born of merchants'<sup>140</sup> into a more complex and formalised process to become the dominant form of ADR mechanism in international investment, business and commerce.<sup>141</sup> Arbitration has also thrived as a functional method of resolving family and employment disputes.<sup>142</sup>

The widespread use of arbitration for many different types of disputes lends credence to the potential impact of B2B arbitration for promoting sustainable development. Indeed, B2B arbitration has become a vital justice option for the resolution of commercial disputes and

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<<https://thecommonwealth.org/news/arbitration-study-urges-countries-not-lose-foreign-investment-and-trade>>, accessed August 23, 2023.

<sup>138</sup> *Ibid.*

<sup>139</sup> Thomas Hale, "What is the Effect on Commercial Arbitration on Trade?" in Walter Mattli and Thomas Dietz (eds.), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press, 2014), p. 196.

<sup>140</sup> Serge Lazareff, 'L'arbitre singe ou comment assassiner l'arbitrage' in Gerald Aksen and Robert Briner (eds.), *Global Reflections in International Law, Commerce and Dispute Resolution: Liber in Honour of Robert Briner* (Paris: ICC Publishing, 2005), p. 478.

<sup>141</sup> Nigel Blackaby, Constantine Partasides and Alan Redfern (2022), *supra* note 109, p. 2.

<sup>142</sup> Anna Heenan, *Haley v Haley: Family Law Arbitration and the New Frontier of Private Ordering*, 84 *Modern Law Review*, no. 4 (2021), 1189; Gillian Whitehouse, *From Family Wage to Parental Leave: The Changing Relationship between Arbitration and the Family*, 46 *Journal of Industrial Relations*, no. 4, (2004), 400; Brian Towers and William A Brown, *Employment Relations in Britain: 25 Years of the Advisory, Conciliation and Arbitration Service* (Oxford: Blackwell, 2000).

remains a critical pathway to providing access to justice in aid of sustainable development. B2B arbitration has been shown to be capable of resolving business and human rights (BHR) disputes and providing effective remedies to those affected by the human rights impacts of business activities. As discussed in part II of this article, the UNGPs seek to facilitate access to justice by setting standards for businesses regarding respect for human rights and the imperative of a remedy for those affected by business-related human rights abuses (Pillar III). Pillar III specifically acknowledges state-based judicial and non-judicial mechanisms as operational principles for facilitating protection against business-related human rights abuse. Consequently, the UNGPs require states to take appropriate steps through ‘judicial ... or other appropriate means’<sup>143</sup> to ensure that those whose rights are affected have access to effective remedy.

It is presumably on this basis that The Netherlands funded the project which culminated in The Hague Rules on Business and Human Rights Arbitration (Hague Arbitration Rules)<sup>144</sup> to assist in the resolution of BHR disputes. While it is evident that the Hague Arbitration Rules were drafted with the special nature of disputes related to the human rights impacts of business activities in mind, one may extrapolate the rationale for these rules to be the resolution of business disputes. This is especially so as the Hague Arbitration Rules are based on the UNCITRAL Arbitration Rules which provide for the settlement of disputes that may arise in the context of international commercial relations by arbitration. Significantly, the Hague Arbitration Rules reiterate the principle of party autonomy by extending the application of the rules to any disputes that the parties may choose irrespective of the type of parties or subject matter. These include natural and juristic persons including business entities and similar organisations. In addition, the intention behind the flexibility for parties and finality of awards under the Hague Arbitration Rules is said to ‘allow for a more rapid and effective resolution of the dispute than domestic courts’<sup>145</sup> and where alternative avenues are not available or adequate<sup>146</sup> is in keeping with the aim of Agenda 2030 to ‘ensure equal access to justice for all’ while simultaneously assisting businesses to observe their various corporate obligations and meet their responsibilities under the UNGPs. Similarly, BHR arbitration provides a means for those affected by a business’ operations including its workers and other businesses within a supply chain to obtain a remedy and hold that business accountable.<sup>147</sup> In the same vein, businesses could rely on the arbitration of BHR disputes to enforce sustainable development commitments with its business partners and other relevant stakeholders. The recent operationalisation of the Hague Arbitration Rules in 2019 highlights the potential impact of business operations and activities on human rights, and invariably, the attainment of Agenda 2030 which seeks to strengthen universal peace in larger freedom.

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<sup>143</sup> Paragraph 25.

<sup>144</sup> Centre for International Legal Cooperation, *The Hague Rules on Business and Human Rights Arbitration* (12 December 2019), available at: <[https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration\\_CILC-digital-version.pdf](https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf)>, accessed August 18, 2023.

<sup>145</sup> Centre for International Legal Cooperation, *The Hague Rules on Business and Human Rights Arbitration: Questions and Answers* 4, available at: <<https://www.cilc.nl/cms/wp-content/uploads/2021/05/QA-The-Hague-Rules.pdf>>, accessed August 18, 2023.

<sup>146</sup> The Hague Rules on Business and Human Rights Arbitration, preamble para 3, p. 13; Commentary p. 15.

<sup>147</sup> Centre for International Legal Cooperation, *supra* note 145, at 2.

As can be seen above, to the extent that arbitration can be employed to flexibly and expertly resolve various disputes, the express encapsulation of B2B arbitration in the access to justice guarantee in Agenda 2030 is beneficial to sustaining rule of law and achieving sustainable development. Its use and value ranges from the resolution of disputes between businesses *inter se* to disputes arising from the impact of business activities on natural persons. By prioritising B2B arbitration as a means for accessing civil justice, the path to attaining Agenda 2030 by the target end date will be much quicker and effective.

### iii. Supply chain regulation

Law is not a static entity and society is ever evolving. In the same way, supply chains are not static as they experience changes for reasons including market demand and technological breakthroughs.<sup>148</sup> Beyond economic and technological considerations, other forces such as regulatory frameworks<sup>149</sup> and sustainability agendas<sup>150</sup> affect the configuration and functionality of supply chains. As such, law and its functions should be evolutionary in response to these changes, including supply chain regulation which this article argues as follows.

The express acknowledgment of B2B arbitration in the access to justice guarantee in Agenda 2030 can assist in ensuring the compliance of supply chains with mandatory human rights and environmental due diligence (HREDD) requirements. This not only offers concrete business benefits but also assists in the overall actualisation of sustainable development. These requirements are reflected, for example, in the harmonised proposal by the European Commission which obliges all EU member states to adopt laws imposing HREDD obligations on EU and non-EU businesses (generating turnover in the EU) to identify and cease or mitigate the human rights and environmental impacts of their operations, and those of their subsidiaries and value chains.<sup>151</sup> These include HREDD responsibilities towards minerals sourced from conflict-affected and high-risk areas (Conflict Minerals Regulation)<sup>152</sup> as well as the avoidance of products made with forced labour in the EU market (Forced Labour Regulation).<sup>153</sup> The proposal requires EU member states to impose obligations to conduct HREDD through measures including integrating due diligence into business policies, and preventing and mitigating potential adverse impacts.

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<sup>148</sup> Bart L. MacCarthy, C. Blome, J. Olhager, J. S. Srai, and X. Zhao, *Supply Chain Evolution – Theory, Concepts and Science*, 36 *International Journal of Operations and Production Management*, no. 12 (2016), 1696.

<sup>149</sup> Karen E. Woody, *Conflict Minerals Legislation: The SEC’s New Role as Diplomatic and Humanitarian Watchdog*, 81 *Fordham Law Review*, no. 3 (2012), 1315.

<sup>150</sup> Mark Pagel and Zhaohui Wu, *Building a More Complete Theory of Sustainable Supply Chain Management Using Case Studies of 10 Exemplars*, 45 *Journal of Supply Chain Management*, no. 2 (2009) 37.

<sup>151</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Document 52022PC0071, COM/2022/71 final.

<sup>152</sup> Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas Document 02017R0821-20201119.

<sup>153</sup> Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market Document 52022PC0453, COM/2022/453 final.

An appropriate measure to adopt for fulfilling these requirements is the inclusion of sustainable development targets in company policies and actively seeking to promote the actualisation of Agenda 2030 by the proposed target end date. More specifically herein, would be the express adoption of A2J obligations through B2B arbitration in supply chain contracts to the effect that any business disputes that may arise in the conduct of their business should be resolved by arbitration. Businesses should make a commitment that any civil disputes that may arise would be voluntarily subjected to resolution by B2B arbitration. In doing so, businesses can reduce waste, improve efficiency, potentially lower overall costs, and avoid the adverse features that domestic litigation is characterised by including delays and procedural inflexibility while invariably being postured as responsible sustainable development actors. Indeed, the potential for individual and community rights to be better protected by B2B arbitration is potentially higher as the power of businesses to extract certain dispute resolution commitments from their business counterparts is evident while contemporaneously empowering advocacy groups and other stakeholders to ensure that these commitments are enforced in the service of sustainable development.

#### **iv. Improved partnership with the private sector**

One of the themes of legal functionalism is a quest for better legal solutions to societal problems, a quest also known as the ‘better solutions’ impulse.<sup>154</sup> Zweigert and Kötz argue that functionalism attempts to provide advice on legal policy by ‘suggest[ing] how a specific problem can most appropriately be solved under the given social and economic circumstances’.<sup>155</sup> In the context of the challenges disputing parties face in accessing justice through the courts, this article turns to B2B arbitration as a means of more efficiently accessing justice in the service of sustainable development.

Over time, the private sector has grown to be a major player in the evolution of society and has become an ‘indispensable force for sustainable development’. Expanding access to justice in the context of Agenda 2030 and improving how SDG 16.3 functions for business efficiency can lead to better coherence and partnership with the private sector. As businesses have a responsibility towards people and the environment as well as creating jobs and innovation, a holistic partnership with the private sector is vital for sustainable development.<sup>156</sup> Without prejudice to some of the negative impacts of their activities, the ability of companies to take high levels of risk to foster large scale (international) trade and commerce<sup>157</sup> based on the corporate law principle of limited liability is necessary for

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<sup>154</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd ed., Oxford: Oxford University Press, 1998), p. 15.

<sup>155</sup> *ibid* at 11.

<sup>156</sup> Bradley Googins and Steven Rochlin, *Creating the Partnership Society: Understanding the Rhetoric and Reality of Cross-Sectoral Partnerships*, 105 *Business and Society Review*, no. 1 (2000), 127; Shift, *Business, Human Rights and the Sustainable Development Goals: Forging a Coherent Vision and Strategy*, a paper commissioned by the Business and Sustainable Development Commission 29 (November 2016), available at: <<https://s3.amazonaws.com/aws-bsdc/BSDC-Biz-HumanRights-SDGs.pdf>>, accessed July 16, 2023.

<sup>157</sup> Sir Roy Goode in Ewan McKendrick, ed, *Goode on Commercial Law*, 4th ed (Penguin, 2010) 3: ‘One of the most powerful influences on human activity is the driving force of trade. Governments may be overthrown, wars may break out, large areas of a country may be devastated by natural disaster, but somehow traders find ways of establishing business relationships.’

investment and economic development. Besides, the existence of business activities encourages competition and increases economic productivity.<sup>158</sup> In addition, businesses have the expertise, resources, and capabilities needed to help accelerate the sustainable development transitions required to achieve the SDGs by 2030. It is therefore in the interest of businesses to operate within a healthy environment and economy. Indeed, many executives have demonstrated that pursuing sustainable development strategies makes good business sense.<sup>159</sup> Therefore, irrespective of the uncertainty of the financial returns from investments in sustainability, there is now widespread support for sustainable development principles within the business community with businesses developing and incorporating sustainable products and services to their core business thereby expanding the potential for increased business opportunities and value added for society.<sup>160</sup>

Without access to justice, other sustainable development goals including ending poverty (SDG 1), combating climate change (SDG 13) or promoting economic growth (SDG 8) will be difficult thereby making the need for a business-friendly legal environment essential. Considering the role that businesses play in the global economy alongside government and other stakeholders in helping to attain the SDGs,<sup>161</sup> as well as the knowledge that disputes are a common and arguably natural part of human interaction,<sup>162</sup> the need for the development and sustenance of robust frameworks for commercial dispute resolution is therefore crucial. Specifically, the procedural flexibility and technical expertise that B2B arbitration provides for the resolution of business disputes constitute good reasons for expanding the meaning of A2J in SDG 16.3 and for accelerating the achievement of sustainable development.

In sum, it is not enough to simply identify access to justice as it is in SDG 16.3. Given the critical place an effective dispute resolution plays in sustainable development, it is essential that the interpretation of SDG 16.3 expressly identifies B2B arbitration and the proposed ‘functionalist business-centred approach’ to access to justice receives the attention it deserves in furtherance of the attainment of Agenda 2030. Just as guaranteeing equity and fairness between natural persons *inter se* is crucial for effective development,<sup>163</sup> so it should be for businesses for this same purpose. Without doubt, there are significant gains that could be made from securing full access to justice, by means of the provision of effective domestic remedies, in conformity with the guarantees of due process of law in aid of sustainable development.

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<sup>158</sup> Competition and Markets Authority, *Productivity and Competition: A Summary of the Evidence* (9 July 2015) 2.

<sup>159</sup> Johan Graafland and Niels Noorderhaven, *Technological Competition, Innovation Motive and Corporate Social Responsibility: Evidence from Top Managers of European SMEs*, 168 *De Economist*, no. 1 (2019), 1.

<sup>160</sup> *Ibid.*

<sup>161</sup> United Nations Secretary General, *Secretary-General’s Remarks at the United Nations Private Sector Forum* (New York, September 26, 2015), available at: <<https://www.un.org/sg/en/content/sg/statement/2015-09-26/secretary-generals-remarks-united-nations-private-sector-forum>>, accessed September 26, 2022.

<sup>162</sup> John Merrills, *International Dispute Settlement* (Cambridge University Press, 2017), p. 1.

<sup>163</sup> The World Bank, *World Development Report 2006: Equity and Development* (The World Bank and Oxford University Press, 2005), p. 7.

## V. CONCLUSION

In view of the links between effective justice delivery and economic growth, and the preference for B2B arbitration for the resolution of transnational business disputes, this article set out to argue for the expansion of the meaning of access to justice in SDG 16.3 to expressly include B2B arbitration in the service of sustainable development. This was done in recognition of the focus of scholarly work on access to justice on formal courts and the criminal justice system as well as for natural persons at the expense of ADR and access to justice for businesses and other juristic persons. Given the increasing search for innovative and efficient ways to implement SDG 16 and increase access to justice in practice, this article investigated the ways in which B2B arbitration for civil access to justice can assist in the actualisation of Agenda 2030. In making the argument that B2B arbitration can assist in the attainment of Agenda 2030, the article opened up space for further research on an important issue that key stakeholders have identified and expressly prioritised as a key factor for sustainable development. The article adopted an enlarged perspective in reviewing the parameters of access to justice and proposed a ‘functionalist business-centred approach’ to access to justice through B2B arbitration. The article reasoned that as only successful and sustainable businesses can contribute to the development and prosperity of nations and the global community, businesses and the society at large would be better served by effective policy and regulatory frameworks for the resolution of business disputes. Given the critical role that businesses play in the global economy, their partnership with other stakeholders in the attainment of Agenda 2030 and the need for sustainable development to be integrated into the planning and measurement systems of business operations, revolutionary changes are required to contribute to a better future. The article therefore argued that access to justice might be further enhanced by expanding its interpretation in SDG 16.3 to include B2B arbitration in aid of sustainable development and Agenda 2030. Significantly, triggering policy, legal and institutional change in the discourse on access to justice can be a channel towards better governance and sustainable development. The increasingly central role that businesses play in sustainable development and economic growth necessitated the argument in favour of the express expansion of the right of access to justice as encapsulated in SDG 16.3.