YOUNGMCIA

The Next Generation of Arbitration in India

Newsletter

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Dear Readers

Despite the global uncertainties brought on by the pandemic, India's development into a twenty-first century powerhouse will continue and should accelerate as we adopt ways of dealing with the 'new normal'.

The legal community has no doubt seized and built upon the opportunities that this disruption has offered. Arbitral institutions have also marched ahead, with extensive adoption of videoconferencing and online hearing. Developments in caselaw have been significant, and the Indian Supreme Court's pro-arbitration stance has continued through the pandemic. Among other developments, Indian parties can choose a seat of arbitration outside India and emergency arbitral awards by India-seated tribunals are now recognised and enforceable in India.

The Young MCIA revamped the Steering Committee in April 2021. More than thirty fantastic arbitration practitioners have joined the Steering Committee. YMCIA has been working on several key initiatives, such as continuation of the flagship event "Lifecycle of Arbitration", launching a knowledge series on Investment Treaty Arbitration, and rolling out our inaugural essay competition. This YMCIA Newsletter is another recent initiative. Its objective is to reach out to and stay engaged with arbitration enthusiasts across the globe. We expect this to be a quarterly initiative.

This edition of the YMCIA Newsletter has much to offer. It begins with an interview with Justice Indu Malhotra, one of India's finest judges, and one of its most pro-arbitration ones. Justice Malhotra retired from the Bench recently and spent time with us to provide her candid and valuable insights into her own career path, arbitration in India, and other trends. This interview will no doubt be inspiring to many practitioners.

This newsletter next discusses the arbitration legacy of – as stated by the Chief Justice of India – one of "the lions that guarded the judicial institution": Justice Rohinton Nariman, who also retired recently, played a crucial role in shaping the arbitration landscape of India. The article discusses Justice Nariman's impact on all stages of the arbitral process, by restricting judicial intervention, and encouraging certainty and finality.

Finally, it summarizes conversations held in arbitration-focussed events organised by the MCIA over the past months, and gives readers a snapshot of upcoming events in the pipeline.

We hope you enjoy reading this edition as much as the YMCIA Committee, have enjoyed putting it together for you.

Best wishes,
Sheila Ahuja, Rishab Gupta, and Alipak Banerjee
Co-Chairs, Young MCIA

Special thanks to the YMCIA Editorial Board
Mr. Joongi Kim, Professor of Law, Yonsei University
Mr. Vijayendra Pratap Singh, Partner & Head Litigation, AZB & Partners
Ms. Patricia Shaughnessy, Associate Professor, Stockholm University

Interview with

Justice Indu Malhotra

Reported by Rohit Bhat, Freshfields and Sanjna Pramod, Norton Rose Fulbright

Justice Indu Malhotra is hailed as an icon, whose career will leave a long-lasting impact on the Indian judiciary. She was one of India's leading advocates on record in the Supreme Court, an eminent senior advocate designated by the Supreme Court (being the second woman to have received that designation), and one of the finest judges (being the first woman to be appointed to the Supreme Court directly from the bar).

In her three-year tenure as a Supreme Court judge, Justice Malhotra dealt with many significant cases. Her separate opinion declaring section 377 of the Indian Penal Code (which criminalised consensual sexual relationships between same-sex adults) unconstitutional ended with an apology to members of the LGBTQ community and their families, for the "delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries", an apology that was received in court with a loud cheer.

To the arbitration community, Justice Malhotra's judgments were a breath of fresh air. Indian arbitration jurisprudence, which has had a chequered history, went through a tectonic shift with Justice Malhotra's judgments. For example, in Union of India v Vedanta, she resolved the conflicting judgments of various High Courts on the issue of the period of limitation for filing an application for enforcement of a foreign award. In Perkins Eastman Architects, she clarified the extent to which officers of companies could be appointed as arbitrators.

The authors had the privilege to interview Justice Malhotra, during which she shared her thoughts over a range of topics, including her early life, her experience as a senior advocate, and later as a judge.

1. What sparked your interest in the law and where did you first practice?

Entering the legal profession was not my first choice. Initially, I was more interested in academia and teaching. After my post-graduation, I taught under-graduate students in Vivekananda College (in Delhi), and subsequently at Miranda House (also in Delhi) for a brief period. I was in a dilemma as to whether I should pursue a career in academia, or whether I should join the legal profession. In 1979, I took a decision to enrol for the undergraduate degree course in Law, in Delhi University.

After my graduation and enrolment, I joined a law firm, which at that time probably had the largest number of filings in the Supreme Court. It was a great learning experience since I got the opportunity to brief the top seniors of that time and watch their performance in Court.

2. What was your experience starting as a young woman lawyer in the eighties, a time when the profession was largely dominated by men?

After working for about three years with the law firm, I started my private practice. I took the Advocate on Record (AOR) exam in 1988. Even though there were fewer women who took to the practise of law as a career, I did not find any gender discrimination in my growth as an AOR. I was able to develop a large practise over a period of time. I practised as an AOR until 2007, when I was designated as a Senior Advocate by the Supreme Court.

3. Moving onto arbitration, when did you start becoming interested in arbitration? How did you develop a practice in arbitration?

I initially appeared in various arbitration related cases both in the Delhi High Court and Supreme Court, which I found interesting. Later, I got an opportunity to work on the edits of the second edition of my father's commentary on the Law & Practise of Arbitration. Sometime in 2010, when my father turned 90, he told me that he was finding it difficult to work on the book any longer and asked me whether I would be interested to author further editions. I took up the challenge, although as a practising advocate I found it very difficult to find the time to work on the book. But I soldiered on, and the 3rd edition was published in 2014.

In early 2016, I was appointed to the high-level committee constituted by the Ministry of Law & Justice (popularly called the Justice B.N. Srikrishna Committee) to make recommendations for further amendments to the Arbitration Act, in order to streamline the conduct of arbitration proceedings in India.

I recognised that no matter how experienced you may be, it is necessary to continue learning, and in 2017, I decided to do a course conducted by the Chartered Institute of Arbitrators held in Oxford.

Meanwhile, I started work on the next edition of my arbitration commentary, which was published in 2020.

4. With respect to your Judgeship, would you please care to elaborate on how that came about? What was that experience like?

The offer of Judgeship of the Supreme Court came as a bolt from the blue. It came as a big surprise to me when the offer was made on 8th January 2018. The Collegium convened on 10th January 2018, when my name was recommended for direct appointment to the Supreme Court.

My experience as a Judge was a greatly fulfilling experience. It gave me a tremendous amount of contentment and satisfaction when long-standing disputes between parties, who had been litigating for years on end, came to a closure. It also gave me a great opportunity to contribute to the jurisprudence of the Supreme Court.

5. Your reputation precedes you as being a pro-arbitration judge.

Well, I am of the view that if arbitration is to be a one-stop adjudication, since the scrutiny by the court at the section 34 stage, and under section 37 at the appellate stage is very limited and circumscribed, the process must be an effective and efficacious alternate mode of dispute resolution, fairly conducted, and free from bias. Parties must get a complete and fair opportunity to present their case before an impartial adjudicator. I tried to implement these views through my judgments.

6. What are your views on arbitration in India?

Arbitration in India continues to be predominantly ad hoc. Parties are reluctant to go in for institutional arbitration, apparently because they find the costs quite daunting, which makes the system still quite unregulated. This needs to change. We need to streamline the arbitration process, and encourage a shift to institutional arbitration, which would be a step in that direction. We also need to develop an arbitration bar. I do see this shift happening, but it will take some time to evolve.

7. Arbitration in India has had a chequered history. Presently, are you seeing an upward trend?

I think great progress has been made in arbitration in India, both by successive amendments to the Indian Arbitration Act, and through progressive judgments by the courts. Seldom are arbitral awards set aside by Indian courts, and foreign awards are routinely enforced.

I think the 2015 Amendment to the Indian Arbitration Act was a landmark moment in the arbitration landscape of India. The 2015 Amendment incorporated various substantive amendments, which were aimed at minimising judicial intervention. Additionally, various provisions were introduced to ensure impartiality of the arbitrators, a statutory time limit was incorporated for conclusion of arbitration proceedings, and the public policy defence to resist enforcement of an arbitration award was circumscribed by statute. In fact, in no other jurisdiction, has the public policy defence been given a narrow construction by statute.

The 2019 Amendment introduced certain further amendments to promote institutional arbitration. It incorporated a clause on confidentiality, and provided protection to actions taken in good faith by the arbitrators to insulate them from vexatious threats being raised by disgruntled parties who had lost in the arbitration proceedings. This Amendment introduced the Eighth Schedule to the Act, which prescribed qualifications to be possessed by an arbitrator. This gave rise to serious criticism. But what is positive is that the Government took note of the criticism, and in 2021 deleted the 8th schedule.

8. The proposed creation of the Arbitration Council of India has set off alarm bells and caused speculation on whether it would lead to overregulation of arbitrations. What are your thoughts on this?

I think the apprehension about the creation of the Arbitration Council of India stems from a misconception about the object for which it was established. This amendment was introduced on the basis of the recommendation of the Srikrishna Committee, of which I was a member. The Arbitration Council of India was intended to be a body to promote institutional arbitration in India, and not to regulate it. The function of the Council was to grade arbitral institutions, to enable the Supreme Court and the High Courts to delegate the default power of making appointment of the arbitrator, in case of a deadlock between the parties. It was perceived to be a forum for exchange of views and techniques to promote India as a robust centre for domestic and international arbitration, and, among other things, make recommendations to the Central Government on various measures for easy resolution of disputes.

That said, the Arbitration Council of India has not so far been established. So, we will have to wait and watch whether it will be established, and if so, whether it fulfils its objectives.

9. What are your views on the importance of an arbitration bar?

I think there are many lawyers who have specialised in arbitration, and have formed various associations, which is very encouraging. As I mentioned above, we do need to develop a unified arbitration bar, which is institutionalised. It would evolve soon. If a unified bar association is formed, it can make representations to various functionaries of the State to improve the system. In fact, recently, a representation has been made by one of the associations before the Chief Justice of India, that lawyers practicing full time in arbitrations, must be considered for senior designations.

The Arbitration Legacy of
Justice R.F. Nariman

A Snapshot of Landmark Judgments

By Deepika Murali, DM Law Chambers

In August 2021, Justice Rohinton Fali Nariman retired as a judge of the Supreme Court of India. His career, both as a senior advocate and as a Supreme Court judge has been exemplary, and his contribution to the development of Indian jurisprudence is unmatched. Justice Nariman has to his credit many firsts – he is one of the youngest lawyers to be designated as a senior advocate at the age of 37 and he belongs to that rare breed of counsels who have been directly elevated from the Bar as a judge of the Supreme Court.

In this short piece, we pay tribute to his arbitration legacy but before doing so, it bears noting that the development of arbitration jurisprudence is just one part of his legacy. During his tenure, as one of the foremost voices of the Supreme Court, he has delivered countless rulings on other important areas of law, including the right to privacy, the decriminalisation of adultery and many more.

With respect to arbitration, Justice Nariman strove to bring about consistency in the Supreme Court's arbitration jurisprudence. A strong advocate for party autonomy, his judgments emphasised minimal court interference, and maximum party autonomy. Some of his key judgments are below:

Validity of Stay on Awards and Constitutionality of Amendments

1. In Board of Cricket Control in India v. Kochi Cricket Pvt. Ltd., while deciding questions with respect to the construction of Section 26 of the 2015 amendment to the Arbitration and Conciliation Act, 1996 ("Act"). The Court held that Section 36 of the Act, as amended, would apply to matters filed under Section 34 before as well as after the commencement of the Arbitration & Conciliation (Amendment) Act, 2015, since the same would be a court proceeding in relation to an arbitral proceeding. The effect of this judgment was that there would be no automatic stay on operation of awards made under Section 36 pre-amendment (execution of an award as if it were a decree) as it is not a vested right even if there is a pendent petition under Section 34.

2. Subsequent to the BCCI judgment, Justice Nariman had the occasion to hear a set of writs challenging the constitutional validity of Section 87 of the Act (which sought to reintroduce automatic stays) in the case of Hindustan Construction Company v. Union of India. Justice Nariman struck down Section 87 of the 2019 Amendment Act as manifestly arbitrary and was enacted to nullify the decision in BCCI v. Kochi Cricket Pvt. Ltd. It was held that an automatic stay would deprive the arbitral award-holder from enjoying the fruits of the award, which is ordinarily gained only after years of litigation.

Necessary Clarifications on Arbitration Agreements and Procedures

3. The tests for fraud and arbitrability of fraud is a subject which is much debated in India. The Supreme Court's judgment in Avitel Post Studioz v. HSBC PI Holdings (Mauritius) Ltd. held that, in the context of arbitrability, only "serious allegations of fraud" need to be determined by courts. Justice Nariman laid down two tests to determine whether such allegations exist. These tests are – first, if the court finds that the arbitration agreement does not exist due to fraud and, second, if the allegations of fraud are made against the State, or its instrumentalities, as this would relate to the domain of public law.

4. During his tenure and through his judgments, Justice Nariman also contributed greatly to setting the law straight on various procedural aspects. In Government of Maharashtra (Water Resources Department) v. M/s Borse Brothers Engineers & Contractors, it was held that a delay in filing an appeal under Section 37 of the Act could be condoned only in cases where there is no negligence, and the application is bona fide. This judgment overruled M/s NV International v. State of Assam (authored by Justice Nariman himself) which had set the threshold for condoning delay in filing of appeal at 120 days.

AIR 2018 SC 1549 AIR 2020 SC 122 2020 (4) ArbLR 1 (SC)

Upholding party autonomy & making India arbitration-friendly

5. In Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, Justice Nariman assessed that arbitral awards from which an appeal is sought under Section 34(2) on the grounds of public policy could be successful only in very exceptional circumstances. For instance, there must have been a substantive or procedural breach of some fundamental principles of justice, which would shock the court's conscience due to its patent illegality. As for the powers of the Court to set aside majority arbitral awards, he noted that such power must not be utilised merely because the Court is of the opinion that justice has not been done, for that would involve looking into the merits of the matter.

6. Undoubtedly, a recent judgment to confer greater party autonomy in arbitrations is that of PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd. In this case, it was held that parties to the arbitration agreement have the autonomy to decide both the procedural law and substantive law that are applicable, and domestic parties have the autonomy to designate the seat of arbitration outside India.

7. Justice Nariman saved his best for last while delivering the judgment in Amazon.com NV Investment Holdings LLC v. Future Retail Pvt. Ltd. The judgment reiterated the common thread of party autonomy. He held that full party autonomy is given by the Act to have a dispute decided in accordance with institutional rules which can include emergency arbitrators delivering interim orders, described as "awards". Such orders are an important step in aid of decongesting the civil courts and affording expeditious interim relief to the parties. Such interim orders are referable to and are made under Section 17(1) of the Act, and are enforceable under Section 17(2) of the Act.

Finally, in Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd., in a greater push for arbitration in India, foreign arbitral awards were held to be enforceable against non-signatories to the arbitration agreement. It was held that foreign awards cannot be challenged on the ground of 'perversity' or on the non-signatory's objection, as Section 48(1) of the Act must be narrowly construed. It was further held that tort claims can be decided by the arbitrator under Section 44 if they are related to the arbitration agreement.

Justice Nariman's contribution to commercial and arbitration jurisprudence over the past seven years has seen complex disputes being settled in the simplest language. While it has been truly difficult to pick and choose between his judgments, his legacy reflects the common thread of a pro-arbitration stance, which has resulted in significant developments to arbitration jurisprudence in India.

2021 (3) ALD 115 AIR 2019 SC 5041 AIR 2021 SC 2517

CA Nos. 4492-4493, 4494-4495 and 4496-4497 of 2021, 06.08.2021

CA Nos. 8343-8344 of 2018 and 8345-8346 of 2018, 10.08.2021

Inaugural India ADR Week

Discussing the present and the future of arbitration in India

Reported by **Dilber Divetre, Homburger and Shreya Gupta, Shardul Amarchand Mangaldas**

The first edition of the India Alternative Dispute Resolution Week or India ADR Week took place virtually from April 6 to April 10, 2021. The webinar included 20 panels covering topics related to arbitration in India and other more general ADR issues. Several panels had over 200 attendees. This post aims to provide a summary of the sessions where topics concerning arbitration in India were discussed.

Out of the 20 sessions included in the India ADR Week, nine sessions touched upon topics relating to arbitration in India. These included a discussion on the current state of Indian arbitration law by a panel composed of Alipak Banerjee, Vyapak Desai, Justice Gita Mittal (Retd.), Prof. Laurence Boo, and Matthew Gearing QC. The panel traced the development of arbitration in India over the last three decades and discussed the legislative changes to Indian arbitration law starting from the Arbitration Act, 1940 to the enactment of the Arbitration and Conciliation Act, 1996 ("Indian Arbitration Act"), and through the 2015 and 2019 amendments which have their foundation in case law. The panel also discussed the contours of conflict of interest, data privacy, and confidentiality which are still evolving concepts.

A panel composed of Kabir Singh, Promod Nair, Percy Billimoria, Rajendra Barot and Vanita Bhargav dwelt more specifically into the recent 2019 amendments to the Indian Arbitration Act. The panel noted that the 2019 amendment takes concrete steps towards recognising and promoting institutional arbitration in India by, in the first instance, adding institutional arbitration to the definition of arbitration and empowering arbitral institutions to take the appointment of arbitrators in their hands. While most of these amendments are yet to be notified, they have played a role in making India an attractive jurisdiction for institutions to set up offices. The panel also debated the imposition of strict timelines under the 2019 amendment and the viability of legislating for the timelines by statute.

Concurrently they discussed whether the timelines lent themselves to misuse by unsuccessful parties to claim that they were denied natural justice. Another provision that was debated was whether the qualifications of arbitrators prescribed by the 2019 amendment amounts to "over-regulation" and would, consequently, stifle party autonomy to choose arbitrators. The general consensus within the panel was that we are yet to see whether the 2019 amendments

end up being a boon or a bane – a question that will only be answered in the fullness of time.

The perennial question of "What's next for arbitration in India?" was debated by a panel composed of Andrew Battisson, Partner at Norton Rose Fulbright; Ashish Bhan, Partner at Trilegal; Darius Khambata, Senior Advocate of the Bombay High Court Manish Sansi, Chief Legal Officer, Bombay high court; Vodafone; Montek, FTI Consulting; Nitish Jain, Partner at Trilegal and Sapan Gupta, General Counsel of Arcelor Mittal Nippon Steel. The panelists discussed the positive developments in Indian arbitration in recent years such as the easier enforceability of awards in India and the pro-arbitration stance taken by Indian courts. However, the panelists considered that certain steps could be taken to enhance the arbitration scene in India further, such as the creation of a dedicated arbitration bar and full-time specialised arbitrators, law school courses on how to conduct arbitrations, technological improvements like live transcripts, and the greater and more efficient use of virtual hearings and quantum experts. Finally, the panel concluded that while India had made great strides in the right direction, further improvements remained to be done.

Section 11 of the Indian Arbitration Act that deals with the appointment of an arbitral tribunal was discussed by a panel composed of Justice B.N. Srikrishna, former Judge of the Supreme Court of India; Manish Lamba, General Counsel at DLF Cybercity; Naresh Thacker, Partner at Economic Laws Practice; and Nicholas Peacock, Partner at Herbert Smith Freehills. The panel unanimously agreed that the scope of Section 11 of the Indian Arbitration Act must be limited to simply confirming whether an arbitration agreement exists and appointing the arbitrator while leaving all issues including a detailed examination of whether the arbitration agreement is valid or disputes are arbitrable to be decided by the tribunal. The panel also expressed the view that courts must take a non-interventionist approach when asked to appoint an arbitrator and not permit parties to needlessly delay the process by objecting to the arbitrators proposed by the counterparty, raising frivolous objections to the existence and validity of the arbitration agreement, or challenging the arbitrability of a dispute. It is in the interest of justice that the principle of competence-competence be adhered to – indeed, this is also supported by the Indian Arbitration Act which does not provide for any appeal against an arbitrator's decision holding that the tribunal has jurisdiction. The appointment of an arbitrator is the first step towards initiating arbitration and this process ought not to lend itself to delay and derailment.

The implications of the new 2021 ICC Rules on Indian parties were discussed by a panel moderated by Abhinav Bhushan, Director, ICC Arbitration & ADR for South Asia, and included Betsy Hellmann, counsel at Skadden in New York; Alexander Fessas, the Secretary General of the ICC Court of Arbitration; Pooja Bedi, General Counsel for Philips India; and Akshay Kishore, Partner at Bird & Bird. The panelists discussed the new ICC rules relating to virtual hearings, third party funding, the ICC's power to appoint the tribunal, and its power to exclude party appointed representatives. Concerning India, the panelists noted that Indian courts and tribunals have adapted exceptionally well to the new format of virtual hearings and nearly 75 to 80 percent of hearings are now conducted virtually. The panelists also applauded the balance struck by the new rules concerning third party funders, as they require disclosure of the identity of the funder, but not the terms. Concerning the new rule that allows the ICC Court to appoint the tribunal in exceptional circumstances, the panelists noted that such a situation could arise within the Indian context, where an employee of one of the parties is appointed as an arbitrator or where the clause gives one party the unilateral right to appoint the arbitrator. However, the need to strike a balance between the alleged unfairness and the parties' explicit agreement were also discussed. Concerning the ICC's power to exclude party appointed representatives in the event of a conflict, the panelists agreed that this is another area where there is a need for a delicate balance, and one will need to wait and watch how these issues play out in practice.

Some practical tips for making awards rendered in India challenge–proof were shared by a panel composed of Tejas Karia, Rishab Gupta and Ila Kapoor, partners at Shardul Amarchand Mangaldas & Co.; Sapan Gupta, General Counsel at ArcelorMittal Nippon Steel India; Gopal Jain, Senior Advocate; and Shruti Sabharwal, Principal Associate at Shardul Amarchand Mangaldas & Co. The panel discussed the role of boilerplate arbitration clauses being used in agreements as a contributing factor to challenge awards. Over time, arbitration clauses have gained more significance and it is important for parties to properly negotiate and draft these clauses so as to ensure that they choose an arbitration friendly jurisdiction, properly designate the seat and the composition of the tribunal. As to the role played by arbitral institutions in reducing the prospects of a challenge to an award being successful, the panel expressed the view that institutional arbitrations do reduce this risk to a large extent. One reason for this is that institutions tend to provide a tribunal of higher quality, where the chair is typically chosen by the institution. Second, institutional rules provide a more efficient, expeditious and transparent process for the arbitration. Third, most institutions provide for scrutiny of arbitral awards which ensure the quality of the arbitral award. The panel also discussed whether the advent of online dispute resolution or "ODR" is likely to make awards more susceptible to challenges. While we are yet to see whether such challenges are raised and how courts will deal with them, there is unfortunately a very real apprehension that unsuccessful parties will raise allegations concerning "due process" violations to challenge such awards.

This, however, can be avoided by parties agreeing to the procedure for virtual hearings beforehand. Of course, while the possibility of a challenge cannot be ruled out, the probability of a successful challenge being raised can be mitigated.

India's future as a potential market for litigation and arbitration funding was also discussed by Darshandev Singh, Partner at Lee Hishammudin Allen & Gledhill; Sherina Petit, Partner at Norton Rose Fulbright; Shreyas Jayasimha, Partner at Aarna Law; and Sindhu Sivakumar, Senior Investment Manager at Innsworth Advosors. The panel discussed the increasing popularity of third party funding in the United Kingdom for commercial disputes (primarily by claimants) in stark contrast to the position in Malaysia and India. The most important factor towards growing third-party funding is the need for legislative and regulatory support. While there is potential for third-party funding in India, at present a regulatory and legislative vacuum exists. Nevertheless, even in the absence of any concrete provisions, there are several safeguards practically built into the process. Further, while third-party funders may not be deterred by the lack of regulation, this option is only likely to be available in select cases. Illustratively, third party funders may choose to impose requirements of threshold claim amounts, an analysis of likelihood of success, the nature of the claim, and the likelihood of recovery at the enforcement stage. Another aspect that was discussed by the panel was the applicability of confidentiality requirements on third-party funders in India, which is similar to the privilege and confidentiality provisions that apply to an attorney-client relationship.

A panel comprising of Gourav Joshi, Senior Advocate; Nicholas Lingard, Partner at Freshfields; Sanjeev Kapoor and Raj Panchamatia, Partners at Khaitan & Co; and Vivek Gambhir, General Counsel at the Abu Dhabi National Energy Company, discussed the position with respect to the enforcement of foreign awards in India and nuances that parties must keep in mind while attempting enforcement. First, the panel discussed the steps that parties can take to reduce the time for enforcement. This timeframe can be compressed by making sure that parties have an ample opportunity and notice to appear for the arbitration itself as well as by having some flexibility in the procedure. The primary reason for delays is the backlog faced by courts coupled with the myriad dilatory tactics employed by unsuccessful parties. Secondly, the panel discussed the pro-enforcement stand taken by Indian courts permitting parties to file comprehensive applications for enforcement and execution, initiating execution in the jurisdictions where assets are located without any pre-requisites being imposed. Most importantly, Indian courts do not permit parties to challenge the merits of an award and only entertain challenges within the narrow pigeonholes prescribed under the Arbitration Act. The panel also discussed the non-interventionist approach taken by Indian courts to stay their hands and lean in favour of upholding an award rather than refusing enforcement even where some grounds for refusing enforcement may exist. Overall, there are several practical steps that parties and tribunals alike may take to ensure an award is as enforceable, and challenge proof, as possible.

The global perspective on recent developments related to international arbitration in India was discussed by a panel composed of Daniel Sharma, Gourab Banerji, Gowri Kangeson and Kate Cervantes-Knox. The panel discussed the benefits of emergency arbitration and when it would be better to approach state courts, the enforceability of emergency arbitration awards in India, and the choice of the seat of arbitration for Indian parties. The panel summarised the key considerations that weigh in favour of opting for emergency arbitration as, determining whether local courts have jurisdiction to grant the relief sought, whether any confidentiality concerns exist (since those would only be available in arbitration proceedings and not before courts), the urgency with which relief is required, and the enforceability of the emergency award. These factors hold equally true for emergency arbitrations in India.

As to enforceability of emergency arbitration awards, the panel drew a distinction between domestic arbitrations and foreign arbitrations. This question is being widely debated at present, but Indian courts seem inclined towards enforcing emergency awards – if not directly, indirectly by granting the same relief as the emergency award in an independent application. Lastly, the panel discussed the ability of Indian parties to choose a foreign seat of arbitration and a foreign substantive law. Interestingly, the panel expressed a pro party autonomy approach, which has subsequently been the view taken by the Supreme Court of India, by holding that there is no bar to two Indian parties selecting a foreign seat of arbitration or a foreign substantive law.

Suffice to say that the arbitration landscape in India has advanced leaps and bounds in the last few years, but the end is far from near. Though the topics discussed by the panels were very diverse, there was a collective optimism that India is moving in the right direction towards becoming a hub for arbitration.

India ADR Week:

International Events

Reported by Deepika Murali, DM Law Chamber

The Mumbai Centre for International Arbitration (MCIA) showcased sixteen sessions focussing on international trends and perspectives in alternate dispute resolution.

A stellar panel consisting of Justice AK Sikri, a former judge of the Supreme Court of India; Hon'ble Alexander Williams III, former Judge of the Los Angeles Superior Court; Shriram Panchu, Senior Advocate, Madras High Court; Professor Joel Lee, Associate Partner, CM partners, Singapore; and Dr Sukhsimranjit Singh, Managing Director of Straus Institute for Dispute Resolution at Pepperdine University, discussed the topic of "Mediation in 2021: An International Perspective". The panelists discussed mediation as a flexible process and legitimacy of mediation as a resolution mechanism including the Singapore Convention on Mediation, which provides a comprehensive and uniform framework for cross border enforcement of an international settlement.

A panel composed of Online Resolution revolutionaries such as Kanchan Gupta of CADRE, Pranjal Sinha of SAMA and Vikas Mahendra of CORD discussed the pressing need for equitable and immediate dispute resolution using technological media. The panel discussed the impact of COVID-19 on online dispute resolution, and various services on offer to adapt to the pandemic and commercial needs. The panel also shed light on the code of International Council for Online Dispute Resolution.

The role of 'GenNext' as arbitrators and mediators was discussed by a distinguished Panel composed of Dr. Lalit Bhasin, Managing Partner of Bhasin and Co.; Advocates, Mr. Lomesh Nidumuri, Partner at Indus Law; and Mr. Shashank Garg, Partner at Adani and Co. The Panel unanimously agreed that there was a strong need for specialised professionals in arbitration. This could be achieved with more training courses, which are presently being offered by a select few institutions, for instance the Chartered Institute of Arbitrators.

The controversial question of ICSID and India's reluctance to re-join the forum was discussed by a diverse panel consisting of Meg Kinnear, Secretary General of ICSID; Claudia Frutos Partner at Curtis, Mallet-Prevost, Colt & Mosle LLP Washington DC; Jan Paulsson, Founding Partner, Three Crowns LLP; and Prabash Rajan, Senior Assistant Professor, South Asian University. The eminent panel delved deep into discussions on the opportunities, concerns and alternatives to ICSID.

A brilliant panel composed of Harish Salve, former Solicitor General of India; Fereshte Sethna Senior Partner, DMD Advocates; Howard Rosen, Managing Director, Secretariat; and Matthew Hogdson, Allen and Overy, discussed the topic of 'Investment Arbitration-Pendulum in favour of investor or host state?' The Panel discussed India's Model BIT, balancing state regulation, fair and equitable treatment and legitimate expectations.

A highly qualified panel of Peter Goldsmith, Co-Managing Partner, Debevoise & Plimpton; Patrick Taylor, Partner, Debevoise and Plimpton; Priya Mehra, General Counsel, Indigo Airlines; and Shreyas Jayasimha, Founding Partner, Aarna Law, discussed the topic of 'Forum selection after Brexit: anti suit or anti arbitration?'. The panel was quick to fend off concerns regarding Brexit's impact on London's strength as an arbitration hub. If anything, the panel noted an emerging a positive outlook for arbitration because of Brexit.

The panel also acknowledged Brexit's effect on investment treaties. They noted, while free trade agreements are being drafted with much fervour, protections offered to investors particularly in the absence of ISDS mechanisms remain unclear.

UPCOMING EVENTS

Annual Young MCIA Conference 2022

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