SIAC

Singapore International Arbitration Centre

Where The World Arbitrates

SIAC INDIA NEWSLETTER

ISSUE 1, JULY 2020

WHAT'S INSIDE

Foreword

India is very important to SIAC. We have built strong bonds with our friends and users in your beautiful country.

India is today at the forefront of international arbitration. It is not just one of the pre-eminent users of this mode of international dispute resolution, it has an eco-system of talent, sophistication and government support which is nothing short of exceptional.

SIAC cheers India on as it continues to shape its laws and practices to bring them in line with, and indeed to influence, the best practices in international arbitration.

We are determined to be an integral part of the India story and will continue to forge closer ties with our cherished friends in the Indian legal and business communities.

To that end, we are delighted to present our India Newsletter. It represents SIAC's continued commitment to thought leadership and to provide platforms for the exchange of knowledge and the sharing of ideas.

We are truly honoured that Indian arbitration specialists and in-house counsel have contributed articles which examine both global and topical issues in the Indian context. We hope that they are read all over the world.

I would like to thank each of the authors for their insightful and thought provoking contributions.

SIAC will always remain open to ideas, contributions and feedback. We grow because of our friends and users. ◆

Mr Davinder Singh, SC
Chairman, SIAC

"We are determined to be an integral part of the India story and will continue to forge closer ties with our cherished friends in the Indian legal and business communities"

SIAC India Webinar Series

Since the implementation of COVID-19 measures, SIAC has taken its events virtual, starting with the SIAC International Arbitration Webinar Series 2020. The first webinar kicked off on 14 April 2020, aptly entitled "Minimising the Impact of COVID-19: A Guide for Counsel and Arbitrators". The SIAC International Arbitration Webinar Series 2020 has gone global – panellists and audiences from all regions around the world have joined the series (including those from Asia, Europe, Middle East, Africa and the Americas), and topics discussed are tailored for each region.

SIAC India has been pleased to host a series of webinars as part of the SIAC International Arbitration Webinar Series 2020. Our inaugural webinar, held on 12 May 2020, started with a fascinating interview with Mr Harish Salve QC, conducted by our very own Head (South Asia), Ms Shwetha Bidhuri. Mr Salve QC gave us an exclusive look into his distinguished career, shared his insights on life and the law, and gave his views on the future of investment and commercial arbitration. Mr Salve QC noted, 'A lawyer is always a student of law – always willing to learn, always ready to learn'

On 16 May 2020, SIAC, together with the Indian Council of Arbitration, hosted a joint webinar on "Arbitration in India – The Way Forward". This webinar was the first of a two-part series to be jointly hosted by SIAC and the Indian Council of Arbitration. Moderated by Mr Zarir Bharucha, panellists Mr Dimitrios Katsikis, Mr Nakul Dewan, Ms Shaneen Parikh and Mr Avinash Pradhan shared unique insights and perspectives on strategies, tips and techniques for the efficient conduct of arbitral proceedings.

On 30 May 2020, we held a webinar on "Perspectives and Insights on Current Issues and Developments in International Arbitration. The panellists included prominent international arbitration practitioners from India, Singapore, England and France. Ms Smitha Menon moderated the session and set the stage for discussion of recent developments in the practice of international arbitration. On the topic of investor state arbitration, Dr. Claudia Annacker focussed on developments in Europe, while Ms Anuradha Dutt discussed the developments in India. Ms Sherina Petit then led an interesting discussion on how 2020 will be considered a turning point in using technology to assist in the efficient and proper administration of justice. She remarked that one of the biggest advantages of using technology in arbitration is the 'reduction of carbon footprint'. Finally, Ms Gauri Rasgotra went on to discuss the developments in third-party funding, and the impact of COVID-19 on the use of such funding. The webinar ended with the panellists addressing the question, 'Is the international arbitration community doing enough to promote gender diversity, and what further steps should be taken in this regard?' The overall consensus was that while the statistics show that arbitral institutions are increasingly appointing a higher number of female arbitrators, parties and co-arbitrators should be encouraged to consider more female arbitrator appointments.

In June, we hosted two more webinars on two pertinent topics. The first, held on 13 June 2020, saw panellists discuss "Doing Business in India". The webinar, moderated by SIAC Board member Mr Rajiv K Luthra, had leading practitioners and general counsel, Mr Jatin R Jalundhwala, Mr Shuva Mandal, Mr Vikram Munje, and Mr Siraj Omar

"Minimising the Impact of COVID-19: A Guide for Counsel and Arbitrators".
Mr Kendista Wantah, Mr Chong Yee Leong, Mr Toby Landau QC, Prof Lawrence Boo, Mr Alastair Henderson

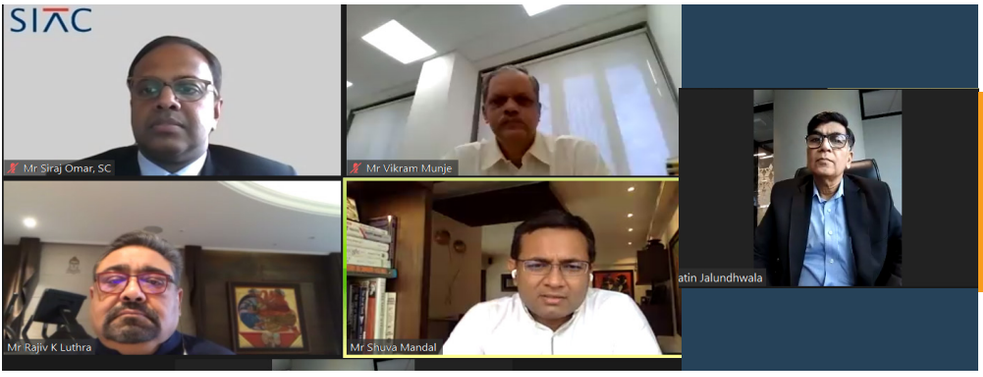
,SC share their views on legal issues that could arise in the course of doing business in India, and discuss their first-hand experiences on how to effectively resolve disputes with Indian parties. Later in the month, on 27 June 2020, we asked leading practitioners, Mr Gaurav Pachnanda, Mr Prakash Pillai, Mr Nirav Singh, Mr Sarjit Singh Gill, SC to address the issue of how an arbitration could be taken forward when parties are faced with a Non-Responsive Respondent. Moderated by Mr Vyapak Desai, the panellists shared their own experiences (often humorous) with dealing with non-responsive respondents, and gave practical tips and guidance on the issue from the viewpoint of both arbitrator and counsel.

On 18 July 2020, we held a webinar on "India's experience with Emergency Arbitrations". Moderated by Ms Karishma Vora, panellists Mr Ben Giaretta, Mr Sharan Jagtiatani (Senior Advocate), Mr Vivekananda Neelakantan and Mr Tan Chuan Thye, SC discussed India's approach towards Emergency Arbitrator decisions, the types of relief typically sought and their experience with using Emergency Arbitration.

Recordings of the webinars held as part of the SIAC International Arbitration Webinar Series 2020 can be found on SIAC's website (which links to SIAC's YouTube Channel or Bilibili). With many more webinars lined up for the rest of the year, SIAC India looks forward to welcoming many more distinguished panellists and discussing topical issues with our audiences.◆

"Arbitration in India – The Way Forward"
Mr Zarir Bharucha, Mr Dimitrios Katsikis, Mr Avinash Pradhan, Mr Nakul Dewan, Ms Shaneen Parikh, Mr Arun Chawla

"Perspectives and Insights on Current Issues and Developments in International Arbitration"
Ms Sherina Petit, Ms Smitha Menon, Ms Gauri Rasgotra, Dr Claudia Annacker, Ms Anuradha Dutt



"Doing Business in India: Pointers, Perspectives and Potential Pitfalls"
Mr Siraj Omar, SC, Mr Vikram Munje, Mr Rajiv K Luthra, Mr Shuva Mandal, Mr Jatin R. Jalundhwala

"Non-Responsive Respondent – How to Take the Arbitration Forward?"
Mr Prakash Pillai, Mr Gaurav Pachnanda, Mr Nirav Shah, Mr Sarjit Singh Gill, SC, Mr Vyapak Desai

"India's experience with Emergency Arbitrations"
Ms Karishma Vora, Mr Tan Chuan Thye, SC, Mr Ben Giaretta, My Sharan Jagtiatanil, Mr Vivekananda Neelakantan

Highlights from the interview with Mr Harish Salve QC

Ms Shwetha Bidhuri: What has been your greatest learning from this pandemic, and where do you think we will find ourselves at the end of it?

Mr Harish Salve: So, yes it took a pandemic to teach this old monkey some new tricks. In fact, ironically in February, when we were at the beginning of this problem, I had a big arbitration starting in March for which we had been preparing for 6 months. One of the suggestions came up about having a virtual hearing, I said, "no question". I was not agreeable and for the simple reason I felt, how can you cross-examine a witness if he is not in the same room, unless you can connect with his energy and sort of zoom in on him personally? If the same situation arose today, I don't think I will repeat that. So yes we have learnt because we were driven to learn. We have learnt how to work virtually… there are minor hiccups which we will learn to resolve as we go along. I think this system is working quite well. For smaller hearings I think we will be able to use this and thereby save a lot of cost and inconvenience to clients which is one of the USPs of arbitration…

Ms Shwetha Bidhuri: …If you could share the role that Mr Nani Palkhivala has played in your life and if you can recall any particular episode that you treasure the most.

Mr Harish Salve: …Mr Palkhiwala, he was a lawyer, who apart from his complete understanding of the law and understanding of the philosophy of the law, had incredible forensic skills. The way to present a case, what to say, how to say, when to say, the three key elements of advocacy and when not to say and what not to say, is what I have learnt from him apart from his attention to detail. …

The second thing I've learnt from him is when you write… it should be written so perfectly that nobody should be able to reduce even a word from what you have written, and that's how it is the most effective, the most convincing…

And on a personal level, what I learnt from him was that a lawyer is always a student of law, always willing to learn, always ready to learn, and how one should behave with younger members of the bar. When I was a youngster I saw, how much affection he got, and the innate humility of the man. First time when I appeared with him and he met my father (who was a great fan of his, being a tax chartered accountant), I can never forget what he said. He said, "NKP, it is such a pleasure working with your son". He didn't say "what a pleasure it is to have your son working with me". You know it struck me that this is what a human being should be like…

Ms Shwetha Bidhuri: Anything from litigation that you feel, any feature, that can be brought to international arbitration, that could really change the efficiency of international arbitration?

"And on a personal level, what I learnt from him was that a lawyer is always a student of law, always willing to learn, always ready to learn, and how one should behave with younger members of the bar"

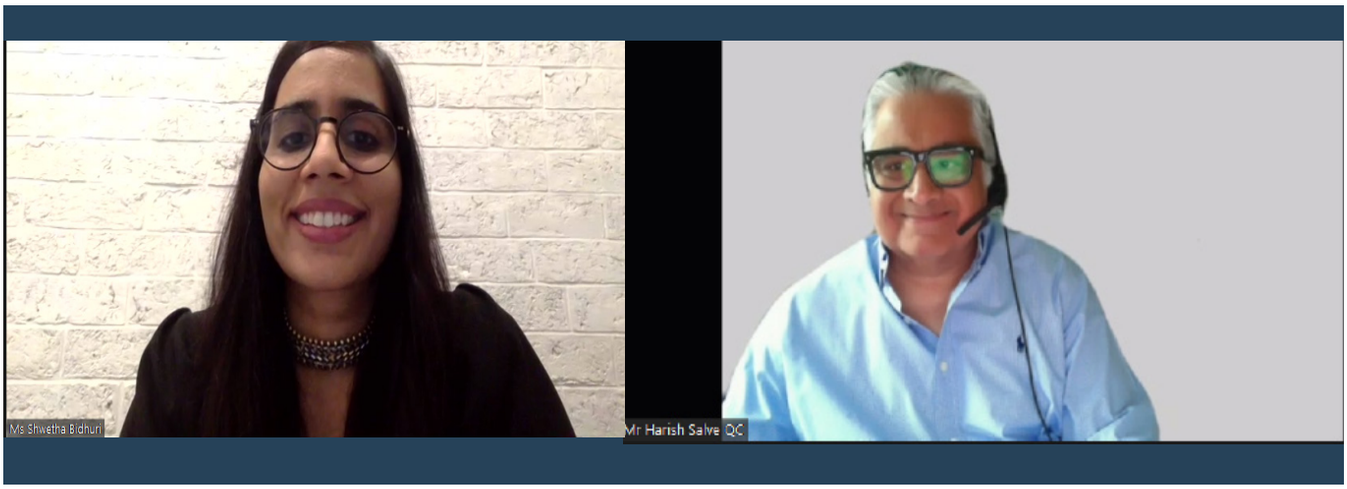
Mr Harish Salve: Not really. I think international arbitration over a period of time, especially the way it has evolved, is doing wonderfully well. In fact, and this is something which I always tell Indian judges who join arbitral panels, please don't give up your habit of reading…

Like you would be happy to know when a PIL was filed in the Supreme Court, the Chief Justice, Justice Gogoi at that time, he said "let's recast the commercial courts". The Chief Justice Gita Mittal at that time, was very happy, she called the original side bar. Originally, there were huge howls over writing of the rules for the commercial courts, and what I did was, I took our SIAC Rules, I took the English Rules of Court, the Civil Procedure Rules, and I wrote up the Delhi High Court Commercial Court Rules, and finally we managed to persuade the Court. And if you notice, I think Delhi High Court is the only Court which has in its rules, the Redfern Schedule.

So in fact, it's the arbitration world which is cross fertilising… So it has become a lot more user friendly...

Not too much stress on formality, not too much stress on following civil rules. As long as there is substantial compliance of natural justice, get on with it and decide…

Ms Shwetha Bidhuri: You have been on both sides: you have acted for the Government, and you have acted against the Government in a number of cases. How do you balance the two?



Interview with Mr Harish Salve QC
Ms Shwetha Bidhuri, Mr Harish Salve QC

Mr Harish Salve: Well, it's actually an exercise which I learnt very early on in life, because one of the reasons I readily accepted becoming Solicitor General (although it was financially, a huge sacrifice), was I wanted to see life on the other side of the fence. And when you work for the government, you realise their difficulties, you realise the pressures inherent in any government system. … So once you are aware of this, it is not that difficult to accommodate these conflicting interests…

> "Could anyone have argued this better'? And if the answer is 'Yes', you need to work on your skills. If the answer is 'No', don't worry about the result."

Ms Shwetha Bidhuri: Just going back to what different Governments across the world have done in response to the Covid-19 situation, there have been some unprecedented measures, and in fact, the level of state intervention into private rights is also quite unparalleled. Do you think this will find a way into bilateral investment treaty claims?

Mr Harish Salve: I don't know how far you will be able to sustain a bilateral investment treaty claim, because on the anvil of reasonableness, I think most governments will be able to justify what they have done, at least up till now. And I don't think the governments have really exposed themselves to BIT investments because fortunately, lockdown for example, and the kinds of lockdown that we have seen, have been devastating, and have been a global phenomenon. So it's not a knee jerk reaction of a country, or it's not a politically driven action which, see underlying all this Shwetha, like in Constitutional law, as in BIT law, if the arbitrators feel that what has been done by the government is driven by political considerations, is driven by knee jerk, is changing the policy after investments are made, the arbitrators have a reaction. Where the arbitrators feel that the system in a country is what it is that's how it is and there are problems which have to be dealt with then they will deal with it accordingly…

Ms Shwetha Bidhuri: …What are the general strategies you would advise young practitioners who want to position themselves a strong career in international arbitration to take, whether as Counsel or as an Arbitrator?

Mr Harish Salve: Well, you start as Counsel, so for youngsters to start arbitration practice, the starting point is you start working on arbitrations. There is lot of scope to work in arbitrations. Don't disconnect yourself from Courts completely, because you will meet your clients when you are doing Court work. But having said that, if you are in a law firm, you focus on arbitration practice, remember your life will not be as exciting as your colleague who works in a Court. But if you stay the course, and if you work hard, arbitrations can perhaps at times be even more intellectually rewarding than Court litigation. That's my advice, stay the course. It's hard in the initial stages, but then it's equally hard in litigation practice. Don't get deterred, and yes you don't have the exciting cases which hit the headlines going before arbitrators, but if you are fond of the field of commercial law, arbitration is where it is increasingly happening all over the world.

Ms Shwetha Bidhuri: …Would you like to say a few words about some of the greatest losses in your legal career?

Mr Harish Salve: Some of the greatest losses. Yes. You know I am an incorrigible optimist, so I forget my losses very easily, but I have never one thing. I will say generally, it takes a lot to force me to read a judgement of a case which I have argued. I believe in moving on, and yes there are some cases which we felt really bad about losing (when you felt you had a very good case, and you felt the law was against).

…and one thing Mr Palkhiwala taught me very early in the profession… he said, "Harish, on a personal note, let me tell you. When you come out of a court room, you must ask yourself, 'Could anyone have argued this better'? And if the answer is 'Yes', you need to work on your skills. If the answer is 'No', don't worry about the result." So I have followed that rule. If you ask me which are my biggest losses, honestly, if you ask me about a case that I have lost, I am happy to talk about it, but I sort of delete it from my memory bank and move on. ◆

International Arbitration During COVID-19: A Case Counsel's Perspective*

MR CHAHAT CHAWLA, ASSOCIATE COUNSEL, SIAC

BACKGROUND

There is much public discourse on the impact of the ongoing pandemic on international arbitrations. Commentators and scholars have provided perspectives on how to navigate and find safe harbours in the uncharted waters of COVID-19. In the "new normal" of wide-ranging travel advisories and restrictions, there is an emerging consensus to better integrate the use of technology with dispute resolution. Indeed, major hearing centres located in Singapore, London, and Toronto have collaborated to share resources and offer virtual hearing solutions. Suggestions such as the increased use of electronic filings, virtual evidentiary hearings, and online case management have been widely discussed, and these mechanisms are now being applied at pace in international arbitrations.

In addition to the implementation of technology, stakeholders are assessing other tools to mitigate the impact of COVID-19. Recently, Mr Gary Born, the President of the SIAC Court of Arbitration, in his Open Letter addressed some of these issues. Against the background of these unprecedented circumstances, I draw on my experience as a member of the SIAC Secretariat to shed light on some recent trends and how SIAC tribunals have responded in this crisis to fulfil their adjudicative mandate.

The first quarter of 2020 has been an active period for the SIAC Secretariat. It is common practice for SIAC tribunals to conduct the preliminary case management conference telephonically or virtually. However, given the dramatic change in the arbitration landscape in the past few months, SIAC tribunals have successfully conducted a variety of hearings remotely, including applications for emergency interim relief and evidentiary hearings. Two recent SIAC arbitrations are illustrative of this trend.

CASE STUDY I – CONDUCTING AN EA HEARING FOR URGENT INTERIM RELIEF

With various national courts not fully operational, the use of EA proceedings in compelling circumstances has become more attractive to users of international arbitration. Due to travel and other constraints, SIAC EAs and parties have used different modes to conduct hearings. For instance, participants have used Maxwell Chambers ADR Hearing Solutions, Zoom, and Microsoft Teams platforms for EA-related virtual hearings. Further, in some other cases, EA proceedings have been conducted on a documents-only basis.

In one of SIAC's most recent EA applications filed in April 2020, the EA, as is required under the SIAC Rules, was appointed within 24 hours of the receipt of the EA application. After the EA was appointed, the EA swiftly scheduled a video case management conference (hosted on the Microsoft Teams platform – which was suggested by the claimant and agreed by the parties) to establish a schedule for consideration of the application.

Both parties were represented by counsel based in a common time zone. Following the case management conference, the EA, among other things, directed the parties to make submissions electronically by way of email (the EA did not require any hard copies). Further, the EA requested the parties to arrange for virtual hearing facilities with a service provider (Maxwell Chambers ADR Hearing Solutions in this case) including services for real-time transcription.

A day before the hearing, the EA and the parties, along with the service provider's IT personnel, participated in a "test call" to assess the virtual hearing software. The following day, and based on the established order for advancing oral submissions, a full day of hearing (from 9:30 am to 5:00 pm) was conducted virtually. This hearing was attended by the EA, 9 party representatives, the service provider's "moderator", and a transcriber. In the course of the hearing, counsel relied on various documentary evidence using e-bundles. Subsequently, the EA decision was submitted to SIAC for scrutiny, and the decision was transmitted within the 14-day period as mandated under the SIAC Rules.

CASE STUDY II – CONDUCTING AN EVIDENTIARY HEARING

This international commercial arbitration, seated in Singapore, applied the Expedited Procedure of the SIAC Rules 2016 with a 6-month timeframe for its completion. A tranche of the oral hearing (concerning evidence taking by witness conferencing), was heard virtually with about 19 participants (comprising the arbitrator, lawyers, expert witnesses, client representatives, transcribers and an IT moderator) from different time zones (GMT +8; and GMT -5).

Given the developing situation of COVID-19, the tribunal requested the parties to liaise with each other and explore methods of conducting expert witness conferencing by way of a video facility. The parties identified and agreed on a service provider (Maxwell Chambers ADR Hearing Solutions). Subsequently, the tribunal conducted a case management hearing over the telephone to discuss logistical issues and other procedural matters.

A day before the hearing the participants took part in a "dry run" to test the screen sharing, audiovisual, and other aspects of the virtual hearing. The parties agreed to be "guided" by the Guidance Note of Remote Dispute Resolution Proceedings as published by CIArb (Guidance Note).

Following Appendix I of the Guidance Note, the claimant noted the parties' agreement to hold a video conference hearing, identified the party representatives, and the list of electronic documents proposed to be referred to in the hearing.

The "dry run" or the practice round enabled the tribunal to tighten loose ends and run a full day of evidentiary hearing between 8:00 am and 4:00 pm Singapore time. During the hearing, the tribunal permitted the parties to use the "chat function" for communication and to raise objections during the evidentiary hearing. To impart flexibility, the tribunal also allowed parties to raise urgent objections by use of the 'un-mute' feature. To maintain the proper structure of the evidentiary hearing, the tribunal managed the participants' order of speaking.

OTHER TRENDS:

In addition to the shift to online platforms, the tribunals have, on a case-by-case basis and subject to the circumstances of any particular dispute, adjourned some hearings for a later date or have extended timelines for written submissions or witness statements. In some cases, parties have jointly requested for the suspension of the proceedings to hold without prejudice settlement talks. In less complex cases, parties have requested the tribunal to dispense with the oral hearing and decide the dispute based on documents alone.

In one EP case, the parties agreed to inform the tribunal whether they would be agreeable for the proceedings to proceed on a documents-only basis after filing of the first round of pleadings. This shows that there may be merit in an ongoing conversation about the possibility of deciding the dispute solely on the documents in circumstances where it may be difficult to properly evaluate the suitability of documents-only arbitration at an early stage. Tribunals are also working to minimise the impact of COVID-19 on arbitral timelines. For instance, a tribunal suggested (and the parties agreed) to facilitate the exchange of unsigned final witness statements as the witnesses found it difficult, due to governmental regulations, to affix physical signatures on their statements. In this case, the tribunal directed the parties to exchange the final signed version of the witness statement on a later date.

THREE KEY CONSIDERATIONS FOR VIRTUAL HEARINGS

1. Developing best practices for a virtual hearing: If managed properly and applied in appropriate disputes, virtual hearings can save considerable time and costs. As a matter of prudence and proper planning, stakeholders may wish to consider the following factors whilst opting for virtual hearings:
    a. Feasibility to organise a virtual hearing – assessing the number of participants, the participants' access to technology, time-zone differences, and the parties' ability to present their case virtually;
    b. Whether any guidelines or protocols (including security measures) are to be adopted;
    c. Whether there are any data privacy concerns;
    d. Whether any specific communication protocol may be followed (e.g., a paperless arbitration);
    e. The procedure for the selection of an online platform;
    f. Revisiting the appropriate length of the oral hearing (stakeholders may explore the possibility of minimising the duration of the hearing);
    g. The order of presentation and time-allocation between the parties;
    h. The speaking etiquette (for instance, identifying

oneself before speaking and exploring means to ensure that participants do not talk over one another);

i. Format for e-bundles (tribunals may have subjective preferences in this regard);
j. Whether a third-party vendor is needed to host documents;
k. The mode for taking of evidence and how objections may be made;
l. Planning for breaks (the duration and modalities for requesting short-breaks);
m. Whether additional services such as transcription and translation are required;
n. Whether the hearing would be recorded;
o. Planning for alternative hearing and communication arrangements (such as teleconferencing) in case there are technical issues during the virtual hearing; and
p. Applicability of any recent case law and other policies being generated in the context of virtual court hearings.

2. The practice round: Various service providers allow arbitral participants to organise "dry runs" before the hearing day so that the users can acquaint themselves with the relevant technology. A well-organised dry run will work to ensure that participants have an uninterrupted experience on the hearing day. Participants should take particular note of the following features:

a. Audio-video quality and the tribunal's clarity of line of sight (in particular for hearings with factual witnesses where arbitrators may require an unobstructed panoramic view of the witness' location and any documents that they may be referring to);
b. Functionality of the "break-out rooms", common and private chat features, and understanding how and when these will be engaged (this may be particularly useful in case of a three-member tribunal);
c. How parties and the tribunal will view e-documents (participants may use actual or dummy e-bundles to check ease of access to the documents);
d. Communication protocol with the moderators or third-party vendors. For instance, it is important to consider how the transcribers will notify the tribunal in case they are experiencing technical issues and are unable to transcribe any specific portion of the hearing;
e. Parties and the tribunal should consider the adequacy of their IT infrastructure. For instance, and even though it is a matter of individual preference, an SIAC tribunal described having multiple screens for the hearing as "very important". The tribunal used four screens for the evidentiary hearing - the first screen for the live video feed of the hearing room, the second screen for viewing and comparing documents, the third screen for witnesses, and the fourth screen for transcription and translation. Further, using a desktop or a laptop as one of the four screens was recommended as it would allow a tribunal to edit, search for specific keywords, and perform other editing tasks with relative ease;
f. Ordering of communication to ensure that participants do not speak over each other; and
g. Finally, the tribunal and the parties may consider situations where one or more participants (including witnesses) get disconnected or "dropped off" from the virtual platform. In these situations, the tribunal may consider solutions such as a short break until the participant re-connects.

3. Using reliable technology: Most service providers offer a technical guide to plan a virtual hearing. The following checklist sets out factors that participants may consider in case they opt to hold a hearing without a service provider's oversight:

d. Selection of a quiet location with adequate lighting;
e. Assessing internet connectivity;
f. Use of earphones with microphones for audio clarity;
g. Muting microphones when a participant is not speaking and minimising competing sounds such as typing as they may create issues with transcriptions;
h. Testing all the devices; and
i. Planning for troubleshooting processes.

CONCLUSION

COVID-19 has undoubtedly accelerated the use and acceptance of virtual hearings in international arbitration. In the coming months and after the travel restrictions are eased, it is expected that users of arbitration will continue to refine and enhance the use of technology for virtual hearings. These hearings may become a "new normal" for cross-border disputes, at least for less complex cases, which may be better suited for online platforms. The arbitration community will also need to consider the question of whether virtual hearings should directly replicate "in-person" hearings or whether further efficiencies may be achieved to streamline the arbitral process.◆

**Disclaimer – The views and opinions expressed in this article are solely those of the author(s) and do not necessarily reflect the official views of SIAC.*

* This article was originally published as a post on the Kluwer Arbitration Blog as "International Arbitration During COVID-19: A Case Counsel's Perspective" on June 4, 2020 (http://arbitrationblog.kluwerarbitration.com/2020/06/04/international-arbitration-during-covid-19-a-case-counsels-perspective/).

The SIAC Emergency Arbitrator Enforcement Experience

MR VIVEKANANDA N[1], PARTNER (FOREIGN LAW), ALLEN & GLEDHILL LLP (SINGAPORE)

THE SIAC EA EXPERIENCE

About 6 years ago, I penned a short piece on SIAC's experience with the emergency arbitrator ("EA") provisions which had been introduced in 2010, and had been in vogue for about 3 years then[2] . At the time, SIAC had received 34 applications seeking the appointment of an EA to consider urgent requests for interim relief. Currently, that number has grown to a total of almost 100 applications made to the institution under these provisions. [3]

By now, the benefits of the EA provisions are well known to the legal and business communities. A party that requires urgent interim relief in relation to an ongoing or proposed arbitration normally only had two options, apply to a court, or apply to an arbitral tribunal. Where the arbitral tribunal is not in place or time is required to constitute it, a party had no choice but to approach a national court. However, parties often do not want their disputes before unfamiliar national courts, or in the public domain. In some situations, national courts do not entertain such applications at all, including in some cases, where the arbitration is seated in a different jurisdiction from the court. The EA provisions provide a panacea for these issues. Introduced by the ICDR in 1999 and the SCC in 2010, they were first adopted by an international arbitral institution based in Asia in 2010 by the SIAC.

SIAC is yet to reject an EA application although the President of the Court of Arbitration exercises that discretion on a case to case basis, primarily guided as a matter of practice, by the urgency of the issues at hand. SIAC EA cases have come from varied sectors and categories of contracts, and have involved parties from every continent except South America.[4] Much has been said on the tests to be adopted by EAs[5] , with a broad consensus leaning towards the adoption of transnational standards rather than tests that a local court would apply to the grant of interim relief. The most widely accepted formulation of these transnational standards are those set out in the celebrated treatise by Prof Gary Born and include consideration of whether there is a prima facie case on merits, urgency, and the risk of irreparable injury. [6] It is also clear as night and day that the SIAC EA process is efficient and speedy. Historically, SIAC EAs made preliminary orders in as little as 2 days, and awards or orders on the application in about 10 days. The 2016 SIAC Rules further ensure efficiency by introducing a 14-day time limit for EAs to make orders or awards unless extended by the registrar in exceptional circumstances.[7] The benefits and the vast experience of the SIAC in administering EA applications are unmistakable. However, parties rarely commence arbitration for the sheer joy of experiencing that heady world of translational jurisprudence, or the swiftness of interim orders. The real proof of the pudding lies in the eating which in this case is the enforcement of such orders.

SOME COUNTRIES HAVE BEEN PROGRESSIVE

Although EA provisions have been in vogue for almost 10 years now, and every major and minor international arbitral institution has incorporated them into their rules, legislations have been slow to catch up. As has often been the case with its quick legislative responses, Singapore was among the forerunners to introduce provisions for the enforceability of EA orders. The Singapore IAA[8] was amended to include EAs within the definition of an 'arbitral tribunal' such that orders and directions given by an EA would be enforceable in the same manner as if they were orders made by a court. However, even Singapore with its normally precise legislation appears to have missed the opportunity to provide for the enforceability of EA orders made in arbitrations seated outside Singapore. This was perhaps the intention behind the amendment to the definition of 'arbitral award' in section 27, but on a plain reading of that provision it is arguable that EA orders from arbitrations seated elsewhere are not enforceable in Singapore. This is because the new inclusive definition of an 'arbitral tribunal' including an EA only applies to arbitrations seated in Singapore. This is yet to be tested.

Hong Kong[9] and New Zealand[10] are other prominent common law jurisdictions that have followed suit with amendments to their legislations to provide for the enforceability of EA orders. Elsewhere, such as in the US, local courts have adopted a pro-enforcement approach to EA orders even in the absence of specific legislative provisions, on the basis that enforcement of such provisional measures is necessary to safeguard the efficiency of arbitration[11] or that such measures did not violate a fundamental public policy including for instance, First Amendment rights.[12]

1. The views expressed in this article are personal and do not reflect the views of Allen & Gledhill LLP or its partners.
2. The SIAC Emergency Arbitrator Experience, June 2013, available at < https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/338-the-siac-emergency-arbitrator-experience >.
3. SIAC Annual Report 2019, p.19, available at: < https://www.siac.org.sg/images/stories/articles/annual_report/SIAC%20Annual%20Report%202019%20(FINAL).pdf >.
4. Ibid.
5. See Steven Lim, Interim Relief in International Arbitration, available at: <https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/444-interim-relief-in-international-arbitration>
6. Gary B. Born, International Commercial Arbitration (2014, 2nd ed.) ¶¶ 2468-2481.
7. Paragraph 9, Schedule 1, SIAC Rules 2016.
8. [Singapore] International Arbitration Act (Cap.143A).
9. Part 3A of the Hong Kong Arbitration Ordinance (Cap. 609).
10. Section 2(1)(b) read with Chapter 4 of the New Zealand Arbitration Act 1996

"Indian parties have been the single largest participants in SIAC arbitrations for most of the last 10 years"

VOLUNTARY COMPLIANCE

It is argued that there is a large number of orders made by EAs see voluntary compliance as parties do not wish to be seen by an EA or a future arbitral tribunal to disobey orders made in the arbitration. However, the powers of an arbitral tribunal or an EA to sanction non-compliance is limited. Moreover, as parties become more familiar with the EA process, they are likely to be innovative in finding approaches engineered to avoid compliance. Therefore, legislative and judicial mechanisms to enforce EA orders are all the more important.

THE MISSED OPPORTUNITY TO CREATE A LEGISLATIVE FRAMEWORK FOR ENFORCEMENT OF EA ORDERS IN INDIA

The most interesting approach to this issue appears to arise from India. Firstly, this is not surprising on its own given that Indian parties have been the single largest participants in SIAC arbitrations for most of the last 10 years.[13] This is also reflected in the large number of Indian parties in EA cases, 47 in the period from 2010 to 2019. Secondly, obtaining interim relief is often crucial in Indian litigation.

The Law Commission of India in its 246th Report released in August 2014 recommended that emergency arbitrators be given legislative recognition and consequent amendments be introduced to the Indian Arbitration and Conciliation Act, 1996 ("Indian Arbitration Act"). The amendments introduced in 2015 did not incorporate these suggestions. A further round of amendments to the Indian Arbitration Act introduced in 2019 also did not incorporate these suggestions. While amendments were introduced to provide for the enforceability of interim orders made by tribunals, these did not extend to tribunals seated outside India or to emergency arbitrators, either in India-seated or foreign-seated arbitrations.

THE INDIAN JUDICAL APPROACH TO ENFORCEMENT OF DECISIONS OF EAs

However, parties with the assistance of some progressive Indian courts have addressed the issue. The solution is quite straightforward. A request is made to an Indian court under section 9 of the Indian Arbitration Act seeking interim relief in aid of a foreign seated arbitration, say in Singapore. In support of such an application, a party that has secured an EA order or award seeks to persuade the Indian court to adopt the reasoning of the EA, and grant similar orders as those granted by the EA. This has been referred to as an indirect enforcement of EA orders or awards. While the solution is not complicated, examples of the approach are worth examining not least because they have been confused as suggestive of a narrow approach by the Indian courts.

HSBC AND AVITEL

The first of these is HSBC v Avitel[14] . HSBC secured two awards from an SIAC EA granting freezing orders against the respondents. The agreements among the parties preserved their right to approach the Indian courts for interim relief under section 9 of the Indian Arbitration Act. Under the regime then applicable in India, HSBC made the necessary applications to the High Court of Bombay under section 9. In doing so, HSBC sought to persuade the High Court to grant it similar freezing orders against the respondents as had been granted by the EA. The Bombay High Court granted interim reliefs in similar terms to those in the EA orders, and took the view that HSBC was entitled to utilise the section 9 route to seek independent interim measures from the court without having to seek 'enforcement' of the EA orders. The Bombay High Court's decision was affirmed in appeal with the Division Bench of the same court taking the view that HSBC could not be denied the ability to apply for independent interim measures only because it had in place EA orders which could well be enforceable directly in other jurisdictions around the world[15].

IMPACT OF BALCO AND THE 2015 AMENDMENTS

The seminal decision of the Indian Supreme Court in BALCO[16] made on 6 September 2012 altered the landscape dramatically for the next few years because it took the view that Indian courts did not have the power to grant interim measures in aid of foreign seated arbitrations under the provisions of the Indian Arbitration Act. While this was the correct position in law, it meant that section 9 applications to Indian courts for interim measures in aid of foreign seated arbitrations, or to seek similar orders as EA orders dried up.

This changed on 23 October 2015 when the 2015 amendments to the Indian Arbitration Act reinstated the power of Indian courts to grant such interim measures in aid of foreign seated arbitrations[17].

RAFFLES AND EDUCOMP

One of the first section 9 applications to be filed with the High Court of Delhi in November 2015 is another important example of an indirect enforcement of EA orders. Raffles Education, a Singapore company had sought and obtained an SIAC EA's award and orders against certain Educomp entities, incorporated in India and Singapore[18]. Raffles sought and obtained enforcement of the EA orders in Singapore under the provisions of the IAA.

Simultaneously, Raffles sought orders from the High Court of Delhi in similar terms as the EA orders particularly since the nature of the

11. Publicis Communications v True North Communications Inc, [2000] 206 F 3d 725 (7th Cir); Yahoo! Inc. v Microsoft Corp, [2013] 983 F Supp 2d 310.
12. Sharp Corp. v Hisense USA Corp., 292 F. Supp. 3d 157 (D.D.C. 2017).
13. See SIAC Annual Reports from 2010 to 2019, available at < https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report >.
14. See Orders of the Bombay High Court dated 3 Aug 2012, 9 Aug 2012, 30 Aug 2012, 5 Nov 2012 and Judgment dated 22 Jan 2014, all in Arbitration Petition No. 1062 of 2012 (available on the website of the High Court of Bombay).
15. See Judgment dated 31 July 2014 of the Bombay High Court in Appeal No. 196 of 2014 in Arbitration Petition No. 1062 of 2012 (available on the website of the High Court of Bombay).
16. BALCO v Kaiser Aluminum Technical Services Inc. (2012) 9 SCC 552.

relief obtained in that case pertained to certain events and actions ongoing in India. The High Court of Delhi despite objection from the Educomp entities granted orders that were similar and wider than those granted by the EA[19].

The Raffles v Educomp decision[20] is often wrongly cited for the proposition that EA orders are not enforceable in India[21]. Raffles did not seek enforcement of the EA orders but instead sought the court's independent exercise of jurisdiction under section 9. Educomp on the other hand challenged the court's jurisdiction to grant such relief, among other grounds, on the basis that this would amount to enforcement of the EA orders under the Indian Arbitration Act. The High Court clarified that the EA's orders could not be enforced under the Indian Arbitration Act, a position not disputed by Raffles, but set out that the court should carry out an independent review of the request for interim relief.

There is therefore no difference in the approaches of the High Courts in HSBC and Raffles, with both High Courts affirming the view that the section 9 courts should exercise their jurisdiction independently to decide if interim relief ought to be granted and if so, whether in similar terms as EA orders or not.

HOTEL MUMBAI

A third example of the approach is the Hotel Mumbai case. Plus Holdings, a UAE based company secured distribution rights for the SAARC region for the movie 'Hotel Mumbai' based on the 2008 Mumbai terror attacks. The movie starred Dev Patel, Anupam Kher, Nazanin Boniadi and others and was critically acclaimed. The Singapore incorporated production house, Xeitgeist, attempted to terminate the distribution agreement on some flimsy grounds and had struck a deal with Netflix to release the movie in India on that platform. Plus Holdings applied to SIAC to seek the appointment of an EA, which SIAC accepted. The SIAC EA upon receiving and hearing submissions from the parties issued orders restraining Xeitgeist from entering into any agreements with third parties inconsistent with Plus Holdings' distribution rights, and further ordered it to take steps within its power to ensure that third parties who may have been conferred with rights inconsistent with Plus Holdings' rights, not exercise such rights[22].

The issue was far from fixed because Netflix was not a party to the arbitration or the EA proceedings. Plus Holdings applied to the High Court of Bombay under section 9 of the Indian Arbitration Act and joined Netflix as a party to those proceedings. Plus Holdings sought orders from the High Court on similar terms as those granted by the EA. The Bombay High Court granted Plus Holdings similar injunctive relief as those granted by the SIAC EA and noted in particular that[23]: "…having considered the reliefs as granted by the learned Emergency Arbitrator under the Emergency Award, in favour of the petitioner, it appears that there is some substance in the contentions as raised on behalf of the petitioner… It appears that the rights of the petitioner in regard to the film in question have been sufficiently recognized in the Emergency Award". Netflix thereafter terminated its agreement with Xeitgeist, and the matter came to be settled shortly thereafter.

It is therefore arguable that although the section 9 courts exercise their jurisdiction independently, there is great benefit in considering a previous EA order without being legally bound by it. After all, like in the Raffles and Hotel Mumbai cases, the respective EAs had considered witness statements and submissions on fact and law filed by both sets of parties, had the benefit of an in-person hearing to hear counsel for the parties, and rendered detailed orders in both cases before granting the urgent relief sought. A section 9 court in India would therefore benefit immensely from considering such EA orders in some detail (as was done in the above cases) without being legally bound to arrive at the same conclusion as the EA.

IN CONCLUSION

It is right to say that EA orders are not directly enforceable in India or several other jurisdictions. However, the above examples demonstrate that the Indian courts have been progressive in elegantly exercising their jurisdiction under section 9 to fill the gap left by the legislature, to provide parties the ability to rely on EA orders and to seek the protection they require from the Indian courts. Other jurisdictions would do well to follow these examples to provide commercial efficacy to a procedure that has truly been a game changer in international arbitration in the last decade. Singapore's Honourable Chief Justice Sundaresh Menon's remarks on the approach to arrive at transnational guidelines for ethics in international arbitration is equally appropriate here: "in order to create a map of the world, one first needs to have maps of individual localities".[24] ◆

**Disclaimer – The views and opinions expressed in this article are solely those of the author(s) and do not necessarily reflect the official views of SIAC.*

17. New Proviso to Section 2(2) of the Indian Arbitration and Conciliation Act, 1996 added by Section 2(II) of the Arbitration and Conciliation (Amendment) Act, 2015.
18. I was one of the counsel acting for Raffles Education in the SIAC arbitration and EA proceedings
19. See Order of the Delhi High Court dated 2 Dec 2015 in OMP (I) (Comm.) 23 of 2015 (available on the website of the High Court of Delhi).
20. The decision that is often referred to is the Judgment of the Delhi High Court dated 7 October 2016, dealing with the jurisdictional objections of Educomp primarily centred around whether the 2015 Amendment applied to the case or not.
21. For instance, see Kartikey Mahajan and Sagar Gupta, Uncertainty of enforcement of emergency awards in India, available at < http://arbitrationblog.kluwerarbitration.com/2016/12/07/uncertainty-of-enforcement-of-emergency-awards-in-india >
22. I was one of the counsel acting for Plus Holdings in the SIAC arbitration and EA proceedings.
23. Order of the High Court of Bombay dated 7 March 2019 in Commercial Arbitration Petition No.339 of 2019, (available on the website of the High Court of Delhi).
24. Honourable Chief Justice Sundaresh Menon, The special role and responsibility of arbitral institutions in charting the future of international arbitration, Keynote Address, SIAC Congress 2018, available at < https://www.supremecourt.gov.sg/news/speeches/page/5 >

Recent Developments in the Indian Arbitration Regime

MS SHANEEN PARIKH, PARTNER, CYRIL AMARCHAND MANGALDAS

The landmark decision of India's Supreme Court in Bharat Aluminum Co. v Kaiser Aluminum Technical Services, Inc.[1] settled the position that the Indian judiciary would take going forward, i.e. that of limited court intervention in arbitral proceedings; as intended by the Arbitration and Conciliation Act, 1996 (the "Act").

Since then, the Indian Government has taken a concerted pro-arbitration approach, recognising that increasing efficiencies in arbitration and strengthening the enforcement process would increase its attractiveness as an investment destination. Far-reaching changes to the Act were introduced on October 23, 2015 (the "2015 Amendments"), in an attempt to streamline the arbitral process. This included providing recourse to Indian courts for interim relief in foreign seated arbitrations (something not available earlier), and reducing any judicial meddling in arbitration proceedings and awards.

Soon after, a High-Level Committee was constituted to prepare a roadmap for making India "a robust centre for international and domestic arbitration." The Committee's Report recommended further progressive amendments to secure India's aspiration of being a viable arbitral seat,[2] and culminated in amendments introduced on August 30, 2019 (the "2019 Amendments"). Not all recommendations were accepted in the form suggested and not all the amendments achieve the intended result. Indeed (as of May 2020), an entire Chapter remains to be notified, indicating that this needs further thought.

We analyze certain key Amendments, their implications and their consequences.

PUSH FOR GREATER INSTITUTIONALIZATION

Ad hoc arbitration, favoured by many Indian companies (particularly, public sector undertakings), has been criticized for years. Plagued by delays and an overly formalistic procedure, it is out-of-sync with today's international arbitration practice. Several measures therefore promote institutional over ad hoc arbitration. For instance, the already beleaguered courts may designate specific institutions to appoint arbitrators, thus easing their burden and facilitating speedy disposal of applications to ensure that the arbitration proceeds expeditiously.

The New Delhi International Arbitration Centre is being constituted as a robust international arbitration centre which will give a fillip to institutional arbitration.

MINIMISING COURT INTERFERENCE WITH AWARDS

A critical amendment in 2015, was the inclusion of specific wording restricting the scope of the public policy challenge to clarify that, an award will be in conflict with the public policy of India only if: (a) the making of the award is affected by fraud or corruption, or was in violation of confidentiality or admissibility of evidence provisions; (b) it is in conflict with the most basic notions of morality or justice; or (c) it is in contravention with the fundamental policy of Indian law. Specifically, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

An additional ground of challenge to purely domestic awards (i.e. between Indian parties), is 'patent illegality' appearing on the face of the award. The Act differentiates between domestic and international commercial arbitrations (albeit both may be seated in India); the rationale being, that it is more legitimate to intervene in a purely domestic award as opposed to an award passed in an international commercial arbitration, or a foreign award.[3]

Continued attempts to review an award on merits are further circumscribed by clarifying that any challenge must be established only on the record before the arbitral tribunal.

Indian courts have adopted a pro-enforcement approach, reading the provisions for challenge strictly, and refusing to interfere, unless egregious injustice has occurred. The narrow construction of public policy (consistent with India's ratification of the New York Convention), has been upheld repeatedly. An award will be set aside only where, substantively or procedurally, some fundamental principle of justice is breached, which shocks the conscience of the court.[4] A mere contravention of Indian law, including foreign exchange laws, will not tantamount to a violation of public policy. [5]

That said, recently the Supreme Court has interfered twice. It refused to enforce a foreign award on the basis that it was contrary to public policy,[6] and it set aside a domestic award which it held to be perverse.[7] On the other hand, costs of INR 5 million were imposed as costs on a party for abusing the court process to delay the enforcement of an award,[8] showing that frivolous applications will not be tolerated.

1. (2012) 9 SCC 552
2. Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India: http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf
3. The 20th Law Commission's Report No. 246 (August 2014) - http://lawcommissionofindia.nic.in/reports/report246.pdf Chapter I, at Paragraphs 34 & 35
4. Ssangyong Engineering & Construction Co. Ltd. v. National Highway Authority of India, 2019 SCC OnLine SC 677
5. Cruz City 1 Mauritius Holdings v. Unitech Ltd., 2017 (3) ArbLR 20 (Delhi); Vijay Karia v. Prysmian Cavi E Sistemi Sr, 2020 SCC Online SC 177;
6. National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A., Civil Appeal No. 667 of 2012, delivered on April 22, 2020
7. South East Asia Marine Engineering & Construction Ltd. v. Oil India Ltd., Civil Appeal No. 673 of 2012, delivered on May 11, 2020
8. Vijay Karia v. Prysmian Cavi E Sistemi Sr, 2020 SCC Online SC 177

"All eyes will now be on India's apex Court which is setting a clear path to reform. It cannot be doubted that India's focus remains on becoming a viable arbitral seat in the region, for which there is still hope"

DEPOSIT OF AWARD AMOUNT CONDITIONAL FOR GRANTING A STAY OF THE AWARD

The problem of recoverability under an award was also addressed. Respondents routinely challenge awards and oppose enforcement of foreign awards, leaving claimants to spend several years in Indian courts, litigating what should have been a final decision. Under the old regime, an award could not be executed if it had been challenged, and as such, this was tantamount to an automatic stay until the application was decided.

This position was revised to provide that the filing of an application to set aside an award, would not by itself, render the award unenforceable. Instead, a party must specifically apply to the court for a stay of the award, which may be granted on such considerations as applicable for stay of a money decree, such as deposit of decretal amount, attachment etc. such as would secure the award holder.

Since then, courts have had little patience with frivolous setting-aside petitions and defiant award-debtors. The conditions for granting a stay are stringent and courts have directed deposit of between 50% to even 100% of the award amount as a pre-condition to a stay, also allowing the claimant to withdraw such amount.[9] This puts paid to respondents who take advantage of the pending challenge, to negotiate a downward settlement with an obviously impatient claimant.

THE ARBITRATION COUNCIL OF INDIA

The High Level Committee recommended the formation of the Arbitration Promotion Council of India ("APCI"), an "autonomous body", grade and monitor the working of arbitral institutions in India. Observing that it was necessary to have qualified and well-trained arbitrators, the Committee proposed that the APCI recognise professional institutes providing accreditation.

New Part I-A of the Act (which has not yet been notified), envisages the formation of the Arbitration Council of India ("ACI"). Deviating from what was recommended, the constitution of the ACI does not include an overseas practitioner having substantial experience in international arbitration. The ACI will consist of individuals nominated by the Central Government and other ex-officio members. Concerns abound that such a composition could hamper independence and result in conflicts of interest – for instance at the time of grading of arbitral institutions / arbitrators, and in arbitrations involving the Government as a party.

GRADING OF ARBITRAL INSTITUTIONS:

The ACI will grade and accredit arbitral institutions on various criteria, including infrastructure, quality and caliber of arbitrators, performance and compliance of time limits for disposal of arbitrations, as may be specified by regulations (which have not as yet been framed). This creates its own set of uncertainties. Firstly, it appears to preclude the appointment of institutions that have not been accredited, thus diminishing party autonomy. Secondly, it would be surprising if international arbitral institutions would be willing to submit to the ACI's accreditation, or agree to meet the parameters, once set.

ACCREDITATION OF ARBITRATORS:

The ACI is also empowered to review the grading of arbitral institutions and arbitrators, which suggests that it may set out some parameters, or undertake the process itself.

A new Eighth Schedule to the Act sets out an exhaustive list of norms and qualifications for accreditation of arbitrators. Anyone not falling within this list, shall "not be qualified to be an arbitrator". Primacy seems to have been given to seniority, a basic professional degree, or number of years of employment in a government service, rather than relevance to a person's knowledge or experience in arbitration. While one notes the laudable objective of improving the quality of arbitrators, the exhaustive list severely compromises party autonomy.
Disappointingly, the Eighth Schedule, effectively disqualifies foreign lawyers by including only "advocates" within the meaning of the Indian Advocates Act, 1961, ignoring other foreign legal qualifications. This virtually ensures that foreign parties will have one more reason to push back against an India seat. This could not have been the intention of the Legislature – particularly given that the hope was that India would become a viable centre for international arbitration. Reassuringly however, the Union Law Minister has indicated that foreign arbitrators would be permitted.[10]

DEPOSITORY OF AWARDS:

The ACI will maintain an electronic depository of arbitral awards made in India and such other records as may be specified. No mechanism or details have been set out and there are no regulations in place. Hopefully, this will be an opt-in feature, as confidentiality is an important reason for parties to choose arbitration to resolve their disputes.

CONFIDENTIALITY:

Confidentiality is now expressly required to be maintained for all arbitral proceedings except the award, where its disclosure

9. Kochi Cricket Private Ltd. v. Board of Control for Cricket in India, SLP (C) No. 11468 of 2018, Order dated May 11, 2018; Essar Shipping td. v. Steel Authority of India Ltd. SLP (C) No. 23144 of 2018, Order dated November 26, 2018

is necessary for implementation and enforcement. Notably, there is no provision for disclosure if required by legal duty, or to protect or enforce a legal right, or to challenge an award, which is a glaring omission. We can expect that these issues will ultimately be judicially determined.

There are no consequences for breach of confidentiality, though a party should be able to obtain an injunction against apprehended disclosure, or damages, in case of breach.

TIMELINES:

The lengthy delays that beleaguered ad hoc arbitration, were sought to be redressed by introducing timelines for passing of the award. An award must be made within 18 months from the date of completion of pleadings, i.e. statements of claim and defence (which must be filed within 6 months from the date of appointment of the tribunal). This does not however consider cases where further pleadings, such as counter-claims and rejoinders may be required.

Extension can only be obtained upon an application to the Court, failing which the mandate of the arbitrator terminates.[11]

These timelines however apply only to domestic arbitrations. Insofar as international commercial arbitrations are concerned, the timelines are not mandatory. The restriction to domestic arbitrations, seems to be on the basis that they were likely to be ad hoc (whereas international arbitrations would likely be under the rules of an arbitral institution, which would be capable of ensuring that efficiency is maintained). A best endeavour wish was however incorporated, requiring that the award in international arbitrations, be made as expeditiously as possible and within 12 months of completion of pleadings.

ARBITRATOR IMMUNITY:

A welcome introduction is the provision for arbitrator immunity to protect arbitrators from legal proceedings for anything which is done in good faith. This ensures that arbitrators can function without fear of prosecution, a provision that is common in many foreign statutes and international institutional rules, including those of the SIAC.

APPLICABILITY OF THE AMENDMENTS TO ARBITRATIONS AND ARBITRATION PROCEEDINGS:

Finally, we come to the question of applicability of the 2015 and 2019 Amendments.

The 2019 Amendments stated that unless the parties otherwise agree, the 2015 Amendments would not apply to arbitral proceedings commenced prior to October 23, 2015 (i.e. the date of the 2015 Amendments came into force), or to court proceedings arising out of or in relation to these arbitration proceedings. This provision sought to override the of the Supreme Court in BCCI v. Kochi Cricket Pvt. Ltd.,[12] where it held that the 2015 Amendments would apply to all court proceedings pending on the day they came into force.

However, late last year, in Hindustan Construction Company v. Union of India,[13] the Supreme Court struck down the relevant provision, and revived the position set out in the BCCI. As such, the 2015 Amendments apply to all court proceedings pending as on October 23, 2015 albeit the arbitration in question may have commenced prior thereto).

CONCLUSION:

The 2019 Amendment Act bears testimony to India's efforts to gradually revolutionize the law of arbitration in India. It is the second major reform of India's arbitration regime after the Supreme Court signaled a course correct in the BALCO case and in attempting to bring greater institutionalization to arbitration proceedings, the 2019 Amendments take a step in the right direction. However, some ambiguities and practical hurdles still need to be cleared. All eyes will now be on India's apex Court which is setting a clear path to reform. It cannot be doubted that India's focus remains on becoming a viable arbitral seat in the region, for which there is still hope. ◆

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10. https://www.barandbench.com/news/wolters-kluwer-launches-commentary-on-the-law-of-arbitration-by-justice-indu-malhotra
11. Since we are writing this in the time of India's COVID lockdown, it is relevant to note that the Supreme Court has extended these time limits till further orders. See Order dated May 6, 2020, Suo Motto Writ (Civil) No. 3 of 2020.
12. (2018) 6 SCC 287
13. Hindustan Construction Company v. Union of India, 2019 (16) SCALE 823.

Investment Protections in the COVID-19 Pandemic and Lockdown

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In response to the COVID-19 pandemic and ensuing economic recession, governments around the world have taken several unprecedented measures. These measures, collectively, have led to a de facto shutdown of significant sectors of the global economy. This level of state intervention with private rights is unparalleled. Yet, States still have obligations under domestic and international law with which they must comply, even in times of crisis. Foreign investors equally have rights – both under domestic and international law – which must be protected.

This article considers the measures that States have taken in different jurisdictions and assesses their lawfulness in relation to applicable international investment law standards.

STATE MEASURES

The COVID-19 pandemic has forced many governments to suspend the operation of 'non-essential' businesses and issue 'stay-at-home' orders. In India, which has adopted some of the most stringent measures, virtually all economic activity has ground to a halt.

Movement of people across borders has also come to a standstill with travel bans and related airport closure. Not surprisingly, many airlines are expected to seek protection by filing for bankruptcy; those that remain afloat will almost certainly require state aid. In the US, for example, Congress is zeroing in on a bailout package in excess of US$ 25 billion for American carriers. Similarly, Singapore Airlines received US$ 13 billion from Temasek Holdings, a Singapore government owned fund, to help see it survive the COVID-19 crisis.

Governments have also started nationalizing private businesses, especially in the healthcare sector. Spain and Ireland, for example, have temporarily nationalized all private hospitals and healthcare centres. Italy has introduced sweeping emergency legislation, which allows its government to order the requisition of hotels and medical equipment. Canada, Chile, Ecuador, and Germany have taken steps to make it easier to override patents by issuing 'compulsory licenses' for COVID-19-related medication, vaccines, and other medical supplies and tools. Israel has already issued a compulsory license – the first ever in the nation's history – for a vaccine it considers to have potential application against COVID-19. Whenever a vaccine for COVID-19 is discovered, India is likely to follow suit. To illustrate by way of example, India granted a compulsory license in 2012 to an Indian generic drug manufacturer for Nexavar, a cancer drug patented by Germany's Bayer.

Restrictions have already been placed on exports of medicines and food over concerns of shortages in domestic markets. India, which accounts for 20% of the world's generic drug supply, has put a curb on the export of several pharmaceutical products, including the antimalarial drug 'hydroxychloroquine', claimed by some to be a potential treatment for COVID-19. Russia, which is the world's top wheat exporter, has temporarily restricted exports of certain processed gains. Many other countries including those that have publicly reported relatively fewer cases of COVID-19 infections, such as Vietnam and Kazakhstan, have issued similar restrictions on exports of essential commodities.

Countries have also introduced measures to address concerns regarding foreign acquisitions of companies whose valuations have been adversely affected by the COVID-19 pandemic. Australia, for instance, has announced that all foreign takeovers and investment proposals would now be scrutinized by its foreign investment review board. Previously, the Australian government did not examine most overseas takeovers of private companies, unless they were valued in excess of U$ 1.1 billion.

India has similarly made prior government clearance mandatory for all forms of investments, even indirect ones, from all countries sharing a land border with India. While the notification does not refer to China specifically, nor does it apply to China only (India shares a land border with seven countries including China), it is widely understood that this new requirement has been introduced to curb the acquisition of Indian companies by Chinese entities. The European Union has also urged its member states to engage in foreign investment screening to protect local strategic industries.

Finally, as the burden of debt rises in countries, it is possible (in fact, likely) that some of these countries will start defaulting on their obligations. More worryingly, States might introduce capital restrictions on the free movement of capital and payments across national borders. Indeed, capital control is one of the policy responses to the COVID-19 pandemic that has been mooted by many economists.

PROTECTIONS AVAILABLE UNDER INTERNATIONAL INVESTMENT AGREEMENTS

International investment agreements ("IIAs") are bilateral or multilateral treaties entered into with the aim of promoting and protecting foreign investment flows between Contracting Parties. They include bilateral investment treaties ("BITs") or bilateral investment promotion agreements ("BIPAs"), as they are known in India, multilateral investment treaties (such as the ASEAN Comprehensive Investment Agreement, and the investment chapters contained in bilateral or multilateral free trade agreements ("FTA") (such as the Trans-Pacific Partnership Agreement)).

Each treaty must be considered on its own terms but IIAs commonly include the following investment protections:

Protection from Expropriation without Compensation

Protection against expropriation is one of the most crucial protections provided under IIAs. Typically, expropriation by a State is permitted if it is for a public purpose, non-discriminatory, in accordance with due process, and accompanied by adequate compensation. Both direct as well as indirect expropriation, which results in substantial deprivation of the use and value of the investment, is within the purview of this protection.

Fair and Equitable Treatment

Host States are typically required to accord fair and equitable treatment to all investors of the other Contracting State. Host States must not take any arbitrary, grossly unfair or discriminatory measures against foreign investments. They must maintain a transparent and predictable regulatory framework for the investment, and meet the investor's legitimate expectations relied upon at the time of investing.

Full Protection and Security

This provision imposes certain positive obligations on Host States to exercise due diligence by physically protecting the foreign investment, including the investor's officials, employees and facilities. Several arbitral tribunals have interpreted this requirement to include a guarantee of regulatory and legal security for investments.

National Treatment

This provision requires foreign investors to be treated at par with local investors/companies of the Host State. Host States cannot treat their investors or companies more favourably than it treats foreign investors.

Most-Favoured-Nation Treatment

Typically, host States are under an obligation to not treat investors of any third State any better than investors of the home State. This leads to the creation of a single 'highest' standard for all Contracting Parties to IIAs with a particular State. Consequently, investors can rely upon more favourable commitments in other IIAs entered into by the host State.

Protection against Breach of a Legal Obligation

Host States are required to observe specific obligations or commitments entered into in contracts with foreign investors. This is also known as an 'elevator' or 'umbrella' clause and can elevate a breach of contract or licence entered with the investor into a breach of the IIA when certain conditions are met.

INVESTOR-STATE CLAIMS DURING TIMES OF CRISIS

In the past, measures taken by States during times of national crises have been challenged by investors under IIAs. For example, after the 2001 economic crisis, Argentina took various emergency steps including a freeze on utility rates, nationalization of assets, devaluation of its currency, and restructuring of sovereign bonds. Foreign investors, which were adversely affected by these measures, brought dozens of claims under IIAs concluded by Argentina. In many of these claims, Argentina was found to be in breach of its international law obligations and investors were awarded hundreds of millions of dollars in damages. Several other claims were settled by Argentina.

Similarly, claims were brought – although with lesser successes – against States after the 2008 global financial crisis and the 2011 'Arab Spring'.

It is, therefore, possible that measures taken by States to combat the COVID-19 pandemic could also be challenged under IIAs. The merits of any such claim would depend on a variety of factors, such as the scope and timing of the measure under challenge, the extent of compensation offered to the investor (in case of compulsory requisition or nationalization), the treatment offered to other investors in like circumstances and adherence to local laws and procedures.

However, even if a measure is found to be inconsistent with treaty protections, States are likely to argue that they have a valid defence to the investor's claim. Broadly, such defences would include exceptions available under the applicable treaties and general defences available under customary international law. As for treaty exceptions, the precise text of the applicable IIA will determine the strength of the defence. For example, older generation Indian BIPAs, many of which have now been terminated by the State, allow Contracting Parties to take measures to protect "essential security interests" or in "circumstances of extreme emergency". By contrast, new-generation Indian BIPAs, and in particular investment chapters in Indian FTAs, contain general exceptions similar to those found in World Trade Organization agreements which allow States to adopt measures to protect human life or health, provided that the measures are not arbitrary or discriminatory. Consequently, India's defence in a claim brought under, say, the India-Lithuania BIPA is likely to be on a weaker footing, compared to a claim brought under the investment chapter of the India-Singapore FTA.

The second category of defences that is available to States are under customary international law. These defenses do not depend on the text of the applicable treaty. Among the defences recognized under international law, those that are likely to be relevant in the present circumstances are (in the order of relevance): necessity, force majeure and distress. The threshold for the defence of necessity is high: the act of the State must be "the only way for the State to safeguard an essential interest against a grave and imminent peril" (see Articles on State Responsibility of the International Law Commission, Article 25). Indeed, most investor-State tribunals constituted in the aftermath of the 2001 Argentine crisis rejected this defence. Defences of force majeure and distress – which arguably set even higher thresholds – are rarely invoked by States and, therefore, guidance from case law authorities is sparse.

In summary, when enacting measures to combat the COVID-19 pandemic, States need to be mindful of protections that they agreed to give to investors under their IIAs. While those protections are not absolute and must be balanced against the State's pursuit of legitimate policy objectives, whether that balance has been struck in a particular instance is a fact and treaty-specific question. ◆

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The Unprecedented New Normal Navigating the Global Economic and Legal Impact of COVID-19

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ECONOMIC IMPACT OF COVID-19

The COVID-19 pandemic has resulted in an unusual complex global economic dis-equilibrium where disruption seems to be the only constant. In theory, the assumption of ceteris paribus, that is "all other things remaining constant", is instrumental in determining causation and understanding fundamental economic principles of equilibrium of demand and supply. The unprecedented rampant simultaneous shock waves to both demand and supply curves have left global policymakers and central banks bewildered.

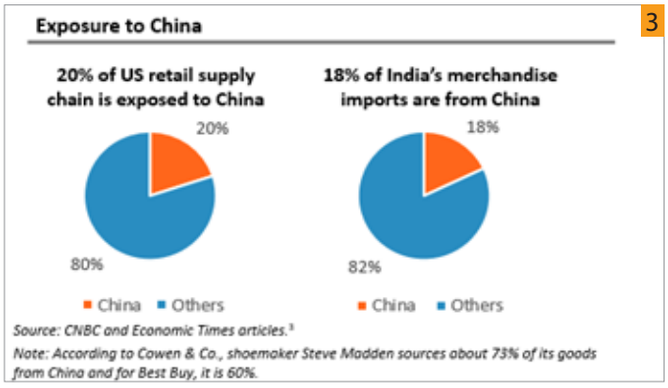
SUPPLY AND DEMAND SHOCKS

Supply shock is inevitable as it emanates from drastic lockdown measures implemented by the governments worldwide in the process of evaluating the inescapable trade-off between saving mankind and economy.

Simultaneously, on the demand side, decline in consumer spending and business investment has slowed economic growth and is likely to drive economies towards recession. Consumers feel less confident about the overall future of the economy and prefer to save rather than spend or consume. Rising unemployment rates in many developed economies further exacerbate the slowing demand. Business confidence has also declined as corporates believe that future payoffs from their current investments would be low. The combined effect of supply and demand shocks are likely to vary across different sectors with some sectors experiencing far worse impacts than others.

This vicious circle of demand and supply disruption has worsened because the supply chain shock is not just confined to domestic businesses but is a global phenomenon. China is the largest manufacturer in the world and is responsible for around one third of global manufacturing.[1] Therefore, slowdown in the manufacturing activity in China is affecting exports and businesses across the globe. Supply chains in the rest of the world are also expected to remain broken (at least in short term), shrinking the global demand for products manufactured in China's factories.[2]

3



Source: CNBC and Economic Times articles.[3]

Note: According to Cowen & Co., shoemaker Steve Madden sources about 73% of its goods from China and for Best Buy, it is 60%.

4

Source: WTO press release.[4]

As the epicentre of COVID-19 has moved from China to Europe and United States, lockdown measures have caused global PMI (excluding China) to fall to the lowest levels since 2009.[5]

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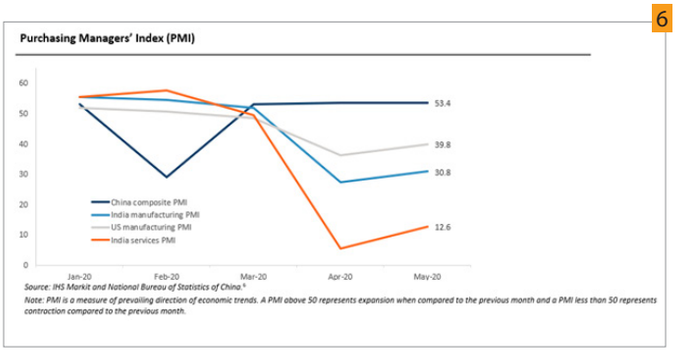

Source: IHS Markit and National Bureau of Statistics of China.[6]

Note: PMI is a measure of prevailing direction of economic trends. A PMI above 50 represents expansion when compared to the previous month and a PMI less than 50 represents contraction compared to the previous month.

1. 'These are the top 10 manufacturing countries in the world', World Economic Forum, 25 February 2020 https://www.weforum.org/agenda/2020/02/countries-manufacturing-trade-exports- economics/
2. China: Downgrade GDP and yuan forecasts from double hit of global supply and demand', ING, 15 March 2020 https://think.ing.com/articles/china-downgrade-gdp-and-yuan-forecast- from-double-hit-of-global-supply-and-demand/
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4. 'Trade set to plunge as COVID-19 pandemic upends global economy', World Trade Organisation, 8 April 2020 https://www.wto.org/english/news_e/pres20_e/pr855_e.htm
5. 'Lockdowns have dragged global manufacturing into a historic slump', The Print, 2 April 2020 https://theprint.in/economy/lockdowns-have-dragged-global-manufacturing-into-a-historic- slump/393416/
6. 'Purchasing Managers Index for May 2020', National Bureau of Statistics of China, 1 June 2020 http://www.stats.gov.cn/english/PressRelease/202006/t20200601_1753274.html
   US manufacturing PMI, India manufacturing PMI and India services PMI as published by IHS Markit on its website https://www.markiteconomics.com/

CHALLENGE TO THE POLICY MAKERS

The current scenario of broken supply chains, quarantine measures, travel bans and reduced demand, poses a significant challenge to governments and policy makers worldwide. They are expected to provide adequate essential goods and services including medical care, prevent businesses from insolvency, sustain current employment levels and revive consumer and business confidence in long run.

In lieu of this, several governments and central banks have implemented radical expansionary monetary policies in the form of interest rate cuts and public spending increases to provide an immediate impetus to the tumbling financial markets and stimulate demand in medium to long term. The yield on benchmark 10-year US treasury contracts fell in March 2020 to less than 1% for the first time in history.[7] In addition, increasing demand for safe-haven assets amongst investors is pushing bond prices up and reducing yields to historic lows.

The extent such measures will be successful in containing this massive disruption of cash flows and its impact on GDP is yet to be seen.

It may also be pertinent to evaluate the potential risk of an increase in inflation resulting from such stimulus in absence of any real economic growth. The resultant combination of rising prices amidst an economic slowdown, that is, stagflation, is even more lethal for economy.[8]

EXTENT OF DISRUPTION

The fundamental question is the extent of disruption that could be caused to economies from the lockdown and quarantine measures. Global stock markets have been volatile over the last few months with sharp losses followed by rapid recoveries largely driven by gains in the technology sector.

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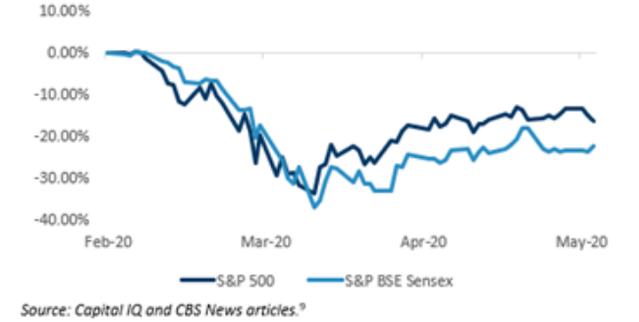
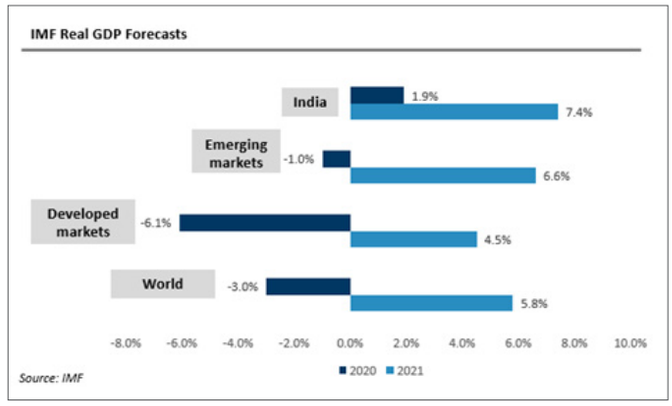


Source: Capital IQ and CBS News articles.[9]

The pandemic cost global stock markets USD 16 trillion over the period 19 February 2020 to 13 March 2020

The IMF's estimate for overall financial needs of emerging markets is USD 2.5 trillion, at a lower end.[10] In April 2020, the IMF revised its real GDP forecasts for 2020 and 2021 as below. [11] A 2006 paper by the World Bank puts the potential cost of a severe flu pandemic at 4.8% of global GDP.[12] This implies that the potential cost of COVID-19 could be more than USD 4 trillion.



IMPACT ON ASSESSMENT OF DAMAGES

It is not unreasonable to expect an increase in number of dispute cases across different sectors as parties are likely to default on their contractual obligations resulting in claims for wasted costs or loss of profits.

In general, loss of profits is calculated as the difference between the counterfactual (but-for) financial position and the actual financial position of the injured party over the period after the date of breach. Any calculation of loss of profits should be carried out based on facts known or knowable as at the date of assessment, which may or may not coincide with the date of breach. In the current scenario, the choice of date of assessment during the pre COVID-19 period or post may have a significant impact on the calculation of loss of profits.

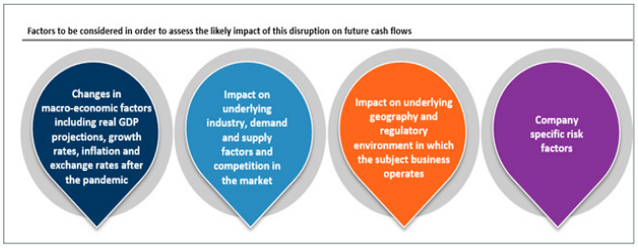
The but-for and actual financial positions should reflect a credible estimate of the projected future cash flows of the injured party discounted back to the date of assessment using an appropriate discount rate applicable to the inherent risk in such cash flows (also known as discounted cash flow method under income approach of valuation).

However, the pandemic is likely to result in an extended period of volatility and uncertainty in global financial markets and disruption of future cash flows. It may be difficult to quantify the duration of such period of uncertainty and the extent of the damage caused to businesses during such period in both the counterfactual and actual financial positions, depending on the date of assessment. In addition, the impact of pandemic may vary across companies, sectors and geographies.

Therefore, a rigorous cash flow analyses using financial scenarios is required to ensure that any uncertainty is appropriately reflected in

7. Fed Rates at 0% Now Seen Within Months Amid Global Bond Frenzy', Bloomberg, 9 March 2020 https://www.bloomberg.com/news/articles/2020-03-09/treasury-10-year-yields-sink-to-0-5-for-the-first-time
8. 'The coronavirus economic 'disaster' scenario: Stagflation', CNN Business, 10 March 2020 https://edition.cnn.com/2020/03/10/investing/stagflation-economy-coronavirus/index.html
9. 'Coronavirus has cost global stock markets $16 trillion in less than a month', CBS News, 13 March 2020 https://www.cbsnews.com/news/coronavirus-has-cost-global-stock-markets-16-trillion-in-less-than-a-month-2020-03-12/
10. 'We have entered recession: IMF chief', Deccan Herald, 27 March 2020 https://www.deccanherald.com/business/we-have-entered-recession-imf-chief-818358.html
11. 'The Great Lockdown: Worst Economic Downturn Since the Great Depression', IMF Blog, 14 April 2020 https://blogs.imf.org/2020/04/14/the-great-lockdown-worst-economic-downturn-since-the-great-depression/
12. 'Pandemic risk', The World Bank, October 2013 https://www.worldbank.org/content/dam/Worldbank/document/HDN/Health/WDR14_bp_Pandemic_Risk_Jonas.pdf

the financial projections of subject business by accounting for:



In the current scenario, it may be equally complex to determine an appropriate discount rate that is commensurate with time value of money and risk inherent in such future cash flows. It may be pertinent to assess the extent of reliance on recent volatility as compared to a long-term view of normalised historical data while calculating cost of equity and cost of debt:

The presence of contemporaneous documents, parties' agreed business plans, substantive history of profitability, well-reasoned and conservative assumptions and general availability of historical financial information and quality data on the business will continue to play a pivotal role in minimising subjectivity and speculation and building a robust and reliable set of projected future cash flows.

An equally pertinent issue is to evaluate whether the discounted cash flow method of valuation is appropriate for businesses facing severe liquidity issues and threats to their continuity and "going concern" amidst such a period of uncertainty.

LEGAL IMPACT OF COVID-19 ON BUSINESSES

Disruption of labour markets, manufacturing capacity and trading routes means that companies in both upstream and downstream markets may struggle to perform under existing contracts and will therefore seek to terminate or excuse themselves from their contractual obligations.

Parties to a contract often include a so-called force majeure clause, which defines an uncertain set of circumstances, beyond a party's control, in which failure to perform a contract will be excused. These clauses are not universal in commercial contracts, therefore definitive guidance is not possible, and each clause will be subject to the usual rules of contractual interpretation.

Some force majeure clauses may have an express reference to "pandemic", "disease" or similar. This alone is not sufficient however, as it is the knock-on effects of COVID-19 which will be in issue rather than the pandemic itself. The party seeking to rely on the clause will need to point to a specific force majeure event that has occurred; whilst a government-imposed closure of a port would be a clear example of such an event, a recommendation that use is to be restricted to essential imports only is less straightforward.

Having identified a force majeure event, the party will then need to demonstrate that that event has caused or will cause non-performance of its contractual obligations. Whilst this question will ultimately depend on the specific wording in the contract, it is generally the case that a party will need to prove (i) that the event is unforeseeable and outside of its control and, (ii) that the event has prevented performance (or in some circumstances hindered or delayed) of its contractual obligations. In the context of Covid-19, even if a contract has an express reference to "pandemic" as a prescribed force majeure event, it will not be enough to simply show that an event has arisen. What needs to be demonstrated is a causative link between the event and non-performance of the contract.

Many force majeure clauses will not expressly refer to a pandemic. They may instead refer to an "Act of God", an extremely wide definition that has not been explored at great length in English law, or language such as "any other cause beyond the party's reasonable control", which again requires the parties to consider potentially complex issues of causation.

If a party successfully claims force majeure, the consequences will ultimately depend upon the precise wording in the force majeure clause. The most common consequence is that it is relieved from performing its obligations for the period of time that the force majeure event occurs with the contract effectively 'suspended' until the event ends and performance can be resumed.

Another potential consequence is termination of the contract. Termination can arise either as an automatic consequence of claiming force majeure or it can be at the option of one of the parties often after the elapse of a period of time. In rarer cases a contract may allow the affected party to claim financial compensation from the non-affected party for costs associated with the event. Should a party successfully claim force majeure as a result of Covid-19, it will need to consider whether it is under a duty to mitigate the impacts of the event.

At common law there is no duty for a party to take steps to mitigate a force majeure event but there is often an express (or implied) provision in the contract. In the Covid-19 scenario, it is unclear to what lengths a party would have to go to mitigate the impact that Covid-19 might have on their ability to perform under their contract.

Where a force majeure clause has not been included in a contract, parties may be able to rely on the concept of frustration. Frustration is a narrow doctrine which only applies where events occur that make the performance of the contract impossible, illegal or radically different from that originally envisioned by the parties.

It is not enough for a contract to become more expensive or onerous than originally contemplated for it to be frustrated, and therefore will require parties to seek alternative routes or source from different suppliers even if the costs involved are significantly higher.

In the context of facility agreements or other finance documents, material adverse change (MAC) or material adverse effect (MAE) clauses permit a lender to cease performing its obligations where there has been a material adverse change to the borrower's financial position, but which falls short of insolvency. These types of clauses have not however been extensively tested before the courts, and there is therefore significant uncertainty as to the likely judicial approach in the event a lender invokes such a clause.

Companies are starting to consider whether loss of profit clauses in insurance contracts can be invoked, however protection under most types of business interruption insurance cover is triggered by damage to property resulting in partial or total closure of the business, which itself leads to loss of profit. Certain extensions to cover may apply to circumstances where there is no physical damage, such as denial of access to premises, and some policies may specifically cover infections or contagious diseases. These are not however market standard, therefore as with force majeure clauses the wording of the policy must be checked in order to ascertain whether such circumstances are covered.

CONCLUSION

The debate over the likely shape and form of economic recovery is endless. While it may be a V-shaped revival for some nations, others may take longer to revive their economies and stabilize thereafter (following a U-shaped curve). The late Austrian economist and Harvard professor Joseph Schumpeter considered disruption critical for economic growth and societal advancement. While the pandemic is far from over, the question is are we ready to embrace it? Lockdowns have resulted in new socio-economic and cultural norms and acceptances that may continue beyond the crisis.[13] ◆

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