

SIAC INDIA NEWSLETTER

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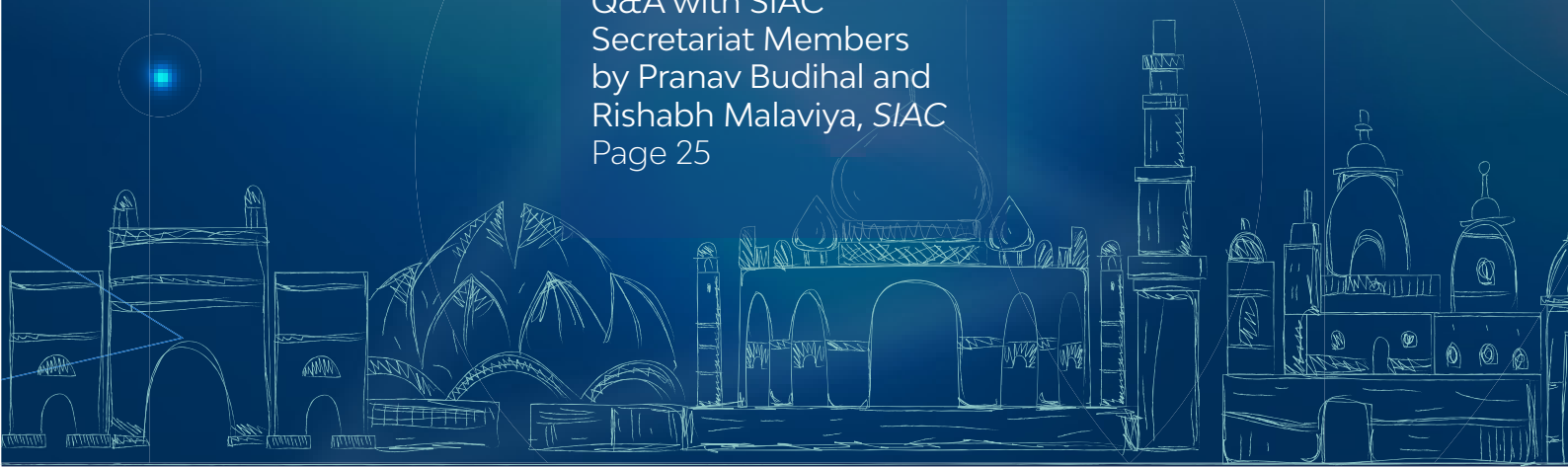
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Foreword

As a member of the SIAC Court of Arbitration, it is my pleasure to present the third issue of SIAC's India Newsletter.

The last few years have been very exciting for SIAC. According to the 2021 QMUL - White & Case arbitration survey, SIAC is now considered the second most preferred arbitral institution in the world, and the most preferred institution in Asia. In the last 10 years, SIAC has seen over 2,000 Indian parties involved in SIAC arbitrations and over 1300 cases involving Indian parties.

As Indian corporates increasingly recognise the advantages of expeditious dispute resolution by a neutral and intellectually robust Tribunal, there will be a growing need for institutionally supervised arbitrations.

India is working at moving ahead in the field of international arbitration and is in the process of developing an ecosystem of talent, sophistication and support from both judiciary and government. Setbacks are inevitable as old habits die hard, but the unwavering support of the Supreme Court to arbitrations has set the tone for a paradigm change in dispute resolution. The final step will be when the Government, increasingly a counter party in commercial disputes also, accepts with its heart and soul the need for institutional arbitration as a mode of dispute resolution. In this fast changing landscape, I am delighted that SIAC has made its presence felt by working closely with the legal and arbitral community in India.

This edition of SIAC's India Newsletter, through contribution from leading international arbitration practitioners, examines key issues in international arbitration, such as asymmetric arbitration clauses, parallel proceedings, and analyses recent Indian judgments and the way ahead for investment arbitration in India.

Importantly, the Newsletter provides perspective on critical aspects of international arbitration, such as cost and time, which are particularly relevant to the users of arbitration.

I hope that each of you will enjoy reading this edition of the Newsletter, as much as I did, and wish you all a Happy New Year.

Harish Salve KC
Member, SIAC Court of Arbitration



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As Indian corporates increasingly recognise the advantages of expeditious dispute resolution by a neutral and intellectually robust Tribunal, there will be a growing need for institutionally supervised arbitrations.

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Highlights of SIAC's Key India Events in 2022

SIAC South Asia Office, as part of SIAC's outreach activities, organised a series of events, physically and virtually, to widen SIAC's engagement and renew the commitment to SIAC's Indian users. The main events are highlighted below.

SIAC Annual India Conference 2022

SIAC organised its Annual India Conference 2022 in New Delhi on November 26, 2022. The theme of the Conference was '**Contemporary Challenges and Opportunities in International Arbitration**'. Around 400 attendees participated in the Conference.

The welcome address was delivered by Mr. Davinder Singh SC, Chairman, SIAC. Hon'ble Mr. Justice Sanjay Kishan Kaul, Judge, Supreme Court of India delivered the Keynote Address. Minister Edwin Tong Chun Fai SC, Singapore's Minister for Culture, Community, and Youth and Second Minister for Law was an honoured guest and engaged in a conversation with Mr. Darius Khambata SA (Member, SIAC Court of Arbitration; One Essex Court).

The Conference featured two panel discussions. The first panel session, hosted by Kevin Nash (Registrar, SIAC) highlighted the topic '*Current Challenges in International Arbitration and the Role of Arbitral Institutions*'. The speakers in this session included Mr. VK Rajah SC (Duxton Hill Chambers), Ms. Sheila Ahuja (Partner, Allen & Overy), Mr. Arjun Krishnan (Partner, Samvad Partners), Mr. Pranav Mago (Director of International Arbitration, Cyril Amarchand Mangaldas), and Mr. Krishnayan Sen (Partner, L&L Partners). The panel discussed various issues, including, the role of the institution, encouraging diversity in arbitral

appointments, and challenges faced by the arbitrators.

The second panel session, conducted by Mr. Ankit Goyal (Partner, Allen & Gledhill) was titled '*Arbitration Agreements and Non-Signatories: Perspectives from Round the Globe*'. The speakers included Mr. Toby Landau KC (Vice President, SIAC Court of Arbitration), Ms. Koh Swee Yen SC (Partner, WongPartnership LLP), Mr. Ashish Bhan (Partner, Trilegal), Mr. Aseem Chaturvedi (Partner, Khaitan & Co.), Mr. Soorjya Ganguli (Partner, Argus Partners) and Mr. Nish Shetty (Partner & Head - International Arbitration, Clifford Chance Asia). The presenters at this session delved into the idea of extending arbitration agreements to non-signatories, its guiding principles, difficulties, and approach in various jurisdictions, such as India, Singapore, and the UK.

The conference concluded with a debate on the motion '*Barbers and Taxidermists are subject to far greater regulation than Arbitrators*'. Mr. Toby Landau KC (Vice President, SIAC Court of Arbitration) and Ms. Pallavi Shroff (Managing Partner, Shardul Amarchand Mangaldas) argued in favour of the motion, and Dr. Abhishek Manu Singhvi SA and Mr. Ritin Rai SA (Tenant, 7KBW) argued against the motion. The debate was judged by Hon'ble Ms. Justice (Retd.) Indu Malhotra and Hon'ble Mr. Justice (Retd.) Badar Durrez Ahmed, and moderated by YSIAC India Committee Members, Mr. Lomesh Nidumuri (Partner & Head - Disputes, South Asia, Cyril Amarchand Mangaldas) and Mr. Bharat Chugh (Chambers of Bharat Chugh).

The closing remarks were delivered by Mr. Rajiv K Luthra (Member, SIAC Board of Directors; Managing Partner, L&L Partners).



Left to right: (Top) Hon'ble Mr. Justice Sanjay Kishan Kaul;
Mr. Davinder Singh SC
Left to right: (Bottom) Ms. Gloria Lim, Mr. Rajiv Luthra



Left to right: Mr. Kevin Nash, Mr. VK Rajah SC, Ms. Sheila Ahuja,
Mr. Arjun Krishnan, Mr. Pranav Mago, and Mr. Krishnayan Sen



Left to right: Mr. Darius Khambata SA and Minister Edwin Tong
Chun Fai SC



Left to right: Mr. Ankit Goyal, Mr. Toby Landau KC, Ms. Koh Swee
Yen SC, Mr. Ashish Bhan, Mr. Aseem Chaturvedi, Mr. Soorjya
Ganguli, and Mr. Nish Shetty



Left to right: Mr. Bharat Chugh, Mr. Lomesh Nidumuri, Ms. Pallavi
Shroff, Mr. Toby Ladau KC, Hon'ble Ms. Justice (Retd.) Indu
Malhotra, Hon'ble Mr. Justice (Retd.) Badar Durrez, Dr. Abhishek
Manu Singhvi SA, Mr. Ritin Rai SA



Left to right: (Top) Mr. Rishabh Malviya, Mr. Krishnayan Sen,
Mr. Pranav Mago, Mr. Ritin Rai SA, Ms. Shwetha Bidhuri, Mr.
Nish Shetty, Ms. Gloria Lim, Ms. Koh Swee Yen SC, Mr. Soorjya
Ganguli, Mr. Ankit Goyal, Mr. Aseem Chaturvedi
Left to right: (Bottom) Mr. Darius Khambata SA, Mr. Kevin Nash,
Mr. Rajiv Luthra, Minister Edwin Tong Chun Fai SC, Dr Abhishek
Manu Singhvi SA, Mr. Toby Landau KC, Hon'ble Mr. Justice
(Retd.) Badar Durrez, Mr. Tejas Karia, and Mr. Lomesh Nidumuri

SIAC Mumbai Conference 2022

SIAC held its Mumbai Conference 2022 on June 17, 2022. The theme of the Conference was '**Current Choices and Emerging Trends in International Arbitration**'. Around 150 people participated in the Conference.

The Welcome Address was delivered by Ms. Gloria Lim, CEO, SIAC. Prof. Jan Paulsson graced the event as the Keynote Speaker.

SIAC Board and Court Members, including Mr. Chong Yee Leong (Deputy Chairman, SIAC Board of Directors; Co-Head of International Arbitration, Allen & Gledhill), Mr. Tejas Karia (Member, SIAC Court of Arbitration; Partner & Head - Arbitration, Shardul Amarchand Mangaldas), Mr. Darius Khambata SA (Member, SIAC Court of Arbitration; One Essex Court), Mr. Siraj Omar SC (Member, SIAC Board of Directors; Director, Dispute Resolution, Drew & Napier), Ms. Shaneen Parikh (Member, SIAC Court of Arbitration; Partner and Head - International Arbitration, Cyril Amarchand Mangaldas), Ms. Gloria Lim (CEO, SIAC), and Mr. Kevin Nash (Registrar, SIAC) participated in the Conference.

Prominent legal luminaries and arbitration experts, including Ms. Koh Swee Yen SC (Partner, WongPartnership LLP), Mr. Rajendra Barot (Senior Partner, AZB & Partners), Mr. Nitesh Jain (Partner, Trilegal), Mr. Raj Panchmatia (Partner, Khaitan & Co.), Mr. Prakash Pillai (Managing Director, Clasis LLC and Partner, Clyde & Co, Singapore), Mr. Siddharth Sharma (General Counsel, Tata Sons Ltd), and Mr. Naresh Thacker (Partner, Economic Laws Practice) also participated in the Conference.

The Conference focused on the critical topic of Emergency Arbitration at SIAC, and discussed the key internationally emerging trends in arbitration.

The closing remarks were delivered by Ms. Shwetha Bhidhuri (Head - South Asia, SIAC).



Prof. Jan Paulsson



Left to right: Mr. Raj Panchmatia, Ms. Koh Swee Yen SC, Mr. Tejas Karia, Mr. Kevin Nash, Mr. Chong Yee Leong, Mr. Prakash Pillai, and Mr. Naresh Thacker



Left to right: Mr. Nitesh Jain, Mr. Siddharth Sharma, Mr. Darius Khambata SA, Ms. Shaneen Parikh, Mr. Siraj Omar SC, and Mr. Rajendra Barot

SIAC South Asia Webinar 2022

SIAC hosted a South Asia Webinar on '**Recent Changes and Developments in Arbitration in South Asia**' on April 21, 2022. This Webinar focused on bringing together leading arbitration practitioners from the South Asian countries (India, Pakistan, Sri Lanka and Bangladesh) to discuss the key changes witnessed in the arbitration ecosystem in their respective jurisdictions in the last 5 years. The Webinar was moderated by Mr. Nish Shetty (Partner & Head - International Arbitration, Clifford Chance Asia), and the panelists included Ms. Pinky Anand SA (Former Additional Solicitor-General, India), Mr. Makhdoom Ali Khan (Senior Partner, Fazleghani Advocates, Pakistan), Mr. Imtiaz Farooq (Head of Chambers, Farooq and Associates; Barrister-at-Law; Advocate, Supreme Court of Bangladesh), and Mr. Avindra Rodrigo (President's Counsel; Senior Counsel, M/s. F.J. & G de Saram, Sri Lanka). The webinar was attended by over 350 viewers.

(then Partner, Allen & Gledhill; present Deputy Registrar, SIAC) and panelists included Mr. Gregory Vijayendran, SC (Partner, Rajah & Tann), Ms. Ila Kapoor (Partner, Shardul Amarchand Mangaldas), Mr. Rashi Dhir (Senior Partner, DMD Advocates) and Ms. Sapna Jhangiani KC (Attorney General's Chambers, Singapore).



*Left to right: (Top) Mr. Rashi Dhir, Ms. Sapna Jhangiani KC, Mr. Vivekananda Neelakantan
Left to right: (Bottom) Mr. Gregory Vijayendran SC, and Ms. Ila Kapoor*



*Left to right: (Top) Ms. Shwetha Bidhuri, Mr. Makhdoom Ali Khan, Mr. Nish Shetty
Left to right: (Bottom) Ms. Pinky Anand SA, Mr. Imtiaz Farooq, and Mr. Avindra Rodrigo*

SIAC Panel at the India ADR Week 2022

During the India ADR Week, SIAC, in association with Singapore International Mediation Centre (SIMC) hosted a panel discussion on "**International Arbitration and Mediation: Complimentary Systems to Preserve Business Relationships and Effectively Resolve Disputes**". The session was moderated by Mr. Vivekananda Neelakantan

Tread Carefully: Asymmetric Arbitration Clauses And Their Potential Pitfalls

LIONEL LEO, PARTNER, WONGPARTNERSHIP LLP
PIYUSH PRASAD, COUNSEL, WONGPARTNERSHIP LLP
EDEN LI YILING, SENIOR ASSOCIATE, WONGPARTNERSHIP LLP

If party autonomy forms the bedrock of arbitration, then can parties agree that while the default option is for their disputes to be arbitrated, one of them has the additional, exclusive right to choose litigation? Or does this contravene the concept of equality of treatment, or constitute unconscionability or even a violation of public policy? National courts have adopted differing attitudes towards how such asymmetric arbitration clauses (“**AACs**”) should be treated, invoking various justifications. This article briefly explores the treatment of AACs and provides some drafting tips to business users who are looking to incorporate AACs in their contracts.

What are AACs?

AACs are arbitration clauses which provide one of the parties (the “**beneficiary party**”) with an additional option to litigate their disputes, while the other party (the “**counterparty**”) can only refer disputes to arbitration. Put another way, they are bilateral arbitration clauses with a unilateral option to litigate. AACs are also termed “unilateral” or “one-sided” arbitration clauses.

The key benefit of an AAC is that it preserves the advantage of both types of dispute resolution mechanisms for the beneficiary party, until the dispute actually arises. When the nature of the dispute and the identity of the counterparty become known, the beneficiary party can then choose the mechanism that best suits its interests. For

instance, if the dispute involves commercial sensitivities, arbitration may be preferred to maintain confidentiality. Conversely, if confidentiality is not critical but a quick resolution is desired, litigation in the jurisdiction where the counterparty’s assets are located may be preferred due to the availability of summary and default judgment procedures, and for ease of enforcement thereafter. The beneficiary party thus retains flexibility of choice, and is able to more effectively manage its risk exposure.

AACs are commonly found in financing transactions in favour of the lender. The lender generally prefers to have the option to litigate in the debtor’s home jurisdiction or where its assets are located – such choice can only be made when the debtor’s identity becomes known. Additionally, for the straightforward recovery of an undisputed debt, the lender can invoke expedited procedures available in the national courts for a swift resolution. In contrast, the debtor is denied the option to litigate, so it is prevented from potentially forum-shopping and dragging the lender into an unfamiliar or unfavourable jurisdiction. In any event, unlike the lender, the debtor is less likely to have concerns about enforcement.

As illustrated above, the advantages of an AAC are clear. However, a party hoping to incorporate an AAC in its favour faces the real obstacle of legal uncertainty as to whether the AAC will be upheld as a valid and enforceable arbitration agreement. After

all, there is no use negotiating for an AAC if its inclusion only generates satellite litigation or arbitration. It bears highlighting that the wastage of time and costs could be very substantial, particularly where the challenge is brought only in the late stages – say, after an award has been issued – and where the award creditor is seeking enforcement. If the seat court or the national court of the jurisdiction where enforcement is sought finds that the AAC is not a valid arbitration agreement, the entire award may be set aside or refused enforcement. It will then be back to square one, but with a hefty legal bill.

For this reason, when parties are looking to assess the relative advantages and risks of incorporating an AAC, they would do well to take note of national courts' varying attitudes towards AACs.

Treatment of AACs: A brief summary

Generally speaking, jurisdictions can be classified into two categories:

(i) those which are more likely to uphold AACs as valid and enforceable arbitration agreements; and

(ii) those which are less likely to do so.

For ease of reference, we refer to these as “pro-AAC” and “anti-AAC” jurisdictions respectively.

For pro-AAC jurisdictions like England, Singapore, Hong Kong, Malaysia and New Zealand, the main driving force is the concept of party autonomy. Parties have the freedom to choose the governing law, forum, and all procedural aspects of an arbitration agreement to suit their commercial needs. This is captured in Article 19 of UNCITRAL Model Law of International Commercial Arbitration (“**Model Law**”): “Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”

Seen from this lens, an AAC is merely a product of the commercial bargain struck by the parties, which the law should strive to uphold. It does not matter that one party is placed in a better position than the other, if the AAC had been freely agreed. This reasoning is exemplified in *NB Three Shipping v Harebell Shipping*,¹ where the High Court of England and Wales (“**EWHC**”) held that parties are free to agree on any type of dispute resolution mechanism, even if it means conferring unilateral rights of reference on one of the parties. While the beneficiary party has a “better right” of choosing between arbitration and litigation depending on which is more beneficial for its claim, it does not amount to the clause being invalidated.

Similar sentiments according primacy to party autonomy have been echoed by the national courts of Singapore (see the Court of Appeal decision of *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd*²).

For anti-AAC jurisdictions like Russia, Bulgaria and Poland, the tendency to invalidate AACs is often premised on one or more of the following objections:

- (i) procedural inequality;
- (ii) the lack of mutuality;
- (iii) unconscionability; and
- (iv) the doctrine of “*potestativité*”.

We briefly explore each in turn.

The argument on inequality is that it is unfair for only one party to enjoy the exclusive right to refer a dispute to litigation. Doctrinally, the argument may be said to find its grounding in Article 18 of the Model Law which provides that: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”. This serves as an express limitation

¹[2004] EWHC 2001 (Comm.).

²[2017] 2 SLR 362.

on the concept of party autonomy in Article 19. Article 6 of the European Convention on Human Rights (“**ECHR**”), which provides for equal access to justice, has also been cited as the basis for such an argument (see *Russkaya Telephonnaya Kompaniya v Sony Ericsson Mobile Communications Rus Ltd. Liability*³). That being said, doubt has been cast on the applicability of these articles. See, for instance, the EWHC’s decision in *Mauritius Commercial Bank v Hestia Holding Ltd*⁴ stating that Article 6 of the ECHR “is directed to access within the forum chosen by the parties, not to choice of forum”. Accordingly, it does not matter that only one party has the option to invoke another dispute resolution mechanism, as long as within each “track”, parties are guaranteed equal access to justice.

The argument on mutuality is premised on the notion that a dispute resolution clause must grant precisely identical rights to all parties. Since an AAC by definition lacks mutuality, it is not a valid arbitration agreement. This reasoning has been adopted in several decisions of the Delhi High Court (see *Bhartia Cutler Hammer Limited v AVN Tubes Limited*⁵; *Lucent Technologies Inc v ICICI Bank*⁶; and most recently in *Tata Capital Finance Limited v Shri Chand Construction and Apartment Pvt Ltd*⁷). The argument has also been framed as a lack of consideration: since the beneficiary party has not furnished consideration for its additional right (ie, the unilateral option), the arbitration agreement does not independently satisfy all the requirements for contract formation (see *Prima Paint Corp v Flood & Conklin Mfg. Co.*⁸).

The argument on unconscionability is that an inherently imbalanced clause like an AAC is reflective of the inequality of parties’ bargaining powers. Courts should not condone the exploitative conduct of the

beneficiary party (presumably in a more powerful position) of insisting on the inclusion of an AAC, while forcing the weaker counterparty to be bound to arbitrate (which can often be costly and prohibitive). In this connection, it bears mentioning that apart from financing transactions, AACs are commonly found in employment and consumer agreements. Such contracts tend to be standard form contracts developed by the party with superior bargaining strength, and imposed on the counterparty with little or no room for negotiation. In this context, it can be appreciated why certain US courts have taken the view that AACs contained in such “contracts of adhesion” should not be enforced against the weaker party (see for instance, the California Supreme Court decision of *Armendariz v Foundation Health*⁹).

Closely related to the above, the argument relying on the doctrine of “*potestativité*” provides that where the performance of a contract is subject to the fulfilment of a condition precedent which is entirely within one party’s discretion, such a clause is void. This was the reasoning adopted by the *French Cour de Cassation in X v Banque Privée Edmond de Rothschild Europe*,¹⁰ where it struck down an asymmetric jurisdiction clause providing that all disputes were to be brought before the Luxembourg courts, but preserving the bank’s right to bring an action before the courts of the customer’s domicile or any other court of competent jurisdiction. Under the Rothschild reasoning, an AAC would likely be struck down as a clause of “*potestativité*” nature. This is because the underlying purpose of the doctrine is to avoid unconscionability and inequality of powers.

³(2012) Decision No. 1831/12 (Supreme Arbitration (Commercial) Court of Russian Federation).

⁴[2013] EWHC 1328 (Comm.).

⁵1995 (33) DRJ 672.

⁶2009 SCC OnLine Del 3213.

⁷2021 SCC OnLine Del 5091.

⁸388 U.S. 395, 409 (1967).

⁹6 P.3d Rptr. 2d 376, 383 (Cal. Ct. App. 2001).

¹⁰(2012) Cass. Civ (1ère).

Even amongst anti-AAC jurisdictions, there does not appear to be a uniform way in which the courts treat AACs. In general, there appear to be three possible outcomes.¹¹ First, the court could interpret the asymmetrical portion of the clause as a bilateral right (*i.e.*, give the counterparty the right to opt for litigation as well) – this appears to be the approach taken by the Russian courts. Secondly, the court could strike down the unilateral option part of the clause, leaving only the default bilateral arbitration clause. Thirdly, the court could strike down the entire dispute resolution clause. This could be justified on the basis that without the unilateral option, the beneficiary party would not have agreed to the dispute resolution clause at all. The particular approach taken by the court would likely turn on the drafting of the clause in question, and the objection(s) relied upon by the court in invalidating the AAC.

India's approach towards AACs

Where then does India fall on the spectrum ranging from pro-AAC to anti-AAC jurisdictions? Unfortunately, the position is currently unsettled as the Supreme Court has yet to pronounce definitively on this issue. The Delhi High Court has in general tended towards being anti-AAC, primarily relying on the lack of mutuality argument, coupled with the argument that AACs restrain a party's right to pursue legal proceedings in violation of Section 28 of the Indian Contract Act, 1872 and therefore violate public policy. In contrast, the Madras High Court¹² and Calcutta High Court¹³ have generally adopted a more pro-AAC stance.

It is respectfully suggested that when the Supreme Court has the opportunity to rule on the validity and enforceability of AACs, it should

adopt a pro-AAC stance that promises minimal interference with the operation of AACs. For one, this would be more in line with the jurisprudence of leading arbitral hubs. The argument that "mutuality" is an essential ingredient has been widely criticised on the basis that the definition of arbitration agreement (whether under the Model Law or the Convention on the Recognition and Enforcement of Arbitral Awards) does not specify "mutuality" as a requirement. The position is the same under Section 7 of the (Indian) Arbitration and Conciliation Act, 1996. As for the argument on consideration, it invokes the doctrine of separability to "sever" the arbitration agreement from the rest of the commercial agreement, and on this basis requires the former to separately satisfy the requirement for consideration. Arguably, this does not square with reality, where consideration for the unilateral option may be present in the overall agreement by way of, for instance, a substantive commercial concession.¹⁴ Finally, the argument concerning the alleged violation of Section 28 of the Indian Contract Act has been criticised for failing to take into account that Exception 1 specifically provides that arbitration agreements are not considered invalid for violation of Section 28.

Moreover, from a policy perspective, a shift towards according greater prominence to party autonomy¹⁵ and upholding arbitration agreements would likely enhance India's standing as an arbitration-friendly jurisdiction, and justify the Indian courts uniformly adopting a pro-AAC approach. That being said, there could be situations where the court is justified in intervening with the operation of an AAC – these are situations where it is clearly evident that

¹¹Raluca Papadima, "The Uncertain Fate of Asymmetrical Dispute Resolution Clauses in Arbitration around the Globe: To Be or Not to Be" (2021) *Mississippi Law Journal* 90(3) 541, at pp 625–628.

¹²See, for example, *Castrol India Ltd v Apex Tooling Solutions* 2015 SCC OnLine Mad 2095.

¹³See, for example, *Kedarnath Atmaram v Kesoram Cotton Mills, Ltd.* 1949 SCC OnLine Cal 382; and *New India Assurance Co. Ltd v Central Bank of India & Ors* (1985) AIR Cal 76.

¹⁴See, for example, *Doctor's Assocs., Inc v Distajo* 66 F.3d 438, 451-453 (2d Cir. 1995); and *Sablosky v Edward S Gordon Co* 535 N.E.2d 643, 646 (NY 1989).

¹⁵See, *Centrotrade Minerals & Metal Inc. v Hindustan Copper Ltd.*, (2017) 2 SCC 228; and *PASL Wind Solutions (P) Ltd. v GE Power Conversion (India)(P) Ltd.* 2021 SCC OnLine SC 331, where the Supreme Court has held that party autonomy is the bedrock of arbitration. *Ltd.* 2021 SCC OnLine SC 331, where the Supreme Court has held that party autonomy is the bedrock of arbitration.

the AAC had only been included as a result of unequal bargaining power, such as in a consumer contract. In such a scenario, the policy consideration of consumer protection would be a strong militating concern against a blanket pro-AAC approach. It is thus recommended that in this narrow category of cases, the doctrine of unconscionability can and should be relied on to refuse enforcement of an AAC as against the weaker party.

Takeaways for drafters

Given the uncertain status of AACs as briefly explored above, parties are advised to tread carefully before including AACs in their commercial agreements. In particular, parties should obtain advice on the attitudes of the national courts of the seat, and the jurisdiction(s) where enforcement may be sought. Business users may also wish to consider the following drafting tips:

- The arbitration and litigation clauses should be set out in separate provisions, to minimise the risk that the (in)validity of one affects the other (although it remains to be seen how the courts that currently adopt an anti-ACC approach would view this).
- The unilateral option should clearly delineate what types of claims can be submitted to litigation – is it all disputes, or only a specific sub-set (for instance, claims relating to certain subject matters, or claims with a quantum exceeding a certain threshold)? The point is to provide objective criteria, therefore legal certainty, as to when the litigation option can be invoked, and militate against an argument that parties' intent to arbitrate is unclear.
- The unilateral option should also define the point in time when the beneficiary party

must exercise its right, and whether notice of election must be given to the counterparty (and if so, when). The point is to circumscribe the perceived unfair advantage accorded to the beneficiary party, and pre-emptively address arguments premised on inequality and unconscionability.

- Where the beneficiary party's standard form contract is used (or more generally, if there is a risk that parties' bargaining power may be viewed as being unequal), the beneficiary party should draw the counterparty's attention to the AAC in an explicit manner, and ensure that the other party is independently advised. This is to reduce the risk of arguments premised on unconscionability arising.

*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.

Parallel Proceedings in Indian Arbitration Law

LYNN PEREIRA, PARTNER, DMD ADVOCATES
HAARIS FAZILI, COUNSEL, DMD ADVOCATES

More than 2300 years ago, Aristotle said *"Indeed, arbitration was devised to the end that equity might have a full sway"*. In a different era, Benjamin Franklin said, *"When will mankind be convinced and agree to settle their disputes by Arbitration?"*.

In a growing economy such as India, with an ever-growing population (of both persons and companies), disputes are but inevitable. In these circumstances, arbitration offers a speedy, cost-effective, flexible, confidential and specialised mode (to name a few advantages) of dispute resolution to parties. The exponential growth in commerce and industry, economic liberalisation as well as the sporadic germination of new uncharted fields, and the consequential complications emanating from them, are arguably best tackled via arbitration, since parties are at liberty to refer disputes to eminent experts in the relevant field.

The backlog of litigation cases in India is alarming, whereas disposal of disputes expeditiously is a must for the maintenance of rule of law in the largest democracy in the world. It cannot be disputed that in contemporary India, the balance of scales tips in favour of arbitration over traditional litigation. Arbitration allows parties freedom to choose the procedure under which their dispute is to be settled, thereby increasing efficacy and saving time. This becomes particularly relevant in more complex disputes where the parties are able to set block dates for trial and hearing, this is a big advantage over the court system where trials can go

on for up to a decade, with multiple judges hearing the dispute at different stages, each judge bringing with him/her the *"inarticulate major premise"* (as coined by Justice Holmes and referred to by the late Justice M.C. Chagla in his autobiography¹ – *"[t]he way a judge decides depends very often upon his background, his temperament, his ideals and his outlook on life"*). India is no stranger to arbitration. Arbitration has deep, ancient roots in India. Since vedic times, arbitration has enjoyed a respectable place as a means of resolving disputes. India was also one of the first countries to adopt the New York Convention (in 1960). However, despite such heritage, India's growth in the field of arbitration has not lived up to its expectations. It may be argued that one of the reasons is parallel proceedings being filed in relation to the dispute in arbitration.

In a recent decision (*Oil and Natural Gas Corporation Ltd v Afcons Gunanusa JV, Arbitration Petition (Civil) No. 05 of 2022*) the Indian Supreme Court outlined reasons why it wished to effectuate the object and purpose behind enacting the model fee schedule (in the Fourth Schedule of the Act) – *"Conscious and aware as we are that (i) Arbitration proceedings must be conducted expeditiously; (ii) Court interference should be minimal; and (iii) Some litigants would object to even a just and fair arbitration fee..."*. The third reason being illustrative of just one of the many modes adopted by a recalcitrant party to prolong or frustrate the arbitration proceedings, these considerations would be equally relevant in considering and

¹M.C. Chagla - *Roses in December - An Autobiography*.

dealing with parallel proceedings – one of the modes used by recalcitrant parties to derail arbitration proceedings having an Indian element, or the realisation of the fruits of such proceedings. These tactics include using the court/ statutory tribunal mechanism, with no limit to the imagination and ingenuity. Approaching courts and other statutory regulatory authorities, often results in stalling the arbitral process, ultimately weakening arbitration’s efficiency and efficacy in general.

A party to a dispute approached the Indian courts for grant of an injunction against arbitration proceedings emanating from an unregistered trust deed involving immovable properties in India.² While initially the courts upheld the jurisdiction of the arbitrator on the principle of *Kompetenz-Kompetenz*, the same was overturned in appeal on grounds that under Indian law (which is under constant state of development), trust disputes are not arbitrable. The parallel proceedings are continuing and the arbitration has since been in the doldrums.

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Arbitration allows parties freedom to choose the procedure under which their dispute is to be settled, thereby increasing efficacy and saving time.

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Reluctant to fight an investment treaty battle, the Government of India approached the court for grant of an injunction against an investment treaty arbitration brought by a foreign investor.³ The Single Judge initially granted the requested injunction and the

investment treaty proceedings were effectively stalled. After several hearings, the Single Judge, vacated the stay and dismissed the Government’s suit. However in appeal, the arbitration was halted once again. Eventually the litigation came to a quietus, since India corrected its much-criticized retroactive tax legislation.

The much-publicized tug-of-war between *Amazon* and *Future group* is another example of how parallel proceedings impede arbitrations. Having suffered an unfavorable emergency award on 25 October 2020 under the SIAC Rules, Future Group contended that the emergency award had no legal sanctity under Indian law. The issue was finally settled on 6 August 2021,⁴ with the Indian Supreme Court emphatically holding emergency awards are legal, valid, and enforceable under the Act. Further, in the midst of the arbitration proceedings, Future Group also filed a complaint before the Indian anti-trust regulator, i.e., the Competition Commission of India, seeking revocation of the approval that was granted to Amazon for its investment in Future Group. Future Group was infact successful in its endeavour. Future Group moved applications for termination of the arbitration proceedings before the arbitral tribunal itself based on the CCI order. Future Group invoked the supervisory, constitutional power of the court, and ultimately on appeal before a division bench, was granted a stay of the arbitral proceedings. Later, the Supreme Court allowed the arbitration proceedings between Amazon and Future Retail to continue. However, considerable time had elapsed.

Another newly devised tactic used by parties to wriggle out of the fruits of arbitration, is

²*Dr. Bina Modi v. Mr. Lalit Modi & Ors.* CS(OS) 84/2020 and 85/2020.

³*Union Of India v. Vodafone Group Plc* CS(OS) 383/2017.

⁴*Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors* Civil Appeal nos. 4492-4493 of 2021.

a collateral attack on the main contract as being tainted by fraud. In a recent instance, the award holder (an Indian company) was wound up by the National Company Law Tribunal (“**NCLT**”) in proceedings under the Indian Companies Act on the ground that the award holder was formed for a fraudulent purpose and its affairs have been conducted in a fraudulent manner, which fraud infected the main contract which had been the subject matter of arbitration proceedings which culminated in an award in favour of the Indian company. The Indian Supreme Court upheld the order passed by the NCLT.⁵

However, parallel proceedings need not always be a stumbling block in the path of arbitration proceedings if such parallel proceedings are appropriately viewed and dealt with by the concerned court or other judicial authority. An illustrative example of this is the dispute between the Indian subsidiary of an international fast-food chain (“**Company**”) and its former joint venture partner in India (“**JVP**”).⁶ This dispute resulted in a petition filed by the JVP for oppression and mismanagement before the erstwhile Company Law Board (“**CLB**”) challenging both his removal as managing director and a consequent exercise of a call option in respect of his shares in the joint venture company (“**JVC**”). Subsequently, the Company invoked (London-seated) arbitration proceedings in relation to its termination of the joint venture agreement (“**JVA**”) and its consequent entitlement to buy out the JVP.

The JVP sought to challenge the termination of the JVA, and sought stay of the arbitration proceedings, in the pending company petition before the CLB. Stay of arbitration was declined by the CLB. The JVP thereafter filed a suit in the Delhi High Court (“**Delhi Suit**”) seeking to restrain the Company-initiated arbitration proceedings.

The Single Judge held that the JVP had been able to show prima facie that the arbitration agreement between the parties was inoperative or incapable of performance on account of the fact that the JVP had already filed a petition for oppression and mismanagement before the CLB, which had directed the Company to maintain *status quo* with regard to the shareholding pattern of the JVC during the pendency of the CLB petition. The Single Judge restrained the Company from pursuing the arbitration proceedings till the disposal of the Delhi Suit, or alternatively, till the CLB vacated its aforesaid status quo order. The Company appealed, and the Division Bench of the Delhi High Court (“**DB**”) allowed the appeal by a judgment authored by Justice (Retd.) Badar Durrez Ahmed.

The DB noted the change in regime between the 1940 Act and the 1996 Act. Based on the interplay of Sections 34 and 35 of the 1940 Act, the Indian Supreme Court had taken the view that a suit and an arbitration could not go on simultaneously, and that either the suit would have to be stayed under Section 34 or the arbitration proceedings (on the same subject matter) would become invalid under Section 35. However, Sections 8 and 45 of the 1996 Act mandate a judicial authority to refer the parties to arbitration unless it appears that no valid arbitration agreement exists.

The DB also noted that the case before it pertained to an anti-arbitration injunction, and the principles governing such case cannot be the same as those governing a case of an anti-suit injunction, in view of the principles of autonomy of arbitration and the *Kompetenz-kompetenz* principle. It further noted that the exceptional cases in which arbitrations could be enjoined are where the arbitration proceedings would be oppressive

⁵Devas Multimedia Private Ltd v. Antrix Corporation Ltd. & Anr. Civil appeal no.5766 of 2021.

⁶McDonald's India Pvt Ltd. v. Vikram Bakshi & Ors. FAO (OS) 9/2015 and CM No. 326/2015.

or unconscionable, where the very issue was whether or not the parties had consented to the arbitration (such as, an allegation that the arbitration agreement was forged).

Very significantly, the DB relied on the decision of the Supreme Court in *World Sport Group (Mauritius) Ltd vs MSM Satellite (Singapore) Pte Ltd*,⁷ which had expressed the view that the mere existence of multiple proceedings is not sufficient to render the arbitration agreement inoperative.

The DB also analysed, with due care, the subject matter of the two proceedings. Although both arose out of the same dispute between the Company and the JVP, the DB concluded that the subject matter of the proceedings before the CLB fell within the ambit of the alleged oppression and mismanagement, whereas the subject matter of the dispute before the arbitral tribunal related to the termination of the JVA and the rights flowing therefrom. The DB set aside the impugned judgment of the Single Judge, allowing the arbitration to proceed. The JVP's challenge to the DB's judgment was rejected in *limine* by a bench of the Supreme Court, headed by Justice (Retd.) Chelameswar.

In stark contrast to the above is the case of an arbitration between an infrastructure company and a public authority. The authority applied to the arbitral tribunal seeking termination of the company-initiated arbitration proceedings on the ground that the issues in arbitration had been heard and decided in an earlier writ petition before an Indian High Court, and therefore the arbitration proceedings were barred by the principle of *res judicata* and needed to be stayed as these issues were *sub judice* before the Indian Supreme Court (in an appeal from the decision of the aforesaid High Court). The arbitral tribunal rejected this jurisdictional challenge (clarifying that it would abide by

the binding findings, if any applied, of the High Court). The remedy should have been a challenge to such rejection along with a challenge to the final award. However, the Supreme Court, after simply recording that parties had been heard (with no further reasoning), by a single-sentence order stayed the arbitration proceedings. The stay remains in effect years later.

“

However, parallel proceedings need not always be a stumbling block in the path of arbitration proceedings if such parallel proceedings are appropriately viewed and dealt with by the concerned court or other judicial authority.

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In this context, the reference of the abovementioned DB to “a very interesting observation” in Redfern and Hunter on International Arbitration (Sixth Edition) is of great importance - “The relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership. Arbitration is dependent on the underlying support of the courts, which alone have the power to rescue the system when one party seeks to sabotage it...”. The DB added that “Courts need to remind themselves that the trend is to minimize interference with arbitration process as that is the forum of choice. That is also the policy discernible from the 1996 Act.”

Apart from the above wise words regarding the relationship between national courts and arbitral tribunals, courts and other judicial authorities in India ought to bear in mind that arbitration does not seek to wage a turf war with courts and tribunals. Sections 34 and 48 of the 1996 Act, both contain provisions empowering a court to

⁷(2014) 11 SCC 639.

ensure that an arbitral tribunal cannot effectively exceed its jurisdiction and tread upon the turf of other *fora*.

Contracting parties could also make efforts to minimise the risk of parallel proceedings. The Indian Supreme Court has identified (albeit not exhaustively) seven types of disputes that would not be arbitrable in India namely, (i) relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction; and (vii) grievances involving the rights, duties and obligations of the settlor, trustees and the beneficiaries which are specifically governed by the provisions of the Trusts Act. At the time of entering into contracts, parties could bear this in mind and take care that their contractual provisions provide clarity (if that be the case) that the nature of the contractual relationship would not result in such kind of disputes. An example of a provision which supports the arbitrable nature of contractual disputes is Article 20.3.11 of the (*publicly available*) Operation, Management and Development Agreement in relation to the Delhi Airport, which provides as follows:

“Waiver of Immunity

“AAI hereby agrees that the execution, delivery and performance by it of this Agreement constitute private and commercial acts rather than public or governmental acts and accordingly, no immunity from proceedings brought against it or its assets in relation to this Agreement shall be claimed on the ground that the execution, delivery and performance by it of this Agreement constitute public or governmental acts.”

Parties can perhaps adopt safeguards in the contracts itself to cut down the avenues for parallel proceedings emanating from an arbitration. However, primarily, it is up to the Indian legislature and judiciary to slay the heads of the hydra to ensure the efficacy of arbitration, and it is they who must bear in mind Benjamin Franklin’s question *“When will mankind be convinced and agree to settle their disputes by Arbitration?”*.

**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.*

Implications of Recent Indian Judgements on International Arbitration

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In 2022, Indian courts have continued the effort to match progressive jurisdictions for international arbitration. The Supreme Court of India has been consistent and clarificatory on aspects of Indian law affecting international arbitration for the most part, and various High Courts have adopted a pro-enforcement attitude towards foreign arbitral awards. In this piece, we summarise key decisions reflecting these trends and consider their likely implications, concluding with our hope for the future.

Jurisdiction, non-arbitrability examinable at the stage of appointment of arbitrators

In *IOCL v. NCCL*,¹ the Supreme Court confirmed that courts can examine questions of jurisdiction and non-arbitrability when approached to appoint an arbitrator, if the facts are clear and glaring (with respect to these issues); in cases of debatable or disputable facts, the matter can be left to the arbitral tribunal. With respect to the dispute before it, the court examined which claims of the contractor against the owner were contractually excluded from the arbitral tribunal's jurisdiction, and overturned a High Court decision to refer those claims to the tribunal.²

The ruling is an extension of recent, consistent efforts by the top court to clarify the scope of pre-reference judicial scrutiny of arbitral disputes. In the December 2020 judgment of *Vidya Drolia*,³ the court identified certain subject matters as non-arbitrable, i.e. incapable of resolution through arbitration, and confirmed a court's authority to examine non-arbitrability when approached to appoint an arbitrator and / or refer a dispute to arbitration.⁴ In subsequent decisions, it took the view that at this stage courts have a judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood (of frivolous claims),⁵ and the authority to examine challenges to admissibility of claims (for example, where a claim is evidently time-barred).⁶

As things now stand, issues of jurisdiction, non-arbitrability and admissibility can be examined by Indian courts when approached to appoint an arbitrator and / or refer a dispute to arbitration. This gives the objecting party a wide array of arguments to forestall the reference of disputes to arbitration: a result which is unlikely to augment the top court's efforts towards speedy disposal of applications for appointment / substitution / change of arbitrators, discussed in the following section.

¹*Indian Oil Corporation Limited v NCC Limited* [2022] SCC OnLine SC 896.

²*Ibid* [89] – [97].

³*Vidya Drolia and Others v Durga Trading Corporation* [2021] 2 SCC 1.

⁴*Ibid* [76], [154].

⁵*DLF Home Developers Limited v Rajapura Homes Private Limited* [2021] SCC OnLine SC 781 [18].

⁶*Bharat Sanchar Nigam Limited and another v Nortel Networks India Private Limited* [2021] 5 SCC 738 [38] – [47].

High Courts to expedite appointment of arbitrators

In *Shree Vishnu Constructions*,⁷ the Supreme Court directed High Courts to ensure that all applications for appointment of arbitrators and / or any other applications for substitution and / or change of arbitrators, pending for more than a year from the date of filing, are decided within six months from the decision (19 May 2022). Moreover, that all endeavours are to be made to decide and dispose of applications of this nature at the earliest and preferably within a period of six months from the date of filing. The directions were issued after statements received from various High Courts showed a number of such applications were pending for more than a year, in some cases for four to five years. The delay, the court observed, defeated the object and purpose of the Indian Arbitration and Conciliation Act 1996 (“**Act**”), and the significance of arbitration as an effective alternative dispute resolution mechanism.⁸

Tribunal bound by the terms of the submission to arbitration

In *IOCL v. Shree Ganesh Petroleum Rajgurunagar*,⁹ the Supreme Court set aside part of an India-seated arbitral award issued by a tribunal constituted under a dealership agreement between disputing parties to the extent that it dealt with disputes under a separate lease agreement between the same parties. The court concluded that the latter disputes – under the lease agreement which had an independent and distinct arbitration clause, with a different procedure for appointment of an arbitral tribunal – were not contemplated by the arbitration clause in the dealership agreement and did not fall within the terms of submission to

arbitration.¹⁰ In particular, respondent had objected to claimant’s claims under the lease agreement, and the jurisdiction of the tribunal to decide those claims was specifically in issue before the tribunal.¹¹ Yet (and without addressing the jurisdictional objection), the tribunal proceeded to grant the claimant / lessee relief based on claims under the lease agreement. The court found this to be patently beyond the scope of the competence of the tribunal.¹²

The principle underlying the court’s approach finds resonance in the Singapore Court of Appeal’s decision in *CBX and Another v. CBZ and Others*.¹³ The court set aside two partial awards arising out of two share purchase agreements in so far as they ordered payment of certain “Remaining Amounts”, which had originally been claimed by the sellers on the basis that their due dates had been accelerated by reason of the buyers’ conduct. The tribunal did not accept this claim but ordered that the buyers make payment of the Remaining Amounts when they became due in any event, without acceleration.¹⁴ The Court of Appeal found that the permissibility of claims to recover remaining amounts other than by way of acceleration, and the buyers’ related jurisdictional objections, were not identified or addressed by the tribunal.¹⁵ In failing to make a ruling on these issues before admitting the claims, the tribunal was found to have acted in excess of its jurisdiction.¹⁶

In essence, the Indian Supreme Court, like the Singapore Court of Appeal, has re-affirmed the cardinal principle that an arbitral tribunal is bound by the terms of the submission to arbitration, and cannot go beyond those terms to deal with issues

⁷*M/s Shree Vishnu Constructions v The Engineer in Chief, Military Engineering Service & Ors* [2022] LiveLaw (SC) 523.

⁸*M/s Shree Vishnu Constructions v The Engineer in Chief, Military Engineering Service & Ors* [2022] LiveLaw (SC) 523 [2].

⁹*Indian Oil Corporation Ltd v M/s Shree Ganesh Petroleum Rajgurunagar* [2022] 4 SCC 463.

¹⁰*Ibid* [31].

¹¹*Indian Oil Corporation Ltd v M/s Shree Ganesh Petroleum Rajgurunagar* [2022] 4 SCC 463 [23], [39], [40] 463.

¹²*Ibid* [47].

¹³*CBX and another v CBZ and others* [2021] SGCA(I) 3.

¹⁴Sapna Jhangiani & Jarret Huang, ‘Limits, Latitude, and Lacunae: Rare Set-aside of Award in *CBX v CBZ*’ (Kluwer Arbitration Blog, 26 July 2021) <<http://arbitrationblog.kluwerarbitration.com/2021/07/26/limits-latitude-and-lacunae-rare-set-aside-of-award-in-cbx-v-cbz/>> accessed 29 October 2022.

¹⁵*CBX and another v CBZ and others* [2021] SGCA(I) 3 [53].

¹⁶*CBX and another v CBZ and others* [2021] SGCA(I) 3 [55], [57].

not contemplated by the parties. Moreover, a tribunal cannot simply overlook jurisdictional objections to the claims made before it. These must be addressed; failing to do so may result in the award being set aside for excess of jurisdiction.

Interim relief securing amounts in dispute obtainable without proof of dissipation of assets

In *Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited*,¹⁷ the Supreme Court held that the Act gives courts wide powers to pass orders securing the amount in dispute in an arbitration.¹⁸ Proof of actual attempts to deal with, remove or dispose of property to defeat or delay the realisation of an impending arbitral award is not imperative for grant of interim relief; a strong possibility of diminution of assets suffices.¹⁹ On facts, the court upheld orders of the Bombay High Court directing the deposit of certain security deposits paid by Essar Steel to its group companies, concluding that these security deposits were not being released to Arcellor (which took over Essar Steel in a corporate insolvency resolution process) based on a convoluted series of internal arrangements between Essar Steel's group companies to divert them for liquidation of alleged dues to third parties. This, in the court's view, constituted a sufficient basis to secure the amounts in question.²⁰

The decision is important because the standards for interim relief applied by Indian courts are uniform across arbitrations seated in India and outside India.²¹ The top court has, in effect, clarified that in all instances courts have flexibility from the technical rigors of India's domestic civil procedure code while granting interim relief in support of arbitrations.

Post-award interest on whole or part of sum awarded (principal amount + pre-award interest)

In *Morgan Securities and Credits Pvt. Ltd. v. Videocon Industries Limited*,²² the Supreme Court held that in India-seated arbitrations, an arbitral tribunal has the discretion to award post-award interest on the whole or part of the 'sum' awarded under the Act. The 'sum' includes the principal amount and the pre-award interest. As such, it would be within the discretion of the tribunal to grant post-award interest only on the principal amount if it considers appropriate; provided that this discretion is exercised reasonably and in good faith, taking into account all relevant circumstances.²³

The Supreme Court thus clarified the uncertainty ensuing from its previous decision in *Hyder Consulting*,²⁴ which was seen by some quarters as mandating post-award interest on both the principal amount and pre-award interest.²⁵ The ruling of the court is consistent with a string of recent decisions which recognise the broad discretion of arbitral tribunals to grant post-award interest.²⁶

Pro-enforcement attitude adopted by several courts towards foreign awards

The year began with the Supreme Court dismissing a petition²⁷ against the Calcutta High Court's decision in *EIG (Mauritius) Limited v. McNally Bharat Engineering Company Limited*.²⁸ The Calcutta High Court upheld an ICC award favouring an investor's (EIG / petitioner) exercise of a put option, notwithstanding

¹⁷*Essar House Private Limited v Arcellor Mittal Nippon Steel India Limited* [2022] SCC OnLine SC 1219.

¹⁸*Ibid* [48].

¹⁹*Ibid* [50].

²⁰*Ibid* [51] – [53].

²¹Arbitration and Conciliation Act 1996, s 2(2) proviso.

²²*Morgan Securities and Credits Pvt Ltd v Videocon Industries Ltd* [2022] SCC OnLine SC 1127.

²³*Ibid* [24] – [25].

²⁴*Hyder Consulting (UK) Limited v Governor, State of Orissa* [2015] 2 SCC 189.

²⁵*Morgan Securities and Credits Pvt Ltd v Videocon Industries Ltd* [2022] SCC OnLine SC 1127 [17] – [21].

²⁶*UHL Power Company Limited v State of Himachal Pradesh* [2022] 4 SCC 116; *Indian Oil Corporation Ltd v UB Engineering Ltd & Another* (Supreme Court, 12 April 2022); *Delhi Airport Metro Express Private Ltd. v. Delhi Metro Rail Corporation* [2022] SCC OnLine SC 549; *Morgan Securities and Credits Pvt Ltd v Videocon Industries Ltd* [2022] SCC OnLine SC 1127.

²⁷*McNally Bharat Engineering Company Limited v EIG (Mauritius) Limited* (Supreme Court of India, 12 January 2022).

²⁸*EIG (Mauritius) Limited v. McNally Bharat Engineering Company Limited* [2021] SCC OnLine Cal 2915.

the award debtor's (MBECL / respondent) objection that the put option was violative of the Foreign Exchange Management Act 1999 ("**FEMA**") since it provided assured returns to the investor or a "legally able" non-resident third party (in violation of guidelines prohibiting guaranteed returns on investments). The Calcutta High Court took the view, consistent with previous decisions on the issue,²⁹ that every violation of FEMA does not form part of the fundamental policy of Indian law so as to render an award unenforceable as "contrary to the public policy of India" (under Section 48 of the Act which lists the conditions for enforcement of foreign awards).³⁰

Close on its heels, the High Court of Delhi (single judge) observed in *Taqa India Power Ventures Private Limited & Another v. NCC Infrastructure Holdings Limited*³¹ that a party cannot file objections to a petition for enforcement of a foreign arbitral award in a piecemeal manner, first to oppose maintainability and then (if the petition is found maintainable) to oppose enforceability. While this enforcement petition was pending before the High Court of Delhi, the Madras High Court ruled that it had jurisdiction to entertain an enforcement petition by the party opposing enforcement before the High Court of Delhi, *NCC Infrastructure Holdings Limited*, for enforcement of that part of the award which was favourable to it.³² The latter ruling is currently in appeal before the Supreme Court.

Thereafter, the High Court of Karnataka in *CTI Future Corporation v. Ducgiang Chemical and Detergent Powder Joint Stock Company*,³³ confirmed its jurisdiction to enforce a foreign award rendered outside India, between parties who had no connection to India, on the basis that

properties against which enforcement was sought were within its territorial limits.

These decisions are indicative of a pro-enforcement attitude of High Courts in different states towards foreign arbitral awards and signal a positive development for India's global perception as an arbitral-friendly jurisdiction.

Looking forward to 2023

The above run-through shows that Indian courts have overall supported greater tribunal discretion, for instance, in the grant of interim relief and post-award interest, but retained a measure of judicial scrutiny at the pre-reference stage. The latter is likely to prolong court proceedings related to arbitration and stretch the time taken to resolve a dispute following the invocation of arbitration. A positive outcome for 2023 would be to see courts give greater deference to the competence of the arbitral tribunal on matters of jurisdiction, non-arbitrability and admissibility, on a case-by-case basis. This would also further the top court's directive to secure speedier disposal of applications for appointment of arbitrators.

On the bright side, the reasoning adopted in several judgments, together with the outcomes summarised above, reflect an alignment with international best practices. India seems to be maturing as an arbitral-friendly jurisdiction and integrating progressively with the international arbitration landscape. Here is hoping that this trend continues going forward.

**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.*

²⁹*Vijay Karia & Another v Prysman Cavi E Sistemi SRL and others* [2020] 11 SCC 1; *Cruz City 1 Mauritius Holdings v Unitech Limited* [2017] SCC OnLine Del 7810; *Banyan Tree Growth Capital LLC v. Axiom Cordages Limited* [2020] SCC OnLine Bom 781.

³⁰*EIG (Mauritius) Limited v. McNally Bharat Engineering Company Limited* [2021] SCC OnLine Cal 2915 [29].

³¹*Taqa India Power Ventures Private Limited & Another v NCC Infrastructure Holdings Limited* (Delhi High Court, 1 February 2022).

³²*NCC Infrastructure Holdings Limited v TAQA India Power Ventures Private Limited and connected matter* [2022] MANU/TN/0092/2022.

³³*CTI Future Corporation v Ducgiang Chemical and Detergent Powder Joint Stock Company* [2022] SCC OnLine Kar 535.

The Way Ahead for India in Investment Arbitration

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The last three decades has seen the landscape for foreign direct investment ("FDI") into India develop in a unique manner, and with it a unique relationship with investment treaties and investment arbitration. With the economic liberalisation in the early 1990s led by then Finance Minister, Manmohan Singh, India signed its first bilateral investment treaty ("BIT") with the United Kingdom in 1994. By 2015, India had signed 83 BITs.

For many years, India saw few disputes under its investment treaties, the notable exceptions being claims regarding the Dabhol project and the White Industry case, discussed below. However, this changed in around 2015 when a wave of claims began to be brought against India. This has led to India facing a total of 26 known cases as of the date of this article.²

In 2015, India began to review its existing BITs and terminated a number of them. Since 2015, India has unilaterally terminated 77 BITs,³ including as recently as 2021.⁴ Following these terminations, in 2016, India published a new Model BIT which proposed to narrow the scope of investor protections that had resulted in claims against it.

At the same time, India has continued to seek FDI, and has remained a popular destination for investors seeking growth and a hedge against other emerging economies. Where does India's approach to BITs and investor protection sit within this, and the energetic efforts of 'India Inc.' to expand into new markets around the world?

This article explores the evolution of the investment arbitration landscape in India and the choices for India as it seeks a way ahead in its relationship with investment arbitration.

India as a respondent to claims in investment arbitration

The first reported investment arbitration claims against India emerged in 2003 and 2004⁵ and related to the *Dabhol power plant* project in Maharashtra. Nine cases were initiated by banks associated with the financing of the plant or by shareholders⁶, which were later settled.

This was followed in 2011 by the *White Industries* case. This involved an Australian manufacturing company which successfully brought a commercial arbitration claim against Coal India in Paris. White Industries then sought to enforce the award in the Delhi

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²India | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub.

³India | International Investment Agreements Navigator | UNCTAD Investment Policy Hub.

⁴The India-Latvia BIT terminated on 26 November 2021: India - Latvia BIT (2010) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub

⁵India | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub.

⁶E.g. *Standard Chartered Bank v. India*; *Erste Bank v. India*; *Credit Suisse v. India*; *Credit Lyonnais v. India*; *BNP Paribas v. India*; *ANZEF v. India*; *ABN Amro v. India*, and *Bechtel v. India*; *Offshore Power v. India*.

court, while Coal India asked the Calcutta court to set-aside the award (as Indian jurisprudence then allowed). A challenge to the jurisdiction of the Calcutta court was referred to the Supreme Court, where it awaited hearing. After nine years of litigation, White Industries commenced investment arbitration under the India-Australia BIT on the basis that the judicial delays amounted to a denial of justice, in breach of India's obligation to accord "*fair and equitable treatment*" to investors. Also, that India had failed to provide "*effective means of asserting claims and enforcing rights with respect to investments*" in breach of a requirement under the India-Kuwait BIT which was applicable pursuant to the "*most-favoured nation*" provision in the India-Australia BIT. An investment arbitration tribunal sitting in Singapore upheld the latter claim and ordered India to pay approximately AUD4 million in damages. Despite some heated criticism of the award, India duly paid.

The following year, a new wave of cases began. Between 2012 and 2013,⁷ several telecom companies brought BIT claims against India arising out of the Indian Supreme Court's decision to cancel 122 2G spectrum licences said to be affected by corruption.⁸ Further cases followed the decision of the Indian Government in its 2012 budget to change the law on capital gains with retroactive effect in order to tax the sale by Hutchinson of its Indian business to Vodafone business. The Indian tax authorities used the 'new' law to raise multi-billion USD value retroactive tax demands, and even claims for interest, on several historic transactions involving overseas investors. This in turn led to investment arbitration claims against India alleging a breach of fair and equitable treatment.⁹

India's unilateral termination of BITs & new Model BIT

Faced with a number of investment claims against it, India initiated unilateral termination of various BITs. In March 2016, India issued notices to terminate 57 BITs out of the 80 BITs in place at the time, which took effect (depending on the treaty) 6-12 months later. To date, 77 BITs have been terminated.¹⁰

Alongside its cancellation notices, the Indian Government then published a new 2016 Model BIT¹¹ as the basis for the negotiation of new treaties. The new Model BIT excluded those claims that had previously been brought against India, and restricted the scope of investment claims. For example:¹²

- Definition of investment: now expressly excludes "*an order or judgment sought or entered in any judicial, administrative or arbitral proceeding*".
- Carve-out (Article 2.4): the Model BIT expressly does not apply to services supplied in the exercise of governmental authority (potentially including court services), or "*any law or measure regarding taxation, including measures taken to enforce taxation obligations*".
- Conditions precedent to making a claim (Article 15): before bringing a claim under the treaty, all investors are required to exhaust: "*all judicial and administrative remedies relating to the measure underlying the claim for at least a period of five years from the date on which the investor first acquired knowledge of the measure in question*".
- Missing of investor protections: the Model BIT notably omits several customary protections such as the promise of "*fair and equitable treatment*", as well as any "*most favoured nation*" protection.

⁷India | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub.

⁸*Naumchenko and others v. India; Devas v. India; Deutsche Telekom v. India; KHTML v. India.*

⁹*Vodafone v India; Cairn Energy v India; Vedanta Resources v India.*

¹⁰India | International Investment Agreements Navigator | UNCTAD Investment Policy Hub.

¹¹ModelBIT_Annex_0.pdf (dea.gov.in).

¹²ModelBIT_Annex_0.pdf (dea.gov.in).

The Model BIT does not appear to have attracted significant uptake. Since its release in 2016, India has signed four BITs which appear to be based on the Model with Belarus,¹³ Kyrgyzstan,¹⁴ Taiwan¹⁵ and Brazil.¹⁶ None of these BITs is currently in force.

Meanwhile, investment claims have continued to be brought, including claims based on residual ('sunset') protections under the cancelled BITs. Most of the earlier wave of cases have been resolved, often in India's favour. Since 2016, India has recorded a total of nine reported cases.

Missing protections for outbound Indian investors?

While India may have historically entered into BITs primarily as a capital importing country, this is no longer the case. In the financial year 2021-2022, the Indian Government reported overseas direct investment ("**ODI**") of some USD 17.7 billion.¹⁷

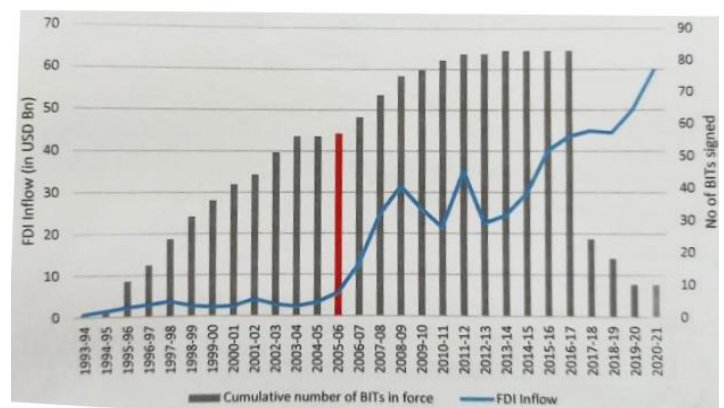
India Inc. has become a major investor in developed and developing economies around the world. Thus, while the cancellation and attempted recasting of BITs may serve to limit the exposure of India to claims, it also reduces or removes the mutual protections available to Indian investors on their outbound ODI.

The Indian Government appears to be conscious of this dichotomy. An interesting assessment was provided in the Tenth Report of the Ministry of External Affairs to the Lok Sabha on India and BITs in September 2021 of the "*Cost Benefit Analysis of BITs*" which reported that:

"3.1 ... the cost of a BIT includes expensive litigations through international arbitration, including legal and arbitrator fees and arbitration costs, liability for the Government in case of adverse award, reputational cost in international investment arena, reduced policy space due to commitments in international treaties, distorted power dynamics between capital exporting and capital importing countries and uncertainty in the law arising out of the inconsistent interpretations by different tribunals.

*3.2 The benefits of the BITs include expectation that the BITs would lead to higher investment and thus higher employment and job creation. It would also provide comfort of protection to Indian investors investing in other countries."*¹⁸

Interestingly, the report cited a "*weak and insignificant*" correlation between the existence of BITs and investment inflows into India, based on plotting the number of BITs signed by India against the BITs then in force. After India cancelled most of its BITs, FDI was shown to have stalled, but then increased, as below.¹⁹



¹³ Belarus - India BIT (2018).

¹⁴ India - Kyrgyzstan BIT (2019).

¹⁵ Bilateral Investment Agreement between India Taipei Association in Taipei and The Taipei Economic and Cultural Centre in India (2018).

¹⁶ Brazil - India Investment Cooperation and Facilitation Treaty (2020).

¹⁷ [Approved September factsheet.pdf \(dea.gov.in\)](#).

¹⁸ [17 External Affairs 10.pdf](#).

¹⁹ [17 External Affairs 10.pdf](#), paragraph 3.10. The chart is as it appears in the Report.

The same report also cited a separate empirical study based on the Gravitational Model of FDI which suggests that *“there may be some spill-over benefits for investment inflows from the BIT regime as a whole, though a relationship between investment and signing a particular treaty cannot be established”*.

In his opening statement to the Lok Sabha in September 2020, India’s Minister of External Affairs had acknowledged the challenges that India was facing and said that the Government *“remains conscious of the realities of negotiations with sovereign Governments while upholding [India’s] national interests and priorities”*.

After considering the inputs, the recommendation of the Committee on External Affairs was ultimately that *“signing of BITs should be encouraged selectively in identified core/priority sectors/areas to attract more FDIs which will lead to growth and development of the economy”*.²⁰

The way ahead?

India remains a compelling investment destination. In FY 2021-2022, India reported its highest ever FDI at USD 83.6 billion.²¹ Compared to inflows of USD 45.15 billion in FY 2014-2015, India has nearly doubled its FDI within an 8-year period.

The role and balance of investment protection within such growth remains a relevant and complex question. With the benefit of hindsight, both advocates and opponents of investment protection may find support in the mass cancellation of BITs from 2016 and the absence of dramatic trends in the years that have followed. India did not lose all the claims that followed, nor did investment levels drop like a stone.

While negotiating a new network of BITs, the interests of both Indian inbound and outbound investment would need to be considered. The continuing availability of investment arbitration in a neutral forum before an independent and impartial tribunal is a feature of real and continuing interest to businesses conducting cross-border investment. It is a feature already being used by Indian businesses to protect their investments outside India. At the same time, the new generation of BITs should also reflect the changing consensus around how investment protection should interact with, and leave space for, national policy growth, no more so than in the realm of environmental protection and responses to climate change.

With the spotlight focussed by the Indian Government on the scope of substantive protections in its Model BIT, it is interesting to note that it has not sought to dispense with the mechanisms of investor-state arbitration as the fall-back dispute resolution mechanisms, in contrast to the approach taken in Europe by the EU Commission. Arbitration and India remain companions on the journey of economic growth.

*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.

²⁰ 17_External_Affairs_10.pdf , paragraph 3.18.

²¹ <https://pib.gov.in/PressReleasePage.aspx?PRID=1826946>.

Costs of Arbitration -Q&A with SIAC Secretariat Members

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1. What are 'costs of arbitration' under the SIAC Rules?

Under the SIAC Rules,² the term 'costs of the arbitration' comprises of three components.³ First, the Tribunal's fees and expenses and the Emergency Arbitrator's fees and expenses, where applicable; second, the SIAC's administration fees and expenses; and finally, the costs of any expert appointed by the Tribunal and of any other assistance reasonably required by the Tribunal. In all cases, the actual costs of arbitration are determined by the Registrar at the conclusion of the arbitration after considering the circumstances of the case. Notably, 'costs of arbitration' do not include 'legal and other costs' that may be incurred by the parties.

2. How are 'costs of arbitration' different from 'legal and other costs'?

In contrast to 'costs of arbitration', 'legal and other costs' refer to costs in relation to legal services (e.g., expense on lawyers) and other ancillary services required during the course of the arbitration (e.g., costs of the hearing room, online hearing facilities, tribunal secretary, transcriber, translators, parties' expert witnesses). As stated above, the Tribunal's fees are included in 'costs of arbitration', and not in 'legal and other costs'.

Unless otherwise agreed by the parties, the Tribunal is required to specify the costs of arbitration (as determined by the Registrar)

and apportion the costs of arbitration amongst the parties.⁴ The Tribunal also has the authority to order in its Award all or a part of the legal or other costs of a party to be paid by another party.⁵

3. How does SIAC calculate the 'costs of arbitration'? What is the difference between the estimated costs of arbitration and actual costs of arbitration?

As a matter of general practice, the SIAC Secretariat informs the Parties of the estimated costs of arbitration whilst commencing arbitration under the applicable rules. These *estimated* costs of arbitration are calculated based on SIAC's Schedule of Fees, as in force at the time of commencement of the arbitration and which operates on an *ad valorem* basis. Accordingly, the arbitrators' and SIAC's fee caps or estimated maximum fees are calculated based on the total sum in dispute (which is in turn computed based on the relief sought by the Parties) in a particular case. These estimated costs may be revised in the course of the arbitration if there is a change in the sum in dispute. We have found that this helps the Parties budget for the maximum that an arbitration might cost under the SIAC Rules.

Whilst the Schedule of Fees is used to calculate the maximum fees, the *actual* arbitrators' fees and SIAC's administrative fees are determined by the Registrar at the conclusion of the proceedings having regard to the facts and circumstances of the case.⁶

¹This Q&A is designed to provide Parties with general information about SIAC's financial management of proceedings. The answers provided herein should not be construed as legal advice. SIAC's practices may differ depending on the peculiar facts of each case.

²Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules 6th Edition, 1 August 2016 ("SIAC Rules").

³See Rule 35.2 of the SIAC Rules.

⁴See Rule 35.1 of the SIAC Rules.

⁵See Rule 37 of the SIAC Rules.

⁶See Rule 34.7 of the SIAC Rules.

For instance, if a matter is settled at an early stage, the Registrar may attribute a relatively smaller percentage of the maximum fee cap as arbitrators' fees and/ or the administrative fees, as opposed to when an arbitration concludes after an entire life cycle resulting in a final award. This power of the Registrar also acts as a check on avoidable inefficiencies in the arbitral process. For instance, the Registrar may tax the Tribunal's fees and SIAC's fees for delays in the conduct of the proceedings. Thus, the SIAC Rules empower the Registrar to determine the 'costs of arbitration' that are commensurate with the work done by the Tribunal and SIAC.

The Registrar may also allow interim payments to be made to the Tribunal on achievement of significant milestones in the arbitral process, such as the issuance of Partial Awards. These interim payments are subject to, and typically would not aggregate to more than 50% of, the Tribunal's fee cap.⁷ Thus, Tribunals that conduct themselves efficiently need not wait until the conclusion of the proceedings to be remunerated.

Any excess deposits collected from the Parties are refunded to the Parties at the conclusion of the case.

4. Is there a quick way to assess or get an overview of the possible 'costs of arbitration' before submitting a Notice of Arbitration?

Yes, a prospective Claimant (or any other party) could get an overview of the 'costs of arbitration' through SIAC's Fee Calculator that can be accessed from our [website](#). Thus, Parties can estimate their maximum exposure towards the 'costs of arbitration' at an early stage.

5. Does SIAC's Schedule of Fees apply to all SIAC-administered arbitrations? Are there any alternative methods of remunerating the arbitrator?

Yes, SIAC's Schedule of Fees applies to all cases administered under the SIAC Rules and the UNCITRAL Rules. The Tribunal's fees and SIAC's administrative fees are ascertained in accordance with the Schedule of Fees in force at the time of commencement of the arbitration. However, the Parties may agree to alternative methods of determining the Tribunal's fees *prior* to the constitution of the Tribunal (such as an agreed hourly rate).⁸

6. What are some of the benefits of a fixed fee schedule? Does the Registrar have the power to pay additional fees to the arbitrator over and that prescribed in the Schedule of Fees?

A fixed fee schedule gives predictability to the Parties. From the commencement of the arbitration, the Parties are assured that the deposits will be collected based on the sum in dispute. This also informs procedural efficiency by the Tribunal and the parties to the arbitration. The Tribunal is bound by a fee cap, so there is no financial incentive to prolong procedures in the arbitration. The Parties are likely to be careful about incurring disproportionate legal costs in arbitrations in comparison to the fixed costs of arbitration. Since SIAC's fee schedule operates on an *ad valorem* basis, Parties may also be discouraged from artificially inflating claims, since they would then have to pay deposits upfront for the inflated claims.

In exceptional circumstances, the Registrar may allow an additional fee to be paid to the Tribunal over that prescribed in the Schedule of Fees.⁹

⁷See Paragraphs 25 to 29 of the SIAC Practice Note for Administered Cases PN-01/14 (02 January 2014).

⁸See Rule 34.1 of the SIAC Rules.

⁹See Paragraph 14 of the Practice Note for Administered Cases PN – 01/14 (02 January 2014).

7. In practice, how are estimated costs of arbitration collected from the Parties? Is it the same for every case?

As a matter of general practice, the estimated costs of arbitration are collected from the Parties in three tranches. In most cases, the Registrar would request the Parties to deposit 40% of the estimated costs before the constitution of the Tribunal and shortly after commencement of the arbitration, another 40% within two months from the date of the constitution of the Tribunal (or shortly after completion of pleadings), and the final tranche, representing the last 20%, two months prior to the evidentiary hearing.

Importantly, and in order to promote procedural efficiency whilst collecting deposits, the number of tranches and the percentage of each tranche may vary depending of the facts and circumstances of the case. For instance, in most cases being administered under the expedited procedure,¹⁰ the Secretariat would request deposits in two equal tranches as opposed to three tranches. Conversely, in arbitrations where the sum in dispute is relatively large, the Registrar may allow Parties to make deposits in more than three tranches.

8. Is it possible for separate deposits to be fixed for the Claimant and the Respondent? In which cases may this happen?

It is possible for the Registrar to fix separate deposits for the claims and the counterclaims (to be paid by the Claimant and the Respondent, respectively).¹¹ In practice, Parties request fixing of separate deposits where there is a significant difference in the quantum of the claims and that of the counterclaims.

9. Are there any specific remedies against a Respondent who fails to pay its share of the estimated costs?

As a matter of general practice, the estimated costs of arbitration are requested from Parties in equal proportions. However, in cases where the Respondent fails to deposit the requested estimated costs of arbitration, the Claimant may be requested to make substituted payment on the Respondent's behalf. This is because Parties are jointly and severally liable for costs of arbitration under the SIAC Rules.¹²

In cases where the Claimant has made such substituted payment, it could consider making an application under Rule 27(g) of the SIAC Rules to seek recovery of payment. Rule 27(g) codifies a Tribunal's power to issue an order or award for the reimbursement of such substituted payment towards the costs of arbitration.

Alternatively, a Claimant could also seek repayment of the substituted payment as part of its costs submissions before the Tribunal. In such cases, unpaid costs would generally be awarded in the final Award.

10. What are the consequences of the Parties' failure to pay the costs of arbitration?

The consequences of non-payment of the estimated costs of arbitration can be serious. In cases where a party fails to pay the deposits, the Tribunal (if constituted) may suspend its work and the Registrar may suspend SIAC's administration of the arbitration.¹³

¹⁰See Rule 5 of the SIAC Rules. In most expedited procedure arbitrations, the total sum in dispute is less than SGD 6 million.

¹¹See Rule 34.2 of the SIAC Rules.

¹²See Rule 34.5 of the SIAC Rules.

¹³See Rule 34.6(a) of the SIAC Rules.

The Registrar may also, after consultation with the Tribunal, and after informing the Parties, set a deadline for the payment of the requisite deposits. If the deposits remain unpaid after the deadline, the relevant claims or the counterclaims may be considered withdrawn (without prejudice to their reintroduction in another proceeding).¹⁴

The Respondent's failure to pay its share of the requested deposits will not prevent it from defending itself against the Claimant's claims. However, this failure may have an adverse impact on its ability to pursue its counterclaims. Much like the Claimant's claims, if the Respondent does not pay the requisite deposits, its counterclaims could be suspended or withdrawn (on a without prejudice basis) under the SIAC Rules.¹⁵

11. Under the SIAC framework, can a successful party be awarded the 'costs of arbitration' and 'legal and other costs'?

Subject to the Parties' agreement and any applicable laws, a Tribunal is empowered to determine the apportionment of 'costs of arbitration' among the Parties.¹⁶ Further, a Tribunal is also authorised to order that all or a part of the 'legal and other costs' of a party shall be paid by the other party.¹⁷ Thus, a successful party can potentially seek or recover both 'costs of arbitration' and 'legal and other costs' that it incurred during the arbitration process.

12. Is third party funding allowed in SIAC arbitrations? Are there any applicable practice notes that a user should be aware of?

The SIAC Rules do not proscribe third party funding in arbitrations. However,

Parties may wish to review the applicable laws and SIAC's Practice Note 'PN -01/17 (31 March 2017) on Arbitrator Conduct in cases involving External Funding' before opting for third party funding. For instance, Singapore laws allow external funding in international arbitration proceedings and related court and mediation proceedings. This may or may not be the case in other jurisdictions.

13. What are some of the cost saving features of SIAC Rules? How can Parties save costs?

In the spirit of flexibility, the SIAC Rules allow Parties to adopt bespoke procedures to achieve procedural efficiency. Thus, external and in-house counsel should carefully review the SIAC Rules for the appropriate procedures that may add to the efficiency of the dispute resolution process.

For instance, Parties could consider:

- Whether a case is suited for expedited procedure ("**EP**") arbitration.¹⁸ In summary, EP arbitrations are generally appropriate for less complex disputes where the sum in dispute is less than SGD 6 million (or approximately INR 36 crores). Importantly, EP does not apply automatically in cases where the disputed sum is less than SGD 6 million and a party (either a Claimant or a Respondent) is required to make an application to invoke the EP provisions. Significantly, if an application for EP is granted, the Tribunal has to render the award within 6 months from the date of its constitution (unless the Registrar extends this timeline in exceptional circumstances). Further, the Tribunal, in consultation with the Parties, may decide to adjudicate the dispute based on documents alone, thus dispensing with the need to conduct

¹⁴See Rule 34.6(b) of the SIAC Rules.

¹⁵See Rule 34.6 of the SIAC Rules.

¹⁶See Rule 35.1 of the SIAC Rules.

¹⁷See Rule 37 of the SIAC Rules.

¹⁸See Rule 5 of the SIAC Rules. An EP application can also be made in cases of 'exception urgency' or where Parties agree.

evidentiary or other hearings. Finally, EP cases are generally referred to a sole arbitrator thereby reducing a Tribunal's fees by about two-thirds as compared to a three-member tribunal.

- Whether the case involves any jurisdictional objections to the existence or validity of the arbitration agreement.¹⁹ The SIAC Rules provide for a two-step mechanism to address any jurisdictional objections that might be raised by a party prior to the constitution of the Tribunal. In the first instance, the Registrar can decide whether to refer the objections to the SIAC Court based on the nature of the objections. If referred, the SIAC Court will decide if it is *prima facie* satisfied that the arbitration is to proceed. A meritorious jurisdictional objection might save the Respondent from incurring significant costs in defending the claim before the Tribunal.
- Whether any procedural application, such as joinder and consolidation should be made. For instance, it may be more economically efficient for the Parties to apply for consolidation where disputes arise out of a series of contracts. This would obviate the need for multiple and parallel proceedings thus dramatically reducing costs.
- Whether an application for early dismissal is necessary. The SIAC Rules codify a Tribunal's power to summarily dismiss claims or defences which are 'manifestly without legal merit' or 'manifestly outside the jurisdiction of the Tribunal'.²⁰ This procedure is aimed at allowing clearly unmeritorious claims to be quickly disposed of, which is time-saving and cost-saving.

- Whether the proceedings should be bifurcated if there are preliminary issues that could be dispositive of some or all of the entire case (e.g., jurisdiction and arbitrability).
- Whether multiple rounds of pleadings are necessary, the extent to which document production is required, and whether an evidentiary hearing is required or if the matter can be determined on the documents alone.

The costs regime under the SIAC Rules has been effective in not only providing predictability as to the maximum costs of arbitration, but also in encouraging efficient conduct of the arbitration. This is because the actual costs of arbitration are only determined at the conclusion of the proceedings and after considering the circumstances of the case.

Finally and unrelated to the conduct of arbitration, Parties should also carefully examine their dispute resolution clauses at the contract drafting stage. A 'pathological' or a defective arbitration clause can lead to unwanted disputes and wasted time and costs. We recommend that Parties adopt and use our model clause which can be accessed from our website here: <https://www.siac.org.sg/model-clauses/siac-model-clause>. Alternatively, Parties are welcome to write to us at casemanagement@siac.org.sg for necessary assistance and/or clarification.

14. Are SIAC's services and the SIAC Rules suitable for small-value contracts, or are they only relevant in high-value contracts?

While SIAC routinely handles high-value disputes, a significant number of cases relate

¹⁹See Rule 28.1 of the SIAC Rules.

²⁰See Rule 29 of the SIAC Rules.

to small-value claims. Based on empirical analysis of our case statistics, it appears to us that Parties have found the SIAC Rules to be cost effective even for their lower value claims. For instance, between 2010 and 2021, SIAC has seen 715 EP applications. As mentioned above, the value of an EP case is typically under SGD 6 million.



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