SIAC
Singapore International Arbitration Centre

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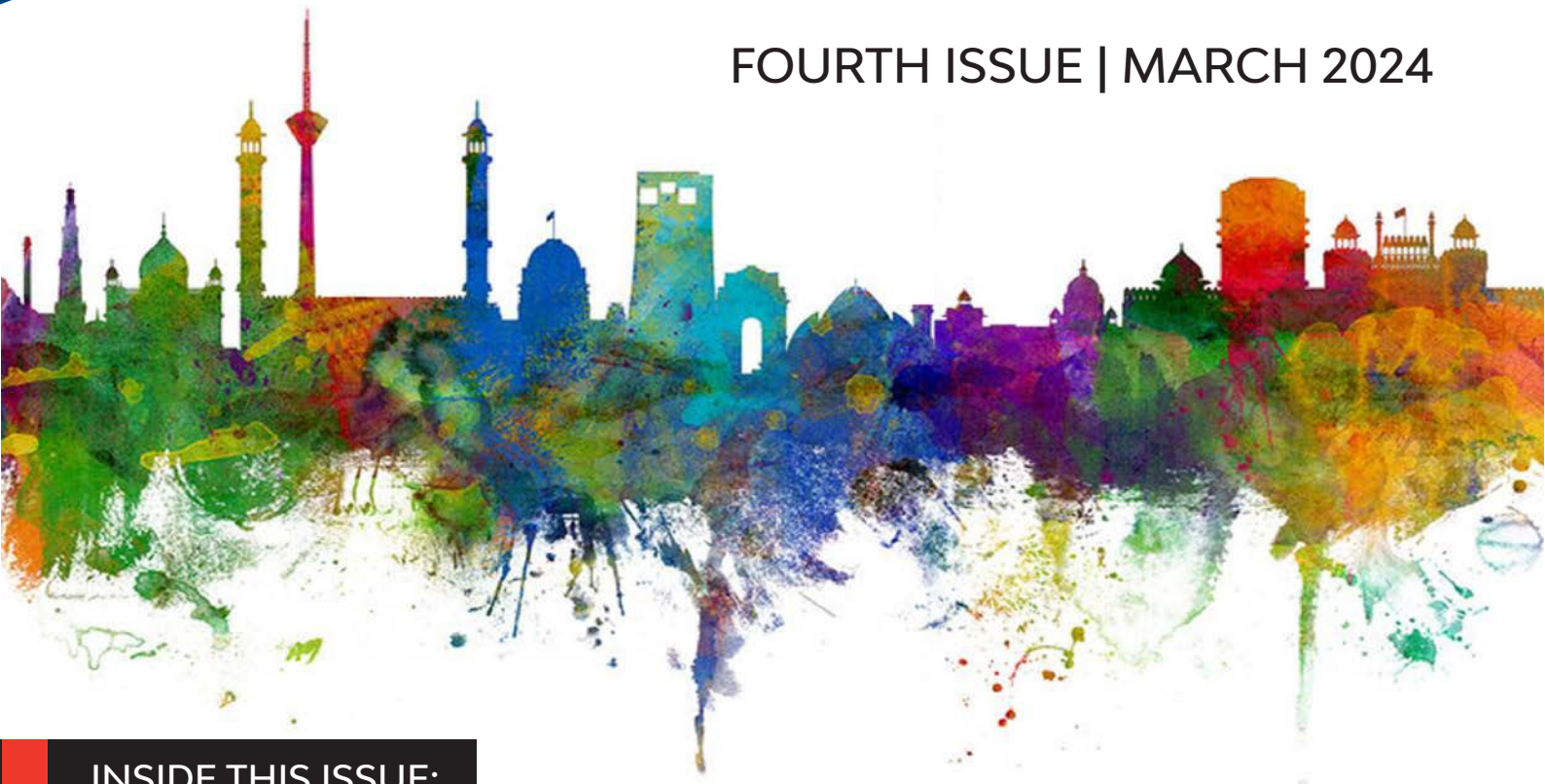

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Foreword

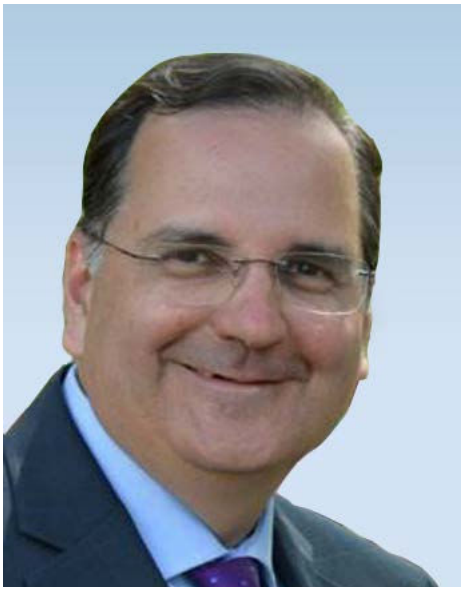
I'm delighted to introduce this 4th Edition of the annual SIAC India newsletter. The future of international commercial arbitration lies very much on the paths that major global economies will take. India's economy is expected to be the world's third largest by 2030. Hence Indian arbitration will inevitably be an indispensable part of that future.

Courts in India are firmly in pro arbitration mode. The Supreme Court in two recent judgments, recalibrated some doctrines to the significant advantage of arbitration in India. First, the group of companies doctrine has been emphatically reaffirmed but with guard rails, to ensure that the doctrine is no longer a trawl net to ensnare the most solvent member of an economic group of companies. The Supreme Court has revived the original Dow Chemicals doctrine and the restated doctrine requires the non-signatory to be a "*veritable party*" to the arbitration agreement, based on the requirements of contract law.

The second decision concerned the vexed issue as to whether an arbitration agreement was voided by failure to have it appropriately stamped. It would be facile to view this judgment as limited to the much needed ring fencing of arbitration from the "*weapon of technicality*" of stamp. The judgment advances the frontiers of Kompetenz - Kompetenz (both positive and negative) and recognises not only the primacy of the Arbitration & Conciliation Act 1996 over all other laws, but also the separability doctrine as substantively underpinning arbitration, not limiting it to only the express recognition under Section 16 of the Arbitration Act.

The ramifications of these doctrinal advancements are far reaching and constitute an unequivocal affirmation of arbitration as the preferred means of commercial dispute resolution in India.

Added to these developments is a proposal for further amendments to the Arbitration Act. One hopes that



"The future of international commercial arbitration lies very much on the paths that major global economies will take. India's economy is expected to be the world's third largest by 2030. Hence Indian arbitration will inevitably be an indispensable part of that future."

Foreword

these will display a softer touch rather than any major surgery that might derail the now steady progress of arbitration in India. Statutory intervention would be welcome to expand the arbitrability of disputes in areas such as intellectual property and corporate disputes and to grant enforceability to BIT awards, as "*commercial*" under the New York Convention.

Despite some areas requiring reform, it is fair to say that stakeholders in Indian arbitration now have the tools for effective and enforceable arbitration but it is for them to finish the job. "*Make in India*" will remain incomplete without the critical component of "*Resolve in India*".

There remains the imperative to develop an Indian arbitration bar skilled in the best international arbitral practices. That will include greater emphasis on written, rather than oral, submissions, standard use of real time transcription, eschewing "*ambushing*" of opponents and strict adherence to timelines, for filings, cross examination and oral arguments. To aspire to international competitiveness, the otherwise talented Indian Bar needs to pledge itself to a new form of practice.

In this concerted restructuring of Indian arbitration, SIAC has been an active participant. SIAC is viewed in India as a premier arbitral institution, not only in terms of its cutting edge rules but also because of the promptness, efficiency and fairness of its Secretariat. Trust is the one word that comes to mind when Indian arbitrants think of SIAC.

In a sense, SIAC is a constructive partner in India's aspiration to become a popular seat for international commercial arbitration. For the last several years, a significant percentage of SIAC's arbitration docket has come from India related disputes, several seated in India. SIAC has also actively encouraged an arbitration culture in India, by its extremely well received seminars, workshops and training sessions. This newsletter symbolises SIAC's commitment to Indian arbitration.

This year's edition covers several big ticket issues, including the law governing the arbitration agreement (an issue that has gained traction with the recent judgments of the Singapore Court of Appeal and of the Bombay High Court concerning an anti-suit injunction issued in Singapore against proceedings before an Indian tribunal) and the interplay between arbitration and insolvency law.

As the scope and pace of arbitration grows in India, I have no doubt that SIAC will remain an increasingly important player in the story.

Mr Darius Khambata, SA
Member, SIAC Court of Arbitration

Highlights of Key SIAC India Events in 2023

SIAC South Asia Office, as part of SIAC's outreach activities, organised a series of events in key India cities, to widen SIAC's engagement and renew the commitment to SIAC's Indian users. The Conferences were attended by around 800 participants, including in-house counsel and international and national arbitration practitioners. The main events are highlighted below.

SIAC Annual India Conference 2023

SIAC organised its Annual India Conference 2023 in New Delhi on September 16, 2023. The theme of the Conference was '**International Arbitration in India - Rise, Challenges and Reform**'.

The Conference commenced with a Welcome Address by Mr Davinder Singh SC, Chairman, SIAC, followed by an Opening Address delivered by Ms Rahayu Mahzam, Senior Parliamentary Secretary, Ministry of Health & Ministry of Law, Singapore. Justice Vibhu Bakhru, Judge, High Court of Delhi was an honoured guest and engaged in a fireside chat with Ms Lucy Reed, President, SIAC Court of Arbitration, moderated by Mr Kevin Nash, Registrar, SIAC.

The Conference featured two panel discussions. The first panel, titled 'Provisional Measures in International Arbitration: Strategic Lessons from Recent Practice' explored institutional perspectives, best practices, and strategic considerations surrounding the effective utilisation of provisional measures in an arbitration cycle. Mr. Vivekananda Neelakantan (Deputy Registrar, SIAC) moderated the discussion, featuring speakers including Ms. Lucy Reed, Prof Lawrence Boo (Member, SIAC Court of Arbitration; Independent Arbitrator), Mr. Nakul Dewan, SA (Barrister, Twenty Essex), Ms. Sapna Jhangiani KC (International Legal Counsel, Attorney-General's Chambers, Singapore, Arbitrator & Mediator), and Ms. Jamie Pang (Senior Associate, Clifford Chance Asia).

The second panel discussion focused on the topic 'Navigating Evolving Jurisprudence During an Arbitration'. In this panel, moderated by Ms Shwetha Bidhuri (Director & Head (South Asia), SIAC), the panellists delved into the idea of evolving jurisprudence on matters such as non-stamping of arbitration agreements, arbitrability, and group of companies' doctrine. The speakers in this session included Dr Michael Hwang, SC (Chartered Arbitrator, Michael Hwang Chambers LLC), Mr Ashish Kabra (YSIAC Committee Member; Head - Singapore Office, Nishith Desai Associates), Mr Ananya Kumar (Partner, JSA), Mr Avinash Pradhan (Deputy Head, International Arbitration, Co-Head, South Asia Desk, Rajah & Tann Singapore LLP, Partner, Christopher & Lee Ong, Malaysia), and Mr Mohit Rohatgi (Partner, Trilegal).

The conference concluded with an oxford – style debate powered by YSIAC on the motion 'This House Believes That Indian Arbitration Law Should Have a Binary Regime with Two Separate Acts, One for Domestic Arbitrations and the Other for International Arbitrations'. The debaters included Mr Vijayendra Pratap Singh (Member, SIAC Court of Arbitration; Senior Partner & Head - Litigation, AZB & Partners), Dr Pinky Anand (Senior Advocate, Former Additional Solicitor General of India), Ms Anuradha Dutt (Founder & Managing Partner (Delhi), DMD Advocates), and Mr Darius Khambata SC (One Essex Court; Member, SIAC Court of Arbitration). The debate was judged by Justice U.U. Lalit

(Former Chief Justice of India), and Justice A.K. Sikri (Former Judge, Supreme Court of India, Presently International Judge, SICC) and was moderated by Mr Anirudh Krishnan (YSIAC Committee Member; Founding Partner, AK Law Chambers), and Mr Krishnayan Sen (YSIAC Committee Member; Partner, Luthra & Luthra Law Offices India).

The Closing Remarks were delivered by Mr Cyril Shroff, Member, SIAC Board of Directors; Managing Partner, Cyril Amarchand Mangaldas.

Group Picture at the SIAC Annual India Conference 2023

Fireside Chat at the SIAC Annual India Conference
(L to R: Mr Kevin Nash, Justice Vibhu Bakhru, Ms. Lucy Reed)

Left to Right: Mr Krishnayan Sen, Dr Pinky Anand SA, Mr Vijayendra Pratap Singh, (Retd.) Justice U.U Lalit, (Retd.) Justice A.K Sikri, Ms Anuradha Dutt, Mr Darius Khambata SC

SIAC Mumbai Conference 2023

SIAC organised its Mumbai Conference 2023 on September 15, 2023. The theme of the Conference was '**Navigating Risks and Challenges in International Arbitration**'.

The Welcome Address was delivered by Ms Gloria Lim, CEO, SIAC. The Opening Address was delivered by Ms Rahayu Mahzam, Senior Parliamentary Secretary, Ministry of Health & Ministry of Law, Singapore, followed by a Special Address by Mr Cyril Shroff.

The Conference featured two panel discussions. The first panel discussion highlighted the topic of the 'Value and Efficiency of Early Dismissal and other Dispositive Motions in International Arbitration'. The panel, moderated by Mr Kevin Nash, discussed institutional perspectives, best practices, and strategic considerations surrounding the effective utilisation of early dismissal and other dispositive mechanisms in resolving disputes. The panellists in this session included Ms Lucy Reed, Ms Payel Chatterjee (Partner, Trilegal), Dr Michael Hwang SC, Ms Sapna Jhangiani KC, and Ms Jamie Pang.

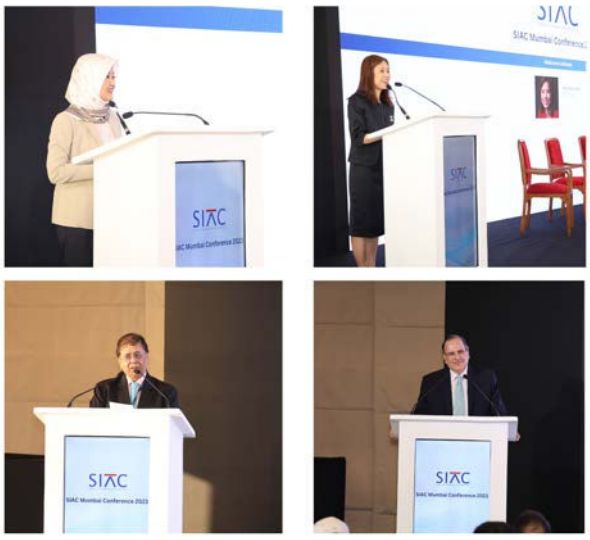
The second panel discussion, moderated by Mr. Rohit Bhat (Lead - India Disputes, Freshfields Bruckhaus Deringer), dove into the topic of 'Intersection between Insolvency and International Arbitration'. This panel discussed the interplay between insolvency proceedings and international arbitration, addressing jurisdictional complexities, recent trends, and evolving practices. Speakers in this session included Ms. Seema Bono (Partner, Pinsent Masons), Ms. Koh Swee Yen SC (Head, International Arbitration Practice, Partner, Commercial & Corporate Disputes Practice, WongPartnership LLP), Mr. Prakash Pillai (Partner, Clyde & Co. Clasis Singapore), Mr. Avinash Pradhan, and Mr. Varghese Thomas (Partner, JSA).

The conference concluded with an oxford – style debate powered by YSIAC on the motion 'This House Believes that Third Party Funded Disputes Are About Business, Not Justice'. The debaters included Justice Somasekhar Sundaresan (Additional Judge, High Court of Bombay), Dr Rishab Gupta (Barrister, Twenty Essex), Ms Shaneen Parikh (Partner and Head – International Arbitration, Cyril Amarchand Mangaldas), and Mr Ritin Rai (Senior Advocate, Tenant, 7KBW). The debate was judged by Mr Anand Desai (Managing Partner, DSK Legal), Mr Rabindra Jhunjhunwala (Partner, Corporate and Commercial, Mergers and Acquisitions, Private Equity, Khaitan & Co) and Ms Zia J. Mody (Co-Founder & Managing Partner, AZB & Partners). The moderators included Ms Sushmita Gandhi (YSIAC Committee Member; Partner, Indus Law) and Mr Ashish Kabra (YSIAC Committee Member; Head - Singapore Office, Nishith Desai Associates).

Mr Darius J. Khambata, SC delivered the Closing Remarks.

Group Picture at the SIAC Mumbai Conference 2023

Left to Right: Ms Sushmita Gandhi, Mr Ashish Kabra, Dr Rishab Gupta, Justice Somasekhar Sundaresan, Mr Rabindra Jhunjhunwala, Ms Zia Mody, Mr Anand Desai, Ms Shaneen Parikh, Mr Ritin Rai SA at the SIAC Mumbai Conference



SIAC Mumbai Conference
(Top L to R: SPS Rahayu Mahzam, Ms Gloria Lim
Bottom L to R: Mr Cyril Shroff, Mr Darius Khambata SA)

SIAC India Academy 2023

SIAC organised its offline Academy in Mumbai on September 14, 2023. The Academy provided practical, 'hands-on' training on advocacy and cross examination skills to the participants. Titled, 'Making of an Advocate' and chaired by Ms Lucy Reed, the Academy was attended by 48 participants from various law firms, 7 faculty members and 12 facilitators. The faculty list included several renowned arbitration experts like Mr Kevin Nash, Dr Michael Hwang, SC, Ms Sapna Jhangiani KC, Ms Koh Swee Yen SC, Ms Shaneen Parikh, Mr Baiju Vasani (Barrister & Arbitrator, Twenty Essex), and Mr Vijayendra Pratap Singh.

The facilitators included Mr Madhur Baya (Principal, Lex Arbitri), Ms Ila Kapoor (Partner, Shardul Amarchand Mangaldas), Mr Krishnayan Sen, Mr Rohit Bhat, Mr Divyesh Menon (Counsel, Internal Arbitration, Construction & Projects, Rajah & Tann), Mr Rishabh Malaviya (Deputy Counsel, SIAC), Mr Sahil Kanuga (Co-Head, International Dispute Resolution & Investigations Practice, Nishith Desai Associates), Ms Abhisaar Bairagi (Partner, Khaitan & Co), Mr Abhijnan

Jha (Partner, AZB & Partners), Ms Sushmita Gandhi, Mr Aditya Mehta (Partner, Cyril Amarchand Mangaldas), and Mr Anuj Berry (Partner, Trilegal).

SIAC India Academy
Left: Faculty Chair, Ms Lucy Reed
Top: Panel Discussion at the Academy (L to R: Mr Kevin Nash, Ms Lucy Reed, Dr Michael Hwang SC, Ms Sapna Jhangiani KC, Ms Koh Swee Yen SC, Ms Shaneen Parikh, Mr Baiju Vasani)
Bottom: SIAC India Academy Group Picture

SIAC Bengaluru Conference 2023

SIAC organised its Bengaluru Conference 2023 on June 23, 2023. The theme of the Conference was '**Adopting and Advancing International Arbitration for Efficient Resolution of Commercial Disputes**'.

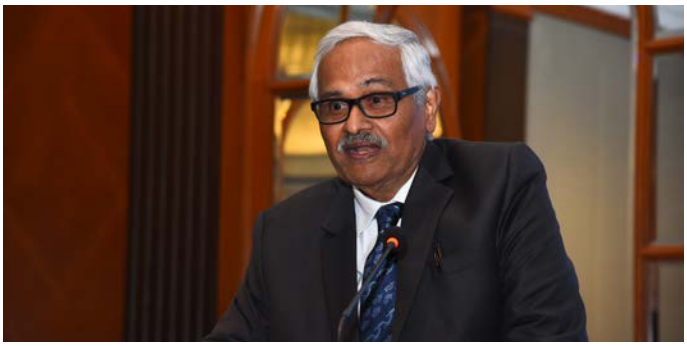
The Conference commenced with a Welcome Address by Ms Gloria Lim, CEO, SIAC. The Conference featured two panel discussions. The first panel tiled 'Dispute Resolution for the Start-Up Ecosystem: SIAC's Offerings' and moderated by Mr Ashish Kabra deliberated on the important factors and considerations for the start-up ecosystem in resolving their disputes, including the relevance of adopting institutional arbitration with reference to various mechanisms under the SIAC Rules. The panellists included Mr Tanmay Amar (Vice President (Legal), Omidyar Network India), Mr Prakash Pillai, Mr Ankit Goyal (Partner (Foreign Law), Allen & Gledhill LLP), Mr Aditya Vikram Bhat (Senior Partner, AZB & Partners), and Mr Francis Xavier, SC (Regional Head – Dispute Resolution, Rajah & Tann Singapore LLP).

The second panel discussion highlighted the topic 'Drafting Arbitration Agreements: Lessons Learnt in Recent Years'. In the panel, moderated by Mr Pranav Budihal (Deputy Counsel, SIAC) the panellists discussed the practical tips that parties can use to ensure they draft effective arbitration agreements and avoid potential pitfalls by referencing the judicial decisions in recent years. The panellists included Ms Tine Abraham (Partner, Trilegal), Mr Glenn George Cheng (Founder & Managing Partner, GGC Law), Mr Ranjit Prakash (Managing Partner, Archeus Law), Mr Sreenivasan Narayanan S.C. (Managing Partner- Singapore Office, K&L Gates Straits Law), and Mr Varghese Thomas.

The Conference concluded with an oxford style debate on the motion 'This House Believes that the Opening of Doors to Foreign Law Firms will Make India a Hub of International Arbitration'. The debaters included Mr Shreyas Jayasimha (Co – Founder, Aarna Law (India), Simha Law (Singapore)), Mr Lomesh Nidumuri (Partner, Head-Disputes (South India), Cyril Amarchand Mangaldas), Mr Dhyan Chinnappa (Senior Advocate, High Court of Karnataka), and Ms Poornima Hatti (Partner, Samvad Partners). Hon'ble Justice R.V Raveendran (Former Judge, Supreme Court of India), Mr Promod Nair (Senior Advocate, High Court of Karnataka), and Mr Vivek K. Chandy (Joint Managing Partner, JSA) judged the debate. The debate was moderated by Ms Mayuri Tiwari Agarwala (Partner, Khaitan & Co) and Mr Vikas Mahendra (Partner, Keystone Partners).

Justice R.V Raveendran delivered the Closing Remarks.

Group Picture at the SIAC Bengaluru Conference 2023



Retired Justice R V Raveendran at the SIAC Bengaluru Conference

SIAC – MCCI Chennai Conference 2023

SIAC, in partnership with the Madras Chamber of Commerce and Industry (MCCI) organised a Conference in Chennai on June 24, 2023. The theme of the Conference was '**Adopting and Advancing International Arbitration for Efficient Resolution of Commercial Disputes**'.

The Conference commenced with a Welcome Address by Ms Gloria Lim, followed by the Opening Remarks delivered by Mr Ramkumar Shankar, Member, MAMC Governing Council & Vice President, MCCI.

The Conference featured two panel discussions. The first panel, titled 'Institutional Insights on the use of Emergency Arbitration, Expedited Procedure, and Early Dismissal' and moderated by Mr Tamal Mandal (Partner, Luthra & Luthra Law Offices) featured panellists including Mr Ramesh Selvaraj (Partner and Deputy Head- International Arbitration, Allen & Gledhill), Mr Siraj Omar SC, Mr Vinod Kumar (Partner, JSA), and Mr Zarir Bharucha (Managing Partner, ZBA).

The second panel discussion focussed on the topic 'Drafting Arbitration Agreements: Lessons Learnt in Recent Years'. The panel was moderated by Mr Anirudh Krishnan, and featured speakers including Mr Amba Prasad (Vice President and Head-Legal Services, Larsen & Toubro Limited), Mr Ashish Chugh (Principal, Baker McKenzie Wong & Leow), Mr T K Bhaskar (Partner, H&B Partners) and Ms Tine Abraham.

The Conference concluded with an oxford style debate on the motion 'This House Believes that the Opening of Doors to Foreign Law Firms will Make India a Hub of International Arbitration'. The debaters included Mr Ganesh Chandru (Partner, Dua Associates), Mr Gaurav Pachnanda (Senior Advocate, Supreme Court of India; Barrister, Fountain Court Chambers, London), Mr Hiroo Advani (Founding and Managing Partner, Advani Law LLP) and Ms Manini Brar (Head, Arbridge Chambers). Hon'ble Mr Justice M. Sundar, Judge, High Court of Madras, Hon'ble Mr Justice Senthilkumar Ramamoorthy, Judge, High Court of Madras and Hon'ble Retd. Justice K Kannan, Judge, Punjab & Haryana High Court also graced the event and judged the debate. The debate was moderated by Ms Dorothy Thomas (Partner, Shardul Amarchand Mangaldas) and Mr Thriyambak J. Kannan (Partner, Khaitan & Co).

Ms Shwetha Bidhuri delivered the Closing Remarks.

Left to Right: Ms Dorothy Thomas, Mr Thriyambak Kannan, Justice M. Sundar, Justice Senthilkumar Ramamoorthy, Retd. Justice K Kannan, Mr Ganesh Chandru, Mr Gaurav Pachnanda SA, Mr Hiroo Advani SA, and Ms Manini Brar at the SIAC – MCCI Chennai Conference

SIAC Gujarat Conference 2023

SIAC organised its Gujarat Conference in GIFT City on March 25, 2023. The theme of the Conference was '**Advancing Business Interests Through Efficient Resolution of Global Disputes**'.

Ms Gloria Lim delivered the Welcome Remarks, followed by a Special Address by Mr Kamal B. Trivedi, Senior Advocate & Advocate General, High Court of Gujarat. Hon'ble Justice M.R. Shah, Judge, Supreme Court of India was an honoured guest and delivered the Keynote Speech. The Conference featured two panel discussions, and discussed the topics of 'Demystifying the value of Institutional Arbitration' and 'Use of Arbitration in Resolving Banking and Financial Disputes'.

The first panel discussion was moderated by Mr Tejas Karia (SIAC Court of Arbitration; Partner, Head - Arbitration, Shardul Amarchand Mangaldas & Co), and featured panellists including Ms Payel Chatterjee, Mr Nitesh Jain (Partner, Trilegal), Mr Divyesh Menon, Mr Dhirendra Negi (Partner, JSA), and Mr Prakash Pillai. The second panel was moderated by Ms Shwetha Bidhuri, and featured speakers including Dr Rishab Gupta, Mr Elan Krishna (Partner, Clifford Chance Asia), Mr Ankoosh K Mehta (Partner, Cyril Amarchand Mangaldas), Mr Nishant Singh (Partner, Luthra & Luthra Law Offices India) and Mr Saurabh Soparkar (Senior Advocate, Gujarat High Court).

The Closing Remarks were delivered by Mr Krishnayan Sen, on behalf of Late Mr Rajiv K. Luthra.

Panel Discussion at the SIAC Gujarat Conference (L to R: Ms Shwetha Bidhuri, Mr Ankoosh Mehta, Mr Elan Krishna, Mr Nishant Singh, Dr Rishab Gupta, Mr Saurabh Soparkar SA)

Retired Justice M R Shah at the SIAC Gujarat Conference

Other Prominent Events

Ms Shwetha Bidhuri spoke at various events in India, including GAR Live India, YAWP event, TAI event, Paris Arbitration Week, FICL Delhi Discourse, and IBA India M&A Conference. She also delivered lectures on international arbitration at NALSAR, Hyderabad and the Institute of Chartered Accountants of India. Ms Steffi Mary Punnose (Strategy & Development Manager (South Asia), SIAC) spoke at the CCAI NextGen Legal Rumination Summit 2023.

SIAC South Asia Office also collaborated with leading law schools in India on various international competitions, including the NLS – Trilegal International Arbitration Moot at the National Law School of India University, Bangalore, Prof SP Sathe International Moot Competition at ILS Law College, Pune, and the NLIU-Justice R.K. Tankha Memorial International Moot Court Competition at NLIU Bhopal.

Review of Key Indian Judgments on Arbitration in 2023

Juhi Gupta, Principal Associate
Swagata Ghosh, Senior Associate
Ayan Tandon, Foreign Trained Lawyer
Shardul Amarchand Mangaldas

Introduction

It is undeniable that over the past several years, there has been a tangible pro-arbitration shift in decisions of Indian courts. While this has consistently facilitated the uptake of arbitration as a preferred mechanism to resolve disputes, the decisions have typically followed a pattern of two steps forward, one step back. This article reviews the key judgments of the Supreme Court of India (**SC**) and various High Courts in 2023 to assess whether this trend continued.

The curious case of stamping

The validity of arbitration clauses in unstamped or insufficiently stamped contracts was a hotly contested issue before Indian courts in 2023. Hopefully, this has been put to rest by the decision of a seven-judge constitution bench of the SC in December 2023, which ruled that this issue was to be decided by the arbitral tribunal, not by any court, thereby removing a hindrance to arbitrate.

In getting here, in April 2023, a five-judge constitution bench of the SC in ***N.N. Global Mercantile Pvt Ltd v. Indo Unique Flame Ltd***[1] held (by a 3:2 majority) that an unstamped (or insufficiently stamped) arbitration agreement (**Unstamped Arbitration Agreement**) that attracts stamp duty, or an arbitration agreement in an unstamped or insufficiently stamped contract (**Unstamped Instrument)** (even if the arbitration agreement itself does not attract stamp duty) is non-existent and cannot be acted upon until the arbitration agreement or the underlying instrument (as the case may be) is sufficiently stamped.

Apart from raising eyebrows regarding the potential adverse impact of the judgment on arbitration in India, *N.N. Global* also left open several practical and substantive questions. Various High Courts endeavoured to provide helpful clarity. For instance, in ***Arg Outlier Media Private Limited v. HT Media Limited***[2], the Delhi High Court (**DHC**) held that an arbitral award cannot be challenged on the ground that the underlying agreement was insufficiently stamped, more so if a similar challenge had not been raised before the tribunal. While cognisant of the ruling in *N.N. Global*, the DHC held that once an unstamped agreement is admitted in evidence by the tribunal, the award passed in reliance on such agreement cannot be faulted on the ground that the agreement is unstamped. The Bombay High Court (**BHC**) made similar observations in ***Azizur Rehman Gulam and Ors v. Radio Restaurant and Ors***[3] where the BHC held that *N.N. Global* cannot apply to set aside an award where the issue of non-stamping or insufficient stamping was raised for the first time before the appellate court. Taking this forward, in ***Shakeel Pasha and Ors v. City Max Hotels***[4], the Karnataka High Court (**KHC**) ruled that

[1] *N.N. Global Mercantile Pvt Ltd v. Indo Unique Flame Ltd, 2023 SCC OnLine SC 495.*
[2] *Arg Outlier Media Private Limited v. HT Media Limited, 2023 SCC OnLine Del 3885.*
[3] *Azizur Rehman Gulam and Ors v. Radio Restaurant and Ors, 2023 SCC OnLine Bom 2320.*
[4] *Shakeel Pasha and Ors v. City Max Hotels, Karnataka High Court, Writ Petition No. 8352 of 2022 (GM-CPC).*

penalties for unstamped / insufficiently stamped instruments would not apply to arbitral awards during their enforcement or execution stage.

In ***L&T Finance Limited v. Diamond Projects Limited & Ors***[5], the BHC held that under Section 9 of the Arbitration and Conciliation Act, 1996 (**ACA**), the court shall not examine whether the underlying instrument containing the arbitration agreement was sufficiently stamped. Such a determination can only be made at the stage when the instrument is produced as evidence. If the court is satisfied that a case has been made out for the grant of interim reliefs, the fact that the underlying instrument is unstamped or insufficiently stamped would not preclude it from granting such reliefs.

Finally, in December 2023, the seven-judge constitution bench of the SC overruled the five-judge bench decision in *N.N Global* and held that Unstamped Instruments, although not admissible in evidence, are not *void ab initio* or unenforceable[6]. The SC further held that while hearing applications under Section 8 (judicial reference to arbitration when an arbitration agreement exists) or Section 11 (judicial appointment of arbitrator) of the ACA, courts should not examine objections regarding the stamping of the instrument and that it is the arbitral tribunal that should decide whether the instrument is sufficiently stamped. Notably, the SC also clarified that courts shall not deal with questions pertaining to stamping in Section 9 proceedings.

Group of companies doctrine and non-signatories

In December 2023, in ***Cox & Kings Ltd. v. SAP India (P) Ltd.***[7], a five-judge bench of the SC upheld the applicability of the group of companies' doctrine to arbitration in India, noting that the doctrine has utility in complex multi-party and multi-contract arbitrations. The SC recognised that the applicability of the doctrine is based on various factual elements including, among others, the mutual intent of the parties, commonality of subject matter, and composite nature of the transactions. The SC also upheld the general proposition that non-signatories to an arbitration agreement may also be bound by the agreement, so long as such intention to be bound is evident from the conduct of the parties.

In its analysis in *Cox & Kings*, the starting point of the SC's analysis was that consent is the cornerstone of arbitration. Similarly, the DHC upheld the importance of party autonomy and consent in arbitration in ***Tomorrow Sales Agency Pvt Ltd v. SBS Holdings***[8]. In this case, the DHC refused to bind a third party to an award under the ACA on the ground that it was neither a party to the arbitration agreement, nor was it subject to the arbitral award. Having said this, it should be noted that the DHC factored (i) the airtight funding agreement, which terminated upon the claim being unsuccessful (which was the fate of this claim); and (ii) the SIAC Rules, which specify the criteria to be satisfied for joinder of a third party to an arbitration. Nevertheless, by expressly finding third-party funding to be "*essential to ensure access to justice*" and the need for it to be transparent and non-exploitative, this decision simultaneously reiterated first principles of arbitration and arguably provided a shot in the arm for third-party funding in India.

Having said this, Indian courts have kept abreast with international developments and the exceptions carved to the general rule of privity in arbitration. One such exception was

[5] *L&T Finance Limited v. Diamond Projects Limited & Ors, Bombay High Court, Commercial Arbitration Petition No. 1430 of 2019.*
[6] *In Re: Interplay between the arbitration agreements under the ACA and the Stamp Act, Curative Petition (C) No. 44 of 2023, Judgment dated 14 December 2023.*
[7] *Cox & Kings Ltd. v. SAP India (P) Ltd., 2023 SCC OnLine SC 1634.*
[8] *Tomorrow Sales Agency Pvt Ltd v. SBS Holdings, 2023 SCC OnLine Del 3191.*

expounded by the DHC in ***Gaurav Dhanuka and Anr v. Surya Maintenance Agency Pvt Ltd and Ors***[9] in a Section 11 proceeding. The DHC impleaded one of the respondents, which was not a party to a maintenance agreement containing the arbitration clause, to the arbitration. The Court found that an agreement the respondent had signed (which did not contain an arbitration clause) was "*inextricably linked*" to the maintenance agreement, and both agreements had to be read together for the parties to derive their respective rights and obligations. The DHC also applied the principle of estoppel to hold that having benefitted from the contractual relationship, the respondent was now prohibited from disavowing the obligation to arbitrate.

In ***Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Ltd***[10], the DHC applied the alter ego doctrine to enforce an arbitral award against the assets of third parties. The Court found that the Government of the National Capital Territory of Delhi and the Ministry of Housing controlled the Delhi Metro Rail Corporation (**DMRC**) by virtue of the capital they had invested in DMRC as well as the control they exercised over DMRC's affairs. Thus, these two shareholders were not permitted to hide behind a corporate veil and public policy demanded that appropriate steps be taken to ensure compliance with the award. This decision has been challenged before the SC, which is pending, and the execution proceedings have been stayed.

Judicial intervention in arbitration

Several judgments reiterated the principle of judicial non-intervention in arbitration, particularly in the context of modifying an arbitral award. In ***Larsen Air Conditioning and Refrigeration Company v. Union of India and Ors***[11], the arbitrator had granted a particular rate of interest on the sums awarded that was subsequently altered by the Allahabad High Court (**AHC**). On appeal, the SC reinstated the interest rate awarded by the arbitrator and held that the limited interference under Section 34 of the ACA could only be permitted in cases of patent illegality or denial of natural justice.

Similarly, in ***Indian Oil Corporation Ltd and Ors v. Sathyanarayana Service Station and Anr***[12], the SC held that after setting aside an award, a court cannot grant further relief by modifying the award. In this case, the SC overturned a decision of the DHC, which not only set aside the arbitration award but also amended it to restore the contractual relationship between the parties. The SC affirmed that while a court may arrive at a different plausible view of the facts from the tribunal, this would not mean that the tribunal's view is perverse and patently illegal.

Importance of public policy in enforcement of arbitral awards

Various decisions acknowledged the narrow scope of resisting enforcement of an award thereby adopting a pro-arbitration approach.

In ***HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Private Limited & Ors***[13], the respondents unsuccessfully challenged the enforcement of a foreign award in India on inter alia the ground of alleged bias against the presiding arbitrator and his failure to disclose certain information about his alleged relationship with the petitioner. The respondents contended that this rendered the award contrary to the public policy of India under Section 48(2)(b) of the ACA. The BHC dismissed the challenge, acknowledging the narrow scope of

[9] *Gaurav Dhanuka and Anr v. Surya Maintenance Agency Pvt Ltd and Ors, 2023 SCC OnLine Del 2178.*
[10] *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Ltd, 2023 SCC OnLine Del 1619.*
[11] *Larsen Air Conditioning and Refrigeration Company v. Union of India and Ors, 2023 SCC OnLine SC 982.*
[12] *Indian Oil Corporation Ltd and Ors v. Sathyanarayana Service Station and Anr, 2023 SCC OnLine SC 597.*
[13] *Delhi HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Private Limited & Ors, 2023 SCC OnLine Bom 901.*

challenging a foreign award under Section 48. While the BHC also acknowledged that the IBA guidelines on conflict of interest are a part of the public policy of India, it confirmed that any contravention of public policy must be clearly established, which the respondents had failed to do.

Clarity on what could fly in the face of the public policy of India was provided in ***Unibros v. All India Radio***[14]. Here the SC found that an award for loss of profit that is not substantiated with credible evidence is in conflict with the public policy of India under Section 34(2)(b)(ii) of the ACA.

The contours of the public policy of India also played an important role in the *Antrix-Devas* dispute. In ***Devas Employees Fund US LLC v. Antrix Corporation Limited and Ors***[15], the SC refused to interfere with a decision of the DHC, in which it was held that an award tainted by fraud conflicts with the public policy of India and can therefore, be set aside under Section 34 of the ACA[16]. As such, the SC ended Devas' long-drawn efforts to enforce an ICC award of USD 562.5 million in India. This judgment confirms the alignment of the legal position in India with the internationally recognised principle that fraud flies in the face of public policy and cannot be condoned.

Interim reliefs

Anti-anti-arbitration injunctions (or anti-enforcement injunctions) were the subject of much discussion in ***Anupam Mittal v. People Interactive (India) Pvt Ltd and Ors***[17], in which the concepts of arbitrability and public policy attracted significant attention. For context, disputes in this case arose under a shareholders' agreement that provided for Singapore as the seat of arbitration. The Singapore Court of Appeal (**SGCA**) passed an anti-suit injunction, restraining the petitioner from pursuing his suit for oppression and mismanagement (**O&M**) before the National Company Law Tribunal, Mumbai (**NCLT**). However, the BHC passed an anti-enforcement injunction restraining the enforcement of this anti-suit injunction on the basis that as per Indian public policy, O&M suits are non-arbitrable because of which the NCLT has exclusive jurisdiction to determine such disputes. Therefore, an injunction offensive to such public policy can be resisted, which cannot be overridden by the principle of comity of courts, the application of which would leave the petitioner remediless. On the back of the BHC's decision, the petitioner approached the NCLT. The NCLT granted an interim stay *via* an anti-arbitration injunction, which it found it had the power to grant, on the ongoing arbitration proceedings in Singapore[18]. The NCLT reiterated the BHC's observations and found that the petitioner had satisfied the applicable tests of *prima facie* case, irreparable harm and balance of convenience.

Interim mandatory injunctions are not a routine interim relief to grant at the Section 9 stage. To be granted, there must be strong circumstances such that withholding the relief would prick the court's conscience and do violence to the sense of justice, resulting in injustice being perpetuated. The BHC found this standard to be met in ***Swashray Co-op. Housing Society Ltd & Ors v. Shanti Enterprises***[19], and granted an interim mandatory injunction to the petitioner housing society on the ground that the respondent developer had repeatedly breached the terms of the underlying development agreement and was evidently disinclined to undertake any

[14] *Unibros v. All India Radio, 2023 SCC OnLine SC 1366.*
[15] *Devas Employees Fund US LLC v. Antrix Corporation Limited and Ors, Supreme Court, SLP (C) No(s). 22622/2023.*
[16] *Devas Employees Mauritius (P) Ltd v. Antrix Corporation Ltd, 2023 SCC OnLine Del 1608.*
[17] *Anupam Mittal v. People Interactive (India) Pvt Ltd and Ors, 2023 SCC OnLine Bom 1925.*
[18] *Anupam Mittal v. People Interactive (India) Pvt Ltd and Ors, National Company Law Tribunal (Mumbai Bench), CA/392/2023 in CP/92(MB)2021.*
[19] *Swashray Co-op. Housing Society Ltd & Ors v. Shanti Enterprises, Bombay High Court, Commercial Arbitration Petition (L) No. 10432 of 2023.*

remedial measures. In the circumstances, the BHC held that the petitioner society cannot be expected to be at the mercy of a developer in whom it had lost faith and where there is no hope for the project to actually be completed.

Miscellaneous decisions

An arbitration agreement cannot fall foul of the Constitution of India (**Constitution**). In ***Lombardi Engineering Ltd v. Uttarakhand Jal Vidyut Nigam Ltd***[20],in a Section 11 petition, the SC held that a pre-deposit condition in an arbitration clause requiring a claimant to deposit 7% of the claim amount as security deposit in order to commence the arbitration was arbitrary and unfair, and thus, violated Article 14 of the Constitution.[21] The SC also reiterated that party autonomy (and, in turn, prior consent to an arbitration clause) cannot violate fundamental rights under the Constitution and an arbitration agreement has to be in consonance with the Constitution in order to be legally binding.

The Calcutta High Court's judgment in ***Homevista Décor and Furnishing Pvt Ltd & Anr v. Connect Residuary Pvt Ltd***[22] reiterated that where the 'seat' of arbitration is not expressly mentioned in the arbitration clause, the venue would be designated the seat. The Court also reiterated the 'contrary indicia' exception, i.e., the venue will not automatically be designated as the seat if other clauses of the agreement, such as an exclusive jurisdiction clause, suggest that the parties did not intend the venue to be the seat.

The DHC, in ***ITD Cementation India Ltd v. SSJV-ZVS Joint Venture and Ors***[23], determined that all constituents of a joint venture are automatically bound by the outcome of an arbitral award. Therefore, the petitioner did not have to make the individual constituents parties to the proceedings. However, the Court did provide the caveat that the individual liability of the constituents would be subject to any agreement between them.

Conclusion

In the view of the authors, 2023 was largely a year where Indian courts reiterated settled positions, furthered the pro-arbitration approach and sparked hope for relatively nascent facets of arbitration in India, such as third-party funding. The year also ended with two critical decisions from different constitution benches of the SC in *N.N. Global* and *Cox & Kings*, both of which prioritised the intention to arbitrate. All in all, the lack of too many surprises or disruptions should be viewed positively and reflective of a continuously maturing arbitration jurisdiction.

**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] *Lombardi Engineering Ltd v. Uttarakhand Jal Vidyut Nigam Ltd, 2023 SCC OnLine SC 1422.*
[21] *Article 14 of the Constitution mandates equality before law. It provides that the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.*
[22] *Homevista Décor and Furnishing Pvt Ltd & Anr v. Connect Residuary Pvt Ltd, 2023 SCC OnLine Cal 1405.*
[23] *ITD Cementation India Ltd v. SSJV-ZVS Joint Venture and Ors, 2023 SCC OnLine Del 1391.*

The Interplay Between International Arbitration and Insolvency Proceedings: Indian Perspective

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The interplay of insolvency and arbitration laws has been a topic of jurisprudential discussion and scholarship[24] for some time now. Insolvency and arbitration are fundamentally conflicting regimes. Their co-existence has been best described by the US Courts as a 'conflict of near polar extremes' as bankruptcy exerts an inexorable pull towards centralization of dispute resolution, while arbitration advocates a decentralised approach[25].

In India too, the insolvency and arbitration regimes are separately codified. While the (Indian) Arbitration & Conciliation Act, 1996 ("**Arbitration Act**") has been in force for much longer, the Insolvency and Bankruptcy Code, 2016 ("**IBC**") is more recent and has replaced and consolidated the insolvency laws in India.

The framework of these statutes is distinct as they operate in different spheres. Arbitration is a recovery mechanism. The IBC is aimed at resolving a company's inability to pay its debts.

The IBC is a self-contained code, which provides for the modes and manner in which a company can be admitted into the insolvency process by an adjudicating authority empowered by the statute. The main aim of the IBC is to ensure asset value maximization and time bound resolution of companies admitted into insolvency.

The Indian Supreme Court has historically declared insolvency as a non-arbitrable subject and has developed this jurisprudence on a case-to-case basis.

However, the governing legal principle and its applicability to various aspects of parallel insolvency and arbitration proceedings is still at an early stage and constantly evolving.

This article examines the general principle of non-arbitrability of insolvency disputes in India in the first part and then proceeds to discuss the evolution of the jurisprudence on parallel proceedings in the second part.

Part I: Arbitrability of insolvency disputes in India

What is the test of arbitrability of insolvency disputes in India?

In 1999, the Indian Supreme Court while dealing with the arbitrability of the erstwhile

[24] *Deyan Draguiev, "The Effect of Insolvency on Pending International Arbitration: What is and What Should Not Be", (2015) 32 Journal of International Arbitration, Issue 5, pp. 511-542*
[25] *In Re United Stated Lines Inc. 197 F.3d 631 (2nd Cir. 1999)*

winding up regime, held in the case of *Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd.*[26], that an arbitrator would not be competent or empowered by law to decide a case which required orders for winding up of a company. An arbitrator can only be referred those disputes which the arbitrator is competent, or empowered, to decide. Winding up, however, has the effect of a company becoming insolvent and the power to pass such an order only lies with a statutory Court.

In 2015, in *Booz Allen & Hamilton Inc.*[27] the Supreme Court was called upon to ascertain subject matter arbitrability more generally. The Court held that certain matters are excluded from examination by a private forum as rights in rem cannot be arbitrated. This started the discussion on arbitrability of rights in rem (vis-à-vis rights *in personam*).

Traditionally, all disputes relating to rights *in personam* are considered amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and statutory tribunals, being unsuited for private arbitration. This is not, however, a rigid or inflexible rule[28].

Most recently, in December 2020, the Indian Supreme Court streamlined the test of arbitrability in the case of *Vidya Drolia & Others v. Durga Trading Corporation*[29]. In this case, the Court laid down a four-fold test to determine whether a dispute is arbitrable in India[30]. The test relevant for insolvency proceedings is the first one, which states that the subject matter of a dispute is non-arbitrable when the "*cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem*". In other words, arbitration by necessary implication excludes actions in rem as any award or proceeding which has an *erga omnes* effect on third parties would not be in tune with the contractual nature of arbitrations, which only bind the parties to the arbitration agreement.

In this decision, the Supreme Court recognised that there are other jurisdictions which allow arbitrations of rights in rem through statutory frameworks. As a parting statement, the Supreme Court acknowledges that it may be worthwhile for India to study the feasibility of the same if India is keen to provide impetus to arbitrations.

The Supreme Court's obiter observations, notwithstanding the prevailing judicial test for determining the arbitrability of insolvency disputes in India, hinges on the proceeding being *in rem* or *in personnam*.

The transition of insolvency proceedings from *in rem* to *in personnam*

This section deals with the 'moratorium' under the IBC and its impact on transitioning insolvency from *in personam* proceedings to *in rem* proceedings.

Typically, an insolvency proceeding in India is instituted by a creditor against a corporate debtor (and personal guarantors) and is therefore, a proceeding *in personam* between the creditor and debtor initially.

Insolvency proceedings get converted from *in personam* to *in rem* proceedings when a company is admitted into insolvency and a moratorium is imposed.

The IBC contemplates that upon a company's admission into insolvency, a 'moratorium' is imposed on adverse claims against the company. To better understand

[26] *(1999) 5 SCC 688*
[27] *(2011) 5 SCC 532*
[28] *ibid*
[29] *(2021) 2 SCC 1*
[30] *The Court propounded the following a fourfold test to determine when the subject-matter of a dispute in an arbitration agreement is arbitrable:*
(1) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.
(2) When cause of action and subject-matter of the dispute affects third-party rights; have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.
(3) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.
(4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

the impact of such a moratorium, we will briefly understand its effect and purpose under the IBC.

Section 14 of the IBC envisages a bar on the *institution* of suits or *continuation* of pending suits or proceedings against the company under insolvency, including execution of a judgment, decree, or order in any court of law, tribunal, arbitration panel or other authority. It also bars any action to foreclose, recover or enforce any security created by the company, as well as any transfer, encumbrance or alienation of any assets, legal rights or beneficial interests by the company.

Moratoriums are intended to create a time-bound "calm period" for asset and estate protection of the company during the insolvency process and assess viability of resolutions. The Supreme Court has also described it like a "breathing spell" during which companies can reorganise the business[32].

While the IBC is clear that the guillotine of a moratorium falls on the date of commencement of insolvency, the Supreme Court in its landmark decision of *Indus Biotech Private Limited v. Kotak India Ventur (Offshore) Fund & Ors.*[33] has clarified the point when the insolvency proceedings transition from *in personam* to *in rem* proceedings.

In this case, the Supreme Court dealt with an application under Section 8 of the Arbitration Act to refer the parties to arbitration, as well as an application under Section 7 of the IBC to initiate insolvency pending before the court. While considering this overlap, the Supreme Court stated that mere pendency of an application under the IBC does not render the proceedings *in rem* and thus, non-arbitrable. The proceedings under IBC transition from *in personam* to *in rem* only when the application under the IBC is admitted as this causes an *erga omnes* effect and leads to the creation of third-party rights against all creditors. The court proceeded to further clarify that the true effect of the moratorium (and the bar on arbitration) comes into play only immediately upon admission of insolvency applications, as it is only then that the *in personam* proceedings truly become *in rem*.

Consequentially, the Court clarified that mere filing of an insolvency application and its pendency, therefore, could not be construed as the triggering of a proceeding *in rem*.

The Court, hence, held that the determination of the insolvency application would "befall" the arbitration application (and not vice versa). The NCLT[34] (the Adjudicating Authority under the IBC) will first make a determination of the insolvency application and this determination will determine the fate of the arbitration proceedings. Broadly, two scenarios may occur:

If the insolvency application is admitted, in rem proceedings against the debtor would be admitted and the inter-se disputes would not be arbitrable.

- If the insolvency application is rejected, there would be no reason for the NCLT to decide the arbitration application and the parties can exercise party autonomy to appoint an arbitral tribunal to decide their inter-se disputes.

This decision is consistent with the earlier pronouncements of the Supreme Court, specifically *Swiss Ribbons v. Union of India*[35], where the Supreme Court acknowledged that insolvency proceedings remain *in*

[31] *5.3.1 (Steps at the start of the IRP) of Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design (November 2015) [https://ibbi.gov.in/BLRCReportVol1_04112015.pdf]*
[32] *(2018) 1 SCC 407*
[33] *(2021 6 (SCC) 436)*
[34] *In terms of Section 5(1) of the IBC, "Adjudicating Authority", for the purposes of this Part, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.*
[35] *(2019) 4 SCC 17*

personam till the claims of the creditors are received and a Committee of Creditors ("**CoC**") is constituted. This finding was rendered in the background of the Supreme Court deciding a constitutional challenge to provisions of the IBC. While deciding the validity of Section 12A of the IBC which contemplates the withdrawal of an insolvency application by a creditor, the Supreme Court held that once an application to trigger insolvency is admitted, the proceeding becomes a proceeding *in rem*, and it becomes necessary to have the approval of the CoC before any claim is settled. However, where the CoC has not been constituted, a party can directly approach the NCLT for withdrawal/ settlement.

While the aforementioned section explained the general position in respect of arbitrability of insolvency in India, the next section examines the nuances that arise when the Court encounters parallel insolvencies and arbitration proceedings. These aspects are nascent and the jurisprudence in this regard is still evolving in India.

Part II: Nuances of the interplay of arbitrations and insolvencies in India

Judicial exception to applicability of moratorium on arbitrations

The rule, as encapsulated by the Supreme Court in *Alchemist Asset Reconstruction Company Ltd.*[36], is that arbitrations commenced after the commencement of the insolvency process are *non-est* and arbitrations pending on the date of commencement of insolvency cannot proceed once the moratorium is imposed[37].

While the IBC does not make any exceptions, Courts in India have carved out exceptions to this general rule on moratorium impeding arbitration. Based on the scope and purpose of a moratorium, Courts have held that the moratorium does not bar continuity of arbitrations instituted *by* the company (under insolvency) against another party[38]. However, Courts have also sanctioned continuation of those arbitrations which (i) maximise the value of the assets of the corporate debtors or (ii) are beneficial to the corporate debtor and do not adversely impact the assets of the corporate debtor[39].

The applicability of the moratorium at different stages of arbitration

While dealing with various nuances of the interplay of arbitrations and insolvencies in India, the Courts have varied their view on the applicability of moratorium based on the stage of the arbitration. The following paragraphs better explain this position.

1. **Pre-award stage:** Courts have not stayed the continuity of those arbitrations where no recovery is pursued against the company during the moratorium period[40], or where the continuity of the claims/counterclaims do not adversely affect the company until they are finally adjudicated upon (i.e., at the pre-award stage)[41].

2. **Post-award stage:** Those continuing claims/counterclaims may be hit by the moratorium at the post-award stage if the award is against the company. In other words, as the moratorium bars any recoveries from the company[42], any adverse awards cannot be enforced during moratorium.

3. **Enforcement stage:** While a company under insolvency can initiate proceedings to enforce an award in its favour, an award for recovery against such company will be hit by the moratorium. Even foreign awards which need to be enforced against domestic assets

[36] *(2018) 16 SCC 94*
[37] *2018 SCC OnLine NCLAT 352*
[38] *(2022) 8 SCC 384 was rendered by the Supreme Court in the context of an application under Section 11(6) of the Arbitration Act filed by the company under insolvency for appointment of an arbitrator.*
[39] *2017 SCC OnLine Del 12189*
[40] *Order dated 03.08.2018 in Company Appeal (AT)(Ins.) No. 285 of 2018*
[41] *2019 SCC OnLine Del 9339*
[42] *Ibid.*

of the company under insolvency are barred under the general rule of moratorium.

While moratorium under Section 14 of the IBC concludes upon the expiry of the insolvency process, in case the company is unable to resolve its debts, the company goes into liquidation. The moratorium at the stage of liquidation varies from the moratorium during insolvency. During liquidation, there is no bar on the continuity of pending legal proceedings, and there is only a bar on the institution of proceedings by, or against, the company (unless approved by the NCLT)[43].

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Foreign-seated arbitrations

The provisions of the IBC are only applicable to companies incorporated in India[45]. The IBC empowers the Government of India to enter into reciprocating agreements with foreign countries and extend the applicability of the IBC to those assets and property of a company (under insolvency) with whom India has such reciprocating arrangements[46]. However, till date, India has not notified any reciprocating country and the IBC is silent on what happens in the absence of any reciprocating arrangement. Taking a cue from the *Elektrim SA case*[47], in the absence of a reciprocating agreement with the seat of the arbitration, the arbitral tribunal will not be required to recognise the insolvency regime under the IBC. Theory aside, even practically, the company may not be affected domestically since the award can only be enforced against foreign assets and not against the assets located in India.

Implementing awards during insolvency: are arbitral awards valid proof of debt?

In India, arbitral awards constitute a debt for the company against which the award has been passed[48].

The Supreme Court[49] has held that arbitral awards are valid records of an 'operational debt'[50] under the IBC (as opposed to a 'financial debt'[51]). The Court has, however, caveated this position by requiring that the operational debt must be undisputed to be able to initiate insolvency for such debt[52]. This is in line with the requirements stipulated under the IBC. Under the IBC, to initiate insolvency against a company for a default of an 'operational debt', there should be no pre-existing dispute between the parties in relation to the operational debt owed. Thus, when there is a challenge

[43] *Order dated 13.03.2019 in M.A. No. 1300/2018 in C.P. (IB) - 02/(MB)/2018 (Videocon Industries Limited v. Union of India), ffirmed by NCLAT, (Videocon Industries Limited Union of India), ffirmed by NCLAT, New Delhi in Comp Appeal (AT) (Insolvency) No. 408 of 2019 (Union of India v. Videocon Industries Ltd.).*

[44] *Section 33(5) of the IBC*

[45] *Section 2(a), 3(7) and 3(8) of the IBC.*

[46] *O234. Agreements with foreign countries. - (1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code. (2) The Central Government may by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.*

[47] *In SA [2007] EWHC 571 (Comm), tribunals seated in two different jurisdictions (England and Switzerland) came to opposite conclusions on the continuity of arbitration upon initiation of insolvency proceedings of the party in Poland. Though an insolvency moratorium was imposed under Polish law, the English Courts ruled in favour of continuing the arbitration under English law (curial law).*

[48] *2017 SCC OnLine NCLAT 380.*

[49] *(2018) 17 SCC 662*

[50] *Section 5 (21) of the IBC defines an "operational debt" as "...a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority...".*

[51] *In (2021) 10 SCC 330, the Supreme Court while dealing with cases of arbitral award of recovery of financial dues has held that failure to satisfy the award would constitue a 'financial debt' and the 'financial creditor' can initiate appropriate insolvency proceedings in respect thereof.*

[52] *(2018) 17 SCC 662*

to an arbitral award, such challenge would constitute such a 'dispute' for the purposes of IBC[53].

With respect to foreign awards, it can be used to initiate insolvency proceedings once it has been recognised for enforcement in India.

In India, a foreign award is not a decree by itself, and it only becomes executable after a Court decides that it is enforceable under Part II of the Arbitration Act[54]. It is only after the enforceability of a foreign award is decided that effective steps may be taken for the execution of an award. Therefore, it is only once a foreign award is recognised and if such award is not contested during enforcement, does the award qualify as an "operational debt".

Presently, there are two conflicting decisions by coordinate benches of the NCLT on whether the recognition of an award is a prerequisite to commence insolvency proceedings. In *Adityaa Energy Resources Ptd. Ltd.*[55], NCLT Hyderabad held that an arbitral award must be recognised before insolvency proceedings can be initiated based on that award. Meanwhile NCLT, Mumbai in *Agrocorp International (P) Ltd.*[56] held that there is no requirement for a foreign award to be recognised before initiating insolvency proceedings based thereon. NCLT, Mumbai came to this conclusion based on Section 44-A of the Code of Civil Procedure, 1908 (which governs enforcement of foreign decrees in India) and held that the foreign award was executable by itself since it was made in a "reciprocating territory" referenced under Section 44-A of the CPC.
To conclude, the position of law as it stands today in India is that insolvency disputes are not arbitrable. However, the existence of disputes in cases of operational debts bar insolvency proceedings under IBC. Thus, there is a substantial interplay between the two regimes which is dynamic and developing rapidly, so much so that it would not be a surprise if there is already a new development by the time this article is published.

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[53] *2023 SCC OnLine NCLAT 271*
[54] *(2020) 10 SCC 1*
[55] *2019 SCC OnLine NCLT 22389*
[56] *2019 SCC OnLine NCLT 20328*

Law Governing the Arbitration Agreement: Position in India, UK and Singapore

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Introduction

1. When considering governing law and dispute resolution clauses, most commercial parties which adopt arbitration are alive to the need to specify the law governing the contract, as well as the seat, which governs the procedural law of the arbitration.

2. The law governing the arbitration agreement, however, is a less familiar concept. It exists because of the separability principle: because an international arbitration agreement is presumptively separable from the underlying contract, it is possible for the arbitration agreement to be governed by a different law from the governing law of the underlying contract[58]. The question which courts have grappled with is how to ascertain the law governing the arbitration agreement in cases where, as is frequently the case, it is not expressly provided for.

3. In recent years, considerable judicial and academic ink has been spilt on this subject. While the law governing the arbitration agreement often passes unnoticed, in certain cases it is crucial that it be identified, given that it has a bearing on issues such as formal validity, substantive validity, capacity, interpretation, assignment and waiver of an international arbitration agreement, as well as the question of arbitrability[59]. The relevance of the law governing the arbitration agreement was neatly summarised in the Indian Supreme Court decision of *National Thermal Power Corporation v The Singer Company* (1992) 3 SCC 551[60]:

> *"The validity, effect and interpretation of the arbitration agreement are governed by its proper law. Such law will decide whether the arbitration clause is wide enough to cover the dispute between the parties. Such law will, also ordinarily decide whether the arbitration clause binds the parties even when one of them alleges that the contract is void, or voidable or illegal or that such contract has been discharged by breach or frustration. (...) The proper law of arbitration will also decide whether the arbitration clause would equally apply to a different contract between the same parties or between one of those parties and a third party."*

[57] *The authors are also grateful to the assistance of Sanjna Pramod (Senior Associate, Clifford Chance) in preparing this article*
[58] *Gary B. Born, International Commercial Arbitration (Third Edition) (Kluwer Law International; Kluwer Law International 2021), §4.01. The separability principle is statutorily enshrined in the laws of the three jurisdictions which are the subject of this article (India, the UK and Singapore): see, section 16(1)(a) of the Indian Arbitration and Conciliation Act, 1996; section 7 of the UK Arbitration Act 1996; section 2A(2) of the Singapore International Arbitration Act 1994.*
[59] *Gary B. Born, International Commercial Arbitration (Third Edition) (Kluwer Law International; Kluwer Law International 2021), §4.01.*
[60] *At [23].*

4. This article compares the approaches taken by the courts in the United Kingdom, Singapore and India in identifying the law governing the arbitration agreement. It concludes with observations on the underlying principles and values that have shaped such jurisprudence, and with practical guidance on drafting a clear dispute resolution clause.

Approaches in the United Kingdom, Singapore and India

5. The English, Singapore and Indian courts have taken a broadly similar approach to determining the law of the arbitration agreement.

United Kingdom and Singapore

6. Under English and Singapore law, the proper applicable to arbitration agreements is to be determined by undertaking the following three-stage enquiry:

a. Stage 1: Is there an express choice of law?

b. Stage 2: If not, is there an implied choice of law?

c. Stage 3: If not, with what system of law does the arbitration agreement have its closest and most real connection?

7. In England, the test for determining the law applicable to arbitration agreements was laid down by the Court of Appeal in *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 ("***Sulamérica***"). The three-stage test was endorsed by the Singapore courts in *BCY v BCZ* [2017] 3 SLR 357 ("***BCY v BCZ***")[61].

8. There are no significant differences between the English and Singapore courts' respective application of the three-stage enquiry, which may be summarised as follows:

9. At **Stage 1**, the court will scrutinise the relevant arbitration agreement to see if there is explicit language stating in no uncertain terms, the parties' expressly choice of law of the arbitration agreement. The choice of governing law for the underlying substantive contract is not to be construed as expressly choosing the law to govern the arbitration agreement.

10. **Stage 2** comes into play if there is no express choice. The courts have applied the following principles in determining if there is an implied choice of the proper law to govern the arbitration agreement:

a. The governing law of the main contract is a strong indicator of the governing law of the arbitration agreement when the court is seeking to imply the governing law. (a principle enunciated in *Sulamérica*)[64]. A choice of seat different from the law of the governing contract would not in itself be sufficient to displace that starting point[65]. In *Enka v Chubb*, the UKSC explained the reasonableness of, as a general rule, construing a choice of law to govern the contract as applying to an arbitration agreement within the contract on the basis that this approach provides certainty, achieves consistency and avoids complexities and artificiality[66].

b. However, the general presumption may be displaced by the facts of the case, in particular the terms of the arbitration agreement itself or how its effectiveness will be impacted by

[61] *The three-stage enquiry has since again been affirmed in England in the leading UK Supreme Court decision of Enka v Chubb [2020] UKSC 38 ("**Enka v Chubb**") at [257] and in Singapore in Anupam Mittal v Westbridge Ventures II Investment Holdings [2023] SGCA 1 ("Anupam Mittal") at [62].*

[62] *Anupam Mittal at [66]; Enka v Chubb at [170(iii)].*

[63] *BNA v BNB and another [2020] 1 SLR 456 ("BNA")*

[64] *Anupam Mittal at [68]; Enka v Chubb at [170(iv)]. Previously, in FirstLink Investments Corpn Ltd v GT Payment Pte Ltd [2014] SGHCR 12 the Singapore court had held that the law of the seat should generally apply to the arbitration agreement. Subsequently, the court in BCY v BCZ disagreed and held that the approach in Sulamérica should be followed as it "is supported by the weight of authority and is, in any event, preferable as a matter of principle".*

[65] *Anupam Mittal at [69]; Enka v Chubb at [170(v)].*

[66] *Enka v Chubb at [53].*

the choice of the same governing law for the arbitration agreement[67].

c. In Singapore, the following have also been identified as relevant factors in the inquiry:

i. Whether parties were aware that the choice of proper law of the arbitration agreement could have an impact upon the validity of the arbitration agreement[68]; and

ii. The strength of the parties' desire for all disputes to be resolved by arbitration, as inferred from amongst others, the terms of the main contract[69].

d. An example of this displacement can be seen in *Anupam Mittal*, where the court found that an implied choice of India law as the law of the arbitration agreement would negate the agreement to have disputes "*relating to the management of the Company*" resolved by arbitration since oppression claims (which are often intertwined with management disputes) are not arbitrable in India.[70]

11. If the court finds that there is neither an express nor implied choice, the court will then move to Stage 3 to consider which law has the most real and substantial connection with the arbitration agreement. Where the parties have chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations[71].

India

12. While the Indian courts have not yet established a definitive test for determining the law applicable to the arbitration agreement, they have nonetheless looked to familiar common law principles when examining this question. The question of determining the law of the arbitration agreement has arisen only as an ancillary issue when Indian courts have considered their jurisdiction in relation to foreign-seated international commercial arbitrations.

13. The starting point is that where parties have expressly chosen the law governing the arbitration agreement, effect will be given to that choice. In *Reliance Industries Limited v Union of India*[72], the Supreme Court of India upheld the express choice of English law as the applicable law of the arbitration agreement, observing that the lower Court had "*failed to distinguish between the law applicable to the proper law of the contract and proper law of the arbitration agreement* (...)"(at [60]).

14. In the absence of such choice, the Indian courts have broadly adopted either a "*seat-centric approach*" or the "*proper law of the contract approach*".

15. In the 1992 decision of *NTPC v Singer Co.*[73], the Supreme Court undertook a choice of law analysis relating to the arbitration agreement. The Delhi High Court had refused to interfere with a London-seated tribunal's interim award on the ground that Indian law did not govern the arbitration agreement. On appeal, the Supreme Court held that where the parties had expressly chosen the proper law of the contract, "*such law must, in the absence of any unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless part of such contract*"[74]. In the absence of such express choice of the proper law of contract, the law of the seat would govern the arbitration agreement[75].

16. The Supreme Court continued to adopt the proper law of contract approach in *Sumitomo Heavy Industries Ltd v ONGC*

[67] *Anupam Mittal at [79].*
[68] *Anupam Mittal at [71].*
[69] *Anupam Mittal at [72].*
[70] *Anupam Mittal at [73].*
[71] *Enka v Chubb at [170(viii)]*
[72] *Civil Appeal No. 5765 of 2014.*
[73] *NTPC v Singer Co. (1992) 3 SCC 551.*
[74] *NTPC v Singer Co. (1992) 3 SCC 551 at [24].*
[75] *NTPC v Singer Co. (1992) 3 SCC 551 at [25].*

(1998) 1 SCC 3015 [16] and *Indtel Technical Services Pvt Ltd v WS Atkins Rail Ltd* (2008) 10 SCC 308 [24] where the law of the arbitration agreement was held to be the same as the proper law of the contract.

17. However, in more recent jurisprudence under the Indian Arbitration and Conciliation Act, 1996, the courts have taken a more seat-centric approach, distinct from *NTPC* and *Sumitomo* (which were rendered under the now-repealed Indian Arbitration Act, 1940 and the Foreign Awards Act, 1961).

18. For instance, in *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd*[76], the Bombay High Court held that the law of the seat would have the closest connection to the arbitration and would accordingly apply to the arbitration agreement (at [72]).

19. In *Katra Holdings Ltd v Corsair Investments Ltd*[77], the Bombay High Court held that the arbitration agreement was governed by New York law (the law of the seat) and not Indian law (being the law of the contract). The Court considered the conduct of the parties and how they "*understood the contract*" as relevant factors in determining that New York law applied:

> *One must not lose sight of the fact that the parties are free to choose which law would apply to the arbitration agreement. This is a matter of contract. Taking this into consideration, we think that it would be also very relevant to see how the parties themselves understood and interpreted clauses 15 and 16 of the Escrow Agreement. (...) how the parties understood the contract is certainly a very relevant factor that would be taken into consideration before coming to the conclusion as to which law applies to the arbitration agreement"*

20. As such, while the Indian courts have not established a test for determining the law governing the arbitration agreement, the cases demonstrate an analysis based on principles which are similar to those adopted by the UK and Singapore courts.

Principles and values that have shaped the jurisprudence

Party autonomy

21. The clearest value which has guided the courts in determining the law governing the arbitration agreement is party autonomy. This makes sense, as it is consistent with both the ideals of freedom of contract, and party autonomy in arbitration. The importance of party autonomy is seen from the fact that in all three jurisdictions, the courts will first look to see if the parties have expressly chosen the law of the arbitration agreement. Where such an express choice exists, it will be given effect to.

22. Further, even in the absence of an express choice, the courts still try to give effect to party autonomy by considering whether the parties have impliedly chosen the law of the arbitration agreement. What the parties chose remains the focus of the inquiry. Of course, at this second stage, one may legitimately ask to what extent the inquiry on implied choice is genuinely focused on discerning what the parties chose, or whether implied choice is ultimately a judicial construct that allows other judicial values and policies to enter the fray.

23. On the one hand the fact that the courts in all three jurisdictions have placed significant weight on the choices the parties have made in respect of the governing law of the contract and/or the seat of arbitration does indicate that genuine regard is being had to what law the parties want (or would have wanted) to govern the arbitration agreement.

[76] *2014 SCC OnLine Bom 102.*

[77] *2018 SCC Online Bom 4031.*

24. Further, giving weight to factors such as the parties' awareness that the law of the arbitration agreement could have an impact upon the validity of the arbitration agreement, or the strength of the parties' desire for all disputes to be resolved by arbitration, as inferred from the terms of the main contract (as in the Singapore law jurisprudence), also point towards the courts having genuine regard for what the parties want.

25. On the other hand, however, one may ask whether the validation principle applied by the Singapore and English courts[78], for example, is one that is genuinely linked to party autonomy. While such a test still can be justified as an attempt to give effect to the parties' intention to arbitrate, it may nevertheless be asked whether the court is putting the cart before the horse by presuming that the parties had no intention to choose a law of the arbitration agreement that, for example, limits the scope of the agreement to arbitrate.

Domestic policy towards arbitration – pro-arbitration stance and issues of non-arbitrability

26. This brings to the fore the possibility that other values are potentially at play, including whether the jurisdiction has a pro-arbitration stance and how this interplays with issues of domestic public policy. agreement.

27. The case of *Anupam Mittal* is instructive. There, the Singapore Court of Appeal ruled that a finding that the implied choice of law (India law) was the governing law of the contract would have meant that the arbitration in question would not have been able to proceed for reasons of non-arbitrability. Therefore, the Singapore court found a way – by applying the test of whether the consequences of choosing it as the governing law of the arbitration agreement would negate the arbitration agreement – to find instead that Singapore law was the governing law of the arbitration agreement.

28. In this regard, the court in *Anupam Mittal* (at [74]) was open about the significance of a pro-arbitration judicial policy in the inquiry:

> *We would note in this connection Singapore's strong public policy in favour of arbitration [...] The courts must give effect to that public policy by upholding arbitration agreements and the obligation to arbitrate thereunder unless there is good reason not to do so.*

29. But the Singapore courts will not apply the law which upholds the arbitration agreement at all costs. This is demonstrated by the Singapore case of BNA, where in a case where the main contract was governed by PRC law and the seat of the arbitration was Singapore, the court held that (unlike in Anupam Mittal) the circumstances were not sufficient to displace the implied choice of PRC law as the proper law of the arbitration agreement, even though this resulted in the arbitration agreement potentially being deemed invalid.

Conclusion: Drafting good dispute resolution clauses

30. What does this mean for commercial parties? To put it simply, a failure to clearly and expressly specify the law governing the arbitration agreement will potentially leave the parties in a position of considerable uncertainty. Among other risks, this potentially subjects the parties to unnecessary litigation and disputes concerning the law governing the arbitration agreement, with no guarantee that all

[78] *See Enka v Chubb at [95]; Anupam v Mittal at [69].*

national courts will be single-mindedly focused on giving effect to the parties' intentions.

31. These kinds of issues and satellite litigation arise not infrequently in the context of India-related disputes (as demonstrated by *Anupam Mittal*), given that Indian law has tended to adopt a narrower view on questions of arbitrability than the law of many international seat jurisdictions.

32. Parties who value certainty should therefore clearly and expressly state the law governing the arbitration agreement. This is an approach which is suggested in the model arbitration clauses of several established arbitration institutions, including the HKIAC and the MCIA. Other institutions like the ICC include the "*law governing the arbitration agreement*" on a checklist of items the parties may wish to stipulate in the arbitration clause, and for the LCIA there is an express presumption under Article 16.4 of the LCIA Rules 2020 that the law applicable to the arbitration agreement shall be the law applicable to the seat of the arbitration, unless parties have agreed otherwise.

33. Commercial parties to international transactions are well advised to consider and expressly state the law of the arbitration agreement – which in most cases should be the law of a jurisdiction which is pro-arbitration. However, it is unrealistic to expect that parties will provide for the law governing the arbitration agreement in all cases. As such, the principles set out in the UK, Singapore and Indian jurisprudence considered above are likely to be tested again in future disputes.

Content relating to India is based on our experience as international counsel representing clients in their business activities in India. We are not permitted to advise on the laws of India, and should such advice be required we would work alongside a domestic law firm.

**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.*

Resolving Cryptocurrency Disputes – Notes on Prevailing Trends and Challenges[79]

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Introduction

While the idea of digital currency or electronic money was mooted in the 1980's, the genesis of 'Bitcoin' which fuelled the rise of cryptocurrencies can be traced to an anonymous paper titled "Bitcoin: A Peer-to-Peer Cashless Electronic System" published anonymously in the year 2008 under a pseudonym Satoshi Nakamoto[80].

Over the past few years, Bitcoin and other iterations of cryptocurrencies have attracted intrigue and scepticism in equal measure. Although their legal status is still continuing to evolve across the globe, what is seemingly apparent is that cryptocurrencies have been adopted not only as a mode of exchange but more so as investment instruments.

With cryptocurrencies firmly finding a place in the global economy, there is also a rise in disputes involving them. In this article, we discuss some of the unique challenges which have come to light in disputes, particularly arbitrations relating to cryptocurrencies. We also examine a few notable innovations prompted by the underlying blockchain technology, which herald the direction in which dispute resolutions mechanisms can evolve.

The concept of cryptocurrency and how it works?

Conceptually, cryptocurrencies are digital assets which offer people a chance to repose their faith in technology and computers, rather than physical banks or financial institutions[81]. The prevailing iterations of cryptocurrencies are based on the blockchain technology - a decentralised digital database of all cryptocurrency transactions. Simply put, a cryptocurrency is a "decentralised digital asset" represented by "line items" on a "distributed public ledger" whose value is determined based on what people transacting in it believe the value should be[82].

Cryptocurrencies are 'mined' by 'solving' cryptographic equations using computational power, for which a reward is offered in the form of 'coins'. These coins can then be transferred across 'wallets' thereby enabling them to be used as a currency or a payment system for any type of transaction. One way the value of cryptocurrencies like Bitcoin is derived is by virtue of only a finite number of coins ever being generated, by design.

The vision of Bitcoin in Satoshi Nakamoto's paper was rather idealistic given that it

[79] *Authored with assistance from Aishwarya Wagle, Senior Associate and Shrudula Murthy, Associate at Cyril Amarchand Mangaldas*
[80] *Satoshi Nakamoto, Bitcoin: A Peer-to-Peer Electronic Cash System, available at bitcoin.pdf*
[81] *Simon Geiregat, Cryptocurrencies are (smart) contracts, 34 Computer Law and Security Review (2018)*
[82] *Jerry Brito & Andrea Castillo, Bitcoin: A Primer for Policymakers, Mercatus Center (2013)*

arose from the embers of the 2008 financial crisis. An alternative financial system was envisaged to be created that was cash-less and bank-less and based on a decentralised platform. Although initially slow on the uptake, after the year 2015 the value of Bitcoin and various other cryptocurrencies (which spawned thereafter) started growing exponentially (and dropping equally).

One of the primary reasons for rapid rise in value of major cryptocurrencies can be attributed to the crypto exchanges which allowed investors to speculate and use cryptocurrencies as investment vehicles or stores of value. Their proliferation into the mainstream economy has consequently resulted in the mushrooming of commercial disputes stemming from cryptocurrency transactions, most common them being disputes between investors and crypto exchanges, bringing with them a set of unique challenges.

The nature of cryptocurrency disputes

What makes the nature of such disputes distinctive is the attribute of cryptocurrencies being decentralised by nature and freely transferable across the internet, agnostic of any geographical limitation, where neither the digital asset nor the trading platform can always be traced to one physical location. It is common for cryptocurrency transactions and disputes to involve parties from different jurisdictions, and the anonymity offered by the blockchain network means that traders and investors will likely only know the exchange – and not each other. Additionally, the jurisdictional limits of domestic courts – which are geographically territorial in nature; the several laws that may apply; and most importantly, the fact that cryptocurrencies are not legal in several countries means that apart from the main dispute, there are several other issues and potential satellite issues that may have to be dealt with. This is apart from the especially complex technical evidence that needs to be obtained and put together. All these issues complicate the effective resolution of disputes arising from trading of cryptocurrencies[83].

Considering these unique challenges, international arbitration may be the most viable dispute resolution mechanism for parties to adopt, keeping in mind its key attribute of party autonomy, which would permit a party to choose:

- a jurisdiction with laws which recognise / permit crypto-assets and treat them as arbitrable;

- a favourable / progressive seat, with courts which support the arbitration process;

- procedural rules which are efficient and permit granting of interim emergency reliefs (including bespoke dispute resolution rules such as the Digital Dispute Resolution Rules developed by the UK Jurisdiction Taskforce). The grant of interim relief may be incredibly important as it may can become critical to "freeze" assets, particularly when their values fluctuate wildly in a volatile market; and

- arbitrators with experience in financial products, blockchain and crypto currency.

In summary, the advantage of adopting arbitration is the ability and flexibility it can provide to cater to a unique dispute, since parties can be given the option of designing the arbitration process according to their specific requirements[84]. Pertinently, reference to international arbitration mechanisms in dispute resolution clauses including to Singapore International Arbitration Centre is not uncommon anymore, with several

[83] *Tamar Meshel and Moin A. Yahya, Crypto Dispute Resolution: An Empirical Study, available at ssrn.com*

[84] *Joyce W. Chen, Dispute Resolution in the New Digital Age- Exploring Arbitration as a Suitable Mechanism to Resolve Disputes Over Crypto Assets, 15(2) CONTEMP. ASIA ARB. J. 25, (2022)*

crypto exchanges operating in Asia-Pacific adopting SIAC Rules for resolution of any disputes with their investors[85].

Challenges unique to cryptocurrency disputes

The unique challenges which plague cryptocurrency disputes have come to light in recent cases.

The *Binance* class action arbitration is a perfect example. Added to the various peculiarities of crypto transactions is the fact that it is not clear which *Binance* entity is the parent/controlling entity and ought to be made the respondent. While the media characterised *Binance* as an ephemeral, stateless and decentralised platform, their global corporate structure is opaque and unknown, even to regulators such as the UK's FCA, who reportedly requested this information and were refused by Binance's UK entity[86].

In 2021, the crypto trading platform run by *Binance* suffered a major outage when crypto markets had a crash. Several thousand trading accounts on the platform froze and became un-tradable which resulted in investors incurring significant losses since they were unable to sell their cryptocurrencies on the platform. The margin trading feature on the platform further caused the cryptocurrencies of some traders to be forcibly liquidated, as their collaterals were insufficient to cover the scale of their losses.

Consequently, several hundred claimants jointly initiated arbitration proceedings under the Rules of the Hong Kong International Arbitration Centre claiming losses on account of the trading platform, against all known *Binance* entities in the world (owing to its lack of transparency in it organisational structure), including companies incorporated in the Cayman Islands and Hong Kong. In such circumstances, the inability to join the proper parties in the arbitration proceedings may ultimately prove a challenge for the claimant investors.

While individual actions may be maintained, that the terms of use of *Binance* which provided for waiver of class action by all its users, is another issue that these investors would have to contend with. Further complications may arise from jurisdictions (such as UK, India, Hong Kong and European Union), which provide that notwithstanding an arbitration agreement between the parties, consumers are nevertheless entitled to bring claims in the relevant domestic consumer courts. For instance, the English High Court[87] held that the existence of an arbitration agreement in the user agreement of a crypto exchange did not deprive it of jurisdiction to hear claims against the exchange brought by an English consumer. In this case, the Court refused to enforce an award made by a California seated tribunal. In particular, the judge held that the arbitrator's refusal to consider English consumer protection law, where it involved a UK-based consumer, resulted in enforcement of the award being contrary to UK public policy (and thus refused enforcement). Similarly, in India, an arbitration agreement will not exclude the jurisdiction of consumer courts and a consumer would nevertheless be entitled to approach a consumer court (as it is an additional special and statutory remedy provided to him). If they elect to do so, the court will not refer parties to arbitration[88].

Further, while the terms of use provided for the laws of Hong Kong as the governing law which permit retail trading in 2023,

[85] *For instance, in India CoinDCX (Terms & Conditions, July 2023); and WazirX (Terms & Conditions, August, 2023) have adopted SIAC Rules in their dispute resolution clauses.*
[86] *The Impending Binance Arbitration: a Primer on the World of Cryptocurrencies, Derivatives Trading and Decentralised Finance on the Blockchain, available at Kluwer Arbitration Blog*
[87] *Chechetkin v Payward Ltd, [2022] EWHC 3057 (Ch)*
[88] *Emaar MGF v. Aftab Singh, 2018 (15) SCALE 846*

the laws of Hong Kong (as they stood then) prohibited the trading of unlicensed derivatives. Therefore, applying the laws of a particular country/jurisdiction to a dispute involving unregulated, decentralised services including the trading of cryptocurrency derivatives which are beyond regulatory control can potentially have an effect on the claims made in the arbitration proceedings.

Enforcement of the Arbitral Award

Assuming a successful arbitration and a favourable award is not enough. There are other difficulties which could arise in relation to enforcement of arbitral awards including for instance:

- the recognition and enforcement of the arbitration awards in various jurisdictions; and
- tracing the assets of the respondents.

The award must be enforceable by the law of the jurisdiction in which it is brought for enforcement – where the assets of the award debtor are being proceeded against. In the context of cryptocurrencies, several jurisdictions are yet to clearly determine their legal status including in India where a legislative bill has been in abeyance.

In such jurisdictions, the enforcement of such awards is likely to attract judicial scrutiny at the time of enforcement. This becomes all the more relevant where in a particular jurisdiction, there is either a restriction on trading in alternative derivatives or where there are policy considerations, and the status of cryptocurrency assets is in limbo[89]. For instance, a Chinese court[90] refused to enforce an arbitral award concerning cryptocurrencies and set it aside, even though the award was in the Chinese Yuan.

Even in jurisdictions that do not explicitly ban the usage of cryptocurrencies, there still exists a challenge of not being able to enforce the award based on grounds of public policy. In 2022, a Greek Court[91] refused to enforce an arbitral award primarily on the ground that there had been no decision as to the status of cryptocurrency in Greece. The court also cited other grounds for non-enforcement of the award under the umbrella of public policy such as tax evasion, money laundering etc[92].

In India, since the question of the validity of cryptocurrency in India is currently in a state of suspense, it is uncertain as to whether an arbitral award concerning cryptocurrency or proceedings against crypto assets, can be enforced in India. Despite the ban on cryptocurrencies imposed by the Reserve Bank of India being set aside by the Supreme Court[93], they have also not been made *per se* legal. Notably though, the Indian government has imposed a tax on any gains from crypto transactions.

Even as disputes pertaining to cryptocurrencies may be invoked, the validity of awards which may be passed will likely be tested presumably on the contention that by permitting such awards, would courts implicitly provide recognition of cryptocurrencies as a valid denomination, which issue the legislature or regulators have not decided as yet.

Tracing of assets may be easier as it is not unusual for the intangible crypto assets to be converted into tangible and more material assets, such as luxury real estate, art, jewellery, yachts, and also hard cash investments. Asset tracing can play a vital role in the recovery strategy. Investigative teams may also be able to trace keys or tokens

[89] *Kluwer Arbitration Blog, The Impending Binance Arbitration: a Primer on the World of Cryptocurrencies, Derivatives Trading and Decentralised Finance on the Blockchain, 13 October, 2021, available at Kluwer Arbitration Blog.*

[90] *Zheyu v Shenzhen Yunsilu Innovation Development Fund Enterprise (L.P.) and Li Bin, (2018) Yue 03 Min Te No. 719)*

[91] *Court of Appeal of Western Central Greece, No. 88/2021*

[92] *Clifford Chance, Arbitration of crypto asset and smart contract disputes: arbitration unchained?, (July 19, 2023), available at arbitration-of-cryptoasset.pdf (cliffordchance.com).*

[93] *Internet and Mobile Association of India v. Reserve Bank of India, 2018 SCC OnLine SC 3554*

which can follow the flow of crypto funds and transactions across blockchains (which are publicly accessible) and digital wallets.

Notable trends and innovation

In addition to the existing arbitration rules, there has been a step towards introducing arbitral mechanisms specifically dedicated for dispute resolution of disputes pertaining to cryptocurrency transactions as also disputes arising out of blockchain activities[94] and smart contracts[95].

Notably, the draft set of rules for disputes arising from smart contracts published by JAMS are specifically tailored for adjudication of disputes arising from smart contracts in a number of ways. For instance, discovery is limited to the deposition of an expert witness on the meaning of the code, and the arbitrator's review of evidence is limited to that deposition, the code, any wrapper contract and witness evidence. The JAMS Rules also make provision for how a smart contract written in code should be interpreted, giving the code primacy and that any "translation" of that code into natural language is to be considered by the arbitrator only if there is ambiguity or logic contradiction in the code. The whole process is intended to be extremely quick, with the arbitrator being required to issue an award within 30 days of their appointment.

The United Kingdom has also published the Digital Dispute Resolution Rules specifically for resolving digital disputes which cover a whole range of disputes, including those relating to Cryptocurrency[96]. These mechanisms will serve as an important step towards harmonizing the dispute resolution processes and bringing in more clarity in the specific field.

Separately, the blockchain technology has been used to develop not only to develop Smart Contracts but also decentralised online dispute resolution platforms such as Kleros[97], which in itself is an interesting innovation in the realm of dispute resolution. In 2022, a Mexican court was approached for enforcement of an arbitral award rendered using the Kleros platform in a case involving a real estate leasing agreement which provided for a hybrid arbitration mechanism on the Kleros platform. The clause in the agreement specifically stated that the arbitrator should incorporate the decision rendered by Kleros into the final arbitral award. When disputes arose, the matter was referred to Kleros and the arbitrator in the matter incorporated the decision so rendered into the final arbitral award. Interestingly, the arbitral award passed "on-chain" in respect of an "off-chain" chain dispute (in that it pertained to physical real estate), for which it was necessary to connect the "on-chain" decision to the "off-chain" dispute so as to render the order effective[98].

In conclusion

While international arbitration provides a feasible mechanism for resolution crypto disputes, there still exist certain apprehensions around its practical implementation. Specifically, with respect to India, there remains an apprehension whether cryptocurrency disputes are arbitrable, and if they are, whether such awards are freely enforceable. While the larger ambit of smart contracts and other blockchain disputes might be permitted to be referred to arbitration in India, it is the specific question of the impact on public policy that needs to be determined in the context of cryptocurrency disputes.

[94] *Smart Contracts, Blockchain and Cryptocurrencies, JAMS Mediation, Arbitration, ADR Services available at jamsadr.com*
[95] *JAMS Rules Governing Disputes Arising out of Smart Contracts, available at JAMS Rules Governing Disputes Arising out of Smart Contracts.*
[96] *DLA Piper, The UKJT Dispute Resolution Rules- Keeping Pace With The Change, Available at The UKJT Digital Dispute Resolution Rules – Keeping Pace with Change | DLA Piper.*
[97] *Dispute Revolution, The Kleros Handbook of Decentralised Justice, Available at Dispute Revolution - The Kleros Handbook of Decentralised Justice*
[98] *Arbitration Tech Toolbox: Is a Mexican Court Decision the First Stone to Bridging the Blockchain Arbitral Order with National Legal Orders?, (4 March, 2022), Available at Kluwer Arbitration Blog.*

If cryptocurrencies are here to stay, there is also a need for legal systems across the world to keep pace, especially considering that the use of cryptocurrencies is not restricted by territorial borders or conventional financial systems. Mexican courts have set a strong example in adapting an "on-chain" arbitration agreement and enforcing an award rendered through a blockchain based dispute resolution platform. International model arbitration clauses tailored to cryptocurrency disputes should be adapted and the existing arbitration rules ought to be modified to encompass the rapid changes being bought about in the sector. A list of specialised arbitrators specializing in such matters can also be published to better help parties navigate this terrain.

While there might not be any one "best" model or solution presently, there is a requirement to envisage an evolving mechanism which can accommodate within its contours, the unique disputes pertaining to cryptocurrencies.

**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.*

Arbitrating Banking and Financial Disputes

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Introduction

In my 17 years of banking and arbitration practice, I have only seen one banking dispute being arbitrated. It concerned the mis-selling of Icelandic bonds and was the subject of a New York seated FINRA arbitration. The remaining disputes that I have seen, have gone through courts. Courts in New York and London[99] continue to be a favourite for banking disputes i.e. the banking disputes tend to be litigated, not arbitrated.

Does this need to be revisited? Do financial institutions need to be drawn towards arbitration instead?

Why did financial institutions prefer to litigate?

In my view, a primary reason that the courts have been a traditional dispute resolution forum for banking disputes is the plethora of enforceable interim reliefs available if parties go to court. For example, a worldwide freezing injunction passed by the English Commercial Court is a remedy that is too good to refuse for a banker. It freezes the borrowers' / guarantors' assets across the world and prevents assets from being dissipated and being put out of the lenders' hands while the matter awaits trial.

Another remedy that was traditionally only offered by courts is summary judgments. Quick and cost-effective, banks treasured being granted a summary judgment that cut short the need for a trial. Despite judgment being pronounced quickly and without trial, it was considered to be a full and enforceable judgment. Claimants love this, and summary judgments were not permitted in arbitration for many years. This is changing and arbitration institutions are allowing summary judgments, in a slightly different way, by specifically allowing it in their rules. More on this later.

Traditionally there was an assumption that there is no place for arbitration in the banking and financial industry. The industry did not embrace arbitration as a dispute resolution mechanism in the same way as other sectors.

Openness to arbitrate

There has been a gradual shift to arbitrating financial disputes in recent years.

The Financial Industry Regulatory Authority (FINRA), USA administers nearly all securities-related arbitrations by providing a forum for disputes between customers, members and associated persons. Its arbitration rules are approved by the SEC. FINRA uses an algorithm called the Neutral List Selection System, to generate a list of arbitrators from the arbitrator roster at random, to ensure quick appointments. A similar process is adopted by the National Stock Exchange (NSE) and Bombay Stock Exchange (BSE) in India for their securities-related arbitrations. The Singapore Financial Industry Disputes

[99]London and New York are perceived as 'bank-friendly' jurisdictions because they are known for their efficiency and commercially-minded judges with a reputation for upholding every term of the contract. These jurisdictions are also preferred because financial institutions find their courts predictable and reliable. In addition to New York and London, I have also seen a fair few banking disputes being heard at the DIFC Court in Dubai e.g. the NMC Health Scam banking disputes that are presently going through those courts. See Emirates NBD Bank PJSC v KBBO CPG Investment LLC and others DIFC Claim No. CFI-045-2020, order dated 18 August 2021

Resolution Centre (FIDRC) instituted by the Monetary Authority of Singapore mandatorily asks consumers to arbitrate disputes before undertaking judicial recourse.

Hong Kong's Financial Dispute Resolution Scheme and Centre offers mediation and arbitration services to financial institutions and their customers.

Kind of claims that do well to be arbitrated

There are several reasons for the gradual rise of arbitration in the banking and finance industry.

Derivative claims

Increasing complexity in claims involving financial products is a contributing factor.

In an arbitration, parties are able to appoint experienced arbitrators of their choice who have an expertise in financial markets[100]. This is not always certain with courts. For example, one could be allocated a judge for their matter who might have been a shipping practitioner before being elevated as a judge. As investment in emerging economies increases, concerns about litigating before local courts unfamiliar with complex financial products can be reduced by turning to arbitration.

Arbitrations before such experienced arbitrators are also confidential.

Disputes concerning derivatives were previously almost exclusively settled by courts in London or New York, but now the International Swaps and Derivatives Association (ISDA) provides for arbitration as an option to resolve disputes regarding derivatives. ISDA began a consultation in 2011-2012 on the potential incorporation of arbitration clauses within its Master Agreements. That consultation resulted in the publication of its 2013 Arbitration Guide in 2013, which provides a range of model arbitration clauses that could be included in an ISDA Master Agreement. The options include a variety of arbitral institutions and different locations as a seat of arbitration. This was updated in 2018 with further model clauses covering a larger number of seats and arbitral institutions along with developments in the arbitration market since the previous edition.

Sovereign Finance

Sovereign immunity is a real issue when litigating against states. Arbitration can fill this gap. An alternative to arbitration could be against nation-states before their local courts, which is avoidable.

Sometimes, states also favour neutral and confidential dispute resolution forums and therefore find solace in arbitration. From a cultural point of view as well, arbitration offers flexibility since arbitrators are more accepting of varying advocacy styles can differ considerably from jurisdiction to jurisdiction.

Factors contributing to the rise of banking arbitration

Ability to obtain urgent reliefs

Emergency arbitration has provided disputing parties the chance to apply for urgent interim reliefs, akin to court, and at times faster than litigation. The arbitration community, however, continues to grapple with quick enforcement of such interim reliefs.

[100] *The Panel for Recognised International Market Experts in Finance (PRIME Finance) was launched in January 2012 to facilitate dispute resolution in the global financial market. It provides access to a panel of expert arbitrators as well as a set of specialised arbitral rules which are administered by the Permanent Court of Arbitration catering to the resolution of derivatives, project and sovereign finance, asset management and regulatory matters.*

Availability of summary procedure

Summary procedure enables an early determination of the matter on the merits, but without extensive disclosure or trial.

The 2018 White and Case and Queen Mary University International Arbitration Survey titled 'The Evolution of International Arbitration' found that 56% of surveyors anticipated an increase in arbitration in the banking sector and 30% of surveyors thought the introduction of summary determination procedures would make arbitration more appealing for the sector.

I cannot agree more. Summary judgments are one of my favourite strategies for banking disputes, second only to obtaining world-wide freezing injunctions. There has been a long-standing debate about whether summary judgments can be passed in an arbitration. In one of my reported judgments, passed by the *English Commercial Court Uttam Galva Steels Ltd v Gunvor Singapore Pte Ltd* [2018] 2 Lloyd's Rep. 152, Mr Justice Picken held at [49] that an in an English-seated arbitration, summary judgments could be awarded. In doing so, he held against the Singaporean authority of *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza Spa* [2016] SGCA 53. Picken J held

"As for Mr Swaroop's point concerning the availability of summary judgment, or something similar, in arbitration (as opposed to in court), I consider that this has been overstated. First, as Mr Lewis pointed out, section 47(1) of the 1996 Act expressly provides that "Unless otherwise agreed by the parties, the tribunal may make more than one award different times on different aspects of the matters to be determined" and section 47(2) spells out that any such award can relate to either "an issue affecting the whole claim" or "a part only of the claims or cross-claim submitted to it for decision". Furthermore, Regulation 12.6 of the LME Arbitration Regulations echoes this by providing that "The Tribunal may make separate final awards on different issues at different times". It follows, therefore, that I do not accept that Mr Swaroop was right when he suggested that relief akin to summary judgment would not be available in arbitration in an appropriate case."

Many leading international arbitration institutions, including SIAC, now allow summary procedures in arbitration.

In 2016, SIAC was one of the pioneers that introduced Rule 29 to the SIAC Rules which allows parties to apply for the early dismissal of a claim or a defence on the basis that the claim or defence is manifestly without legal merit or manifestly outside the jurisdiction of the Tribunal. They also offer shortened streamlined procedures in the nature of expedited proceedings for small value claims.

ICC, LCIA, SCC and HKIAC have all followed suit and now provide for early determination or expeditious determination for manifestly unmeritorious claims, defences, or counterclaim.

Ease of serving legal proceedings

There is a formality about the service of court proceedings. In England, there is an entire body of law on permission to serve outside the jurisdiction on foreign defendants. In the absence of a 'service agent' clause, service of English court proceedings on a defendant in India must be made under the Hague Convention[101] and could take several months to two years.

Arbitration avoids this delay. There is an ease of serving arbitration proceedings on foreign defendants in cross border claims.

[101] *on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*

Serving arbitration proceedings also avoids complications and tactical moves. For example, when I once appeared for a personal guarantor in *Punjab National Bank (International) Ltd v Srinivasan & Ors* [2019] EWHC 89 (Ch) , I was able to successfully strike out the bank's claim on the basis that permission to serve the defendants in India by email (rather than the usual method of service under the Hague Convention) was obtained by misleading the English court[102].

Publications of awards

In line with a commitment to transparency in international commercial arbitration, many arbitration institutions including SIAC are leaning towards the anonymous publication of awards. This will assist in developing a body of banking arbitration law.

Ease of enforcement

Judgments pronounced by courts are not easily enforceable across borders. There is no world-wide treaty that enables the enforcement of court judgments. In most instances, countries enter into bilateral treaties for the enforcement of judgments and these can be limited e.g. India has treaties with only about 9 countries to enforce judgments in India that have been passed by their courts.

On the other hand, an arbitration award can be comparatively widely enforced under the New York Convention, which has been signed by no less than 149 countries.

Conclusion

There is a place for both litigation and arbitration to resolve banking and financial disputes. There cannot be a one-size-fits-all approach. The decision to elect arbitration over litigation will often depend on the nature of each transaction. With the rise of financial investments in emerging markets, arbitration can provide an effective means of dispute resolution. Borrowing from litigation, key features that financial institutions desire, together with inherent advantages offered by arbitration such as the ease of service, confidentiality, seamless enforcement etc. can grow arbitration as a mode of dispute resolution in the banking sector.

**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.*

[102] *Parallel proceedings at the Debt Recovery Tribunal (DRT) were not disclosed by the bank to the English court in breach of their duty of full and frank disclosure when applying for permission to serve out.*

Draft 7th Edition of the SIAC Rules: What Is New?

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Introduction

On 22 August 2023, SIAC announced the release of the public consultation draft of the 7th Edition of the SIAC Rules ("**Draft Rules**"). The Draft Rules have been prepared in light of SIAC's experience administering thousands of cases under the 2016 Rules and aim to fine-tune the arbitral process. As described below, the Draft Rules propose to tweak certain existing provisions of the 2016 Rules and introduce new procedures for the benefit of users. Underlying the proposed changes is the common thread of an emphasis on cost-effectiveness and efficiency.

Certain key features of the Draft Rules are discussed below.

Streamlined Procedure (Draft Rule 13 and Schedule 2)

To demonstrate SIAC's continued commitment towards advancing the conduct and practice of international arbitration, the Draft Rules propose to implement the "Streamlined Procedure", a unique procedural framework that proposes to have a final award issued within three months from the date of constitution of the tribunal.

Under Rule 13.1 of the Draft Rules, a party may file an application to have the arbitration conducted in accordance with the Streamlined Procedure, where:

(i) parties agree to the application of the Streamlined Procedure;

(ii) the amount in dispute does not exceed the equivalent value of SGD 1,000,000 (approx. INR 6 crores); or

(iii) circumstances of the case warrant the application of the Streamlined Procedure.

To ensure that an award is issued within three months under the Streamlined Procedure, the Draft Rules provide exclusively for the appointment of a sole arbitrator under this procedure. This is in contrast to the appointment of an arbitrator under the Expedited Procedure, which provides for the appointment of a sole arbitrator unless determined otherwise by the President of the SIAC Court of Arbitration ("**President**").

The sole arbitrator may either be jointly nominated by the parties within 3 days of the application for Streamlined Procedure being granted, or if the parties fail to agree upon a joint nomination, the President shall appoint the sole arbitrator within the next three days.

To facilitate the resolution of disputes within three months, the framework provided for Streamlined Procedure under the draft Schedule 2, proposes:

(i) the tribunal conduct a case management conference with the parties within three days

[103] *This article is designed to provide Parties with general information about SIAC's Draft 7th Edition Rules. This should not be construed as legal advice and determinative and/or exhaustive of SIAC's processes and procedures. SIAC's practices may differ depending on the peculiar facts of each case. The Draft Rules may be updated, and are not final.*

from the date of constitution of the tribunal;

(ii) unless determined otherwise by the tribunal: (a) the proceedings are decided on the basis of written submissions and any supporting documentary evidence; (b) no party shall be entitled to make requests for document production; and (c) no party shall be entitled to file any fact or expert witness evidence;

(iii) any challenge to the appointment of the sole arbitrator must be made within three days from the date of receipt of the notice of appointment of the tribunal or within three days from the date that circumstances specified under draft Rule 26.1 becomes known or should have reasonably been known to the parties;

(iv) the reasons for any award be in summary form, unless the parties agree that no reasons are to be given.

In addition to providing a speedy redressal of lower value disputes, the procedure aims to significantly reduce the costs of arbitration for the parties by providing a 50% reduction to the maximum costs of arbitration calculated in accordance with the SIAC Schedule of Fees.

For example, if the total sum in dispute in a matter is INR 5 crores (SGD 793,500.00), the maximum estimated total costs of arbitration in accordance with current SIAC Schedule of Fess would be SGD 75,922.71 (approx. INR 47 lakhs). However, under the Streamlined Procedure, the maximum estimated total costs of arbitration for the matter would be 50% of this amount.

In addition to the standard SIAC arbitration procedure and Expedited Procedure, the introduction of the Streamlined Procedure would provide users an additional avenue to swiftly resolve their disputes at reduced costs.

Expedited Procedure (Draft Rule 14)

Ever since its introduction, SIAC's Expedited Procedure has provided parties an avenue to obtain a time-bound and cost-effective resolution of disputes and has been frequently used in India-related cases. Under the 2016 Rules, a party may apply for the proceedings to be conducted in accordance with Expedited Procedure, where:

(i) the amount in dispute does not exceed the equivalent amount of SGD 6,000,000.00 (approx. INR 37 crores) representing the aggregate of the claim, counterclaim and any defence of set-off;

(ii) the parties so agree; or

(iii) there is exceptional urgency

The final award under Expedited Procedure is to be issued within 6 months of the tribunal being constituted.

To further enhance this procedure, the Draft Rules propose to increase the financial threshold for application of the procedure from SGD 6,000,000.00 (approx. INR 37 crores) to SGD 10,000,000.00 (approx. 62 crores). Another important change to the Expedited Procedure under the Draft Rules, is the removal of the criteria of "exceptional urgency". Instead, Expedited Procedure may be available where the circumstances of the case warrant the application of Expedited Procedure. These modifications aim to widen the net of Expedited Procedure, with more users and types of disputes potentially being eligible for the procedure.

Consolidation

The consolidation provisions under the SIAC Rules 2016 have proved to be very effective in increasing the time and cost efficiencies in arbitrations involving multiple contracts and multiple parties. These provisions have been further enhanced under the Draft Rules. The 2016 Rules allow for consolidation where:

a. The parties agree to consolidation;

b. The claims in the arbitrations are made under the same arbitration agreement; or

c. The arbitration agreements are compatible, and: (i) the disputes arise out of the same legal relationship(s); (ii) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (iii) the disputes arise out of the same transaction or series of transactions.

The Draft Rules now propose to also allow consolidation in cases that the arbitration agreements are compatible and *'a common question of law or fact arises out of or in connection with all the arbitrations.'* In other words, the Draft Rules will recognize commonality of disputes as a ground for allowing consolidation of disputes. In cases with sufficient commonality, parties stand to significantly reduce costs expended on parallel proceedings. Importantly, parties will also avoid res judicata issues from potentially different tribunals deciding common issues in dispute differently.

Coordinated Proceedings

Parallel arbitration proceedings are not new to international arbitration, or indeed to arbitrations under the various editions of the SIAC Rules. The Draft Rules now propose to allow for efficiencies in such parallel proceedings. Rule 17 of the Draft Rules empowers a tribunal common to two or more arbitrations to bring in procedural efficiencies, by running the arbitrations in a coordinated manner. Before a tribunal can use these efficiencies, a tribunal must ensure that:

a. the tribunal is the same in two or more arbitrations,

b. with a common question of law or fact,

c. that arises out of or in connection with all the arbitrations.

The tribunal may decide, after providing all the parties with an opportunity to be heard, that:

a. the coordinated arbitrations shall be conducted concurrently or sequentially;

b. the coordinated arbitrations shall be heard together and any procedural aspects shall be aligned; or

c. any of the coordinated arbitrations shall be suspended pending a determination in any of the other coordinated arbitrations.

These efficiencies are aimed at reducing costs of the parties in agitating the same set of facts or issues or law by empowering the tribunal to reduce the procedural steps involved in such decision making. This also will likely have time efficiencies and avoid res judicata issues across the various arbitrations.

Preliminary Determination

Parties to an arbitration have always had the ability to request for a preliminary determination of certain issues. In the proposed Rule 46, the Draft Rules aim to provide a framework for the parties to request such a determination. A party may apply to the tribunal to determine any issue in the arbitration on a preliminary basis on the grounds that:

a. the parties have agreed that the issue shall be determined on a preliminary basis;

b. a preliminary determination of the issue(s) will likely contribute to time and cost efficiencies in the arbitration; or

c. the circumstances of the case warrant the preliminary determination.

The tribunal may, after giving the parties an opportunity to be heard, decide on the application. If the tribunal decides to grant the application, the tribunal is required to pass its decision, ruling, order or award within 45 days

of filing the application.

The option for preliminary determination is in addition to the existing time and cost efficiency tools of early determination and expedited procedure. In a suitable case, a party may opt to apply for expedited procedure. If granted, the arbitration would have to be concluded within 6 months of appointing the tribunal. The party may then apply for early dismissal of claim or defence that is manifestly without legal merit or outside the jurisdiction of the tribunal. If granted, the tribunal would have to decide on the dismissal within 45 days of the application being filed. The party may, subsequently, seek for preliminary determination of certain issues. Depending on the nature of the claims and the arguments made, a claimant or respondent stands to make considerable time and costs savings in the arbitration.

Appointment of Arbitrators (Draft Rules 19-23)

The Draft Rules propose to introduce changes to the default appointment procedure (for the appointment of arbitrators where the parties cannot agree on the appointment procedure, or where that agreed procedure fails). While default appointments continue to be made by the President, the Draft Rules provide that, in cases where parties belong to different nationalities, the President will take into account the nationality of any candidate being considered for appointment as the sole arbitrator or presiding arbitrator. The appointed sole arbitrator or presiding arbitrator is to be of a neutral nationality, unless the parties agree otherwise or the President determines otherwise. The proposed change aims to assuage any concerns regarding the perceived neutrality of the sole arbitrator or the presiding arbitrator, whose decision can often be determinative. It is important to underscore that the draft Rules propose to retain flexibility in this regard, since the parties can agree to vary and the President can agree to depart from such approach.

Additionally, where appointments are to be made by the President, such appointments can be made either directly, or after following a "list procedure". The proposed list procedure contemplates that:

(i) The President will provide the parties with an identical list containing five or more names;

(ii) The parties then have the option to strike out one name from the list, and to return the list with the candidates ranked in order of preference;

(iii) The appointment may thereafter be made from the list, taking into account the mutual order of preference of the parties.

The list procedure aims to involve the parties as far as possible in the appointment procedure, even in circumstances where they are unable to agree on the appointment itself.

Tribunal Secretaries (Draft Rule 24)

The Draft Rules propose to allow members of the SIAC Secretariat to act as tribunal secretaries in some circumstances (tribunals may also separately appoint "external" tribunal secretaries). Draft Rule 24 provides inter alia that the Registrar may appoint a member of the SIAC Secretariat to act as tribunal secretary, after considering the views of the parties, and upon the tribunal's request. The members of SIAC's Secretariat are qualified in a number of jurisdictions, are experienced in the application of the SIAC Rules, and understand the functioning of the institution. Allowing members of SIAC's Secretariat to serve as tribunal secretary thus aims to enhance the efficiency of the arbitral process.

Separately, the Draft Rules recognize the potentially sensitive role played by tribunal

secretaries, whether appointed by the Registrar or by the tribunal. The Draft Rules stipulate that the tribunal is not to delegate any decision-making or essential functions to the tribunal secretary. Tribunal secretaries are subject to the same duties of disclosure as the tribunal and may be removed by the tribunal (in consultation with the Registrar). The Draft Rules also contemplate a procedure for challenging a tribunal secretary, which challenge is to be decided by the Registrar. Thus, while the Draft Rules underscore the importance of a tribunal secretary, they also aim to closely regulate the functioning of tribunal secretaries.

Emergency Arbitration (Draft Rule 12 and Schedule 1)

Understanding the need for parties to be able to seek emergency relief, the Draft Rules, have enhanced the existing provisions for the emergency arbitration procedure. Under the 2016 Rules, a party may file an application for emergency interim relief either concurrently or after filing the notice of arbitration, but prior to the constitution of the tribunal.

Under the Draft Rules, a party may file an application for emergency interim relief prior to filing a notice of arbitration. However, the party would be required to file their notice of arbitration within five days from the date of Registrar's receipt of the emergency interim relief application. Should the party fail to file the notice of arbitration within this period, the application would be considered as withdrawn on a without prejudice basis.

Another key change proposed to this procedure is that the emergency arbitrator is required to pass an order or award within 10 days from the date of the emergency arbitrator's appointment (shortened from 14 days under the 2016 Rules). To ensure these time limits can be achieved, the time limit for the emergency arbitrator to establish a schedule for consideration of the application has been shortened from 2 days of the emergency arbitrator's appointment to 24 hours from their appointment.

Similarly, any challenges to the appointment of the emergency arbitrator must be made within 24 hours from the receipt of the notice of the emergency arbitrator's appointment or within 24 hours from the date that the circumstances specified in draft Rule 26.1 become known or should have reasonably been known to that party. This is a departure from the 2 days provided to parties for making any challenges to the appointment of the emergency arbitrator under the 2016 Rules.

Miscellaneous Provisions

(i) The Draft Rules foreshadow the implementation of the SIAC Gateway, which aims to facilitate online filings and case management.

(ii) Where a challenge is made to an arbitrator who is a member of the SIAC Court or SIAC Board, the Draft Rules provide that an external member will be added to the Committee of the Court deciding such Challenge. Such member is to be appointed in accordance with the list procedure described above.

(iii) The Draft Rules also provide a framework within which parties can apply for security for costs *and* security for claims (the latter meaning that a party responding to a claim, counterclaim, or cross-claim may be asked to provide security against the relevant claim).

(iv) The Draft Rules empower tribunals to refuse to allow a party to change its representatives, if such change in representation could jeopardize the composition of the tribunal.

(v) In similar vein, and after the constitution of the tribunal, parties may not enter into third-party funding arrangements which could give rise to a conflict of interest with any member of the tribunal.

(vi) The Draft Rules also provide for an opt-

out mechanism for publication of awards/ orders/ decisions. The parties will be deemed to have agreed that SIAC may publish awards/ orders/ decisions in relation to arbitrations, with identifying information redacted. The parties may opt out of publication by objecting to such publication within 6 months of the conclusion of the arbitration.

Conclusion

As the provisions highlighted above demonstrate, the Draft Rules focus on cost-effectiveness and efficiency of the overall arbitral process. Every provision of the Draft Rules is crafted with these goals in mind. While the Draft Rules are a product of SIAC's 30+ years of experience administering thousands of cases, they do not represent a culmination of this experience. SIAC's learnings are ongoing, and the aim is to enhance the user experience with every successive edition of the Rules. That said, we believe that the Draft Rules are a step in the right direction- they are a step into the future.

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