National Law School of India University
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National Law School Trilegal International Arbitration Conference

CONCEPT NOTE

18 May 2023

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INTRODUCTION

The National Law School Trilegal International Arbitration Conference is an annual event that takes place alongside the National Law School Trilegal International Arbitration Moot. The conference is in its fourth edition and provides a unique opportunity for students, researchers, arbitration professionals, lawyers, and corporate firms to engage on contemporary issues impacting international arbitration in the ever-evolving legal and economic environment. The conference also offers participants the chance to engage with arbitration experts, academics, and professionals on these important themes. The conference aims to provide a platform for participants to engage in discussions and debates on these important themes and to learn from arbitration experts, academics, and professionals.

The concept note for the National Law School Trilegal International Arbitration Conference outlines the themes and topics that will be discussed during the conference.

PANEL – I

PROPER LAW OF ARBITRATION AGREEMENTS

The entire process of international arbitration pivots upon the choice of law as it determines which law governs which facet of the dispute. In a usual case of international arbitration, multiple national laws are involved. Tribunals often spend a large chunk of their time determining which law to apply for a particular issue. The theory of arbitration has established the concept of 'severability,' which separates the arbitration clause from its original contract. Flowing from the notion of party autonomy is the presumption that the law applicable to the original contract does not automatically govern the arbitration agreement. But why is this determination important?

If the parties fail to agree on the law which will arbitrate their matter, then courts are forced to go through various legal rules to determine the applicable law. The entire process can be expensive and time-consuming. Moreover, since such questions of the applicable laws often end up in national courts, they are likely to apply the lex fori. However, international arbitral tribunals do not face similar concerns and are mandated to carefully determine the governing law before adjudicating the issue. Despite Article V(1)(a) of the New York Convention advocating for the law of the seat as the law governing the arbitration, its varied applications have resulted in a situation pervaded by the lack of a standard approach.

The most intuitive method is to apply the law of the underlying contract. The rationale behind this method is that the parties have implicitly chosen this law under their contract. A similar interpretation was seen in the Sulamerica Case wherein the English High Court ruled that when there is a lack of clear choice of law, there would be an assumption that the parties intended to apply the

same law for the entire contract. However, in this case, an application of Brazilian law governing the contract invalidated the arbitration agreement. Consequently, the Court concluded that parties could have never intended to choose this law, since it would lead to an in toto negation of the arbitration agreement. The Court then applied the "closest connection" test, which led them to adopt the law of the seat.

However, in Mittal v. Westbridge Ventures, the Singapore Court of Appeal recently adopted a different approach to resolve the issue. In this case, a shareholders' agreement signed between Westbridge and the promoters of People Interactive (India) Pvt. Ltd. contained a clause subjecting its provisions to the laws of India but simultaneously contained an ICC arbitration clause that provided for arbitration in Singapore. The issue, in this case, was whether the question of a dispute arising from the said agreement being arbitrable or not would be determined under the law governing the agreement, or the law governing the arbitration clause only. The court stated that directly adopting an either-or approach could potentially cause havoc if the same question of arbitrability was determined based on one law pre-award and a different law post-award, especially if the dispute is arbitrable under one law and not so under the other.

To prevent this quandary, it becomes imperative that the law governing the main contract, as well as the arbitration agreement, must be taken into consideration. For a dispute to be arbitrable, it must be arbitrable under both laws to ensure the broader necessity of public policy is met. To further determine the law applicable to the arbitration agreement, the court emphasised the validation principle enumerated in Enka v Chubb and held that even though the rule is to consider the express choice of law for the main contract as implicitly binding on the arbitration agreement as well, it would not be so if the former ends up invalidating or frustrating the arbitration agreement.

Questions:

I) Does this crucial but puzzling question bring into question the general principle of severability of the arbitration agreement from the main contract?

II) Is the unifying approach adopted in Mittal ideal for determining the appropriate jurisdiction and applicability of laws to a given dispute?

III) Should alternate solutions- like asking parties to insert a clause choosing their preferred laws- be looked at?

PANEL – II

CHALLENGING AN AWARD BASED ON THE TRIBUNAL'S TREATMENT OF EVIDENCE

Arbitration primarily rose to prominence as an alternative dispute resolution method directed at reducing the adjudicatory burden on national courts. Nevertheless, the efficiency of this mechanism has come under suspicion in light of the various complications and appeal mechanisms it has been subjected to. Section 34(2) of the Arbitration and Conciliation Act 1996 exhaustively lists the grounds under which a Court can refuse the enforcement of an arbitral award. Yet, courts have dealt with cases where the validity of the arbitral award was challenged on the ground that evidence relating to the dispute was not appreciated adequately in the arbitral proceedings. This has led to the judicial entrenchment of a standard for challenging an award when the appeal is based on the treatment of evidence.

While the court refrains from re-examining the evidence before it, an award based on a lack of evidence or the ignorance of vital evidence is considered to be affected by "patent illegality" under Section 34(2A) of the Act. This was the legal position adopted by PSA Sical Terminals Pvt Ltd v The Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Ors. (2018). The Court here relied upon Associate Builders v DDA (2014), which had posited that if an award was passed based on no evidence or evidence that no reasonable person would rely on, then it could be set aside on public policy grounds. However, merely because there was little evidence or because the evidence did not measure up in quality to that of a trained legal mind, the award could not be said to be against public policy. Therefore, the standard that emerges has a very high threshold– the burden to prove that evidence was not appreciated fully would be hard to discharge. A successful challenge would still have to demonstrate

of the court.

To succinctly restate the position, a two-pronged test can be propounded. First, if the decision was based on an absolute lack of evidence, the decision is termed patently illegal under Section 34(2A). Second, if the decision was based on evidence which was then incorrectly appreciated to give rise to an incoherent finding, the burden rests on the person challenging the award to prove that the award violated principles of public policy and natural justice.

It is against this backdrop of this test that the following questions must be considered:

1. How can a balance be ensured between two objectives- one, a need to ensure that courts do not interfere with the merits of arbitral proceedings, and two, the need to repudiate arbitral awards that have been passed without the due appreciation of attendant, appropriate evidence?

2. To what extent can courts interfere in matters of arbitral enforcement on grounds of the appreciation of evidence as per the laws of that particular country? Are there different extents present, and what can the Indian arbitration regime gather from these standards?

3. In analysing whether an arbitral tribunal has duly considered evidence, what should be the approach of our Courts? Should the approach be limited to determining whether evidence has been analysed at all? Or should courts scrutinise how various chunks of evidence have been analysed and weighed specifically?

4. In the context of policy stance favouring the rise of domestic commercial arbitration, is it appropriate to allow Courts to interfere in the enforcement of arbitral awards based on how the arbitral tribunal treated evidence?

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SPEAKER PROFILES

Steven Finizio

Steven Finizio's practice focuses on international dispute resolution. Mr. Finizio also serves as an arbitrator. He is a partner at Wilmer Cutler Pickering Hale. He has particular experience with energy, financial services, shareholder, joint venture and M&A, and manufacturing issues. He has advised clients regarding disputes under the rules of most of the well-recognized international arbitration institutions and governed by the laws of jurisdictions in Europe, Asia, Africa and the US, as well as under bilateral and regional investment treaties. His pro bono work has included assisting a Central European government to draft new arbitration legislation and he was part of a team that won a landmark decision in the first freedom of expression case in the African Court on Human and Peoples' Rights in Issa Loha Konaté v Burkina Faso.

Friedrich Rosenfeld

Dr. Friedrich Rosenfeld acts as counsel and arbitrator. He has represented companies and states in arbitration proceedings with a focus on construction (FIDIC contracts), post-M&A, commercial and investment disputes. In addition, he has been arbitrator in cases involving a range of applicable substantive laws and seats (e.g. Austria, Denmark, England, France, Germany, Greece, Israel, Northern Macedonia, Switzerland, and the United States). His expertise in arbitration is recognized in international rankings.

Alongside his full-time practice, Friedrich is also Global Adjunct Professor of Law at NYU Law in Paris, lecturer for investment arbitration at Bucerius Law School as well as Visiting Professor for arbitration at the International Hellenic University in Thessaloniki. He has published five books and various articles on arbitration.

Friedrich studied at Bucerius Law School in Hamburg and at Columbia Law School in New York. He holds a PhD in international law (summa cum laude). Before joining HANEFELD, he worked as a consultant for the United Nations Assistance to the Khmer Rouge Trials in Cambodia.

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Tine Abraham

Tine Abraham is a Partner in the Delhi office of Trilegal and specialises in Commercial Disputes. She regularly represents Indian and multinational clients in complex disputes in institutional and ad-hoc arbitrations and before various courts and tribunals in India. Her expertise has been sought after in areas ranging from infrastructure contracts, investments by foreign firms in India, and regulatory issues to financial mismanagement, shareholder disputes and insolvency proceedings. She has advised clients on disputes pertaining to media rights licensing, supply contracts, infrastructure contracts and equity/debt investment contracts.

Shruti Sabharwal

Shruti is a Partner with Shardul Amarchand Mangaldas's Dispute Resolution Practice. She specializes in domestic and international arbitrations as well as commercial litigations.

Shruti regularly represents and advices clients, both private and state entities, in commercial arbitrations and litigations. She has acted for Indian and foreign parties conducted under the auspice of institutions such as International Chamber of Commerce, London Chamber of International Arbitration, Singapore International Arbitration Centre, International Centre for Settlement of Investment Disputes and in ad-hoc proceedings. She also acts for clients before various forums including the Supreme Court of India, High Courts of Delhi, Mumbai, Bangalore and Ahmedabad besides others.

Her area of focus is the construction and infrastructure industry, power sector including oil and gas, manufacturing sector, hospitality industry etc. She has worked on disputes arising from concession agreements, joint venture agreements, construction agreements, hotel management agreements, share purchase agreements, supply and distributors agreements, which have arisen under the laws of India, United Arab Emirates, Kuwait, United Kingdom and involved aspects of international law.

Promod Nair

Promod Nair is a Senior Advocate who appears regularly before the Supreme Court of India and the Karnataka, Bombay and New Delhi High Courts and a wide variety of other courts and tribunals in India. He is also admitted as a Solicitor Advocate with Higher Rights of Audience in England and Wales (currently non-practising). He has extensive experience of appearing as counsel in complex disputes and has a wide-ranging practice encompassing commercial litigation, public law, arbitration and white-collar offences. Promod has acted as counsel or arbitrator in over sixty domestic and international arbitrations, and has conducted arbitrations in various jurisdictions and under various institutional rules. He has represented the Republic of India in arbitrations commenced under Bilateral Investment Treaties and has also represented India at the United Nations. He is currently a Council Member of the Hong Kong International Arbitration Centre, a member of the Advisory Council of the Mumbai Centre for International Arbitration and a Governing Council Member of the International Arbitration and Mediation Centre, Hyderabad. He holds degrees in law from the National Law School of India (2001) where he graduated at the top of his class and the University of Cambridge where he was awarded the Clive Parry (Overseas) Prize in International Law and DFID-Cambridge and Pegasus Scholarships.

Shanelle Irani

Shanelle Irani is a senior associate in the Litigation/Controversy Department, at Wilmer Hale. She is a member of the International Arbitration Practice Group. Ms. Irani has a particular focus on India-related disputes. She is a member of the Young IAMC Steering Committee of the International Arbitration & Mediation Centre (IAMC), Hyderabad.

She graduated from Narsee Monjee College of Commerce and Economics in Mumbai and pursued a career as an advocate after graduating from Government Law College

Shwetha Bidhuri

Shwetha joined SIAC in November 2018 and is based in the SIAC Mumbai Office. Shwetha was enrolled as an Advocate in 2007 and holds a Master of Laws degree. Prior to joining SIAC, Shwetha worked in the dispute resolution practice of a leading law firm in New Delhi for nearly a decade on commercial litigation cases as well as investment treaty arbitrations involving foreign and Indian investors. Shwetha has worked on many leading cases which have contributed to the development of law affecting global companies.

Ganapathy Subbiah

Ganapathy Subbiah is a Partner in the Dispute Resolution practice group in the Bengaluru office of Khaitan & co. He advises and represents domestic and multinational clients in a variety of disputes including commercial, white-collar, arbitration, intellectual property, employment, mining, real estate, and consumer litigations.

Ganapathy appears inter alia before the Hon'ble High Court of Karnataka, Commercial Courts, Civil Courts, Arbitral Tribunals, Magistrate Courts, National Company Law Tribunal, Consumer Forums, and other statutory authorities. He also advises clients in internal investigations into employee fraud and corporate espionage. Additionally, Ganapathy assists clients across different sectors in assessing potential litigation-related risks in high-stake investments.

Pallav Shukla

Pallav Shukla is a Partner in Trilegal's New Delhi office and part of the Dispute Resolution practice. Pallav focuses on white-collar criminal defence, internal investigations, high-stake employment disputes and contentious intellectual property infringement cases. Pallav has substantial experience in defending some of the world's leading IT, aerospace, life sciences and defence manufacturing companies in anti-corruption and anti-money laundering enforcement in India. He has successfully represented clients in judicial review of related debarment actions by the government. Pallav is regularly instructed to pursue civil and criminal remedies for IPR infringement, breach of confidentiality/data theft, and financial and cyber crimes. He has strong trial credentials in, both, defence and private prosecution involving such cases.

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