EDITORIAL

The second year of the pandemic affected all walks of life, including arbitration proceedings across the globe. Due to this, trends like the continuation of the invocation of force majeure clauses, and a sharp rise in infrastructure related arbitration proceedings due to delayed completions and financing issues were observed. Certain landmark decisions have also stirred the arbitration community. The UK Supreme Court's ["**UKSC**"] judgment of *Kabab-Ji Sal (Lebanon) v. Kout Food Group (Kuwait)* ["**Kabab-Ji v. Kout**"] has clarified the issue of the governing law of arbitration agreements. The UKSC reaffirmed that the law of the underlying contract governs the arbitration agreement. Similarly, the Singapore High Court in *Westbridge Ventures II Investment Holdings v. Anupam Mittal* for the first time, debated if the arbitrability of an issue should be decided by the governing law of the arbitration agreement or the law of the seat of arbitration. The Singapore High Court held that at a pre-award stage, the issue of arbitrability is determined by the law of the seat and not the law of the arbitration agreement.

In the past year, India witnessed several favourable and welcomed pro-arbitration judgments, particularly from the Supreme Court of India ["**Supreme Court**"]. One of the highlights of 2021 has been the Supreme Court's commitment to upholding party autonomy as the guiding principle and pillar of arbitration in India. Among other key rulings this year, the Supreme Court in *PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.* upheld the right of two Indian parties to choose to arbitrate their dispute at a foreign seat of arbitration. Recognizing that free choice of applicable law is one of the most important tenets of arbitration, the Supreme Court ruled that there is nothing in the arbitration law or the public policy of India which restricts two Indian parties from arbitrating their dispute at a seat other than India. In another landmark decision, the Supreme Court in *Amazon.com NV Investment Holdings LLC v. Future Retail Limited* upheld the legality and validity of emergency arbitration and ruled that emergency awards are enforceable like orders passed by courts in India. This decision is a major boost for institutional arbitration in India and adds India to a very limited group of jurisdictions that expressly recognize the enforceability of emergency awards.

These decisions and the outlook of the Supreme Court in recent times have not only furthered the underlying *ethos* and spirit of the UNCITRAL Model Law in India but have also enhanced India's image as a favourable seat for arbitration. It is difficult to gainsay that the approach to arbitration prevailing in other jurisdictions has had a role to play in the development of a strong arbitration culture in India. As India emerges as a political and economic superpower, India

recognizes the need to not be an outlier, and align its arbitration framework with the best international practices followed in other jurisdictions. The recent legislative and judicial developments in India have indeed been considerate of this fact. A smooth exchange of ideas and values across jurisdictions therefore assumes importance because the arbitration practices or norms prevailing in one state have a direct or indirect impact on the outlook of other states.

International arbitration brings together legal professionals and academics from diverse legal cultures and backgrounds. As a result, there is abundant room for individuals coming from different jurisdictions and experiences to engage in meaningful and purposeful discussions and discourse. With this in mind, the Centre for Arbitration and Research, Maharashtra National Law University orchestrated the Indian Review of International Arbitration ["**IRIArb**"] to facilitate a platform for the industry as well as academia to come together and interact on key issues in the field. The focus of the IRIArb is not only to introduce its readers in India to the critical developments taking place across jurisdictions but also to integrate the Indian perspective into the increasing discourse on international arbitration. In line with this objective, the IRIArb has also launched a "Distinguished Guest Lecture Series on International Arbitration", wherein prominent names in the field of international arbitration are called upon to share their experience and expertise. The aim of this distinguished guest lecture series is to have leading experts speak about their original research work.

After the successful launch of the inaugural issue in July 2021, the IRIArb is very pleased to have been receiving contributions from all over the globe. The second issue of the first volume of the IRIArb consists of contributions on a wide subset of topics within the realm of international arbitration, such as judicial comity of international dispute settlement, investor misconduct in third party arbitration, use of eDiscovery technology in arbitration.

Kevin Kim (Founding Partner, Peter & Kim) in his distinguished lecture on the *"Development of Arbitration in Korea - Lessons for Emerging Arbitral Regimes"* talks about the emergence of international arbitration in South Korea, taking the readers through an anecdote from his childhood to put the massive growth of arbitration in perspective. He discusses the inhibitions that had restrained the growth of arbitration and attributes the "vivid" rise of international arbitration in Korea to the Asian Financial Crisis in the late 90s, and the international arbitration clauses found in the FDIs that emerged in the aftermath of the crisis. The speaker discussed the emergence of "chaebols" in Korea and the resultant industry specific disputes that came about as a result of the international investment of these family centred businesses. The speaker

statistically explained the heavy share of Korean parties in domestic and international arbitrations, and the return of Korean lawyers from the West to set up their practices in Korea as they are aware of the culture and practices. The speaker moved on to the salient factors involved in this growth, those being knowledge sharing, hiring of international practitioners, the support of the government and the stature of Korea as a global city. The speaker then moved to the establishment and growth of the Korean Commercial Arbitration Board and also the agreements between North Korea and South Korea to resolve their commercial disputes via arbitration. The speaker concludes by saying that *"K-Arbitration"* is soon to be a global hot topic, and finishes the overview by highlighting the key lessons that are worth examining.

Harshad Pathak (Doctoral Candidate, University of Geneva and Consultant, Mayer Brown) in his article titled *"Judicial Comity in International Dispute Settlement"* examines the problem of parallel proceedings existing in the domain of investor-state disputes and analyses if the principle of comity could be a solution to the same. The author starts by stating the problem of parallel proceedings i.e., the risk of a multiplicity of decisions for the same dispute due to the availability of multiple avenues for investors to assert their rights. Further, the author examines the lack of a beneficial option by which investment treaty tribunals can avoid parallel proceedings. The author then, at length, explains the origin and principle of comity. Going further, the author elaborates on the concept of judicial comity. The author also duly recognizes the opposition to this principle of comity in terms of international tribunals not being bound by a particular state's legal norms. However, the author seeks to negate this opposition by underlining the rising problem of jurisdictional conflicts and contending that limiting the principle to municipal courts only adds to the problem. The paper also discusses the landmark case of *The MOX Plant Case (Ireland v. United Kingdom)* in which the Tribunal stayed the ongoing proceedings in light of the principle of comity and thus prevented parallel proceedings. The paper goes on to consider judicial comity as a principle of global ordering which will enable dialogue across competing forums and help them improve the quality of judicial outcomes. The paper also explains the two conceptions of judicial comity, one as a concept of sovereignty and another as a legal tool to address the problem of parallel proceedings. Finally, the author concludes the paper by stressing on the immeasurable potential of the principle of comity in international dispute settlement.

Dr. M. Uzeyir Karabiyik (International Investment Law Expert and a delegate to UNCITRAL's Working Group III) in his article titled *"Remedying Investor Misconduct in Investor-State*

Arbitration Through Third Party Funding" delves into the various aspects of misconduct that are reminiscent of domestic litigations and have threatened the reputation of the investment arbitration system, focusing on third party funding and the misconduct in its regard. The author proceeds to discuss the framework vis-à-vis third party funding in investor-state dispute settlement ["**ISDS**"], discussing the regression of third party funding as support to claimants who lacked the requisite funds to afford an ISDS to becoming a savvy investment option for third-parties and a no-risk arbitral proceeding. The author proceeds to discuss the deficiencies in the third party funding regime and its employment as a massive weapon in the hands of claimants in whose favour the ISDS system is already biased. The author explains the rise of entities dedicated to third party funding in order to reap massive profits, and their lack of interest in justice. The author in the next section discusses the role of third party funding in resolving investor misconduct under two points: by filtering out frivolous claims, and by signing agreements with warranties and financial control over the investor in order to restrict any form of investor misconduct. The author, under these two heads, puts forth a host of suggestions and modifications to the third party funding regime and refers to various possible scenarios wherein a level of control can be exercised by the funder. However, the author does end this section with the thought that misconduct could well be ignored, maybe even encouraged, by third party funders if they believe this misconduct will strengthen their case in the proceedings. The author concludes the article by highlighting that third party funding is a new but problematic phenomenon and that UNCITRAL Working Group III has included third party funding as a part of its agenda and will continue discussions upon it in the future.

Amit Jaju (Senior Managing Director, Ankura Consulting Group) & Ankush Lamba (Managing Director, Ankura Consulting Group) through their article titled *"Unlock the Value of your Data using eDiscovery Technology in Arbitrations"* aim to create more awareness about the rules governing the use of Electronic Stored Information ["**ESI**"] and electronic discovery ["**eDiscovery**"] in Arbitration. This paper gains relevance in a setting where a sizeable number of arbitrations were conducted virtually due to the Covid-19 pandemic. The paper promotes the use of eDiscovery since it has a number of advantages over paper-based discovery. The authors begin the paper by highlighting the protocols of e-disclosure laid down by different arbitral tribunals and the modes of disclosure of ESI. The authors underscore the importance of metadata and the Electronic Discovery Reference Model in the eDiscovery technology. The authors then, at length, explain the steps in which eDiscovery technology can be used in arbitrations; right from data preservation, data processing, technology assisted

review to advanced analytics. Further, the paper explains in detail the advantages of eDiscovery technology like automatic email threading, personal data detection for redaction, massive reduction of costs, shorter time frame, etc. Finally, the authors conclude the paper by calling attention to the obvious benefits of the eDiscovery technology and encouraging the use of eDiscovery technology to gather ESI.

Vyapak Desai (Partner and Head of the International Dispute Resolution Team, Nishith Desai Associates) and Arth Nagpal (Member, Nishith Desai Associates) in their case comment titled "*Enka v. Chubb: The UK Supreme Court's Decision On The Law Governing The Arbitration Agreement"* discuss the UKSC's decision with regard to establishing the law governing the arbitration agreement. The authors succinctly explain the facts of *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* ["**Enka v. Chubb**"] and the events that led the parties to the UK Court of Appeals and then the UKSC. The authors take the readers through the reasoning of the UK Court of Appeals and the UKSC with regard to the law governing the arbitration agreement. The UK Court of Appeals' order stated that the law of the seat would govern the arbitration agreement, providing reasoning under three heads. The authors then move to the reasoning of the UKSC in stating that the governing law would be the one specified by the parties, and if not, the 'closest connection' test applies. The authors have summarized the factors involved in the UKSC's decisions in 4 elaborate points, further aided by two factors that led to the negation of a holding to the contrary. The authors move to their analysis of the judgment of the UKSC, celebrating the judgment of the Court while also delving into the issues that were left unanswered in *Enka v. Chubb*. The authors briefly weigh the apprehensions of the minority judgment of the UKSC and conclude their analysis with a discussion of the queries answered via the UKSC upholding its decision in *Enka v. Chubb* in the case of *Kabab-Ji v. Kout.* The authors then move to a jurisdictional comparison of the judgment in *Enka v. Chubb* and the position in law vis-à-vis choice of law governing the arbitration agreement in India, the United States, France, Singapore and China. The authors conclude the comment with a hope for converging judicial opinions to lead to higher consistency and support for international arbitrations.

Dineshwar Gaur (Superintending Engineer & Project Manager, South Asian University Project, Government of India) has written a book review of the book titled *"Commercial Arbitration: International Trends and Practices".* The author's approach towards the book review has been to conduct a detailed chapter-wise analysis of the book. At the end of every

analysis, the author has articulated the essence of the respective chapter. The author has highlighted the significant contributions from eminent authors covering key issues like third part funding in India, the status of the concept of arbitrability, the concept of interim measures in arbitration, emerging concept of emergency awards in arbitration, arbitrator's duty to raise public policy issues, recent developments in the enforcement of foreign arbitral awards in India, mediation-arbitration as an alternate dispute resolution combination, etc.

On 4th December, 2021, the Centre for Arbitration and Research conducted the "Global Energy Arbitration Conference". The Conference saw eminent speakers from multiple jurisdictions speaking about various issues in energy arbitration. Further, the IRIArb believes that disputes in the energy sector are at the heart of international arbitration, frequently involving prominent parties and state interests. In an attempt to add further to this discourse, the theme for our next issue is energy arbitration. Submissions may cover issues related to petroleum and natural gas disputes, mining disputes, renewable energy and ESG disputes, investment-treaty disputes or any other topic related to energy arbitration. We look forward to receiving contributions from across the globe for our second volume.

- Abhisar Vidyarthi, Shubham Dhamnaskar & Yagnesh Sharma*

* Abhisar Vidyarthi is the Managing Editor of the Journal. He can be reached at abhisar.vidyarthi@azbpartners.com. Shubham Dhamnaskar and Yagnesh Sharma are Copy Editors at the Journal. They can be reached at shubhamdhamnaskar@mnlumumbai.edu.in and yagneshsharma@mnlumumbai.edu.in.