EDITORIAL

2022 has been a year where arbitration matters have touched record highs in arbitral institutions.[1] The pandemic and the Russia-Ukraine war have had a dominant effect on the arbitration landscape.[2] The post-pandemic world has been flooded with arbitration matters are attributable to the pandemic. The war is expected to affect many sectors which may lead to more international disputes. Russia is a leading producer of oil, natural gas, steel, and nickel the imposition of sanctions by the US is expected to disrupt supply chains globally. Therefore, arbitration matters will in all probability increase in 2023. The world is still reeling from the pandemic wherein remote hearings had become the norm. While fillings and conferences may remain remote for good, hearings have resumed physically in most of the arbitral institutes. In 2022 many arbitral institutions recorded arbitration cases at an all-time high. In 2022 SIAC recorded 469 new cases, LCIA recorded 387 new cases, HKIAC recorded 483 new cases and ICC recorded 853 new cases.[3]

Along with the rise in number of cases, there were also some landmark arbitration cases that were decided in 2022.

1) *ZF Automotive US Inc. v. Luxshare Ltd.*[4]

In this case, it was decided whether the procedure for discovery under section 1782 of the 28 U.S.C applied to international private adjudicatory bodies. It was held that section 1782 only applied to 'governmental and intergovernmental bodies' and private adjudicatory bodies did not fall under this definition.[5] This judgment settled the hotly contested issue of what constituted a 'foreign or international tribunal' under section 1782 of the code which had been the subject of contradicting judgments.

2*) Morgan v. Sundance Inc.*[6]

[1] Gary Born, *International Arbitration 2022*, CHAMBERS GLOBAL PRACTICE AND GUIDES https://practiceguides.chambers.com/practice-guides/international-arbitration-2022 (Dec. 12, 2022, 1:13 PM).
[2] *Id.*
[3] *Supra* Note 4.
[4] ZF Automotive US Inc. v. Luxshare Ltd., 596 U. S. (2022).
[5] Dana MacGrath*, "I Can See Clearly Now the Rain Is Gone…" U.S. Supreme Court Definitively Holds that Section 1782 Does Not Permit Discovery Assistance from U.S. Courts for Private Foreign or International Arbitrations*, KLUWER ARBITRATION BLOG, http://enalsar.informaticsglobal.com:2365/2022/06/14/i-can-see-clearly-now-the-rain-is-gone-u-s-supreme-court-definitively-holds-that-section-1782-does-not-permit-discovery-assistance-from-u-s-courts-for-private-foreign-or-i/. (Dec.12, 2022 accessed at 5:15 PM).
[6] Morgan v. Sundance Inc. 596 U.S. (2022).

This was another major decision delivered by the US Supreme Court. In this case, the question of law was: when can a party be considered to have waived its right to arbitrate; and what would be the test for such a waiver? The lower courts applied a two-fold test: i) whether the party was aware of its right and acted inconsistently with it, and ii) whether the party's inconsistent actions prejudiced the other party. The second requirement of prejudice was not a part of the federal waiver law. However, the courts added it because in their opinion the federal law was more favourable towards arbitration agreements. The Supreme Court did away with the requirement of prejudice and sent the case back to the lower court. The lower court held that arbitration agreements had to be treated as all other agreements and the only requirement to be considered was whether a party had acted inconsistent with its right to arbitrate.

3) *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait) ("Kabab-Ji")*[7]

This case has led to two very important judgments both of which are contradictory and have been delivered in different jurisdictions – France and the United Kingdom. The moot question was whether the law that would apply to the arbitral proceedings would be English law because it was the law that was governing the contract; or French law because that was the law of the seat of arbitration. The case first went from French courts all the way up to the French Cour de Cassation and the ruling was in favour of KJS. Then KJS sought enforcement of the award and applied to English courts as the assets of KFG were located in England, however, the English courts denied enforcement on the grounds that KFG was not a party to the arbitration agreement.

The English courts ruled that the law that would apply would be the English law as it governed the contract and the French courts ruled that the French law would apply as it was the law of the seat of arbitration. This has created two very contradictory judgments. This case highlights the problem of not specifying the law that governs the arbitration agreement when the seat of arbitration is different from the place where enforcement of the award is sought. Therefore, in future arbitration agreements, the law governing the arbitration must be specified and existing agreements should be amended if they don't specify the governing law for arbitration.

[7] Raid Abu Manneh and Dany Khayat, *"The Anglo-French Clash over the Law Governing the Arbitration Agreement: Why this is Important"*, MAYER BROWN https://www.mayerbrown.com/en/perspectives-events/publications/2022/12/the-anglo-french-clash-over-the-law-governing-the-arbitration-agreement-why-this-is-important. (Dec. 14, 2022, 2:14 PM).

Arbitration is also rapidly growing in India. India is increasingly preferred as a seat of arbitration, fortified as by the developing pro-enforcement regime.[8] There have been a large number of arbitration judgments in 2022.[9] Like in the world, in India as well, the pandemic has made technology an essential part of the arbitration process. Although physical hearings and meetings have resumed, a large part of the process continues to be digitized. While disputes attributable to the pandemic are ongoing, the possibility of cryptocurrency and data protection legislation, after the acceptance of cryptocurrency in the financial budget there is a tangible possibility that could lead to an increasing number of disputes referable to arbitration in 2023. The centres for arbitration in India such as IAMC (International Arbitration and Mediation Centre) and MCIA (Mumbai Centre for International Arbitration) are also growing rapidly. The New Delhi International Arbitration (Amendment) bill introduced in the Lok Sabha in 2022,[10] aims to make the New Delhi International Arbitration Centre a centre of national importance.

There have also been some noteworthy domestic judgements regarding arbitration in 2022.

1) *UHL Power Company Ltd. v. State of Himachal Pradesh*[11]

In this case, the issue of whether post-award interest can be granted on the interest amount awarded was decided upon. The court while overturning the Himachal Pradesh High Court's decision said that post-award interest on the interest amount awarded can be granted. The court majorly relied on the decision of *Hyder Consulting (UK) Ltd.* v. *Governor, State of Orissa through Chief Engineer*[12] in which it had been held that an arbitral tribunal may award interest on interest or compound interest in the post-award or pre-award period.

2) *Cox and Kings Ltd. v. SAP India Pvt. Ltd.*[13]

In this case, the correctness of the 'Group of Companies' doctrine was questioned. The doctrine was expounded in the *Chloro Controls*[14] judgement wherein the court laid down the following factors to be considered when applying the doctrine (i) intention of the parties, (ii) directness of the relationship of the non-signatory to the signatory party, (iii) commonality of subject

[8] Ravi Singhania and Shilpa Shah, *India trends and development 2022*, CHAMBERS AND PARTNERS, https://practiceguides.chambers.com/practice-guides/international-arbitration-2022/india/trends-and-developments (Dec. 14, 2:30 PM)
[9] *Id.*
[10] The New Delhi International Arbitration Centre (Amendment) Bill, 2022, Bill no. 186, of 2022.
[11] UHL Power Company Ltd. v. State of Himachal Pradesh, (2022) 4 SCC 116.
[12] Hyder Consulting (UK) Ltd. v. Governor, State of Orissa through Chief Engineer, (2015) 2 SCC 189.
[13] Cox and Kings Ltd. v. SAP India Pvt. Ltd., 2022 SCC OnLine SC 570.
[14] Chloro Controls Private Limited v. Severn Trent Water Purification Inc. and Others, (2013) 1 SCC 641.

matter, (iv) serving end of justice. There is heavy onus on the party seeking joinder. The Supreme Court opined that this doctrine was too broad and open to be interpreted in different ways. Therefore, the three-judge bench, in this case, referred the matter to a larger bench for consideration.

3) *Indian Oil Corporation Ltd. v. NCC Ltd.*[15]

In this case, the court decided the extent of the powers given to courts under Section 11 of the Arbitration and Conciliation Act, 1996. The court held that questions of arbitrability of the dispute could be considered, and overturned the finding of the Delhi High Court that the scope of enquiry by the court was only limited to - whether an arbitration agreement existed or not. However, the court stated that the questions of arbitrability should be left to the arbitral tribunal unless the facts were very '*clear and glaring*'.

Against, this backdrop of significant arbitral developments, the Indian Review of International Arbitration ["**IRIArb**"] brings Volume 2 of its Second Issue which not only features the pandemic induced, widely discussed issue of online dispute resolution in the form of arbitration but also focuses of a very relevant theme – Energy Arbitration.

In December 2021, the Centre for Arbitration and Research ["**CAR**"] at Maharashtra National Law University had conceptualised, organised and hosted the Global Energy Arbitration Conference. The conference was a platform where eminent practitioners as well as sitting judges of the High Courts of Delhi, Allahabad and Orrisa, spoke about disputes in industries such as petroleum and natural gas, renewable energy and ESG. With the aim to carry forward conversations from the conference and take the dialogue on this issue to a wider platform, the journal wing of the CAR – IRIArb sought to centre Volume II Issue 2 around the theme of Energy Arbitration.

The article by Dr. Gordan Blanke titled "*Oil & Gas Arbitration in the MENA: An Introductory Overview*" provides an overview of oil and gas arbitration in the MENA. In doing so, it introduces the reader to the legal and procedural framework of oil and gas arbitration in the region. Throughout, the article makes reference to the acquis of such arbitrations to date. For practical guidance, an annex summarises a total of 49 MENA oil and gas arbitrations, both commercial and Investor-State, by reference to a number of main procedural and substantive parameters, such as the identity of the parties and the tribunal, the type of dispute, the seat of

[15] Indian Oil Corporation Ltd. v. NCC Ltd., 2022 SCC OnLine SC 896.

the arbitration, the procedural law applicable to the reference, the governing law on the merits and the tribunal's findings.

Thomas R. Snider in his article titled "*The Resolution of Disputes under Petroleum Production Sharing Agreements*" discusses the advent of Production Sharing Agreements ["**PSAs**"]. The author details the types of disputes commonly arising out of PSAs and types of damages that are pursued in PSA disputes including the calculation of damages in such claims. The author concludes with an observation that while PSAs are a preferred form of granting contract and have several beneficial legal attributes, disputes will nevertheless continue to be a fact of life in the PSA context given the conditions which are discussed in the article.

Gunjan Sharma in his article titled "*The Continuing Backlash against Investor-State Arbitration may Call for the Increasing Use of Contract Terms to Protect Energy Investments*" discusses the political risk in Investor-State Arbitration of uncompensated extortion or unlawful interference by government in large energy projects and international energy contracts as it involves high capital articulating the shifts during the life cycle of a project. The author makes suggestions for investor behaviour in host states in terms of factors that an investor must take into account while investing.

The Energy Charter Treaty ("**ECT**") is in crisis. The conclusion of the 2015 Paris Agreement raises legitimate concerns about its consistency with the substantive standards of investment protection in the ECT. These concerns bring into focus the critical role played by investment arbitration tribunals to resolve investor-state claims, including under the ECT. The article by Harshad Pathak mobilizes the lens of Critical Legal Studies and argues that the ECT crisis is more appropriately characterised as yet another attempt to review the jurisdiction of investment arbitration tribunals to decide critical issues of public importance. The article triggers a fundamental question – can the fate of the global response to climate change be left at the altar of investment arbitration tribunals? This question is elaborated on and answered in the paper titled "*The Energy Charter Treaty Crisis: Old Wine in a New Bottle*".

Online Dispute Resolution ("**ODR**") has become a very important mechanism for resolving disputes. After the pandemic, most disputes are getting resolved online to adapt to the change in the dispute resolution landscape. Even though hearings and arbitrations are once again taking place offline the authors Siddharth Kapoor and Ananya Singhal advocate for the ODR method to not lose momentum particularly in the context of small-value claims or disputes. Parties involved in small and medium-value claims would greatly benefit by using the ODR method

and would significantly cut their costs. The article titled "*Online Dispute Resolution: Creating A Level-Playing Field In Small Value Claims*" elaborates on this and also discusses the various advantages of the ODR method.

The subject of whether and under what circumstances ICSID tribunals may require security for costs is very disputed. With the recent appearance of third-party financing, a new element has been added to the debate over whether ICSID tribunals should evaluate petitions for security for costs in light of this factor. The article titled "*Competence of an ICSID Tribunal to Order Security for Costs*" by Ahan Gadkari and Vaneet Kumar focuses on this issue. The article argues that ICSID courts have the authority to impose these interim remedies after briefly discussing the purpose and function of security for costs.