

EDITORIAL

The impact of the Russia-Ukraine war has continued to affect arbitrations in 2023 and is expected to create further disputes in the second half of the year.¹ This will include international disputes arising as a result of supply chain disruptions and sanctions imposed by multiple states on Russia.² There may even be an increase in expropriation claims by non-state investors against Russia as evidenced by the recent expropriation claims raised by ExxonMobil.³ There may be further problems in enforcing arbitral awards in Russia and various roadblocks in arbitration proceedings involving Russia.⁴

There has been a change in how arbitrations are conducted as a consequence of the boom in the technology sector in 2023.⁵ Artificial intelligence [“AI”] has brought about this change and various AI tools are being used by arbitration practitioners.⁶ Technology has also impacted arbitrations in terms of the kind of matters being referred to arbitration in 2023 as disputes over blockchain technologies are expected to increase.⁷

The recent crash of the Crypto market in 2022 has led to a multitude of arbitration disputes.⁸ The recent judgement of the US Supreme Court wherein the court favoured arbitration over litigation to settle customer disputes of Coinbase is one such example.⁹ Cryptocurrency-related disputes raise many complex questions regarding jurisdiction, applicable law, and parties to the dispute because of

¹ Nicholas Lawn, and Helen Laufer, (2023) *Potential claims for compensation against Russia following its invasion of Ukraine part II: Claims relating to Russia's domestic measures against foreign investors*, Lexology. Available at: <https://www.lexology.com/library/detail.aspx?g=dd97a8dd-9a56-4a6c-b1e4-2aecd16aac71> (Accessed: 26 June 2023).

² James Rogers, and Katie McDougall, (2022) *Impact of international sanctions on arbitral proceedings*, Lexology. Available at: <https://www.lexology.com/commentary/arbitration-adr/international/norton-rose-fulbright/impact-of-international-sanctions-on-arbitral-proceedings> (Accessed: 26 June 2023).

³ Sabrina Valle, (2022) *Exclusive: Exxon exits Russia empty-handed with oil project 'unilaterally terminated'*, Reuters. Available at: <https://www.reuters.com/business/energy/exclusive-exxon-exits-russia-empty-handed-with-oil-project-unilaterally-2022-10-17/> (Accessed: 26 June 2023).

⁴ *Five international arbitration trends and topics for 2023 - Cleary Gottlieb*. Available at: <https://www.clearygottlieb.com/-/media/files/alert-memos-2023/five-international-arbitration-trends-and-topics-for-2023.pdf> (Accessed: 26 June 2023).

⁵ Sam Brown Ling Ho (2023) *Tech arbitration trends 2023*, Clifford Chance. Available at: <https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2023/02/tech-arbitration-trends-2023.html> (Accessed: 26 June 2023).

⁶ Andrea Seet, , et al. (2023) *Arbitration tech toolbox: Looking beyond the black box of AI in disputes over ai's use*, Kluwer Arbitration Blog. Available at: <https://arbitrationblog.kluwerarbitration.com/2023/05/25/arbitration-tech-toolbox-looking-beyond-the-black-box-of-ai-in-disputes-over-ais-use/> (Accessed: 26 June 2023).

⁷ Sam Brown (2023) *Crypto Litigation & Arbitration Trends to Watch in 2023*, Clifford Chance. Available at: <https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2023/01/crypto-litigation-arbitration-trends-to-watch-in-2023.html> (Accessed: 26 June 2023).

⁸ Rashi Maheshwari, (2023) *Why is the crypto market down in June 2023?*, Forbes. Available at: <https://www.forbes.com/advisor/in/investing/cryptocurrency/why-crypto-market-is-down/> (Accessed: 26 June 2023).

⁹ Coinbase Inc. v. Bielski, 599 U. S. (2023).

the decentralised nature of most of these currencies as well as their exchanges.¹⁰ The ongoing dispute regarding Binance may bring clarity to many of these questions in the second half of 2023.¹¹

2023 has also seen an increase in disputes regarding climate change.¹² Azerbaijan recently initiated arbitration proceedings against Armenia under the Bern Convention, 1982.¹³ This is the first-ever inter-state arbitration initiated by a state under the convention. There may also be more arbitration proceedings under the Energy Charter Treaty [“ECT”]. However, given the number of states withdrawing from the ECT, the future of the treaty and its application in arbitrations remains to be seen.¹⁴

Along with the rise in the number and types of disputes being referred to arbitration, the first half of 2023 has also seen some significant judgements in international arbitration.

1) *Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A*¹⁵

In this case, the US court held that the grounds for invalidating an arbitral award in the primary jurisdiction should be determined by domestic law, specifically Section 10 of the Federal Arbitration Act, 1925 [“FAA”]. The court ruled that Article V of the New York Convention¹⁶ does not govern the grounds for vacating an award in the primary jurisdiction, contrary to previous decisions. The court emphasized the importance of interpreting the treaty and statute based on their text and logic. This judgment is significant because it establishes the proper interpretation and application of the New York Convention and the FAA in determining the grounds for invalidating arbitral awards in the United States.

2) *Jan de Nul and Credendo v. Autonomous Port of Douala*¹⁷

¹⁰ *Supra* note 4.

¹¹ Sean McCarthy, *et al.* (2021) *The impending Binance Arbitration: A Primer on the world of cryptocurrencies, derivatives trading and decentralised finance on the blockchain*, Kluwer Arbitration Blog. Available at: <https://arbitrationblog.kluwerarbitration.com/2021/10/13/the-impending-binance-arbitration-a-primer-on-the-world-of-cryptocurrencies-derivatives-trading-and-decentralised-finance-on-the-blockchain/> (Accessed: 26 June 2023).

¹² *Top trends in a Changing World International Arbitration in 2023*. Available at: <https://www.freshfields.com/493257/globalassets/noindex/international-arbitration-top-trends-2023.pdf?epieditmode=false> (Accessed: 26 June 2023).

¹³ Jayde Pulford, Nigel Brook, and Zaneta Sedilekova, (2023) *Azerbaijan initiates first inter-state arbitration against Armenia*, Lexology. Available at: <https://www.lexology.com/library/detail.aspx?g=9d7f193a-c465-4c27-ba8b-1536ef937b6d> (Accessed: 26 June 2023).

¹⁴ Wendler Carsten, Garcia Bel Marta and Petazzi Gregorio (2023) *Withdrawal from the ECT: One step forward, Two steps back?* Available at: <https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2023/withdrawal-from-the-energy-charter-treaty/> (Accessed: 26 June 2023).

¹⁵ 2023 WL 2922297, at 9 (11th Cir. 2023).

¹⁶ Article V, The New York Convention.

¹⁷ *Jan de Nul and Credendo v. Autonomous Port of Douala* - Judgment of the Paris Court of Appeal 22/00408 - 4 April 2023 on *Jan de Nul and Credendo Export Credit Agency v. Port Autonome de Douala*, ICC Case No. 24961/DDA.

In this case, the Paris Court of Appeal reviewed an action to annul a partial arbitral award dated December 21, 2020, under ICC reference no. 24961/DDA. The dispute involved a public contract between the Autonomous Port of [Locality 3] (PAD) and Jan de Nul (JDN) for dredging and maintenance works in the access channel to the Port of [Locality 3]. The PAD argued against the arbitral tribunal's jurisdiction based on the arbitration clause's ambiguity and the non-arbitrability of the tax matter. However, the court dismissed these arguments, determining that the clause indicated the parties' intent for ICC-administered institutional arbitration and that the tax matter fell within the arbitration agreement's scope. This judgment is significant as it clarifies the arbitration clause interpretation and confirms the arbitrability of tax matters in international disputes.

3) *Deutsche Telekom v. India*¹⁸

In this case, India obtained electromagnetic frequency bands from ITU and contracted with Devas Multimedia for S-band spectrum use. Deutsche Telekom AG, a subsidiary of Deutsche Telekom, invested in Devas and alleged a breach of the Germany-India BIT by India. Arbitration ensued, and the tribunal in Geneva found India in breach of fair and equitable treatment under the BIT. India challenged jurisdiction, but the Federal Supreme Court dismissed the review. The tribunal issued a final award for damages. India sought a review of the awards based on newly discovered facts. The Federal Supreme Court examined the admissibility and content of the review. This case is a landmark in international arbitration, addressing jurisdiction, fair treatment, and the review process.

In addition to these international judgments, there were many landmark judgements regarding arbitration in 2023 in the Indian context.

4) *Devas Employees Mauritius (P) Ltd. v. Antrix Corporation Ltd.*¹⁹

In this case the single-judge bench of the Delhi High Court set aside the award passed by the ICC under Section 34 of the Arbitration & Conciliation Act, 1996 [**“Arbitration Act”**] based on fraud and opposing the public policy of India. The case ensued between Devas, a wholly owned government company and Antrix, the commercial arm of ISRO. The ICC award passed in the favour of Devas was set aside by the Delhi High Court on the grounds of patent illegality, fraud and conflict with the Indian public policy. The Court relied on the NCLAT decision that the relationship between Antrix and Devas Multimedia was a product of fraud perpetrated by Devas Multimedia and hence the arbitral award, would be infected with the poison of fraud.

¹⁸ Deutsche Telekom v. India PCA Case No. 2014-10, Decision of the Swiss Federal Tribunal 4A_184/2022 on 8 March 2023.

¹⁹ Devas Employees Mauritius (P) Ltd. v. Antrix Corporation Ltd. 2023 SCC OnLine Del 1608.

5) *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.*²⁰

In this case the five-judge Supreme Court bench delved into the issue of whether unstamped arbitration agreements are valid and the scope of the court's intervention under Section 11 of the Arbitration Act. In the appeal, the 3:2 majority overturned the decision and held that an unstamped or inadequately stamped arbitration agreement is not valid in law. An unstamped instrument, when it is required to be stamped is not a contract and not enforceable in law. On the second issue, the court held that it has the power to ascertain the existence of an arbitration agreement under Section 11. The Court, acting under Section 11, is bound to act under Sections 33 and 35 of the Stamp Act if the instrument is not stamped or insufficiently stamped.

6) *Vodafone Idea Cellular Ltd. v. Ajay Kumar Agarwal*²¹

This case determined the question of whether Section 7B of the Indian Telegraphic Act, 1885, which provides for statutory arbitration ousts the jurisdiction of the Consumer Forum on the disputes relating to goods and services. The Supreme Court relying on the *Emaar MGF Land Ltd. v. Aftab Singh*²² held that the Arbitration Act is to act in addition to and not in derogation of any provisions of any other enactment. Section 7B has a similar scheme as the Arbitration Act and hence it does not oust the jurisdiction of the Consumer forum.

It is amidst this backdrop of significant developments in the global landscape of Arbitration that the Indian Review of International Arbitration [“**IRI Arb**”] brings Volume 3 of its first Issue. The issue contains contributions from around the world and features articles on issues relevant to arbitrations, such as stamping of arbitration agreements, unilateral appointments of arbitrators, the effect of awards after the annulment, and also includes two book reviews.

The article by Vyapak Desai and Shweta Sahu titled “*Unilateral Appointment of Arbitrators: Looking Beyond Perkins*” discusses the recent ruling by the Delhi High Court in *Envirad*,²³ declaring that unilateral appointment of arbitrators in public-sector contracts is unenforceable. Precedents like the *Perkins*²⁴ judgment and *Prodattur*²⁵ judgment have already established the legal position on this issue. The author expresses concerns about the complete prohibition of party autonomy in such cases, and instead suggests imposing limitations based on public policy or invoking unconscionability in specific cases. Balancing party autonomy, transparency, and fairness in arbitration is emphasized,

²⁰ N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. 2023 SCC OnLine SC 495.

²¹ Vodafone Idea Cellular Ltd. v. Ajay Kumar Agarwal II (2022) CPJ1 (SC).

²² Emaar MGF Land Limited v. Aftab Singh, 2018 SCC OnLine SC 2945.

²³ Envirad Projects Pvt. Ltd. v. NTPC Ltd., ARB.P. 27/2022 (India).

²⁴ Perkins Eastman Architects DPC v. HSCC (India) Ltd, 2019 SCC OnLine SC 1517 (India).

²⁵ Proddatur Cable TV Digi Services v. Siti Cable Network Limited, (2020) 267 DLT 51 (India).

along with the need for investigating potential bias and parties' willingness to agree to unilateral appointment clauses.

The article by Tariq Khan and Nooreen Sarna titled "*Enforcement of Awards Annulled at the Seat: International Perspective*" analyzes the treatment of awards annulled at the seat in different jurisdictions. It explores this issue from the perspective of French, British, American, and Indian courts. The article highlights how French courts deviate from the norm by enforcing annulled awards through case law, while American courts do not recognize annulled awards. It also discusses the approach of British courts, which is the opinion of the authors is balanced. Lastly, the article examines the Vijay Karia Judgment, which outlines grounds for non-enforcement of arbitral awards in India.

The paper by Nilovna Maelzer titled "*Arbitration & Conciliation (Amendment) Act, 2021: Return of Unconditional Stay on Enforcement of Awards - A Retrograde Step?*" discusses the 2021 amendment to the Arbitration Act, which adds fraud and corruption as grounds for seeking unconditional stay on award enforcement under Section 34. The author criticizes the retrospective application of the amendment and highlights the uncertainties it brings to award enforcement. The paper briefly explores the history of unconditional stay on enforcement in the Indian arbitration regime. Concluding remarks suggest measures to overcome this setback and address the challenges in enforcing challenged domestic arbitral awards.

The article by Vedaant Agarwal & Shivankar Sukul titled "*Feasibility & Legitimacy of Third-Party Extension of Arbitration Agreement in Indian Arbitration Regime*" explores the development of third-party extensions in India. It highlights the lack of recognition by the Indian judiciary and legislature regarding the distinctions between multi-party arbitration and multi-claim arbitration. The case of *Chloro Controls* is examined to illustrate the court's conceptual ambiguity. The analysis also considers the 2015 amendment to Section 8 of the Arbitration Act, which attempted to address this issue but suffered from poor drafting. The authors hope that the recent case, *Cox & Kings*,²⁶ will provide clarity on these matters.

The article by Mr. Tejas Karia and Ms. Vrinda Pareek titled "*Stamping of Arbitration Agreements: Analysis of Evolving Indian Arbitration Landscape*" explores the evolving jurisprudence on whether arbitration agreements require stamp duty. It introduces the requirement to pay stamp duty and explains how arbitration agreements fall under the "Residuary Article" for stamp duty. The article highlights the importance of stamping instruments and the negative consequences of non-stamping. It discusses contradictory Supreme Court judgments and the current position on stamp duty payment.

²⁶ Cox & Kings Ltd. v. SAP India Pvt. Ltd, Arbitration Petition, (Civil) No. 38/2020.

and enforceability of arbitration agreements. Lastly, the article concludes with the ramifications of the NN Global Reference Judgment, which established the existing jurisprudence on this matter.

Shashank Garg's book review of "*Commercial Arbitration in Australia under the Model Law*" by Doug Jones AO and Janet Walker CM highlights its authoritative and invaluable guidance for domestic arbitration. It discusses the adoption of the UNCITRAL Model Law on International Commercial Arbitration and its implications for domestic arbitrations in Australia. The review covers the third edition, including recent judicial pronouncements, and praises the comprehensive coverage of topics such as arbitration history, arbitrability, virtual hearings, consolidation of proceedings, and emergency award enforcement. The addition of Professor Janet Walker as a co-author is noted for its impact. Overall, the review states that the book is essential for judges, practitioners, and academics in Australian commercial arbitration.

In his book review, Dr. Christopher highlights the unique value of "*Arbitration in India: A Comprehensive Guide*" by Tariq Khan. He notes that as a leading expert in international arbitration, Khan presents a straightforward and comprehensive view of the arbitration process in India, making it accessible to readers from start to finish. The author in his review breaks down different sections of the book and provides a brief overview of each section. The author also appreciates the user-centric approach and how this book has allowed readers unfamiliar with arbitration in India to grasp the subject. The author concludes by emphasizing the book's value to both local and international practitioners and parties.