

EDITORIAL

As India continues to establish itself as a key player in the international arbitration community, IRIArb's commitment to shaping the contemporary narratives of the field is stronger than ever.

The second half of 2023 was another instrumental year for arbitration law and practice in India, both at the legislative as well as judicial fronts. During this period, it became clear that arbitration law in India would be gearing towards another round of reforms. The Indian government set up a high-level expert committee [**"Expert Committee"**] to recommend reforms to the [Indian] Arbitration & Conciliation Act, 1996 [**"Act"**]. The terms of reference of the Expert Committee, among other issues, includes recommending statutory means to minimise recourse to judicial authorities in arbitration matters. The report of the Expert Committee is still pending, and it is expected to endeavour to supplement the pro-arbitration amendments made in 2015 and 2019, and further align India's practice with other pro-arbitration jurisdictions. Arbitration friendly reforms to the Act would be a great way to commemorate the silver jubilee of the Act and ensure that India moves closer to becoming the leading seat for arbitrations.

Notably, in parallel, the UK & Wales Law Commission [**"UK Law Commission"**], also concluded a detailed three-stage public consultation process, whereby it reviewed various facets of the [English] Arbitration Act, 1996.¹ The Expert Committee may consider taking inspiration from the wide-ranging areas of reforms suggested by the UK Law Commission to shed light on certain shortcomings in the Act.² One such area may be the approach taken towards the protection of confidentiality of an arbitration.

There is no gainsaying that arbitration's confidentiality is an essential element in determining the suitability of a seat of arbitration. It is essential that a regime for safeguarding confidentiality must include a robust list of exceptions coupled with guarantees that disclosures, if any, are only done to the extent necessary. Blanket confidentiality is certain to be a hindrance in the arbitral process as well as in the taking of evidence by courts. Once confidentiality has been breached, not much can be done, irrespective of whether the cause of disclosure was legitimate or not. It is therefore necessary to have the exceptions coupled with mechanisms of disclosures set out in law. This could either be instilled in common law or statute. On the one hand, the Law Commission considered the former to be better

¹ England and Wales Law Commission Report on the Review of Arbitration Act 1996 (2022-2023).

² Arbitration & Conciliation Act 1996 (India).

suited owing to the facts' specific and robust nature of confidentiality.³ On the other hand, common law jurisdictions such as New Zealand,⁴ Australia,⁵ and Singapore,⁶ have a codified robust confidentiality provision with exceptions and guidance on the extent of disclosure. For instance, when invoking an 'interests of justice' exception, the court will determine whether the disclosure is necessary for true evidence to reach the court and the extent to which it is necessary.

Although India has a codified provision in Section 42A of the Act, the same is rather rigid and not exhaustive or robust. The only exception envisaged by the provision is for the enforcement of awards. Arbitration practice however reveals that disclosures may also be required for other purposes such as solicitation of third-party Funders, disclosure by an arbitrator (as seen in *Haliburton v. Chubb*),⁷ in public interest, interests of justice and protection of legitimate interests of the parties. Notably, the Justice B.N. Srikrishna Committee in its report had also recommended keeping "*disclosure is required by legal duty, to protect or enforce a legal right, or to enforce or challenge an award before a court or judicial authority*" as exceptions.⁸ This suggestion, however, was not incorporated by the legislature.

Apart from the above-highlighted concern of Section 42A being rigid and a potential hindrance to the effective conduct of the arbitral process, a completely polar concern exists of the provision being construed very narrowly. The provision mandates that the delineated actors must maintain confidentiality of all 'arbitral proceedings'. The same is not defined in the Arbitration & Conciliation Act and because there is no jurisprudence, there may be uncertainty on fronts such as whether the provision covers documents being used in arbitration. In a nutshell, the current provision as it stands is rigid, which may act as a potential hinderance in certain arbitral processes. Apart from just adding robust exceptions, clarity on the scope of the provision's applicability to documents, evidence, other third parties such as witnesses and third-party funders, etc is also required. This is to ensure that the provision is not so narrow as to render it nugatory in certain circumstances.

On the judicial front, India witnesses a very eventful year with landmark judgments being pronounced on certain widely deliberated issues of Indian arbitration jurisprudence. In particular, the

³ England and Wales Law Commission Consultation Paper 257 (Sept., 2022) [2.39-2.46].

⁴ Arbitration Act 1996, §14B – 14E. (New Zealand)

⁵ International Arbitration Act 1974, §15, 23C – 23G.

⁶ International Arbitration Act, §23.

⁷ *Halliburton Company v. Chubb Bermuda Insurance Ltd*, [2020] UKSC 48.

⁸ High Level Committee to Review The Institutionalization of Arbitration Mechanism in India (July 30, 2017).

judgments pronounced by the constitutional bench of the Supreme Court in *Cox and Kings* and *NN Global*.

In our preceding issue, we extensively covered the case of *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd*, since then, there has been a pivotal development in this case, warranting further examination. Now *In re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 And The Indian Stamp Act, 1899*,⁹ a seven-judge bench of the Supreme Court delivered its judgment on the disputed position of unstamped arbitration agreements in India. The court ruled that arbitration clauses in unstamped or inadequately stamped arbitration agreements are enforceable. In overruling the position taken in *NN Global II*,¹⁰ the court effectively affirmed its position in *NN Global I*.¹¹ The bench has unanimously ruled that the court under Sections 8 and 11 shall only limit its examination to the existence of the arbitration agreement and the issue of stamping shall be decided by the Tribunal under Section 16 of the Act.

The Supreme Court examined the provisions of Section 5, along with Section 16 of the Act, that were intended to minimise judicial interference in the arbitral process. The court noted that Section 5 began with a non-obstante clause due to which it prevailed over the duties of the court envisaged in Sections 33 and 35 of the Indian Stamp Act, 1899 [**“Stamp Act”**]. On a combined reading of the above, the Court held that judicial authorities could not interfere in matters dealing with the jurisdiction of the tribunal. Since the power of examining the validity of an arbitration agreement to determine jurisdiction has been vested solely upon the tribunal, it implies that courts can’t decide the question of the validity of an arbitration agreement in a Section 11 application, and must limit them only to examine for its existence.

The court also emphasized the importance of honouring the separative presumption. It underscored that this presumption is crucial for upholding the parties' intentions and ensuring the effective operation of the competence-competence doctrine. Consequently, the court firmly established that the arbitration agreement stands entirely distinct from the underlying contract. Thus, even if the main contract were deemed unenforceable due to lack of stamping, it would not impede the enforceability of the arbitration agreement. As a result, objections related to stamping, which essentially question the validity of the arbitration agreement, cannot be raised in a Section 11 application, and squarely fall under the tribunal's exclusive jurisdiction.

⁹ 2023 LiveLaw (SC) 1049.

¹⁰ 2023 SCC OnLine SC 495.

¹¹ (2021) 4 SCC 379.

A single-judge bench of the Supreme Court in *M/S Larsen Air Conditioning and Refrigeration Company v. Union of India & Ors.*¹² reiterated its stance that a court exercising power under Section 34 of the Act is not clothed with the power to modify an arbitral award *qua* interest. The court can only set aside the award in part or whole. The issue before the bench was whether the High Court erred in modifying the arbitral award to the extent of reducing the interest rate from compound interest of 18% to a simple interest of 9% per annum.

The Supreme Court examined Section 31(7)(b) of the pre-amended Act and while citing a similar case, it observed that since the arbitration commenced in 1997, the Act applied to the present matter. In the pre-2015 amendment provisions of Section 31(7), the statutory threshold for interest was set at 18% per annum in cases where the arbitral award did not specify a rate and therefore, the order of the arbitrator could not be interfered with. It further observed that interference with the award was warranted solely on the grounds of patent illegality and unless the arbitrator interprets a contractual term unreasonably, the arbitral award remained immune to being set aside.

To substantiate its stance, the Supreme Court referred to *NHAI v. Hakeem*¹³ [**“Hakeem”**], a division bench decision, to outline the narrow scope of interference with arbitral awards. However, it is noteworthy that neither the court in the present case nor Hakeem referred to *Vedanta Limited v. Shenzhen Shandong Nuclear Power*¹⁴ [**“Vedanta”**] which modified the interest granted by the arbitral tribunal and set the stage for other courts to modify an award *qua* interest. More so, the Hakeem decision, and thereby the present case, posits its observation that modification of an award could be done only while exercising extraordinary powers under Article 142. At the same time, the Vedanta decision does not rely upon Article 142 and bases its observation on the anvils of reasonability, prevailing economic conditions, and interests of justice. It is evident that the Vedanta decision (also a division bench) still stands in place which has been completely overlooked by the court in the present case.

While the decision of the Supreme Court may be correct, it has overlooked a substantial question of law- a law still in existence, delivered by a higher bench of this court.

In another landmark case of *Cox and Kings v. Sap India Private Ltd.*,¹⁵ the Supreme Court has given a new shape to the Indian arbitration landscape. It emphasized the crucial distinction between a non-party and a non-signatory and observed that implied consent can also be wielded to

¹² (2023) INSC 708.

¹³ (2019) 11 SCC 465.

¹⁴ (2021) SCC OnLine SC 473.

¹⁵ *Cox and Kings v. Sap India Private Ltd*, (2023) SCC OnLine 1634.

consider a non-signatory as a party to an arbitration agreement. The Supreme Court has settled the dust concerning multi-party arbitration by ruling upon the application of the ‘Group of Companies’ doctrine in India. It laid down several factors namely the mutual intent, relationship of the non-signatory with the party signatory to the agreement, commonality of subject matter, composite nature of transactions and performance of the contract that must be cumulatively looked into before the application of the doctrine.

The global arbitration sphere has also witnessed developments with judgements being passed on various contentious issues in particular by the courts in U.S.A. and Singapore.

Whether an award annulled at the seat of arbitration can be recognized and enforced in another jurisdiction is always a contentious issue. A straight-jacketed answer in the negative would have major undesired ramifications striking at the foundations of the arbitration law. The aim/ desired ends of International Arbitration, as stated in Redfern & Hunter, is to be free from the constraints of national laws to the extent practicable. A fixed answer in the negative also furthers the misuse of such an approach by state entities in both investment and commercial arbitrations.

We witnessed an interesting development on this front in the US Court of Appeals for the Tenth Circuit. The holding of the impugned case i.e., *Compania de Inversiones Mercantiles SA* [“CIMS A”] v. *Grupo Cementos de Chihuahua SAB de CV* [“GCC”] was that an award annulled at the seat can still be enforced in the U.S.A. as long as it does not violate the American public policy.¹⁶ The holding appears to be furthering the stance taken in the seminal case of *Chromalloy Aeroservices v. Arab Republic of Egypt*.¹⁷ The approach (as will be detailed below) has also been taken in various other American cases,¹⁸ as well as by courts in other jurisdictions.¹⁹

To delve into the instant case, CIMS A in 2015 was awarded damages for breach of shareholder agreement in a Bolivian seated arbitration. GCC then plead before a lower Bolivian court to annul the damages award, the ruling of which came in their favour. However, after subsequent rounds of appeal, the Plurinational Constitution Tribunal (apex court) vacated the lower court’s decision of annulment. To counter the recognition of the award, GCC filed a new appeal leading another chamber of the Bolivian PCT to finally annul the award in October 2020. Coming to the chain of events

¹⁶ *Compania De Inversiones v. Grupo Cementos de Chihuahua*, No. 21-1324 (10th Cir. 2023).

¹⁷ *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996).

¹⁸ For example, See: *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92 (2d Cir. 2016).

¹⁹ See: UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016), at 220, 221.

revolving in the U.S.A., CIMS A back in September 2015 had already filed for recognition of the award in the district court of Colorado. The ruling for which was in their favour. GCC however asked the district court to vacate its judgement after the 2020 annulment by the PCT. The motion to vacate was denied on the grounds of i) finality being a part of the American Public Policy; ii) upholding parties' contractual expectations; and iii) policy in favour of arbitral dispute resolution. The majority in the Tenth Circuit bench upholding the district court's reasoning also held that per Article V(2)(b) of the New York Convention,²⁰ the courts have the discretion to not enforce an award when it violates the seat's public policy. It also observed that considerations of finality as a public policy outweighed considerations of comity. The dissent on the contrary held that the test applied had been rejected by the sibling circuits, is contrary to the New York Convention and overturned the district court's decision as finality did not constitute a part of the American public policy among other reasons of domestic law. As stated above, the majority reasoning (as also addressed in the judgement) is the one in line with other courts, both American and globally. The majority could also have relied on Article VII(1) of the New York Convention to further buttress its interpretation.²¹ The same states "...nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon" and is a mandatory provision.

Another contentious judgment is in the case of *Anupam Mittal v. Westbridge Ventures II Investment Holdings*.²² This case revolves around a shareholders' agreement ["SHA"] entered into by the parties in 2006, which included a dispute resolution clause mandating Singapore arbitration, subject to the Act for enforcing awards. Disputes arose in 2019, leading the Applicant to file a company petition²³ before the National Company Law Tribunal ["NCLT"] in India. In response, the Respondents sought an anti-suit injunction from the Singapore High Court ["HC"], leading to a complex legal battle. The HC²⁴ granted an ex-parte anti-suit injunction, upheld on appeal by the Court of Appeal in Singapore ["SCA"] in January 2023. Simultaneously, the Respondents initiated arbitration proceedings, and the Applicant sought relief from the Bombay High Court²⁵ against the anti-suit injunction, which was granted.

²⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 330 UNTS 3. [hereinafter "**New York Convention**"]

²¹ New York Convention art. VII (1).

²² *Anupam Mittal v. Westbridge Ventures II Investment Holdings*, [2023] SGCA 1.

²³ *Anupam Mittal v. People Interactive (India) Pvt. Ltd. and Others*, CP/92(MB) 2021.

²⁴ *Westbridge Ventures II Investment Holdings v. Anupam Mittal*, [2021] SGHC 244.

²⁵ *Anupam Mittal v. People Interactive (India) Pvt. Ltd. and Others*, Suit No. 95 of 2021.

The SHA specified that the agreement and its execution would be governed by Indian law, but the SCA disagreed. The SCA applied the hierarchy laid down in the *Sulamerica*²⁶ case, prioritizing the express choice of law, the implied law reflecting intention, or the law closely connected to arbitration. The SCA found the arbitration clause ambiguous, allowing it to apply Singapore laws due to its interpretation of the *Sulamerica* case. The SCA's perspective considered the non-arbitrability of oppression and mismanagement [“O&M”] disputes in India and allowed Singapore laws to govern the arbitration, but only until the pre-award stage.

The anti-anti-injunction suit was granted by NCLT on the grounds of India's public policy. It raises concerns about the post-award stage, as Indian courts, under the Act, would likely refuse enforcement, considering O&M disputes non-arbitrable in India. The SCA's decision to apply Singapore laws until the pre-award stage is questioned, as it seems to prioritize protecting Singapore's pro-arbitration image over the potential enforceability issues in India. The SCA's approach may render the arbitration process futile, despite the court's assertion that it remains worthwhile for evidence gathering and legal principle establishment.

Amidst this backdrop of significant developments in the global landscape of Arbitration, IRIArb brings the second issue of its Volume 3. The issue contains contributions from around the world and features articles on issues relevant to arbitrations, such as the role of arbitration in combating climate change, the disproportionate impact of BITs on host states, the restricted pre-referral jurisdiction of Indian courts, and also includes an industry insight.

The article by Lalit Kumar Deb and Prithivi Raj titled “*Arbitration Strategies for Resolving Climate Change and Sustainability Disputes in Commercial Transactions*” explores arbitration in addressing climate change and sustainability disputes in commercial transactions. Emphasising the challenges posed by regulatory shifts, extreme weather events, and changing consumer demands, the authors argue that arbitration's flexibility makes it a practical and confidential platform for resolving these issues. They highlight the potential of arbitration agreements to incorporate sustainability considerations, promoting responsible corporate behaviour. The article discusses the evolving landscape of climate-related disputes, emphasising the need for specialised expertise in environmental matters during arbitration. It categorises disputes based on legal actions, financial responsibilities, industry changes, meteorological phenomena, conflicts between nations, and government contracts. The authors stress the importance of aligning contractual obligations with

²⁶ *Sulamérica Cia Nacional de Seguros S.A. and Others v. Enesa Engenharia S.A. and Others*, [2012] EWCA Civ 638.

environmental responsibility to mitigate climate change risks. The article recommends proactive measures, including well-drafted arbitration agreements, early dispute resolution, risk audits, and dispute protocols for managing climate change and sustainability disputes in commercial transactions.

The article by Thiago Ferreira Almeida titled “*Protection of the Foreign Investor: An Analysis of the Main Substantive Clause under the Perspective of Host States*” critically examines the historical development and contemporary challenges of international investment law, centring on Bilateral Investment Treaties (BITs) and their repercussions on host states. Initially designed to unilaterally safeguard foreign investors, BITs saw a surge in adoption from the latter half of the 20th century, intensifying notably post-1980s. However, the 21st century brought forth substantial criticism, citing subjective decisions, contentious interpretations, and perceived constraints on states’ legitimate pursuit of public interest goals, such as environmental protection and economic measures. The study delves into ad hoc arbitration cases, scrutinising substantive BIT rules including National Treatment, Most-Favoured-Nation Treatment, Minimum Standard of Treatment, Fair and Equitable Treatment, Full Protection and Security, Direct and Indirect Expropriations, Compensation, and the Umbrella Clause. The analysis unveils a discernible pattern of inconsistent arbitral awards that disproportionately affect states, particularly host nations, as underscored by recent amendments reflecting a shift towards more restrictive models in international investment protection.

The article by Ieshan Sinha titled “*Pre-referral Jurisdiction: B&T AG v. Ministry of Defence Widens the Eye of the Needle*” analyses the extent of the pre-referral jurisdiction of the court i.e., at the stage of referring the matter to arbitration. It acknowledges how the scope of interference by the courts is limited to rejecting ex-facie time-barred claims or claims barred by limitation and highlights how the court wielded this ground of limitation to expand the scope of the pre-referral jurisdiction. The author concludes that such precedent would warrant unnecessary and unjustified interference by the courts denuding the claimant of its right to a prompt resolution of dispute.

In the industry insight, Shravan Niranjana and Aisvaria Subramaniam explore the Singapore International Arbitration Centre [“SIAC”] as a prominent arbitral institution, positioning itself as the second most preferred globally after the International Chamber of Commerce. The focus is on the 7th edition draft of SIAC amendment rules, designed to align with contemporary arbitration practices. The amendments include innovative features such as the Streamlined Procedure, Third-Party Funding, Preliminary Determination, and SIAC Gateway. The Streamlined Procedure, a notable addition, aims to expedite dispute resolution, introducing a quicker track for small-value disputes. However, concerns arise regarding potential limitations on party autonomy, the absence of guaranteed

rights to a hearing, and unclear criteria for its application. The article also highlights amendments related to Third-Party Funding, requiring disclosure of agreements, and the introduction of Preliminary Determination for efficient issue resolution. The SIAC Gateway incorporates technological advancements, facilitating centralized case filing and hybrid hearings. The SIAC's proactive approach to rule evolution is emphasized, aligning with the institution's commitment to adaptability and innovation in international arbitration.