International Arbitration Focus: India

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ReedSmith

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Contents

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Welcome

This is the final Reed Smith newsletter on international arbitration in 2022, and it focuses on a single country – India.

India is a place of vast possibilities but also a place where foreign lawyers are not yet able to practice. This means our arbitration practitioners interested and invested in India are not based there. Instead, they operate from London, Singapore, the Middle East, and other offices in our global network. As this newsletter showcases, we have a wide range of practitioners for whom India occupies much time and energy. We can coordinate across offices to help clients in India or with India-related issues. Good relations with leading Indian legal practitioners are, of course, important in delivering effective service to our clients in such matters. Our arbitration group is a key part of that service.

As India continues to make headlines in various fields of endeavor, arbitration is an area where headlines can also be written. In this newsletter, the constraints of space mean we must limit the number of subjects covered by our arbitration lawyers. However, Reed Smith is committed to those invested in India and looks to contribute to headline matters in India across the sectors of activity for which it is well known. Our experience and local knowledge, obtained through many years of involvement in India, mean that we understand how Indian clients and businesses operate. We also understand the cultural, historical, and social aspects of India as a country and as a commercial marketplace. All these factors have influenced, and continue to influence, how arbitration is viewed and embraced by Indian stakeholders. In recent times, India has increasingly aligned with international good arbitral practices, but local knowledge remains key to a successful outcome. We look to combine our sector strengths with our country knowledge, while always being ready to listen and learn as we partner with clients through the challenges they face.

We hope that you enjoy this edition of our newsletter and that it may give you pause for thought and comment.

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Note from the Editors

Today, India is a unique proposition, mixing a rich past, a young population and an exciting future. That was perhaps not always the global perception. But in this century and looking forward, India arguably occupies the single most interesting position amongst large nations. It is on the verge of becoming the most populous nation in the world. As its self-confidence grows, so do its ambitions, led by forward-thinkers who have worked tirelessly to bring India into the modern world. The bureaucracy has perhaps not yet been satisfactorily overcome, but India has nevertheless shown itself to be both astute and determined on the world stage.

Looking from the outside, it might sometimes appear that India remains somewhat rooted in the past while at the same time working to modernise and continue its pursuit of trade liberalisation these past 20 to 30 years. The practice of law illustrates this balancing act, with foreign lawyers not currently permitted to practise in India and no re-qualification system for foreign lawyers in place. But it is a fair assumption that India will not stand still on this and other matters. India's biggest asset, about 20 per cent of the world's youth population, almost guarantees that.

In matters of arbitration, India has had legislation in place since the turn of the 20th century. But it is probably fair to say that India was not regarded as arbitration-friendly throughout most of the 20th century. However, the 1996 Arbitration and Conciliation Act heralded modernisation and change in the Indian legislative framework.

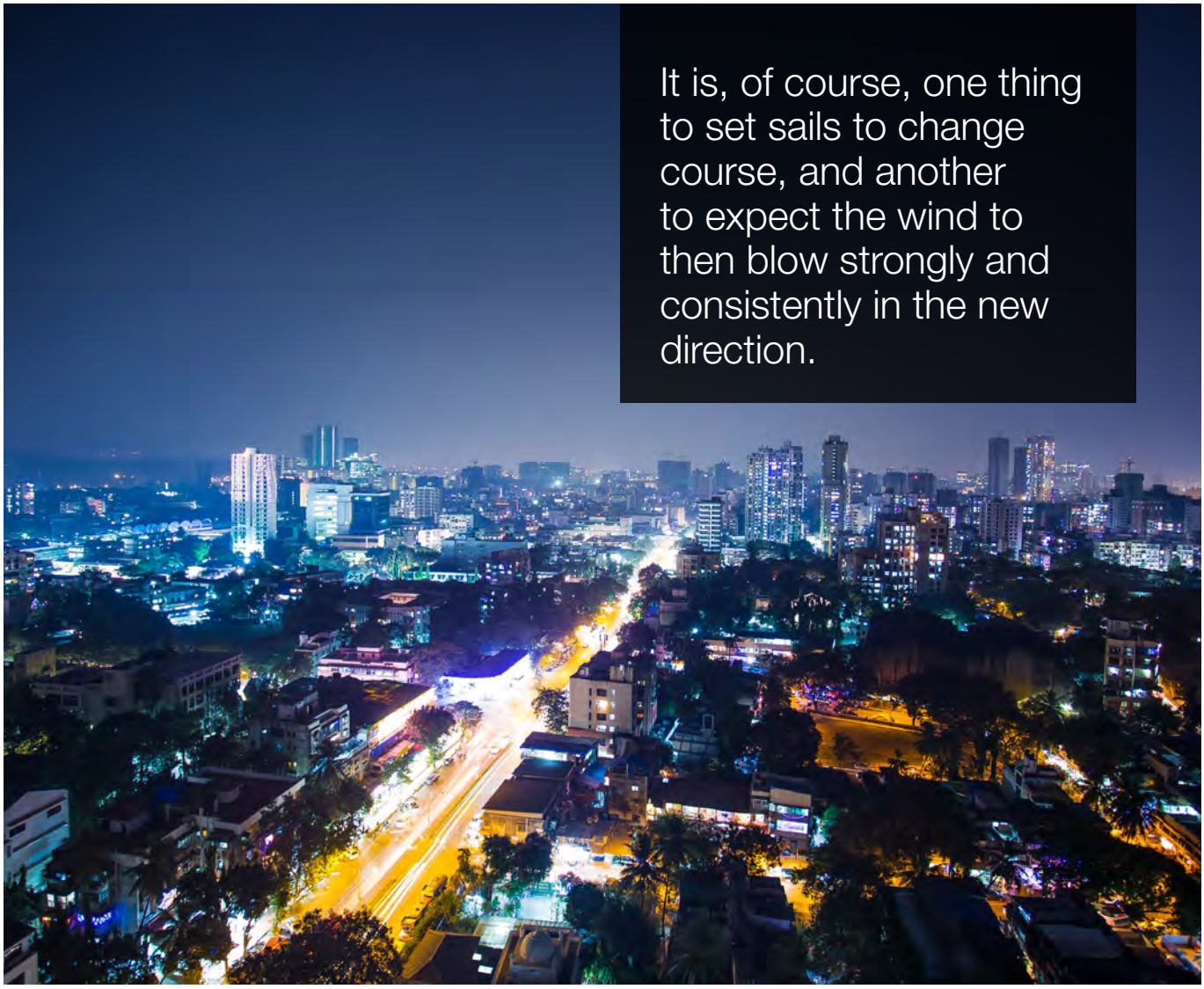
It is, of course, one thing to set sails to change course, and another to expect the wind to then blow strongly and consistently in the new direction. But as this newsletter hopefully evidences, the world of international arbitration is a dynamic topic in India and the future looks bright.

In this edition, the contributions from our international arbitration lawyers, drawn from around our global network, range from investment treaty issues to profiles of some of India's leading personalities in the arbitration field. A common theme is that they show India to be alive and actively attentive in matters of international arbitration.

Chloe Carswell, Rebeca Mosquera, Lucy Winnington-Ingram and Wardah Bari offer insight into investment arbitration in India. As well as reporting on cases, the authors comment on the shifting landscape in terms of how far India is prepared (or not) to accept the well-known international standards that have historically applied to investor claims.

Gautam Bhattacharyya reports on how the yearly Global Arbitration Review (GAR) gathering in India has become a central arbitration fixture in India. Gautam has co-chaired GAR India since its inception in 2019.

Simon Greer reports on the Mumbai Centre for International Arbitration, founded in 2016, which is attracting attention as part of a wave of regional arbitration centres in India.



Timothy Cooke and **Khyati Raniwala** offer their thoughts on a widely reported 2021 Indian Supreme Court judgment. The Supreme Court held that awards by emergency arbitrators in India-seated arbitrations would be directly enforceable in India as awards.

Soham Panchamiya offers thoughts on enforcing blockchain arbitration awards in India. This throws up issues that the drafters of the New York Convention could never have had in mind.

We conclude this newsletter on a more personal note with insights from two of India's best-known and respected legal names in arbitration – Mr. Fali S Nariman and Justice B N Srikrishna. Both were hosted by **Gautam Bhattacharyya** as part of our regular podcast series, Arbitral Insights. Listen to the episodes in full by searching Arbitral Insights on reedsmith.com, or by accessing here.

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Investment Treaty Arbitration in India

A brief history of ISDS claims against India

India signed its first bilateral investment treaty (BIT) with the United Kingdom in 1994. Since 1994, India has signed BITs with 86 countries.[1] With the opening up of Indian markets to foreign investment in 1991, India entered into a series of BITs (mostly with capital exporting countries) with the expectation that they would increase investors' confidence, leading to higher foreign investment.

In the last 20 years, there have been more than 25 investment dispute settlement (ISDS) cases against India, [2] making India one of the most frequent respondent states in ISDS.[3] The BIT regime in India gained particular attention in 2010 with the settlement of the first-ever treaty claim launched against India and in 2011 when India received its first adverse award in *White Industries* under the India-Australia BIT.

Since 2010, 20 ISDS claims have been brought against India, seeing India subject to six adverse awards and prevailing in two of those cases. The remaining cases are either pending or have been discontinued. Most of the claims have been brought under the India-Mauritius BIT or the India-UK BIT. While the claims cover a wide variety of sectors, including oil and gas, automotive, transportation, and media and broadcasting, most of the claims arise out of investments in the telecommunications industry. Most claims relate to actions of the executive branches, although some are attributable to the judicial and legislative functions.

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A summary of some of the more recent cases is provided below.

Nissan v. India (2017): Japanese carmaker Nissan brought claims against India arising out of non-payment incentives by the Indian state government of Tamil Nadu, which had allegedly been promised to the claimant under an agreement to build a car plant, which was signed by the state in 2008. The case was brought under the Economic Partnership between Japan and India (2011). Despite ongoing settlement discussions and efforts by the Indian courts to restrain the arbitral proceedings, an arbitral tribunal was constituted to hear the case. The case was settled in 2020 with Nissan receiving one-third of the $660 million it claimed in damages during the arbitration.[4]

Vodafone v. India (II) (2017): Vodafone filed a second multibillion-dollar investment treaty claim against India in connection with a retrospective transaction tax imposed by the government over the claimants' acquisition of Indian-based Hutchison Whampoa telecoms business (Vodafone II). The claim followed an earlier UNCITRAL claim filed by Vodafone's Dutch subsidiary under the Netherlands-India BIT in 2014 (Vodafone I). This time, Vodafone brought the claims under the India-United Kingdom BIT (1994), arguing that it was not liable for the tax as the transaction was conducted between two non-Indian companies, and the target asset was registered in the Cayman Islands. Vodafone I was decided in favor of the investor, and India challenged the award before the courts in Singapore. Vodafone has chosen not to take any steps to advance the second arbitration pending the outcome of India's challenge of the award, and it is presently unclear whether Vodafone has formally requested a discontinuance of the proceedings.[5]

Astro and South Asia Entertainment v. India (2016): Astro and South Asia Entertainment brought claims under the India-Mauritius BIT (1998) and the India-UK BIT (1994) arising out of an allegedly unfair and biased criminal investigation by the government relating to suspected bribery by the claimants of Indian government officials. Astro, a Malaysian satellite TV group, had been targeted by a criminal prosecution linked to the country's 2G spectrum scandal. The Astro group of companies, which does not operate in India's mobile market but has been under investigation in connection with the 2G scam since 2011, sent India a notice of dispute. However, the claimants withdrew their claims, and the tribunal issued an award recording the withdrawal and imposing a cost order against the claimants.[6]

RAKIA v. India (2016): Rakia brought claims arising out of the alleged non-fulfillment and subsequent cancellation of a memorandum of understanding signed in 2007 between the government of the Indian state of Andhra Pradesh and the claimant. In a May 11, 2022 award, the tribunal unanimously dismissed the case on jurisdictional grounds.[7]

Cairn v. India (2016): Cairn UK Holdings Limited brought claims arising out of a draft assessment order issued by the Indian Income Tax Department, in respect of fiscal year 2006/7 for $1.6 billion-plus any applicable interest and penalties; and the alleged prohibition against the claimant selling its 10 percent shareholding in Cairn India Limited. The claims were brought under the India-UK BIT (1994). On December 21, 2020, the tribunal found that tax measures applied retroactively had violated the BIT. India was ordered to pay over $1.2 billion in compensation. However, in a December 21, 2021 decision, the Hague Court of Appeal decided to set aside the award after the claimant opted not to object to the set-aside application, reportedly on the basis of ongoing settlement negotiations with the state.[8]

Louis Dreyfus Armateurs (LDA) SAS v. India (2014): LDA brought claims under the France-India BIT (1997) for measures by the Indian government that allegedly prevented the effective implementation of a joint venture related to a port modernization project at Haldia in Kolkota, in which the claimant held stakes. The claimant alleged that India failed to provide protection and security to the project and to obey court orders concerning the removal of equipment from the port. On September 11, 2018, the tribunal dismissed the investor's claims, concluding that LDA's claims lacked jurisdiction since the BIT required that an investor in an indirect investment hold at least 51 percent ownership to fall within the BIT's protection.[9]

Deutsche Telekom v. India (2013): Deutsche Telekom brought claims against India under the Germany-India BIT (1995), arising from the government's cancellation of a contract concluded with Devas, a company in which the claimant held interests, concerning the provision of broadband services to Indian consumers. In a 2017 interim award, the tribunal unanimously found that the cancellation violated the Germany-India BIT's fair and equitable treatment provision. India's subsequent bid to set the partial award aside in Switzerland failed. On May 27, 2020, the tribunal ordered India to pay approximately $93 million to the claimant.[10]

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India's decision to terminate its treaties and the new Model BIT

In *White Industries*, an Australian investor filed a claim against India under the India-Australia BIT due to lengthy judicial delays in enforcing a commercial arbitration award against Coal India Limited in India. Among other things, White Industries argued that because of the judicial delays, India had failed to provide "effective means of asserting claims and enforcing rights" (the "effective means" standard) to White Industries. The tribunal agreed with White Industries and held India responsible for violating the effective means standard.[11] The tribunal held that by virtue of the most favored nation clause in the India-Australia BIT, White Industries could invoke the effective means standard accepted by India under the India-Kuwait BIT. In 2011, the tribunal found that India violated its obligations under the India-Australia BIT.[12]

After the adverse decision in *White Industries*, several foreign corporations submitted ISDS claims against India, challenging various regulatory measures, such as the imposition of retrospective taxes, cancellation of spectrum licenses, and revocation of telecoms licenses. These claims following the decision in *White Industries* ultimately led to India's termination of existing BITs and adoption of a new model in 2016.

In July 2016, India sent notices to 58 countries announcing its intention to terminate (or not renew) its various BITs (including the United Kingdom, France, Germany, and Sweden BITs). This notice heralded a shift from India's previous foreign investment policies, which saw India enter into around four or five investment treaties a year between 1994 and 2011.

Whilst these BITs may have been terminated (or not renewed), many of them included "sunset" clauses such that existing investors will continue to receive investment protections for a further period of, for example, 10 or 15 years after the date of termination. Several other treaties remain in effect in India because they cannot be terminated until their initial terms have expired. As a result, India has circulated a proposed joint interpretative statement to the contracting states to these BITs (including the China, Finland, Bangladesh, and Mexico BITs) to clarify any ambiguities in the texts in order to avoid expansive interpretations by arbitration tribunals. India also aims to use a revised BIT framework to negotiate future investment chapters in free trade agreements (FTAs), such as comprehensive economic cooperation agreements (CECAs) and comprehensive economic partnership agreements (CEPAs).

India's termination of its existing BITs was followed by the introduction of a new and more restrictive model text. In 2016, India published a draft Model Text for the Indian Bilateral Investment Treaty (Model BIT), which attempted to recalibrate the balance between the state and foreign investors, thereby addressing India's concerns that previous BITs were skewed in favor of foreign investors.

As such, the 2015 Indian Model BIT aims to balance the investors' rights and the government's obligations, and it restricts the standards of protection given to investors. In particular:

1. The most favored nation treatment often used to import substantive protections from other BITs is excluded.

2. The broadly interpreted fair and equitable treatment wording typically found in investment treaties is excluded and replaced with a list of measures, such as denial of justice, fundamental breach of due process and discrimination, or manifestly abusive treatment, each of which must constitute a violation of customary international law in order to constitute a breach of the treaty.

3. The full protection and security provision is expressly stated to be restricted to the physical security of investors.

4. A foreign investor's right to commence arbitration is also limited as the investor must first attempt to exhaust local remedies for five years.

These changes appear to be squarely aimed at preventing any repeat of previous claims. One of the main questions with India's new Model BIT is whether the resulting provisions may discourage foreign direct investment into India. However, according to the United Nations Conference on Trade and Development (UNCTAD) World Investment Report, although there was a decline in foreign direct investment inflows from 2020 to 2021, India remains among the top 10 economies of the world receiving foreign direct investment, ranking seventh after the United States, China, Hong Kong, Singapore, Canada, and Brazil and with robust investments through cross-border mergers and acquisitions in ICT (software and hardware), healthcare, infrastructure, construction, and energy in recent years.[13]

Horizon scanning

Notwithstanding its decision to terminate the majority of its BITs, the government of India has made significant efforts to attract and increase foreign direct investment over the last few years, despite the impact of the COVID-19 pandemic disproportionately affecting India compared with other nations. India has relaxed administrative regulations for foreign investors in some industrial sectors by abolishing the requirement for approval by the Reserve Bank of India in certain circumstances. The government has recently relaxed foreign investment policy in a variety of sectors by raising the foreign investment limit, easing conditions for investment, and putting many sectors on the "automatic route" – the current foreign investment regulations allow 100 percent foreign investment in most sectors open to private investment in India (as opposed to the "government route" that applies to certain areas that require prior government approval before a foreign investment can be made, or where less than 100 percent foreign ownership is permitted, which requires approval from the Foreign Investment Promotion Board).

Government involvement and support of foreign investment are proactive, with central government providing tax and non-tax investment incentives in specific sectors and regions and creating incentives for manufacturing companies to set up in special economic zones, national investment and manufacturing zones, and export-oriented units. In addition, each state government has its own policies, providing additional investment incentives, including subsidized land prices, attractive interest rates on loans, reduced tariffs on electric power supply, and tax concessions. In 2021, India launched the National Single-Window System, which will become a one-stop shop for approvals and clearances needed by investors, entrepreneurs, and businesses.

These efforts have borne fruit – foreign investment in India over the last two to three years has been encouraging. In addition to ranking seventh among the top 20 foreign investment host economies, a flurry of new international project finance deals were announced in the country in 2021: 108 projects, compared with 20 projects, on average, for the last 10 years. The largest number of projects was in renewables. Singapore, Mauritius, the Netherlands, Japan, the United States, the UK, France, and Germany are the main investing countries in India in the services, computer software and hardware, telecommunications, trade, automobile industry, construction, and chemicals industry sectors.

Whilst this is commendable, the country still has several restrictive laws on foreign investment, excessive bureaucracy with cumbersome and slow administrative procedures, and high levels of corruption. This, in turn, leads to a tension between the speed of, and enthusiasm for, reform and the processes required to facilitate it and how it might be operating in practice, thereby creating a fertile breeding ground for disputes between foreign investors and the state. In addition, the positive initiatives designed to encourage foreign investment can also conversely provide the basis for investment claims. For example, the unilateral removal of, or adverse changes in, sector-specific incentives, favorable tariff regimes, land subsidies, increased interest rates, and the potential for inconsistent approaches by central and regional governments are all likely to constitute one or more breaches of a treaty.

Currently, foreign investment primarily comes from a limited number of states, suggesting a nervousness about the robustness of the investment environment outside the limited treaty regime, despite the positive steps to encourage it. In recognition of this, in February 2022, the Committee on External Affairs recommended that the signing of BITs be "encouraged selectively in identified core/priority sectors/areas" and that such core/priority sectors be identified by the concerned ministries/departments/agencies.

India is obviously keen to avoid investment treaty disputes and is sensitive to public perception and the visibility of disputes with foreign investors. The Committee on External Affairs has further recommended that steps be taken to settle each dispute "outside of arbitration/before it proceeds to arbitration or comes up before the Tribunals" through a mechanism of pre-arbitration consultation/negotiation, in an effort to deal quickly with disputes below the radar and present a positive investment environment.

Recent cases initiated against India since the termination of the majority of its BITs have been brought by foreign investors from as far afield as Korea, Germany, Sweden, Switzerland, Malaysia, Mauritius, Singapore, the UK, the UAE, and Cyprus. These include claims arising out of the failure to provide loan facilities, the failure of a local telecoms company due to the acts and omissions of the government, the termination of contracts for ground handling contracts at airports in India, and the breach of legitimate expectations relating to the legal and policy framework in India at the time an investment was made, in addition to reliance on statements made by the central and local governments that had painted the region as open to investment in its gas power sector.

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Global Arbitration Review (GAR) India

Reed Smith is privileged to have been closely involved in curating the agenda for, and contributing to, the GAR India conference.

We are already now involved in preparations for the fifth annual GAR India, which is set to take place in Mumbai on February 18, 2023.

Following GAR India 2019 in Mumbai, GAR India 2020 took place in New Delhi. Due to the COVID-19 pandemic, GAR India 2021 and 2022 took place remotely. It will be great to be back in person again for the 2023 edition.

In the course of the four GAR India editions so far, we have been fortunate to have as panelists, moderators, and keynote speakers several of the most eminent and respected international arbitration practitioners from India and abroad.

We have covered several issues that have generated impassioned discussion among the panels and equally among the delegates. We have also covered some hot topics in the much-anticipated GAR debates. There is never a monopoly on wisdom, and the contributions in the course of GAR India so far have very much underlined that.

Reed Smith international arbitration and litigation partner Gautam Bhattacharyya has co-chaired GAR India since 2019. His co-chair for the 2019 and 2020 editions was Shyam Divan, one of India's top Senior Advocates (equivalent to King's Counsel in the UK). Gautam's co-chair since GAR India 2021 has been Justice BN Srikrishna, a retired judge of India's Supreme Court and now one of India's foremost arbitrators.

Some of the topics GAR India has covered over the years include:

- Whether the 2018 Indian Arbitration Bill was a force for good in Indian arbitration, what is hindering the development of arbitration in India, and what the future for arbitration looks like.
- The role of third-party funding in Indian arbitration.
- Whether overseas parties are now able to rest easy on the enforcement of foreign arbitral awards in India.
- Investment treaty arbitration and India.
- Confidentiality and modern-day arbitration.
- The challenges and effects of new technology and data privacy on international arbitration, and efficiency and innovation in arbitration.
- Diversity in arbitration.
- Arbitrator conflicts and bias and maintaining faith and confidence in arbitration.
- Witness and expert evidence in international arbitration.
- The GAR Live Debates have explored the following motions:
  - Whether India can establish itself as an internationally accepted center for international arbitration within the next five years.
  - Whether aspiring Indian international arbitration practitioners need to first work overseas to build their expertise and experience.
  - The improvements needed to make Indian international arbitration a better version of what it is currently.
  - Whether there is due process paranoia in Indian international arbitration.

Our keynote speakers have included Fali Nariman (widely recognized as India's best-ever Senior Advocate and an authority on all aspects of international arbitration), Lord Mance (a former UK Supreme Court judge and now an arbitrator), and Justice Rohinton Nariman (then a serving Indian Supreme Court judge and now retired).

We are honored to have contributed to highlighting India as an important jurisdiction for arbitration excellence and talent, with the potential to be one of the world's leading arbitration centers. India very much deserves the focus that has rightly been placed on it by the international arbitration community and by companies and entities involved in doing business with Indian counterparties.

We look forward to GAR India 2023 being the best yet.

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Mumbai Center for International Arbitration and Young Mumbai Center for International Arbitration

Mumbai Center for International Arbitration

Founded in 2016, the Mumbai Center for International Arbitration (MCIA) is part of the wave of new regional arbitration centers that have opened across the globe in the last decade. India has long been a major jurisdiction in the arbitral world, with Indian parties and parties doing business in India regularly favoring arbitration agreements in their contracts, as opposed to court jurisdiction. This is across many industries that are huge areas of growth in India – financial services, tech, pharma, construction and engineering, and commodities, to name a few.

Traditionally, many Indian-related arbitrations were administered by the ICC, LCIA, or SIAC, being some of the most commonly used institutions by Indian parties and parties doing business in India. At present, that remains the case, with Singapore in particular now being a huge hub for Indian-related business and, consequently, arbitration. However, arbitration is a competitive business and, with the continued exponential rise of India as a global economic powerhouse, it is no surprise that arbitration centers within India itself have broken into the arbitration market. Having a first-class and modern arbitration center now goes hand in hand with trying to be a global financial center.

The MCIA is one such new entry to the arbitration community. Now in its sixth year of existence, it has grown swiftly, with the support of a Council of 16 leading domestic and international arbitration practitioners. Its Annual Report for 2021 explains that its caseload doubled that year and that the total value of cases under its administration had exceeded USD500 million. Headquartered at 2nd Floor, Express Towers, Ramnath Goenka Marg in Nariman Point in Mumbai, the MCIA has also expanded its footprint with Secretariat offices in Bengaluru and Gurugram (near New Delhi).

The MCIA has sophisticated and well-developed arbitration rules, which were drafted with the input of a diverse group of eminent arbitration practitioners. As of now, the current MCIA Rules are the Second Edition, dated 15 January 2017. Those Rules have kept pace with many of the demands and complexities of modern arbitration. For example, they include:

- Fee schedules for both administrative fees and arbitrator's fees, which are calculated by reference to the sum in dispute in INR. These give a greater degree of certainty to the costs of an arbitration.
- A consolidation mechanism, whereby the MCIA Council has the power to consolidate two or more arbitrations pending under the MCIA Rules with the parties' agreement or where the claims are made under the same arbitration agreement (see MCIA Rule 5). This is an important provision in the context of the increased prevalence of multi-party and multi-contract arbitration disputes, helping to ensure that such disputes can be resolved as efficiently as possible and eliminating the risk of competing and conflicting awards.
- An expedited procedure, which can be agreed on in writing by the parties or can be sought in relation to disputes up to the value of Rs100 million (see MCIA Rule 12). Under the expedited procedure, a dispute is determined by a sole arbitrator, the MCIA Registrar may shorten any time limits under the MCIA Rules, and any award must be issued within six months from the date that the tribunal was constituted, unless, in exceptional circumstances, the deadline is extended by the MCIA Registrar.

- Specific provisions in relation to the appointment of an emergency arbitrator and applying for emergency interim relief prior to the constitution of the tribunal (see MCIA Rule 14). The deadline for an emergency arbitrator to decide a claim for emergency interim relief is no later than 14 days following their appointment, and this deadline may only be extended in exceptional circumstances by the MCIA Council or by the written agreement of all parties to the emergency proceedings. At this point, it is worth mentioning that emergency arbitration is a rapidly developing area of arbitral law around the world, and India is no exception. On August 6, 2021, the Supreme Court of India delivered a landmark judgment in Indian arbitral law in *Amazon.Com NV Investment Holdings LLC v. Future Retail Limited & Others*. In its decision, the Supreme Court of India decided that an interim award issued by an emergency arbitrator in an Indian-seated arbitration amounted to an order for interim measures by an arbitral tribunal within the meaning of section 17(1) of India's Arbitration and Conciliation Act 1996. This decision by the Indian Supreme Court was a significant step in ensuring that the Indian Courts continue to keep pace with the increasing importance of the availability of swift interim relief to parties to arbitrations by affirming that emergency arbitration awards in Indian-seated arbitrations are enforceable in India. The MCIA Rules were "ahead of the game" on this, so to speak, and the Indian Supreme Court's decision is a welcome boost to the practical effectiveness of the emergency arbitrator provisions in the MCIA Rules.
- A provision expressly providing that a tribunal may, at the request of a party, grant an injunction of any other interim relief it seems appropriate (see MCIA Rule 15).

In addition, to keep track of developments in the arbitral community and the feedback of arbitration users, the MCIA has a users council, with a diverse executive committee of members spread across industries, including maritime, automotive, energy and power, FMCG, TMT, infrastructure, financial institutions, and realty. Committees of this nature are an important method by which institutions keep their rules up to date and in line with the modern demands of arbitration users.

Such is the success and rapid development of the MCIA and its rules that:

- In 2017, the Government of Maharashtra recognized the MCIA as a preferred arbitral institution in the context of its policy for mandatory institutional arbitration clauses to be used in all government contracts in the state of Maharashtra with a value of over INR50 million. When one considers that in addition to Mumbai, Maharashtra contains Pune, an important manufacturing and educational city, and Nagpur, a city that has been projected to be the fifth fastest growing city in the world up to 2035, the increasing significance of the MCIA's role in future disputes is almost a certainty.
- There are increasingly common instances of the Indian Courts referring disputes to the MCIA for determination by arbitration, including, in 2021, the Supreme Court of India ordering two financial disputes to be determined by arbitration under the MCIA Rules (with the consent of the parties).

Young Mumbai Center for International Arbitration

The Young Mumbai Center for Arbitration (YMCIA) is a sub-group within the MCIA for practitioners, experts, and clients under the age of 40 with an interest in arbitration and India. It was launched in February 2017.

It currently has three co-chairs and a 29-member steering committee which is made up of a diverse group including people from leading Indian and international law firms, barristers' chambers, professional services firms, and commercial enterprises.

Broadly speaking, the YMCIA's objectives are to:

- Establish a network of individuals interested in international arbitration.
- Share knowledge and experience in relation to international arbitration.
- Organize training, seminars, workshops, and social events to encourage the development of know-how.
- Educate young practitioners on best practices in international arbitrations.
- Facilitate the writing of articles and blogs and provide updates on the latest developments in international arbitration.
- Promote the use of ADR and institutional arbitration.

Increasing membership of the YMCIA is at the heart of its work, and I am closely involved in the sub-committee that assists in reviewing the large volume of new applicants that the MCIA receives. It is great to see so much interest in both Indian domestic and international arbitration from young students and practitioners. Ultimately, they are the arbitrators, practitioners, and arbitration users of the future, and giving them access to a modern arbitral institution and encouraging them to be part of its initiatives will help arbitration to flourish in future generations.

On that note, two specific initiatives are the YMCIA's essay competition and mentoring scheme:

- The inaugural essay competition was launched in 2021 with participants being able to choose to write on either "Use of Technology in Arbitration – What will the Future of Arbitration Look Like?" or "The Emergence of Emergency Arbitration in International Arbitration." The competition was a great success with many insightful and well-written articles on these two hot topics in international arbitration. Another competition is planned for the end of 2022, with topics relating to ESG and sanctions in international arbitration, which are two further hot topics and topics on which the insights of young students and practitioners will be very interesting to see. Reed Smith co-sponsored the 2021 competition and is again co-sponsoring the 2022 competition, with Gautam Bhattacharyya, an international arbitration partner in Reed Smith's London office, being a judge.
- In 2021, the YMCIA launched a mentoring scheme, offering students in the final year of an LLB course or enrolled in an LLM program, or young professionals under the age of 32, an opportunity to receive career guidance and practical knowledge about arbitration, for a one year period, from eminent and senior arbitration practitioners. Reed Smith's Gautam Bhattacharyya acts as a mentor in this scheme.

Institutional arbitration in India is booming, and the MCIA is at the forefront of this rapidly growing trend.

The YMCIA also:

- Runs a successful webinar series entitled "Lifeline of an Arbitration," which gives attendees an insight into the five key stages of an arbitration: (1) drafting an effective dispute resolution clause, (2) managing and strategizing in the pre-disputes phase, (3) commencement of arbitration proceedings, (4) procedural steps in an arbitration, and (5) post-arbitration award.
- Publishes a newsletter that discusses hot topics in Indian and international arbitration and contains interviews with leading figures in the Indian legal profession and arbitration community.
- Is heavily involved in the organization and running of the new India ADR Week, which began in 2021, was recently held for a second time in October 2022, and looks to be a fantastic new annual event bringing together a wide range of people interested in ADR and India and offering excellent discussion and networking opportunities.
- Finally, the YMCIA is keen to promote and encourage diversity in arbitration, another hot topic in the arbitration community and one in which it is great to see institutions taking a keen interest. The YMCIA's inaugural newsletter included an interview with Justice Indu Malhotra, who was the first female advocate to be appointed to the Indian Supreme Court directly from the bar and the second woman to be appointed Senior Advocate by the Indian Supreme Court (after Justice Leila Seth in 1977). In her interview, Justice Malhotra discussed her career, her interest in arbitration, and developments in India relating to arbitration. Hearing the stories and views of eminent individuals like Justice Malhotra will no doubt inspire a new and diverse generation of arbitration practitioners.

Conclusion

Institutional arbitration in India is booming, and the MCIA is at the forefront of this rapidly growing trend. In the six years it has existed, the MCIA has already made substantial progress towards becoming a leading arbitration center, and as the world's attention continues to be drawn towards India and its rapid economic growth, the importance of the MCIA will inevitably increase in the arbitral community. It is a privilege to be involved in the YMCIA and help to develop this young institution in an incredibly exciting and interesting jurisdiction for arbitration and disputes.

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Simon is currently serving a two-year term (from April 2021 to March 2023) as a member of the YMCIA's steering committee.

It is a privilege to be involved in the YMCIA and help to develop this young institution in an incredibly exciting and interesting jurisdiction for arbitration and disputes.

The status of emergency awards in India **Finally settled?**

The recent Indian Supreme Court judgment in *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. & Ors (Amazon.com)* attracted significant international attention. In its decision, the Supreme Court held that awards by emergency arbitrators in India-seated arbitrations would be enforceable in India.

While Indian arbitration legislation has been silent on this issue, the Supreme Court's decision in Amazon.com has signaled unequivocal judicial support for arbitration and provided welcome clarification, at least in the context of India-seated arbitrations.

Emergency arbitration

Applications for emergency relief have become increasingly common in international arbitration practice, and a popular mechanism of choice in India-related disputes.

The last decade has demonstrated that the availability of emergency relief has become a valuable feature of international arbitration when a party finds itself in need of urgent relief and is unable to wait for the appointment of a tribunal. It is especially useful when a recalcitrant respondent looking to delay the proceedings tries to stonewall or delay the constitution of an arbitral tribunal. Anecdotally, it appears that voluntary compliance with emergency awards is typically high. However, there are instances where a successful party is compelled to take steps to enforce such orders.

Recent decisions of courts globally show support for the enforcement of decisions made in emergency awards. A number of jurisdictions have responded quickly to the increasing use of emergency relief in order to promote the efficacy of emergency awards, and as a consequence, have amended their legislation to permit the recognition and enforcement of emergency relief. There has also been significant judicial support for emergency arbitration in such jurisdictions.

In Asia, Singapore and Hong Kong have led the way. The Singapore International Arbitration Act (Cap. 143A) (IAA) was amended in 2012 to broaden the definition of "arbitral tribunal" in section 2(1) to include emergency arbitrators. Similarly, Hong Kong amended its Arbitration Ordinance in 2013 to incorporate Part 3A, which allows the recognition and enforcement of emergency relief whether in or outside Hong Kong by an emergency arbitrator.

The legislative approach in India

The acceptance and status of emergency awards have been less clear in India. This is because the Indian Arbitration and Conciliation Act 1996 (the Act) does not contain express provisions dealing with emergency arbitration. Although the Act defines the term "arbitral award" to include "interim award," this definition does not expressly consider emergency orders or awards.

Proposals to amend the relevant sections of the Act to fill this lacuna in Indian legislation have not been implemented. For example, in the 2014 Law Commission of India Report (LCI Report), the Law Commission of India recommended amendments to the Act to expand the definition of "arbitral tribunal" to include "emergency arbitrator." The recommendation was modeled on a similar provision in Singapore's IAA. While other changes recommended by the LCI Report were implemented in the Arbitration and Conciliation (Amendment) Act 2015 (2015 Amendment Act), this recommendation was not adopted. Subsequently, the 2017 Report of the High Level Committee (Srikrishna Report) recommended bringing the Indian statutory framework in line with international practice and proposed amendments to section 2 of the Act providing for the recognition of emergency awards. The Srikrishna Report recommended expanding the meaning of an award to include emergency awards and further expanding the definition of an arbitral tribunal to include an emergency arbitrator in respect of arbitrations conducted under institutional rules. These recommendations were also not incorporated in subsequent amendments to the Act.

The lack of legislation recognizing emergency awards has resulted in parties repeatedly approaching busy, if not overburdened, Indian courts to determine issues relating to emergency arbitration. A statutory framework expressly recognizing emergency arbitration would accelerate the disposal of cases in the Indian courts that are otherwise resolved only after periods of delay.

Judicial support for emergency arbitration

Notwithstanding the lack of a clear legislative framework, the Indian courts have long recognized emergency awards. Prior to the Amazon.com case, parties adopted an indirect approach to give effect to emergency awards. Upon obtaining such an award, a party would apply for interim measures before the Indian courts pursuant to section 9 of the Indian Arbitration Act. The party would seek orders in terms similar to those made by the emergency arbitrator. This approach was successfully deployed by the applicant before the Bombay High Court in the leading case of *HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd & Others in 2014*.

Subsequently, in the 2016 decision of *Raffles Design International India (P) Ltd. v. Educomp Professional Education Ltd (Raffles Design)* the Delhi High Court dealt with an award of an emergency arbitrator in a Singapore-seated arbitration. While the Delhi High Court determined that a foreign emergency award was not enforceable in India, it held that a party to such proceedings could make an application under section 9 of the Act for interim relief and would not be precluded from doing so simply because the party had been awarded emergency interim relief from an emergency arbitrator. The Delhi High Court also held that courts should determine the question of whether to grant interim measures under section 9 of the Act independently of the decision of the emergency arbitrator. Thus, in the 2019 decision of the Bombay High Court in *Plus Holdings v. Xeitgeist Entertainment Group*, the court ordered injunctive relief under section 9 of the Act where similar relief had been granted by a foreign-seated emergency arbitrator and which the court considered to have been well-founded.

However, as the Delhi High Court subsequently clarified in the 2020 decision of *Ashwani Minda & Another v. U-Shin Limited & Another (Ashwani Minda)*, it would not entertain applications under Section 9 of the Act where a party had been unsuccessful in obtaining interim relief in a foreign-seated arbitration. In that case, the Delhi High Court dismissed an application by a party to a Japan-seated arbitration for interim relief under section 9 of the Act, following the applicant's unsuccessful attempt to receive relief from an emergency arbitrator. The fact that the applicable rules governing the arbitration in Ashwani Minda did not recognize a party's right to approach a national court for interim relief (in contrast with the applicable rules in Raffles Design) was also a relevant factor that influenced the decision.

In *Amazon.com*, the Supreme Court of India held that in an India-seated arbitration, an award of an emergency arbitrator is recognized and enforceable as an order under section 17(1) of the Indian Arbitration Act and is not subject to appeal as an interim order under section 17(2) of the Indian Arbitration Act.

Looking ahead

The Indian court decisions have underscored the primacy of party autonomy. In particular, the *Amazon.com* decision sets the clear precedent that the parties' agreement to appoint emergency arbitrators will be respected in India and that emergency awards and orders will be upheld where the seat is India.

The position is less clear where foreign-seated arbitrations are concerned. Section 17 of the Act is not engaged in the context of a foreign-seated arbitration and the court in *Amazon.com* did not deal with the enforceability of foreign-seated emergency awards in India. Until such time as there is a clarifying decision from the Supreme Court of India or there are legislative changes for foreign-seated arbitrations (and emergency arbitration generally), parties will likely continue to adopt the indirect method of seeking interim relief under section 9 of the Arbitration Act.

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The Indian court decisions have underscored the primacy of party autonomy.

Enforcing blockchain arbitration awards in India **Opportunities and limitations**

For the purposes of this article, the focus is on discussing the leveraging of blockchain technology for the adjudication of party disputes through arbitration and the recognition and enforceability of the same within the Indian legal framework.

What is blockchain technology?

A blockchain is a communal and public database filled with entries validated and recorded on a ledger. These encrypted entries are recorded in "blocks," which are then linked together as "chains" to create a ledger that is permanent and immutable.

The reason this technology has gained such popularity is because of its versatility and adaptability. Other technologies can be "linked" to the chain, the prime example being "smart contracts" where a set of software code clauses are placed on the blockchain to be executed when a predetermined set of events occur.

As this process is decentralized, there is immense potential to deploy this technology towards streamlining existing arbitration processes to increase efficiency and increase trust in the arbitral process. The scope of blockchain is further enhanced when it is linked with existing advancements in artificial intelligence and the Internet of Things. However, such connective developments remain in their infancy at this time.

Decentralized justice

At its core, blockchain arbitration is a decentralized system of dispute resolution conducted entirely online, where decisions are rendered through a community of jurors who are crowdsourced to perform a decision-making function, akin to an arbitral tribunal. The most popular of these platforms or dApps are Aragon, Kleros, and Jur.

Significantly, for a dispute to be adjudicated on any of these platforms, one of the key requirements is that parties to a dispute must submit their monies (usually in the form of the cryptocurrency native to the platform) into a secure third-party-controlled wallet (effectively, an escrow account). Once a decision is made, the winning party automatically receives the money held in the escrow wallet through the execution of a smart contract to that effect.

All the while, the transaction and the operation of the dApp are recorded on the blockchain. In general, such decisions are rendered quickly; expeditiously; and, significantly, much more cost-effectively than traditional arbitration. Where the values in dispute are low, such that traditional arbitration processes and procedures could end up being too costly to pursue, blockchain arbitration can provide a cheaper and faster solution.

Of course, this speed comes with challenges of due process. By its very nature, blockchain arbitration poses fundamental challenges to traditional notions of due process but may also eschew them in ways that traditional arbitration cannot. While interesting, this debate is beyond the scope of this article.

The limitation of blockchain arbitration

While the concept is interesting, the absolute requirement for parties to submit their monies into a wallet to be held in escrow vastly limits the appeal of decentralized justice dApps or blockchain arbitration in its current form.

Blockchain arbitration has to ensure monies are deposited into escrow wallets, not only to ensure enforcement is swift at the end of the adjudication but also to ensure that payment to the participating jurors for their staked amounts is also justified. Unlike conventional arbitration, blockchain arbitration does not have the benefit of a multilateral and nearly universally adopted treaty like the New York Convention for the Recognition and Enforcement of Arbitral Awards (New York Convention).

By its very nature, blockchain arbitration poses fundamental challenges to traditional notions of due process but may also eschew them in ways that traditional arbitration cannot.

Unlike conventional arbitration, blockchain arbitration does not have the benefit of a multilateral and nearly universally adopted treaty like the New York Convention for the Recognition and Enforcement of Arbitral Awards

Without parties "buying into" the blockchain arbitration process by depositing their monies into an escrow wallet, the scope for enforcement of a blockchain arbitration award, under the current framework for foreign arbitral awards, would be novel and thus up for judicial challenge.

The Kleros decision: The effect of hybrid arbitration[14]

Against this backdrop, the recent development involving the recognition and enforcement of a Kleros dApp award in a Mexican court is a revolutionary step forward.

In September 2020, the parties in the case entered into a tenancy agreement over a property in Mexico. The agreement contained a standard arbitration clause for dispute resolution purposes. However, the sole arbitrator was mandated in the agreement to draft a procedural order and rules in such a manner that he would be required to send the same to Kleros, along with the supporting evidence to render a decision.

The arbitrator followed this mandate when the arbitration was filed in November 2020 by the landlord of the property. Kleros ran its protocol, and a decision was reached by the jurors on the platform where the tenant was held liable to pay rent arrears.

The Kleros award was then incorporated into the final award by the arbitrator. This final award complied with all the procedural requirements of being in writing and including the date, location, signature, and name of the arbitrator.

When the landlord later sought to enforce the award in a Mexican court, the court upheld the award, thus recognizing the novel hybrid arbitration model as being covered by the New York Convention.

This novel approach created a second use case for blockchain arbitration. Blockchain arbitration was created as an alternative to traditional dispute resolution mechanisms. However, the hybrid approach allows blockchain arbitrations to be incorporated into a traditional arbitration model, with the traditional arbitrator effectively acting to "package" the blockchain arbitration award to ensure enforceability under the New York Convention.

The issue with territoriality and enforcement

Despite the above, it is notable that the Kleros process was not a focal point in the award issued by the sole arbitrator. Moreover, as the case involved a rental dispute that was entirely in Mexican currency, the monies involved were entirely off the blockchain. In the end, the Mexican court did nothing out of the ordinary as it enforced a traditional award without examining its merits or substance. It is not guaranteed that courts in other parts of the world will take a similar approach.

Blockchain arbitration awards are issued online and adjudicated online. They have no territory to speak of. The New York Convention exists to provide enforcement for "foreign" arbitral awards, that is, awards in territories outside of where they are being enforced.

The creation of the hybrid arbitral process thus takes away from the notion of decentralized justice, which blockchain arbitration was created to establish and represent.

Purists would argue that the purpose of blockchain arbitration is to ensure self-triggered awards with immediate enforceability (without the requirements for enforceability in any traditional sense of the word). But such a hard-line approach greatly limits the reach of blockchain arbitration and limits it to purely blockchain disputes where decentralization matters to the parties involved.

The decision of the Mexican court and the hybrid arbitral process have brought in a quiet paradigm shift because they have introduced the prospect of territoriality to the blockchain and thus moved it one step closer to the physical world where we all interact and live.

The issue of enforceability in India

The notion of blockchain arbitration has not been heavily tested in Indian courts yet. Historically, Indian courts have taken a relatively suspicious view of arbitration, which has only recently begun to change.[15]

The agreement has to be in writing

Section 7 of the Arbitration and Conciliation Act 1996 (the Act) requires that an arbitration agreement should be "in writing." Interestingly, departing from Article II of the New York Convention, section 7 elaborates that an agreement is in writing if communicated via "electronic means." This allowance for "electronic means" was added via section 3 of the Arbitration and Conciliation (Amendment) Act, 2015. Unfortunately, "electronic means" is not a defined term despite the inclusion of such a definition being a recommendation in the 246th Law Commission Report.

A parallel can be drawn from section 10A of the Information Technology Act 2000 (ITA) which recognizes contracts concluded through "electronic means." In the ITA, "electronic means" is defined as a method used to create an "electronic record," which is further defined as "data recorded or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche."

Considering the basis of blockchain technology and its use of smart contracts, which are sets of programming code used to execute actions upon satisfaction of predetermined conditions, there is room to argue that blockchain arbitration agreements satisfy the definition of "electronic means." However, no definitive answer on this point will be available until the courts or the Law Commission clarifies it.

Territoriality

India has a noted reservation to the New York Convention under Article I, which means that foreign arbitral awards from only certain parties to the New York Convention will be recognized and upheld.

As mentioned above, blockchain arbitrations are decentralized by their very design. Therefore, a pure blockchain arbitration is unlikely to satisfy the tests for territoriality in India and such awards are likely to be denied enforcement as a result. The reason for this is that India has not permitted recognition of awards made on the Internet, outside of the territory of any nation.

This is a novel problem and likely one that can only be solved with legislation. But there is a glimmer of hope on the horizon. The October 2021 report from NITI Aayog[16] entitled "Designing the Future of Dispute Resolution: The ODR Policy of India" specifically referred to blockchain-based smart contracts as having the potential to revolutionize arbitral processes.

The potential of hybrid awards in India

The issues surrounding enforcement under the Act and India's reservations to the New York Convention could be neatly sidestepped through a hybrid arbitration model. If a blockchain arbitration award was "packaged" into a traditional arbitration award, the "look and feel" of the foreign arbitral award would be conventional rather than novel.

While this may not be the ideal solution or one that supporters of decentralized justice will accept, the power afforded to a party through the New York Convention is undeniable. A hybrid arbitration process would allow parties on the blockchain to take their blockchain arbitration awards and get true enforcement of the same with the full backing of the New York Convention.

While there remain questions surrounding due process, pseudo-anonymity, and other concerns that arise from operating in the web3 space, a hybrid arbitration model has the potential to provide mainstream access and justice through the Indian judicial system – a move that could see blockchain arbitration slowly go from strength to strength.

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In conversation with Mr. Fali S Nariman and Justice B N Srikrishna

In the course of our Arbitral Insights podcast series, we have interviewed eminent arbitrators and arbitration practitioners from a number of jurisdictions. Our interviewees have included several high-profile members of the international arbitration community based in India.

In this edition of our newsletter, we include excerpts from interviews based on two of those podcasts conducted by one of our London-based international arbitration partners, **Gautam Bhattacharyya**, who also chairs Reed Smith's India Business team.

One of the interview pieces is with **Fali S Nariman**, widely regarded as not just a legal legend but also the leading Senior Advocate in India, and whose name is synonymous with the development and growth of arbitration in India. The other is with **Justice B N Srikrishna**, a retired Indian Supreme Court judge and now a leading and much-in-demand arbitrator. These interviews provide up close and personal reflections from the stellar careers of Mr. Nariman and Justice Srikrishna, their views on the development of arbitration in India, and the ways in which it can improve.

In conversation with Mr. Fali S Nariman, Senior Advocate

Gautam Bhattacharyya (GB): I remember when I last met you in February 2020 in Delhi at GAR India, you were described by Dr. Lalit Bhasin, himself a legal legend in India, as three things. He said you were a great lawyer, a great human being, and a great Indian. And I do not think there's any better way to summarize you than like that.

What inspired you to become a lawyer?

Fali Nariman (FN): It was by default really because I was pretty poor in science and mathematics. So, the arts were the only thing for me. I was good in history, and then the obvious thing was to take law. That's how it all started, quite frankly. My father really wanted me to do the ICS – the Indian Civil Service exams. But I knew that he could not afford it and it would have meant my coming to England and going back to India and sitting the ICS exams. Fortunately, my luck in taking up the law worked out.

Two of my excellent professors at law college inspired me. They were Nani Palkhivala, who was a great constitutional lawyer of our time. He was my professor and then became a very dear friend as well. The other was a former Chief Justice of India Y V Chandrachud. They were both part-time professors, meaning that they were lecturing and, at the same time, practicing in court. I was very fortunate in having a fantastic senior, Jamshedji Kanga, when I first began practicing. Mr. Kanga was a giant of a man. Giant both in head and heart, and physically also, all 6'4" of him. He was quite remarkable. I was very fortunate to join his chambers. It was an excellent chambers full of very senior people who were doing extraordinarily well. I fondly recall that there would be a lull in the evenings at 6:30pm or 7pm, when everybody stopped work and then we'd move to sit with Mr. Kanga and he'd regale us with fabulous stories of past cases. He had a great sense of not just humor but fun.

GB: You had some great mentors in Mr. Palkivala, Mr. Kanga, and Chief Justice Chandrachud. Are there any particular standout moments and any cases where they left a particular imprint?

"I fondly recall that there would be a lull in the evenings at 6:30pm or 7pm, when everybody stopped work and then we'd move to sit with Mr. Kanga and he'd regale us with fabulous stories of past cases. He had a great sense of not just humor but fun."

Fali Nariman

FN: Oh, yes. I assisted Mr. Palkhivala in the famous Golak Nath case. It was a big constitutional law case where a bench of 11 judges sat to determine under what circumstances the Indian Constitution could be amended and to what extent fundamental rights could be taken away. That case determined something which the government would not accept, and ultimately only two or three years later, in 1973, a bench of 13 judges sat to reconsider it. There was a very narrow majority of seven to six. Justice Khanna moved the majority, and it was decided that every article of the Constitution was amendable save that it was not possible to amend the Constitution so as to take away its basic structure. And what that basic structure meant was that the government could pass any law it liked but the courts would determine whether the changes affected the basic structure or not. That's how the law stands today, and that's been accepted. That case was an individual triumph for Mr. Palkhivala because he argued it extraordinarily well.

GB: You have written a number of books, several of which I have. One of them is your remarkable autobiography, "Before Memory Fades." There is a chapter in it called Judicial Governance and Judicial Activism. Where do you stand on whether judges should exhibit activism where appropriate?

FN: Judges have to be at the very top of things on that. Judicial independence is fundamental. In India, as a result of the case I mentioned, we now have a structure where the final interpreters of the Constitution are the judges and no one else. So, whatever law is passed must fit into not being contrary to the basic structure of the Constitution, and it is for the courts to be the final arbiters of what constitutes the basic structure. I should also have mentioned when speaking about that seminal constitutional law case that one of the judges, Justice Khanna, wrote in his autobiography that he had never heard advocacy of such magnificence as Mr. Palkhivala's argument in that one and a half days of his submissions. That case saved the Constitution.

GB: When did you first become involved in the world of arbitration?

FN: It just happened to me. My wife and I were invited to an international arbitration conference at which I chaired a session. It was the International Conference of Commercial Arbitration in Mexico in 1978. It was a magnificent conference and hilarious because the conference took place in a distillery, and they only served brandy and coke! So, most of the famous arbitrators of our time in those days were drunk! When the band played, the delegates were dancing on the tables. I still remember it vividly. Peter Sanders was there; he was the father of The New York Convention.

GB: Did you dance on those tables?

FN: No, I didn't. I'm a very poor dancer. My wife was a very good one, but I was not!

GB: From that introduction in Mexico to the world of international arbitration, tell us a little more about what you got involved in.

FN: After that came my appointment to be the vice-president of the ICC Court, Paris. That was a continuous period from about 1979 to 2005. I gained a lot of experience and saw a lot of arbitration at a very high level with the ICC Court.

GB: That's how I first came across your name. When I first began practicing 30 years ago, I remember seeing your name and being inspired by someone from India achieving at that time, 30 years ago, such a prominent role in the ICC. It grabbed my attention and made me want to find out more about you and try to be like you.

FN: This reminds me, because my memory is also quite faded now, very vividly of what happened in Paris when the ICC Court of International Arbitration had its 60th anniversary, its Diamond Jubilee. One of the attendees was Judge Howard Holtzman. He was a member of the Iran-U.S. Claims Tribunal and also a great American lawyer. Someone who was opposed to international arbitration was Keba Mbaye, who was the Chief Justice of Senegal. He was later a judge of the International Court and the president of the International Court of Justice as well. Judge Holtzman thought that he was expressing a widely accepted view that judges and arbitrators are partners in a system of international justice. Keba Mbaye refuted him saying that the notion that there is a system of international justice was not shared by some countries, notably some of those in Africa, Asia, and Latin America, who still saw arbitration as a foreign judicial institution imposed upon them. Judge Holtzman expressed the hope that international arbitration would one day get accepted. It has. That's what I am very happy to see.

Third World acceptance and Third World confidence are important. The only area where Third World confidence in arbitration has not yet taken place is in international investment arbitration. There have been so many critics from the First World as well.

GB: What are your views about the evolution of arbitration in India? It is now a very different thing from what it has been in the past.

FN: I've written two books on it. We originally followed the British pattern. We adopted the 1899 Arbitration Act years ago. Then we had the 1914 Indian Arbitration Act. That was in the days of British India. Parties were permitted to challenge awards on the ground of error of law apparent on the face of the record. Then we saw the English Arbitration Act of 1933. India carried on with its 1914 Act, right until 1996 when we got our present law. Indian law is unfortunately still in the making because there have been so many amendments to it. I'm very upset with it quite frankly. The important thing is that in India, we haven't got into the spirit of international arbitration. Of course, that spirit is slowly coming, but very slowly. It is not yet pronounced. For instance, we have the PCA – the Permanent Court of Arbitration. We have signed a treaty country agreement like other countries have. But it requires that India provides the PCA with some infrastructure within the country, which has not yet been provided. Singapore and Mauritius have, and they have been doing extremely well in international arbitration. India, fortunately, followed the Model Law – the UNCITRAL Model Law – which most nations have followed, and that has certainly helped us. India was also one of the original signatories to the New York Convention 1958.

GB: What do you think we can do to improve the future of institutional arbitration in India?

FN: Since we have already entered into agreements with the PCA and there is a lot of arbitration going on at the Permanent Court of Arbitration at The Hague, India has to give them the necessary infrastructure here in India. So far as institutional arbitration is concerned, the law is there but it needs to be brought into force, and that's a matter of discretion for the executive. Arbitration is a very low priority in India. We are still in court mode.

GB: There is rightly a real focus on diversity, equality, and inclusion in the law, in society, in arbitration, and in all walks of life. In your autobiography, at page 442, you say, "My greatest regret in a long, happy, interesting life is the intolerance that has crept into our society." And then on the next page, at 443, you talk about diversity being tremendous and being important to bring people together. What are your thoughts about what that means from the perspective of the law?

"Third World acceptance and Third World confidence are important."

Fali Nariman

"When I first began practicing 30 years ago, I remember seeing your name and being inspired by someone from India achieving at that time, 30 years ago, such a prominent role in the ICC."

Gautam Bhattacharyya

FN: It's very important. Particularly, because in India we have not merely the majority community, which is the Hindus, but we have a large number of minorities. They are constitutionally protected, and they are protected also by the courts. But, and this is a big but, politically the diversity factor of ours hasn't gone down too well with the majority community. But ours is a very diverse set of communities, diverse objects, and diverse aims. Therefore, it becomes a little difficult to administer. It's a difficult country to govern.

GB: Do you have any memorable recollections of the advocacy of any of your opponents?

FN: A very senior lawyer, when I was a junior in the Bombay High Court arguing a very heavy company law matter, got up and started coughing, and he coughed again. He cleared his throat again. The judge said, "Mr. Daphtary, please sit down and have a sip of water." My opponent said, "No, no, my Lord, it's nothing to do with that. It's just my learned friend's argument that I can't swallow!"

GB: You know the art of advocacy. I'm going to read back to you some words from your autobiography. You said, "At this ripe old age, besides family and staff, what sustains me are two things. First, and frankly, the possibility and the thrill, even now, of winning a difficult case. But the race is over, the work is never done while the power to work remains." And then you said, "And second, the affection of all my colleagues at the bar, young and old, whose company I greatly value and enjoy so much." Despite the incredible career you've had, despite everything you've achieved, you just love doing what you do. So, what is it about still practicing and advising that gives you that buzz?

FN: Well, I think that's the only thing that keeps me going at 92.

GB: Did the life of a judge ever interest you?

FN: No. I was offered judgeships both in Bombay and Delhi. Unfortunately, the first time I had to support a grandmother, and it was just not possible. The remuneration of judges was very low. By the second time, I was getting on. But my son, Justice Rohinton Nariman, has done outstandingly well as a counsel and a judge of the Indian Supreme Court. He was the Solicitor General for a while and at the top of the profession. Then, one fine day, he came to his mother and me and told us that he'd just been asked by the Chief Justice to step up directly to the Indian Supreme Court, and he wanted to take it to do some good.

To hear the full interview please access the podcast here.

In conversation with leading arbitrator and former Indian Supreme Court judge, Justice B N Srikrishna

Gautam Bhattacharyya (GB): I've had the privilege of co-chairing the GAR India conference with you and being a panelist with you at other international arbitration conferences. What inspired you to become a lawyer?

B N Srikrishna (BNS): There is a book published in India called The Reluctant Prime Minister.

I'm somewhat of a reluctant lawyer. My father was a very senior lawyer, practicing in the Supreme Court, the Bombay High Court, and other courts. I was intent on not becoming a lawyer. My father kept on insisting that I joined the administrative service, but I was not interested in that. I was more into nuclear science. Prime Minister Nehru had come up with an Atomic Energy Commission, and it was exciting. I passed my bachelors, and then applied for a masters in science. I wanted to specialize in either nuclear science or quantum theory. One day, my father said that you can't be a good lawyer unless you have some special intellectual prowess.

I can never resist a challenge, I told him. I thought, if you can be a good lawyer, I can be a better lawyer. The next day, I went to the law college and got admitted. The professor at the Institute of Science kept waiting for me to pay the term's fees. The day of the term fees came and passed. He called me up frantically and asked if I had financial difficulties and if so, he would pay the first term's fees. I declined and said that I would come to explain why. When I did, he told me that I was forsaking a good career in science for being a lawyer. He told me that I should at least be a good lawyer.

GB: You've had a very illustrious and glittering career in the law. The cherry on the cake was that you sat as a Supreme Court judge. Are there some key reflections from your time as a Supreme Court judge?

BNS: The biggest advantage of being a Supreme Court judge is that you get a hands-on view of the law in the different states. India is a country of many states and some of the laws are quite different. In fact, land measures are different in different states. It's a fascinating array of laws across the country.

Number two is you get to do a lot of constitutional law cases.

The next thing is the variety of cases. For example, when I was a judge at the Bombay Court, I did very few criminal matters. Some judges tend to avoid particular branches of the law. I didn't do that. I must thank my Chief Justice for rotating me in different branches of law, from Parsi matrimonial law to land law, criminal law, tax, and Hindu law, not to forget. Sitting in the Supreme Court gives you a broad vision of the entire law in the country. I got to know the viewpoints of different judges on particular issues and judgments.

My time on the bench also taught me that your reputation is what others think of you and not what you think of yourself. A great insight is being able to engage with different colleagues. The advantage of being in the Supreme Court is that the cream of the legal community is before you in the form of eminent counsel.

GB: What first created your interest in the world of arbitration?

BNS: I am again going to say that I am an accidental arbitrator. Honestly, my view was that after retiring from the Supreme Court, I should perhaps do some teaching at law school. When I attempted to do that in my old alma mater, the Government Law College, and said that I did not want to be paid for it, they ultimately did not take me up on my offer. I was told that they could not take free services from me. I looked around and all my colleagues were doing arbitration. I jumped in and there I am still stuck here almost 15 or 16 years after my retirement as a judge.

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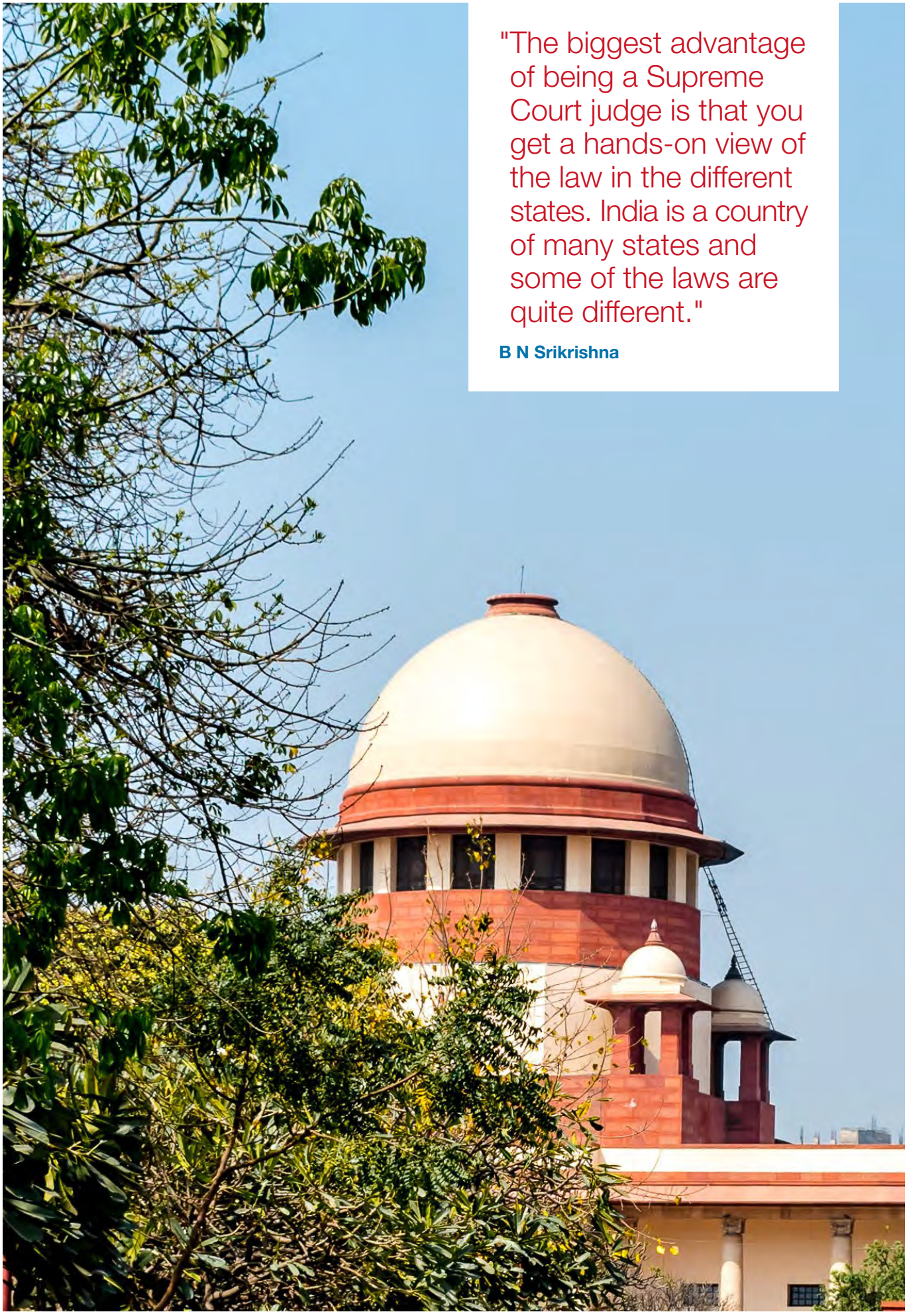
To hear the full interview, please acces the podcast here.

"My time on the bench also taught me that your reputation is what others think of you and not what you think of yourself."

B N Srikrishna



"The biggest advantage of being a Supreme Court judge is that you get a hands-on view of the law in the different states. India is a country of many states and some of the laws are quite different."

B N Srikrishna

Endnotes

Investment Treaty Arbitration in India

1. UNCTAD, International Investment Agreements Navigator, India, https://investmentpolicy.unctad.org/country-navigator/98/india. However, despite this termination, the treaty provisions shall continue to remain effective for investments made before the date of termination for a further period of 15 years – see Article 16(1) of the India-Netherlands BIT.
2. UNCTAD, International Investment Agreements Navigator, India, https://investmentpolicy.unctad.org/country-navigator/98/india.
3. UNCTAD, Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019, https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf (July 2020).
4. *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37.
5. *Vodafone Group Plc and Vodafone Consolidated Holdings Limited v. India (II)*, UNCITRAL (1976); see also, Global Arbitration Review, *Vodafone files Second Tax Claim Against India*, https://globalarbitrationreview.com/article/vodafone-files-second-tax-claim-against-india (17 May 2017).
6. *Astro All Asia Networks Limited and South Asia Entertainment Holdings Limited v. India*, PCA Case No. 2016-24/25.
7. *Ras al-Khaimah Investment Authority v. India*, UNCITRAL.
8. *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016-7.
9. *Louis Dreyfus Armaterus SAS v. Republic of India*, PCA Case No. 2014-26.
10. *Deutsche Telekom v. India*, PCA Case No. 2014-10.
11. Article 4(2) of the India-Australia BIT provides the most favored nation provision according to which, "a contracting party shall at all times treat investments in its territory on a basis no less favorable than that accorded to investments or investors of any third country."
12. *Id.* at 1.6.1(a).
13. https://www.business-standard.com/article/economy-policy/india-s-fdi-rank-rises-to-7th-position-despite-falling-inflows-unctad-122060900883_1.html.

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14. Virues, M. (2022, January 10), "How to Enforce Blockchain Dispute Resolution in Court? The Kleros Case in Mexico," Kleros. Retrieved on November 2, 2022, from https://blog.kleros.io/how-to-enforce-blockchain-dispute-resolution-in-court-the-kleros-case-in-mexico/.
15. Gogisetti, V. (2019, May 20), "Changing trends of international commercial arbitration in India," CIArb. Retrieved on November 2, 2022, from https://www.ciarb.org/resources/features/changing-trends-of-international-commercial-arbitration-in-india/.
16. The NITI Aayog serves as the apex public policy think tank of the Government of India and the nodal agency tasked with catalyzing economic development and fostering cooperative federalism through the involvement of the state governments of India in the economic policy-making process using a bottom-up approach.

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We are a recognized leader in international arbitration, and are ranked in the elite GAR 30, *Global Arbitration Review*'s ranking of the world's leading international arbitration practices. We have substantial experience representing both claimants and respondents, and a strong track record of obtaining successful results. Our deep knowledge of industry sectors including energy, natural resources, life sciences, transportation, telecoms, insurance, and banking enables us to understand the industry-specific factors and environments affecting our clients' disputes. This combination of deep arbitration experience, our lawyers' advocacy skills, and industry knowledge gives us a competitive advantage when representing our clients.

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