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mADR

BROADCAST

EXPERT'S VOICE

Ms. Svenja Wachtel

A discussion with Ms. Svenja Wachtel and her thoughts on future of the Industry.

Single key for a double locking system: How the Delhi High Court has blurred the distinction between proper law of Substance & Arbitration Agreement

By - Arijit Sanyal

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Ms. Svenja Wachtel

Svenja is counsel in the Frankfurt office of Willkie Farr & Gallagher LLP. She studied law at the University of Kiel and holds an LL.M. degree from Columbia Law School. Her practice concentrates on arbitration and complex commercial litigation with a particular focus on multi-jurisdictional legal actions with an emphasis on commercial questions as well as Post-M&A disputes. The cases are usually subject to many different systems of law and under several institutional rules, in particular under the arbitration rules of the DIS and ICC.

1) As a founder of "Digital Coffee Break in Arbitration", you have described its vision as to create awareness about the potential impact of digitisation in Arbitration. Speaking of digitisation, what role did the COVID pandemic play in expediting digitisation?

I founded "Digital Coffee Break in Arbitration" in end of 2019 as an Interview Series with arbitration practitioners talking to them about a certain topic in international arbitration related to digital transformation in general. A few months later, the pandemic took the world by surprise and all of a sudden working remotely, videoconferencing and virtual hearings became the new normal. Even people who were skeptical became aware of the technology out there and actually had to use it to keep the business alive.

The arbitration community reacted quickly to adapt to this new way of handling cases. For example, Delos published a list of "Resources on holding remote or virtual arbitration and mediation hearings" on a variety of information such as webinar recordings, model procedural orders etc. As early as April 2020, CIArb published a Guidance Note on Remote Dispute Resolution Proceedings, and other institutions followed with similar notes.

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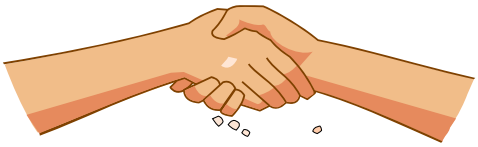
Even the Problem of the 28th Vis Moot addressed the issue of whether the examination of witnesses and experts should be conducted remotely if a hearing in person is not considered possible. The overall acceptance of technology would – most likely – not have happened this rapidly without the pandemic and without the need to come up with an solution.

2) As an ambassador for Racial Equality for Arbitration Lawyers, how do you think digitisation has furthered inclusiveness across various competitions, panel discussions and other opportunities, which would not have been possible had it been in-person?

One important objective of R.E.A.L. - Racial Equality for Arbitration Lawyers is "access to the arbitration club". And this includes all aspects of access: access to opportunities such as scholarships, access to knowledge, access to mentorship, access to events and access to information.

Every characteristic of this access is crucial to have a diverse, and dynamic work environment. By using technology, getting this access can be a little less burdensome. Technology is not the Holy Grail, but it can be one piece of building the path to a more diverse and inclusive community in international arbitration. One good example is the participation of in-person conferences: During the pandemic, conferences turned into in-person webinars and all of a sudden everyone could become a speaker in an event or simply attend this webinar. It was not necessary anymore to travel to Paris, for example, and to pay for accommodation, travel costs etc. but one could be anywhere in the world (access to the internet being required) and attend. Many of these webinars are still available online and can be watched. And there is no excuse anymore not to have a diverse panel of speakers, because the technology available allows us to be inclusive.



3) Arbitration Happy Hour, a venture jointly managed by you on Clubhouse has successfully brought together students, practitioners, young arbitrators from across the world together. What motivated you to start this venture on Clubhouse and where do you see it in the coming months?

My partner in crime, and friend Sneha Ashtikar from Jus Mundi and I started the Arbitration Happy Hour beginning of this year when

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Clubhouse was new, the pandemic was still in full force, and basically everyone worked from home. It was the new thing everyone spoke about. And we just wanted to give it a try. Neither of us knew if the idea of hosting a "room" and talking about a topic in arbitration would be well perceived by the audience. We were delighted to see that the feedback was very positive. It was just a new way to further the communication between everyone.

Luckily, Covid is slowing down in most parts of the world and many of us are going back to the office, meeting family, friends and colleagues and spend less time in front of the screen. As a consequence, many people contacted us asking for a change in the format, because they cannot attend Thursdays for a full hour. We are now considering the format because we want to make sure, that the content doesn't get lost. We will announce the new format soon and hope that everyone will be happy and keep sending us ideas for topics. We already have some ideas and you can be sure that the Arbitration Happy Hour will be better than ever.

4) Online Dispute Resolution ('ODR') has been making inroads and has become a preferred mode of dispute resolution for many. What according to you are the challenges for parties opting for ODR and whether the same can hamper the prospects of justice?

The reasoning behind ODR is to solve disputes faster and more cost efficient. This particular way of dispute resolution is especially valuable in international disputes. One great example is the European Online Dispute Resolution platform provided by the European Commission to settle disputes between online consumers and traders about online purchases. With the right technology, and (stable) access to the internet, ODR is a great method.

However, when talking about technology, this might give rise to concern about the prospects of justice. Adequate resources of technology are mandatory to fully participate. Also, the personal interaction is significantly reduced which might result in difficulties when accepting the outcome of a case or finding an amicable solution. The human factor is of great importance for some. While ODR is certainly not the perfect fit for all disputes, it is definitely a valuable modus operandi to be considered.

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5) Finally, as we look towards a hybrid mode of dispute resolution moving forward, what advice do you have for young graduates and practitioners looking to make their careers in the domain of arbitration and commercial law?

Firstly, it is crucial to understand and learn the basics of international arbitration. Today it is so much easier to educate yourself and to get all the information one may need. Depending on individual preferences, one can attend online classes, join webinars, read the cases and information available online, or just simply read a book about arbitration.

Besides that I would strongly recommend to become an active member of the arbitration community. Find groups and initiatives which fit your interests, such as ArbitralWomen, the Campaign for Greener Arbitration, R.E.A.L. - Racial Equality for Arbitration Lawyers etc. and get involved. There are plenty of fabulous groups/initiatives out there and it is impossible to join every initiative but make sure to be an active and valuable member of the initiatives you are joining. Participate in moot courts to get a feeling what it means to prepare a case, to make your arguments and maybe how it feels when the tribunal cannot hear you due to technical circumstances you did not foresee.

No matter how awful you might feel in situations when things do not go as planned, it is incredibly valuable to have had this experience and to learn to handle the unexpected.

AROUND THE GLOBE

ASIA

Federal Court of Malaysia provides guidelines for determining place of arbitration within Malaysia [Masenang Sdn v. Sabanilam Enterprise Bhd, Federal Court of Malaysia, September 2021].

The Federal Court of Malaysia observed that when an arbitration was seated in Malaysia, the Court of first instance of the place specified as the seat will have supervisory jurisdiction. The Court added that parties who wished to opt for a seat within Malaysia will be required to identify a specific city in Malaysia as their seat.

High Court of Malaysia declines to stay proceedings on allegations of bribery [Vertex Superieur Sdn Bhd v. Shell Malaysia Bhd, High Court of Malaysia, September 2021].

The High Court of Malaysia refused to stay proceedings on allegations of bribery brought forward by a third-party. The Court based its decision on contours of public interest. The Court observed that instances of corruption and bribery required expeditious court proceedings and the same could not be referred to arbitration.

High Court of Malaysia refuses to provide costs on successful application for referral to arbitration [Lineclear Motion Pictures Bhd v. Measat Broadcast Network Bhd, High Court of Malaysia, October 2021].

The High Court of Malaysia reused to award costs to a party obtaining stay of court proceedings. The Court observed that costs can only be awarded when a party seeking them is able to demonstrate an unreasonable conduct by the party at breach. Additionally, the party must also show that there was a reasonable conduct at their part, before they make an application for costs.

Court of First Instance of Hong Kong allows arbitration agreement which was permissive in nature[Kinli Civil Engineering Limited v. Geotech Engineering Ltd, Court of First Instance of Hong Kong, September 2021].

The Court of First Instance at Hong Kong, refused to stay an action to arbitrate owing to the arbitration clause which read as "parties may arbitrate". The Court held that notwithstanding the use of term "may" in the clause, arbitration was mandatory.

Court of First Instance of Hong Kong refuses to stay enforcement of award [Construction Company v. Guaarantor, Court of First Instance of Hong Kong, September 2021].

The Court of First Instance at Hong Kong refused to set aside an enforcement order for an award on grounds that the arbitration agreement was invalid and that the award debtor was unable to present their case. The Court added that when the Court having supervisory jurisdiction had upheld the impugned award and passed an enforcement order, the said order cannot be challenged before the Courts of enforcement.

AFRICA

Congo hit with another mining claim [Republic of Congo, September 2021].

An Australian mining company has launched an ICSID claim against the Republic of the Congo over the revocation of licences for iron ore projects, as the state faces contractual claims by two other miners totalling US$36 billion.

AROUND THE GLOBE

AMERICA(S)

Zimbabwe creditors race to enforce overlapping ICSID awards [Zimbabwe, September 2021]

Two sets of ICSID creditors have applied to a US court to enforce overlapping ICSID awards against Zimbabwe over land expropriations as they sue each other in London.

South African Oil Company gets Default Judgment against Congo [Republic of Congo, September 2021].

A South African oil company has obtained a default judgment from a US court enforcing a US$619 million ICC award against the Democratic Republic of the Congo over contracts for four petroleum blocks

Nigeria fights to reverse Chinese investor's treaty win [Nigeria, September 2021].

Nigeria has asked a UK court to overturn the first known investment treaty award won by a mainland Chinese investor against an African state, in a dispute over a soured joint venture to develop a free trade zone near Lagos.

New law casts doubt on enforcement against Egypt [Egypt, September 2021].

Practitioners in Egypt have expressed concern at a new law granting the Supreme Constitutional Court the power to invalidate decisions rendered against the state by international institutions, despite a last-minute change to the bill to remove express mention of arbitration.

ICDID along with UNCITRAL suggest options to curb double-hatting. [September 2021].

The third draft of ICSID and UNCITRAL's code of conduct for adjudicators in investment disputes sets out options for curbing "double hatting", ranging from a complete ban to a requirement to fully disclose relevant counsel and expert witness appointments.

ICSID upholds Glencore's award against Columbia [Columbia, September 2021].

An ICSID committee has upheld a US$19 million award in favour of Swiss mining group Glencore against Colombia, finding the tribunal was right to refuse to consider documents relating to allegations of corruption.

Air Cananda Lands win against Venezuela [Canada, September, 2021].

Air Canada has secured a US$26 million ICSID additional facility award against Venezuela over the state's failure to convert its bolivar-denominated earnings to US dollars so that they could be repatriated.

United States report: Hidden psychological impact of virtual hearings cannot be undermined [USA, September, 2021].

Practitioners' experience of virtual hearings during the pandemic has been largely positive, a new US-based Berkeley Research Group (BRG) report has found, while warning of psychological side effects including bias against those with technical issues, proceedings being difficult to police and "Zoom fatigue".

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Drymer resigns after Venezuela Challenge [Venezuela, August 2021].

Stephen Drymer had survived Venezuela's effort to disqualify him from hearing its ICSID dispute with ExxonMobil, with his co-panellists rejecting arguments that he would be biased because of the state's successful challenge against him in another case. However, in a recent turn of events, the Canadian arbitrator has resigned from an ICSID tribunal hearing a US insurer's claim against Venezuela after the state successfully challenged his appointment in a parallel UNCITRAL case.

EUROPE

Findings of an Arbitral Tribunal not binding in a separate proceeding between different but related parties [Vale v. Steinmetz, Court of Appeals, England, September 2021].

The Court of Appeals observed that except in rare circumstances, the findings of an arbitral tribunal cannot be binding. The Court clarified that though the parties were related to the award, it cannot be binding on them unless a contrary agreement between the parties could be discerned.

SINGLE KEY FOR A DOUBLE LOCKING SYSTEM: HOW THE DELHI HIGH COURT HAS BLURRED THE DISTINCTION BETWEEN PROPER LAW OF SUBSTANCE & ARBITRATION AGREEMENT

- Mr. Arijit Sanyal

The Supreme Court of India ('SC') in PASL Wind Solutions v. GE Power Conversion India has settled the question as to the ability of two Indian parties to choose a foreign seat of arbitration. Reiterating that Part I and II of the Arbitration and Conciliation Act, 1996 are mutually exclusive, the SC observed two Indian parties were at the liberty to opt for a foreign seat. The SC added that a foreign award, irrespective of the nationality of the parties will be governed by Part II of the Act which is concerned with recognition and enforcement of foreign awards. While the SC settled an important aspect with regards to party autonomy, the question as to the law governing the underlying contract went unanswered. To add on to the confusion, the Delhi High Court ('HC') in **Dholi Spintex v. Louis Dreyfus** had earlier allowed two Indian parties to submit their underlying contract to foreign law. This came against the backdrop of an illusive foreign element, which has added up to the confusion regarding law applicable to the underlying contract.

The matter involved two parties who had an agreement to enter into a High Sea Sales Agreement ('HSSA'). However, the agreement was never entered into as a result of which the Plaintiff refused to accept the goods. Despite there being no HSSA between the parties, the Defendant invoked the arbitration clause contained in it. Refuting the existence of the arbitral tribunal, the Plaintiff requested the HC to pass an anti-arbitration injunction in their favour. However, the HC while relying on factually different precedents observed that two parties, irrespective of their nationalities were permitted to submit their underlying contract to foreign law if a foreign element could be discerned. Though the tests applied by the HC were in consonance with general practice concerning the determination of law applicable to an underlying contract, it has come at a different conclusion than it should have, in light of the facts of the case. The foreign element being illusive, has not only reduced the authority of the judgement but has ended up adding a layer of confusion to the issue of law governing the underlying contract.

The HC while applying the test of foreign element, relied heavily on Sasan Power Ltd v. NAAC along with Atlas Export Industries v. Kotak. While these precedents did involve a foreign element, the HC's reliance was misplaced as it failed to consider the context which was different from the facts of the present case. Both Sasan and Atlas involved tripartite agreements involving foreign parties. Additionally, the subject matter of the dispute in the above-mentioned cases concerned law governing the arbitration agreement as opposed to the law governing the contract. Applying the facts to the present case, there was no discernible foreign element as the HSSA was never entered into by the parties. Moreover, the subject matter of the present dispute being distinct the HC has ended up blurring up the delimitation between the two sets of laws applicable.

Additionally, the HC misinterpreted past rulings of the SC while considering the entire transaction from the lens of public policy. The HC rightly agreed that when public policy was invoked, anti-arbitration suit can only be granted on limited grounds. However, the HC failed to take a note of the ruling in Board of Trustees, Kolkata Port v. Louis Dreyfus, wherein it was observed that if continuing an arbitration was vexatious or unconscionable, the Court should grant an anti-arbitration injunction from the perspective of public policy. This principle has been crystalised by the SC in ONGC v Western Co of North America, where it was held that forcing an Indian company to submit to foreign law without compelling reasons will be vexatious and oppressive. Evaluating the facts of the present case against the above-mentioned principles, it is clear that the HC deviated from the fundamental public policy of India, by asking two Indian parties to submit their contract to foreign system of law.

It is a settled principle that presence of a foreign element invites the application of at least three sets of laws that is law governing the procedure and laws governing the substantive contract & arbitration agreement respectively. It is also a settled principle that though the law governing the procedure and the arbitration agreement may be determined by way of the seat, the same test cannot be applied while determining the law governing the substantive contract. It may as well be noted that once conflict of law rules do not apply, parties or one of them do not have the liberty to opt for a foreign law. As in the present case the goods were meant to be sold on HSS basic the conflict of law rules will not apply, as the destination port and the place of delivery were not the same as observed in SCIL v. BEML Ltd. Therefore, the HC's ruling in Dholi Spintex,given precedence to party autonomy over mandatory stipulations of fundamental public policy of India. This goes contrary to international practice where party autonomy has been overridden by mandatory principles of national and international (where applicable) laws, when the same was opposed to fundamental public policy. While SC's ruling in PASL has settled the issue of party autonomy vis-à-vis foreign seat, lack of clarity with regards to the contract will only add up to the confusion. Resultingly, the Courts should be cautious about the pitfalls and issues neglected by the Delhi HC in Dholi Spintex.

Events

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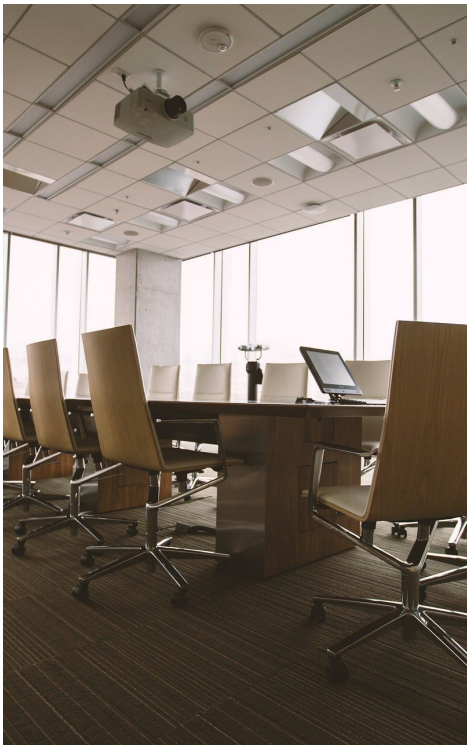

ABOUT MEDIATEGURU

MediateGuru is a social initiative led by members across the globe. The aim of the organization is to build a bridge using which more law students can be encouraged to opt for ADR methods. MediateGuru is creating a social awareness campaign for showcasing mediation as a future of alternative dispute resolution to provide ease to the judiciary as well as to the pockets of general litigants.

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