Under the aegis of

Technology Partner

India Arbitration Week 2022
Session: Future of arbitration: new and emerging norms

Event Date / Time : 10th October 2022 / 5 pm
Event Duration : 1 hour

SPEAKERS NAMES:

1. **Andrew Pullen,** : Fountain Court Chambers
2. **Kartikey Mahajan** : Partner, Khaitan & Co.
3. **Louis Flannery KC** : Partner, Mishcon
4. **Nish Shetty** : Partner, Head, Litigation and Dispute Resolution (Asia Pacific) Clifford Chance
5. **Piyush Prasad** : Counsel (Foreign law) WongPartnership LLP
6. **Sharon Chong** : Partner, Skrine

Shreya Jain

Good evening. Welcome to today's session on the “Future of arbitration: new and emerging norms” at the India ADR Week. This session is sponsored by Clifford Chance, and of course, you can see all our panelists on the screen in front of you. I will take the liberty of taking the first couple of minutes to introduce them, although I'm sure all the attendees are very well familiar with them. So, my name is Shreya Jain, I'm a Principal Associate in the arbitration team at SAM, Mumbai.

Today's panel will be moderated by Nish Shetty, who, of course is the Partner, Head of Litigation and Dispute Resolution (Asia Pacific) at Clifford Chance. Nish, of course, specializes in international arbitration with the focus, especially on restructuring and insolvency related work. I don't really need to introduce his credentials, but we know that he's been a past Founder as well as ex-Chairman of the SIAC User Council, as well as a Co-Chair of the Council of Arbitration of MCIA. He was in fact, the first in Asia to be appointed as a Judge-in-Appeal of the FIA International Court of Appeal in Paris. Nish, thank you very much for taking the time to moderate this event.

Next, I'll take the liberty of introducing Piyush Prasad, who also is a counsel at WongPartnership, based in Singapore. He specializes in cross border dispute resolution, and I think some of us, or most of us might remember him from his days at SIAC, where he has administered over 200 arbitrations. Welcome Piyush.

Piyush Prasad

Thank you, Shreya.

Shreya Jain

Third on my list here is Sharon Chong, Partner at Skrine. Sharon has a special focus, of course, in arbitration, but also on aviation related disputes, as well as insolvency and restructuring. She

has been a past President of the Malaysian Institute of Arbitrators, and a Committee Member of the YSIAC. Sharon was in fact appointed to the first ever adhoc arbitration panel at the 29th SEA Games, Kuala Lumpur in 2017, which is a feat very few people can speak of. So, Sharon, we are very excited to have you on this panel today.

Sharon Chang

Thanks Shreya.

Shreya Jain

Next, we have Louis Flannery KC, who's a Partner at Mishcon. Louis also heads the international arbitration practice, and has a particular specialization in disputes involving fraud and conflict of laws. He has, of course, been recognized as a leading arbitration practitioner in almost all international arbitration rankings. We are very privileged to have him speak at this panel today. Welcome, Louis.

Louis Flannery KC

Shreya, thank you.

Shreya Jain

Next on my list is Andrew Pullen. Andrew, of course, is at the Fountain Court Chambers and was in the International Arbitration Group at Allen & Overy for several years before he moved. Andrew serves in the Council of Singapore Institute of Arbitrators since 2017, and is currently serving as the Vice President. Andrew, we are very glad to have you with us today.

Andrew Pullen

Well, thank you very much.

Shreya Jain

Last and definitely not the least, I have the pleasure of introducing Kartikey Mahajan, who is the Partner in the Dispute Resolution Practice Group at Khaitan & Co in Singapore. I, of course, had the privilege of working alongside him when he was at SAM & Co. Kartikey's practice focuses on international arbitration as well as commercial litigation with a special focus on cross border element disputes. He is also a Steering Committee Member of the SIAC User Council as well as Young SIAC and CPR by the ADR Committee. Kartikey it's very great to see you again.

Kartikey Mahajan

Thanks Shreya, pleasure to be here.

Shreya Jain

So, without further ado, I'll hand over to Nish now to carry forward the proceedings.

Nish Shetty

Thank you, Shreya. Thank you. Hello everyone, I hope you're all enjoying the first day of ADR Week in India. I've attended a number of the sessions, and they've all been really, really good. I'm sure you caught the Chief Justice's introductory remarks as well. And his comment around institutional arbitration, and the importance of that being more widely used in India. So, for the purposes of this panel, we are going to really look at the future, the future of arbitration through the eyes of the panelists that we have before you, and really try and eke out what the panelists consider to be the new and emerging norms in international arbitration. We're going to try and

deal with a number of subtopics under this broad rubric. We'll see where we get to in terms of time, I know that MCIA prides itself on being absolutely on time. So, I know that we will have an hour from the start of the session and no more.

So let's get on with the discussion itself, the real subtopics that we're going to start with are use of technology in international arbitration, how is that impacting the practice of international arbitration. Then we'll talk about a new and emerging norm in India, and what the future of international arbitration in the Indian context looks like. We'll touch on 3rd party funding. And this is obviously an area that's of interest, not just in India, but right across the international arbitration spectrum. So, we'll touch on that and see how that looking and what the future looks like, with that in mind. Then we'll touch on diversity and inclusion in the context of international arbitration, what the trends there. And finally, we'll touch a bit on ESG, and how that is being looked at by the International Arbitration world, where we see those principles playing a part in the way that international arbitration is conducted across the globe and in India.

So, with that broad roadmap, let's kick off with the use of technology in international arbitration. Now, one of the things that this horrible pandemic, that all of us have had to endure over the last couple of years, what that brought is the use of technology into international arbitration, perhaps in a way that it wasn't used before. And we had to adapt, and we did adapt, there was a lot of uncertainty when it all began, how it will all work. It was challenging old norms, in the way that these hearings will be conducted, court hearings were suspended. But over time, we got used to virtual hearings, virtual platforms, we liked some we didn't like others. We are now hopefully, at the tail end of the pandemic. I know, that's not necessarily the case in every part of the globe.

But certainly, in many parts of the globe, we are treating this as an endemic situation, and we're getting on with life, including in the international arbitration law. So, what does the future hold in terms of remote hearings and the use of technology, in that context? Perhaps I will ask Sharon, to kick off. Do you have thoughts on whether remote hearings have become a feature of the international arbitration landscape? Will they remain a permanent feature? Or is it something that

we will discard as soon as we can, and get back to sort of physical hearings moving forward? What are your thoughts, Sharon?

Sharon Chang

Thanks, Nish, for the very good question. I recall the time when the COVID pandemic first hit, and in **[inaudible 00:09:12],** international courts were either closed with either trials and hearings suspended, or they were scrambling to get ready proper infrastructure and system to allow for remote hearing. And we were all, as counsel, busy putting together virtual hearings and trial protocols for the court. On the other hand, what we saw was for international arbitration, it was almost business as usual. Although for the first couple of months, I suppose, cases did get suspended, as things were quite uncertain, and most countries were still under lockdown.

But very shortly thereafter, we saw hearings resume virtually, and I must say that virtual hearings were something new in the arbitration world pre-pandemic, we had various types of video conferencing facilities even then used for arbitration. As we see that the pandemic is now as you said, in endemic stage, and most borders have reopened, with minimal travels with minimal restrictions. That is a very good question as to whether, virtual hearings are here to stay. And for this, I must look back in 2020. And at that time, I recall that I thought and expected that the future will be filled with remote hearings, virtual hearings, even after the pandemic. But I must say that the present is not quite what I anticipated then.

As people got used to virtual hearings, I think everyone is just very eager to get back into in-person hearings and trials. In fact, in one of the arbitration matters, where I'm sitting as arbitrator, the very first week that AIAC reopened and resumed room bookings on their premises, the parties had immediately asked for an in-person hearing, and this was still in 2021, before the borders reopened. So, what I observe is that parties, counsel, arbitrators, still prefer to have in-person hearings, and many will still insist on it, now that it is permitted and feasible with lifting of restrictions. But the good thing is that, the parties are now used to this mode of virtual hearings and remote hearings, that for preliminary issues or case management conferences, parties are

now open to having that done or conducted virtually. So, I think there's a balance between in-person and virtual hearings, and I think, parties and counsel and arbitrators, are all working together to see what is the best way of conducting hearings, with minimal costs and with minimal delay, and how to make use of this virtual infrastructure that we've had put in place, in the last few years.

Nish Shetty

Thank you, Sharon. I definitely agree with you. Andy, any thoughts on this?

Andrew Pullen

Yes, I agree with Sharon, in terms of saying there is some movement back towards in-person hearings, but that it is going to be a mixed picture. So, I think we've all got much more competent at using the technology, much more familiar with using it. But we still recognize that there are some advantages for in-person hearings for certain types of things. What I think we're going to see, in years to come is that anything that pre-pandemic, and I'm particularly talking about international arbitrations here, the pre-pandemic would have been done over a telephone hearing, or would often have been done on a telephone hearing, such as procedural hearing, CMCs, sometimes urgent applications for interim relief, that it seems to me is likely to stay virtual and for the most part, and it's going to be done as we are now on Zoom or a similar sort of platform.

It seems to me where there's going to be a bit more of a mix is the substantive evidential hearings, where I suspect we're going to see a bit of a hybrid developing. So, I've got a case, where we had our CMC recently, the tribunal proposed doing the main hearing in-person and neither party batted an eyelid at that. There's a degree of moving back towards that part, with reservation that we might want to have people dialing in to observe the proceedings, for instance, the clients or in house counsel who may not necessarily need to be in-person in the room. And I think, thinking more broadly, we may also see some witnesses, it seems to me that there's two major issues

here. There's the convenience for the witness, or whoever it is, in terms of less travel time to get to the relevant place where the arbitration hearing is taking place, and the cost.

And it does seem to me that clients are going to be looking at cost, and they will no longer buy the idea that it's impossible, as it would perhaps have been suggested by people in the past, to do a cross examination virtually. And I think arbitrators will have to accept that, and counsel will have to accept that, that can no longer be said. There are pros and cons to doing it virtually, but it's not impossible. And so, I think what we might see, is a mixture with people in-person in the hearing to counsel, the arbitrators, and probably the principal witnesses appearing in-person, but the minor witness, who are only on for half an hour, it may be difficult to persuade clients that they should be paying to fly somebody across the world for that. So, I think we will see that sort of mix and match approach in future.

Nish Shetty

So, it sounds like it's not binary, it's not either or. You try and come up with a procedure, that will ensure efficiency and cost efficiency. One of the things that I think all of us are facing today, is just the sheer cost of travel, post pandemic, it is extraordinary what travel costs are these days. And I think that will be a feature as well, for minor witnesses to have to fly in to an in-person hearing, to give sort of 15 minutes of evidence or whatever, I think that discussion will certainly need to be had. Piyush, any thoughts from your side?

Piyush Prasad

I completely agree, I have been part of proceedings where parties sometimes are open to it, and sometimes they are not, I think now, since it's no longer an unknown beast, because I remember we attending these webinars two years ago, what Sharon was referring to, at the start of the pandemic, and everybody was like, what is this? How are we going to, although arbitration practitioners have been used to it, but it was always a question of, are you able to eyeball your

witness or not. But I think now, almost 3 years, 21/2 years into it, there is a more advanced approach.

Where you know that it's going to be a straightforward question of law that will decide the dispute, you don't really need to focus much on witnesses and cross examination, there I think there is unanimous consent that look, we can just go ahead with the virtual arbitration, no problems at all. But yes, certain other disputes where the witness evidence assumes a lot more importance, is where people are leaning towards in-person hearings, now that that is an option. But what I'm glad is that the fear of the unknown is behind us. And completely agree with Andrew and Sharon, that now it's an option. People are more happy to embrace than earlier.

Andrew Pullen

Just picking up, if I may, on what Piyush said about submissions. It seems to me that that is something where the advent of virtual hearings is something that could give us greater procedural flexibility and future. So, one of the things it seems to me, that has developed over the years in international arbitration, is a lot of advocacy is written. We can now have oral advocacy more easily if you like, by doing it virtually. So, you don't need to get everyone in the same room.

So that could open up opportunities to do things that in the past have perhaps been difficult, such as oral closing submissions, where parties may be reluctant or counsel may be reluctant to do on the last day of say, a 2-week hearing. But if you could come back a week later, and orally close, that may be something that parties might be more inclined to do. And you could do that oral closing virtually, even if you had your witness hearing in person, much more conveniently than then keep everyone in one place.

Nish Shetty

Louis, any thoughts from you on this?

Louis Flannery KC

Three different thoughts. Number one, the world's happiest arbitrator, I think, in 2022, the award must go to Lucy Greenwood, who has been struggling to persuade people to cut out air travel and pay for work, for a number of years. And finally, her wishes come true. She obviously had something to do with the start of the pandemic. because nobody is going to be a better beneficiary. But she has made us all realize, when of course for the first six weeks, as Sharon was saying, it was all a bit holy schmoly, how are we going to cope with this. But we all realize that we've done the occasional hearing by telephone or by video, it could work and lo and behold, it did work, and the systems held up.

The two other thoughts I had apart from the fact that it's just such a green thing to do have a virtual hearing. And I've done all of them now, I've done the hybrid I've done the fully virtual I've gone fully in-person. But the other thought is, particularly when you've got counsel in massively different time zones, your hearing day can be so contracted that if it's a two-week hearing, it's definitely going to take another week, and I've got one at the moment where our hearing day is 4 hours, because of the time difference. If obviously, the equation starts to move the other way, in terms of that being a factor if you want a shorter hearing, to get everybody in the same room.

Then the third thought was, I've had this both as tribunal and as counsel, where the tribunal can easily get in one city because they're all either in Central Europe, London or somewhere. But one side's counsel is in a far-flung jurisdiction, and the witnesses are far flung. And the other side counsel is also in the same jurisdiction as the arbitrator. What do you do, and in that situation as a tribunal, we've moved from half hybrid, to full hybrid. By half hybrid, I mean, tribunal, one side counsel in the room, other side's counsel virtual. We decided that not being in the room was too much of a disadvantage. So, we said to both counsel, you stay outside the room, we as tribunal will stay inside the room, and that's worked.

And the last thought was just that, and Friday was a perfect example of a very heated preliminary interim measures application, very contested, quiet considerable amount of money at stake, but

no reason to pull in everybody from all the jurisdictions to be in a room physically. So, the entire thing was conducted online, and I did my bit for Lucy, by not asking for a single document in paper. The technology has also improved, I think massively in the last two years, with the platforms that we can now have the downloading and the access to the documentation is just brilliant. But it is here to stay. No question, though there'll be a slight return. We all like the fact that we're in a conference now, but we're not together, is it's a positive, the fact that we're saving the planet but a negative in the sense that, we're not doing that networking afterwards, that gets the relationships that makes the world go around.

Nish Shetty

Absolutely agree with all of that. You touched on other technologies, just to close off this particular topic. We're now obviously very familiar with Zoom and similar technologies. What else do you think, is going to be part of the international arbitration landscape in the coming years? You touched on sort of digital platforms for communications and the like. Anyone wants to sort of crystal ball gaze and predict what are going to be the tools of the international arbitration lawyer's toolkit in the future, or at least in the near term, Kartikey**?**

Kartikey Mahajan

Yes, sure Nish, I mean, I was just thinking as to what international arbitration might look after 5-7 years. I think it's obviously very difficult to crystal ball gaze, but what I definitely see with the onset of technology in our arbitrations is, platforms like OPUS, EPIC, those who have become document providers, that document providing service can take the next shape, from those of us who end up doing a fair amount of white-collar stuff, you see platforms like Relativity, in which there is a lot of coding happening when it comes to discovery of investigation materials. I still haven't personally seen the same kind of tools being applied in an international arbitration, say in a construction case, in which you're looking at volumes of documents.

I see some of that playing out, people trying to make those processes more efficient. Obviously, when it comes to cybersecurity, I think that's another stream that some of these document service providers, some of these platform providers will try and ensure that there is strict compliance, because there'll be more attacks. So, more money, more time will be spent in ensuring all of those procedures are watertight. I think beyond this, I want to get on to the world of blockchain. But I will possibly not do so with a lot of trepidation. Because you just don't know what you're encountering in that world yet. I think there is a lot going on. People are talking a lot about blockchain arbitration, and how it can lead to, I think it's still really untested and wouldn't like to enter into that zone yet.

Nish Shetty

You have touched on a bunch of points within this subtopic. Even in terms of technology, we talked about digital platforms to file sharing. You've touched on cybersecurity, which is a huge issue. We had one arbitration; I remember where we disclosed documents as part of normal disclosure. And the other side asked us to use a particular platform. And we agreed to look at their documents, and we just experienced glitches while we were doing that. And we raised that with our cybersecurity team in our office, and we found that the, the other side have actually recommended a military grade file security site, that we think they were using to monitor what documents we're looking at. So, while technology is a great enabler, there are also things one needs to be cautious about.

So, I think when one talks about norms, these issues, the bad experiences, the good experiences, will then define what the norms should be, as we move forward. Now, that's a great segue into norms in India, more domestically. What are we seeing? What are we likely to see in the coming years when it comes to arbitration in India. Let me start first with just how arbitrations are conducted. I think it's fair to say for a fair number of years, I'd like to say before MCIA got involved, a lot of parties would choose retired Supreme Court judges and High Court judges, very distinguished individuals, to be arbitrators of India related disputes or disputes in India.

Is that still the trend? Are we seeing a change? What do we, what does the future look like for arbitrators in the Indian context? Let me first go to Piyush. Piyush, what are your thoughts?

Piyush Prasad

You know, I've practiced in India, and it is often that, although arbitration is supposed to be an alternative to what we see in the court system, the traditional mindsets to when you're approaching appointing an arbitrator, you still carry what you practice in the courts. I think it's more subconscious. So, as you're familiar with the judges, seeing them during the daytime, you also appoint retired judges in arbitrations, that has been the trend. Now, as I said, I have practiced in the courts, and I can say with confidence that Indian judges do possess **[inaudible 00:27:09]** knowledge of law and have great legal minds.

But now let's take a step back, and look at the alternate system that we are talking about. Usually, when in an arbitration, you will have a technical commercial dispute, let's for example, take a petrochemical, any dispute in relation to a petrochemical complex. Now, the determination of this dispute will require certain expertise. Now, if we have a panel of arbitrators, of course the judicial mind will be a great addition to that panel. But at the same time, we also need to look at the particular dispute, because arbitration does give you that opportunity to choose your arbitrator.

So, it need not necessarily be a retired judge, who may not have all that is required to do justice on that particular dispute. Because you may have, let's say, an academic and practicing advocate, to comprise the panel along with the judge, so we need to start looking at other individuals with different backgrounds and bring them in. Now, I understand that judges, the courts, as you know, while exercising their jurisdiction under Section 11 have been appointing arbitrators who are not only judges, which is a welcome change in the Indian scheme of things.

And even from my experience of working at SIAC, what I saw that, we were working on appointing a tribunal, a chair rather, because both sides had nominated retired Indian judges, the appointing authority in that case appointed a young advocate as the Chair, I mean, one of the concerns was

also that we need to have diversity on the panel. So, now that the trend is slowly changing, but of course, the large part of arbitrator work is still with retired judges, but I think we need to think about a particular dispute and come out of the mold of just appointing retired judges. Glad to know that Section 11, the judges, the courts are doing so.

Nish Shetty

So, I guess it's also beyond Section 11. And if you have institutional arbitration, you have the institution itself, assisting in that process, and that's where, you know, for example, MCIA has appointed a whole host of other individuals as arbitrators, counsel, female counsel, and so on. And the question really is, is that a trend that we see sort of becoming more and more apparent in the years to come. Kartikey, what are your thoughts? I mean, you've practiced both in India and in Singapore.

Kartikey Mahajan

I think Nish, that trend is certainly going to increase with time. And I say that because Indian arbitration has come a long way, in the last 5-7 years. Since Srikrishna committee report came about, since there has been a concerted push from all legs of Government, whether it be at the executive, legislature or the judiciary to promote institutional arbitration. And the best way of promoting institutional arbitration, is to get those people on board as arbitrators who will lay the right course. If you end up appointing people, who come with a sense of not of promoting arbitration, but to ensure that they have a retirement job, I think that will never set the right course. I think people who are looking at coming up with commercial solutions to arbitrations, no matter what their designation is, that is what is going to promote.

Now, if you look at the last 4 years, it's not only MCIA, it's even the Delhi International Arbitration Center, who has started appointing advocates. Not only the International Arbitration Center in Delhi, but also the Delhi High Court. So, there is an increased perception amongst judges, thanks to all the training which has been given to them, thanks to all these seminars and webinars, the

ones that even MCIA is organizing. They are also getting abreast of what is happening in the international sphere, what is possibly leading to a bad name with certain aspects of Indian arbitration, and they're trying to correct it.

See, India takes its time, India is not Singapore, India is not Hong Kong. It's a complex, diverse country in which it is trying to come up with new practices, which will get established across India. So, while Delhi and Mumbai might sign up for something, that doesn't mean all the cities in India will, so it will take some time to trickle down. So, you have to give it that time.

Nish Shetty

Thank you. That's really, I mean, the fact that, that's the trend in and of itself is huge.

Louis Flannery KC

Just, I'm loving what I'm hearing from Kartikey and Piyush, because it's purely from my perspective of perception, rather than the reality. But I suspect that has been something of a marriage between the two, that laterally, the perception has been from London, that if you are an arbitrator in India, and you're not a retired judge, you don't stand as much chance as a retired judge, of getting an appointment. In other words, the appointments seem to be hogged by retired judges, a lot of whom aren't as technically savvy as the younger practitioners and won't necessarily make a better decision maker in that environment. Because the skill set is so different.

We have a similar problem in London, but to a lesser extent, in other words, a lot of judges are looking at this as a second pension, to come off the bench and go straight into arbitral appointments, without actually understanding that the psychological dynamic of an arbitration, is so different to that of a court proceeding. But it's very pleasing to hear that the trends are shifting, trickling towards the employment of younger arbitrators.

Nish Shetty

And I think those in the arbitration community and arbitral institutions have a role to play in ensuring that that trend continues, the capacity is built. I will tell you, as you know, we do a fair bit of India related work, and oftentimes, we hear the refrain from those that want to appoint a retired Indian judge, which we look at it very closely, if that recommendation is made. And the suggestion that is made is, unless you have a retired Indian judge on the tribunal, your award won't get enforced in India.

And that, I don't know how that originated, who started that? Unless Piyush and Kartikey you tell me that I'm completely wrong here, I think that's utter nonsense. I think the judges these days are very increasingly pro arbitration, and it won't matter to them. Whether it's a senior international arbitration practitioner that delivered the award, or a tribunal comprising of arbitration practitioners, as compared to judges, they will look at the merits of the application itself. So, these are some of the things that are that are floating around that sort of lead to lead to the perception that you must appoint a retired Indian judge. And that's why I say there is a role to play for those in the community and institutions as well, too.

Louis Flannery KC

And our students are wrong for us.

Nish Shetty

For sure. Now, let me sort of move again, we were talking about emerging norms in India. And, you know, the Chief Justice this morning touched on institutional arbitration. And the fact that we still have to speak about institutional arbitration as a way forward in India, tells us that we're not there yet. A good number of arbitrations in India are still ad hoc. There is a perception that that's the right way to do it? Is that perception changing? And are we seeing higher value India related disputes going to institutional arbitration? Who has some thoughts on that?

Kartikey Mahajan

I'm sure others have thoughts as well, but let me lay down the ground work here. I mean, Nish on this point, I'll make four points, one of them I've already made before, which is that there is a concerted effort on all wings of the state to promote institutional arbitration, starting from the Srikrishna committee report in 2017. And what it has led to, is some of the effects that we just discussed when it comes to looking at different arbitrators, etc. But now you have very big cases which are going into institutions like one is, which just came about last month, our from five, which is the Reliance versus Adani case, which has gone to the MCIA, the biggest case that has gone to the MCIA. And this trend is going to rise. There are three other reasons for it.

The second reason is you look at India, India is now the fifth largest economy in the world. In the next 5 to 7 years, you're looking at India being the third largest, at a conservative rate of growth. With that comes infrastructure investment, with that comes a lot of money in a particular contract. And when those disputes will come out, they'll be massive. There is an increasing uptake, this is my third reason, when it comes to institutional arbitration, when it comes to any institution around the world. It has taken them that time to find confidence amongst the parties. I was doing some stats of SIAC, 2 months ago, because one of my clients asked me, as to how many Indian parties are doing. And I was just, you know, curiously going through the last 5-7 years.

And I saw that in 2014, SIAC had 400 odd cases, in 2021 SIAC had 1000 cases. So obviously, over a period of time, it becomes double, triple, and similar stats have come out of MCIA, that in the last three years, it's almost doubling every year. So, if it keeps on maintaining that rate, obviously, the number of cases will increase. And similarly, there are other institutions which are coming up in India weather be at Delhi International Arbitration Center, Hyderabad International Arbitration Center, they are all getting promoted, and you will see an uptick in institutional arbitration.

And I think the most important thing that I have seen, since I have joined an Indian firm, is that clients are generally fed up with adhoc arbitration and by clients, I mean, commercially savvy clients, obviously, there is a set of clients which are so cost conscious, that they think institutional arbitration is expensive than ad hoc, which is obviously a misnomer. Because if anyone has experienced adhoc arbitration in India, they would know that it is possibly clients more than institutional arbitration.

So, they are so fed up that I am now seeing clauses like MCIA in my contracts. And similarly, there is at least a discussion to have an Indian arbitral institution in an Indian seated arbitration not SIAC all the time, which I think is real progress. And I think when you interact with the clients, that tells you whether it is their mindset is progressing or not. And I can tell you that it is.

Nish Shetty

That's really good to hear. I want to move to the final point on this, that I was going to ask you all to address and that is really, one of the complaints I've heard repeatedly about the choice of arbitration in India, and why parties don't choose arbitration in India, is because they feel that the usual Indian litigation tactic of running for an injunction, is the way you conduct disputes in India. So, if you win on an interim relief application, before a court in India, then you've won quickly, and it doesn't matter if the rest of the litigation, you know, lasts for 20 years thereafter.

Now, how is that being looked at? Is that still the perception? Has there been any change on that front from an Indian arbitration perspective? What does the future look like? Anyone? Andy, I know that you're not an Indian practitioner, but I know that you do a fair amount of India related work. So maybe I'll ask you to comment on this.

Andrew Pullen

Well, I think the general proposition is, the parties still rush to court. I think some sometimes they do. And we see that in some of the high-profile cases. And you can see that sometimes people

do get bogged down in litigation on the side, but it's not always the case. And I think what we are also seeing is, the Indian courts being increasingly supportive of the arbitral process. And I think somebody said earlier, things take time, you kind of steering the supertanker rather than a small boat. But the Indian Supreme Court is very clearly giving a steer in favor of arbitration. And I think we've seen a few judgments in relation to emergency arbitrator awards that I think emphasize that trend and the supportive nature.

I think one of the interesting ones is the Amazon, the Amazon and Reliance Industries case, Amazon and Future Retail, which was all to do with whether an emergency arbitrator's interim award should be enforced and what the process for enforcement was. And in particular, there was a question about whether an emergency arbitrator amounts to an arbitral tribunal, in order that his order or award could be enforced in India, under the Arbitration and Conciliation Act, given that there's no specific mention of emergency arbitrators in the legislation, and the Supreme Court's judgment from August of last year, I think, is a really very well written and very carefully reasoned and clear judgment actually on that. A really excellent one, actually, and very pro party autonomy. So, a lot of weight given to the fact that the parties had chosen the SIAC rules in that particular case, which had an emergency arbitrator as part of the process.

Nish Shetty

Andy, I'm sorry I don't have the decision, I thought that was appalling decision **[inaudible 00:42:19]**

Andrew Pullen

So yes, it was an emergency arbitrator who granted an injunction to restrain the sale of a business to Reliance, sale of Future Retail, their business to Reliance, which is in contravention of a set of a shareholder agreement. And so, there was, there was a there was a little bit of a saga over a period of time, with that first going to Delhi High Court single judge who, who upheld it, and then there was some more litigation, but it eventually ended up in the Supreme Court. And essentially,

the key thing, which is very important for the future, is that upholding the idea that an emergency arbitrator's order is enforceable as a matter of Indian law under the ACA.

Because there aren't very many statutes around the world that have got a reference to an emergency arbitrator in them, Singapore, Hong Kong, I think New Zealand is another one which was cited in that case. And the judge in that case looked at the definition of arbitral tribunal, looked at some language which you don't see in every Arbitration Act, but which you see in many where they have the definitions, they said the definition applies unless the context requires otherwise. They said the context of the interim relief provisions of Section 17 required otherwise, in that you give a broader reading to the definition of arbitral tribunal, and therefore the emergency arbitrator's order counted.

And as I say, so I think the technical point seems to me that is a judgment that could be relied upon in other jurisdictions where you don't have the specific reference to emergency arbitrator, but you have a similar provision in the definitions section. But more broadly for India, I think that just the sentiment, and they're really very pro arbitration, very pro party autonomy, taking careful note of what the what the rules provided on a few other technical arguments that were run, and rejecting those arguments by reference, the fact that the parties had agreed to certain provisions in the SIAC rules. I think that all bodes very well for the future, arbitration in general, and also for institutional arbitration, that it gives real weight to the institutional rules.

Nish Shetty

And it's also good spate to this argument that you can only get such relief before the National Court. And you can get this from a tribunal, quite often as quickly, if not quicker than before a court.

Andrew Pullen

Absolutely. I think the emergency arbitrator, of all the many innovations we've seen going into optional rules over the last 10 years, it seems to me the emergency arbitration probably the most successful, it really works well. And I think so, the more jurisdictions that are recognizing that and enforcing the orders, that just supports the process even more.

Nish Shetty

And the one thing that again, we won't touch on this now, but I mentioned this summary determination, which is there in some rules, Neeti I can disclose that the MCIA rules are in fact, going to be looked at and amended to take into account recent developments. And that will certainly be one thing that we will look at, but it is one gap, that people point to, when comparing domestic litigation with international arbitration.

Can I now move on to 3rd party funding? Can I perhaps ask either Sharon or Louis, just talk a little bit about how 3rd party funding has come into the international arbitration world? Is it good, is it bad, is it here to stay? What do you all think about it? And perhaps then I'll take it to, take it back to India, and see in the Indian context, whether this is something that that we're going to see more often in India. So, who wants to go first?

Louis Flannery KC

I actually think that 3rd party funding in London terms, has probably reached a sort of peak, in the sense that the market is so saturated, and the players are so competitive, that it's not going to have explosive growth from the last few years, because it's already had one. It's a beautiful or ugly creature, depending on your point of view. It promotes a claimant friendly approach, because only a claimant could get the funding for its claim. And as I've seen, it's obviously because the funder has realized that there is a pot of gold at the end of the rainbow, that they want to share in the trove. But there are cases, and a celebrated case where one corporate party was pretty much

brought to its knees by another, decided it needed to get 3rd party funding went out and got it, the usual multiple applied as in 3 times investment.

The arbitrator was asked to award in effect, whatever the party paid the funder, the arbitrator said that's a reasonable cost. And if you look at the English Arbitration Act, you can probably squeeze it in to the definition. And the arbitrator, none other than a very distinguished retired **[inaudible 00:47:50]** Judge said I agree. And awarded the entire amount, on the basis that he was satisfied that the party didn't really have an option. It went to court and because it went to court, we will know about it, because it got reported. It would otherwise would have remained under wraps as an ICC arbitration. And it went to court and an equally brave judge now, Mr. Justice Waxman upheld the award.

And so, a lot of people have decided to try and shoehorn their cases into that principle, to try and recover the funding. It's anecdotal, but it seems that tribunals are getting more used to the idea of awarding the uplift in a way that judges can't anymore. Judges can't even order an applicant on a conditional fee agreement. So, there is that to be said for it, but it does represent a tremendously, a seismic shift towards claimants, as in a body in effect, an industry that is, its whole income revolves around the party succeeding in arbitration and getting cash.

Nish Shetty

Yeah, I mean, I think industry is the right way to describe it. My own experience with it is that it's becoming a very, very sophisticated industry. They're operating like hedge funds. So, the traditional multiple approach is no longer the approach that is adopted by a lot of funders. So, they do get into the case a lot more. They, work out their financial metrics. Obviously, it's a financial play, a lot more. Sharon, what's your experience with 3rd party funding?

Sharon Chang

Well, unfortunately, in Malaysia it is not permitted yet. It is in the works. But I do see quite a lot of 3rd party funding in other jurisdictions. And further to what Louis said earlier, we are accustomed to seeing 3rd party funders, which funds claimant's arbitration costs, for a share in the proceeds of the arbitration. And we do see that the reasons for using the 3rd party funding are no longer the same as before, no longer as limited as before, where, the claimant is impecunious and has little or insufficient funds to pursue its claim. We see now a lot of companies using 3rd party funding to free up their company's working capital for other projects, or more imminent capital expenditure, or for risk management purposes.

But more recently, there are also investors in particular investment funds, they're showing a keen interest in investing after the arbitral proceedings are over and after an award has been rendered in favor of the claimants. So, this is where claimants who do not wish to pursue or continue with a potentially protracted enforcement proceedings, they will sell the awards to a third party, typically at a discount, perhaps on the face value of the award. There are a variety of reasons as to why award creditor may want to monetize its awards, it may be due to arbitration or litigation fatigue, they would have spent several years and a substantial amount of money arbitrating the dispute.

And then only to see the counterparty refusing to honoUr the final award. And this is especially so in investment arbitration, where the prospect of enforcing against a state, maybe more daunting than a private company, or even a public company or any company or any losing party. So, we do see this phenomenon in inter party funding, and as you say, Nish I think it has become, a very complex and complicated matter where we see counsel or we see lawyers now specializing in reviewing or drafting 3rd party funding arrangements or agreements.

Nish Shetty

Thank you, Sharon. Kartikey, what about the Indian context, this is coming into the market or not?

Kartikey Mahajan

So let me say this Nish, that is already in the market, there are deals happening. And by 3rd party funding, I'll just broaden the definition, 3rd party funding doesn't only mean funding for an arbitration claim, it also means funding for any sort of litigation or a portfolio funding or any sort of lawyer financing that might be required in a particular case. So, in that sense, there is now an Indian fund by the name of LegalPay, which is established in India, trying to crowdsource funding options, and then look at the relevant outside funders who can fund. It's working successfully, apparently, but even outside funders are looking at India.

But there are certain bottlenecks. Before I get onto the bottlenecks, let me give one minute of quick macroeconomic environment, in which I think because of which 3rd party funding will increase, we have just come out of COVID. A lot of companies had their bankruptcies frozen, because the Indian Supreme Court had come up with an order that no bankruptcy will take place until further date, as a result of which no one was actually filing insolvency claims. Now, with the Federal Interest rates going up, you're looking at 4.5% by the end of next year, you will see wide ranging bankruptcies with also options into India.

And you may see lot of Indian companies trying to avail 3rd party funding. But not all funders are looking at India for three reasons. One is the withholding tax concerns in India. So, if you are situated outside India, you have to pay withholding tax in India, which obviously eats up into their returns. Second is the Indian rupee depreciation. Any funder who is giving that sort of money, is looking at a net IRR of 14 or 15% after currency depreciation, which is a huge return to be made. And with every year Indian rupee falling, it's very difficult to cap that. And the third is, when it comes to enforcement, if the enforcement is only in India, then it leads to court delays, which also deters foreign funders from entering into India. So, unless and until these bottlenecks are removed, it will be difficult to see a flourishing industry in India.

Nish Shetty

Thank you. That's a very clear answer Kartikey. Now, we've got literally three minutes to go. I think Shreya will close. So, in the three minutes, I'd like to see if we can manage to cover two big topics. One is diversity. I really did want us to cover that. And secondly, what Louis touched on briefly, which is really Lucy Greenwoods project around greener arbitrations. So, let's go with diversity first. Over to you, Sharon.

What does a diverse tribunal look like to you? Are we embracing diversity a bit more in the arbitration world? I mean, I know a number of years ago, we started with the arbitration pledge to have more women arbitrators in that position. And I think that's worked, to some extent, and we certainly see a lot more of that. But what does diversity mean for you? And what are your thoughts?

Sharon Chang

To me, a diverse tribunal is diverse in the broadest sense of the word, from gender, seniority, ethnicity, racial, cultural, geographical location, jurisdictional to interdisciplinary diversity. So, in the broadest of sense, and I think many of the current efforts to improve diversity, are largely at the institutional level. We see a lot more appointment of younger and female arbitrators. But given the prevalence of party nominated arbitrator appointments, I believe that we must, do our role as practitioners, to emphasize to the clients that diversity is not a mere checkbox, but actually makes good commercial sense. By widening the pool of candidates for arbitrators, we get a broader range of talents, and this is more likely to yield better results.

Nish Shetty

Thanks Sharon. Louis, on greener arbitrations, is that the direction we need to travel towards?

Louis Flannery KC

Yes, it is. So, I do want to just follow up on something Sharon has said.

Nish Shetty

Sure.

Louis Flannery KC

It's on diversity, and it's less than 60 seconds. 20 years ago, I saw Jan Paulsson at a conference, and he said that he had just been appointed arbitrator with another equally distinguished arbitrator. And they'd taken the decision to appoint somebody almost half their age, who was a woman who'd never sat as a presiding arbitrator. So, the two wingers agreed to appoint a woman who had never sat as arbitrator. I have used that exact technique not less than five times. So, I have given five women arbitrators, a break as first presiding arbitrator. To say that it's down to the institutions is wrong, we can play a part.

So, I have one where I've just been appointed, I'm about to say to that person, you're old and over the hill, I'm old and over the hill, let's get somebody who's not old and over the hill, who's never had a presiding arbitrator job and is a woman to chair us. We can guide that person, because we've got the experience.

On the green arbitration. It's easy. Travel by bike, travel by train. Sail to India, I don't know. It's hard, of course, it's hard because we leave such a carbon footprint when we get on a plane.

Nish Shetty

And virtual arbitration conferences.

Louis Flannery KC

I went up to the **[inaudible 00:58:00]** by train. I did my bit. And I was on the same train as Lucy Greenwood. Parading my ecological quality or qualities. But yes, it's hard but we have to do it. We got to save the planet. It's our children's future.

Nish Shetty

If we wrap all of that together, if we talk about technology where we started, and the ability to use technology, not in a binary fashion. To look at each arbitration and see what do we actually have to do, then I think the greener push can fit within that quite easily. If we look at it through that lens, then the way that an arbitration should be conducted may become more apparent. I promised Shreya that I will hand mike back to her for literally the final minute. I have to thank all of you. I think we could have gone on for another hour very, very easily. So, thank you all for your comments. Shreya, back to you.

Shreya Jain

Thank you, Nish. I only take back the mantle very reluctantly, because this session was incredibly engaging. And I have to specially thank all of you for being so candid with your insights and telling us so many interesting things from your experience, including a train ride, which sounds very, very exciting. Taking cue from Nish, and Nish before I go there, thanks a lot for moderating the panel so seamlessly, where you covered topics as far off the scale as technology, 3rd party funding, greener arbitrations and more diverse arbitrations. It felt like we were all just sort of listening to all of you in a very informal setting but covering very important topics.

So that's a great panel. Thank you. I did want to end with one concluding thought, which I think is how you ended the session as well, with two important topics of greener arbitrations and more diverse arbitrations. That's something the MCIAs ADR week is giving a lot of focus on as well. And I know there's a session tomorrow, where there's focus entirely on diversity in arbitration.

So, I hope to see our audience attend all of these sessions and in big numbers. But for now, I will bring the session to a close, we've touched the one-hour mark. So, thank you very much. I do want to mention that all the videos and transcripts of the India ADR Week sessions will be available on the website, which is www.adrweek.in, starting next week. So if you know any of your colleagues or friends, who missed attending sessions, such as the one today, then they can benefit from these videos starting next week. And I hope to see all of you in great numbers for the remaining sessions as well. So, thank you.

Louis Flannery KC

All right.

Nish Shetty

Thank you all.

Piyush Prasad

Thank you.

Sharon Chang

Thank you.

Kartikey Mahajan

Thank you.