Arbitration Committee Meeting

Date: September 23, 2021
Time: 1:30 – 3:00 (ET)
Location: Online (Zoom)

Attendees:

Abhishikta Mallick	Aditi Nandanwar	Aditya Prasad
Adolfo Jimenez	Akash Srivastava	Alex Yanos
Allen Waxman	Ameyavikrama Thanvi	Andrew Ling
Arjan Sodhi	Ashlesha Srivastava	BHAVIK RAJANI
Divyanshi Dwivedi	Ellen Parker	Harry Trueheart
Helena Erickson	Jasmine Kaur	Jeffery Commission
Jennifer Glasser	Jim Reiman	John Pinney
Kirtan Prasad	Kuldip Singh QC	Lili Schroppe
Michael Lampert	Mikael Linton-Wahlgren	Payal Saraogi
Pranav Sethi	Pratik Pawar	Puloma Mukherjee
Quentin Pak	Radha Raghavan	Rashmita Chowdhury
Rishab Gupta	Roopa Mathews	Rupert Macey-Dare
Sanjeev Kapoor	SHANEEN PARIKH	Sherman Kahn
Shigeki Obi	Shivani Sanghi	Shouvik Bhattacharya
Shresth Vardhan	Sunita Advani	Surya Gopalan
Tapasi Sil	Theresa Puthumana	Viren Mascarenhas

Minutes

Ms. Erickson opened the meeting and welcomed all participants and members of the Arbitration Committee of the International Institute for Conflict Prevention & Resolution (CPR). The meeting was held by video. Ms. Glasser recognized the passing of Barry Garfinkel, a former Skadden partner and a longtime member of the CPR Arbitration Committee.

1. Panel discussion regarding arbitration in India

The Committee hosted a panel discussion concerning the arbitration environment in India. The panelists were: Tapasi Sil (General Counsel, South Asia, GE Energy), Rishab Gupta (Partner, Shardul Amarchand Mangaldas), Shaneen Parikh (Partner, Cyril Amarchand Mangaldas), Sanjeev Kapoor (Partner, Khaitan & Co.), and Quentin Pak (Director, Burford Capital). Mr. Mascarenhas briefly addressed CPR's 2019 India Supplement to the 2017 Corporate Counsel Manual. He introduced speakers for the panel and invited their perspectives on the arbitration environment in India, including recent developments in Indian arbitration law.

Ms. Sil discussed her experience in selecting external counsel. She explained that GE Energy looks to the complexity of the dispute, the amount of damages at stake, and the reputational risk to the company. She noted that representations made in an Indian arbitration could still have implications for GE's businesses in other parts of the world; for that reason, she said, GE Energy often prefers to engage a local counsel team together with an international counsel team. Ms. Sil also noted that GE Energy pays

attention to diversity when engaging external counsel. Ms. Sil noted that there had been positive developments in India with the recent passage of legislation towards a more pro-arbitration environment. Nonetheless, she explained that there remains a mindset in India that arbitration as a process is very long and can be very expensive. She noted that her team advises GE business to explore non-adversarial dispute resolution mechanisms, including conciliation, if there is scope to do so in resolving a dispute.

Mr. Gupta noted that India's Arbitration Act is based on the UNCITRAL Model Law, but that it had nonetheless been amended three times: in 2015, 2019, and 2021. To describe the arbitration environment in India, and determine why the Indian legislature felt it necessary to amend the Model Law, Mr. Gupta pointed to several general cultural factors. First, he explained that India historically had only *ad hoc* arbitrations because Indian arbitration institutions did not garner the confidence of the user base. Second, he explained that India did not historically have a professional arbitrator body. He explained that Indian arbitrators tend to be retired judges and import their own traditions as Indian judges. Third, he explained that India has historically not had a professional arbitration bar, which has led to a small minority of advocates available for complex arbitration work. Fourth, he explained that Indian courts have not shown confidence in arbitration processes. Fifth, he explained that because there has been an historical inability to develop a strong arbitration culture in India, Indian users of arbitration have generally tried to seat arbitrations outside of India. He explained that Indian arbitration users historically preferred London as an arbitral seat but that this moved to Singapore over time. Mr. Gupta also addressed a few key elements of the 2015 amendments. Among them, he explained that India is now the only country to require that arbitrations seated in the country be completed within 18 months. He also noted that it is now clear that if an arbitration is seated outside of India, for example, in Singapore, parties may still approach Indian courts to obtain interim relief. Mr. Gupta noted that Indian-seated arbitrations seem to be moving on faster timelines generally, but also that arbitration users still tend to prefer to use foreign seats, particularly Singapore.

Ms. Parikh also discussed India's Arbitration Act, as amended, and related jurisprudence. She explained that the law distinguishes between international commercial arbitration and domestic arbitration. She noted that one key difference is that, in a purely domestic arbitration, a party has the ability to challenge the award on the basis of patent illegality. In contrast, she said, two Indian parties arbitrating in a foreign seat will not have recourse to the patent illegality ground in challenging an award. Ms. Parikh also noted that a recent ruling from the Indian Supreme Court clarified that two Indian parties could choose a foreign seat of arbitration. Ms. Parikh also explained that India adopted a "reciprocity" reservation when it acceded to the New York Convention, which requires it to notify a foreign State in India's official Gazette before awards made in that foreign State can be enforced in India. She noted that not all countries that have ratified New York Convention have been notified by India in this way, and that parties should factor this into their investment protection planning.

Mr. Kapoor discussed the enforcement of interim measures in India. He explained that three kinds of interim orders are possible: (i) those passed by institutional tribunals seated in India; (ii) orders issued by emergency arbitrators seated in India; and (iii) orders issued by arbitrators seated outside India. He discussed applicable Indian legislation, and related jurisprudence, and explained that all three kinds have been held to be enforceable, but noted that some uncertainty persists as to the enforcement in India of interim orders issued by tribunals outside India.

Mr. Pak discussed recent trends in third-party funding of arbitration in India. He explained that there has been increasing interest in this area. He explained that this can be explained in part by the passage of legislation in Hong Kong and Singapore – where many Indian arbitration practitioners are located – having a "boomerang" effect on the Indian market. He also noted that part of the explanation is due to macroeconomic factors, including COVID-related stress on company balance sheets. Mr. Pak discussed Burford Capital's work in India, noting particular interest in the monetization of awards and judgments. Mr. Pak explained that when Burford evaluates a case, it looks at counsel, the legal merits of the claim, the claim size, and the likelihood of recovery, including enforcement against assets if needed. Mr. Pak noted that, with funding, a litigant can transfer duration risk, obtain flexibility in its fee arrangement with proposed counsel, and also stress test legal tactics pursued by counsel, as well as the legal budget.

2. Other CPR Announcements

Ms. Parker provided an update on upcoming CPR committee meetings and referred attendees to the Events page of the CPR website for further information. She also invited attendees who are not already members of CPR to join. Ms. Erickson asked that any members interested in contributing to a joint project with CPR's Healthcare and Life Sciences Committee regarding best practices in life science disputes get in touch.

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Ms. Erickson concluded the meeting.