Kluwer Arbitration Blog

LIDW 2023: India: Trends, Opportunities, and Challenges

Zil Shah · Saturday, May 20th, 2023

Indian arbitration landscape continues to evolve and London continues to play an important part in cross-border disputes with a link to India. Anuradha Agnihotri, Devika Khopkar, Arun Mal, and Nicholas Peacock, with Rishab Gupta as moderator, shed light on various aspects of the Indian disputes market during LIDW 2023, including India's recent move towards liberalization, popular arbitration seats among Indian parties, and enforcement of foreign awards in India. The panel addressed opportunities and challenges faced in the Indian arbitration landscape and underscored the importance of strategic decision-making, international collaboration, and continuous improvements to make India an attractive destination for international arbitration.

Liberalization of the Indian Market

The recent liberalization of the Indian market has generated interest, confusion, and controversy among many. Nicholas Peacock highlighted its potential impact on foreign law firms. The Bar Council of India's (BCI) notification issued in March 2023 allowed foreign lawyers and law firms to advise clients on non-litigious matters involving foreign law. Mr Peacock pointed out the uncertainty created by the absence of an "appended 'Form A'" to which the notification specifically refers, the eligibility criteria for a foreign firm to have an office and the cap of 60 days of permitted practice within the jurisdiction in any given 12-month period. He expressed optimism about the potential for foreign law firms to build presence in India but noted that further clarity was needed before such presence could be established.

The panelists then discussed how liberalization of the Indian market would affect both transactional and non-transactional legal practice. While acknowledging the positive move, they emphasized that a conducive environment for arbitration to flourish was essential for India to become an international arbitration hub. When asked whether following this liberalization and entry of foreign law firms into the Indian market, foreign firms would create substantial competition to local firms, Anuradha Agnihotri denied noting that good talent existed everywhere and thus, she saw no reason for clients not preferring local firms.

London as a Popular Choice

Arun Mal explained why London remains a popular choice for arbitration, citing a QMUL survey

that ranked London as the top seat of arbitration globally. He attributed this to historical and cultural factors, such as the common law system and the use of English language. Therefore, naturally also, arbitrations related to India were frequently seated in London. Mr Mal highlighted the increasing business ties between India and the UK, with Indian businesses being the second largest group of FDI investors in the UK. He further emphasized the reputation and high standing that the English Commercial Court had as a supervisory court, which was also a key consideration for Indian parties preferring their disputes being heard in the UK. However, he noted that to maintain London's position as a desirable seat among Indian parties, market players needed to develop template arbitration clauses specifically suited for Indian parties.

Choosing between Singapore and London as a Seat for Indian Disputes

The panel next discussed the recent shift in the choice by Indian parties of having their disputes seated in Singapore rather than London. While the panel generally agreed that this had been the trend, Mr Peacock countered the notion that Singapore's gain was London's loss in the arbitration landscape. He emphasized that Singapore's rise was a result of the growth of international arbitration overall and resulted from a move away from litigation. He agreed that one of the reasons for Singapore's growth as an arbitration hub was Singapore's excellent infrastructure, the growth of Maxwell Chambers, and the cost-efficient options offered by institutions such as the SIAC. However, Mr Peacock pointed out that even if costs were an important consideration for Indian parties, LCIA would have a lower costs model overall (even with its ad-valorem model) and thus, still an excellent choice.

Devika Khopkar mentioned how the nationality of an investor was also one of the key considerations in the choice of a seat. She noted that her experience from practice showed that in investment treaty cases Singapore was the first choice for Indian clients followed by London, adding further, however, that from an enforcement perspective more Indian assets lied in the UK.

The panel discussed factors influencing the choice between SIAC and LCIA, depending on the nature of the dispute and the preferences of the parties involved, such as the historical preference by Indian parties of choosing LCIA for commercial disputes, ICC for construction disputes, and SIAC for venture capital disputes.

Enforcement of Foreign Awards in India

Ms Agnihotri first explained how the enforcement process in India was split into two stages i.e. recognition and execution, and added that it was the stage of execution that had historically proven tricky for parties. In saying this, she emphasized the need to develop the "execution machinery" within the country. She also noted a positive trend of faster timelines with enforcement at various Indian courts but mentioned problems that nevertheless existed. Ms Khopkar noted that in one instance (*NTT Docomo Inc v Tata Sons Ltd*), the enforcement proceedings were quick, efficient, and completed within 8-10 months. When asked how different High Courts compared when it came to enforcement, the panelists agreed that all High Courts would substantively reach the same outcome but the key consideration for clients would be to choose which High Court was strategically better to approach and this would differ on a case to case basis.

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The panelists summarized their key takeaways on India-related disputes as follows:

1. Mr Peacock emphasized the expectation of “hard-fought cases” due to the multiple layers involved with enforcement.
2. Mr Mal advised on carefully selecting the arbitration seat if the dispute had a nexus to India.
3. Ms Khopkar stressed the importance of specifically selecting “arbitration” as a mechanism to avoid pathological clauses.
4. Ms Agnihotri highlighted the need to strategize well and the importance of taking a holistic approach in navigating the evolving arbitration landscape in India.

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