

Kluwer Arbitration Blog

Delhi Arbitration Weekend 2024: Spotlight on State Owned Entities and the Role of Technology in Arbitration

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The Delhi Arbitration Week (“DAW”) 2024 that took place from 6 to 10 March 2024 featured two panel discussions that focused on emerging issues such as state owned entities (“SOEs”) and the role of technology in arbitration.

The panel discussions came into play at a time when there have been significant developments and challenges globally and in India regarding SOEs and technology (discussed [here](#) and [here](#) respectively) in international arbitration.

This post covers the discussions of the two panels, “The State of Arbitration – Navigating an Arbitration Involving State-Owned Entities” (“SOE Panel”) and “Keeping Up with the Tech – Exploring the Interplay of Technology & Arbitration” (“Technology Panel”).

The SOE Panel was chaired by [Justice Hrishikesh Roy](#) (Judge, Supreme Court of India), who opened the discussion by providing insights on the issues faced by SOEs in arbitration proceedings. The panel consisted of [Justice Senthilkumar Ramamoorthy](#) (Judge from the High Court of Madras) and [Mr. Tushar Mehta](#) (Solicitor General for India) who reflected on construction disputes involving SOEs and proposed ways to minimise and reduce disputes. On the other hand, [Mr. Fionn Pilbrow KC](#) (Brick Court Chambers), presented an SOE’s perspective in investment arbitrations. Finally, [Ms. Koh Swee Yen, SC](#) (Partner, WongPartnership LLP) addressed the challenges in enforcing awards against SOEs.

The Technology Panel focussed on the interplay of technology and arbitration and was chaired by [Justice Aniruddha Bose](#) (Judge, Supreme Court of India). The panellists included [Justice Ajay Bhanot](#) (Judge, High Court of Judicature at Allahabad); [Mr. Gopal Subramaniam](#) (Senior Advocate) who addressed the challenges posed by technology and Artificial Intelligence (“AI”) respectively. Further, [Mr. Richard Wilmot-Smith KC](#) (39 Essex Chambers) gave an overview of how the use of technology in dispute resolution has changed over the years. Finally, [Mr. Alberto Predieri](#) (Founding Partner, de Bedin & Lee Studio Legale Associato) provided an overview of the interplay between technology and arbitration from the perspective of civil law and sports disputes.

The State of Arbitration: Navigating an Arbitration Involving SOEs

Arbitration and SOEs

Justice Hrishikesh Roy set the tone by emphasising the essence of arbitration i.e., parties' autonomy and the need for a fair and speedy resolution. He discussed the diverse landscape of arbitration and highlighted that state entities were key players in various arbitration settings. During the session, the prevalent reluctance of state entities i.e., Public Sector Undertakings ("PSUs") such as the National Highways Authority of India in accepting arbitral awards was noted. This scepticism can be said to be well founded as PSUs involve a hierarchical structure. Consequentially, some of the calls made by higher management in good faith may be used to initiate arbitrations against them. Thus, the Indian government has been taking steps towards mitigating scepticism. One such measure which was pointed out is, "Vivad se Vishwas II – (Contractual Disputes)" by the Department of Expenditure, Ministry of Finance of India, which translates to, "from a dispute to trust". This is a scheme, which encourages PSUs to settle pending contractual disputes, and has been seen as a **major step** towards settling disputes involving PSUs.

Justice Senthilkumar Ramamoorthy discussed SOEs from the perspective of construction arbitrations. In this regard, he remarked that construction disputes were one of the most prominent disputes involving PSUs and often arose from issues starting at the contract formation stage and continuing through the actual performance of the contract and into the pre-arbitration phase. This, he noted, highlighted the importance of contract management, and how PSUs should look beyond standard form contracts. One of the major reasons for considering this could be to address roadblocks, such as, mitigation of damages or change in law clauses. Further, multi-tiered dispute settlement could also be proposed for specific claims which need not go through an arbitral process.

State's Perspective of Arbitration

Mr. Tushar Mehta raised several important points regarding arbitration involving SOEs. He highlighted the lack of a level playing field between PSUs and private entities in arbitration. In his view, this phenomenon indicated that reforms were required to address and reduce these imbalances. Mr. Mehta also emphasised the need of a mechanism where parties would be asked to deposit a certain percentage of the value of the award before challenging the same. Whether such a rule can be implemented or not will have to be seen. However, the proposed mechanism does have the potential to avoid frivolous claims, according to Mr. Tushar Mehta. At the same time, courts should also be mindful of the condition of the parties, as smaller enterprises and Micro, Small and Medium Enterprises who are award debtors, may face liquidity issues in depositing sums which may form a considerable portion of their operational budget.

Mr. Fionn Pilbrow, KC addressed the issue of attribution of responsibility on state entities in international investment arbitrations. He referred to Article 4, Draft Articles on Responsibility of States for Internationally Wrongful Acts, which deals with the conduct of state organs. Mr. Pilbrow highlighted a key case, *Mobile Telesystems v. Turkmenistan*, ARB(AF)/18/4, to illustrate that ownership of an entity by the state is not determinative of the state's responsibility. Given the criticism that investment arbitration has been receiving, such an approach such may dispel part of it. For instance, if a tribunal were to consider if an entity was actually acting on behalf of a state's instruction, it may assist them in reaching a well-reasoned conclusion, as compared to a mere assessment of whether an entity was owned by state.

Enforcement Against SOEs

Ms. Koh Swee Yen, SC, discussed the enforcement of awards against SOEs in arbitration. She addressed the question of whether SOEs can claim immunity against the enforcement or execution of arbitration awards. Ms. Koh Swee Yen, SC explained that SOEs often argue that they are organs of the state and therefore immune from execution. This comes at a time when states have themselves tried to claim sovereign immunity against enforcement of awards in proceedings in the United Kingdom and the United States. SOEs in the future may try to adopt a similar strategy and argue that the assets against which enforcement may be sought are sovereign assets owned by the states. In such a scenario, the enforcement courts will have to consider whether there are commercial assets belonging to states in their jurisdictions.

Keeping up With The Tech – Exploring the Interplay of Technology and Arbitration

Interplay of Arbitration and Technology

Justice Aniruddha Bose opened the session with an emphasis on virtual arbitrations which in his view, had enabled arbitrators and parties from diverse global locations to convene without hassles. He highlighted that other aspects of technology should be looked into from the perspective of arbitration such as the potential use of technology in case management. His remarks come at a time when the Supreme Court of India has been taking active measures to implement the use of technology. However, it will have to be seen how far such use can be successfully implemented into arbitration proceedings.

Justice Ajay Bhanot provided valuable insights into the disruptive nature of technology. He noted that while societies have readily embraced technological advancements, courts and institutions often struggle to adapt to technological advancements due to institutional constraints. Justice Bhanot highlighted the role of technology in capacity-building, making law firms more efficient, and emphasised the importance of institutions in utilising technology effectively in arbitration proceedings. However, when it came to arbitration proceedings, one could not rely on technological tools solely. This is because several platforms that have surfaced are at a nascent stage. Hence, they may only be able to provide limited assistance which are purely administrative in nature.

AI and Arbitration

Mr. Gopal Subramaniam, S.A. shared intriguing insights into the use of AI technology in arbitration. He presented quotes generated from ChatGPT and asked if the human mind is capable of writing more comprehensively than ChatGPT. He also highlighted the role of AI in assisting law firms with arbitrability and selection of arbitrators. While technological tools such as Kluwer Arbitration's Relationship Indicator have proven useful, parties may want to reassess their reliability on technology. For instance, certain tasks such as research are well suited for natural persons, as one would want to avoid instances of case laws being fabricated by AI-based platforms.

Mr. Richard Wilmot-Smith KC concurred with Mr. Gopal Subramaniam on a few counts. He shared his experiences with technology in his legal practice. He discussed how AI has pushed him out of his comfort zone and highlighted its impact on handling vast amounts of documentation and data retrieval.

Does AI Pose a Threat?

Mr. Alberto Predieri shared his experience of practicing in the sports sector and arbitration. He raised an intriguing question about the role of AI in arbitrations, questioning whether AI could function as an arbitrator given that the law typically requires an arbitrator to be a natural person. He also discussed the European Union's legislation, particularly the General Data Protection Regulation, emphasising the need for caution in the use of AI in the administration of justice. Mr. Predieri noted the opacity of AI, likening it to a "black box" where the inner workings are not fully understood. These observations reaffirm the position that AI may only be suited for specific tasks and is meant to assist individuals rather than replacing them altogether.

Concluding Remarks

The session concluded with a consensus on the transformative potential of technology in arbitration, coupled with a cautious approach towards its implementation. The two abovementioned panels demonstrate that the DAW 2024 was a valuable and comprehensive attempt to discuss ongoing issues in international arbitration from an Indian perspective. Both these themes resonated with the Indian position well. On one hand, it presents an overview into the nature of disputes involving SOEs that may arise in India. On the other hand, it shows the trajectory arbitration in India may follow with an increased but calculated use of technology.

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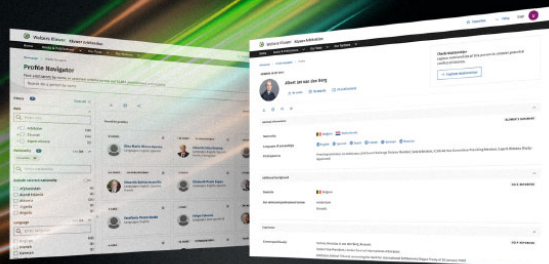
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