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NEWSLETTER

CENTRE FOR ALTERNATIVE DISPUTE RESOLUTION (CADR)

ARBITRATION

INTERNATIONAL NEWS

1. AMBITIOUS NEW 2020 LCIA ARBITRATION RULES, WITH AN INCREASE IN COSTS

On 11 August 2020, the London Court of International Arbitration (LCIA) announced a surprising update to its Arbitration Rules and Costs by introducing the “2020 LCIA Arbitration Rules” and the “2020 LCIA Schedule of Costs”. They will take effect on 1 October 2020 and apply to all LCIA arbitrations that commence on or after that date notwithstanding when the arbitration agreement was concluded except when the parties have expressly agreed that the earlier version should apply. The notable changes include an increase in arbitration costs and broadening of the Arbitral Tribunal’s power to order consolidation.

Read more

2. FLORIDA DISTRICT COURT HOLDS THAT FEDERAL ARBITRATION ACT GROUNDS
FOR VACATUR ARE INAPPLICABLE TO AN INTERNATIONAL ARBITRATION AWARD GOVERNED BY THE NEW YORK CONVENTION

In the case of Corporación AIC S.A. v. Hidroelectrica Santa Rita S.A., the district court for the Southern District of Florida upheld the Eleventh Circuit’s decision in Inversiones and Industrial Risk, which ruled that a party can only invoke the defences ascribed in the New York Convention in order to vacate an international arbitration award. The court concluded that Section 10 of the Federal Arbitration Act, which authorises a court to vacate an arbitration award where an arbitrator has exceeded his authority, was inapplicable to an award given by the International Court of Arbitration.

Read more

3. AUSTRALIAN COURT ENFORCES FOREIGN ARBITRAL AWARD MADE IN PEOPLE’S REPUBLIC OF CHINA

In the case of Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang, the Federal Court of Australia has held that an award made in China by the China International and Trade Arbitration Commission on 3 September 2018 (CIETAC Award) shall be enforced in Australia. The court extended its decision and determined that the suitable form of order would be a declaration as per section 8(3) of the International Arbitration Act, 1974 and accordingly the applicant has the right to enforce the award as if it were a judgement of the court.

Read more

4. ENGLISH SUPREME COURT TO DECIDE APPROACH IN DETERMINING GOVERNING LAW OF ARBITRATION AGREEMENT

The Supreme Court heard an expedited appeal against a judgement of the Court of Appeal in the case of Enka Insaat ve Sanayi A.S. v OOO Insurance Co. Chubb on 27 and 28 July, 2020. It has been asked to decide upon the following two issues:

a. The correct approach to determining the proper law of an arbitration agreement.

b. The role of the court of the seat of arbitration in determining whether foreign proceedings give rise to a breach of an agreement to arbitrate.

Read more

5. ENFORCING AWARDS DOWN UNDER CONTINUES TO PAY OFF: FEDERAL COURT OF AUSTRALIA ENFORCES FOREIGN AWARD DESPITE PROCEDURAL IRREGULARITIES
In the case, *Energy City Qatar Holding Company v. Hub Street Equipment Pty. Ltd.*, Federal Court of Australia granted an application to enforce an arbitral award as a judgement of the court in accordance with section 8(3) of the International Arbitration Act, 1974 despite procedural irregularities in the arbitration proceedings. The Federal Court enforced the award in circumstances where the respondent did not participate in the proceedings but later attempted to raise procedural irregularities to prevent enforcement of the award.

Read more

6. **Arbitration In South Africa Receives Another Boost**

South Africa’s International Arbitration Act was passed in 2017 and that resulted in the rise of international arbitration in the country. It has been further boosted with the Arbitration Foundation of South Africa publishing its draft International Arbitration Rules, which are currently out for comments.

Read more

7. **English High Court Dismisses Challenge To Enforcement Of Award Where Award Debtor Allegedly Unable To Engage A Hearing Advocate**

In the case, *Shell Energy Europe Limited v Meta Energia Sp.A.*, the English High Court dismissed a challenge to the court’s previous order under section 66 of the Arbitration Act, 1966 and granted leave to enforce the award. The challenge was made on the ground that the applicant was not able to take part in the merits hearing in the arbitration due to difficulty in securing an advocate.

Read more

8. **Ethiopia Accedes To The New York Convention**

On 24 August 2020 Ethiopia became the 165th state party to the New York Convention after acceding to it. As per Article XII (2), the convention will come into force for Ethiopia on 22 November 2020.

Read more

9. **Cayman Islands Court Of Appeal Enforces Foreign Arbitral Award Of R$92,987,672 In Favour Of Brazilian Airline Gol Linhas Aereas SA.**

The Court of Appeal has now held that the award debtors and respondents to the appeal are estopped from challenging enforcement of the award by virtue of Brazilian court decisions, in which the various challenges had already been raised and dismissed.

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10. **The Swiss Parliament has approved new rules to govern Arbitration of Corporate Law Disputes.**

The new rules, which will come into effect in 2021 or early 2022, are scattered across two major legislative amendments: one to the Swiss arbitration laws— the Private International Law Act (“PILA”) and the Code of Civil Procedure (“CPC”) – and the other to the Code of Obligations (“CO”)’s sections on corporate law dealing with Swiss stock corporations and limited liability companies. It very efficiently demarcates disputes as international and domestic being governed by the Private International Law Act and Code of Civil Procedure respectively.

Read More

11. **The European Union and Mexico are deliberating upon a potential agreement to bring into existence a Permanent Arbitration Court and an Appellate Mechanism, with reference to Investor-State Dispute Settlements (ISDS)**

Mexico and the EU recently released a draft text of the upcoming EU-Mexico Free Trade Agreement, including its proposed investor-State dispute chapter. A couple of innovations contained in said Agreement are the elimination of party-appointed arbitrators in favour of a pre-selected pool of arbitrators, appointed by States and the inclusion of a permanent appellate arbitration court also appointed by the States. These changes are consistent with the EU’s announced approach to ISDS in 2018.

Read More

**National News**

1. **Allegation of Fraud cannot be used to defraud an Arbitration Agreement - Indian Supreme Court's Ruling on Arbitrability**

In *Airtel Post Studios Limited & Ors. v HSBC PI Holdings (Mauritius) Limited*, Supreme Court clarified that only “serious allegations of fraud” will take a dispute outside the ambit of an arbitration clause. In a situation where the same set of facts give rise to simultaneous civil and criminal liability, an arbitrable dispute will not be rendered non-arbitrable. This decision maintains the contractual bargaining power of the parties and restricts the respondent from thwarting an arbitration agreement simply by raising fraud as an issue in the dispute.

Read more

2. **Courts in India have power to grant anti-arbitration injunction**
AGAINST FOREIGN-SEATED ARBITRATION, ALBEIT SPARINGLY: CALCUTTA HC

The Calcutta HC ruled that while the civil courts in India have the power to grant anti-arbitration injunctions against a foreign-seated arbitration, this power is required to be used sparingly and with abundant caution.

Read more

3. [ENRICA LEXIE] PERMANENT COURT OF ARBITRATION PUBLISHES AWARD & DISSenting OPINIONS

The Permanent Court of Arbitration published its award and opinions (concurring as well as dissenting) in the case between India and Italy (Enrica Lexie). Previously the Court had only published an extract of the award since the Rules of Procedure provide that the full award can be published only after the Parties’ confidentiality is reviewed. The 326-page award has been uploaded on the PCA web portal.

Read more

4. POWER TO GRANT INTERIM RELIEF SHOULD NOT BE EXERCISED BEFORE THE CONSTITUTION OF THE ARBITRAL TRIBUNAL UNLESS THE MATTER CANNOT AVOID THE CONSTITUTION

The Delhi High Court in the case of Avantha Holdings Limited v. Vistra ITCL India Limited held that the court while exercising jurisdiction under Section 9, even at a pre-arbitration stage, cannot usurp the jurisdiction of the arbitral tribunal. It also provided for certain pre-requisites the court has to satisfy while passing any order under section 9 of Arbitration and Conciliation Act, 1996.

Read more

5. THE DELHI HIGH COURT HELD THAT THE COURT CAN APPOINT A SOLE ARBITRATOR IN CASE AN EVEN NUMBER OF ARBITRATORS IS SPECIFIED BY THE ARBITRATION AGREEMENT.

The Court formed its opinion on the basis of a Supreme Court ruling in M.M.T.C Ltd v. Sterlite Industries (India) Ltd where the Court held that validity of an Arbitration Agreement does not depend on the number of Arbitrators. An Arbitration Agreement specifying an even number of Arbitrators cannot be a ground to render the Agreement invalid under the 1996 Act.

Read more
INVESTMENT ARBITRATION

1. EU RELEASES PROPOSAL FOR ENERGY CHARTER TREATY (ECT) MODERNIZATION

The European Union recently released a proposal for modernizing its multilateral investment treaties in certain key areas. Primarily, it modifies the definition of an investor to include a mandatory requirement of an investment existing ‘for a certain duration’ and it also categorically states that ‘a simple loan or financial contribution’ does not amount to investment, and an investor must be engaged in ‘substantive business activities’, in the territory of the contracting party. These modifications are a significant departure from the earlier definition of a valid investment and will have a major effect on the ISDR regime vis-à-vis the EU.

Read more

2. DELHI HIGH COURT ASSERTS DOMESTIC COURT JURISDICTION ON BILATERAL INVESTMENT TREATY ARBITRATION.

The Delhi High Court recently in the Vodafone case reasserted its own jurisdiction as well as of other domestic courts in India on BIT arbitration. The court’s reasoning was that there is no statutory law barring such jurisdiction and nor is there any precedent barring it. Moreover, since India has not signed the ICSID convention, there is no treaty or rule of International Law precluding such jurisdiction.

Read more

3. PAKISTAN APPEALS AGAINST 5.8 BN. DOLLAR FINE IMPOSED ON IT OVER A MINING LEASE

Pakistan is seeking a reversal of a fine imposed on it by an investment tribunal amounting to 5.8 billion dollars before ICSID. The fine is in relation to a mining agreement between Pakistan and an Australian Company in the mineral rich state of Balochistan in Pakistan. Following a fallout after a denial of a mining lease, the claims arose and Pakistan was found in violation of its obligations.

Read more

4. FIRST ANNULMENT OF AN INVESTMENT ARBITRATION AWARD BY THE SUPREME COURT OF THE UNITED STATES.

Clorox, a US parent company had initiated arbitral proceedings against the State of Venezuela. The arbitral tribunal had declared itself as not having jurisdiction over the matter and thus dismissed the case. Clorox then proceeded to appeal in the Supreme Court against this decision and the court annulled the decision by the tribunal, thus rendering a historic decision by annulling an investment arbitration award for the first time.
5. **23 EU Member States Agree to Terminate BITs in Wake of CJEU Judgement**

The Court of Justice of the European Union (CJEU) analysed the Czechoslovakia – Netherlands Bilateral Investment Treaty (BIT) and found the arbitration clause within the Treaty to be violative of EU law. Following this judgement, many member states were showing interest in terminating intra-EU BITs while many opposed this stance vehemently. However, 23 member states have now agreed to terminate their intra EU BITs, and this has opened up a new chapter with respect to Investment Arbitration in the EU.

6. **Australia Enforces Two ICSID Awards Against Spain Despite Challenges to Jurisdiction**

The Federal Court of Australia enforce two ICSID awards on Spain despite Spain claiming that it was immune from the jurisdiction of Australian courts. Both arbitrations were in regard to the Energy Charter Treaty, involving Spain’s regulatory framework jeopardizing the claimant’s investment in the renewable energy sector of Spain. Article 54 of the ICSID Convention was invoked in the enforcement of the two awards by the Australian Court.

7. **ICSID and UNCITRAL release the new Draft Code of Conduct for Adjudicators in Investment Disputes.**

ICSID and UNCITRAL have recently released the new Draft Code of Conduct for Adjudicators in Investment Arbitral proceedings. This code of conduct lays down stricter guidelines for impartiality and independence of arbitrators, along with institution measures to control and eliminate the practice of double hatting in Investment Arbitration. This Draft moves the discussion around neutral and effective adjudication in Investment Arbitration in a new direction and is a giant leap in the ISDR regime.

8. **All Claims on Merit Dismissed by an ICSID Tribunal in Lidercon v. Peru Dispute**

All merit claims were rejected by the Tribunal categorically, deciding that the host state had not violated any FET standard. This case was unusual as the investor had not claimed discrimination, but rather that it was entitled to an exclusion of competition, both domestic and foreign, relying on a clause in its concession agreement. The Tribunal noted that mere competition from other business ventures does not amount to discrimination by the state.
ICSID Tribunal decides that Ukraine did not violate due process by claiming three plots of land from British investors

ICSID Tribunal denied that Ukraine violated its obligations under the 1993 Ukraine–United Kingdom BIT and rejected the due-process claims raised by the claimant, British investor Krederi Ltd. The Tribunal ruled that judicial activity could only amount to expropriation when there was an express denial of justice, which was not present in this dispute.

MEDIATION

1. Welcome move by BCI to make mediation compulsory subject

The BCI has instructed all legal education institutions and universities to have mediation as a compulsory subject for both three-year and five-year integrated law courses from session 2020-21 onwards. This was advocated by CJI S.A. Bobde to meet the current and future needs of global dispute resolution and reduce the pendency of cases in the country. The BCI has also recommended books and authors in this regard.

2. Hong Kong’s initiatives for promoting mediation:

Ms. Teresa Cheng, Secretary of Justice, Hong Kong’s Department of Justice, has presented the DoJ’s Mediation Team’s long-term policy to promote mediation services in Hong-Kong. The DoJ is set to officially launch its 10-year “Vision 2030 for Rule of Law” for pursuing sustainable and inclusive dispute resolution. This year’s Legal Week would organize a Mediation Conference to deliberate on topics such as sports mediation, the United Nations’ Mediation Convention, and investor-State mediation.

Hong Kong is planning on setting up a ‘Legal Hub’ to facilitate dispute resolution in the Asia Pacific regions.

3. Co-mediation in insurance-bankruptcy disputes:

With the disruption in usual court proceedings caused by the pandemic, the range of matters taken up through mediation is widening. Mediators have also been facilitating the resolution of disputes involving the nexus between bankruptcy and insurance by helping parties gain economic viability through value-maximizing solutions. Co-mediation involves having two mediators, one
with expertise in insurance matters and the other in bankruptcy. Through this, the interests of the company, the insurers, and the creditors can be brought together leading to efficient dispute resolution.

Read more

4. **SIDRA’S SURVEY, 2020 ON INCLUSION OF TECHNOLOGY IN MEDIATION:**

The Singapore International Dispute Resolution Academy (SIDRA) in its series of surveys under the International Dispute Resolution Survey, 2020, has revealed that as compared to Legal Users, Client Users show higher allegiance towards the involvement of technology in international commercial mediation and other dispute resolution mechanisms. Client Users constitute corporate executives and in-house counsels whereas Legal Users are lawyers, legal advisors, mediators, arbitrators, etc. A huge portion of Client Users has rated analytical appointment of mediators, virtual hearings and sessions, e-discovery and due diligence tools, automated negotiations as ‘extremely useful’ or ‘useful’.

Read more

Executive Summary of surveys:

Click here

5. **NYC LAUNCHES MEDIATION PROGRAM TO HELP RESIDENTS SETTLE QUALITY-OF-LIFE DISPUTES WITH RESTAURANTS, BARS**

Owing to the surge in complaints during the COVID-19 Pandemic against hospitality businesses, New York City has launched MEND NYC (Mediating Establishment and Neighbour Disputes). Residents who experience chronic and urgent quality-of-life problems are eligible to benefit from MEND. This program promotes creative conflict resolution and prevents such disputes from burdening the enforcement agencies. MEND would be run by the Office of Administrative Trials and Hearings (OATH) in partnership with the Office of Nightlife.

Read more

6. **MEDIATION AUTHORIZED BY THE PUEBLO CITY COUNCIL, CALIFORNIA IN THE CHRISTOPHER COLUMBUS STATUE DISPUTE IS SHOWING SCENES OF REACHING AN AGREEMENT RESOLUTION**

The Pueblo City Council has approved the hiring of a mediator to aid in the on-going debate over the Christopher Columbus statue. The ordinance was passed on a 5-2 vote. Fred Galves, a professor in California, had already signed a contract with the City of Pueblo for mediation services before Council approved it. A plan imagined by City Council President...
Dennis Flores that would see an outdoor museum created where the statue sits in the Mesa Junction that would present a broader scope of history has been agreed upon by both sides of the issue during mediation sessions that have been held, according to Flores and Fred Galves, the mediator who has overseen those sessions.

**BLOGS**

**ARBITRATION**

1. **The Impact of Exclusion Clauses in Arbitration: A Study on Judicial Opinions, Legislative Inputs, and Way Out for Global Emergence**

Anchit Jain in this article analyses Exclusion Clauses in Arbitration Agreements. He does so while discussing various relevant case laws.

2. **Tracing the Resolution of Arbitrations Through Consolidation**

This article by Arjun Chakladar and Devanshi Prasad, traces the development of consolidation in multi-party arbitral disputes in India as well as its counterparts in the Commonwealth of Nations.

3. **Double Hatting and the new Draft Code of Conduct for Adjudicators: Putting the debate to rest and redefining adjudicator impartiality in Investment Arbitration.**

The article by Anirudh Vats talks about the primary concerns double hatting raises and the debate surrounding the issue. Further, it analyses the basic tenets of the Draft Code of Conduct for Adjudicators’ guidelines.

4. **Maintainability of Domestic Anti-Arbitration Injunction Suit in India: A Tough Row to Hoe**

Ashutosh Choudhary and Anshul Goyal critically analyse distinct judicial opinions on the matter of maintainability of anti-arbitration injunction suits in India and the dilemma which they end up creating.

5. **Arbitrability of Tenancy Disputes: A Welcoming Remedy for the Wrongfully Evicted**

Aarushi Kapoor and Ssanjnna Gupta, in light of the host of tenancy disputes arising during the lockdown, analyse the question of arbitrability of such disputes.
6. **Emergency Arbitration or Court for Interim Relief? Answer through the Indian Prism**

Ramit Singh and Sakshi Lulla, in their article, analyse the scope of seeking emergency relief under the Arbitration and Conciliation Act 1996 and the latest legal position of the same.

**Read more**

7. **Critical Analysis of Rule 29 of SIAC Arbitration Rules: Explaining Manifestness**

The article, by Christina D’souza critically analyses Rule 29 of the SIAC Arbitration Rules in reference to the COVID-19 pandemic. The article further suggests criteria to determine the threshold for manifestness while determining claims suitable for early dismissal under Rule 29.

**Read more**

**EVENTS**

**Events Held**

1. **CADR and Peshori Consultants, Mumbai organised a Course on International Taxation and Tax Policy in post BEPS World**

CADR in association with the Peshori Consultants, Mumbai organised a three-day course on “International Taxation and Tax Policy in post BEPS World” from 3-5 August, 2020. The resource person for the course was CA Prerna Peshori (CA, LLB, LLM, DIIT, M.Com.). The course was intended to equip law students with basic knowledge on BEPS Action Plan.

2. **CADR Hosts a Webinar Series on Mediation: a Peek into the Post COVID-19 Scenario**

CADR hosted a Webinar Series on “Mediation: a Peek into the Post COVID-19 Scenario” on the 1st and 2nd of September, 2020. The key speakers were Mr. Arlene Kiefer, Mr. Veeraraghavan Inbavijayan, Ms. Iram Majid and Ms. Akhila Raj. The webinar aimed to give participants an insight into
mediation, the impact of the pandemic on it and the way forward.

3. CADR Hosts Internal Capacity Building Sessions
CADR organised three Capacity Building Sessions for the students of Rajiv Gandhi National University of Law in order to familiarise them with the world of ADR.

The first session was on “Getting Initiated to Arbitration” with Mr. Sidharath Goyal, Mr. Alok Vajpeyi and Mr. Ananya Pratap Singh as the key speakers. Students were given insights into the field of arbitration, arbitration moots and academic writing.

The second session was on “Getting Initiated to Mediation” with Mr. Jonathan Rodrigues as the key speaker. The session gave an insight into the field of mediation and academic writing on the same.

The third session was on “Acting Mediation and Negotiation Competitions”. The key speakers for the session were Ms. Yamini Kumar and Mr. Akshit Goyal with Ms. Komal Parakh as the moderator.

Upcoming Events

1. CADR to Host a Panel Discussion on the Interface Between Arbitration and Mediation vis-à-vis the Singapore Convention

CADR on 12th September, 2020 is to host a panel discussion on “The Interface between Arbitration and Mediation vis-à-vis the Singapore Convention”. The panelists for the day will be Hon’ble Justice K. Kannan, Mr. Paul Eric Mason, Mr. Francis Goh and Dr. Sukhsimranjit Singh with Ms. Bhavya Mahajan as the Moderator.
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