



Monday, October 25
4:30pm-6:00pm

404 - Effectively Resolve International Disputes in Challenging Territories

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Faculty Biographies

Stuart Dutson

Stuart Dutson is a partner at Eversheds, LLP, London where he specializes in international arbitration, international litigation, and international law. He has conducted arbitrations under all major arbitration institutions' rules in London, Europe, the Middle East and Africa; and has litigated international disputes in London, Australia, Africa and the Middle East. Mr. Dutson has also designed complex dispute resolution mechanisms, including oil and gas projects in Russia, Chile, Kuwait, and Nigeria.

Prior to joining Eversheds Mr. Dutson was at Linklaters and Herbert Smith and served as Malawi's state advocate from 2000 to 2001.

He has written numerous articles on international arbitration and private/public international law.

Mr. Dutson has a PhD from Cambridge University and is a member of the ICC Court of International Arbitration.

Nathan Nelson

Albion Laboratories, Inc.

Nick Sayeedi

Nick Sayeedi is vice president and associate general counsel at Dish Network, a Fortune 200 company with more than 25,000 employees. He leads a team of 12 lawyers in the U.S. and Europe, overseeing all transactional legal work for both Dish Network and its recently spun off affiliate EchoStar. Previously, Mr. Sayeedi oversaw all EMEA legal work of the combined companies from its European headquarters in the U.K.

He is a past chair of the ACC International Committee.

Mr. Sayeedi is a graduate of the University of California/Hastings College of the Law.

James Shannon

Bechtel Group, Inc.

Vijayendra Pratap Singh

Vijayendra Pratap Singh is a partner with the dispute resolution practice of Amarchand & Mangaldas & Suresh A. Shroff & Co. He has experience in commercial dispute resolution, arbitrations (domestic and international- adhoc and institutional), international trade, taxation and regulatory representation (electricity, media and foreign exchange). In the course of his practice, he has represented Fortune 500 corporations, multinational

corporations, Indian government, Indian business houses, and high net worth individuals before courts/tribunals/fora in India and other jurisdictions.

Mr. Singh has written numerous articles and papers on arbitration, commercial/corporate dispute resolution, international trade and energy law, which have been published/presented in various international and national publications and seminars. He was involved in advising the Government of India on its stand on issues of compulsory licensing and the Declaration on the TRIPs Agreement and Public Health. He has also been involved with representations to the Standing Committee of Parliament/Government on the Arbitration and Conciliation (Amendment) Bill 2003 and the Broadcasting Services Regulation Bill, 2006. He has been actively involved with capacity building initiatives on alternate dispute resolution at the Indian Institute of Management and the Institute of Chartered Accountants of India. Mr. Singh is enrolled with the Delhi Bar Council and is a member of the Delhi High Court Bar Association. He is also a registered patent agent.

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**Effectively Resolving International Disputes
 in Challenging Territories :**
An Indian perspective

By
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 Presented at:
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Importance of Enforcement

- A jurisdiction's credibility as arbitration friendly, rests primarily on the efficiency and efficacy of its award enforcement regime.
- The Arbitration and Conciliation Act, 1996 ("1996 Act") is faithfully based on the Model Law. However, the courts in India have not been as faithful to the objectives of the Model Law whilst interpreting the 1996 Act.

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Objectives of the 1996 Act- Journey well begun

- To ensure speedy arbitration with minimum judicial intervention;
- To provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;
- To provide that for the purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international conventions relating to foreign awards to which India is a party applies, will be treated as a foreign award.

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Initial years of the 1996 Act

- In the initial years of the 1996 Act, the Supreme Court sought to give a "purposive interpretation" to the 1996 Act consistent with the objectives of the 1996 Act.
- In *M/s Furest Day Lawson Ltd. v. Jindal Exports Ltd.*, AIR 2001 SC 2293, the Supreme Court held that under the 1996 Act, there is no requirement for a separate decree to be passed by a Court of competent jurisdiction for the foreign award to be enforced: the award itself serves as a decree for the purposes of enforcement.
- The Supreme Court also sought to further the objectives of expeditious enforcement of foreign awards of the 1996 Act by minimizing the procedural filings for recognition and enforcement.

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Initial years of the 1996 Act (Contd.)

- In *Furest Lay Lawson*, the Supreme Court held that there is no requirement to first file a Petition for seeking satisfaction on enforceability of the Court and upon obtaining such satisfaction, to file an execution petition. It was held that the same Petition can be treated as a composite Petition, first for satisfaction and thereafter for execution.
- Moreover, in *Bhatia International v. Bulk Trading SA*, (2002) 4 SCC 105, the Supreme Court held that interim relief through Indian courts, where the assets, against which interim relief may be sought are situated in one of the parties, would be available even though the scheme of the 1996 Act did not expressly provide for such intervention and relief.

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Initial years of the 1996 Act (Contd.)

- Therefore, the court once again interpreted the 1996 Act by purposively construing its provisions in line with the objective the 1996 Act to make the 1996 Act more responsive to contemporary requirements thrown up by the economic reforms undertaken by the country by providing a settlement process which was in tune with the reform.

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Subsequent interpretation- Journey unfortunately half done

- Subsequent interpretation of the 1996 Act by the Supreme Court somewhat runs counter to the objectives of the 1996 Act.
- The Supreme Court in *ONGC v. Saw Pipes*, (2003) 5 SCC 705 held that an award could be set aside if it is against public policy of India, i.e. if it is contrary to :
 - Fundamental policy of Indian law; or
 - The interest of India; or
 - Justice or morality, or
 - in addition, if it is patently illegal.

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Subsequent interpretation- Journey unfortunately half done (Contd.)

- The Court equated “patent illegality” with “error of law”: This could lead to a full blown review of the merits of the decision.
- However, it was believed that the decision in *Saw Pipes* might not apply to foreign awards as defined under the 1996 Act.
- Later, in *Venture Global Engineering v. Satyam Computer Services Ltd. & Anr.* (2008) 4 SCC 190, the Supreme Court held that a challenge to a foreign award is in fact maintainable under Section 34 of the 1996 Act.
- The decision in *Venture Global* has rendered havoc to the scheme and objectives of the 1996 Act and there was a need felt for the same to be reconsidered.

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Way forward- Light at the end of the tunnel
Consultation Paper- 1996 Act

- There is a need to amend the 1996 Act in a manner as wherein only the enabling provisions under Part I of the 1996 Act are provided to arbitrations held outside of India.
- Some of the possible amendments that could be made to the 1996 Act to make it more arbitration friendly for enforcement of foreign awards:
 - A. Section 2(2) of the 1996 Act should be amended to extended those provisions present in Part I of the 1996 Act which facilitate the arbitral process to foreign arbitrations as well, such as mandatory reference to arbitration interim relief and court assistance in obtaining evidence.
- In fact, the Law Ministry released a Consultation Paper in April 2010 setting out the proposed amendments to the 1996 Act.

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**Way forward- Light at the end of the tunnel
 Consultation Paper- 1996 Act- (Contd.)**

- Amongst the objective sought to be achieved by the Consultation Paper was to make India into an arbitration friendly jurisdiction and to encourage the process of institutional arbitration in dispute resolution.
- LCIA has announced India specific Rules which would be administered through LCIA India.
- India has also a host country agreement with the Permanent Court of Arbitration.

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**Way forward- Light at the end of the tunnel
 Consultation Paper- 1996 Act- (Contd.)**

- The Consultation Paper, amongst other changes, seeks to nullify the havoc rendered by *Venture Global* by amending Section 2(2) of the 1996 Act to provide that Part I of the 1996 Act (which includes Section 34) except Sections 9 and 27, would apply only to arbitrations which are held in India.
- The proposed amendment would to Section 2(2) of the 1996 Act would allow for parties to seek interim measures from the court (Section 9) and avail of court assistance in evidence taking (Section 27) even in cases where the arbitration is seated outside India.

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**Way forward- Light at the end of the tunnel
 Consultation Paper- 1996 Act- (Contd.)**

- Such an amendment would also ensure that the confusion created in the absence of such a provision, which has resulted in the *Venture Global* judgment can be not only avoided but the amendment would also repair the disruption caused to the arbitral process on account of the same.
- In fact, the Law Ministry has tried to involve the stakeholders in obtaining their comments and suggestions to the Consultation Paper to ensure that the concerns and shortcomings are appropriately addressed. Road shows have been held not only in India but also abroad (Singapore) to invite comments on the Consultation Paper. The Law Ministry is actively considering a prompt amendment of the 1996 Act to meet the concerns brought to its attention by Indiana and international stakeholders (for instance companies, lawyers, law firms, etc.).

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**Way forward- Light at the end of the tunnel
 Consultation Paper- 1996 Act- (Contd.)**

- The Consultation Paper recognizes the problems created by various interventionist decisions of Indian courts and the Indian Government is willing to look into the problems raised by such decisions.

B. The Consultation Paper also proposes to introduce Section 37(A) whereby commercial contracts having consideration in excess of Rs. 5 crore/US\$1.1 million shall be deemed to have an institutional arbitration agreement.

- The recognition of arbitration being a favoured mode of dispute resolution for high value commercial dispute is certainly a welcome step. However, there are certain difficulties with its current formulation which are highlighted hereinafter:

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**Way forward- Light at the end of the tunnel
 Consultation Paper- 1996 Act- (Contd.)**

- Compulsory arbitration in cases of commercial contracts with specified value of Rs. 5 crores and more may create overlapping jurisdictions with existing forums specially in case of banks and other financial institutions, who have recourse to Debt Recovery Tribunals where the burden of proof of proving their claim is much lower than that before an arbitral tribunal.
- In the event the amendment is brought about, Section 7 (which defines an arbitration agreement as one being in writing) would need to be appropriately amended.

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**Way forward- Light at the end of the tunnel
 The Commercial Division of High Courts Bill**

- The Government has also proposed a Commercial Division of High Courts Bill, 2009 which seeks to adjudicate commercial disputes of high value (disputes above US\$ 1.1 Million).
- The Bill seeks to constitute "Commercial Divisions" in each High Court (the highest court in an Indian state).
- The Bill provides that challenges to an award as well as any appeals against appealable orders under the 1996 Act, would lie to the Commercial Division of the High Court where the amount in dispute is above the specified value.

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Way forward- Light at the end of the tunnel
The Commercial Division of High Courts Bill- (Contd.)

- The Bill prescribes timelines for completion of the various stages in an adjudication before the Commercial Division.
- The Bill also states that the court shall endeavour that proceedings be completed within one year from the date of service of notice on the opposite party.
- By vesting the jurisdiction in the High Court, the matter is considered by a more experienced set of judges.

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Way forward- Light at the end of the tunnel
The National Litigation Policy

- The Indian Government has also notified a National Litigation Policy which is based on the recognition that Government and its various agencies are the pre-dominant litigants in courts and Tribunals in the country.
- The aim of the National Litigation Policy is to transform the Government into an *efficient* and *responsible* litigant.
- The purpose underlying this policy is also to reduce Government litigation in courts so that valuable court time would be spent in resolving other pending cases so to reduce average pendency time from 15 years to 3 years.

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Conclusion

- Courts in India need to resist the temptation of unduly intervening in the arbitral process.
- Moreover, supplying legislative omissions through legislation by appropriate amendments in the 1996 Act, is a more long term fix for the problems.
- Cutting down on the litigation by the Government is a welcome step as proposed by the Law Minister thereby not only reducing the docket of the courts but also the tendency to disregard contractual commitments by the Government.
- Vesting of jurisdiction in commercial matters in a specialized Commercial Division at the level of High Courts in Indian States would further cut down time as well as ensure a more experienced/considered adjudication of the disputes.

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Thank you

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Effectively resolving international disputes in challenging territories

Brazil, Russia, China and the Middle East

ACC Annual Meeting - 2010

Stuart Dutson, Eversheds LLP, London
October 2010

Arbitration laws and regimes

Territory	Model Law jurisdiction	Attitude of local courts	Investment Treaties	Arbitration Conventions
Brazil	Yes	Good	None	NYC, Panama
Russia	Yes	Good, risk of political influence	50+	NYC, ICSID*, ECT†
China	No, bespoke	Good, risk of political influence	90+	NYC (agreement with HK), ICSID
Hong Kong	Yes	Very good	20+	As per China
UAE	No (under review)	Good	20+	NYC, ICSID, Riyadh, ECT‡
DIFC	Yes	Very good (albeit few cases so far)	As per UAE	As per UAE
Qatar	No, bespoke	No cases yet. QFC judges high quality	5+	NYC, ICSID*, Riyadh, ECT‡
Bahrain	Yes	Very good	10+	NYC, ICSID, Riyadh, ECT‡

*Not ratified † Seeking to withdraw ‡ Observer member only

Arbitration issues to note - Brazil and Russia

Brazil

- Recently ratified NY Convention and adopted Model Law
- Never entered into BITs - investors limited to contractual claims/ local remedies
- *COPEL* case concluded state entities could not submit to arbitration, but legislation/courts now more pro-arbitration
- Restrictions on clauses giving parties the option for either litigation or arbitration
- Arbitration clause must set out sufficient details concerning the constitution of the arbitration tribunal in order to be enforceable (otherwise a post-dispute agreement would also be required)

Russia

- Never ratified Energy Charter Treaty (ECT), now withdrawing
- *YUKOS* arbitrations - \$100bn claim against Russia for unlawful appropriation of investments, under ECT
 - ECT Art. 45 - Tribunal held Russia obliged to provisionally apply ECT up to date of notice of withdrawal (October 2009)
- Recent decision from Netherlands: Dutch court enforced an award that had already been set aside in a Russian court, on the basis that the Russian court was not independent.

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Arbitration issues to note - China and Middle East

China

- Ad hoc arbitration not permitted in China, failure to select a institution invalidates arbitration agreement when seat is China
- Awards made in Hong Kong, Taiwan and Macau are enforceable in China under separate regime, not under NYC
- Any decision by a Chinese court not to enforce an international arbitration award (made outside of mainland China) must be referred to and approved by the Chinese Supreme Court – this helps ensure a consistent approach to enforcement of international awards, but lengthy delays in dealing with the referral are not uncommon

Middle East

- DIFC is a separate jurisdiction to the rest of the UAE – neutral, arbitration-friendly forum
- LCIA has established an arbitration centre in DIFC
- DIFC awards enforceable throughout the UAE without opportunity for challenge
- Enforcement of awards in Saudi Arabia: difficult, unless award is consistent with Sharia law on interest

Protection for Foreign Investments - BITs

- Bilateral / Multilateral Investment Treaties (BITs/ MITs)
 - Provide protection for foreign investors from host State's actions against investments
 - Foreign investors have the right to bring an arbitration claim against the host State, under international law and BIT/MIT
 - ICSID or *ad hoc* proceedings, usually a neutral venue
 - State waives sovereign immunity in proceedings
 - ICSID awards enforceable in all ICSID signatory States
- Investor protections may include:
 - Protection against expropriation by host State
 - Obligation for host State to provide fair and equitable treatment towards foreign investor and/or investment
 - Obligation for host State to treat foreign investor or investment no less favourably than local investor or investment
 - Obligation for host State to abide by contractual provisions it has entered into with investor ("umbrella clause" – contested interpretations)

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