LIVE: 2nd CARTAL Conference on International Arbitration, 2017

LAW SCHOOL NEWSLIVE BLOGGING
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The 2nd CARTAL Conference on International Arbitration, 2017 will commence at 3 p.m on 30.09.2017. The conference shall be live blogged on both days. Watch this space for regular updates on the panel discussions. Please check out the Conference Brochure for more details on the themes of the conference and the line up of panelists.
The Centre for Advanced Research & Training in Arbitration Law (CARTAL) and the Indian Journal of Arbitration Law (IJAL), along with Baker McKenzie, are organizing a two-day international conference on the state of arbitration, "**Looking East: Arbitration in the Asian Age**".

The Conference is institutionally supported by the UNCITRAL Regional Centre for Asia and the Pacific, the ICC International Court of Arbitration (Paris), the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association, the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC), the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the Asia Pacific Forum

for International Arbitration (AFIA) and the Mumbai Centre for International Arbitration (MCIA).

The Conference shall be conducted as a series of four panel discussions. The theme of the 2nd Annual International Arbitration Conference is "Looking East: Arbitration in the Asian Age". The definition of East for the purpose of the Conference encompasses favored and emerging seats of arbitration in North East, South, South East and Central Asia. The main aim of the Conference is to study the different approaches adopted by various regions in Asia in adapting to the practice of international arbitration.

The following are the themes for the panel discussions:

Panel Discussion I: International Arbitration across Legal and Economic Cultures
Panel Discussion II: Exploring the varying dimensions of Public Policy in International Arbitration
Panel Discussion III: The BRICS Dispute Resolution Forum – Optimizing Efficacy and Efficiency
Panel Discussion IV: Third Party Funding (TPF)

DAY 1
3:30 PM Inaugural Ceremony
We are pleased to welcome you to the 2nd CARTAL Conference on International Arbitration, *Looking East: Arbitration in the Asian Age.* We report to you live from the inaugural ceremony where we are about to begin the proceedings.

The Welcome Address will be delivered by Prof. Poonam Saxena, Vice Chancellor, NLU Jodhpur. She begins by welcoming Hon'ble Justice Madan B. Lokur, the panellists and participants to the conference. She thanks Hon'ble Justice Madan B. Lokur for accepting the invitation to attend the Conference. She introduces the International Commercial Arbitration and Investment Treaty Arbitration course offered by the University. She commends NLU Jodhpur's faculty and scholars on their accomplishments, and IJAL and CARTAL on their sustained efforts and hard work for organizing the Conference. She talks about how CARTAL has grown in leaps and bounds, even hosting the Second Edition of the Gary B. Born Essay Competition. She introduces the different themes of the Conference, which will be discussed in the course of next two days. She thanks the various institutional partners and organisations who extended support for bringing the Conference to fruition. She wishes the participants a fruitful time at the conference and a comfortable stay at NLU Jodhpur.

The introduction to CARTAL, IJAL and the Conference is delivered by Ms. Nidhi Gupta, Executive Director, CARTAL. She talks about CARTAL's eminent board members and commends IJAL as today being widely regarded as the leading dispute resolution journal. She reminisces about the success and the international outreach of the 1st CARTAL Conference. She explains the theme of the 2ndCARTAL Conference, and the first panel discussion to be held shortly after her address. She points out that it is an opportune time to discuss arbitration in India and in law schools. She thanks Hon'ble Justice Madan B. Lokur for agreeing to stay for the entire duration of the Conference. She discusses how the 2nd CARTAL Conference was conceptualized, and encourages the audience to be enthusiastic.

The presidential address is delivered by Hon'ble Justice Madan B. Lokur. He introduces the theme of the Conference, highlighting the importance of Hong Kong and Singapore in the arena of International Arbitration. He discusses the importance of arbitration as a choice of dispute resolution in the 21st Century. This, he says, is manifested by the efforts of the Asian nations to establish multiple institutional arbitration centre. He believes that these institutions will play an important role in making Asia a hub of International Arbitration. He talks about the individual performance of Hong Kong and Singapore as the increasing choice of the seat of arbitration in international commercial contracts. He believes that the growth of arbitration is not restricted to the aforesaid nations. He talks how Malaysia, China and India are making strides to become the hub of International Arbitration. He further talks about India's efforts to establish multiple institutional arbitration centres and their respective performance. He praises High Courts of Delhi, Punjab & Haryana and Madras for setting up their own arbitration centres for expeditious resolution of disputes. He talks about the need to introspect to improve the performance of the various institutional arbitration centres in India. This, he believes, can be done on the basis of 4 criteria set by a survey conducted by Queen Mary University of London namely, (1) expeditious nature of administration, (2) perceived internationality of an institutions, (3) perceived neutrality, and (4) the ability to administer award internationally. He points out the shortcomings in the conduct of international arbitration in India. He further provides solution for dealing with the aforesaid shortcomings. He emphasizes the need to adapt the recommendations of 246th Law Commission Report, which was followed in the recent Justice Srikrishna Committee Report. He provides the example of Singapore which benefitted immensely from amending its statutory law. He points out that institutional changes must be coupled with creation of a culture which breeds qualified arbitrators. He believes that BRICS Dispute Resolution Forum will go a long way in making India a hub of International Arbitration. He looks forward to the upcoming panel discussions and the enthusiastic participation.

4:45 PM PANEL DISCUSSION I

We will now begin with Panel Discussion I, the theme of which is, "**International Arbitration across Legal and Economic Cultures.**" The Panellists for this discussion are:

1. Abhinav Bhushan, Director, South Asia, ICC Arbitration and ADR will be moderating the discussion and delivering the introduction to the theme and opening remarks.
2. Neeti Sachdeva, Secretary General and Registrar, MCIA
3. Dharshini Prasad, Associate, Wilmer Cutler Pickering Hale and Dorr LLP, London
4. Tatiana Polevshchikova, Senior International Case Counsel, KLRCA

The Panel Discussion shall be conducted as a series of questions asked by the Moderator, Mr. Abhinav Bhushan and answers given by the other panellists. The audience is also given the opportunity to ask the panellists questions during the discussion.

Mr. Abhinav Bhushan starts by wishing everyone a Happy Dussehra, explaining the reason for the celebration of the festival to the panellists who have come from abroad. He gives the introduction to the theme and opening remarks on the panel. He begins by thanking CARTAL and IJAL for organizing the programme. He invites Ms. Neeti Sachdeva to explain the concept of Seat and Venue in International Arbitration.

Ms. Neeti Sachdeva: She discusses the provisions in the Indian Arbitration and Conciliation Act on seat of arbitration. She cogently explains the difference between the Seat and the Venue in International Arbitration.

Question 1: How do you define success in international arbitration? Which jurisdiction, according to you is successful?

Ms. Tatiana Polevshchikova: According to her, success of a jurisdiction depends on whether it is a trustworthy jurisdiction in terms of compliance with best international practices and responsiveness to the changes in the arena of International Arbitration. She gives the example of Hong Kong, which became a favourable centre for arbitration by being the first to introduce the concept of Third Party Funding.

Question 2: How do you harmonize different notions of best international practice in different jurisdictions?

Ms. Tatiana Polevshchikova: She explains the history of harmonisation of laws and practices in international arbitration and how they set a good precedent for us to follow in the future.

Ms. Dharshini Prasad: She adopted a teleological approach in answering the question. She talks about the reasons for development of standardisation of law. She further explains that standardisation aims at settlement of disputes which arise in different jurisdictions in an expeditious manner. This creates consistency which, in turn, leads to creation of uniformity in best practices.

Question 3: How do you justify the impact of economic culture in determining the nature of uniform practice?

Ms. Dharshini Prasad: She begins by explaining the nature of economic culture. She explains the impact of economic culture by giving example of the development of UNICTRAL Model Law. She concludes that we do not require complete standardisation. What is required is consistency on certain core concepts, like grant of interim reliefs. The need is selective uniformity and not absolute uniformity.

Question 4: What role does the divergence in common law and civil law traditions play in determining core concepts for selective standardisation?

Answer: Both, **Ms. Tatiana Polevshchikova and Mr. Abhinav Bhushan,** give examples of both legal and cultural divergence present in the international arbitration. Uniformity in such scenarios, according to **Ms. Neeti Sachdeva**, can be brought about by a careful selection of arbitrators. The arbitrators then have a duty, which they indeed fulfil, to resolve the cultural and legal divergences through the issuance of Procedural Orders.

Question 5: If there is so much research gone into appointment of arbitrators, then why is there a lack of diversity in the appointment of arbitrators?

Ms. Dharshini Prasad: She highlights the contentious nature of the issue of gender diversity in international arbitration. She points out that lack of female participation plagues not only the field of international arbitration but the legal profession as a whole.

NOTE: Mr. Abhinav Bhushan differed with Dharshini's opinion. He cited his own experience in international arbitration, including the composition of the current panel, to explain that women are playing an important role in international arbitration.

6:15 PM PANEL DISCUSSION II

We will now begin with Panel Discussion II, the theme of which is "**Exploring the varying dimensions of Public Policy in International Arbitration.**" The Panel Discussion will be

moderated by Mr. Sahil Kanuga, Co-head, International Litigation & Dispute Resolution Practice, Nishith Desai Associates. He gives the introduction to the theme and opening remarks on the panel.

1. **Jayant Mehta, Advocate, Supreme Court of India:** He explains the concept of Public Policy. He talks about Public Policy being a grey area in International Arbitration. He begins his speech by explaining the meaning of Public Policy. He declares Public Policy to be a necessary evil. He explains the origins of Public Policy, which is rooted in the Contract Law. Public Policy, according to him, acted as a limit to freedom to contract which proscribed the parties to enter the realm of illegality. He cites a catena of decisions, both foreign and Indian, through which the concept of Public Policy was developed. He explains the effect of these decisions, based on Contract Law, on the arena of Indian and International arbitration. He explains the broad and the narrow view taken in *ONGC v. Saw Pipes* and *Renusagar Power Co. Ltd.* respectively and their effect in determining the nature of Public Policy in India. He explains the different approach of the Indian Courts while dealing with a domestic award and a foreign award. He talks about the Phulchand Conundrum (2 judge bench) where the court wrongly interpreted the ratio in *Saw Pipes,* which was later corrected by *Sri Lal Mahal Ltd.* (3-judge bench). He further explains how the misinterpreted ratio in *Saw Pipes* was cemented in *Western GECO International Limited*. He concluded by talking about how arguing on Public Policy has now become a lawyer's delight.
2. **Greg Lourie, University of Frankfurt**: He talks about the civil law perspective of Public Policy or *ordere public*, as it is known in Europe. He begins by discussing the **Swiss Perspective on Public Policy**, explaining the different approach taken by Swiss Courts while dealing with domestic and foreign award. He talks about the distinction, which exists in Switzerland, between Domestic Public Policy and International Public Policy. He proceeds to talk about the **German Perspective on Public Policy**. He explains that, in Germany, there exists a separate threshold for recognition of an award based on Public Policy on one hand and its setting aside, on the other hand. However, he points out, that there are only a few cases which are challenged on Public Policy. This is due to the extremely high threshold which exists for the Public Policy exception to come into picture. Under **Austrian Law**, only international Public Policy is taken into account. He proceeds to talk about the **impact of EU Law**. He talks about the primary and secondary EU law. He talks about cases where the ECJ was asked to determine whether the law of EU will qualify as Domestic Public Policy or International Public Policy. The ECJ answered the question by distinguishing between the subject matter of different cases. He concludes that the distinction between Domestic Public Policy and International Public Policy is merely theoretical in nature and that Civil law nations tend to adopt a pro arbitration approach while dealing with the question of Public Policy.
3. **Gunjan Sharma, Senior Associate, Skadden, Arps, Slate, Meagher and Flom, LLP**: He starts by explaining that the scope of Public Policy will depend on the perspective from which one sees Public Policy. He talks about **the approach of US Courts** in dealing with Public Policy. He explains that US Courts base their understanding of Public Policy on Contract Law and that this approach is in conflict with New York Convention. The courts in US have adopted a narrow approach while

dealing with Public Policy, applicable only when the enforcement would violate the fundamental principles of morality and justice. He explains the fundamental principle of morality and justice through a series of decisions of the US Courts, starting from *PDV Sweeny v. ConocoPhillips* to *KBR v. Pemex* to *Hardy Oil v. India*. It is important to note that the last decision is *sub judice.*

4. **Manish Aggarwal Senior Associate, Three Crowns LLP, London**: He talks about the scope of Public Policy exception in Investment Treaty Arbitration. He explains that the issue of Public Policy, in Investment Treaty Arbitration, can arise at any stage, jurisdiction, admissibility, merits or quantum of damages. He explains the entire process of Investment Treaty Arbitration, starting from the invocation of the BIT Protection followed by application of clean hands doctrine and its adverse effects on investors, and merits of the dispute, concluding with the quantum of damages. Under merits, he focuses more on the issue of expropriation without compensation. He explains that the lawful or unlawful nature of expropriation have great repercussions on the quantum of damages. He raises the issue of drawing the line between a bona fide regulation and expropriation. With regard to quantum of damages, he explains that there exists two principles based on which the Tribunal decides the quantum: (1) Illegal takings must come at a higher cost than lawful expropriations whenever the investment has increased in value by the time of the Award; and (2) States cannot immunize themselves from the liability by introducing legislations which will bring down the value of profit on investment during the course of arbitration proceedings.

7:45 PM Cultural Performance

The first day of the International Conference was concluded by a cultural performance.

DAY 2

We are pleased to welcome you back to the 2nd CARTAL Conference on International Arbitration, Looking East: Arbitration in the Asian Age. We report to you live on Day 2.

8: 45 AM PANEL DISCUSSION III

We will now begin with Panel Discussion III, the theme of which is **"The BRICS Dispute Resolution Forum – Optimizing Efficacy And Efficiency".** The Panel Discussion will be moderated by Hon'ble Justice Madan B. Lokur. He gives the introduction to the theme and opening remarks on the panel.

The Panellists for this discussion are: –

1. Hon'ble Justice Madan B. Lokur, Supreme Court of India
2. Ms. Niyati Gandhi, Advocate, Aarna Law, Bangalore
3. Mr. Sameer Jain, Founding Partners, PAMASIS, Law Chambers
4. Ms. Sonali Mathur, Partner, AZB & Partners, Mumbai

The Panel Discussion shall be conducted as a series of questions asked by the Moderator, Hon'ble Justice Madan B. Lokur, and answers given by the other panellists. The audience is also given the opportunity to ask the panellists questions during the discussion.

Question 1: Do we need another Dispute Resolution Institution?
Mr. Sameer Jain: The idea of another Dispute Resolution Institution does not make sense for the following reasons: (1) There already exists a lot of institutions, (2) it would involve a lot of rule-making, appointment of arbitrators etc, (3) the role of an institution is to resolve disputes and this is already done by the existing institutions, (4) setting up an institution would require a lot of co-operation between the BRICS nation, which is not feasible.
Ms. Sonali Mathur: She differs in opinion with Mr. Sameer Jain on grounds that BRICS nations contribute more than 20% of the global GDP. There is a greater to bring more recognition to this fact and this can only be done through a separate institution.
Ms. Niyati Gandhi: It is important to create a BRICS trade bloc. By doing this, representations could be made to UNCITRAL Working Group to suggest rules to suit their interests.
Question 2: What will be the structure of this institution?
Ms. Sonali Mathur: The structure of the institution will be based on harmonisation of laws of the BRICS nations.
Ms. Niyati Gandhi: The structure of the institution will be based on the determination of procedural aspects of the institution.
Mr. Sameer Jain: Having an institution will not amount to much unless the BRICS Nations have a comprehensive treaty governing the administration of the arbitration proceedings and recognition and enforcement of awards among BRICS nations.
Question 3: Taking into account the different legal traditions followed by the BRICS Nations, how can the procedural and enforcement aspect of arbitration?
Mr. Sameer Jain: He gives the example of Russia to point out the divergence in cultures among BRICS nations and highlights the need to resolve such differences.
Ms. Sonali Mathur: She specifically talks about narrowing the scope of Public Policy to bring about greater enforcement of awards among the BRICS nations.
Question 4: How can we reconcile the issue of harmonization of law with the changing nature of Public Policy?
Ms. Sonali Mathur: This issue cannot be resolved only in the long run and any short-term measure will not be sufficient to deal with this issue.
Mr. Sameer Jain: The issue can be resolved only through the co-operation between the judicial interpretation of Public Policy and the actual Executive action.
Ms. Niyati Gandhi: The answer to this question depends on how a nation treats the international arbitration order. All the BRICS nation must adopt an arbitration friendly approach to harmonize laws relating to arbitration.

The Q&A session is followed by a consensus among the panellists on the need to train not only the arbitrators but also the counsels to expeditiously bring the arbitration proceedings to its finality.

10:15 AM PANEL DISCUSSION IV

We will now begin with Panel Discussion IV, the theme of which is "**Third Party Funding**". The Panel Discussion will be moderated by Mr. Shashi K. Dholandas. He gives the introduction to the theme and opening remarks on the panel.

The Panellists for this discussion are: –

1. Mr. Ashish Kabra, Senior Expert, International Litigation & Dispute Resolution, Nishith Desai Associates, New Delhi
2. Mr. Jeffrey Jeng, Associate, Jones Day, Singapore
3. Mr. Shashi K. Dholandas Attorney, Bailey Duquette P.C., New York

The Panel Discussion shall be conducted as a series of questions asked by the Moderator, Mr. Shashi K. Dholandas, and answers given by the other panelists. The audience is also given the opportunity to ask the panelists questions during the discussion.

Question 1: Is Third Party Funding good or evil?

Both Mr. Jeffrey Jeng and Mr. Ashish Kabra agree that it is a good concept as it forms the source of earning for the counsels in international arbitration. Mr. Ashish Kabra highlighted the need to prevent third parties from supporting unjust claims.

Question 2: What is legislative framework on Third Party Funding in India?

Mr. Ashish Kabra: He talks about the origin of Third Party Funding. He explains that the concept finds its roots under the tort of Champerty and Maintenance. He talks that the concept of Third Party Funding had existed in India for a long time in the Code of Civil Procedure under Order XXV. He points out that while Third Party Funding has existed in India for a long time, there is no industry specifically dedicated to this end.

Question 3: What is legislative framework on Third Party Funding in Singapore?
Mr. Jeffrey Jeng: Third Party Funding is legal in Singapore provided it is given by an 'eligible party'. Eligible Party has been defined under Singapore's Civil Law Amendment Act. He points that lawyers, these days, play an important role in drafting contracts between the clients and the eligible party providing the Third Party Funding. He further explains the provisions in the SIAC Arbitration Rules on Third Party Funding.

This is followed by a discussion on the chilling effect that Third Party Funding may have on the decisions of the arbitrators. Mr. Ashish Kabra points out that such a chilling effect, if one is willing to investigate, exists in each aspect of an arbitration. Hence, the concern about the chilling effect is unfounded.

Question 4: Should Third Party Funding be considered to get Security for Costs?

Mr. Ashish Kabra: Mere presence of Third Party Funding should not lead to the Tribunal ordering a party to Security for Costs. It must depend on the nature of dispute and the facts of a particular case.

11:45 AM CLOSING CEREMONY

The Report of the Conference was delivered by Ms. Indulekha Thomas (Convenor, CARTAL) and a Vote of Thanks was delivered by Ms. Anina D'Cunha (Joint Organizing Secretary).