

## Does confidentiality in Arbitration hinder Common Law growth? YSIAC organizes debate



The Young Singapore International Arbitration Centre (YSIAC) on Sunday organized a debate on whether *Confidentiality in Arbitration Hindered the Growth of Jurisprudence and Common Law*.

The event held at The Oberoi, New Delhi was part of the Singapore International Arbitration Centre (SIAC) India Summit 2019 held on August 30–31.

**Toby Landau QC**, Member of the SIAC Court of Arbitration and Barrister & Arbitrator, Essex Court Chambers, along with **Zia Mody**, Managing Partner of AZB & Partners, argued for the motion. **Gary Born**, President of the SIAC Court of Arbitration and Chair of the International Arbitration Practice Group at Wilmer Cutler Pickering Hale and Dorr LLP, along with **Anuradha Dutt**, Founder &

## Toby Landau, the Queen's Counsel who “interned” at Luthra & Luthra

Toby Landau, at the outset, clarified that motion merely referred to a mechanical question i.e. whether confidentiality in arbitration hindered the growth of Common Law and did not ask for a judgment on whether confidentiality ought to be abolished because it was "good or bad".

Landau emphasized the nature of Common Law and its dependence on precedents to argue that confidentiality in commercial arbitration did not help in its growth.

He reminded the audience that arbitration was, in fact, a precursor to litigation and had a jurisprudence of its own. Further, arbitral awards/decisions are not freely available to Courts or even other arbitral tribunals, which leads to its uneven, unfair access, Landau said.

Zia Mody argued that arbitral awards need to be part of the general jurisprudence and there should be "no shroud of secrecy" in the entire process. She further rebutted the claim that confidentiality was necessary for "honesty" in the arbitration proceedings.

With legal systems adopting approaches limiting interference by courts in commercial arbitration, Mody also apprehended that the Common Law jurisprudence in the sphere was bound to "dry up" in the coming years.

She further referred to recent amendments to the Arbitration and Conciliation Act, 1996, which provide for the creation of a repository for arbitral awards and questioned if its creation was possible with "confidentiality".

Both speakers stressed the cost of confidentiality in arbitration with respect to transparency and access to information, but nonetheless clarified that if the parties to an arbitration agree to maintain confidentiality, it should be maintained.

Arguing against the motion, Gary Born remarked that the assumption that

Common Law regime was the most widely used legal system in the world, Born said that it has survived, prospered, and thrived since the 8th century.

He referred to the fact that the Common Law system was the most preferred "choice of law" in ICC arbitration and contended that Common Law was instead flourishing.

Dismissing all apprehensions, Born argued that the number of commercial arbitration cases being heard by the Court had in fact gone up. He stated that confidentiality should not be confused with non-publication, and that awards, after redaction of certain information, were available.

Anuradha Dutt remarked that judges did not need arbitral awards to develop Common Law. Considering the nature of the dispute, the parties also do not wish to make the dispute and any materials available to the public, she said.

She further added that removing confidentiality would hinder quick resolutions and erode people's faith in the mechanism.

At the end of the event, a Jury comprising Senior Advocate **Abhishek Manu Singhvi**, Member of the SIAC Board of Directors and Founding Partner of L&L Partners Law Offices **Rajiv Luthra**, and Senior Counsel and Partner at WongPartnership **Andre Maniam** ruled that the motion stands passed and declared Toby Landau and Zia Mody winners.

