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BROADCAST

EXPERT'S VOICE

Mr. Ben Giaretta

A discussion with Mr. Ben Giaretta and his thoughts on future of the Industry.

Settlement Privilege in International Arbitration: IBA Rules on Taking Evidence as a Torchbearer for Arbitral Tribunals

By - Arijit Sanyal

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Mr. Ben Giaretta

- *Mr. Ben Giaretta is a Co-Head and Partner for International Arbitration and Commercial disputes respectively at Fox Williams. He has diverse experience both as a counsel and as an arbitrator. Additionally, he has had the experience of working in diverse sectors such as construction, energy, shipping, insurance etc.*
- *Apart from being a chartered arbitrator, he is the current chair of the London Branch of Chartered Institute of Arbitrators. Throughout his association with the domain of arbitration, he has been appointed as a presiding arbitrator several times.*

1) You have had the chance of presiding over as an Emergency Arbitrator. How do you think Emergency Arbitration proceedings aid the parties looking for interim relief. How can Emergency Arbitrations replace conventional interim relief procedures presided over by national courts?

The emergency arbitration process, of course, is imperfect. The issues are well known. Most rules require inter partes applications, which might not fit every situation. The jurisdiction of the emergency arbitrator does not extend to third parties. Enforcement of emergency arbitration awards across the world is uneven. So emergency arbitration cannot replace the need for interim relief from national courts – as things presently stand, relief from national courts is needed in situations where emergency arbitration is inadequate.

But applications to national courts are also inadequate in some circumstances. They may not be a neutral forum. The interim relief process may take much too long. The powers available to the local courts to grant interim relief may be too limited (or even non-existent).

As a result it is better to see the two as complementary: emergency arbitration deals with situations where the national courts are inadequate, and the national courts deal with situations where

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the national courts are inadequate, and the national courts deal with situations where emergency arbitration is inadequate. The relationship between the two can be improved, of course (and there are some obvious ways in which emergency arbitration can be developed further).

2) Tell us something about your experience as the chair of CIArb's London branch. What distinct experience did you gather from this role as compared to others?

Being involved in an organisation such as the CIArb opens one's eyes to the community of arbitration practitioners across the world. We have, to a large extent, common aims and interests whichever country we live in - while accepting there are some significant geographical variations. Working in dispute resolution cannot be a solitary exercise. We need the support and camaraderie of our fellow practitioners.

It is an honour to be the Chair of the London Branch, which is one of the largest CIArb Branches. But more than that, it is a privilege to be able to contribute to the ADR community and to promote the fellowship that I have described. London, also, is one of the most active arbitration centres in the world; and CIArb London is one of the most active membership organisations in London.

At a more practical level, through my involvement in the Branch I have improved my people management skills considerably – as well as becoming expert in organising events.

3) You have a rich experience as an Arbitration Counsel and as an Arbitrator. Which one of these roles was more challenging for you and why?

Both roles have their challenges – and challenges which are perhaps underappreciated by people who look on from outside. The Counsel role requires tremendous dedication. One needs to go through the materials (pleadings, documents, witness statements, etc) again and again, so as to identify and reorder the salient points – as well as, very often, to spot what might be missing. All that work needs to be done in advance of the hearing. If it is done thoroughly, the hearing should go well. Otherwise the hearing might be a disaster. There is nothing worse than appreciating a point for the first time when sitting in the hearing-room, after it could have been identified in the months prior to that.

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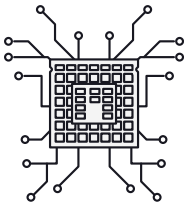
But the arbitrator role can also be difficult. Actually, there are two arbitrator roles. During the proceedings, the arbitrator is the case manager and umpire, ensuring fairness throughout. And when the proceedings are closed, the arbitrator becomes the author, staring at a blank page and having to produce a substantial piece of written work. I've never had a problem with finding things to say in an award, in fact – I'm not afflicted by writer's block. But the editing process after the first draft is written can be a very painstaking task.

So maybe both roles are equally challenging!

4) The pandemic has ushered digitisation in the field of arbitration which has led to an increased use of AI tools for Arbitrator Selection. How can this be secured so as to ensure that interest of parties are not hampered in anyway

More information about potential arbitrators is something to be welcomed, and AI tools can help in identifying and organising that information. There are two complicating factors, however. The first is that the confidentiality of specific arbitrations needs to be preserved, and this can hamper the gathering of information about arbitrators.

The second complicating factor is an availability bias: people make assessments based on the information that is easily available. Such a bias has always operated to the effect of encouraging parties to appoint the best-known arbitrators, and AI tools can potentially exacerbate that problem by creating new availability biases. Take a hypothetical example of two arbitrators who have both issued 50 awards during their careers; and one of them has had 25 awards challenged (successfully or unsuccessfully), whereas the other has had no awards challenged. Since challenging awards makes information about the first arbitrator more available, this might create a bias in that arbitrator's favour, i.e. the AI tool, by gathering information about challenges to awards, might make parties more aware of the first arbitrator than the second.



However, it is not possible to assess from this information whether the first arbitrator would be a better choice than the second in a particular case. Parties therefore need always to be conscious of the imperfect information available about arbitrators, even when using AI tools.

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5) Please add a few lines of advice which you may have for our readers.

When appearing as Counsel, always treat your opponents with respect. It is so easy, when one concentrates on one set of papers, to develop a 'tunnel-vision' and as a result fail to appreciate the merits of the other side's arguments. Often the best adviser to a party is one who can review the other side's arguments dispassionately, and not be swayed by the fact that they are an adversary (nor be too influenced by the flowery language that some lawyers use).

When sitting as arbitrator, be humble, but also be decisive. Recognise that you need the parties' help to understand the issues and the evidence. Ultimately, however, you need to give a decision – and a decision that fits the facts and the arguments in the case. It is very likely that one party will be disappointed by the outcome of the case. How the parties will react to your decision must therefore be put out of your mind. You must concentrate on the materials in front of you: that is where you will find the answer.

AROUND THE GLOBE

ASIA

An order passed by an Emergency Arbitrator under the SIAC Rules is recognisable and enforceable within the contours of Arbitration and Conciliation Act, 1996 [Amazon Investments v. Future Group, Supreme Court of India, August 2021].

The Supreme Court of India held that once parties to an arbitration agreement have consented to Emergency Arbitration proceedings they cannot be allowed to withdraw from the same. Reflecting on the recognition and enforcement of orders passed by an Emergency Arbitrator, the Supreme Court held that such an order will be covered under S. 17, Arbitration and Conciliation Act, 1996 and enforceable in a way provided thereunder.

Perversity as a ground is not available for resisting enforcement of a foreign award under Part II, Arbitration and Conciliation Act, 1996 [Gemini Bay v. Integrated Sales Service, Supreme Court of India, August 2021].

The English High Court, was called upon to decide if an arbitration agreement entered into by a company continued to exist once the company had converted into a registered society. The HC observed that the status of the company may have changed but it does not mean the company (now a registered society) will cease to be a party to agreements it had previously entered into.

People's Republic of China may bring in key changes to arbitration law, suggests the draft of the PRC Arbitration Law [Ministry of Justice, People's Republic of China, August 2021].

The Ministry of Justice, PRC has released a revised draft of China's arbitration law consisting of key changes to existing principles. The changes, among other things include, powers with courts of PRC to supervise arbitration proceedings, broader provisions dealing with procedural equality etc.

AFRICA

Egypt's top court overturns port project award [Court of Cassation, Egypt, Egypt, August 2021].

Egypt's court of Cassations has set aside a US$490 million ICC award against an Egyptian state authority over its termination of a contract to build a container terminal facility, a decision it is said could have broad implications for disputes arising from similar agreements.

Mauritian Supreme Court upholds ICC award [Supreme Court of Mauritius, Mauritius, August 2021].

The Supreme Court of Mauritius has issued an important judgement on the New York Convention, upholding the enforcement of an ICC award of more than US$1.5 billion won by ArcelorMittal despite arguments by Essar Steel that it was denied a fair opportunity to be heard.

Citizens of Sierra Leone seek discovery from Steinmetz Group [Sierra Leone, August 2021].

Citizens of Sierra Leone are pursuing an environmental class action against subsidiaries of Beny Steinmentz BSG Resources have asked a US court for discovery from the Guernsey Mining company and its bankruptcy administrators.

Ghana's central bank sees off LCIA claim [Ghana, August 2021].

An LCIA tribunal has dismissed a US$480 million arbitration against the Bank of Ghana over a cancelled payments systems project after the claimant failed to post security costs- a dispute that saw the bank raise allegations of fraud and corruption.

AROUND THE GLOBE

AUSTRALIA

Sydney court grants injunction over herpes treatments [High Court of Sydney, Australia, August 2021].

A New York pharma company has won an injunction to prevent its Australian partner terminating their contract ahead of an ICC arbitration over services related to commercialising treatments for skin infections caused by herpes.

AMERICA(S)

Ecuador becomes a party to the ICSID Convention [Ecuador, August 2021].

The Constitution Court of Ecuador rules that the head of state of Ecuador has the power to ratify the ICSID Convention even without the approval of the country's national assembly.

The 2020 revisions to the IBA rules on evidence – change for a new decade [International Bar association, August 2021]

The 2020 revisions to the IBA rules of evidence reflect prevailing best practice and accommodate critical technological advances and the arbitration community's response to major global developments such as the covid-19 pandemic, argue Samantha Rowe and Mark McCloskey of Debevoise & Plimpton and Kshama Loya and Bhavana Sunder of Nishith Desai Associates.

Assignee of ICSID award seeks to collect from Argentina [Argentina, August 2021].

A Delaware entity that acquired the rights to a US$320 million ICSID award against Argentina has applied to enforce it in the US in the wake of a dispute with the administrators of the original claimants.

EUROPE

English Court of Appeal orders publication of two judgements concerning arbitration claims between Manchester City FC and the Premier League [MCFC v. FA Premiere League Ltd., Court of Appeals, England, August 2021].

The Court of Appeals ordered the publication of an arbitration related judgement concerning MCFC and the Premiere League. The Court observed that the facts of the case favoured disclosure. Having done the same the Court has clarified that if there are factors favouring disclosure the Court is going to allow the same.

English High Court upholds multiple challenges to arbitral award for breach of tribunal's duty of fairness [PBO v. DONPRO & ors., High Court of England, August 2021].

The English High Court allowed a couple of challenges brought by PBO under s. 68 of the Arbitration Act of England. The appeal was preferred on grounds of "serious irregularity" which according to PBO caused substantial injustice to them. Allowing PBO's appeal, the High Court remitted the award back to the tribunal and asked it to reconsider the award on points raised by the appellants.

English High Court considers scope of arbitration agreement when determining jurisdiction to grant interim relief in support of arbitration [AT & ors. v. Oil and Gas Authority, High Court of England, August 2021].

While considering applications filed under the Arbitration Act of England, the High Court came to a conclusion that interim injunction cannot be granted if an underlying dispute was not within the scope of arbitration agreement.

SETTLEMENT PRIVILEGE IN INTERNATIONAL ARBITRATION: IBA RULES ON TAKING EVIDENCE AS A TORCHBEARER FOR ARBITRAL TRIBUNALS

- Mr. Arijit Sanyal

Settlement of disputes by way of arbitration may have gained momentum, but there remains a possibility that the proceedings continue for too long without any visible end. Resultingly, parties may at a certain point of time, feel the necessity to settle the dispute by other means and subsequently end the arbitration proceedings. Though a settlement may not be reached, the guiding expectation behind such an act is that the documents exchanged, presented during negotiations are protected by settlement privilege.

Resultingly, the said documents cannot be presented and admitted during any proceedings later, should the negotiations fail. However, with a majority of institutional arbitration rules being silent with regards to the same, the discretion vis-à-vis privilege lies with the arbitral tribunal. As a result of which, a document which should have been protected by privilege could be admitted by the tribunal in disregard of the principle of settlement privilege. This practice in turn has convoluted the rules concerning applicability of settlement privilege to any set of documents/ information.

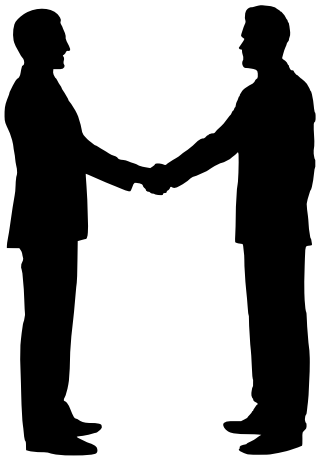
To begin with, parties have the competence to decide on admissibility of issues. However, if parties fail to reach an understanding to that effect, it is generally down to the applicable law and/or the institutional rules to fill the necessary gaps. Among leading institutional rules, the SIAC Rules, 2016 provides that a tribunal shall be vested with powers to determine any claim of legal or other privilege, unless otherwise agreed by the parties **[Rule 27(o)].**

The International Bar Association ('IBA') Rules on taking evidence, have gone a step forward by providing the tribunals with the power to exclude such evidence if it finds it to be privileged under privileged or ethical rules which are determined to be applicable by the tribunal [Article 9(2)(b)]. However, as both national legislations and institutional rules fail to address the issue of determination, it has paved the way for myriad of options for determining the law applicable to determine issues concerning privilege. Resultingly, tribunals have been more inclined towards applying the closest connection test, which comes with its own defects.

However, even while applying the closest connection rule, the tribunals are most likely to defeat the most important element in arbitration proceedings that is, “time”. As a result of which, it is advisable for the parties to agree upon the set of rules which would apply, if an issue concerning settlement privilege does in fact arise. Additionally, the same could also be agreed upon by way of an agreement once a dispute to that effect has actually arisen. Furthermore, as Zara Shafruddin writes, it is ideal for the parties to come up with a privilege index which indicates the documents used during an ADR proceeding in addition to arbitration proceedings. This will not only ensure an understanding between the parties as to what documents are admissible during the proceedings but will allow them to pursue modes of settlement in addition to the proceedings without being concerned about a possible loss of confidentiality. However, a rather anticipated problem may arise, when the counsels belong to different jurisdictions having a different approach to privilege claims. To illustrate a dispute between parties from Common law and Civil Law jurisdictions respectively is likely to give rise to more complications as the former may believe that their documents are protected by virtue of settlement privilege.

However, dearth of recognition of the concept in the latter’s jurisdiction may lead them down a different path, thereby placing the arbitrators in a difficult and unanticipated situation. If the arbitrators decide to apply one of the laws having the closest connection rule, it is bound to place the other party in a disadvantageous position. Similarly, if a neutral seat is provided, the law of the seat too may not satisfy either party to the dispute, which is why an international approach is called for.

Though there are no internationally accepted standards at the moment, Article 9(2)(b), IBA Rules on taking evidence have come the closest in addressing issues where settlement privilege may be involved. Article 9(3)(b) throws some light in this context as it provides for the scope of protection available to a wide range of documents. However, it clarifies the applicability by expressly mentioning when can settlement privilege be invoked that is, only when a document has been exchanged during negotiations in good faith.



Resultingly, if it is proved that a document was exchanged solely for invoking settlement privilege later, the same should not be accepted. Considering the fact that a document may contain confidential information, in cases involving government tenders and high value projects, Article 9(4), IBA Rules on taking evidence requires the tribunals to prevent unwarranted disclosure of confidential evidence. The above-mentioned provisions from the IBA rules on taking evidence jointly constitute as a tool at the disposal of a party willing to invoke settlement privilege. As a result of which the parties should be mindful of opting for the IBA rules on taking evidence should an issue concerning settlement privilege arise. Additionally, as this issue has continued to highlight the shortcomings of institutional rules in this regard, they should be amended to bring them on par with the IBA rules on taking evidence. This will not only expedite the resolution of issues concerning settlement privilege, but allow the leading arbitral institutions to come up with specific guidelines in extension of the good faith principle.

Events

Upcoming events by MediateGuru

Landmark International Conference on Emerging Trends in ADR(11-12 December 2021)

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1st International Investment Arbitration Moot (10-14 September 2021)

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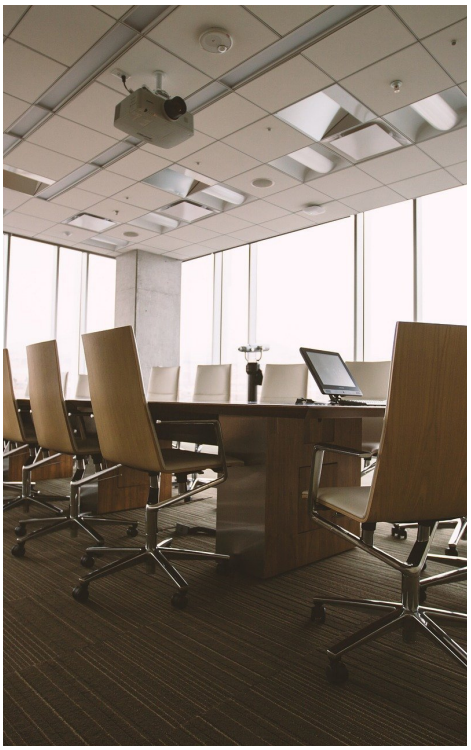

ABOUT MEDIATEGURU

MediateGuru is a social initiative led by members across the globe. The aim of the organization is to build a bridge using which more law students can be encouraged to opt for ADR methods. MediateGuru is creating a social awareness campaign for showcasing mediation as a future of alternative dispute resolution to provide ease to the judiciary as well as to the pockets of general litigants.

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