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mADR

BROADCAST

EXPERT'S VOICE

Mr. Rafael Tyszblat

A discussion with Mr. Rafael Tyszblat and his thoughts on future of the Industry.

Rise of Third-Party Funding in International Arbitration

By - Arijit Sanyal

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EXPERT'S VOICE

Mr. Rafael Tyszblat

- *Rafael Tyszblat is a consultant, program designer, mediator, facilitator and trainer in the fields of conflict resolution and inter identity dialogue.*
- *Based in Paris, France, he is the Innovation and Design Specialist at Soliya.*
- *He designs and leads dialogue programs between youth from North America, Europe, North Africa and the Middle East as well as within European societies between members of antagonistic communities.*
- *He is the Director of Programming at the Muslim-Jewish Conference.*

1) How do you think the antagonist communities benefited from the dialogue programs you created and led?

I have designed and facilitated dialogue programs between national, cultural, religious and convictional groups for 15 years and I think I can say everyone benefited from this way of interacting at various levels. The most basic but fundamental value of dialogue is to put people who belong to groups in tension in contact. Avoidance or confrontations by proxy are the default behaviours when we develop ill feelings towards others. At the very least, dialogue provides the opportunity to speak directly with the people concerned by our grievances and learn from them. Dialogue doesn't always guarantee appeasement or enhanced understanding but realising that it is possible to speak our mind in a structured environment already helps alleviating those tensions and makes people feel less isolated At a higher level, dialogue can also dispel many assumptions and misconceptions and participants can enhance their understanding of the other, which can only benefit their relationships. Finally, many participants also reach a certain level of transformation of their relationships, where they don't just understand where the things in common lay and where differences remain but also why those differences exist in the first place.

EXPERT'S VOICE

2) How best can online mediation sessions be successfully implemented globally paying key particular to developing countries?

I am not a specialist of online mediation per se. I have much more experience in online dialogue (where there is not necessarily an interpersonal conflict between participants). But from what I see with my colleagues, online mediation is developing rapidly and mediators have adapted to this medium. The key issue is ensuring that everyone has access to a broadband that allows video conferencing, keeping in mind that some video conferencing applications require less bandwidth than others. Unfortunately, there is no workaround if you are located in a place with no or too weak connection. For the rest, platforms are now pretty easy to use and the only extra effort needed is for mediators to keep addressing nonverbal communication, despite the inherent limitations of online engagement in that regard.

3) Considering your experience in international relations, how do you see mediators working with diplomats to ensure peaceful resolution of inter state disputes?

First of all, the realm of international relations is not necessarily limited to inter state relations

Our globalised world has made visible and given power to many more sub state actors and transnational relations than before. Therefore, diplomacy shouldn't be reserved to State officials or intergovernmental relations.

The approach to World peace has to be systemic and multi-levelled, including non-state actors such as NGOs, companies, community leaders, city officials, etc. Secondly, State diplomats should not just be people who are experienced with politics and policymaking. They should understand conflict as a human phenomenon and adopt the same communication skills used by interpersonal conflict mediators. If the goal of diplomacy is to contribute to world peace (and not just to defend specific State interests), it needs to update its understanding of conflict, integrating neurosciences and psychology to its approach. In that sense, mediators have a lot to teach diplomats, even when dealing with Track 1 actors (state representatives). But they can also expand the work of diplomats by reaching out to non-elites levels of society (Track 2 and 3), thus ensuring a more comprehensive, inclusive and sustainable peace.

EXPERT'S VOICE

4) How the inter-religious & inter-identity affairs influenced your dispute resolution practice?

I personally do not make a difference between interpersonal, intergroup and international levels of dispute resolution. I don't either make any difference between conflicts depending on where or in what context they take place. Conflicts between religious people over religion, between cultural groups over integration, between parents over children education, between co-workers over task sharing... All those levels and relationships are composed of people who generally function the same way: they try to preserve their physical and symbolic existence and defend themselves against perceived or actual attacks from others. Over the years, my entire practice of bridging divided communities and people has relied on an identity based grid of analysis. I believe that virtually all conflicts and damaged relationships have to do with identity, in both meanings of the term: what makes us unique and what makes us belong. My practice is based on the understanding that any strong emotion, and any violent reaction are caused by a threat feeling towards one's identity. If a third party is to intervene in those situation, they have to help parties understand that their existence and identity is not threatened by the existence and identity of the other.

5) Since you have experience in multi-cultural arena, what are your views about "diversity and inclusion" in international dispute resolution?

I won't go into the controversies surrounding the Diversity & Inclusion field. I think this is a very broad field and different actors use many different approaches to it, so it is hard to generalise. But D&I essentially uses an educative and prescriptive approach, which dispute resolution doesn't. The idea of increasing diversity and ensuring inclusion of all the members of a community or society is a positive and a useful one. The main question is what method we choose to use to make it happen. Intercultural diversity is a good thing, as long as we can find ways to help people form trustful relationships that can handle that diversity. Diversity cannot be imposed, be it by coercion or persuasion, or else it becomes difficult to manage because it can create resistance. I believe Dialogue, which is a tool of dispute resolution, is the most effective and sustainable way to make diversity and inclusion organic.

AROUND THE GLOBE

EUROPE

English High Court allows shareholders to serve out application to join judgement for the purpose of enforcing an arbitral award [Devas Multimedia v. Antrix Corporation Ltd., English High Court, United Kingdom, July 2021].

The English High Court while hearing a plea concerning joinder of third parties to a Court judgement answered in the affirmative. The HC observed that the companies to be joined were interested parties as a result of which it will be necessary to join them for the purpose of enforcement of an arbitral award.

A Company remains the same entity even though it converted to a registered society [Mount Wellington Mine Ltd. v. Renewable Energy Cooperative Ltd., English High Court, United Kingdom, July 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.

Extension to challenge an award not possible under Arbitration Act, 1996, when the Applicant had let the sanctioned time lapse [STA v. OFY, English High Court, United Kingdom, July, 2021].

The English High Court refused to grant an extension of time to an applicant seeking to challenge an arbitral award under s68 of the Arbitration Act 1996, on finding the applicant responsible for time-lapse in the first place. Resultingly, the High Court has reaffirmed the strict time bar concerning s. 68 of the Arbitration Act, 1996.

ASIA

Appellate Court does not have the power to modify an arbitral award under S. 34, Arbitration and Conciliation Act, 1996 [Project Director, NHAI v. M Hakeem, Supreme Court of India, India, July 2021].

The Supreme Court of India clarified that an award passed in relation to the National Highways Act, 1956 could not be amended by the Appellate Court. Accordingly, the modified award by the Madras High Court was set aside. The Court went on to state that under S. 34 of the Arbitration Act, an Appellate Court could only set aside or remit an award but not modify it, which is a departure from the erstwhile Arbitration Act, 1940.

Power to issue directions under S. 9, Arbitration and Conciliation Act, 1996 can only be exercised if there is no final adjudication involved [NBTP Ltd. v. NHAI, Delhi High Court, India, July 2021].

The Delhi High Court iterated that directions concerning interim measures under S. 9 of the Arbitration Act can only be enforced if there is no involvement of final adjudication. Noting the fact that 90% of the payment had become due to the Petitioner, the Court pointed out that this was a mandatory payment. Resultingly, the same could not be equated with the principle of interim relief contained under S. 9 of the Arbitration Act.

Inconsistent awards out of parallel arbitration proceedings are manifestly invalid [W v. AW, Hong Kong High Court, Hong Kong SAR, July 2021].

In a "highly unusual case", the Hong Kong High Court has held an award rendered in HKIAC arbitration proceedings "manifestly invalid" on the basis that the tribunal's findings were inconsistent with an earlier award rendered in a separate arbitration but involving the same parties and one of the same arbitrators.

Arbitral award is liable to be set aside for being patently illegal if the tribunal had ignored vital evidence[PSA Sical Terminals Pvt. Ltd. v. Board of Trustees, CP Trust Tuticorin, Supreme Court of India, India, July 2021].

The Supreme Court of India noted that an award which was passed by ignoring vital evidence was perverse in law. Though perversity did not constitute a public policy ground for challenging arbitral awards in India, the same nonetheless amounted to patent illegality. Holding that, the Supreme Court stated that the Madras High Court had rightly set aside the arbitral award.

Plans worth $ 290 Billion to turn South Korean fishing village into "New Macau" defeated. [South Korea, July, 2021].

A consortium including German-Swiss hotel group Kempinski has lost its ICC claim against the South Korean city of Incheon over an abandoned US$290 billion plan to transform a fishing village into a rival of China's Macau.

UAE healthcare group preps for London arbitration [UAE, July, 2021].

The administrators of an insolvent Emirati healthcare group have agreed to a London arbitration to resolve disputes over insurance receivables that a Dubai bank has claimed as security for an Islamic finance deal.

AUSTRALIA

Government of Australia initiates review into the Bilateral Investment Treaties, Australia to which Australia is a party [Federal Government of Australia, Australia, July 2021].

The Government of Australia has decided to review the BITs it is a part to to decide if it's appropriate to amend, exit or replace them with Free Trade Agreements. Among suggestions received, a majority indicates that ICSID provisions of the BITs should be retained.

Foreign award not enforceable if the tribunal was not constituted as per the arbitration agreement [Hub City Equipment Pty v. Energy City; Federal Court of Australia, Australia, July 2021]

In an appellate judgment, the Full Court of the Federal Court of Australia has ruled that a foreign arbitral award is not enforceable because the arbitral tribunal was not constituted strictly in accordance with the parties' arbitration agreement. Notably, the decision also considers the courts' discretion to enforce an award even where a party establishes a ground for non-enforcement, an issue on which there was previously "no authoritative statement in Australia".

AMERICA

Brazilian distributor wins billion-dollar dispute with Hyundai [ICC, Brazil, July, 2021].

An ICC tribunal in Frankfurt has ruled in a billion-dollar dispute over a distributor's right to import Hyundai cars to Brazil, blocking the Korean company from terminating their contract and ruling it should run for another decade.

Israeli investor fails in tax claim against Ethiopia [Israel, July, 2021].

An UNCITRAL tribunal chaired by the president of the International Court of Justice has rejected an Israeli chemicals group's US$200 million investment treaty claim against Ethiopia over a tax bill.

Peru found liable in metro dispute before ICSID [ICSID, Peru, July, 2021].

An ICSID tribunal has held Peru liable in a contractual claim over a project to build Lima's second metro line, ruling that the state was responsible for delays in the works and must pay damages – also dismissing a US$700 million counterclaim.

AFRICA

South African Labour Court rescues hallow Mediation proceedings [De Bruyn v Metorex Proprietary Limited, Labour Court, South Africa, July 2021].

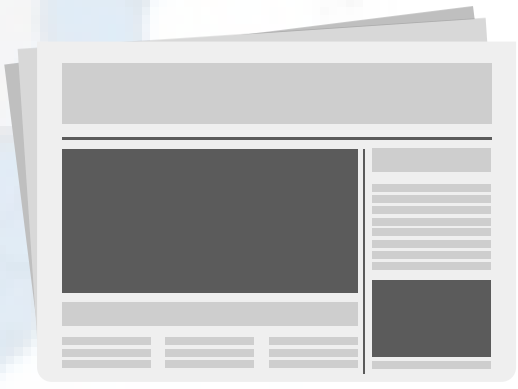
While hearing an appeal, the South African Labour Court observed that termination of employment was not unfair if a new operational model was being implemented. Resultingly, any employment terminated as a result of phasing out of positions, will not be procedurally unfair.

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

Egypt's Court of Cassation 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.

Arbitration Foundation of Southern Africa releases its new International Arbitration Rules [AFSA, South Africa, July, 2021].

AFSA, South Africa has released its new international arbitration rules. Among other additions, the rules feature expedited procedures, emergency arbitrations. Considering the relevant developments, the rules also include provisions related to third party funding. The drafting committee of the rules was headed by Professor Maxi Shearer.



RISE OF THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION: AN ONGOING CONCERN FOR INDEPENDENCE OF ARBITRATORS?

- Mr. Arijit Sanyal

The ongoing pandemic has triggered a recurring wave of disputes between parties to international commerce, with most of the disputes concerning direct breach of contractual terms. Economic distress however, has kept the parties from pursuing their claims or has forced them to settle for something less, irrespective of how favourable the claim may be. It is against this backdrop that multiple jurisdictions have been considering the prospects of Third-Party Funding ('TPF'). TPF may be understood as an arrangement whereby a third-party agrees to finance the claimants in exchange of some collateral, which is generally determined as per the outcome of the dispute. Resultingly, TPF has made significant inroads in the field of international arbitration. However, as Sarah Gilcrest observes, significant inroads within a "small community" of arbitrators/ arbitration counsels has given rise to a conflict of interest, thereby casting a shadow of doubt on impartiality and independence of an arbitrator. As a direct relationship between funders and arbitrators may have a tendency to affect the outcome of the dispute, it becomes necessary to define the contours of impartiality in the context of TPF.

Often used interchangeably, impartiality and independence of an arbitrator are two different things altogether. While the former is subjective and concerned with an arbitrator's biases, the latter is objective and broad enough to encompass an arbitrator's relationship with the parties/ funders; past or present associations which may give rise to a conflict of interest; pre-judgements; financial interests etc.

Codifying the scenario discussed above, Article 12, UNCITRAL Model Law provides that appointment of an arbitrator may be challenged if a circumstance gives rise to justifiable doubts concerning the impartiality and independence of an arbitrator.

Taking this forward, the International Bar Association ('IBA') has classified situations into three lists viz, red; orange and green, respectively. The red list further categorises scenarios as waivable and non-waivable, with the latter being concerned about situations when a conflict of interest cannot be waived. Accordingly, any scenario coinciding with an envisioned situation would automatically bar the arbitrator even if the parties wish otherwise.

The IBA Guidelines on Conflict of Interest ('the Guidelines'), provides that a scenario will be construed under the non-waivable red list, if the arbitrator is associated with the supervisory board of the entity or has controlling influence over one of the parties/entities having an economic interest in the award. Additionally, an arbitrator by way of their financial interest in the outcome of the dispute, may still satisfy the scenario envisioned under the list. While funders may not be considered as parties to the proceedings, an arbitrator may have controlling influence over them. As the global arbitration community is not as large as investment bankers, hedge funds and other funders, it is likely that an arbitrator may be associated with one of these entities in the capacity of an advisor. To illustrate a hedge fund providing means for a claimant to pursue their claims may not be a party to the dispute, yet they may have had one of the arbitrators in a consulting role at one point of time.

The concerns if left unattended, will necessarily affect the transparency and credibility of arbitration proceedings in general. Which is why, countries/ arbitral institutions enacting provisions concerning TPF should consider mandatory disclosures. A settled and widely used principle in Investment-Treaty arbitrations, mandatory disclosures require the claimant using TPF to disclose the identity and operations of the funder. Once disclosed, the tribunal ascertains if the operations are such that it gives rise to conflict of interest concerning an arbitrator. Investment-Treaty tribunals have been taking this forward by imposing additional requirements such as details of the funding. For instance, the tribunal in South American Silver v Bolivia, directed the party to disclose the terms of funding, in addition to the details of the funders.

Resultingly, such disclosures enable the tribunals to determine if an arbitrator is a beneficiary under the TPF agreement. Standard 7(a), of the Guidelines have made an attempt to formalise this requirement by mandating parties to disclose any such relationship with the arbitrator at the earliest possible. However, the Guidelines fall short of those situations wherein funders are not joined as parties to an ongoing dispute for which funds have been provided.

Resultingly, even if an arbitrator does have an association with the funders, it will be difficult for a party to prove conflict of interest.

While TPF may have come to the rescue of claimants facing capital crunch, leaving it unregulated may undermine the credibility and neutrality of arbitration proceedings. In addition to this, recalcitrant parties may see this as an opportunity to initiate frivolous litigation aimed at delaying the arbitration proceedings, if not stop it altogether. Therefore, arbitral institutions as well as national legislations allowing TPF should duly consider issues concerning independence of an arbitrator when TPF is involved. This will not only obviate unnecessary delays and save cost of fruitless litigation but ensure that tribunals are able to address challenges concerning independence of arbitrators in an efficient way. Furthermore, such rules will be effective in reducing frivolous applications in the post award stage as the Courts need only ascertain procedural compliance by the tribunal to assess the authenticity of such an application.

As TPF is here to stay in the post-pandemic world, the global arbitration community shouldn't allow the same to continue unregulated. Rather, it should ensure that by regulating the same, Claimants with limited means are able to pursue genuine claims, which wouldn't be possible in absence of credit.

Events

Upcoming events by MediateGuru

Landmark International Conference on Emerging Trends in ADR(18-20 June 2021)

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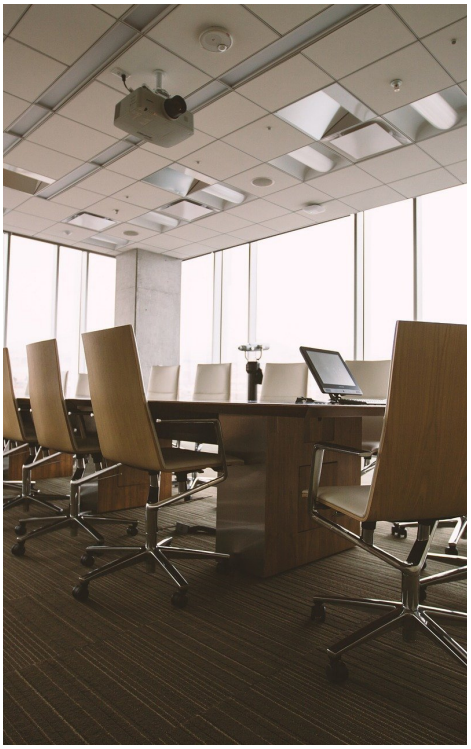

ABOUT MEDIATEGURU

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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