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Session theme:
2019 amendments to the Indian Arbitration Act - Where do we stand?

Transcription of Proceedings

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Mr. Paresh Lal: I think we should start now. So, welcome everyone to the third session on this opening day of the India Arbitration ADR Week, organized by The Mumbai Centre for International Arbitration. This event is being, this session being graciously hosted by Clifford Chance. So, thank you for that. What we will be discussing in this session is, 2019 amendments of the Indian Arbitration Act and where do we stand with regard to them and where do we go from there. We have a, as always, a stellar set of panellists for you to hear from. They all are industry leaders, highly recognized in all relevant publications and the most recognized names in this region and the APAC. We have with us Mr. Kabir Singh, who's a partner with international arbitration dispute resolution group of Clifford Chance. He's based out of Singapore and he deals with complex cross-border disputes across the APAC region and has a focus on India and Southeast Asia. Welcome Mr Singh. We also have Mr. Promod Nair who is a partner with the Arista Chambers. He is an advocate in Indiana and Solicitor advocate with high rights of audience in England Wales. He is an expert in public international law and has been representing India in a number of investment arbitrations. And in fact, has a distinguished honour of representing India before the United Nations. Welcome sir. We have Mr. Percival Billimoria, who is a senior advocate at the Indian bar. He has extensive experience in international commercial arbitration,

as well as arguing matters before the courts in India, including Supreme court. He is regularly appointed as an arbitrator in number of leading international arbitration institutions. And he argues both before, he argues before courts in India and the other tribunals of India as a lead counsel. Welcome sir. We have Mr. Rajendra Barot, who is a partner with AZB and heads the dispute resolution practice of the firm in the Mumbai region. He has acted for clients in numerous high-profile arbitrations, both in and based outside India. He has also acted for clients in investment arbitrations against India. Welcome sir. We also have and finally we have Ms Vanita Bhargava. She's a partner with the Delhi office of Khaitan & Co. She's been an AOR. She has a distinguishment of being an AOR and has 25 years of experience acting for clients in high stake international arbitrations and commercial litigations before various forums. And thank you for joining this ma'am. I will now of course leave the floor to Mr. Singh, to moderate the session and take the discussion forward. Glad to have you all here today.

Mr. Kabir Singh: Thank you very much Paresh for that introduction. It is indeed an honour for me to be moderating the panel today with a really all-star cast of panelists. I must say you put the who's who of Indian arbitration. And I'm very happy that they've all accepted the invite on behalf of Clifford Chance to participate in the panel. Now, the panel

discussion today, as many of you know, will focus on the sought of latest 2019 amendments to India's arbitration legislation. Again, something that many of us can still remember and to take stock of these amendments really and to see where we are and how far we have come and perhaps how far we need to go. Now, historically many of you will be aware that India's aspirations to become a major international centre for arbitration have in a sense been hindered somewhat by their arbitration laws, sometimes the arbitration jurisprudence as well. Now in an attempt to remedy the situation, India's arbitration legislation has seen significant changes over the past six years. Now many of us will remember 2015 as being sought of a watershed in terms of the Indian arbitration landscape when the Indian Government made long awaited overhauls to India's arbitration legislation partly in response to a 2014 Law Commission Report calling for amendments to the arbitration laws. Now some of the key changes were designed really to remedy the shortcomings in Indian arbitration. For example, there were provisions for the granting of interim relief Section 9 in collection of evidence by Indian courts were made applicable to international commercial arbitrations. Section 12 of the Act introduced greater clarity and detail on the circumstances affecting the neutrality of arbitrators. It sets out a list of circumstances in the fifth schedule, which gives rise to justifiable doubts as to independence or impartiality and require written

disclosure from a prospective arbitrator. Strict time limits were imposed on the Arbitral process under Section 29A of the Act. An Arbitral tribunal had to render an award within 12 months. Again, this was probably a first in any jurisdiction that many of us are aware of from the date of the appointment of arbitrators. Again, this was extendable by a further six months. On the enforcement of awards, the amendments clarified that patent illegality as an element of public policy applies only to domestic and not international arbitration and specify that Section 34 reviews should not be reviews on the merits. And then the bill also sought to amend Section 36 of the Act to provide that the mere filing of an application to set aside an award would not result in an automatic stay again. It was a tactic long use to delay the enforcement proceedings. Now the amendments in 2015, I think many of us would recognize and agree were generally well-received by the arbitration community, both inside India and outside. All be it not without some controversy and some dealing difficulties. I mean, there were many first that India sought to introduce in this legislation, but again, many would argue that given the state of affairs that was necessary. Then in 2017, you know recognizing that perhaps some further changes were needed and you know some further tweaks would be beneficial, there was a high-level committee report, chaired by Justice Srikrishna. And they issued a report with recommendations to encourage the use of institutional arbitration in India and to promote India

as a seat for both domestic and international parties. Now on the back of that somewhat you know further legislative changes followed in 2019. Again, these are the 2019 amendments we are talking about, some of which were to be expected but others of which were somewhat surprising. For example, under some of the 2019 amendments the courts were empowered to designate accredited arbitral institutions for the appointment of arbitrators. Again, slightly, you know surprising, slightly new again, not something that you would typically expect courts to get involved in. Again, there was slightly amended time limits that were introduced on the filing of pleadings and issuing of arbitral awards. There was an obligation that was imposed on arbitral institution, the parties to the arbitration to maintain confidentiality. Again, that I think was very welcome by many, many quarters. A new Eighth Schedule was introduced setting out the general norms applicable to an arbitrator. Although arguably, it also, in some, you know in some views disqualified, you know foreign registered lawyers or retired foreign officers from sitting as arbitrators. Again, that was one of the more controversial ones. Then, another creature called the Arbitration Council of India was to be established. A body tasked with promotion and encouragement of arbitration, mediation and conciliation and other modes of alternative dispute resolution. The Council was to be responsible for maintaining uniform professional standards in respect of matters related to arbitration. So

again, you know by many standards these were very bold reforms and you know in many instances a first. Now as to be expected there were some, you know complexities with the implementation of the 2019 amendments. Not all of the provisions in 2019 were actually notified or took effect at the same time. And indeed certain provisions were removed before they could even be implemented. So, I suppose the question for all of us and for our esteemed panelists today is where do we stand? How are the amendments working in practice? And fundamentally are they actually helping to create a landscape and an ecosystem which provides an efficient arbitration mechanism for end users? So, on the back of those introductory remarks, I'll now turn to my panelists and seek to get their views on the couple of key topics that we have pre-agreed. Each of them will give a short introduction of one or two minutes and then we'll have a round of questions. So we are hoping to keep this very active and free flowing as a discussion. And we will of course, you know save enough time at the end for your questions. For those of you joining us, Thank you. And please do feel free to contribute your questions, which we will seek to answer towards the end. Now perhaps Vanita, if I could just turn to you on the topic of institutional arbitration in India, would you like to take the introduction with that one?

Ms. Vanita Bhargava: Thank you. Thank you Kabir and Paresh. A very good afternoon to my esteemed co-panellists and audience.

Hope you're all keeping well and safe. So Kabir like you said, the arbitration landscape in India today has come up far away from 1996. When after opening of the Indian economy, the Government enacted the Arbitration and Conciliation Act. However, there were certain key factors that prevented India from becoming the arbitration hub or the preferred destination. One of them being lack of institutional arbitration. Apart from other factors like high cost of arbitration, delays in proceedings, et cetera. Institutional arbitration does offer the advantages of providing a clear set of arbitration rules and timelines for the conduct of an arbitration, support from trained staff, who administer various stages of the arbitration proceedings, a panel of expert arbitrators to choose from to decide the dispute. And in some cases, supervision in the form of scrutiny of awards. So since effective arbitration process can make India a sought after business destination and enhance ease of business. Some of these issues have been sought to be addressed in the last five years by the way various amendments you had pointed out. Some of the factors that hindered the growth of the arbitral institutions were; one in India, the people still have more faith in traditional ad hoc arbitration which gives parties greater control over the arbitration process, flexibility to decide on the procedure, et cetera. This is something that institutions have to grapple with. Arbitral rules of these institutions were not updated as often as they should have

been. Additionally, most institutions rules did not have provisions permitting accepted best practices as prevalent across the world. There was lack of infrastructure. There was difficulty in assessing quality of the institutions due to lack of information. Lack of personnel without adequate knowledge and experience of arbitration. No minimum criteria for inclusion of arbitrators on panels of the institution. So, Arbitration Amendment Act has brought about some, 2019 though not notify, it has brought about some key changes. Some of the relevant amendments pertaining to institutional arbitration, which you have also pointed out Kabir. One is now, it now defines arbitral institution. It provides for the establishment of Arbitral Council of India. And it's entrusted with the grading of arbitral institutions on basis of different criteria like infrastructure, quality and calibre. So that has some part of monitoring involved. It has also provided at Supreme Court and High Court have the power to designate the arbitral institutions, which have been accredited by the ACI. Section 11 provided for appointment of arbitrator by the Supreme Court or the High Court respectively in domestic arbitrations where the parties fail to appoint. Now the amended Section 11 entrust the appointment of the arbitrator in the arbitral institutions designated by the Supreme Court. The amendments also have introduced express provision on confidentiality of arbitration proceedings and the immunity of arbitrators. Further the 2019 amendment

provided for the Eighth Schedule giving qualifications of arbitrators. But in the 2021 Ordinance Eighth Schedule has been removed. However, the qualification, experience and norms for accreditation is to be specified by the regulations. Now, all these amendments are yet to be notified. So, while the establishment of an Arbitral Council providing for promoting institutional arbitrations specifically, making recommendations regarding personnel, infrastructure, et cetera and keeping a check on quality. These are all good amendments which will promote institutional arbitration. There are many concerns that are anticipated to emerge once the amendments are notified. And it would remain to be seen if the amendments should not prove to be counterproductive in promoting arbitral institutions. Thank you.

Mr. Kabir Singh: Thank you Vanita. I mean, that was a very good introduction to the topic. And I think you've covered a number of the points that many of the participants were interested in learning about. I suppose, looking more directly in your view, I mean, given that we're now one and a half years down from 2019. Do you think that the changes have actually been successful in encouraging the end users as you pointed out you know, to actually adopt institutional arbitration as being, you know, a norm that's more efficient and a more organized way. Or do you think that generally end-

users are still more comfortable with domestic arbitration? And what's your experience with that.

Ms. Vanita Bhargava: The legislative changes focusing on promoting institutional arbitration per se, are yet to be notified. Having said that, however, the biggest amendments in the last five years which you have pointed out have served to encourage arbitration itself. Like ease of enforcement of awards, reduced judicial intervention and respect for finality of awards, provisions to facilitate expedited proceedings, procedural flexibility. So, if India is seen as an arbitral friendly jurisdiction and becomes a favoured seat of arbitration for international arbitrations at the very least in matters involving Indian parties, this would in any event make the jurisdiction attractive for institutions to establish themselves in India. Considering that the caseload would not be manageable by ad hoc arbitration and especially with the growth in specialized arbitrations. So, especially technology contracts, I mean personally I feel where confidentiality and expertise is required it would promote setting up arbitral institutions. Also, this is evident from the fact that, MCIA in late 2016 it was launched, rules of MCIA provide for international best practices like those adopted by international arbitral institutions. And it has also provided much needed physical infrastructure. Then the shift, via the legislative changes, this is also reflected by the positive

steps being taken by international arbitration institutions also, which have been investing in the Indian market. Like ICC recently appointed its first regional director for South Asia. SIAC is open two representatives offices in India. So, encouragement to parties to choose institutional arbitration in the last five years. That has mostly been the effort of the institutions themselves by having a clear set of rules, trained personnel, providing a panel of good arbitrators, creating awareness on advantages of institutional arbitration by holding seminars and workshop. So, the…

Mr. Kabir Singh: Yeah.

Ms. Vanita Bhargava: Yeah.

Mr. Kabir Singh: No. No. That's good to know. And I suppose in your experience, I suppose on the front end are you seeing parties adopting more institutional arbitral clauses and you know, you mentioned MCIA obviously is being one very well-established institution in India. And in what kind of contracts are parties really heading towards institutional arbitration?

Ms. Vanita Bhargava: Yes. In my experience is definitely, there has been a shift towards incorporating institutional arbitral institutions in the clauses. This has mostly been

like I said due to increased publicity and increased awareness. There is no concrete data as such, you know, that in what type of contracts they are adopting. But, however, like I said, mostly technology related contracts where there is a likelihood of alternate dispute resolution. There is likelihood to be an increased and there are certain unique challenges that are faced by technology companies on account of a global impact of their operations, geographical limitations of a country's legal system, you know, fast based transfer of data and maintaining confidentiality on proprietary information. So, all these challenges I think can be met by arbitral institutions. Further in court system judges are also not familiar with technology. So arbitral institutions they can have expert arbitrators, they can provide expert arbitrators. They can help in maintaining confidentiality, ensure neutrality of arbitrators, you know considering the job.

Mr. Kabir Singh: Sure. Sure.

Ms. Vanita Bhargava: Apart from that construction sector, power sector requiring technical expertise they will also choose arbitral institutions.

Mr. Kabir Singh: Ok. Thank You. And I think that's also consistent with our sought of broader experience outside of

India, where these as you mentioned tech related contracts are particularly because of the sensitivity, whether it's intellectual property or the data or the confidentiality as well. So, it seems to be a similar experience. Could I now turn to, perhaps Rajendra one of our other panellists. And Rajendra, I suppose in your experience you do a lot of work, you lead the team out of Mumbai, you have a huge arbitration caseload. What in your experience is the current experience of Indian Arbitral Institutions? I mean, are there caseloads growing? And what do you see as this sort of major areas for future growth, Rajendra?

Mr. Rajendra Barot: Sure. Thanks, Kabir. Hi. Hi everybody. So certainly, from where things were, there is much greater awareness now about arbitral institutions. Vanita, I think made all the right points. Especially with a new found friend COVID-19. I think you have no options, but for technology. Now, is the load growing, Yes! I certainly see that the load of the institutions is growing. The role of the institution is growing. I think institutions are also reacting very well. Courts are reacting very well, by having institutions administer arbitration, even where the clause did not provide. But the question really here is, the second part of your question is; where do I see this go? If one just takes life back to 20 years or maybe 25 years. People thought India is just, you know Mumbai, Bombay, Delhi, Calcutta, Madras. But as

life has shown India really is in the B City, where one heard for the first time that a group of people from Aurangabad got together to buy hundred Mercedes Benz cars. I think that is where India really is. That's what the key is really going to be. If it's a no-brainer, that for example, an Amazon arbitration is going to be institutional. I think it's a no-brainer that most bilateral investment treaty arbitration would be institutional. But it will only be, if it percolates down. It's only when it's trickled down to the smaller towns, which is where there is unbelievable growth potential.

Mr. Kabir Singh: Now, that's, that's a good perspective. And Rajendra you mentioned one point. So, let me just pick up on that before I let you go and we move on to the next topic. Which is what the courts are doing. Again, I mean, as we all know, I mean, you know arbitration is really part of an ecosystem. You have the legislation, you have the courts, you have the end users, you have the institutions. And then I suppose what role do you see the courts playing in terms of encouraging the use of institutional arbitration? And quite honestly how do you think they've been doing so far?

Mr. Rajendra Barot: Sure. As I said when I was, I was responding earlier, the courts have had MCIA administer arbitrations when the clause did not provide. So, I think, it's a, it's the push to what institutional arbitrations,

where the court can play a role. Today, where you, for example, have your Section 11 application for the appointment of arbitrator. If the dispute is above a certain financial threshold, the court can certainly encourage parties. And on the lighter side, our courts are known to have their own arbitration clauses. I mean, I have had occasions where I have appeared before courts and the courts have said that well your clause provide for 3 arbitrators, but guess what, I think this dispute should be resolved by a single arbitrator. And with all this gravitas that the High Court judge brings in more often than not he is very convincing. So, he can also possibly use that same convincing power to say that well with the kind of dispute that you have why don't you take this to X institution Y institution because it will give you everything you wish, the experience, the technology, the ability to have experienced arbitrators, familiarity with the process and for a fee which is certainly not a dent. So, I think that's the role that the courts are playing and the roles that the courts can additionally play.

Mr. Kabir Singh: All right. Thank you for that. Great. And now, I think we've spoken about institutional arbitration. There's a lot more to cover so I'm going to move on now to the next topic which is another very interesting amendment which was timelines for arbitral proceedings. Again that was something introduced in 2015 and perhaps then carried over in

2019 as well. I'm going to turn to another panellist, Percy to give us the introduction to the topic. And then we'll go around with a few questions. Percy over to you.

Mr. Percival Billamoria: Thank you Kabir. So there was an amendment in the provision for timeline in the 2019 amendment. As you mentioned the provision for timeline actually was introduced by the 2015 amendment. I personally do not agree that you can really legislate for timelines. But as you said, some may argue that it was a need of the hour. Now what this amendment does, is it links back the time of 12 months to commence from the date on which the pleadings are completed. So, there's a new provision Section 23(4). According to which the pleadings have to be completed within six months of the tribunal being formed, entering into a reference. Then the timeline for completing the process of arbitration under the Section 29A, is set to be 12 months from the completion of the pleadings. Now this can give rise to some complications such as the one that I experienced recently. Where, if the pleadings are completed before the six-month period that is specified. Then whether the timeline runs from the date of completion of the pleading or the or some may argue based on the language of the section, that it has to be six months from the date of entering into reference. So, these are the complications. But by and large, what this amendment of 2019 does, it extends the time period available by a further six

months, because the time period now runs from the date of completion of pleadings. Again, in a jurisdiction like India, where courts have regularly held that, you know, timeline recommendations are not mandatory. I am not too sure whether it's possible to legislate for timelines. One has to really look at the reason why you know, arbitrations are delayed. You know things like, you know, courts insisting on enforcing certain multi-tiered clauses for example. Where one or the other the parties tries to kick the can down the road, by taking advantage of that. If the clauses are not really properly drafted, then they'll inevitably be an objection to say, you cannot commence because this precondition to arbitration has not been satisfied. And I also do feel that in the 2015 amendments, it was really the arbitrators who had the rough end of the stick. A lot of the times the delays happen also because of counsel. You know, one of the problems that we have is there is no separate arbitration bar. And you cannot arbitrate after four o'clock, after court hours. So these are the endemic problems that are to be addressed rather than to try and legislate for timelines.

Mr. Kabir Singh: Yeah. Now, thank you Percy. I think that was a, there was a fair summary of the position and again, on a very sought of controversial topic. Again, in your experience and obviously we know you sit both, as an arbitrator and has a huge amount of experience as counsel. I mean, aren’t these

timelines actually working in practice? And again, I know you identified a couple of problems, so are the parties are you know, playing balls, so to speak are the tribunals doing the same in terms of giving effect to do what was intended by the legislation or is this all-just sought of, you know academic banter?

Mr. Percival Billamoria: I think the latter, you know very clearly. So, I have a couple of funny experiences. So, for example, there was a very well known, you know, panel constituted recently. Where, you know we were running short of the timeline on the second occasion, right. And they said, okay, well this is the day. So, we must have a hearing on a Sunday. Because in case the court wants to know what the hell is going on, you can point to the fact that we are even having hearings on Sundays. So, I don't think it is a provision that is taken very seriously. Arbitrators are of course very mindful of the timeline. But it must be appreciated a large number of the domestic arbitrations, that we have, you know construction disputes, infrastructure type of disputes, where there are the evidential proceedings itself take a lot of time. And I don't know whether it is possible to impose timelines on those kind of disputes without having, you know losing something in the entire process. As I said, you know the reason for the delay is not that people are not interested in completing the arbitration, in fact. You know there are

many other problems that need to be addressed before you can start legislating.

Mr. Kabir Singh: Yeah. Yeah. No, and again, I think, as you say, that the timelines will work for some cases, they might not work for others. And you know there will be some cases where just by the, you know, nature and complexity of the dispute itself it's not suitable to impose that kind of guillotine. I mean, are we seeing, in terms of practice, many applications to court for the extension of the timeline? So, are the parties sort of saying, look. Enough. We can't simply work with this and one or both parties going to court. Are you, are you seeing that in practice as well? And how are the courts responding to this issue?

Mr. Percival Billamoria: Yes, there are quite a few applications. After the six months consensual period has expired and by and large the courts are also you know if both the parties are coming forward and saying that there must be an extension and it's required. Of course, the law mandates that the court must look into the reason for the delay. But then again, that's another example, I mean, you see, you know we are talking about reducing the role of courts and now you know there are arbitration benches which are getting flooded by these kinds of requests. So, the courts as long as the

parties are ad idem on the fact that more time is required, I think the courts are fairly amenable to that.

Mr. Kabir Singh: Okay. Well, that's good to hear. Can I turn to someone else on the panel. Promod, you know one of the mischiefs, I suppose, the timelines were intended to sought of address, was sort you know dilatory tactics by respondents. Now do you think that some of the timelines give difficult respondents an opportunity to create procedural objections? So, you know whether in the form of the arbitration, in the arbitration proceedings itself or perhaps then you know raise arguments in the enforcement stage that it has, have you seen anything like that emerge out of this issue?

Mr. Promod Nair: Well, I think the short answer is yes, they do. If a request for extension of time is not made by both sides, then this can often create difficulties in practice. And quite often as you know respondents typically in arbitrations have a greater incentive to stall or to delay an arbitration. And therefore, the need to approach the courts for an extension of time sometimes provides fertile ground for an obstructive respondent to delay the arbitration. And that does happen quite frequently. In fact, you know without naming anyone in a recent matter in which I acted as an arbitrator, the claimant approached the court for an extension of time. The respondent neither agreed nor disagreed. It simply did not

respond. Since it was, you know it had to be served with the application for extension of time it managed to avoid service for some period of time. And the end result was that it took more than a year for the proceedings to resume. So the original legislative intention was that the entire arbitral process from start to finish has to be completed within 12 months. But if it takes more than a year to get a three-month extension from the court for the completion of an arbitration then obviously something is not working well in practice. And the unfortunate bit is that this is not an outlier incident. It is quite commonplace. But I didn't want to sound, you know a note of doom and gloom. It's not always, there are some many many positives of the legislative amendment. So, I think one aspect is that arbitrators are far more diligent these days in the matters that they take on as arbitrators. Because that's an aspect that needs to be disclosed even in ad hoc arbitration. Of course, that's always been the norm in institutional arbitration. And the second probably unintended effect is that there's also deepened the pool of arbitrators. You know when the great and the good find themselves too busy. I think it is exactly in these kinds of circumstances that the institutions have to be lauded. The institutions are always looking for fresher younger talent to come through. And my experience has been that the MCIA including all other arbitral institutions which handle India seated or India related arbitrations tend to look beyond the conventional names of

arbitrators for a number of reasons. But I think the timelines is one important factor and that has only served to increase the number of arbitrators or the pool of arbitrators available to serve in these cases.

Mr. Kabir Singh: Okay. No, that's interesting. It's an interesting contrary view that, we are at least seeing some light at the end of the tunnel, as a result of all of these amendments. You know one interesting point that once was put to me was whether or not this might, you know these kinds of provisions might actually form the basis of a challenge during enforcement. And it will be interesting to see whether respondents go down the route of, you know raising natural justice issues or right to be heard, et cetera, if they're forced to complete proceedings in a certain amount of time. But I suppose if there's anywhere in the world that kind of argument will be raised will be in the Indian court. So, we shall all wait and see for that you know for that to be raised soon enough. I'm sure. All right. As, as we are moving on, Promod now you're going to take the sought of mic next on the 2020 amendment Ordinance again. That was sought of the most recent set of amendments, you know on the back of the 2019 ones. Do you want to take us through the introduction and then we will go for round of questions, over to you.

Mr. Promod Nair: Sure. Happy to do that. Thanks, Kabir. Well,

it's actually no longer an Ordinance. I think the Ordinance was promulgated in November 2020 and the Ordinance under the Indian constitutional scheme has a shelf-life of no more than six months. So the Ordinance was in fact replaced by an Act of Parliament. The Parliament voted unanimously to convert the Ordinance which was promulgated by the Government into an Act of Parliament and that happened in March this year. The 2020 Ordinance and the March Act essentially sought to make two main amendments to the Arbitration Act. The first was to grant an unconditional stay on the enforcement of the arbitral award until such time that a challenge to the arbitration award is decided by the courts. And this is limited to cases where the party making the challenge to the arbitration award is able to prima facie establish that the agreement, the arbitration agreement which formed the basis of the award or the making of the award itself is induced or affected by fraud or corruption. The second aspect which was dealt with by the amendment was to delete Schedule 8 and some of the amendments to Section 43 which have proved to be quite controversial both within India and outside India.

Mr. Kabir Singh: Okay. So, I mean, in your view, I suppose, you know what was it that provoked that backtracking, so to speak on some of the aspects of the 2019 Amendments. Again, you've mentioned the controversy. And I suppose on the round,

do you see that as a positive step in the right direction for Indian arbitration?

Mr. Promod Nair: Well, I think, Yes and No. I think it's a, there are, there are layers of answers to it. As far as the 2019 amendments are concerned, you know it inserted a few additional clauses to Section 43 and Schedule 8. And these insertions received a lot of criticism, both in India and internationally for a number of reasons. Firstly, the idea of having a government appointed authority exercising some level of regulation or supervision of arbitration is always bound to be controversial, especially in India, since Government departments or Government companies are large scale users of arbitration. The second reason is that such a regime would create difficult tensions with the principle of party autonomy, which as we all know is the cornerstone of arbitration and the arbitration process. Third, the qualifications that were proposed for arbitrators and which were enumerated in the Schedule 8, the 2019 amendments would not permit or allow for appointment of foreign lawyers or for that matter appointment of non-lawyers such as engineers, charted accountants, et cetera in India seated arbitrations. This would, in my view have reduced the pool of available arbitrators and also undermined India's ambitions to be a global centre of arbitration. You certainly cannot achieve such a lofty ambition by prohibiting the best of foreign

arbitrators from acting in India seated arbitration. So, I think due to these concerns, you know firstly the Government did notify these particular provisions of the 2019 amendment. So, they were never brought into force. And I think it is also welcome that the Government has shown that it's open to receiving feedback, including negative feedback and undertaking a course correction or you know, what has often been described as backtracking on the 2019 amendments.

Mr. Kabir Singh: Thank you. I think that's a very fair answer and a very balanced one. Now just going to one of the, you know, one of the particular provisions and I think it's Section 43(j) of the Act, which provides that the qualifications, experience and norms for accrediting of arbitrators shall be such as maybe specified by the regulation. Then again, by regulations, I think these are to be set by the Arbitration Council of India when it comes into being. Again, I think many people have asked really is that necessary and is there still a tendency to be too interventionists in terms of parties' choices of arbitrators. Again, you mentioned party autonomy being the cornerstone and then we have provisions like that. I suppose, do you see this provision as being too, too over-regulate if that's the word? And if that so, you know what do you think could be done better?

Mr. Promod Nair: Well, I'll stick my neck out and I'll say, I completely agree with you. That, you know if this is actually, I mean, if there are regulations which are very prescriptive, then they would be, it would be controversial. Because the net effect would be that it would over regulate the party's choice of arbitrator. But the good news is that we have not seen any regulations being issued. And I hope Section 43(j) which you've referred to remains a dead letter. With my neck out, I would say that the only real qualifications for appointment of an arbitrator, in my view should be that; Firstly, the arbitrator should enjoy the trust and confidence of the parties or the appointing authority and that the candidate's independence and integrity is completely beyond reproached. So, there is a fairly robust mechanism in the enactment to ensure the latter. And as far as the former, I think we should just trust the parties to make a good choice or that's the choice that they make, then they have to live with the consequences of that choice. I don't think it should matter whether the parties or the appointing institution wishes to appoint an Indian or a foreign national as an arbitrator. If they, whether they appoint a lawyer, a retired judge, a chartered accountant or engineer as an arbitrator is really a matter of individual or institutional choice. And I don't think that the legislation should really provide for it.

Mr. Kabir Singh: Okay. Fair enough. That's fair. Rajendra if I can turn to you now on one of the other aspects of the 2020 amendments. And that was a provision which basically allows a court to stay a domestic arbitral award pending a challenge in circumstances where the court is prima facie satisfied that the arbitration agreement was induced or effected by fraud or corruption. You know how do you see the courts applying this new proviso in cases of fraud and corruption?

Mr. Rajendra Barot: Well, so, if I can just also add to what Promod was saying about 43(j), because I'm going to draw from that in my answer to your question. I think the problem always is the foot in the door. So, as is the case with a court having an ability now to stay enforcement of an award and you have to remember one thing. And which is what I always say, when I tell people to relate to amendments, I tell people to relate judicial precedence. This is not going to be tested in the Supreme Court of India. This is possibly going to get tested in a District Court somewhere, where and I'm sure most judges know about, you know the latest judgment of the Supreme Court in the arbitration law. But most of them don't. And therefore, such vide clauses are not really a foot in the door. They, they're actually way beyond. Therefore, in that sense, I think it's a recipe for disaster.

Mr. Kabir Singh: All right. That was a very frank and honest opinion. Thank you for that. I think we will see how that pans out, but that's certainly one view again. It's something which has caught the interest of the community outside India as well, those of us who are with Indian arbitration. And again, we all are waiting I suppose to see, how this is actually, you know taken up by the courts. And in terms implemented, then as you say, it is going to be likely to be difficult. Now, I suppose, in terms of, you know one of the other related issues to this, right, which is, which is you have the issue of fraud being arbitrable or not. Again, that's always an argument that's raised in the Indian context. Now, you know in the recent India caseload does confirm that, fraud, you know say for the very exceptional circumstances is generally arbitrable in India. And how do you sought of then deal with this kind of an amendment there? Where you've inserted the ability to stay proceedings on the basis of, you know fraud and corruption and using the arbitration agreement. Do you think that sought of complicates the issue somewhat? Because on the one hand you have the court saying, look, fraud is arbitrable and then you have the courts now having to intervene when they believe that fraud and corruption was involved in an arbitration agreement.

Mr. Rajendra Barot: It absolutely does, Kabir. So, I would describe this as one step up and two steps down you know, they

were and because of our Constitution and which is what I think we have inherited from the British. A lot of what is done by the Supreme Court becomes law. And you have the judge of the Supreme Court who may not be completely conscious of what he's saying. And therefore, when people started saying fraud is not arbitrable. We really in that sense stuck out like a sore thumb. When our respective firms, which is Clifford Chance and AZB had to argue arbitrability of fraud in relation to misrepresentation in a contracting evidence. I mean, it was an uphill task. And finally, I think what the Courts have done is absolutely correct to say that; if fraud results in vitiating the arbitration agreement or unless the fraud has a public element, it is arbitrable. And I know I'm oversimplifying it, because I am conscious that we don't have enough time to get into details of things…

Mr. Kabir Singh: Fair enough. Fair enough.

Mr. Rajendra Barot: But now what has happened is with the new introduction. Now, as I said, it's one step up and two steps down because you're back again to a first Court, an appeal Court, ultimately go to the Supreme Court, wait for your appeal to be heard. And finally, a Supreme Court judge will lay down what the law is. So it just sets you back considerably.

Mr. Kabir Singh: Yeah. I understand. I think that's a fair point as well. Because it does insert one other aspect there, which you being a difficult respondent would be able to take full advantage of, may be if your objective was to delay and derail the process. I suppose we are where we are. So Promod for you just to end off this, this line of questions. Again, looking at this particular amendment, do you think that it really opens the door for debtors to gem up enforcement on domestic awards? I mean, I suppose one more string to their bow. If they're looking for a delay strategy.

Mr. Promod Nair: Well on this Kabir to be honest, I would take a slightly different view. I completely understand where Rajendra's coming from, but I would take a slightly different view. You know, I think my difficulty with this amendment is I don't really understand why it was brought into, brought in the first place. It’s really a solution in search of a problem. And why I say that is because I don't think there was ever a specific problem that had interpreted, that had actually arisen in the interpretation of the Act which had to be addressed by means of a clarification or a modification of the Law by Parliament. We already have a provision that says; that when an application is made for a stay of the operation of the arbitral award, the Court can grant stay of operation of the award for such reasons as to be recorded in writing.

And the court could impose terms. The power to therefore stay the operation of an award already existed before this amendment was brought into force. And I don't recall having come across a single judgment where the court actually found that either the arbitration agreement or the arbitral award was prima facie tainted by fraud. And nevertheless, insisted that the losing party had to deposit the entire sum awarded by the arbitral tribunal as a precondition for challenging the arbitration award. So, if that problem hadn't really arisen, I don't really understand why this amendment was necessary. But having said that, while I think that the amendment was unnecessary. I don't think it really opens a new door for award debtors to stall enforcement of awards. Like I mentioned, I don't think the amendment creates a new avenue for challenge to arbitration awards. It does not reverse the trend, which says that, you know fraud claims are arbitrable as a matter of Indian law. The amendment only clarifies that in the event of a court being prima facie satisfied, that the arbitration agreement or arbitration award was induced by fraud or corruption. It could stay enforcement of the arbitral award in toto. And I think this was really the position even before the amendment was brought into force. I therefore don’t see it as being problematic.

Mr. Kabir Singh: Yeah, agreed. No, I don't think it changed the law very much. It's just sought of highlighted the issue

somewhat, I suppose for someone to take advantage of. Great. All right. So, we're moving onto the panel and again, we're reaching our final topic of the day. I'm going to sought of turn to Rajendra at this time to sought of take the baton on, on the topic of India as a seat. Again, you know, all of us know India's aspirations to become a seat for international arbitration. And I suppose what's important for us to try and do today is see what the 2019 amendments have done and how they have sought of helped or set India back in terms of achieving this. So, Rajendra over to you on this one.

Mr. Rajendra Barot: Thanks. Thanks, Kabir. I would divide this it to two buckets very quickly. The first is: Are we saying that India becomes a preferred seat of arbitration like Singapore? Where you have two Indians who prefer to have Singapore as a seat of arbitration. That's the first bucket. The second bucket is: how do we ensure that Indians chose India as a seat of arbitration and don't think of going off to Singapore, London and wherever else. The way I look at it. I think, if we were at a stage where, as someone has said, " Ghar sajane ka tassavur toh bahut baad ka hai. Pehle ye tai ho, is ghar ko bachaye kaise?" So, you know, decorating the house was the second priority. The first priority was to ensure that the house stays. Therefore, I think a lot of these changes were brought in for the second bucket, which is to ensure that two Indians choose India as the Seat of arbitration and not go

away to Singapore especially for large value contract. The best example is the timeline is made applicable to arbitrations which are arbitrations between two Indians and when the seat is Indian. And if its international commercial arbitration even if the seat is India the timeline doesn't apply. So, I think that the intent really is to kind of try and ensure that there is enough incentive for Indians to choose the seat as India. The other very important change that we have seen and it's right now in middle of adjudication. I would just make a reference to it. But this whole concept of emergency arbitrator being available. Now you are in a clogged court system. You know when Promod was saying that, the ground to challenge is already available on fraud. I think the difference is in a sense it accelerates its implementation. If it comes in at a time when you are not required to deposit money and that is because you have a clogged court system. If you were to choose India as a seat and if you were to choose an institution which provides for emergency arbitrator. Look at the benefit of going for an emergency arbitrator. Hopefully the court will stick to the argument that well it's in Section 17 award. Therefore, it has all the it can be enforced it can be challenged and you have the benefit of going this for a tribunal of your own choice because again, party autonomy. I think there are steps in the right direction in order to make India seat of arbitration more for the second bucket than the first bucket.

Mr. Kabir Singh: Okay. Now I suppose when you look at and again, this is a fairly broad question Rajendra. But when you look at the 2015 and 2019 amendments on the round. In your view, has it sought of brought India significantly closer to catching up, for the lack of a better term, with the other major international arbitral seats, you know whether it's, you know Singapore, London, Hong Kong, you know Paris around the world or do you think there's still, you know some way to go?

Mr. Rajendra Barot: Well I think the legislative changes are in place today. As it will get implemented you will have more and more judicial precedence and more clarity. That's the platform that India is looking for. And of course, at the end of the day there's always scope for improvement, right? Nobody's perfect. Nothing is perfect. And certainly not a country of more than 1.4 billion people. So, in that sense, I think all the right noises are being made.

Mr. Kabir Singh: Okay. I suppose when you look specifically at Indian parties and again, you mentioned this interesting point, right. That one would understand typically that international parties doing business in India would tend to choose a foreign seat because of neutrality. They would want to go to Singapore, London or you know one of those jurisdictions. But I suppose we are also seeing a trend in

some of the most substantial cases where you have Indian parties, you know potentially choosing seats outside of India. Now, why do you think this is happening? And, you know, where these Indian sought of parties bring their arbitrations to?

Mr. Rajendra Barot: I think the responsibility in that sense sits with all participants in an arbitration, starting from the arbitrators to the bar to the clients and then to the courts. So, in that sense the simplest argument and we have clients come and ask us these questions very, very often. And, in more cases when there is an international or a non-Indian client than an Indian client. And as all of us have seen, the muscle power of the Indian has changed a lot. So today you are in a position as an Indian client to say as well, I'm not going to agree to a foreign applicable law, I'm not going to agree to a seat outside India. And there is a discussion. I mean, there was a time when the foreigner would just get it. You know. We are not doing this. But now things have changed. And, and what are the factors that come to a person's mind is, simple thing like, court delay. The whole purpose of arbitration is you want to go away from a system where timelines cannot be accurately predicted. Now, with this in mind, it is also therefore gone to two Indians who are also getting into a contract which is not really in that sense, an ordinary contract, it's a high value contract. And therefore, there also the temptation is to go to a jurisdiction where the

court intervention is minimal. Where the challenge, the courts are very reluctant to interfere in challenges. And where the pool of arbitrators which is available is more hardworking than what you would find in India. I am not saying former judges are not hardworking. But maybe they are more hardworking. Maybe they are more commercial. Maybe they are more astute. Maybe they are more on the board. And these are factors which are weighing with Indian parties, when they choose Indian arbitrators seated outside, seated out.

Mr. Kabir Singh: Yeah. All the points that I'm familiar with. I think that must be right. Okay. Shall we, shall we now take the last two questions on the topic and Vanita, I know sort of you've been quiet for a while. Let's come back to you because you started off the session. Again, just in terms of your experience. I mean, we've been talking about Indian parties going outside of India. Let's talk about, I suppose, about the reverse, which is the typical formula being international parties wanting to choose a seat outside of India. Are we now seeing international parties choose India as a seat and sort of how do you think that's working out? You know, Rajendra mentioned the muscle power that Indian parties now have in terms of negotiating contracts and sort of insisting that India might be a seat. Are you actually seeing that, Vanita work in practice where Indian parties are choosing and successfully getting India as a seat in their contracts? And

if so, are than doing it with the institutions or are they actually doing it ad hoc?

Ms. Vanita Bhargava: Yeah. So, considering the pro arbitration judgements that have come and mostly the legislative amendments. So yes, there is an increase. However, the cases wherein India is opted for as a seat of arbitration, it's restricted to cases involving one Indian party or the subject matter of the dispute through the underlying contract is related to India. So international parties I would say, are such as such, still hesitant in opting for India as a seat of arbitration. But having said that the efforts being undertaken and you know through the various legislative reforms, they would take some time to really, you know. It's only been 5 years pro arbitration judgments have started reflecting it. The fact that it will take time and things will grow because, India, the World Bank rankings, India has ranked, 63 in 190 countries and it's moved up from 131 in 2016. So even though now they're not still opting, but I think in the times to come, you know arbitral institutions are at a nascent stage. So as and when they grow, they would definitely choose India. Thank you.

Mr. Kabir Singh: Yeah. I think hopefully five years' time, we're having the same discussion, then we would get slightly voted. We all hope we get different answers, but yes time will

tell. Thank you. Thank you very Vanita for that. Percy over to you. Again, you know, perhaps the million-dollar question saved, saving the best for last, which is you know; what further amendments would you like to see to the Indian Arbitration Act to sort of carry it all the way and to sort sharpen the edges, make it sort of perfect? What do you think realistically, is achievable and you know, in terms of the priority amendments you would like to see? Percy you are on mute. Sorry.

Mr. Percival Billimoria: There you go.

Mr. Kabir Singh: Thank you.

Mr. Percival Billimoria: The less legislation you have the better in my view. But there is room for clarification. So, one of the points of course is as Rajendra mentioned, there's absurdity about Indian law doesn't recognize emergency arbitrators. First of all, I don't think that is true. So, it needs to be clarified. That's all. There was a 246 Report Law Commission had spoken about, giving recognition in the statute to an emergency arbitrator and then it didn't happen. Now, does that really mean that the statute bars emergency arbitrators. I mean when you talk about party autonomy, you know I think Rajendra touched upon this. So, I would like to believe that the amendment did not happen because it was not

found to be necessary in the first place. Now we have this, you know, huge dispute going on, so I think that needs clarification. There are a couple of other things. So, when you look at timeline and things like that, look, I am a firm believer of about arbitrability being one of the issues that we should settle very early on. So, the introduction of prima facie, it was there in Section 8 and then you know 45. The court at the time, it is making a reference and also possibly under Section 11 when it is appointing an arbitrator, to what extent does it go into the issue of arbitrability? Now I know that there is a Section 16, then we follow, the doctrine of competence-competence, right, but consider this, if there is a very important issue about whether the dispute is arbitrable or not. I mean, we are all used to talking about, some frivolous challenges that take place, but presume for a while that a party has a very significant point to make. And the, and the court initially while referring them to arbitration does not cover that or covers that only prima facie. Again, what do you mean by prima facie is. Again, a very good question. Right? Then it goes to Section 16 before the panel. Now in India, most of the Section 16s are not, there's no immediate ruling, it comes out only in the awards. So, you go to the whole process and then you have to challenge it. You have to challenge it as part of the challenge to the award. So, I don't think it is the best thing to do. I think court should be able to decide, you know if it's a valid question

about whether something is arbitrable or not. Then it should be decided upfront. Of course, you know whether there is any such thing as arbitrability or not is a separate issue. Some people are of the view that everything should be arbitrable that's a separate topic altogether. But at least on the Indian law, this should be decided upfront rather than waiting, running the course and then coming to the courts to decide that issue. I think it's just a waste of time and money.

Mr. Kabir Singh: Absolutely. Great. We're sort of coming to the real tail end of the session. I'm getting prompts from the organisers that we're running into the last five minutes. Again, because we started five minutes late, I'm going to take a bit of liberty to give all of us a bit more time. Percy one last topic to cover right at the end. It's really a single question on the Arbitration Council of India. Probably one of the most remarkable and again see you shaking your head already, but controversial concepts to be introduced again, probably a first for the world happening in India. What in a nutshell is your view on it? And then happy to sort of go around the table with the panellists, what's your view in it? Good, not good, serious, is it a serious misstep, or do you think it is something that India needs to sort of deal with the unique challenges it faces?

Mr. Percival Billimoria: Distressing! So, if you look at, how

this emerged, right? I mean, it was in the Justice Shri Krishna's report but in a very different form. And I think the genesis of that is the fact that in India every lawyer and his dog has an arbitration institution. Right. And the question is, see, when you talk about LCIA or Singapore, right? I mean, it's Singapore jurisdiction, London jurisdiction. In India, the feeling is that you cannot really pin down, you know that there will be only one or handful of institutions. So, the need was felt to provide a system of grading on these institutions, which is fair, right? I mean, you can do that. And, who would do the grading? So therefore, the idea of Arbitration Council germinated. Now if you see the Shri Krishna report, the composition of the Council is very different. There was supposed to be in fact, eminent international practitioner on the Council. That's not what how the statutory is and then you find two government officials. If you see the mandate, I suspect that if it ever does come about, it will really be a seminar body, to be very honest. And then, one of the things that you need is, norms to ensure satisfactory level of arbitration. I mean, how does a Council decide what are the norms? So, this is something that needs to be relooked at very quickly.

Mr. Kabir Singh: Yeah. No. Certainly one of the more controversial amendments. And again, turning now to just the last few comments that I will be making and taking some of the

questions that we've received from the audience along the way. Thank you very much, everyone for sort of their contributions and putting in the questions. We've received one specific question and Percy picking up a point that you made relating to the grading of institutional arbitration institutions, is this really a good idea? How does it work? Promod, can I turn to you for your views on this one? I know it's a bit of, a little bit of a hospital fast, but interesting one, I think. You've obviously been very familiar with institutions inside of India, outside of India. You sat on the LCIA as well, you're involved with the HKIAC now. So what has been the reaction to being graded by the Arbitration Council of India? And how do you see this whole concept working, if at all?

Mr. Promod Nair: I will be quite candid about it as Percy was. I would endorse and echo that adjective its distressing. I speak not from a point of view of any arbitral institution, but in a personal capacity. And it's simply unworkable. And, how would you really expect an Arbitration Council comprised of government appointees sitting probably in a building in Delhi to rank and grade an arbitral institution because an arbitration is often as only as good as the arbitrators or the kind of assistance the arbitral tribunal gets from the parties and the Counsel before it. Why would you then fault an arbitral institution for the sins of the arbitral tribunal and incompetent arbitration counsel? How would you actually

implement such a clause? The second aspect is; there is a previous provision which provides that arbitration is supposed to be confidential. Then what would be the data where an Arbitration Council would use to determine whether an arbitral institution has done a good job or not? In practice, it is simply unworkable. It will be information of grading on the basis of incomplete data, maybe bias data provided by a recalcitrant losing party. Especially given the Government is likely to be a party to many such arbitrations. The fact that you have a Government appointed body or a set of people to do this exercise would not inspire much confidence in the process. And I really hope that it remains the way it is, which means that it's there in the statute book but it's never brought into force.

Mr. Kabir Singh: Thank you. Thank you very much, Promod for those final thoughts. And again, thank you again, everyone. You know. Vanita, Percy, Rajendra, Promod again for sort of, you know a very, very engaging and very, very enlightening session. We've received lots of positive comments in the zoom chat, that I'm looking at. We've also received one comment saying, please, please, please, you've already gone past time. Can you please end the session now? So, thank you very much again to the panellists for all your contributions and again also to the audience for joining us. I know there's another session coming up after this. So, wish you well for the day.

And, we hope to catch up with you throughout the week. Thanks. Thanks everyone.

Mr. Paresh Lal: Thank you for all the panellists. And thank you for everyone who attended the session. We had at some point of time, over 160 attendees for the session. We have, of course taking a lot away from all of you in terms of what you've discussed. A lot of food for thought, a lot of things for us to consider about how practically the amendments are kind of a superimposition and glossing over some really significant issues and how, where are the areas where we need a lot more clarity. I think all of us can go back to our respective practices and think about those and see where we will go from here. Thank you everybody for your time. This has been a great learning experience to everybody to hear from you and your thoughts. For the attendees, please stay tuned. We have another fantastic session coming up. We will carry on from our discussions right now and go really to the next section, which talks about where does India go from here? What's next for Indian arbitration. So please stay tuned. Pleasure to have everyone here. Thank you so much.