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Transcription of Proceedings

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NMIOKKA ENGINEERS PVT. LTD.
contact@nmiokka.com
+91 7303622930

Ms. Mumtaz: Good afternoon, everyone. I welcome all of you to the session hosted by DLA Piper on Global Perspective on Recent development in India, India related International Arbitration with our wonderful panellists. In our panel today, we have Mr. Gourab Banerjee, who's a senior advocate at the Supreme Court of India and Overseas Association with Essex Court Chambers, London. He was formerly the Additional Solicitor General of India and now acts as arbitrator and counsel in investment treaty arbitrations, commercial arbitrations and litigation. Then we have Kate Knox, who is a partner in DLA Piper's International Arbitration practice and serves as arbitrator and counsel in commercial and Investment Treaty Disputes across various sectors. We also have Gowri Kangeson, who's a partner in the DLA Piper's International Disputes Practice in Melbourne and has extensive experience in advising clients in technology, infrastructure, energy, and oil and gas sectors. Then we have Dr. Daniel Sharma who is a partner in DLA Piper's International Arbitration practice in Frankfurt and Co-Chair of DLA's Global India group. Daniel regularly sits as arbitrator and advises clients and counsels under various arbitral rules across sectors. I welcome all the panellists and the floor is all available to you. Have a good session, guys.

Dr. Daniel Sharma: Thank you Mumtaz. Good afternoon, everyone. It's a pleasure to be with you and do the session, which comes

at a very crucial time, I believe, for international arbitration. There are challenges, which we have seen due to the pandemic. There are also of course, chances to foster international arbitration, because it ultimately is a very efficient way of resolving disputes as you will hopefully also see in this session. We have speakers from India, from Australia and the UK and we will deal with three topics. One is the question of emergency arbitrations. When does it make sense? When should parties rather go for state courts provisional measures? We have the second topic, which is, the question of enforceability of emergency arbitral awards in India. And of course, Mr. Banerjee is the expert on that. I'm very much looking forward to hearing from you on that. Last but not least, we have a topic that has been discussed for years, if not decades, in the International and Indian arbitration community, which is the question of seats of arbitrations for Indian parties. To the audience, if you have a question please do send them, there is a Q&A box, which you may know of in zoom. Please send your questions and depending on how we progress over the next hour or so, we will be able to answer hopefully most of them. Right with that, I would start with the first topic, which is the question of emergency arbitration versus the interim relief in the state courts. And Kate, let me ask you the first question perhaps. As we all know the ability to apply for interim measures is very important to parties in arbitrations. In particular, in light

of the pandemic that we're facing on now, different situations one can think of, different situations one is of course preserving evidence because as we all know, experts have difficulty traveling around the world and looking at evidence topics. But also, maybe maintaining the status quo of contract implementation. All of this makes it even more important to get interim relief. The question really is for a party that is faced with this, should I go to a state court or should I go to the institution, if the institution rules allow for the interim relief. Kate, what is your view on that in particular from a UK perspective?

Ms. Kate Knox: Thank you, Daniel. Ans so, yes! As you've summarized, situation in relation to seeking interim relief in support of arbitration has evolved somewhat. And we now have the ability under many arbitral rules to apply for an emergency arbitrator to be appointed, to give urgent relief, which was not something which used to exist historically. So historically where you needed emergency relief, very urgent relief, usually a party would need to go to the court, a court that had jurisdiction. Because by the time the arbitral tribunal was constituted, it may be far too late to obtain the type of relief that was being sought. As we know, a number of arbitral institutions have recognized, this gap in the powers of the tribunal and they have incorporated new rules which allow for emergency arbitrators to be appointed to grant

interim relief very quickly, pending the constitution of the tribunal that will then hear the case. And this has been welcomed by parties for arbitration because it gives them an additional option when needing interim relief. So, looking at it from the UK perspective, in relation to arbitration seated in England, what are the key considerations in deciding whether to apply to the court, the English court for relief or to an emergency arbitrator under the arbitration rules? And I would mention four factors that I think are particularly important to consider. The first factor, this is really the headline point, which I would mention is that it's necessary to determine whether the English Court actually has jurisdiction to grant the interim relief that you are seeking. Under Section 44(3) of the English Arbitration Act, the English court may in cases of urgency make orders in support of arbitration proceedings which are necessary to preserve evidence or assets. For example, they have the power to go granting freezing injunction. However, that power is qualified by Section 44(5) of the English Arbitration Act, which provides that the court may only act to extent that the arbitral tribunal has no power or is unable for the time being to act effectively. Now, historically that wording 'unable to act effectively' allowed parties in many cases, to apply to the English court for relief, because it wasn't possible to obtain the necessary relief quickly enough from a tribunal. But now that we have, the advent of an emergency arbitrators,

this provision has been reconsidered by the English Courts. And an important judgment in this regard is the Gerald Metals and Timis, it was given in 2016. And in that case, the court was required to consider its power to grant urgent relief under Section 44 of the Arbitration Act, where there was the ability to apply for urgent relief to an emergency arbitrator or a tribunal and constituted on an expedited basis under the LCIA Rules. And in that case the court declined to grant interim relief holding that where there is sufficient time for an applicant to obtain relief from an expedited tribunal or an emergency arbitrator under the rules, it doesn't have the power to grant urgent relief. And Mr. Justice Legat reasoned in that case that the new emergency arbitrator provisions in the LCIA Rules are aimed at reducing the need to invoke the assistance of the court in cases of urgency by enabling an arbitral tribunal to act quickly in an appropriate case. He also noted that it is only in cases where those powers, as well as the powers of the tribunals constituted in the ordinary way are inadequate or where the practical ability is lacking to exercise those powers, the court may act under Section 44. The upshot of this is that in many cases where the arbitration is seated in England and the relevant arbitral rules provide for an emergency arbitrator to be appointed, the English Courts may not have jurisdiction to intervene. And the courts will however or are willing to accept jurisdiction over interim relief applications where tribunals cannot apply same

relief or it would not be as effective. So, for example, where the relief is sought against a third party who will necessarily be outside the tribunals reach because they're not a party to the arbitration then the English Court may grant relief. So the second factor I would mention is assuming that the English court has jurisdiction in respect of the relevant matter, is the issue of confidentiality. It's important for the parties seeking interim relief to decide whether they wish to preserve the confidentiality of the proceedings. Because under English law an arbitration seated in England benefits for an implied duty of confidentiality. And that may be lost if a party applies to the court for interim relief. The third factor is speed. Of course, the speed of obtaining relief is of paramount importance to any party needing urgent or emergency interim relief. The English Courts can act extremely quickly where urgent relief is required potentially more quickly than an emergency arbitrator. However, emergency arbitrators are also in a position to grant relief rapidly and under the relevant arbitral rules they're are required to be appointed within 24 hours or a few days at most. They're required to make that decision quickly so they can act quickly but potentially cases of greater urgency the court might be able to act more quickly than an emergency arbitrator, simply given the fact that they need to be appointed before they can go on to grant a relief. And the fourth and final factor. And it's very important to consider is the enforceability of the

interim order. This is a topic which, we will come on to discuss further. But I had simply note that in deciding whether to apply to the English Courts for interim relief or to an emergency arbitrator, it is necessary to establish whether either of those types of order will be enforceable in the place of enforcement. That is the question which the laws of the place of enforcement will determine. So these are the key factors Daniel, that I would mention from the UK perspective on this issue.

Dr. Daniel Sharma: Thanks very much, Kate. That's very interesting and you can see already how complex the discussion with clients is about this question whether or not to go for emergency relief in arbitration or in the state courts. And Gowri, over to you. Would you, agree from an Australian perspective to these general factors that play a role and is there anything more specific you would mention in relation to Australia?

Ms. Gowri Kangeson: Sure. I. Thanks Daniel. I would largely agree with a lot of what Kate has said. Obviously, the legislation in Australia is different. For international arbitrations with a seat in Australia, the International Arbitration Act of 1974, which is a Commonwealth Act in Australia provides that the UNCITRAL Model Law has the force of law in Australia and Article 17 of the Model Law provides,

that unless otherwise agreed by the parties, the arbitral tribunal may make interim orders. But it also does, Article 9 also does acknowledge that a party may seek interim relief from a court, prior to, or during, arbitral proceedings. So there is slightly different language to the English Act. In terms of Article 21 of the ACICA Rules. ACICA being the typical institution used in Australia. The predominant institution that allows an arbitral tribunal to order interim measures to protect or prevent assets being removed or evidence being removed or any other sort of order. It also specifically clarifies in Article 28.8 of those Rules that such power shall not prejudice a party's right to apply to any competent court or judicial authority for interim measures. So that's the legal position here in Australia. And in terms of the Australian courts and what they've been doing, I think it's generally accepted in Australia that the Australian courts have been intervening to grant interim relief that has been more popular here at least presently more popular, in respect of international commercial arbitrations, using the provisions of the International Arbitration Act, Section 7 as well as Article 8 and 17(j) of the UNCITRAL Model law. In a recent decision of the New South Wales Court of Appeal and for those who are not familiar with Australia similar to India, it's a multi-state, so there's about seven States in Australia and there's also federal jurisdiction overlaying that. So, you've got the States and the Federation. But in terms of the

state of New South Wales, where Sydney is a recent decision of the Court of Appeal there upheld an order for an interlocutory injunction, which was subject to an order to be made by an arbitral tribunal. That was an interlocutory injunction in respect of a freezing order. And whilst that decision sort of reaffirms the power of the court to make these interim orders, it was also quite important to note that the judges in that matter were quite senior judges in Australia. Whilst reaffirming the capability of an Australian court to fashion interlocutory orders, very specifically fashioned the orders in that case in a way that it would not interfere with future orders to be made by an arbitral tribunal. In fact, expressed, someone expressed caution as to the ability of the court to issue interim measures noting that the power to intervene on an interim basis should be exercised in their view very sparingly by a court and only in circumstances where it was really necessary to protect the position of a party until the arbitral tribunal was convened. So that, I think to an extent has a thread to what Kate was speaking about in terms of jurisdiction, even though the Australian jurisdiction on one view is broader. I think there has been some reservations expressed by a higher court and appellate court in Australia. On the other hand in Western Australia where a lot of mining occurs, in Australia where there's a lot of international arbitration, where its capital city is Perth, for those who are familiar. The Perth Court of Appeal in a 2018 decision,

the last decision I mentioned was in 2017. In a case that's not uncommon, it was about freezing orders as well. At an early stage made an order to prevent the dissipation of assets. And didn't seem to have an issue with ensuring that the freezing order remained in place until the arbitral tribunal was constituted and could address the issue. On the question of whether a court should have, whether a party should approach the court or use the emergency provisions in the rules. I think the ACICA Rules and the SIAC Rules, SIAC being the Singapore Institution of Arbitration Rules provide for emergency arbitration. Those provisions have been around for some time. But it's a judgment call, I would say. If I was approached to advice, I would say it's weighing up the parties involved, the dispute, the financial situation of the parties involved and what you are after, the need for confidentiality once there's an arbitration clause and often the arbitration agreement as well as the general agreement refers to the need for confidentiality. It's a question of whether that's really realistic. It’s often an irony to me that a publicly listed international parties who have an arbitration agreement that says you need to keep it confidential but then under the listing rules they're required to notify anyway. So, it's not exactly that confidential. Then, the other thing is the likelihood of compliance. If you're dealing with a listed entity or a well-known entity, there's a likelihood they are going to comply. The reason I say that's important is because

the benefit of approaching a court is that you can obtain orders with penal notice on them, meaning that you can obtain orders with quite significant, quite a significant impact on one view. If you have a party that's relatively compliant you may not be so concerned about obtaining such orders. In Australia, time constraints on the speed, as Kate mentioned, remain an issue. In practice I think the process of even engaging and having an emergency arbitrator appointed whilst the rules say, can happen very quickly. I think literally in one business day in both Singapore and Australia, I think the fast tracking of that given the usual approach in arbitration could very well mean that you could obtain an order in the Supreme Courts across Australia, as well as a Federal Court, well before you would have the emergency arbitrator appointed. Even, in Australia, it's not unusual, it's happened to me before where I've turned up to respond to an application on a Saturday or a Sunday night. So, it's quick, it's efficient, I'm sure the same is the UK. Another thing is if you're looking to ensure that you're obtaining a freezing order, the benefit of using the court sometimes as opposed to and I think this is still a bit uncertain in arbitration is that you can go on an ex-party basis before a judge very quickly. It may be that you do not want to provide the other party with notification. That is an issue that you would think about, which I do think about. So the benefits of course, of going to arbitration in my mind when I've been advising in the past are

the ability to avoid dealing with things publicly, that is a major issue. And two, I think the ultimate decision makers with the interim relief sometimes can be involved in final relief that might, it may or may not happen that way, but it could. Three is, there's a potential, though I think enforceability is a question. Enforceability of any interim relief order but there may be a potential that the enforcement of an Australian court order maybe, maybe be harder than the enforcement of an interim relief order. So that's something to think about. And, lastly the judges in Australia may not be as experienced as an emergency arbitrator. That it may be that you obtain someone with very specialist experience that really understands the commercial position of the parties. Not that I'm saying that Australian judges don't understand that, but I think, there's a potential you could get someone better qualified. So, in Australia there is an increasing use of emergency arbitration procedures, but it's still not very highly used. And I think at the moment, because the courts have a system that's quite robust and timely in granting interim orders, they still appear to be the more preferable option for Australian parties at this point. I hope that's addressed your question.

Dr. Daniel Sharma: Thanks very much Gowri. Now, Gourab turning to advising Indian parties, which you do all the time, I guess. What would be the factors that you would mention in the

arguments that you would weigh if you were to advise an Indian party whether to go for state court interim relief or arbitrary interim relief? And, maybe in that connection with the seats of the arbitration or the jurisdiction of the state courts play a role in these deliberations.

Mr. Gourab Banerje: Well. Thank you, Daniel. As you highlighted both portions. One is how do we weigh the factors? Whether we should go for an emergency arbitrator or whether we should go for the state court? And secondly obviously seat is relevant. Firstly, I think what I would like to say is that Kate and Gowri have already mentioned some of the factors and obviously those factors carry throughout jurisdictions. In India, we also follow the UNCITRAL Model Law. We have a Section 9, which is very similar to Article 9, which is the same as in Australia. There's a bit of a tweak and an amendment, which I'll just highlight just to explain one aspect of the matter. But in practical terms the factors are very similar. One is the aspect of speed. Obviously, you can get reasonably quick ex-party relief in a state court in Section 9 and it's a toss-up. In an arbitral proceeding it is unlikely that you will get ex-party relief. That's one aspect one might consider, confidentiality of course has been mentioned. One major aspect to go to a state court under Section 9 or a high court, or district court under Section 9 is because if you want, you may want orders against third

parties, which the, you might have a problem with if you have an emergency arbitrator and an in, and there have been recent judgments in India, which say that you can get relief against third parties. There's a recent judgment of the Delhi high court in Blue Coast Infrastructure, which is a 2020 judgment, which discusses the law. One reason could be that you want an order against a third party. You want a freezing order. You want to stay of a bank guarantee. You want to, I mean in that particular case, IFCI was involved with the third-party financial institution. They didn't get relief ultimately, but it was completely unconnected. So, that was an issue which was raised. If the arbitration is seated in India, that's a different dynamic. If it's seated abroad, In the both cases you will have to also think about location of the assets. So far as your question about seat is concerned. Earlier, the law was that an Indian court under Section 9 could not give relief, if it was a foreign seated arbitration. Our Article 9 was not extended to foreign seated arbitrations, that lacuna has now been filled. So even though it's a foreign seated arbitration you can maintain a Section 9 petition in India against Indian assets. There's a little catch there but we'll come back to that later. Enforceability, I'm leaving for the moment. But I want to pick up one point, which, I'm leaving enforceability though by any standards that's critical but we'll come to that. But one point that I wanted to mention, picking up from what Kate had said, which is of jurisdiction.

And she mentioned, Gerald Metals, if I'm not mistaken. Justice Leggatt's judgment. Of course, Justice Leggatt is now Lord Leggatt, sitting in the Supreme Court. But we have a very similar issue, which I think is likely to come up in the context of an emergency arbitral award. Because we have a Section which is 9(3), which is just been introduced, which says once the arbitrary tribunal has been constituted the court shall not entertain an application under 9(1) unless the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious. Section 17 is Article 17, which is where the arbitral tribunal passes an order. So perhaps somebody might take the point which was made in Gerald Metals and say, that I've approached you under Section 9 and the other party may say, well, sorry. You should have gone to the emergency arbitrator. After all he's an arbitral tribunal under the Section 17. We've really not had that problem as yet. We have had a little bit of a hint of that in a case which concerned a foreign seated arbitration, which was a Japanese arbitration. And the party had gone to Japan and the Japanese JCAA had refused interim relief. And then that party had come to India and said look now can I get that same relief here under Section 9. And the Division Bench of Delhi High Court said, look you've gone there, that's some implied exclusion but that was a Part II arbitration. It was a case dealing with the foreign seated arbitration. So, this is a question which will, I think now arise. But ultimately, I

mean, these are factors to be weighed up. It depends on the facts of a particular case. Every situation has pluses and minuses. Of course, there's the elephant in the room which is enforceability which of course we'll come to. So that's where we stand here.

Dr. Daniel Sharma: Thanks very much Gourab. And, in terms of timing, I think it's good to move to the next topic. Which is exactly, enforceability or enforcement of emergency arbitral awards in India. So, I understand this is a critical topic, but also a very difficult topic. You do have experience in that, of course, with the recent Amazon case as well. I also understand that there are high courts that are trying to be helpful to parties, provide arbitration friendly decisions. But I'd be interested to learn what's the overall Indian position would be on that? Would the parties have to go to a specific court to get a helpful decision for example? What is your view on that? And before I hand over to you Gourab, we have one question already which catches on the same topic. That's why I'm reading it out now.

Mr. Gourab Banerje: Great. I will answer that question as I go along. So, I do that as well. I will do that. So Daniel, let me, let me start with the confession that I'm obviously biased. Because I'm appearing in this case, which I, very familiar to people in India. I don't know how familiar to

people abroad. But there's a battle royal going on between Amazon and Future Retail. I'm not going to go into the merits of that because it's really not relevant for this discussion. But I'm one of the counsels representing Amazon. Take everything I say with a pinch of salt. So, with that, the comment is this, I think there is a bit of a misunderstanding. Because this question has two parts. One is, does an emergency arbitral award is it enforceable in a domestic arbitration in India seated arbitration? So that's a separate question. A second separate question is, how do you enforce an emergency arbitrator's award in which is, not India seated, which is foreign? I think there are two separate questions, and there's a bit of a muddle here. So far as the Amazon litigation is concerned. I think a lot of people are not clear about this. This is a domestic arbitration. It is an India/ Delhi seated arbitration. So it's purely a domestic dispute. Of course, it's an international commercial arbitration because one of the parties has a foreign element. But it's a domestic arbitration seated in India. And then the question that really arises and it's a very simple legal question. Is an emergency arbitrator and arbitral tribunal within the meaning of the Indian Act? So, if it is an arbitral tribunal, then the sequitur is then the order which has passed is an interim order. Which of course then can be enforced. An interim order under Section 17, which is similar to Article 17 of the Model Law and it can be enforced. So, the short question is, is an

EA order, an order of an arbitrary tribunal? Now, obviously this is something which is being debated. We have two Delhi High Court judgements in our favour. We have the EA in our favour. So, they've already been three skirmishes. We went to the SIAC. SIAC appointed V.K. Raja. Now this is all in the public domain. So there's no difficulty mentioning it. It's mentioned in a judgment. So there goes confidentiality. So, V.K. Raja one question which was raised before him by the other side was this concept of an emergency arbitrator is not recognized in Indian Law at all. He heard elaborate arguments and he said, no. It is a concept which is recognized, which can fit within the confines of the Act. There was a second round, there was a judgment, an interesting case where a suit was filed sort of trying to derail the arbitration. Where one argument was made that, in fact, the order of the EA was a nullity. It was wastepaper. It was quote unquote, Coram non judice- fancy Latin for rubbish, I assume. But obviously the learned single judge said, no! It's a valid, it's a valid. It’s not a nullity. Then there's been a third round, because Amazon wanted to enforce the order. And, the way to enforce the order under the Indian Part I of the Act, the path Amazon was by saying, it's just an interim order of a tribunal, an interim order of a tribunal is akin to an interim order of a court, which is what our Section says. And therefore, if you are violating it you are in contempt or it can be executed. So that was the idea. So there again, the defence was taken that

look the Act does not recognize. So that's a purely legal question. The judge decided in our favour. There's just one paragraph, which I want to read because he put it really well. And this is what he said. The court is of the view in emergency arbitrators and arbitrator for all purposes which is clear from the reading of Sections 2(1)(d), 2(6)(2),(8) and 19 (2) of the Arbitration Act and the Rules of SIAC, which are part of the arbitration agreement by virtue of Section 2(8). So this was purely an interpretation of the Act. Now, the other side says that, look! You're not right. The Act does not contemplate a creature such as an emergency arbitrator. It's not really an arbitral tribunal. And what the other side says is, if you look at the law commission's report, the law commission wanted a section to be amended. The government has not amended it. So, by a process of reverse interpretation, it is really not covered. What we also said is, look! The MCIA of which, who's hosting this, has emergency arbitrator rules. The Delhi International Arbitration has such rules. The Madras court has rules similar to SIAC. And party autonomy requires that you have this option open in a domestic arbitration situation. After all India’s an arbitration friendly country. And two courts have agreed with us. I mean, let me just draw a straight line under it. Doesn't matter what I say, doesn't matter what the other side says. This case will come up before the Supreme Court, by the end of the month. And before bench of Justice Nariman, R. F. Nariman who's issued notice and is

going to hear this and whatever, the Supreme Court says will be the law. So, the short point is we need to wait for what the result is going to be. So that's so far as domestic arbitration awards, enforcement of domestic EA award is considered. Short answer, wait for a month. Long answer, we are right. Look at the judgment of justice Mirdha. I think his reasoning is great. So that's easy. More difficult and I think much more important. And, that is to answer the question, which is been put. Much more difficult is what happens if you get an EA award which is in an arbitration seated out of India? How do you enforce it? Do you call it an award? So that you enforce it under the New York convention, maybe that's the route. And, but then the problem is, is it really an award? It's really an interim measure. It's not really an award. So, then what's the other way of enforcing it. Well, and that's really where the problem lies. Let's take the Amazon situation where the seat was Singapore and then there are all sorts of problems. The way the courts have got around it is quite interesting. They have taken the Section 9 route, which is now extended to arbitrations seated outside India. So, the court has exercised its power under Section 9, saying that look, the EA order is helpful. It's not binding. We will look at it. And by and large, we will use the Section 9 procedure to implement it. There's a very good judgment of Justice Bakhru, one of our very, very good judges of the Delhi High Court in Raffles, which has been misread. Well, he says, look, we don't have 17

(a), 17 (i) and 17 (j) of the UNCITRAL Model law, which would have solved the problem. We don't have that. So, what we'll do is, we will use Section 9 and we will try and implement it. And that may be a solution to be used. The only issue that comes there is whether Section 9 will apply or not. And I think the trend in HSBC, Avitel and Raffles Design and Aswani Minda is this trend of using Section 9 to implement. And the courts are quite friendly. If you have an EA award in your favour, I don't think many courts will not, not enforce it under Section 9. If the EA order has gone against you, you can't then go to Section 9 and try and enforce it. I think there is a solution in Part II, which the courts have now formulated. So, I would say on balance, you can, there is a problem of enforceability. But on balance, I don't think that's such an overwhelming problem. If you do feel that you should go to get an EA order and then enforce it. There is a point to be said. Now there is another question, you'd like me to answer?

Dr. Daniel Sharma: Maybe we will deal with that later on in the session. Let me just ask one follow-up question, perhaps. Do I understand correctly that there would be a second chance for the losing party in the EA proceeding, the foreign EA proceeding under the Section 9 proceeding in India?

Mr. Gourab Banerje: Well, there is some. Yeah, there is some language in Raffles which seems to suggest that the court will independently consider that. If you look at the more recent judgment in HSBC Avitel, that seems to suggest that once you got an EA order, I think courts really don't, I mean, give it it's due respect and push it through under Section 9. Just one point I, which I have missed. In the Indian scenario, if Amazon is right and we are right there is an appeal against interim order under Section 37. It's not that you're completely left without relief in either events.

Dr. Daniel Sharma: Okay. Thank you very much. We have, we have roughly 15 minutes to go, so let me, let me move on to the third topic, which is extremely important. And it's the issue of the seat of arbitration. It's been discussed for decades, I believe in India. And also, the question, of course, whether two Indian parties can choose a foreign law to govern their dispute or their contract. I understand that there have been judgments recently, answering the question of the foreign seat differently. But I would like to hear a little more from you Gourab about this issue.

Mr. Gourab Banerje: This is a very interesting issue and we've had debates and seminars and papers, et cetera, on this from time immemorial. But, let me start by saying that if you want to understand this issue broadly as to where it stands, there

is actually an excellent article by two of your colleagues at DLA Piper, Geetanjali and Sanjana. And I would invite everybody to have a read of that. And they have discussed the two cases. The two cases which have happened, and there's a subtle distinction between the two cases, which will become clear when we look at them. There's been a judgment of the Delhi High Court in Dholi Spintex, and there's been a judgment of the Gujarat High Court in GE Power. The question really is this, there are two questions, Can two Indian parties at all have, at all go abroad and have a foreign arbitration. That's one part of the question. The second part of the question is, which is, which is a little three contexts. Supposing this is permissible. Are the two Indian parties required to choose Indian law as substantive law, or can they say, for instance, choosing English law or any other law? There are two parts to the question. The Dholi case, which is the Delhi High Court case, was a case where the substantive law was English law and the high court essentially came to the conclusion that that was perfectly valid. You could have two Indian parties doing this and there was nothing wrong with it. And the judgment of Justice Mukta Gupta essentially follows an earlier judgment of hers in GMR. And, the issue there is that there is one particular judgment of the Supreme Court, which is an old judgment of 2008 of Justice Sinha TDM, which has created this doubt. So, which is why there's an open question. The first judgment in Dholi is all about English law, two Indian

parties, foreign jurisdiction, perfectly okay. Suit was stayed under Section 45 of the Act. I'm not going to all the case law on the in the limited time that we have. But the second judgment, and this is the more interesting one, was the Gujarat judgment. Well, what happened was interesting. They were two Indian parties. The substantive law was Indian law. The seat was Switzerland, Zurich. The arbitrator was an ICC arbitrator. Factually everything happened in Bombay. When the award came to be enforced as a foreign award, the PSL said, sorry, this is not a foreign award. This is really an Indian award. And by the way, you cannot do this. You cannot have a foreign seat with two Indian parties. Now, what is interesting about this case is that it is now before the Supreme Court. And it has been heard in parts and it is going to be heard three days from now by a Bench of Justice Nariman. So you will have great clarity on the law on this very soon because his track record is he delivers judgement within a week or 10 days after the matter is heard. The only problem with this case is, if at all, is that, it has Indian law as the substantive law. So, so further point that it's foreign law may or may not arise in this case. So let me, let me not go through all the cases because there's no joy in that. If you read either of the judgments you'll have the list of judgments. But what is the issue? What is the argument? The argument is there is a section called Section 28 in our Act. Which says that in India you will only be able to apply Indian law between two Indian

parties. That's the law. If it's an Indian seated arbitration. If I'm seated in Delhi and I am an arbitration against somebody in Mumbai, I cannot choose a foreign law, unless the other party is a foreign party broadly. The logic in TDM is that this clause, this public policy aspect has been taken to mean that even in a foreign country, you cannot choose a foreign law. So, that's the little catch, that's the little issue. But, and there's another issue as to whether by doing this you somehow avoid the Indian courts and somehow you avoid Section 34, which permits a wider challenge. But there is a very nice comment on this in a book which I think all of you should buy. It's a book by, written of course, by Mr. Fali Nariman, who is the god of arbitration, so far as, at least India is concerned and worldwide. And it's called Harmony Amidst Disharmony. Basically, what he says at page 84, he says, that no part of the 1996 Act prohibits parties from agreeing in a commercial agreement that when disputes arise the place of arbitration should be a place outside India or that such an arbitration must also be governed as between parties only by Indian law. He says, Justice Sinha's judgment is simply a remark, a stray remark, which was wrong. So, he's gone that far. I for one, completely agree with Mr. Nariman and Nariman senior. And the only question is whether this is going to be cited in front of his son. The question then is whether his son is going to, going to follow this or disagree. So, so this is a very interesting topic. But again, I think

frankly, there should be no hesitation in doing this. The law will be settled again within the month, so that's where we are on this.

Dr. Daniel Sharma: Excellent. Thank you. We should all reconvene in a month's time and we get answers.

Mr. Gourab Banerje: And then you have answers to everything.

Dr. Daniel Sharma: Brilliant. Let's set a date then. And will speak to Neeti about it. Kate, the, of course London has for long been a preferred location for arbitrations as a seat of arbitration for Indian parties. Now there has been something, called Brexit, recently, which changes a lot. But does it also change the advantages or disadvantages of London as a seat of arbitration for Indian parties? What are your thoughts about that? And, in connection with this question, we have one question also from the audience from Fransabs. Basically, the other side of the coin where will other European locations become preferred locations, maybe for Indian parties due to Brexit.

Ms. Kate Knox: Well, I should probably preface everything I say, as Gourab did by saying, take it with a pinch of salt. Because obviously I'm a London arbitration practitioner and I'm sort of a biased. But the perspective, I think of most, if

not all London arbitration practitioners think is, that Brexit hasn't had any negative impact on arbitration in London, which remains thriving and London remains a very popular seat of arbitration. I think the reason there are a number of reasons for this, but, one of the main reasons is that the main attractions of arbitration in London haven't changed as a result of Brexit. So parties have often opted for London as a seat because sometimes because they also choose English as a substantive law and English law offers a great deal of contractual certainty compared to some civil laws. Also, we have a judiciary which is recognized globally for being reliable, neutral and impartial and extremely experienced in commercial disputes. So, to the extent the judiciary needs to support the arbitral process, it is very well placed to do so, and it also has a very non-interventionist approach. So, they will only intervene to the extent necessary and in order to support the process rather than interfering the process. It's very difficult to set aside an award made in a London seated arbitration. There are very limited grounds upon which that could be done. And very few circumstances in which the courts have actually set aside awards. There is this sort of deference to the arbitral process of the English courts which, or respect for the process, perhaps I should say, which makes London a very appealing seat. It's important to note, I think as well that the UK's withdrawal from the EU will have no impact whatsoever on the enforceability of English arbitration

awards, which as Gourab's mentioned previously. These are enforced under the New York Convention on the recognition and enforcement of awards and the UK remains the party to the New York Convention. And so arbitral awards made in London remain widely enforceable in the world. In contrast, there's some uncertainty about the enforceability of English court judgements, which may, until the regime press Brexit for recognition enforcement of judgments is settled, that may actually make arbitration even more appealing in the meantime, because there is greater certainty over the enforcement of arbitral awards as compared with the court judgments. And then looking at the statistics of the key institutions, if you look at the LCIA and the ICC, the latest caseload statistics we have available of the 2019 statistics. And the LCIA had a record number of arbitrations in 2019. 89% of their cases are seated in London and in 2020 in the first quarter of 2020, although the full year's statistics are not available, the LCIA reports a spike in arbitration. This is an institution where the vast majority of their arbitrations are seated in London which is just continuing to see extremely high levels of activity. In fact, some the highest levels they've ever seen. And same is the case for the ICC, who has had the second highest number of newly filed cases in any year, since 2016 and the most commonly selected seat was London. Again, I think this really demonstrates that we're not seeing any sort of decline in London arbitrations. The only thing I would mention

actually as the enforceability of interim orders because if there is a need to go to the English court and they have jurisdiction to grant urgent relief. At the moment, if you're seeking to enforce that order in the EU, it's a little bit less clear than it was pre-Brexit as to whether you will be able to enforce that order. That's yet to be decided. Plus, on the flip side, the English courts being, when the UK was part of the EU wasn't, we're not permitted to grant anti-suit injunctions in respect of proceedings in the EU. But arguably depending upon the regime that ultimately is settled upon, they may be able to do so in the future. That's to be decided or to be determined. In summary, I think, London, Brexit has not really negatively impacted London as a seat at all, so far, and we'll see how that progresses over the following years. But the early signs are that London remains a very popular seat for arbitration for all of the reasons I've mentioned.

Dr. Daniel Sharma: Thanks, Kate. So, plenty of open questions as well in relation to the EU. And I'm afraid we won't see the answers to these questions in a months' time, but maybe in a few years' time, I guess.

Ms. Kate Knox: Unfortunately, I fear it may take that long.

Dr. Daniel Sharma: Yes. Gowri over to you. Traditionally places like Hong Kong or Singapore were the preferred seats of arbitration for many companies. Now we have the pandemic and as we all know, due to the pandemic, virtual hearings or virtual proceedings to be more precise have become more popular. This of course enables other places of arbitration to become more prominent. Although some of the factors to determine in the decision where to seat of arbitration are of course, also the arbitration friendliness of the local courts, for example. Do you think Australia would now have a chance to become to get a more prominent role when it comes to the seat of arbitration for Indian companies?

Ms. Gowri Kangeson: I would say, yes. Because, we have a very pro arbitration judiciary, a supportive judiciary, as I mentioned at both state and federal level and well-equipped courts. And they are fairly non-interventionist but in a very supportive of the increasing burgeoning arbitration practice in Australia. Just by way of stats, I think last year alone, there was some $35 billion worth of arbitration matters transacted in Australia based on a survey done by, survey done in published in 2021 by our ACICA. There's been an increasing number of Australian arbitrators used in Hong Kong and Singapore arbitrations. And so there's no reason why they can't perform that role in Australia, in their, in their home country. In terms of the, what I would say with the five

principle factors, which I think will increasingly allow Australia to be a regional front runner in Asia Pacific for international arbitration and in particular for use by Indian parties. We've got a comprehensive legislative framework that is well established. It's supportive of foreign arbitration. It's supportive of ensuring that emergency awards are enforced. It's supportive of a quick result in recognizing the importance of moving things quickly in the commercial world. We have world-class alternative dispute resolution facilities in Australia, particularly in Sydney, Melbourne and Perth. There's a high-quality profession available who are experienced arbitrators, who've done arbitrations across Asia Pacific. And there's broad stakeholder involvement to ensure that the arbitral process works quickly and efficiently. Those would be the reasons why I think Australia will become more of a venue of choice going forward. Politically as well, whilst we may not want to speak of it. Politically Australia is a neutral, stable, liberal democracy, which enhances the certainty parties can feel in terms of having their disputes arbitrated in Australia. I mean, it is part of Asia Pacific and has a very strong connection to Asia with an understanding of the cultural aspects of the place it actually is. I think, there are good reasons now for Australia to be stepping up, as a venue for arbitration going forward.

Dr. Daniel Sharma: Thank you very much, Gowri. In view of the time, it's now, 4:00 pm IST that brings us to the end I'm afraid. It's been a very interesting session and I'm curious to see what's going to happen in a months time in India and in a few years time and in the EU and the UK in relation to these open questions. Thank you Neeti and to you and to your team for making this possible, this session, this interesting session. I wish you all the best. Stay healthy. With that over to you Mumtaz.

Ms. Mumtaz: Thank you, Daniel. Thank you everyone. This was really insightful. Emergency arbitration, arbitration award and their enforceability in India, challenges to its enforceability in contrast to other jurisdictions, especially vis-a-vis domestic and international arbitrations. But how Section 9 amendment plays an important role and is a little step forward to getting some parity. Selection of substantive law in the domestic and international arbitration scene. I'm sure the audience needs enriched. I surely do. This was wonderful. Thank you everyone. This session would be transcribed and uploaded for everyone. Our last session for the first ADR week at 6 pm will be an event hosted by P & A law offices on Double Hatting: Hazardous to International Arbitration or not? I hope to see everyone there. Thank you everyone. Hope you guys have a good weekend.