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The road less travelled on damages assessment: date of assessment, tax, interest and COVID

Transcription of Proceedings

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Stuti Gadodia: Very good afternoon, everyone. My name is Stuti Gadodia and I am an associate in the Frankfurt office of Freshfields Bruckhaus Deringer. I am also a newly appointed Steering Committee member of Young MCIA. It is my pleasure to welcome you to the second panel on day one of the India ADR week. This session is hosted by FTI Consulting and the topic is the road less traveled on damages assessment. During the session panelists will discuss various aspects relating to the calculation of damages in particular, the data for assessment, tax and interest considerations and the all-pervasive issue, that is the impact of COVID-19 on damages assessment. So, to discuss these topics with us, FTI has put together a fantastic panel consisting of arbitration experts, as well as damages experts from India and all over the world. I will go ahead and introduce our panelists now. In the interest of time, I have been asked to keep the introductions brief and I will try my best to do so, but these short introductions of course do not to justice to our speakers for their various accomplishments. So, first up we have Ashish Bhan, a partner at Trilegal in New Delhi. Ashish represents clients in commercial disputes before state courts as well as in arbitration proceedings. Next we have Kunal Vajani. He is the head of chambers at BlackRobe Chambers in New Delhi and has several years of experience in both commercial litigation and arbitration. Bringing in the very valuable client and in-house counsel perspective to this

discussion, Dipti Gandhi, Senior General Manager and the Head of Litigation at Mahindra and Mahindra. Next we have Scott Vesel a partner in the Bahrain office of Three Crowns, LLP. Scott has worked in international arbitration for several years and he has represented clients in both investor state and commercial arbitration proceedings. I am very happy to introduce my colleague from Paris, Vasudha Sinha. Vasudha is a senior associate in the Paris office of Freshfields Bruckhaus Derringer and she has several years of experience in both commercial and investor state arbitration. Joining from New York where it is probably still very early in the morning, we have Sharmistha Chakrabarti. She's an associate at Skadden where her practice focuses on international arbitration and last but certainly not the least, I would like to introduce our hosts from FTI Consulting, Mark Bezant and Montek Mayal. Mark is a Senior Managing Director in the London office of FTI and heads the EMEA and Asia Pacific economic and financial consulting division. Montek is a Senior Managing Director and a member of the economic consulting practice based in New Delhi. Both Mark and Montek regularly serve as expert witnesses in international arbitration proceedings. A big thank you to all of our panelists for joining us today. Now I will hand over to the speakers to kick off the discussion. Thank you very much.

Montek Mayal: Thank you. Thanks Stuti. Thank you for the

introductions as well. Before we kick off Mark, you want to say a few words on our discussion today before I then bring in our experts to talk about the various topics.

Mark Bezant: Thank you, Montek. Certainly. So, so I think there's three things that we wanted to focus on today, to, in a sense of scene setting before we get to the real topic. The first one is little about the role of experts, the use of experts in disputes, in arbitration. There's perspectives obviously from practitioners, from experts and from in-house as to the best time and the best way to use experts. That's the opening part, a little bit of primer or a reminder on some damages questions and some damages considerations that Montek will lead. I think the really interesting topic and in a sense we get to the best bit last. The nature of this or the title of this presentation is the road less traveled. People tend not to focus on things that are fundamental to some damages questions until there's some way into it in our experience, which is why we wanted to, in a sense, make that the subject to this topic. Obviously, the date of assessment of losses, is a very, is a risk, kind of pertinent legal and factual question that drives a lot of the expert questions that come from that. The it's often overlooked that damages assessments are not complete until you've thought about interest awards. Until you've thought about the possibility and implications of taxation, and again, you can find that those considerations

are overlooked. I have a case in the UK where the views on interest and the views on tax quadruple the basic damages claim depending upon which route you go. These questions can be overlooked but fundamental. The thing that in a sense has brought all of it back into the spotlight is COVID because the implications of the last year for the data which you assess a breach the considerations as to whether that has been damaged or a breach your expectations as to what would have happened, all of which have changed radically and continue to change as the pandemic rolls on across the world and in different ways. So these in essence, these questions have become emphasized by the pandemic, more so, and as we go forward, and the economists work out how to recover through changing taxation and as interest rates move up and down again, there's an economic consequences of the pandemic. Some of these issues will become even more sensitized. It's timely that we can try and wrap it all up in this one panel, back to you Montek.

Montek Mayal: Thank you, Mark. And we will do our best given, it’s definitely not a conversation, which is limited to one hour. But getting straight into perhaps the first set of questions, which is on the role of experts and how they're used often in arbitration disputes. The Dictionary defines an expert as a person who is very knowledgeable about or skillful in a particular area. The context of disputes, we see experts come in various shapes and sizes. You might get industry or

subject matter experts like experts in telecoms, oil and gas or technology or you get skilled specialists like valuation experts, accountants, engineers. Such experts can offer evidence or analysis that might be relevant in the context of establishing and assessing damages. It's not the question that often put to experts include valuation of businesses and shares, loss of profit calculations and analyzing costs incurred in business activities or the effect of disruption and delays on such costs, value of patents and IP rights and other theme, which is often explored in disputes. At least in the context of international obligations we are witnessing an increase in use of such experts. But let's learn from our panel today on their experiences of using experts in their matters. Scott first up straight to you, and perhaps the real question is as counsel, can you do without experts? Do you see benefits of using experts on the matters you are involved in?

Sharmistha Chakrabarti: Thank you, Montek. It's a pleasure to be here with all of you on this panel today. I think it's useful to take a step back and think, well, why would you need an expert? And I think it's useful to remember that the only reason you need an expert is if they are going to help the tribunal to decide the issues before them. So often at the start of a case you will look and see, okay, what are the drivers of the outcome in this case? Which of those can I show with documents? Which are legal questions that I can plead?

Which are factual questions that may require an explanation from somebody who was involved? And then which are issues of judgment that are going to be outside the tribunals area of expertise where they would benefit from having an engineer, an accountant, an economist to help them understand the debate in front of them and navigate their way through it. And, I think, if you think about quantum experts in particular, when you have complicated disputes, the valuation issues tend to be very complicated. What the experts can really help is to identify the methodologies. Well, how do we, what are the available methodologies? What are the pros and cons of them? And then within those methodologies, what are the parameters that the tribunal will need to decide to arrive at a number and then what are the considerations? What is the data that allows it to do that? And that then gives the tribunal a roadmap for their decision which they wouldn't have without the experts. And so to me, the value of the quantum experts is to help the tribunal navigate their decision-making process.

Montek Mayal: Thank you. Thank you, Scott and Ashish coming to you, what's been your experience of using experts on India related matters. You do international arbitration work and you also domestic arbitration work. What is, what's been your experience of using experts?

Ashish Bhan: Thanks Montek. It's actually a pleasure to be

amongst all of you today, but just on this issue, I think India has grown into the culture of having experts in arbitrations. Having said that I think we are still a little far from how it is an international commercial arbitration and in some ad hoc, domestic arbitrations, at least the quantum experts are still finding their way into the system, but just taking a point what Scott was saying, I think what is, what has been for me the most significant change in the last five years is that the Indian clients have started to believe that the role of an expert is equally important as the role of the counsel in the arbitration. So what are the things that trends that I've seen is that the clients now have started to engage with the experts prior to even making that claim because we've been advising on that aspect that if you do it post-facto once the claim is already in then you're trying to justify the damage that the quantum that you have specified. It becomes a little difficult to work backwards, as opposed to having the expert on board before you make the formal claim in the tribunals so that the expert can give you a reasonable assessment of how good or bad the claim looks like. We've seen that trend from a quantum expert perspective change a little bit in the Indian context. But I would personally like it to be even more frequent. We are all working towards it. Clients are also becoming, there are understanding the relevance of an expert. I think, one of the key reasons has been that once claims have been rejected, they come back, the clients come

back to us and say and ask us what was the reason. And our plain response is that you just couldn't justify the claim. I mean, you could have letters, you could make a claim, but it's, it doesn't have any value unless somebody who is an expert in the field can really provide a detailed report and analysis of why that claim was made in the first place. So that's the change that I am seeing. Having said that other than the quantum experts, I think from generally the technical experts, we've seen a growing trend, and I can tell you that I haven't done an arbitration in the last five years where we don't have a technical expert, either in the real estate side or in the engineering side. You always do have a lot of these experts deposing on technicalities and more so in infrastructure arbitrations, they are there, a lot of it hinges on them. So the role of the expert, we tend to look at the role of the expert from a limited prism of just the quantum expert, but I think, as we grow we need to understand that an expert will have to be a combination of a quantum expert and a technical expert if the arbitration so desires or if the claims so desires. I think it's a changing trend Montek and I think we've done, I wouldn't say extremely well, in that sense from an Indian arbitration perspective, but it's a change that I see, we'll keep growing and it will be, it will happen for the better in the coming future.

Montek Mayal: Thanks. Thanks, Ashish. I think I completely

echo your views in terms of the change that has been brought in the last especially five or six years, I believe in the increasing use of experts. Sharmistha coming to you, Scott mentioned, obviously one of the benefits or one of the roles actually is to provide or offer evidence that allows the tribunal to make hopefully better decisions, more informed decisions on quantum issues, but as counsel what kind of qualities do you look for when you are out looking for experts?

Sharmistha Chakrabarti: Thanks, Montek. That's a great question. I think a great way to start the discussion about experts, because the very first thing that we as the counsel team will do when we're looking at experts is to interview a panel of them and see who is best suited for the case. Something that Ashish mentioned a minute ago, also resonates with this point very often you'll want one person who is able to not only apply in all the damages, but also speak to certain technical aspects. Very often, I mean, I know FTI has people like that. All of the big shops that do damage evaluations will have people who provide a combination of both technical expertise as well as damages expertise. That's one thing to identify at the very start what is the kind of person you're looking for and who will be able to speak to your case? A couple of points which might be interesting just to throw out there for the panel to think about is when you're

appointing or your law firm appointing an expert, there's very often the tendency to go back and reappoint the same people because you've come very comfortable, appointing the same person again and again. That's a point that we as counsel now are very conscious not to do because it raises another whole host of issues relating to challenges of experts. For example, I was, in one case where Professor Vicuna was, late Professor Vicuna was nominated, as, apologies, he was nominated as the Chair and you had arbitrator challenges, but you similarly also have expert challenges where experts are appointed by the same firm constantly and then they get challenged. It's interesting also to look into the relationships the expert has with issues and what positions they've taken in the past. Because very often during cross-examinations what perhaps you and Mark, may have faced in the past is you will be asked about your prior reports. It's a very detailed exercise and it's a lot of research that goes into appointing the experts. So, so yes, there's a lot of things that goes into even that decision about who you're going to pick when you're starting off with the expert appointment process in arbitration.

Montek Mayal: Thank you. Thank you. I think as you mentioned increasingly as counsel in a law firm partners sitting as arbitrators, again, the relationship in the next person, the counsel and therefore the arbitrators also is quite important to bear in mind. I think, Scott, I am now coming back to you

and flip the question a little bit. Sharmistha was kind enough to answer and get us the quality she looks for. What are the qualities you should be avoiding in choosing your experts?

Sharmistha Chakrabarti: Thanks, Montek. Well, I think the one quality that I try to avoid is an expert who sees themselves as an advocate and that it really is important to distinguish the role of the independent expert, who's there to assist the tribunal from counsel who are there as advocates for the party. And, in my experience there are experts who, there's a risk that they present or appear as overly partisan as advocates, and then they immediately lose their credibility. That also relates to how you work with them. I want an expert who will push back on pressure from the client, say to come up with a bigger or smaller number, and will say, I can't stand behind this. It needs to be robust because when you get to a hearing there will be cross examination. There will be tough questions from the tribunal. What you want is to know that what you're presenting will be robust against that kind of challenge and not just telling the client what they want to hear.

Montek Mayal: Thank you, Scott. Thank you. Before I move on to Dipti, Sharmistha there is one quick question. Obviously, I think these points are quite relevant, especially for party

appointed experts. What's your view of tribunal appointed ones?

Sharmistha Chakrabarti: That’s a great question, Montek. Again, another area which is quite often written about these days. On the one hand, you have an expert presented typically by the claimants and other expert presented by the respondent and they very often have completely opposing views. If you're the tribunal and you're faced with, let's say claimant's experts saying the claim is valued at a billion and the respondent's expert saying, hang on a second, it’s worth nothing. Now as the tribunal, how fuss are you with the DCF model? How fuss are you with running the numbers? So I've seen in a couple of my cases, at least recently that the tribunal itself will suggest to the parties. We would like to appoint an expert to guide the tribunal on certain issues. Now, as counsel, you're then very interesting position because on the one hand you want to appease the tribunal and you'd never want to say no to a tribunal, do not appoint an expert, but it raises a number of questions for counsel because you want the tribunal experts role to be very well defined. Very often what we'll see is that a terms of reference much as you have the terms of reference for the panel will be drawn up where it's critical to understand what the role of that expert is going to be. And another thing that you want to be very careful about is that this expert who is assisting the tribunals

should not become the so-called like fourth arbitrator who comes in and substitutes his or her judgment for the judgment of the tribunal. It can be, I think in some cases very helpful where you have a very complicated damages case and not necessarily a panel who understands the model to help the tribunal appointed expert explain those numbers to the panel, but it's certainly an area which is developing, I'd say. And there's interesting work coming out of that.

Montek Mayal: Thank you. I think the point about this range of damages that are often put forward by the opposing party is a very important one. And that's too common in international arbitration. Dipti has been very kindly hearing to others talk about use of experts and running your case essentially. But what has been your experience as essentially the end client who is often either bringing a claim or defending one, how important is in your view is it to support your claims properly today in front of tribunals, whether domestic ones or international ones?

Dipti Gandhi: Hi, so welcome to all the participants who are hearing all of us and I thank Montek and Neeti from MCIA for bringing me on board this panel. I speak from a perspective of a conglomerate as large as Mahindra and Mahindra. And we have a huge amount of various products that we manufacture and we sell as well as several services that we provide to our

various clients and basis the entire gambit of the services and the products that we sell, I handle the litigation in relation to those sectors and businesses of Mahindra. There are two, three things here Montek. One of them is a lot depends, the need for experts depends a lot on the type of matter, the type of a case that is initiated by or against Mahindra and also the forum and whether the forums are in India or they are abroad or they are international arbitrations. So when I talk about a large, when I talk about the volume of our litigation that Mahindra has, it's largely based out of India and it's not so much abroad. We do have a few matters abroad, but they are not of such large volumes. Considering the matters that we have here since we sell a lot of consumer based products, a large part of our litigation is consumer based. The quantum of claims are based on the products that we sell. Whether it's a tractor, whether it's a helicopter, whether it's a defence, we have Mahindra defence, which manufacturers, et cetera, whether it's an automobile or its seeds or its agri products, essentially the litigation emanates from consumers who are dissatisfied, or it emanates from or against the dealers who sell our products or our service providers. A plethora of our litigation is based from these various parties' end to end considering that for consumer related litigation. Before I say this as a manufacturer, we have huge R & D specialists of our own in all fields. We also have many technical experts, engineers, et

cetera. Whenever there is litigation in the consumer field and they are not of very high stakes, we do use technical experts, but they are technical experts giving in-house reports. Only when a judge requests for an unbiased external expert, there will be a rare such situation where a judge says that, do we produce an external expert, but the quantum of the matter or the amount is so low that to have external experts appointed would only add more value and burden to the client or the end business that we are talking about. But if it matters or if we have to prove a point, we definitely would employ or deploy a technical expert from outside. Having said that my overall experience, except in a few large volume cases, we do not employ deploy experts, for the reasons that I mentioned, but yes, for, we have had international either arbitration or litigation before ITC, et cetera, where say our patents had to be, the validity of our patent that we had or the validity of the agreement that we entered into with any other party in relation to the patent that we had or the design needed a technical expert and at those times, which are a few, we did appoint technical experts.

Montek Mayal: Thank you. I think that makes a lot of sense. I mean of course it depends on the nature of the claim that you're bringing and if you have access for those kind of issues in house, then you're often able to rely on them. But I think your experience still mirrors with what Ashish was also

saying in terms of general use of experts, external experts have still been quite a new thing perhaps in India. Thank you. Thank you very much.

Dipti Gandhi: I just wanted to add one more thing, which I have missed, and that is that a lot of our contracts with our dealers, service providers, people who supply us goods, spare parts, et cetera, our contracts are very waterproof and water tight. We also have a lot of, most of our contracts have arbitrations specially institutional arbitration now as a mode of dispute resolution. Considering that our contracts are so watertight, even when there are claims of damages against us by dealers, et cetera, most of them are resolved through the discussion or the evidence based on the contractual clauses. And therefore we rarely need experts due to that as well. I just thought I should mention that.

Montek Mayal: That’s ideal because it takes us into the next set of questions. I wanted to ask on getting on how do you think about the damages and how do you measure those. But thank you. I think that's absolutely very relevant because clearly the contractural terms will have an implication as well on what type of claims you can even make in a dispute. Using that as a segway to the next set of questions I wanted to ask before we move on, as Mark said, the main event of today's discussion, very briefly I am going to cover on types

of damages or type of claims you see being made in disputes, of course the object of an award of damages award is to adequately compensate the injured party to the extent money can, for example, Lord Blackburn in Livingstone vs Rawyards Coal described damages as a sum of money which will put the party that has been injured or who has suffered in the same position as he would have been in, if he had not sustained the wrong for which he's now getting his compensation or reparation. Public international investment law has own nuances, but as the Tribunal in Chorzow Factory Case explained preparation must as far as possible wipe out all the consequences of the illegal act and reestablish the situation which would in all probability have existed if that act had not been committed. Restitution in kind or if this is not possible payment of a sum corresponding to the value which a restitution in kind would bear. On this basis, in almost all cases damage are assessed by comparing the financial position of injured party is actually in, which is often referred with actual position with the financial position the injured party would have been absent the wrongful act complaint of. What is often referred as the but for the counterfactual position. This overarching framework gives rise to two common approaches to assessing losses, namely expectation loss which is essentially based on the expectations from the effected assets of the contract and reliance loss which is based on investments and costs incurred to develop or build the

effected asset or another contract. Of course, the other forms, for example, compensation based on the gains of the defendant or the respondent, liquidated damages. That's for another day. With this background let's explore these issues in some more detail. Vasudha, coming to you first, legally speaking what is the difference between expectation loss and reliance loss and when might one be granted over the other.

Vasudha Sinha: Thanks very much Montek and thanks for the invitation to join you here today. Going back to the two kinds of damages you just mentioned expectation loss and reliance loss, expectation loss is what you've just described is what we would call the normal rule in the common law or the compensatory principle which is a sum of damages that would restore the claimant to the position it would have been in had the contract not been breached or had the wrong not been done. Reliance damages contrast with that a little bit, the damages that would restore the claimant to the position it would have been in had the contract not been concluded in the first place. The reason the expectation damages are referred to as the normal rule is because that's the default rule at least in most common law systems. The idea of a contract being an accepted allocation of risk between the parties and damages being the means of restoring the economic balance between the parties that should have been in place had the contract been executed. That's generally, that's the normal rule. That's

the, that's the measure of damages that parties would generally seek or argue about. The problem that sometimes arises with expectation damages is that it's difficult to quantify. Particularly when you're looking at long-term contracts or contracts that have a lot of contingencies built into them, or rely on a number of external factors. Where it becomes not difficult but impossible or close to impossible to set or to determine what the party what position the parties would have been in, had the contract not been breached. Reliance damages end up being a fallback mechanism or means for a tribunal or a court to compensate the injured party in a manner that gives some certainty to the parties about what they're restoring what wrong is being undone by the damages, without having too much uncertainty or too much contingency being built into the award. So, often you'll find tribunals who struggle with damages focus on reliance damages as the means of compensating the injured party because of the certainty it provides. Whether it's always the correct means of compensating that party is debatable. Sometimes it's the lazy approach to damages as some would say. It really depends on a tribunals numeracy and its ability to look into the nuances of a damages case, dabble often affect whether reliance or expectation damages end up being awarded in international arbitration.

Montek Mayal: Thank you. Yes, it's sometimes referred to as a

lazy form but also hotly contested in which might be the right appropriate.

Vasudha Sinha: That is certainly the more diplomatic approach. So of course…

Montek Mayal: Just to clarify for the audience as well, is the injured party, does it mean it must elect one form of damages at the outset, is it do parties sort of quantify both and the Tribunal choose the right measure or what's been your experience on that?

Vasudha Sinha: Parties can take different approaches. Generally speaking, I think you'll find a claimant will put forward the case that will most reasonably allow it to achieve the greatest amount of damages awarded. In some cases, seeking expectation damages may result in a much much larger award than reliance damages, but simply be unreasonable based on the facts of the case or the applicable law because the law itself will often determine whether the injured party can seek reliance damages or expectation damages. What you'll often see is a claimant putting forward that highest case the most beneficial case in its first round of submissions. It will obviously get a lot of pushback from the respondent in its responding submission. You may see an alternative theory of damages being put forth by the claimant in the second round of

submissions. That's a strategic issue. There is no rule of thumb on that. It's certainly no hard and fast rule either. Sometimes the claimant will not give up its primary position at all during the course of written submissions but will arrive at the hearing and the tribunals questions to the claimants, to the parties and to the damages experts in particular, will identify a particular leaning of the tribunal one way or the other or the tribunal may specifically direct the parties to give damages numbers based on a particular approach to damages that it seems to be most adequate. It really depends on the tribunal and the parties in terms of how this plays out in international arbitration in practical terms.

Montek Mayal: Thank you. Well I think yeah Sharmistha was also saying in the first round if the other side comes back with a number zero, you might want to put an alternative which is not zero perhaps. Scott, just using that, what's your view on this and what are the main legal issues that are in your view and how to measure damages for different types of claims.

Scott Vesel: Thanks, Montek. Well, I think the first question you need to ask yourself is what is the claim? Because often the nature of the claim will determine which framework you should be looking at for damages. I think it's also, since we're talking about commercial and investment arbitration it's

useful to consider how things can look a bit different in a treaty arbitration. I will just give an example from a real case that highlights how this can play out. The issue was a mining concession that had been terminated by the State. The question is well how do you value that? And the usual approach under international law is you look at the fair market value of the asset on the eve of the expropriation but then the question is well how do you value a mining asset. And in setting aside questions about illegal and legal expropriations and whether a different standard applies and obviously Montek you and Mark would be better placed to discuss this than me but just in at a simple level you have different methodologies that you might apply to a mining concession depending on where it is in its life cycle. If it's a developed mine producing minerals with good records of cash flows you have data that allows you to build a DCF and an income based model. Maybe if it's a bit earlier in its life cycle and these types of interests are traded you might be able to look at comparable mineral assets that are being traded and arrive at a value that way. If it's earlier in its life cycle you may, the appropriate approach may be to say, well how much did it cost to do the exploration work that's been done to get this asset to where it is in its life cycle. It's too speculative to do a discounted cashflow analysis but you might think someone buying this asset would be effectively buying the data, buying the work that's been done on it and so the cost of doing that

work maybe the right, at least starting point for assessing the value. Then if that's your framework, well then it starts to look like a reliance loss claim, but legally it's a very different claim, but in practice, you're looking at the same kind of data. I think it's useful to think about each case on its own terms in terms of what the right approach to damages will be.

Montek Mayal: Thank you. Sharmistha just building on that of course there is the point about the relevant commission standard, that's the point about the contract, but often you see tribunals choose one over the other for other reasons as well. Both Vasudha and Scott touched upon it very briefly in their answer. What's your experience of this, when do tribunals, when might tribunals choose a reliance loss over expedition loss?

Sharmistha Chakrabarti: Absolutely. And as you mentioned Montek, both Scott and Vasudha did touch upon this. What I have seen in my experience is tribunals when they are unable to quantify or project, for example, in a DCF with any certainty what the cash flows are they will then turn to the safer bet which is to say okay, so you as an investor how much of money did you invest in the project. And we will give you that plus sometimes they will give like a top up and how they arrive at that top up, you can ask the tribunal that. But

there is no uniformity in practice. I would say it depends, it's really a case by case analysis that you have to do. You will have some tribunals who are very much not inclined to credit a DCF valuation. When Scott mentioned that mine, for example, did not have past cash flows or revenues that they could look upon. But then there are other tribunals which especially more recent ones which have adopted DCF valuations, even when you have so-called start-up companies or nascent companies. And there's one case which many people in the audience might be familiar with. It's the 2020 decision of CC Devas against the Republic of India. And I was the counsel in that case, and that was a case where just by way of very brief background, Antrix which is the commercial arm of India Space Research Organization entered into a contract with a company called Devas. The Mauritian investors in Devas sued the Republic of India when India canceled that contract. Now when we came to the damages phases and the quantum base of this arbitration, India argued that Devas, the company was a startup and had no historical cash flows. The value of the company was nothing, next to zero. We on the other hand and this is a great example of how different valuations play out in real life, we value the company at over a billion. How do you have a workaround in this scenario? The workaround here was we were able to show and persuade the tribunal that one of the investors in Devas, which was the commercial actor acting on an arms-length transaction before the expropriation

happened was able to come in and it valued the company prior to the Government's expropriatory acts, generated cash flows, which we then projected forward into the future to arrive at a number. Just add one more point to this. You had mentioned a minute ago about like, do claimants typically advocate for just one valuation methodology or are there are multiple. And here what we did in this particular case, for example, and it's a public case you can go and read it. We adopted multiple valuation methods and there were similar transactions which happened in India at that time, including the Reliance Jio transaction which gave us good anchors to anchor our evaluation. Stepping aside from just an example of a case, even if you look at modern and this is something that Scott mentioned, if you look at BITs and especially the modern iterations of BITs you will see that in the investment treaties themselves, the standards that the treaties will put forward are that they will suggest that you look at fair market value, you also look at comps, you look at tax based values. I think there is currently a trend that claimants are expected to put forward more than one valuation to support and anchor their evaluations especially where you have startups.

Montek Mayal: Thank you. I think even for the benefit of the audience as well I think at least in terms of not necessarily jurisprudence or evidentiary value but treaty cases at least provide some context to when tribunals have rejected forward

looking measures. Or as Sharmistha you were saying discounted cashflow methods on valuing assets. The common theme that comes out is essentially entities that are startups, essentially entities, which don't have sufficient history of profits or operations, which perhaps give the tribunals major, which perhaps make the tribunal more reluctant to grant large damages for such entities. Mark, we have heard from the legal side on issues which perhaps provide, which should make tribunals reluctant to grant large figures for early stage businesses or startups, essentially. What, what is, what's your experience of such assets and what can experts do perhaps to provide more comfort in certain circumstances to use forward looking measures, to assess value of these early stage companies?

Mark Bezant: So I was interested in hearing people's experiences because what I've probably seen over the years is tribunals initially being understandably cautious about complicated cashflow models and long range plans for businesses or assets at an early stage of their lines. I think though tribunals have become increasingly confident with such models because they've become exposed to experts and exposed to their experiences sitting on panels and acting as counsel which has made them more confident using DCF models. I think there's a danger in that they become overconfident in using these models. I think what that really means by way of

feedback too to the experts is helping tribunals rationalize positions. You have come a full circle in a sense from populating complicated models with a whole series of assumptions of which there can be legitimate differences of opinion but you have to rationalize and cross-check the end point. Now that sometimes why people go all the way back to as was essentially said some form of disguised reliance measure you put in a hundred how could it be worth a thousand. But some cases it's a question of rationalizing against market benchmarks or indeed just the economic circumstances in which it is possible that the loss can have arisen. I increasingly find myself explaining and rationalizing and indeed other experts doing the same things. Why a model output makes sense as much as why the models inputs make sense. For me that's I think the most kind of important thing and separately I think people have begun to develop more sophisticated techniques because you end up with quite binary views. This discounted cashflow is worth a billion. When in reality, you may be dealing with a range of possible outcomes that some form of scenario planning will help the tribunal investigate where you may be dealing with something that's best understood as a loss of a chance, for example. So, so again, the extensions that one sees are people using a combination of legal principles and kind of economic principles to get people more comfortable with an answer rather than betting the farm one end or other of the spectrum.

Montek Mayal: Thanks. Thanks Mark. Like any evaluation method garbage in and garbage out. So you have to be conscious about what's going into your model for you to conclude what's coming out.

Mark Bezant: Correct.

Montek Mayal: Dipti just coming to you in terms of broader experience and I remember during our conversations you also practiced as an external counsel before this role. What's been your experience of tribunals in India, granting large claims, granting like sizable value, valuable claims, especially when they relate to long-term contracts or damages based on forward-looking measures or profit based measures. What's been your experience are our tribunals granting such figures or are they still quite conservative?

Dipti Gandhi: No, I think they are quite conservative Montek and especially figures or claims of consequential damages, loss of profit, et cetera. So even if you can prove it's a little hard to establish. Even if you can establish it, I think courts do take a conservative view. There are those few one off cases or there are tribunals especially arbitral ad hoc arbitrations where we've had some judges who entertain some part of this but to the best of my experience so far as

claims that I handle or the disputes that I see whether they are institutional arbitration, ad hoc arbitration or matters across India in court or abroad. I mean abroad, I don't want to speak too much about abroad, but the few that I have done I haven't seen or some of them we have settled out of court but like we haven't had any major disputes where we have managed or even the opposite party. We have a lot of our claims of our dealers. We have a lot of dealer related claims against M & M, which we defend. As I said, because our contracts are so watertight we have managed to win most of them. But having said that it doesn't stop them from claiming consequential damages, loss of profits, et cetera. Just to give one matter that I recently did during the Covid times we are in fact going to claim loss of profits, consequential losses, et cetera, but it's still to be tried and tested after we make that claim on how the courts are going to see it.

Montek Mayal: Perfect. Ashish, anything is your experience similar? I mean and to an extent the courts and tribunals are conservative, is there a reason for that? Is it less comfort with such analysis or is it perhaps the lack of evidence that might be led by the injured party on such claims?

Ashish Bhan: It's actually, it starts with what Dipti was, talked about was how the contracts are actually drafted. Historically the contracts in India would always, would always

have a rider saying that no additional costs, they would liquidate damages. They will always restrict, they were restrictive provisions traditionally. I would say that now especially from modern day contracts those provisions are being highly negotiated because of knowing that there could be consequential damages that could be asked for in the later stages. Yes, I do agree with what Dipti is saying that courts and tribunals in India are a little conservative. What is funny is that an arbitrator who would be sitting in an ad hoc arbitration may not grant that relief but if he's sitting on an international commercial arbitration which is institutional, he would find it very easy to kind of grant those claims. So it's a mindset issue. It's not anything else, but as I said if we have more judgments coming in from different high courts which uphold awards of higher value it obviously gives a comfort factor to the tribunal. I can tell you that more than the experienced arbitrators in today's age younger arbitrators are even more proactively granting claims of substantial amount. It's a changing trend, as I said. We are just not there, but we are on the path. If we do indeed have a combination of a little bit of modernization of these contracts along with a lit bit of, and I go back again that the role of experts becomes really important here because if you have the experts in before a claim is made and it's a robust claim then you have to find a way that the tribunal will grant you that damage right. The claim for damages. If

you give them an excuse to not grant you one they'll jump on it. So, the fact is the role of parties revamping their contracts along with the role of experts in the whole process of conducting arbitration in India. It's a mixed approach which will help us come forward. But yes, as of now, as Dipti said, we are still on the borderline.

Montek Mayal: Thank you. Now taking that into some of the specific questions, which we promised at the beginning we will answer on some of the nuanced issues that you end up dealing with in assessment of damages. I am going to go straight to the first one, which is date of assessment, which is quite important, and I had perhaps put it to a speaker to speak on why it is important. Vasuda what is the relevance of the appropriate date of assessment in a damages claim and what are the usual choices that you come across on that date.

Vasudha Sinha: The date of assessment is, in obvious terms, the date at which the losses or the damages in a case are calculated. And I think Mark mentioned this earlier. It's an issue that straddles the line between fact and law because you can pick any date and assess the value of a contract or the value of business going forward or going backwards depending on what the inputs are. Depending on the date that you choose for assessing damages it can significantly affect the valuation because for example, projections of the business

going forward will be affected, interest rates to the appropriate interest rate will be affected. The cost of capital will be affected. So all financial inputs that go into the calculation of damages are dependent on the date at which they're assessed. That's why the valuation date matters. In terms of what the options are for evaluation date the two obvious choices are the date of breach or generally the date of award. Depending on the circumstances of the case, one may be more obvious than the other but in some cases both may be options. It really depends on the circumstances of the case in terms of which one is the more appropriate one. So I think Scott alluded to this earlier but you could, if you're in the circumstance in an international investment treaty case of an expropriation and it's a it was a lawful expropriation. The only question is, what is the appropriate measure of the damages or what is the appropriate compensation that should have been awarded for the expropriation. Then it will be the, Valuation date will be the date immediately before the expropriation was affected. However, when it comes to unlawful expropriation the valuation date may change. If the value of the business has increased after the expropriation occurred then some tribunals may be inclined to not penalize the investor for having lost control of that business after that expropriation. So it will choose or allow the claimant to put forward and adopt evaluation date after the date of the breach, after the date of the expropriation. When it comes to

contract cases, the date of valuation is often determined by the substantive applicable law. So in the common law tradition the date of breach will be the date of valuation for a contract breach. That's pretty established and fairly uncontroversial. It really depends again, as I think we've heard it from all of us across the panel, the facts of a particular case and the facts of the claim will always affect what the appropriate date of evaluation is. Certainly what the facts of the world are on particular valuation date will affect the quantum of the claim that is possible.

Montek Mayal: Perfect. Thank you. Thank you very much. And of course, as you said it's important because it's the cutoff date for an assessment. Often valuers and experts will not use any information beyond that date for assessing the value of the claim. Using that to come to my next question, to you Sharmishta, obviously there's an option. There's a choice of when in certain cases the law obviously will impact that date, which is relevant but what's been your experience of the whole period for assessing losses. Is there often a one right date over the other and what are the factors which one might consider in choosing the appropriate date?

Sharmistha Chakrabarti: I think Vasuda covered it quite well. And it's hard to say whether there's one right date, it really depends on the facts of the particular case, but typically

what you'll see in the case of a lawful expropriation, it will be the date the expropriation took place. It's in the case of when you have an unlawful expropriation that things get a little bit more interesting. Just one case that I'll throw out there that I am sure everybody has talked about and heard of is the Yukos arbitration. I thought the tribunals decision there was very interesting because it actually said that Yukos, the investors as let's use the word victims of an unlawful expropriation were entitled to choose the date that they wanted whether it be the date of the breach or be of the date of the award. So I think that brings in like, the latest trend is more tribunals are actually going towards if the claimant, as they would put it would be in a better position by getting damages as on the date of the award they will be so inclined to do it. There's like a growing trend of cases, ADC vs Hungary and Yukos being the two ones that come top of mind. The other interesting piece and I am not going to go into it in any great detail because it'll take forever is when you have a creeping expropriation. You have a series of tax measures, for example, which result in the loss of an asset it becomes a very interesting question. There is like what is actually the date of assessment? The date of the first tax measure is it the date when the investor loses control over the investment. These are as Mark mentioned like interesting questions of fact and law but the two markers are typically

like, if it's a clear expropriation the date of the expropriation or the date of the award those are the choices.

Montek Mayal: Thank you. And I think in terms of even contractual claims, when there are continuing breaches things become quite interesting. Just using that, I'll go to the next topic of interest and often avoided what can be quite large, especially when the damages occur over a period which is far before the date of the award. Now it's important, but like I said often ignored or at least properly analyzed. Sharmistha coming back to you straight actually, what are the different forms of interests one might claim in when you're assessing or making a payment in the contract under contractual claims and what you often see, which are used.

Sharmistha Chakrabarti: It's a great point because you're right, like when you're writing a memorial, the interest comes at very end. Even though it comes up the very end, the amount of interest might have a very significant bearing on what your clients is either required to pay out or is going to recover. For example, in terms of the forms of interest, you could have typically pre award interest, which would be the date for the interest accruing from the date of the breach to the date of the award which in itself can be significant. And one case comes to mind there. Tenerife vs Venezuela, where I believe the breach happened sometime in 2006. The award was only

rendered probably maybe 8 to 10 years later. The principal damages awarded there was about like in the range of 80 million but the pre award interest was about 85 million. If you forget the interest component, you're losing a very big piece of the pie over there. The second part of interest is the interest that starts accruing from the date of the award to the date the award creditor gets paid. That interest rate is also quite substantial because sorry, the interest component can be substantial because if you have an award debtor who is refusing to pay, then that number can also very quickly start adding up. There you often you'll see that the post award interest rate is sometimes higher or given as a compounded interest because it's meant to be as a detriment to the award debtor and encouraging the award debtor that you should pay as quickly as you can. Otherwise that number is going to keep increasing. An example that I can give there is, again, in the same Devas arbitration, I mentioned the ICC commercial arbitration, the commercial damages that were, or sorry, the principal damages that were awarded was in the range of 560 million, the to date, that has not been paid. The interest component on that now runs over 600 million. And so there you go. You have like now over a billion dollar award outstanding, just because of the interest rate. In terms of benchmarks, we could go on and on about this, but, typically what you'll look for it depends again like who the party is claiming it for. If I am acting for the borrower I am going to

look for the highest rate of interest I can find, what tribunals will look at is they'll try to see that, what is your borrowing rate, for example, like how much do you, how much of money would you, have to, how much of rates would you have to pay in order to borrow the money that is now stuck in this litigation dispute, or they will look often at like alternative investments. Like what, how much money could you have generated if you had put the money that stuck in this dispute in an alternative venture. There are a couple of choices you can look at. But yes, just to wrap it up in neatly interest is often overlooked, but it's often a very large piece of the pie. So it's worth thinking about at the very beginning of the case not at the end.

Montek Mayal: Thank you. Ashish what's in India, perhaps the timelines for settling a case can even be longer, so interest is even more important, perhaps in many disputes, but what's your experience with interest based claims or interest claims in your arbitration, what are the rates that you come across often?

Ashish Bhan: I think it's pretty similar to what was being talked about earlier. I think one of the things that we need to consider in Indian arbitration context is that as you say, as you said, it can take years for them to finish. Perhaps post the amendment the situation has become a little better

but the interest component again what's missing and I'll come back to what is the usual rate of interest but what's missing today is what Sharmistha was saying on the evaluation of how the interest rate is calculated. I think even the tribunals and even the counsels at times just make it as a passing affair that give us interest at 18%, whereas this, there's no analysis to why you're asking for 18% or why you're asking for 15%. And I have seen and personally for in some of my cases, I have seen arbitrators, some of the more financially savvy arbitrators have started to understand that you can't get an 18% interest just for the asking. You need to give a analysis of it because then perhaps delaying from the claimant is better off because they are getting 18%, which they will never get anywhere else. So there's that analysis that's missing and courts have started there's there are a couple of judgments of high courts which have started saying that, what is the logic of going with these high interest rate percentages, et cetera. Usually in India, they would say 2% above the borrowing rate, the standard borrowing rate of the Reserve Bank of India or the State Bank of India and 2% above that. Or at times if it's an international commercial arbitration they will they look at the libor rates and all of that. There are some benchmarks but I think what's missing really in an interest claim is how do you come to that figure. Whether it's in the facts of your case, whether that interest rate is justifiable or it's not justifiable? Are they are the claimants trying to get unjustly

enriched by interest rates whereas really they are the ones who have delayed the whole process. So, it's possible. I think one of the things in Indian courts perspective a lot of judgements have been passed on this is interest rates can be punitive at times but the courts don't like to keep the interest rate as punitive. I do agree with Sharmistha that interest rates for me post award should be punitive because frankly the person would keep going on and on with the appeal processes and keep delaying it. So, there's no penal. There's he doesn't get penalized or they don't get penalized. I am a strong believer that post award interest should be at the highest slab of interest rates to ensure that people actually pay after getting an adverse award.

Montek Mayal: Yeah, it seems to incentivize the payment otherwise in some ways sometimes the respondents, the interest that have pay is lower than what it costs them to borrow money from the market. There's absolutely no incentive to make the payment. Thank you. Moving, we are bit behind time so I wrap it up quite quickly. Only have a couple of issues left. Scott tax is something which perhaps you don't need a full discussion, it can take a panel by itself, but obviously it's an important consideration and can cause Mark also said in the opening remarks substantial over on the compensation, if not dealt properly, when it comes to assessing your claims or even when you are you going to be awarding damages. In your

experience, or in your view, why does tax matter in assessing damages and what are the key issue that you have come across which one should keep in mind when putting claims forward?

Scott Vesel: Well, thanks, Montek. I think one of the things one needs to keep in mind is how damages will be treated in the relevant jurisdictions from a tax perspective, and will they be treated as income will withholding tax apply will VAT apply. You need to think that through to make sure that the amount of damages is appropriate so that the claimant is actually put in a position they would have been absent the breach rather than under over compensated. The other thing you need to be careful to do is to make sure that the request for relief are formulated with sufficient precision that the award you get will be effective. We had a case an expropriation case where the tribunal awarded damages net of all applicable taxes, but then if it's not clear which taxes apply you just had a, and we did have a post award fight seeking clarification of the award to actually put a specific number on that, so that the Government in question, couldn't simply say, Oh, this won't be taxed, or we can't know what the tax is until you file your tax returns 18 months from now. At that point the tribunal is no longer in place to police how the award has been implemented. So you do need to think about these things upfront and make sure that your requests will be effective without needing the tribunal to stay there.

Montek Mayal: Thank you. I think the issue that you were saying is quite relevant is sometimes the profits or the profits of extending the contract have been taxed at a different rate in the in your counterfactual, what's the rate, which now it might apply to the award. Again, those differences can be quite substantial as well. Now for the last topic and unfortunately you cant’s have a session today, and I think in any field, without talking about COVID and I think it's played its own part in complicating perhaps already complicated question of damages in many arbitrations. Scott again, coming to you first, why are such extreme external events like COVID relevant in when you're preparing on assessing damages?

Scott Vesel: Thanks, Montek. Tribunals are always reluctant to grant windfalls to a party and so big economic shocks like this will give make a tribunal want to be very cautious about how they're going about their valuation. They don't want to disrupt the contractual allocation of risk, for example, and you can see how this would be the case in any valuation using a discounted cash flow model where the question will be, did this big shock, and it could be COVID, it could be a financial crisis, currency devaluation, whatever did it happen before or after the date of valuation. If it's after, well, then the normal principle is that it shouldn't be taken into account.

If the government expropriated my theater in London on the 1st of January 2020, it doesn't matter that COVID meant it couldn't be operated from March any more than if it had burnt down in March that wouldn't be relevant. The question is what would someone have paid for it in December, but it's very hard to get a tribunal to ignore this hindsight bias of something that shouldn't affect their judgment, but, they consider it to be relevant and maybe just an anecdote of how COVID is playing out in a real case. We have a case now where there's a concession agreement which is for a particular period of time and the concessionaire paid an upfront consideration to be able to operate the concession for a certain number of years. Now the government who sold them the concession has implemented measures against COVID which mean during a number of months and now more than a year it couldn't be operated. The question is, well how do you value that loss time? How do you assess who should bear that loss and at what level? It just interesting kinds of issues that are cropping up now.

Montek Mayal: Thank you. Vasudha, they're, obviously there it interacts nicely with the first question were discussing on date of assessment where the strict date might be in principle, like Scott said in December 19 or January 20 yet there's an event like COVID a few months down the line. What's, what's been your experience with tribunals, do they avoid looking at hindsight in such issues or are they

compelled to take into account any other considerations or any aspects that you consider important for the parties putting their claims forward during period, which can be, I think at the very least can be defined as a very volatile period of business activities.

Vasudha Sinha: Thanks Montek. I hate to sound like a broken record but I think it is always case specific and tribunal specific. I think there are some tribunals that are very focused on a principled approach to damages. If they go with a valuation date that is date of breach, they will on principle say well we can only project forward as of the date of the breach. Any facts that occurred after the date of the breach that were not foreseeable at the time of the breach, we will simply disregard. I think there's a trend away from that or that is starting to occur. That is largely driven by tribunals that are concerned with awarding damages that most accurately reflect what you would refer to as the actual situation versus the but for situation. So when they are looking at awarding damages they're looking to not overcompensate claimants but also not under compensate claimants and at the same time not over or under penalize the injuring party or the respondent. So it really depends. One of the interesting facts that we're encountering right now are cases that were argued before COVID and that went to the tribunal for deliberation before COVID but where the award is coming out after COVID. Particularly

where damages have not formally been bifurcated as a stage of the arbitration, but where the damages assessment may be done in a separate stage. Nevertheless, it will be interesting to see how the tribunals that were dealing with right now are going to address that situation. It's something, that is developing. I don't think there's any particular trend or any particular answer on it. I think it is very tribunal and fact specific.

Montek Mayal: Thank you. I think the other and perhaps and this is my last question for everyone on the panel before we move to our closing remarks, I appreciate that we are now 12 minutes behind time, but just so we've discussed obviously the date of assessment. I think the other complication which often arises is keeping that aside, let's assume the date is not an issue here and you have to take into account COVID in your assessment of damages, how comfortable are tribunals still granting large figures. Let me put it the other way you have to dissect or perhaps remove the effect of COVID from the effect of the breach. Obviously that becomes quite complicated when depending on which business you are in, for example, if an airline business it wasn't the best year yet you might have suffered some harm on account of certain breaches. As a question to all the panelists, perhaps is, are there any do's and don'ts any considerations to keep in mind when you're

trying to present a case for damages and you have to deal with COVID in one form or the other.

Scott Vesel: Well maybe I'll just offer one thought, which is, if you suppose you're bringing a claim now, and you're trying to do a DCF analysis and the question will be well when is COVID going to end? And what is the world going to look like afterwards? And nobody really knows the answer to those questions. I think it really highlights the general problem you have with these kinds of models where you're making projections about the future. Ultimately, however, we just do the best we can and you see tribunals they ultimately, have to decide these cases and they have to put a number on it. So, and we had a tribunal recently make this point the data they had was not very good. One of the parties had not complied with document disclosure and they said, well we've just got to do the best we can with what we have and that's all you can do.

Ashish Bhan: Yeah. I think what Scott is saying Montek, is even relevant from an Indian context that you're in the last one year I've seen the tribunals being a little reluctant in passing any orders or granting any damage where people have taken a bigger defense of COVID as opposed to a breach because there's so much uncertainty around it that no one knows that whether this was the right approach of claiming amounts or

not. I think what I've seen as a trend, and maybe Dipti can also give us an indication but the clients today are looking at more from that perspective to renegotiate the existing contracts on that issue because they're saying it's difficult to assess the damage today because of COVID because it's so intrinsically linked with the breach and the trend that is there that the tribunals are so reluctant in passing any adverse orders the clients are moving towards getting a business continuity plan with their counter parties and seeing what's best for them from a business perspective.

Montek Mayal: Thank you. With that, thank you, my, thanks to the panel, but Kunal could you do the honor of the closing remarks and then we close the session as well.

Kunal Vajani: Thanks Montek. I am willing to do it provided you assure me no damages claim from MCIA, Madhukeshwar and Neeti. We are way past out time of 1 pm and I am sure everyone's hungry so I will stay as brief as I can. Very important situation, road less traveled. I feel I agree with Ashish that it's road now being traveled. People do see a paradigm shift. The shift is from having an expert being engaged in a timely manner. The expert being brought in to assess damages, to understand damages before the real war is short out. I think that's where the key roles like Sharmistha, Vasudha, Scott play in advising general counsel like Dipti to

understand that do you have a robust meat in the matter, is this worth a journey to travel. So I would turn the topic for the day a little bit around to say that the topic would not be that the road is not traveled or less traveled but the road is traveled in time. A very interesting point that Sharmistha brought out and it's very important and something, I didn't know, was falling part of challenges. I thought we did have a regime around the bias positions of the arbitrators, not bias positions of the experts that you bring in. Montek, I think that was a key indication that Sharmistha is going to break friendship with you soon. Excuse me, now, going to have you around many times, on a lighter note, but Sharmistha I think, it is known the fact that, great things never came from the comfort zones. If you want greater robust reports they will never come out of the comfort zone. We will have to answer the question that you raise is to who and one of the very key important points that was raised by each of you is in this who comes two hats one is technical one is quantum and both becoming very important, how you amalgam them, how you make it more cost effective, whether one team is able to do it, or you need two different teams becomes a very important question. Just an observation in terms of the modality of a proceeding, particularly in the range of the infrastructure arbitrations that Ashish was mentioning. If you have a person or an expert wearing two different hats on the technical and the quantum side, it becomes very difficult for the tribunals to reconcile

the two. I think the answer to that who in my experience would be that you get one qualified assessment quantum analyst who has the experience on the technical world of that nature of dispute as well. That becomes a very important because then to bridge as legal counsel each of you or for a assessing the general counsel life Dipti would be very difficult to even understand as to how they need to amalgam the two versions of the report, one on technical side and one on the quantum side. Very important as a question raised by Montek, in terms of the mindset, why is the world in India so conservative and, I think, very, good point raised by Ashish to say that it changes and that's been the Indian way we are, when it comes to the international world, we wear a different hat. When you, when we use the Indian world, we wear a different hat and that that needs a change. I think with the paradigm shift in the mind that we need a good expert, that mindset to accept a robust report, which may probably, as Scott was saying windfalls won't happen, but windfalls could happen, consequential damages ought to be seen, could have been a mindset which needs now required changing, which needs more deliberation, which needs more discussion. In fact, one of the key issues, there is the interest rate and the kind of judicial intervention that we have still on the face of it in India, the interest rate will always keep mounting because the court has understood one thing, we won't stay the award, but the proceedings are not accelerated within time. The interest

rate is obviously doubling up and increasing. So, like the panelists mentioned that there is a clear view that you see that the interest rate is so high that it has reached astronomical versions of changing the entire quantum of the award. Even in that assessment of the interest rate, it becomes very important as to how you place the damage issue, with the help of the experts that, you know the entire situation is then brought into a situation like Mark said rationalise. Rationalisation the role of an expert to take the, tribunal to the zone of rationalization is now become of key importance and the last magic word that you used and when we are back in the second wave at least in the jurisdiction that Dipti, I, Ashish and Montek you are sitting or MCIA teams sitting we are in the second wave and we are suffering. So this magic word is an unruly horse. The first principles that we were taught at law school were that status quo is an unruly horse. Today COVID is an unruly horse. So, we don't know where it starts. We don't know where it ends. We don't know its boundaries, we don't know its parameters. So, it's very difficult, but to marry that with your contract, I think it's become very important. It's sad as a legal practitioner, often I am told to use COVID as an excuse. It pains you that COVID is used as a real point to renege and then have instead of a breach another counter claim of damages, but that's something which I think what we will have to work over in times to come, because it is an unruly horse. I don't want to keep the lunch

waiting and the next panel delayed. With that, I thank each of you for spending a lovely afternoon. I will take this also as an opportunity on behalf of FTI to each of you to agree to sit by and spend this time afternoon discussing a path which is being traveled. Thank you.

Stuti Gadodia: Thank you. A quick word of thanks from the MCIA as well and especially to FTI, Montek and Mark for putting together this very interesting discussion. I don't want to keep everyone waiting, but just a couple of housekeeping points. The next session will start at 3:00 PM. It's an event hosted by Clifford Chance on the latest amendments to the Indian Arbitration Act and also to all of our participants, the session has been recorded and it will be published on the MCIA website. So, thanks everyone. Hope to see you soon.