



INDIA
ADR WEEK
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Session hosted by:
Khaitan & Co

Session theme:
Enforcement of Arbitral Awards in India

Transcription of Proceedings



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Surjendu Das: Hello everyone. We are starting with the session enforcement of arbitral awards in India. This is one of the most interesting and critical area of arbitration law. The session is hosted by Khaitan & Company, I am privileged to introduce the esteemed speakers for this session. Our first speaker is Mr. Gaurav Joshi, he's a well renowned Senior Advocate with 30 years of rich experience in litigation and arbitration. Next on panel Mr. Nicholas Lingard is a partner with Freshfields. Nicholas represents both investors and States in treaty arbitration cases around Asia and world. He represents clients in commercial and construction disputes across the industries. Moving on to our next speaker, Mr. Sanjeev Kapoor, he is senior partner with a dispute resolution practice of Khaitan and Company, New Delhi. Sanjeev has diverse experience of over 23 years in litigation and arbitration including treaty arbitration. He is one of the popular arbitration practitioners in India. Next on panel Mr. Vivek Gambhir, Mr. Gambhir holds legal qualification in India and in England. He was an Advocate on Record in Supreme Court of India before joining CMS. He is presently General Counsel- Corporate with Abu Dhabi National Energy Company. It is my pleasure to introduce an AOR myself being an AOR. Our fifth speaker is Mr. Raj Panchmatia. Raj is partner with dispute resolution practice of Khaitan and Company, Mumbai. Raj has rich experience in commercial litigation and arbitration, is a dynamic personality. Raj

will be moderating today's session. I welcome you all on behalf of MCIA. The present session is being transcribed as well. Over to you, Raj.

Raj Panchmatia: Thank you Surjendu for the kind introduction and welcome everybody and thank you for joining us for the session on enforcement of arbitral awards in India which is hosted by Khaitan & Company at the India ADR Week which is a first and kind initiative taken by the MCIA and I hope that this will continue and we will do this every year again and again. Thank you MCIA for organizing this. As you know, today we live in a globalized economy. There are cross border transactions, multiple parties getting into contracts in different jurisdictions. That would automatically also involve disputes between parties and cross border disputes coming in. What people look at is arbitration as a natural choice to resolve their disputes in international trade and commerce. When we talk about international arbitration, once we have the award the natural progression is towards enforcing that award. Today we will discuss what are the issues faced while enforcing those awards and what we should keep in mind so that the least number of issues are faced at the time of enforcing those awards in India. As you know for enforcement of award, there is a New York Convention of 1956 which has gone a long way in enforcing international awards across India and across multiple countries. There are around

170 signatories to the New York Convention but just being a signatory to New York Convention doesn't make everything. What is also important is that even if an award is passed from a New York Convention country, a signatory country, it needs to, where you are looking to enforce it, that country also needs to have ratified it. If there is a provision for or requirement of ratification between the two countries. If India has ratified New York Convention with a particular country from somewhere the award is coming in, it becomes that much easier. Therefore, it is important that ratification is also done before enforcement of the foreign awards. India has notified around 45 countries with whom it has a reciprocating arrangement for enforcement of awards. Of course the numbers need to go up much more considering that there are 170 countries who are signatories to the New York Convention and India has only got 45 with whom we have a notification. Having said that we are hoping that Government will notify more countries in the near future. Today to discuss all of this as you rightly know we have an eminent set of panelists who will help us dissect this entire issue and give us a great insight on what we should keep in mind while enforcing these awards into India. Thank you all of you for joining us today. For housekeeping, I just wanted to tell you all that we will be immediately after this putting up two questions on poll. We will request you to please answer those questions that will help us give

a perspective to this entire discussion. Therefore, I will request MCIA to put the polls up. You have 60 seconds to answer these. Can we get the results of the poll? Okay. We have around 40% people who have experience of enforcing awards in India and 60% have not. Most of them feel that enforcing an award in India takes around one to three years. Around 60% of people feel that. 20% feel between three to five years. 18% more than five years. Thank you. This is going to be very helpful for us to set our session going forward. With this I will straightaway come to our panelists. Let me first come to you Gaurav. We have always heard and seen that enforcing an award is always far more challenging. What are some of the reasons why enforcing foreign awards in India can sometimes be time-consuming affair? Is there anything a party can do to reduce these timelines?

Gaurav Joshi: Before I answer the question, I must thank Surjendu for the kind introduction and also thank MCIA and Khaitan & Company for inviting me here. What are the reasons why it can be time consuming? The principle reason is that there is a heavy backlog of cases in court, so it takes time in court. It takes time to process and have the applications heard. Now given that there is this backlog, what can be done to expedite the process? Now, there are two ways we can look at it. You can anticipate the grounds of challenge which are

generally under Section 48 for existing enforcement and you can take steps prior to the award being passed and subsequent to the award being passed. As far as steps to be taken by a party is concerned prior to the award being passed, what basically has to be done is you will have basically two types of arbitrations, contested and non-contested. A non-contested arbitration where an ex-parte award is passed. It may be easier to get the award but then it becomes open to challenge particularly if proper notice is not given or ample opportunity is not been given to the other party to appear. So there you must ensure that ample opportunity and notice is given to the other party to appear and then if they choose not to appear of course there bear the risk. So that is for non-contested. As far as contested awards are concerned, if a party is indulging in dilatory tactics, of course you have to be firm but still not rigid if I may say so. What I mean by that is repeated application of adjournments of course would be refused. But if there are some genuine grounds for adjournment then you should not be too rigid about it for the simple reason that it opens up a ground for resisting the award on the ground that he did not have an ample opportunity, no proper notice was given or he was unable to present this case. Similarly, in so far as evidence is concerned, of course you must go by the rules. If the rules provide for oral evidence, you should allow that. These are all grounds which are something that you can anticipate knowing that this party

will once again seek to resist the enforcement of the award once the award is filed in India for enforcement. So these are some of the grounds. Of course it is also in the hands of the arbitrator and the arbitrator should also necessarily follow the due process and should not be in a haste to pass the award. Now, as far as steps which we can take after the award is filed, first you must ensure that all procedural compliances after the award is passed. You must ensure that when you file the enforcement petition that all procedural compliances are in place. Technical grounds like the copy of the award is not available or a certified copy is not there which are grounds which would, I mean ultimately curable grounds but it would delay the process. The other way I look at it is given the backlog of cases in India and the difficulty of getting the cases particularly in Mumbai and other cities placed on board for an expeditious hearing, if possible and if the ground so justified. If you can move for some interim relief so attachment of properties et cetera then you do get priority because you move for urgent relief. Your matter is heard in that sense for urgent reliefs in priority and at that stage if the judge is impressed, the judge may decide to dispose of the matter itself. These are some of the broad grounds which I feel you can reduce the delays which take place in enforcement of awards.

Raj Panchmatia: Thank you Gaurav. Nicholas, if I may come to you now as an international lawyer who regularly advises clients on India related disputes, what has your experience been with enforcing foreign awards in India and how long have the timelines been in your cases?

Nicholas Lingard: Thank you Raj for the question. Hello everybody and my thanks to the organizers. I am delighted to be here. I might begin by saying I was very disappointed that as panelists were not able to participate in the earlier polls which could have been the simplest answer to your question which I promise I will come onto with answers from my experience in terms of timing. I want to make two general observations at the outset though. The first is my experience now in advising typically foreign clients in connection with India related arbitral awards and enforcement in India is that they will get the right answer. Their awards ultimately will be enforced if their awards are that should be enforced but the note of caution is that it will still take a long time and I will come back and try to put a bit more meat on the bones of what a long time means. The second general observation I thought I would make at the outset is my experiences and I am keen to hear from the other panelists whether this resonates. My experience has been very divergent depending on in which court in which part of the country one finds oneself. Perhaps we can come back to that in more detail as we proceed but my

experience has been very diverse across the country. To give an example, in one case in which I have had involvement over the past years, our client found itself seeking to enforce an award before a High Court in India. Obviously, I was not counsel in the enforcement effort but have been involved in earlier stages in the proceeding and watch the enforcement with great interest. Perhaps what was most interesting to me in that case was the case sat at the High Court level for some five years. Ultimately leading to a judgment wholly in favor of our client and enforcing its award. That quickly was appealed to the Supreme Court. What was most interesting to me was that the Supreme Court dismissed the appeal very rapidly within three months of its getting there which I think is an example of the first point with which I opened that is getting to the right answer. Particularly my impression if I may say so from a distance is once one accedes the Indian Court hierarchy, it is certainly the case that one is more likely to get the right answer. I want to make one final point is this, our focus today is on enforcement, and the anecdote I just offered is about enforcement. There is often a further step of course and that is execution and that can introduce its own complexities and a further time scale. I have seen with my clients that take several further years, particularly if execution requires, for example, the public auction of the asset in question in order to enforce by way of execution which I understand, though everyone else on this panel is

better qualified to speak to this than me. I understand that is the case for some asset types in accordance with the Code of Civil Procedure in India. There is an enforcement phase potentially several years and thereafter potentially an execution phase of which we will should not lose sight.

Raj Panchmatia: Thank you Nicholas. It was very helpful. As you rightly said, enforcement is one step, execution is one more and it can really delay things in India at the time of execution as well because there are a lot of requirements that need to be complied with at the time of execution. So yes it is extremely important. Sanjeev let me come to you. When clients come to you for enforcement of award, what should they keep in mind? What are the requirements for enforcing a foreign award in India? What evidence is required to be submitted to an Indian court for enforcing of foreign award?

Sanjeev Kapoor: Thank you Raj. Good afternoon everybody. I would say as you have pointed out in India the position is slightly peculiar. In the sense that we are a part of the New York Convention but obviously we had an initial requirement, that in addition to being a part of New York Convention, you also require reciprocal arrangement with the other party. I think one of the very basic things obviously which you will test is whether this is an award which is enforceable in India under Arbitration and Conciliation Act. Is it an award which

has been passed in the jurisdiction which is a Convention country and with which India has a reciprocating arrangement. Because obviously the options you will choose for enforcement would be entirely different for two sets. I think that would be the very basic things which you would be doing then obviously as Nick pointed out we have got large country and obviously so many High Courts. There are certain experiences of some High Courts moving very fast, some High Courts moving not at that pace, some having more commercial maturity. Let's put it then maybe some other courts in commercial matters are not that prevalent. I think other things which you will obviously like to test is that there would be multiple options which might be available to the party in the given circumstances to file or enforcement of the award. And you would like to pick up the right kind of High Court so that all the relevant factors are taken into consideration and you are making right kind of a choice and as have been the experiences that is a crucial and critical choice in many cases. Coming to second part of your question, I think as far as the formality which is required or the evidence which is required, I can say it's very informal the Arbitration and Conciliation Act essentially requires two things. One is you need to file the award either in an original or an authenticated copy. Second is you need to file the arbitration agreement either original or an authenticated copy. In case it is an award which is in a language which is different in English language then you file

an obviously translated copy of the same which is duly authenticated. So I think those are the basic kind of an evidences which you would require. Courts have been quite liberal. If you look at the language of that. The language says that these documents are required shall be filed along with applications for enforcement but Supreme Court of India has taken a liberal view. In fact, Supreme Court of India has said that even if they are not filed at the first instance along with the application for enforcement of award then also that application will not be dismissed as non-maintainable and it can be filed at a later stage. I think the formalities and the procedures are quite simple when you are going in for the purposes of enforcement of award but depending upon how it is challenged and what basis it is challenged, obviously it might need to be elaborated upon and maybe the evidence which has been placed before the arbitral tribunal might require to be placed before the court.

Raj Panchmatia: Sanjeev I may just ask you one more question. You are at this time. You mentioned the right court it should go to. So let me ask you, which is the appropriate forum for filing an application for an enforcement of a foreign report? Because I remember there is a lot of jurisprudence on this issue as well and we have seen certain cases on the definition and interpretation on court which you need to go for enforcement. What is your view on this?

Sanjeev Kapoor: Yeah, so I think there was a confusion and obviously different courts have taken different kind of positions et cetera. Fortunately for us, I think in 2018, the Supreme Court of India has in Sundaram Finance case settled this particular issue. Essentially what Supreme Court of India has said that and it's a very pro arbitration line of judgment which essentially says you can file in for enforcement where the assets of the parties are situated. So, obviously in addition to the definition which is already there in the Arbitration and Conciliation Act which says that you can go before the High Court where in case it was not an arbitration but in a civil suit you would have filed a suit. I think in addition to that, the canvas is now slightly more broader because even where you have got assets also there also you can file. Sundaram Finance is in a domestic arbitration under Section 36 but obviously 2(1)(e) definition of the Court and Explanation of 47 is quite similar. I would say that this would be something which would be very much applicable. So you would have various options which would be always available to you and you might be able to pick and choose which might be the right kind of option for you to file for the enforcement and then obviously follow it up in the execution though both are considered to be integrated by many of the judgments of the Courts.

Raj Panchmatia: So at this stage, can I just take one of the audience questions and maybe Nicholas, if you would want to answer that. The question is, could the panel elaborate how an award holder can seek asset related discovery and trace the debtors assets during the enforcement stage?

Nicholas Lingard: I am certainly happy to give it a go, Raj. Thank you. I can take the asset tracing point and then I will defer if I may to Sanjeev and others on the legal question in India of whether the discovery is available. As it is certainly for example in a jurisdiction where I practice New York, one can obtain discovery in support of an enforcement action. I would be keen to hear from the Indian lawyers to the extent that is available in India. Tracing in the enforcement stage though is a commercial activity, the same as it is at any other point in a dispute process perhaps when you have begun before even arbitration proceedings are on foot working with expert asset tracers to locate assets. That may very well be an important part of the process. Let me pass back though if I may Raj on the legal question where I fear I would not be on the firmest footing among my colleagues on this panel.

Raj Panchmatia: Any thoughts from others? Sanjeev, Gaurav, Vivek?

Sanjeev Kapoor: Just to add Raj. In India also you can go to court where you file for enforcement and execution of award and you can seek a direction from the court to seek an affidavit to be filed before the court detailing the assets of a judgment debtor in that sense. I think that you can do your inquiries on the basis of which obviously you can file it but obviously you can also seek the assistance of the court and seek an affidavit of the assets and properties et cetera filed by the party also before the court.

Gaurav Joshi: Raj, under the CPC under Order 21 Rule 41 in execution proceedings, you can call upon the judgment debtor to disclose its assets. You can file an application whether you will get interim reliefs before your award is recognised as enforceable as a matter of argument. If you can show some emergency and some apprehension that the judgment debtor is likely to dispose of his assets and probably even at that stage you can get an order for disclosure. So it's very often done. It's an order which is quite regularly passed. Of course in that case if you are not aware of what assets the judgment debtor has then the court you would go to for enforcement is where the judgment debtor is located. Otherwise you would end up in a court which would otherwise be without jurisdiction, if he says I have no assets in this jurisdiction. You go to a court where he is located where it's a Company or registered office or some other office. If it's an individual where he

resides or carries on business and from that court you would have to then move for under the provisions of the CPC for interim reliefs or final relief for disclosure.

Raj Panchmatia: Vivek any practical experience on this?

Vivek Gambhir: I think, from my point of view, obviously I defer to the experts on Indian law. From my point of view, there are two issues. I think the first issue is that there is still some clarity required in terms of enforcing foreign awards whether it has to be at a place where the assets or where the judgment debtor is or whether it can be at a place as you suggested by the wording of the courts that there is suit would have otherwise lay. Part of the justification for broader approach is that a foreign party may not necessarily know and this was the previous question as to where the assets are and therefore this is not execution, this is enforcement but execution you need to go where the assets are otherwise there is no execution possible. So then there is some debate in my experience that is still to be decided on that question but I have to say that getting a disclosure on assets the courts are rather proactive. They do give due credence to the fact that there is an award debtor against them and in front of them and the assets must be disclosed and they do go for that and in my experience they are pro awarding interim

relives to make sure that the award debtor doesn't use the opportunity of that exercise to syphon away the assets.

Raj Panchmatia: Thank you Vivek. Gaurav may I come to you with another question on what are the grounds for refusing enforcement of an award in India? What do you think are the grounds in which the courts are normally refusing enforcement in India?

Gaurav Joshi: Yeah. Now the law I think on that has been settled by the latest Supreme Court judgment in Vijay Karia. Of course the grounds are there in Section 48 of the Arbitration Act but the judgment of the Supreme Court explains in detail exactly how you have to categorize the grounds which grounds are mandatory and which are discretionary as far as the parties are concerned. It's basically divided into three categories of grounds. One is jurisdictional grounds. Two is party related grounds. Three is the ground of public policy which is the ground which is generally open to the most debate. Now as far as jurisdictional grounds are concerned which are held to be mandatory and not discretionary, if the arbitrator had no jurisdiction or it was a dispute which was not arbitrable, then of course the award would not be enforced in India. It's something which the Supreme Court says it's not open for the court in which the application is filed to enforce such an award. It's a ground which is held to be

mandatory for refusing enforcement. Then there are party related grounds. Party related grounds are that you did not get proper notice. You were unable able to present your case. Now these are grounds which the court has said is discretionary because a party can by its conduct waive the quest of getting notice. It can be a question of unable to present a case is very often cited as the ground that I did not get an opportunity, the arbitrator did not give me enough time. The Supreme Court is categorical that if you have failed to comply with the procedural orders of the arbitrator, then you cannot raise this ground. That means the arbitrator did give you time, if you could not comply, then it is something which it's discretionary and the court can say, yes, sorry, I will not refuse to enforce the award. I will enforce the award in fact. I will exercise my discretion not to reject or to refuse the award enforcement of the award. The third ground is the ground of public policy that has of course been explained by the amendment in 2015 following Renu Sagar. Renu Sagar said it is a very limited or narrow ground. That ground has now been explained as it should be contrary to public policy means contrary to the fundamental policy of Indian law. It's something which is basic to Indian law and which you have ignored or award is contrary to that. Contrary to principles of morality and justice and it is now categorical and it says so in the act itself that you will not review the award on merits. You are not required to review the award on merits. So

ex facie you look at the award and you find something which shocks your conscience and you think this is contrary to the basic principles of Indian law then probably you can refuse the award but not on an analytical thinking, an analytical analysis of the award and deciding what is the merits of the case and whether the decision would be right or wrong. These are the few limited restrictive grounds. The Supreme Court also says that this is a watertight compartment. Whatever the grounds which are there in 48 are watertight. You cannot expand the grounds and come up with new grounds which probably patent illegality and all which are grounds which are available for challenging domestic awards between domestic parties. Those are grounds which are available there. Which are not available while refusing enforcement of the award? This is a broad overview of what are the grounds available for refusing enforcement.

Raj Panchmatia: Thank you Gaurav. Sanjeev at this point can I also trouble you a little bit and your thoughts on will an award that deals with allegations of fraud affect its enforcement in India?

Sanjeev Kapoor: Very interesting issue Raj and I think some kind of innovation has always been done to challenge the award on these grounds. Many a time you will see that there are cases which have been made out on misrepresentation, deceit, a

civil deceit et cetera in the course of the pleadings of the parties. When it comes to the enforcement, many a times ground is taken but this award involves questions of fraud. Questions of fraud cannot be gone into by an arbitral tribunal and therefore this award cannot be enforced. I think Supreme Court grappled with this issue quite a number of times but I think the clarity which has come recently and I would say that it's quite a pro-arbitration kind of approach has been adopted. They have said that except for cases involving serious allegations of fraud, all other issues are arbitrable. It's only the cases which are involving serious allegations of fraud which are required, which cannot be arbitrated but in case these are very peripheral issues of fraud et-cetera or some kind of an allegation which has been made etc, those are not really taking away any kind of jurisdiction, as far as an arbitral tribunal is concerned, merely because word fraud has been mentioned seven times in the pleading or twenty times in the pleading doesn't say that obviously the arbitral tribunal cannot go into it. But still a serious allegation of fraud is also a very amorphous kind of term. It gives quite a lot of kind of leeway to the court which is enforcing the award which is going into the facts and see as to what is serious, what is not serious, what is peripheral, what is accidental etc. But fortunately for us the Supreme Court had the occasion to consider all those and earlier law which has been there in this particular domain. They came out with this judgment, its

Avitel, it came in October, 2020 and therein I think they laid down very robust principles on the basis of which you can decide what a fraud is or what not a fraud is. Essentially, if you cull out two principles which Supreme Court has said are the principles which we say are fraud which are not arbitrable for which you will have to go to civil courts or criminal authorities. They say essentially one is that in case the fraud is of a nature which goes to the very fundamental of the arbitration agreement. That is to say the arbitration agreement itself would not have been existed in case the fraud was discovered. I think that's one test which has been set by them. The other test which is there is that they bring in an element of public. I would say if they say that in case disputes are merely disputes which are contractual or inter-se the parties, then obviously they really don't have larger public implications etc. Therefore, those are issues which can definitely be arbitrated. However, they say that in case there are allegations of malafied, fraudulent conduct et cetera against public instrumentalities, state authorities et cetera, then that brings in some kind of a public element and those are obviously the kind of cases which shouldn't be decided in arbitration which are kind of decided by the courts or by the criminal authorities who are dispensing justice in that kind of field etc. So, slowly and slowly if you see the gate is getting tightened. There was no clarity as to what fraud would be and what fraud would not be, then came to a situation when

they said serious allegations of fraud. Now they are identifying what a serious allegation of fraud is and wherein obviously, there are very serious public law elements which are involved or it goes to the very root of the agreement itself then they are going to interfere etc. So, to say that fraud can never be a ground for challenge of an arbitration, that's not really the case but fraud can now be a round of challenge of enforcement in arbitration award in a very limited kind of circumstances wherein the criteria, challenges Avitel judgment of Supreme Court are made out etc.

Raj Panchmatia: Egregious nature of fraud, if you are able to establish then you will be able to put it up for challenges. That's what I kind of gather.

Sanjeev Kapoor: It's slightly maybe more than that. It goes to the very root of the agreement itself and agreement would be vitiated for that of fraud. It's a slightly higher bar than, I think, so they are putting in degrees of fraud also. The fraud might be very serious but then it has to meet the threshold, which the Supreme Court has laid down.

Raj Panchmatia: Nicholas, now I am gonna come to you. It's a question which is of lot of interest presently in India and there is a great deal of interest in emergency arbitrations and there are a lot of queries that clients have especially in

wake of Amazon and Future dispute which has been all around making headlines in the press as well. So, we have seen many institutions generally have emergency arbitration clauses and so can you give us a brief understanding of what an emergency arbitration provisions are and how effective are they?

Nicholas Lingard: Of course. Thank you for the question. Perhaps I can begin with seeking to contextualize the question. What is the objective of interim relief regardless of the forum to which one goes to seek it. Well, it typically is to preserve the status quo. What does that mean in practice? That might mean and we can come on to speak about Amazon by way of example. That might mean preventing a party from dealing in shares that are the subject of a corporate dispute. It might mean ordering perishable goods. There is one case in Singapore involving coal sitting off the coast of China, it ordering the most perishable goods can be sold pending the resolution of the dispute because otherwise they will perish. It might mean an order that a party not call on a bank guarantee before the dispute is resolved. It is a relief of an interim nature typically designed to preserve the status quo or react to an emergency situation. Now I say there is a debate as to the fora to which one might go. Your question is targeted at one of three options namely an emergency arbitrator but by way of context let us not forget that a party might also go to the arbitral tribunal once it is

constituted. Now it typically as we all know takes some time for an arbitral tribunal to be constituted. The question is what do you do before that, emergency arbitrator is one option. To round out the options, the third is to go to a court of competent jurisdiction. I say of competent jurisdiction advisedly that might be the location of the respondent. It might be the location of the assets. It also might be that the court at the seat of arbitration and let me come having set that scene squarely to emergency arbitrators. They really are a product of the last decade or so. As you rightly said, exist in most institutional rules including here in Singapore in the SIAC Rules, in the ICC Rules and in several others. They are designed to produce a result of sort I said outside of my answer quickly, so to speak of the SIAC Rules, for example once a party seeks an emergency arbitration, the SIAC is obliged to appoint the emergency arbitrator within one day. She is then obliged to establish a procedural schedule within two days after being appointed and to make a decision within 14 days of being appointed. The only data that has been published from the SIAC suggests that most emergency arbitrators in fact decide much faster than that, most decide within two to three days of being appointed, issuing orders of the sort I have said do not deal in the shares pending the resolution of the substantive dispute. What is the emergency arbitrator issue? Well, she issues an order. It is clear in Singapore that it is not an award. Again, I

will defer to others but I understand that is similarly clear in India that it is not an award. What good is it? At least here in Singapore the law is clear that it is enforceable with the leave of the High Court as though it were an order of Singapore's High Court. A provision that I understand closely reflects Section 17(2) of India's Arbitration and Conciliation Act providing that an interim order of an arbitral tribunal that can be enforced as though it were an order of a court which begs the question as to which we can come as to whether the emergency arbitrator is in fact an arbitral tribunal. Let me offer just a Singapore answer to that question in Singapore that answer has been made clear by now relatively old amendment to the International Arbitration Act which provides expressly that an emergency arbitrator is in fact an arbitral tribunal for all purposes of the Act. But perhaps I will pause there.

Raj Panchmatia: That was exactly going to be my next question which you just answered. Whether emergency arbitrator will be treated as a Tribunal? Thank you for that clarification. Gaurav what is your thought? We have seen Amazon dispute going on in relation to this as well. In India do you treat that as an emergency arbitrator's award as an award from tribunal and such are awards enforceable in India.

Gaurav Joshi: So, let's appreciate one thing that the Amazon case was a case of a domestic arbitration. It was an arbitration under the SIAC rules. It was an arbitration where the place of arbitration was to be in India. In view of that Part I of the Arbitration and Conciliation Act applies. Now, given that the question which was then in Amazon case is whether it is an arbitral tribunal at all. Does the Indian law recognize an emergency arbitrator to be an arbitrator who can pass an interim order or award or whatever it is? Obviously he can't pass an award. He can only pass interim orders as Nicholas clarified. The Delhi High Court in his judgment took the view that on the grounds of party autonomy and recognizing that various institutions have similar provisions that the parties could always agree to a procedure for appointment of an arbitrator which would probably include the appointment of an emergency arbitrator who has a very limited jurisdiction over a very limited duration of time. They took the view and that is the moot question which is not pending an appeal is that it is an arbitral tribunal. Once it is an arbitral tribunal, the award becomes enforceable or the order becomes enforceable under Section 17(2) given that it is a domestic arbitration. Now, the question arises what happens in a foreign arbitration. Arbitration not located within India. In that case, of course the rules and the laws of the foreign country would apply in so far as procedure is concerned and recognition of whether an emergency arbitrator is an

arbitrator under their laws. Of course, it all depends on the terms of the contract whether the contract makes Indian law applicable, foreign law applicable. All those are interesting issues which have to be considered. The question then arises, how do you enforce whether an interim order of an arbitrator whether emergency arbitrator or a regular arbitral tribunal which is passed abroad? How do you enforce that order in India? 17 does not apply to foreign arbitrations. Part I of the Indian Arbitration Act only applies to domestic arbitrations except to the extent or certain provisions which are made applicable to international commercial arbitrations where the place of arbitration is outside India which is Section 9, 27 and part of 37. Given that limitation, the probable remedy is that you would have to move under Section 9. That was recognized in the BALCO case also. Therefore, thereafter there was an amendment to the Act that for how do you enforce orders in India in respect of arbitrations which are situated outside India and the legislature having recognizes and recognizing the need for it has made Section 9 applicable and Section 9 as you know is a section applied approaching the Court for interim reliefs. In such a case, probably the way out is that you will have to approach the court for interim relief. Now, in such a case what the court would consider is again a moot question, whether it would consider the controversy de-hors the orders passed by the arbitrator and considered again on merits or whether it would

recognize the fact and accept that the arbitrator has taken a particular view which has to be given credence to. Of course the courts are not going to be bound by the view of the arbitrator. It can always recognize the fact that the arbitrator has taken the view, has applied his mind and the court in such circumstances has very limited scope of review in that sense and would then enforce the order of the arbitrator so that these are all moot questions. These are questions which are developing over a period of time including this Amazon case which is an interesting case which is going to find its way I am sure all the way up to the Supreme Court.

Raj Panchmatia: Sanjeev, Vivek any comments, thoughts on this?

Sanjeev Kapoor: No, I would say as Gaurav has indicated, I think the law is clear on two aspects obviously is that a foreign interim order, I would say award would be different connotation because award would be deciding a question finally but a foreign interim order, I think the judgment. In case you are successful, that has been the judgments. In case you are successful then that's enforceable by filing a Section 9 in India. Obviously what an interim order says would be of a persuasive value to an Indian court. It's not that the Indian court is bound by or it becomes a executing court for that. Law also has been that in case you have gone to an arbitral tribunal trying for an interim order and failed in that then

the judgments of the Supreme Court which has said that you can't have so to say a second bite at the cherry. Then you can't come to India after having made that election of going before the arbitral tribunal out there, come and file Section 9 saying but in Section 9 you always have to consider the issue de-hors of what the arbitral tribunal has said and therefore please allow me to file it again. So, I think generally the approach of the courts have been quite collaborative. They are trying and giving an avenue. The lacuna in the Act is that a foreign interim order cannot be enforced in India. I think that lacuna has been tried to be closed by the court by making the Section 9 remedy applicable as a way of having that interim order enforced in India by filing a new Section 9. But I think courts have also been conscious that it doesn't become kind of a second bite at the cherry. That you lose before the foreign interim tribunal then you file a Section 9 and come to India. So I think it's a kind of cautious approach which has been adopted by the court. Filing the lacuna which is there in the legislation as far as enforcement of interim orders which have been passed by foreign tribunal is concerned.

Vivek Gambhir: If I can just add two sentences to that Raj. From a perspective of a beneficiary or otherwise of an interim award, I think unless the law was absolutely clear and given the urgency of obtaining an interim relief. I think I would

look at very carefully the option of actually trying to do it straight in India. For example or the jurisdiction where the assets were because if you are going to spend a lot of time in trying to convince the court that it should recognize either a new claim or order passed by a foreign court or an emergency order passed by an emergency arbitrator, you can sort of tend to lose the very benefit of getting an interim order quickly. So I think it would be something that I would look personally very closely as the option on intuitively until the law is well settled. It seems to me that the option of trying to get an interim order from a court in India would be top on the list because I think generally speaking the courts are do favor preserving the status quo. It's not as if there is a greater advantage in trying to get an order from outside which you can persuade an Indian court in case it will otherwise not going to get persuaded. That would be from a point of view of a litigant. That's how I would look at it.

Raj Panchmatia: Thank you. I think you made my life easier. I was going to ask you the same question that what would be your choice as an in-house counsel? So Vivek let me come back to you with another question at this juncture. As an in-house lawyer, you have had an occasion to file interim reliefs pending enforcement of awards in various matters. What has been your experience like have you been able to get anything

in the sense have you able to get a restraining orders or kind of an attachment orders even pending execution?

Vivek Gambhir: That's for me Raj?

Raj Panchmatia: That's for you Vivek. Yeah.

Vivek Gambhir: I think my experience in this regard has been favorable. I think this is just reflective of the fact that there is a great deal of understanding about the seriousness that needs to be attached to a foreign award. I think the courts are giving much more are giving due weight to the fact that there is an award that has been passed by, particularly where the awards are coming from well recognized institutions. I think they do that and they do give due weight to it and quickly deal with that subject matter of getting, passing an interim relief. However, whether that I think the interim relief sometimes can be a good spur to getting as I think Gaurav was trying to indicate earlier. This could be a spur to getting the whole dispute resolved, provided that the interim order bites the other party. I think if the interim order doesn't bite the other party in the sense that they don't have plans to sell their assets in any case. Getting that order may not necessarily achieve that second objective because part of the objective of getting an interim order is also to put pressure on the parties to try and award debtor to resolve

that. I think my experience has generally been quite favorable in India. I digress a little bit here, Raj. But I do want to share couple of thoughts on enforcement generally, if I may. I will not take too much time and it's just sort of my experience. I think there are two dimensions that I wish to share. One is that enforcement should probably be thought of right from the time you start the arbitration. Not necessarily something you look at once you get the award. The second aspect of that is that it is not just the litigant or the parties who need to think about it. I think if as an arbitrator who is interested in getting the award upheld, it is also very important to bear in mind as to what kind of challenges and try to cover those areas to avoid those challenges being made particularly on the grounds of natural justice or opportunity not been given or making sure that the public policy grounds are wherever applicable are properly addressed. There is one more element which influences the enforcement is that in a foreign award, you can obviously challenge the award at the seat of arbitration. Now typically when one party does that, it tries to put a spoke in the enforcement using that. That is something which you need to plan for and bear in mind that that is some process or a step that you have to go through in case the party chooses to award debtors might choose to do that. I just wanted to. I didn't want to interrupt earlier but I just want this.

Raj Panchmatia: No, I think it's a very interesting point that you raised that you need to think of enforcement even prior to the award at the time of arbitration. Maybe I may take that liberty to say that you may probably also want to consider it even at the time of drafting of the arbitration clause itself as to where you are going to enforce an award because depending upon that you may also want to choose your seat accordingly. Very interesting observations, Vivek. Sanjeev may I quickly ask you one very nuance thing which people have been normally asking, does India recognize partial awards? And if so, how can they be enforced? Maybe in a couple of minutes. You are on mute Sanjeev.

Sanjeev Kapoor: Yeah. Interesting question. I think there is quite a lot of confusion around what is an interim order and what is a partial award in that particular sense. Because from an enforceability it makes quite a lot of difference. So during the pendency of arbitration any order which is passed by arbitral tribunal would be of an interim nature but those can be the orders, one is that an issue in arbitration is finally disposed of or it's just an interim arrangement and obviously that will get subsumed when the final award is passed. There can be two kind of orders which can obviously be passed during the pendency of the arbitration. The kind of awards which can be passed which will finally dispose of an issue which can be decided finally in arbitration are

something which are called partial awards. Indian Arbitration and Conciliation Act does not define what the partial award and final award et cetera. The only reference which you will find to that is in 2(1)(c) wherein they say arbitral award includes an interim award and 31(6) wherein they say that whatever can be disposed finally by final award by an arbitral tribunal can also be disposed of in the interim finally by the particular tribunal. So, I think we have dwelled upon this particular that if interim order that is to say it is not finally disposing of the issue, it's kind of an interim arrangement during the pendency of the arbitration agreement which has been agreed between the parties then I think Gaurav has elaborated that and the remedy would be that it would not be straightaway enforceable in India. You will have to file a Section 9 and then in that particular case. But the situation is different because in case it is an award which is disposing of an issue finally, then obviously that would be treated as an award which can be enforced straightaway in Indian Arbitration and Conciliation Act. The test would be that it has to meet the other parameters which are there of the award, it has to be a reasoned award, it has to be signed by the parties and parties given opportunity in that particular case but if it is disposing of an issue finally and the final order could be passed independent of this issue which is getting decided by the arbitrator. That is something which is very

much enforceable in India as any award would be enforceable in India.

Raj Panchmatia: Thank you Sanjeev. Now that brings me to maybe our final question. Gaurav if I may come to you for that. Is the judgment of Supreme Court in NAFED vs Alimenta a cause of concern in the context of an award being against the public policy of India? Would the judgment in Vijay Karia overcome this decision?

Gaurav Joshi: The judgment in Vijay Karia is a very detailed judgment and it sets out in detail exactly as to what public policy is, defines it and says that it is ultimately when you talk about fundamental principles of Indian law you are looking at the basic Indian laws against which award should be something which violates the basic Indian laws. Now the law which is set out in Nafed is really no different. It says the same thing, it refers to Renusagar, it refers to the subsequent judgments and reiterates the position that the concept of public policy is very narrow. However, in the facts of that case, it goes on to hold that where some exports are barred by the Government and the party could not export legally make those exports and there was also an arbitration. There was also a clause in the contract which postulated that. It goes on to hold that such a matter pertains to a fundamental policy of India. Now it is debatable whether a

Government order which bars exports could be said to be something which is the fundamental policy of India but the judgment does hold that. It is really in that context restricted to the facts of that case and particularly if you see the judgment, I quite see the point of view of the Supreme Court judges because the facts were quite glaring and jarring. Sometimes it is often said that bad facts make bad law but here luckily the law is exactly what is the law in Vijay Karia maybe not in as much detail but it is that law. The facts were such that where the party was under the disability to export because the Government prohibited the export. Could it be penalized for being in default of the contract when the contract itself postulated that. The one point of view could be that this is a decision on merits which you are barred from looking into and the judgment does go in detail into the merits of the case which is something which Section 48 now says and the explanation says you can go into or is it something where a party is prohibited by law from carrying out its obligations where there is frustration and therefore the contract to that limited extent becomes void. Could it be said to be contrary to the fundamental policy of India and that's the view which was taken that it is contrary to the fundamental policy of India. It was a contingent contract had become void in view of the order of the Government. As far as I see, as far as the law is concerned, according to me there is no cause of concern. There is really no cause for concern.

In any case, Vijay Karia explains in detail all the basic principles. Vijay Karia was also considering a similar issue regarding violation of FEMA but in Vijay Karia's case, it was held that FEMA could not be said to be something which is the fundamental policy of India because the defects under FEMA are curable defects. The question which is really open and probably be considered at the subsequent stages where something is prohibited under Indian law, completely prohibited and there is no cure to it and award which directs you to do something or pay damages for not doing something which is prohibited by Indian law, can it be said to be contrary to the fundamental policy of India. This requires further, probably, NAFED says so and it would require. I mean Vijay Karia does not on a factual basis deal with such a contention. It requires further development and probably the law will develop but often the law also develops depending upon the facts of the case. We will have to wait and see.

Raj Panchmatia: Maybe the Supreme Court will consider this issue in some matter somewhere. Before I jump into the questions of the audience, any concluding remarks, 20 seconds, 30 seconds each to each panelists. Nick anything?

Nicholas Lingard: Nothing. I look forward to the questions. Thank you.

Raj Panchmatia: Sanjeev?

Sanjeev Kapoor: Nothing, Raj. Only one comment is that if we look at the evolution of arbitration and look at the judgments, you see that regime is becoming whether it's legislation or interpretation of High Courts, it's becoming more and more pro-arbitration.

Raj Panchmatia: Okay. Vivek?

Vivek Gambhir: Just one last thought to repeat what I said earlier. Don't neglect enforcement. It is as important as it is getting an award and that would be my concluding remark.

Raj Panchmatia: Gaurav?

Gaurav Joshi: I would agree with Vivek that and also with what you said. That if you are a potential claimant or you are the claimant, don't neglect the enforcement and plan from day one. Probably plan during the drafting of the agreement. If you have to think that there is a potential case which would be likely to come up, you may have disputes and you may have a claim but definitely once the arbitration commences, please plan in advance and ensure that technical grounds are not available to challenge the award. Because the moment technical grounds become available, it does take time as Nicholas

correctly pointed out. Ultimately the decision will be in your favor, if you are correct. Indian courts are very good in so far as merits of the case are concerned but it does take time and the process takes time and then it can be a bit frustrating for a foreign party who finds it that it's taken a few years to enforce the award, when they expect that enforcement should be done in a few days at a very limited cost.

Raj Panchmatia: There are quite a few questions that we have from the audience and maybe I will pick up some of them including there is one from Sunita Advani and a similar question by a couple of others who say what steps is India taking to reduce the backlog in the courts in India and what is the step that Governments are taking to bring in efficiency to increase efficiency so that the enforcement process can go ahead faster. Sanjeev, Gaurav one of you?

Gaurav Joshi: Well as far as the legislature is concerned, acts are passed, Commercial Courts Act has been passed but on ground if you just don't have adequate judges, you have huge vacancies. Appointment of judges is a time consuming process particularly to the High Court and the Supreme Court and we have so much litigation in our country. Ultimately even judges are human beings. I mean, there is a limited number of matters they can deal with. I mean, if you look at a board of a judge

on a given day, he will have 50 matters, 100 matters. If you expect any human being to dispose of so many matters in a day, it's just not possible, humanly possible. So, yes basically the number of judges has to be increased and that unfortunately it's time consuming and despite various time limits being brought in by various acts, you find that ultimately a view is taken then those are not mandatory but there are directory because it's just not practically possible to dispose of. Even if you bring in a legislation saying that enforcement should be disposed of in six months, three months, it just not practically possible and if you end up with a COVID like situation, of course it's going to become even more difficult.

Raj Panchmatia: There is a very interesting question that has come from Akriti Kataria. I understand that limitation period for enforcement of foreign award is three years but limitation period for enforcement of a domestic award is 12 years. Is this fair in your opinion? Sanjeev?

Sanjeev Kapoor: I think Justice Indu Malhotra in her recent judgment wherein they considered it and then they kind of found out and held that essentially a foreign award is on a different kind of pedestal and it's not a decree of the court in that particular sense and if it's not the decree of the court then obviously you go under Section 137 of the

Limitation Act and not 136 and 137 which is 12 years and 137 which is 3 years. Essentially there is and if you have time please go through that particular judgment it is a very well articulated judgment. I think there is a cause which has been clearly articulated as far as that particular judgment is concerned and bringing that kind of distinction. For me, I would say that there should always be a limited time for you to enforce the award because obviously you want certainty in a commercial relationship in a commercial transaction. You can't just keep it lingering for a period of so many years. So if it happens in the case of an international award, I would say that's a good beginning.

Raj Panchmatia: There is one more question. That's again an interesting question. Are awards in the bilateral investment treaty in foreseeable under the New York Convention in India? Sanjeev do you want to take that?

Sanjeev Kapoor: I would say that a New York Convention is where the seat of arbitration. It is not whether an award is under the Bilateral Investment Treaty or an Institutional or an arbitration which is ad-hoc which is seated out there. Any award which is passed in the country which is a reciprocating territory under New York Convention would be enforceable.

Raj Panchmatia: There's is one question arising from the Vijay Karia judgment which is, do you see Indian courts making use of residual discretions in refusing the enforcement as indicated in the Vijay Karia's judgment. Gaurav any thoughts?

Gaurav Joshi: Residual discretion, I think Vijay Karia's judgment is very clear on the grounds that certain grounds are mandatory. Certain grounds you have a discretion even if the ground is applicable, you still have the discretion to enforce the award. That's what Vijay Karia's judgment says. So, when they talk about residual discretion, I don't know in respect of which ground whoever the person who raised the question is referring to but the discretion is generally to enforce the award notwithstanding the fact that broadly speaking one ground is made out because the court finds that no prejudice is caused to the party. I think it does say that these are watertight grounds. So there is no question of having grounds other than the ones which are in the Section 48.

Raj Panchmatia: One more interesting question is if an arbitral award has been passed on the basis of an unsigned arbitration agreement, can the same be challenged under Section 48 during enforcement? Gaurav?

Gaurav Joshi: Well, then you have to go back to 48 and see the principle grounds. One of the grounds being that there is no arbitration agreement. So, yes you could probably say that the

award in the absence of an arbitration agreement, there was no arbitration agreement and therefore jurisdictionally speaking the arbitrator had no jurisdiction but I think that would not depend upon the applicability of the foreign law because you would not be applying the principles of Indian law what constitutes an arbitration agreement under Indian law. While seeking enforcement if the foreign law permits even an unsigned document to be recognized as an arbitration agreement subject to whatever limitations are there under that law, then Indian courts would enforce it. In fact, we had a situation like that where an unsigned document and document exchanged by correspondence, standard forms of contracts and they have been enforced in India, such awards. It depends upon the India law and whether the arbitrator point was raised before the arbitrator. What is the finding of the arbitrator if he holds that under foreign law, it's an enforceable contract. I don't see any reasons why the Indian courts should not enforce it.

Raj Panchmatia: Thank you gentlemen for your elucidated views and thoughts on issues especially concerning those who have obtained an award but are still waiting to enforce them in India and the challenges that they may probably face or they should keep in mind. I think it's an important takeaway for them. I think for me, it is that it is very important to see that when you need to give a lot of importance to your enforcement proceedings and think about enforcement from the

drafting stage to the arbitration commencement stage to the execution stage. I think it's the most important part and that's what you want to eventually achieve if you are going into arbitration because even if you succeed, you need to still enforce them. It's also been a lot of interesting thoughts that we have got on the emergency arbitration award and how they can emergency arbitrators play out their awards whether they are tribunal or not. So I think these were very interesting points that we discussed today and I think I am sure the participants have taken something from us today. I thank you all the panelists for taking your time today and giving and sharing your valuable time and thoughts on a such an interesting topic on enforcement of awards in India. I also thank MCIA and India ADR Week for organizing this India ADR week. We are quite proud and happy to be part of it. Thank you MCIA for hosting us, allowing us to host the session as well. Of course, we will try and attempt to answer all those questions which have been posed but we could not answer it right now. We will try and send a response to you in writing as far as possible. Thank you everybody for joining the session today.

Surjendu Das: Thank you all the panelists. It was a brilliant and informative session with your practical experience. All of it together made the session so lively. Gaurav your view succinctly described the restricted grounds of resisting

enforcement. Yes, these are watertight grounds under Section 48. Sanjeev's suggestion on filing enforcement in India were very helpful. Nicholas, your inputs on emergency arbitration award rather order were very informative. So did yours Sanjeev and Vivek. Enforcement is the stage where you reap the benefits of your success. So don't neglect this stage. Thank you Raj for moderating this session, your precise questions really shaped the session in fact. So that concludes the session. The next session is today at 6:00 PM. IST. The topic is Forum Selection after Brexit - Anti Suit or Anti Arbitration. So another thrilling session is awaiting. Friends, please tune in for it. Thank you all those who were watching or joining us for this session. Thank you.