MUMBAI CENTRE FOR INTERNATIONAL ARBITRATION

INDIA ADR WEEK 2021

Session hosted by:
Nishith Desai Associates

Session theme:
Curtain Raiser - Indian Arbitration Law at a Glance

Transcription of Proceedings

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Trisha Mitra: Good evening to everyone joining from different parts of the world. I'm very excited to welcome you all to the first session of the India ADR week 2021. The first session of the India ADR Week is being hosted by Nishith Desai Associates. Theme of the session will be, Indian arbitration at a glance. This is meant to be a curtain raiser event for the week. Many of the names that you see on the screen before you, they don't need an introduction, but what I will do is give a brief introduction to those on the screen. And, while we are waiting for Justice Mittal to join us in a short moment, Professor Lawrence Boo is an arbitrator, who is based in Singapore. He has been heading the arbitration chambers since its inception in 1996. Professor Boo has sat in more than 300 cases as a presiding arbitrator and as a sole arbitrator in over 200 cases. Welcome Professor Boo. Good morning, Judge Mittal.

Justice Mittal: Good morning.

Trisha Mitra: Welcome.

Justice Mittal: Thank you.

Trisha Mitra: Are you able to hear us and see us properly?

Justice Mittal: I cannot see you, but I can hear you. I apologise for this helter-skelter.

Trisha Mitra: No problems at all.

Justice Mittal: I'm just going to leave for a minute and rejoin just one moment.

Trisha Mitra: Absolutely, please.

Justice Mittal: Can you see me now?

Trisha Mitra: Very well.

Justice Mittal: Yes, please, go ahead.

Trisha Mitra: Thank you. Well, let me then take this opportunity to introduce Justice Mittal. Justice Mittal really does not need an introduction, but, again, very briefly she's had an extremely illustrious legal practice in courts and other judicial forums since 1981. Justice Mittal was invited to the bench of the Delhi High Court, first as a judge in 2004, she then took charge as the Acting Chief Justice of the Delhi High Court in 2017 and held that position until August, 2018. In August 2018, Justice Mittal was sworn in as the first woman Chief Justice of the State of Jammu & Kashmir. Currently Justice Mittal is the chairperson of the Broadcasting Content Complaints Council, Welcome Justice Mittal!. We have next, Matthew Gearing QC, who is a partner at Allen &

Overy's global arbitration group. Matthew has acted in a large number of complex and high-profile arbitrations around the world, both commercial and investment treaty. Matthew also has experience sitting as an arbitrator in a wide range of matters as both Sole and party appointed. Welcome Matthew!

Matthew Gearing: Hello and pleasure to be here.

Trisha Mitra: Now we have the hosts for the event. Vyapak Desai is a partner at the international dispute resolution and investigation practice of Nishith Desai and Associates. His vast experience includes representing clients as a counsel in a host of complex cases, including investment treaty arbitrations, commercial disputes relating to shareholders, international trade and contractual disputes across several industries. He is also a trained Mediator, Conciliator and regularly acts as an arbitrator. Welcome Vyapak!

Vyapak Desai: Thank you, Trisha.

Trisha Mitra: Lastly, but not the least at all. We have Alipak Banerjee who is leader in the international dispute resolution and investigations practice also at Nishith Desai and Associates. He represents clients in a wide range of services with a special focus on cross border and complex litigation and international commercial arbitration. Vyapak is also a steering committee member

of the Young MCIA. Welcome Vyapak. Sorry did I say Vyapak. Sorry, Welcome Alipak.

Vyapak Desai: I don't mind being part of the young arbitration, so it's okay.

Trisha Mitra: Right. Apologies for that. Welcome Alipak.

Alipak Banerjee: Thank you.

Trisha Mitra: I guess this is good moment for me to hand over the floor to both of you.

Vyapak Desai: Thanks a lot, Trisha. Thanks for that introduction. And thanks everyone for joining this session. I think, at least what I know, even as an MCIA, co-chair of the Council, this has been a tremendous effort from MCIA to hold this India ADR Week. Thanks to Madhukeshwar, Neeti and the team and to Pavni and Bhavya and others at the MCIA. Thanks to all the other law firms and supporting organizations to get this through. I think, it's truly an international ADR week, I would say, and not only India ADR Week, though hosted by India, through MCIA. So, thanks for joining. We have, excellent registration and I can see an excellent participation on this call as well. So you have a very good panel to talk about and glance on the arbitration regime in India, through last almost 20 - 30 years that we will try and,

put forward before you, but, please feel free to ask questions. There is a Q & A button. Don't put your questions on the chat button. If you can put it on the Q&A button, I would try and monitor some of the relevant questions to the relevant panelists and you will get Justice Mittal, Matt and Lawrence to really answer some of your queries otherwise. This is your opportunity, please feel free to put questions through the session and we'll try and take it as and when possible, even during the session, and definitely at the end. We will try and cover this topic in next one hour or so. This being a curtain raiser, this is the first session of the India ADR Week. We will try and keep it a little broad, to ensure that the rest of the sessions can go into some of the deeper issues and the topics. We have four sessions every day from today till Saturday. So please hold on to all the sessions, try and attend as many as you can, and I'm sure this is going to be a sea change, and a moment where arbitration regime and the knowledge around it about India and its arbitration regime is going to take a next leap. Thanks again everyone to join this session with that small introduction, I will straight away go into why the thought, to have this topic as the first session, which is Curtain Raiser - Indian arbitration law at a glance. The way we thought we wanted to deal with this session is, first we will look at some of the updates right from the 1940 to 1996 Act and latest 2015, 2019 and 2020 amendments. I think there is a lot which has happened in India in last 10 to 12 years particularly post BALCO. We will request Justice Mittal to take us through the journey of

arbitration in India. I think this is one biggest, in my view, differentiator which has taken India into the doing business in India index several notches higher. The amendments to access to judicial, adjudication, commercial acts and changes in the arbitration for enforcement of contracts has changed the image of India globally. This is one single most change that we have seen in the last few years. That's what I would request, Justice Mittal to talk about, then we would obviously go to other panelists. We would want Matt to talk about the very pertinent and latest debate going on in terms of conflict of interest at every different levels. On data privacy and confidentiality issues from Lawrence Boo and of course we'll go further on those topics and have some discussions among the panel members. That's the flow of the session and let me straight away ask Justice Mittal. Justice Mittal we have seen a huge amount of legislative amendments in last few years. We have seen huge amount of pro arbitration rulings in courts and truly the courts have gone from interference, kind of an image to supporting to arbitration image, so far as Indian arbitration system is concerned. So, over to you Justice Mittal, if you can give your take on what has happened in the last few years and what we are expecting in next few years so far as this regime is concerned.

Justice Mittal: Thank you, Vyapak. Thank you, Alipak. My greetings to friends from across the globe, I see that I will be saying either good morning to good night from the time difference that

must be there from the various participants. I will come to the time neutral greeting, which is very relevant. We talk of neutrality, mediation, we talk of independence and impartiality where arbitration is concerned, but I think neutrality is as important. I'll say a Namaskar to all the friends, from Saudi Arabia and different parts of the country. I've learnt this greeting from my time at Jammu & Kashmir. When I saw the topic, I bawled you have asked me to condense almost a decades jurisprudence which is so effusive and so wide in five minutes. So, Vyapak you will have to control me very strictly as I have been doing in court. I will also like to change the discourse from judicial interference into judicial intervention, judicial innovation and judicial initiative, so far as the jurisprudence is concerned. Getting into the topic immediately, five minutes is too less for somebody like me, who always has a lot to say, we begin with the BALCO judgment. I will apologize to my friends for not having put up slides and do some screen-sharing. If I run into citations, I will waste a lot of time. I'll just refer to the case by the widely popular name by which it is known. We are referring to the judgments of the, I will also restrict myself largely to the jurisprudence from the Supreme Court, in the context of how law has evolved and comment side-by-side on the legislative developments, which also show as to the manner in which the courts and the legislature has worked in synergy in India, so far as arbitration is concerned. We don't usually do that. We are always at loggerheads, but this is, this shows a wonderful team effort

and a wonderful team work. We begin with BALCO wherein there was a huge conflict as to Part I of the Arbitration and Conciliation Act of 1996, a game changer in India applied to arbitrations, all arbitrations that is domestic as well as international. The Supreme Court cleared that a choice of a foreign to the arbitration by the parties ordinarily meant that the parties had agreed to be bound by the curial law of the foreign jurisdiction. Also, the application of the UNCITRAL Model Law was intended to be limited to the territorial jurisdiction of the seat of arbitration. It was very clearly said that Part I of the Arbitration and Conciliation Act of 1996 applied to all arbitrations, domestic and international seated in India only. This decision therefore clearly held that courts cannot assert jurisdiction in matters pertaining to grant of interim remedies and appointment of arbitrators in foreign seated arbitrations and that the objections which were being filed to the arbitral awards foreign awards did not hold the Indian courts would have no jurisdiction to entertain an ordinary suit filed under the Code of Civil Procedure for the purpose of seeking interim relief, even with regard to foreign awards. A little later I'll touch on the way this jurisprudence has evolved. In 2013, the Supreme Court ruled that a non-signatory to an agreement arbitration agreement could be subjected to arbitration without its consent in very clear cases, where the intention of the parties, et cetera, are to be evaluated. In 2014 in the, Enercon case, the Supreme Court held that where an arbitration agreement is governed by foreign law, it

necessarily implied that the parties had intended to exclude the provisions of Part I of the Arbitration Act. That is the provisions relating to the appointment of, this was the Videocon case. I'm sorry, and exclude the provisions of Part I related to appointment of arbitrator, interim relief, et cetera. In 2018 in the MK case, the Court said that it unless absolutely necessary courts would be restricted to the record of the arbitrator. Very significantly in the Kandla Export Corporation case in 2018, the Court also ruled Supreme Court again that parties cannot use the appeal provisions of the Commercial Courts Act to bypass the provisions of the Arbitration Act. No appeal was provided under the Arbitration Act, then you could not take recourse to the provisions of the Commercial Court, appeal provisions under the Commercial Courts Act to a sale arbitral proceedings. In 2014 in the Progetto Grano Spa case was looked into by courts in an enforcement proceedings. There has been a lot of jurisprudence in India with regard to fraud and we will be dealing with it later, but in the World Sport Group case in 2014, the Court said allegations of fraud shall not act as a bar to refer parties to foreign seated arbitration. Therefore, the Supreme Court said the only exception to refer parties to foreign seated arbitrations are those mentioned under Section 45 of the Arbitration Act, clear stipulation of law. Though a very strong reading, the enunciation of the law with regard to allegations of fraud and the jurisdiction of the arbitrator or the court to deal with them came to be, this was a very contested issue, highly, you had conflict

of judgments in several cases. In the Ayyasamy case in 2016, the Supreme Court said that an appointed arbitrator in Indian seated arbitration can thoroughly examine allegations of fraud unless they were serious and complex in nature. This principle was reiterated by the Supreme Court in a latter judgment in 2018, which came to be known as the, which is known as the Ameet Lalchand case. Also there was a requirement in certain contracts and also certain laws, which requires a claimant to deposit including the arbitration to deposit a certain percentage of its claims in arbitration, prior to invocation of the arbitration provision in a judgment in 2019 ICOMM Tele Ltd. vs. Punjab State Water Supply, the Court struck down such a provision and said that, that such a provision was severable from the rest of the arbitration clause and could not be enforced on the principle of de-clogging the court system. At the same time and as I briefly mentioned the legislative development during this period. We had an enactment, old enactment of 1940, which provided a very convoluted procedure regarding the manner in which arbitrations would commence, the manner in which arbitration awards would be given. The worst stage was enforcement and objections to the arbitration in as much as it's redundant, I don't need to go into that further. But in 1996, based on the UNCITRAL Model Law, as we tried to comport to international standards, the legislature enacted the Arbitration and Conciliation Act 1996 with a clear division and recognition of the distinction between domestic arbitration, international commercial arbitration and foreign

awards. This law is very basic and its sort dealt with the enforcement only so far as they were concerned under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the New York Convention and the other enactment in India, which were related to the Geneva Convention. In 2015, very importantly, an amendment was effected giving strict timelines with regard to the scope of the arbitration and the different stages and the Court, the legislature, in fact, realized the difficulties which parties faced with regard to interim urgent interim protections, so far as foreign seated arbitrations were concerned and it was ruled that they could seek recourse and redressal, even in India. Also, the cost follow the relief principle was included and lastly, the process of enforcement and execution streamlined, but this, it seemed was not enough. We saw an amendment in 2019, which was excluding whereby international commercial arbitration was excluded from the time limit, largely because most of it was institutional and there was a soft control of the institutional rules. There was express provision on confidentiality of arbitration proceedings and immunity of the arbitrators. Also, an effort was made to prescribe minimum qualifications, accreditation of arbitrator's eligibility infact. In 2000, this also did not prove sufficient an amendment has been effected in 2021, whereby the principle of unconditional stay was ruled out and the Court was required to record a prima facie finding that the arbitration agreement or the contract which is the basis of the award or the making of the award was induced or

effected by fraud to enable the stay off an arbitration award. The provision of the, which was really contested and criticized prescription of eligibility of arbitrators was taken away. Now at the same time in 2019, we have an old question on that Vijay Drolia, the four-fold test to determine arbitrability was laid down. In 2020 in the Government of India and Vedanta dispute the Supreme Court in the winding up enforcement of a foreign award was directed and objections regarding limitation were overruled. Then in the Bharat Sanchar Limited case, the Court ruled on the applicability of the statutory provision of limitation for filing an application for appointment of an arbitrator. But important is the Vijay Karia judgment in 2020 whereby the Supreme Court expanded and expounded on the what is the meaning of the fundamental policy of India which is an essential and accepted ground for objecting to the maintainability and enforceability of an arbitration award and restricted it to its definition as expressed in statutes as well as the time-honored principles. Again in 2020 in BGS SGS Soma case, the designations, the Court ruled that the designation of a venue in the arbitration agreement can actually indicate the seat of arbitration and that very valuable decision. This shows that the Supreme Court of India and I am not even referred to the High Courts. The wonderful jurisprudence which has flown from the Bombay High Court and the Delhi High Court showing that the Courts are completely in favor of leaving arbitration, arbitrators to continue to work independently, not only the arbitrators, but also the entire

process and the parties to work independently and the manner in which arbitration is growing leaps and bounds shows that it's reference to an alternate dispute resolution is a complete misnomer so far as India is concerned and commercial relations are concerned. Availability of an effective dispute resolution mechanism is an essential part of access to justice to parties. It is wonderful that the manner in which arbitration provides a forum where parties choose who will help them in resolution of the dispute. Thank you.

Vyapak Desai: No, thanks a lot Justice Mittal and I am so sorry. There is so much to talk about, I think just the updates could have taken a couple of hours to talk, but I think thanks a lot. I think participants would have got a whirlwind view of what has happened in last 10-12 years. There is a lot but if I may summarize, I think what has happened through jurisprudence, the very basics of arbitration whether it is competence-competence principle, a minimum interference and maximum support, the way our Indian Government talks about in terms of their governance, but even from a jurisprudence considered, I think arbitration has also been given that kind of an independence to deal with and truly we are moving from an aspect where arbitration is not just an alternate dispute resolution, in my view. It is a parallel dispute resolution in a real sense because alternate dispute resolution gives a little different meaning saying that ok the first approach is Court and then there is an alternate. I would treat this as a

parallel dispute resolution mechanism. That's what our Courts have… Let me go to Alipak to take these discussions forward. Alipak over to you.

Alipak Banerjee: Thank you Vyapak. The next topic is conflict of interest in international arbitration. As the topic suggests, this is of course of great interest in today's context especially with the UK Supreme Court's decision in Halliburton vs Chub last year. I will briefly set out the Indian context in a minute or so and then I will request Mr. Matthew Gearing and Professor Boo to share their views on this topic. Now, I think when we talk of conflict of interest, the first thing which comes to our mind is the IBA Guidelines which prescribes the general standards regarding impartiality, independence and disclosure in arbitral appointments. These guidelines are commonly used by the arbitrators when making decisions about the prospective appointments and disclosures by the parties and their counsel in the assessment of impartiality and independence and by the institutions and courts in considering challenges to the arbitrators. Now, India is one of the few countries to have actually incorporated such standards in the domestic law. This was done in 2015 by way of the arbitration amendments where Fifth and Seventh Schedule was introduced in the Arbitration Act. Now, Section 12 of the Act also provides some guidance. It sets out that when a person is approached for arbitrary appointment, he shall disclose in writing such as the existence of either direct

or indirect of any past-present relationship with or without or interest in any of the parties or in relation to the subject matter of the dispute whether financial business professional or any crime. The Fifth schedule, it sets out various instances that gives rise to justifiable doubts as to the independence and impartiality of the arbitrator and the Seventh schedule of course prescribes the direct ineligibility of the arbitrator where if your matter comes in then you are ineligible. Subsequently there have been a couple of decisions by Supreme Court on this issue which we will discuss some other day. Most specifically entry number 22 of the Fifth Schedule, it prescribes that justifiable doubt as to impartiality and independence maybe inferred if the arbitrator has within the past three years been appointed as an arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties. Similarly entry 24 of the Fifth Schedule also stipulates that the arbitrator currently, there could be a reason for conflict if the arbitrator currently serves or has served within the past three years as an arbitrator in another arbitration on a related issue involving one or more parties or an affiliate of one of the parties. This is where the Indian law is. I think in last post 2015 amendment, we have, I mean, these schedules have been brought in place. It has improved the overall conflict situation in India. With this background, may I request Mr. Gearing to share his views on three aspects broadly one is double hatting. I mean, there could be various issues of conflict when you act as a counsel vis-a-vis the arbitrator, law

firm conflicts tainting arbitrators and number three the linkage with third party funders as well. So over to you, Mr. Gearing.

Matthew Gearing: Alipak, thank you very much. Thank you very much for the invitation from your firm and also from the MCIA to join this session. It's good to see some familiar faces on the screen. In particular, obviously Professor Boo who we have come across each other quite a few times in the context of different arbitrations over the years. I will just say something very briefly about those three points you mentioned. Before I do, I think I agree, I want to agree with you that the introduction into Indian arbitration law of the IBA Guidelines in 2015-2016 statutory development has been a good thing in India because it has bought things, it has caused India to take a considerable step forward in terms of transparency of arbitrators and in terms of the parties knowing who the arbitrators are and everything the arbitrators embraced before they agreed to take them because of course before then as has been alluded to there were, I wouldn't say there were lower standards, but I think they were quite different standards in terms of how, what an arbitrator felt that he or she needed to disclose to the parties before accepting appointment. Certainly, in the context of Indian Governmental contracts, you had some cases and I came across one or two of them where the Indian Government would seek to appoint civil servants or people with direct links with the Indian Government to arbitrate disputes. Obviously in the context of international

arbitration standards of independence and impartiality that would be unacceptable. Three points, I am not going touch on Halliburton and Chub because I think Professor Boo will deal with that but just three brief points in terms of rather than looking back but looking forward as you said Alipak. First of all, double hatting arbitrator and counsel and what is that? Well, that is what it says it is. That is where you have someone who at the same time acts as arbitrator in a number of cases and also acts as counsel in a number of cases. Why is it a problem? Well, why might it be a problem? Well, the reason it might be a problem is because the arbitrator may be deciding issues that he may have issues before him or her which he is also advocating as counsel. And in certain cases, it may be perceived that the arbitrator's decision is influenced by a position that it's in his client's best interest to take when acting as counsel. In other words, he or she is wearing two hats. Now, that's been particularly sensitive in the context of investment treaty arbitration much less so in the context of international commercial arbitration. I think that's mainly because in international commercial arbitration, there is far less transparency. These issues don't come to light. I think, where they are less whether if there was an open field if you like and everybody knew in terms the way you do in Courts what everybody was doing then double hatting might become more of an issue in the context of, I wouldn't say ordinary but non-investment treaty arbitration, international commercial arbitration. Now in India, this has been less of an issue, I think

largely because arbitrators and counsel haven't been double hatting in quite the same way and particularly I think because in India certainly up until recently and I think it is still largely the practice, the parties have the Indian parties where either they appoint international arbitrators which increasingly they do or if they appoint Indian arbitrators they tend to appoint retired judges, senior retired judges. If they do that then the senior retired judge is unlikely to be or won't not be acting as counsel in the context of any or many cases but in the context of now any development and I think a bit of a move or a bit of certainly discussions about whether Indian parties should be appointing partners in Indian law firms or active counsel in the context of international commercial arbitration. In other words, whether India starts to adopt more international practices in this regard then that will become more of an issue. The second point really flows from the first which is law firm conflicts tainting arbitrators. When you are a partner in a large law firm, as I currently am and only now for a few more weeks before I join the bar, but when you are a partner in an international law firm and you are approached to act as arbitrator in the context of a case and very often you will obviously you will search your firm's conflict database and there will be some sort of often quite remote potential issue or conflict in terms of or perceived conflict in terms of the fact that your firm, not you but someone in your firm in another office in another country acted for an affiliate of one of the parties four or five years ago. Now,

obviously you need to disclose all of that. The question is how much of that impugns your own independence and impartiality and the IBA Guidelines touch on law firm conflicts to an extent and there has been quite a lot of jurisprudence as well in recent times. As I think as I said, as I think will happen as partners in Indian law firms start to act as arbitrator more rather than just as counsel in the context of international arbitration, then how you approach those sorts of conflicts more become an issue that needs to be grappled within the Indian context and the third point very briefly which is we are now seeing quite a lot at least I haven't yet seen it Indian context, but I've seen it a number of times and Professor Boo would have seen it, I'm sure outside of the Indian context, is whether an arbitrator, arbitrators now and counsel are developing links with their party funders. Now those links are effectively two-fold, or they could be threefold, but essentially two-fold. One, of course, we all know that third party funders, we have connections with third party funders and they come to us in the context sometimes of bringing instructions to us or also hoping that we will take instructions to third party to them. We will have a case where the client can't necessarily afford to pursue the case or doesn't wish to carry on the and therefore, we will know to team up with one of them. We have our own commercial connections if you like, nothing necessarily formal, but there are now, there's now quite a network of connections between third party funders and counsel in the context of international commercial arbitration, not least because a lot

of people who now work for third party funders used to work in the big law firms doing international commercial arbitration. And, on a second level a number of prominent international arbitrators or counsel in international arbitration act, or act as advisors, formal advisors, or sit on advisory boards or bodies connected with funders. Now, if you do that, which you can do, you are perfectly free to do, can you then act in a case where that funder has an interest you certainly need to disclose it. But, if you have a connection with the funder are you then prohibited from having any involvement or should you be prohibited from having any involvement as an arbitrator in a case where that funder is funding or connected with, one of the parties to the litigation. Very much like, Justice Mittal, I could speak much greater length about those three points, but Alipak I hope that was helpful but very fast run to the three.

Alipak Banerjee: Thank you very much for sharing such insightful situations, at least as you rightly pointed some of these issues are not very common in India because, I mean in about 75 to 80% of the cases we appoint are retired judges as arbitrators. At least on the first point, these issues never come and on the other issues again funding arrangements are, we are at a very early stage in India. So, I'm sure these issues will come going forward but it is always helpful to know of such things in advance.

Matthew Gearing: Alipak, can I just ask you one question then. To break the flow, I would just ask you one question. When you say that you appoint 75 to 80% of your appointees, assuming for Indian parties are retired judges, is that changing? Because the reason I ask is that in recent, I mean I have been involved in Indian arbitrations for quite some time, but in recent years I have been involved in discussions or where Indian parties thinks that they might at least appoint a practicing counsel, or a partner or a senior lawyer in a law firm. I don't think it happened five years ago, but there have been some discussions more like that in the last five years. What's your view and experience on that?

Alipak Banerjee: I think, thanks to institutions like MCIA, I mean Mathew you're very right, five years back had you asked me this question, I would say 90% of the cases we appoint retired judges. I mean, firstly because our judges, I mean at least in Indian context they are extremely superior quality, they have seen the process, they understand how Indian parties react and they can control the process, the arbitral process, But things are changing in last five years, thanks to institutions like MCIA, where over and above the retired judges, various practitioners, both international as well as domestic they have all been empaneled. Even when we have a discussion with the clients, if we were to suggest five names we provide a balance of retired judges as well as counsels both international and domestic.

Justice Mittal: Can I add a point here?

Vyapak Desai: Yeah, infact I was going to come to you madam, we had this discussion yesterday and you had a view on this.

Justice Mittal: So far as judges are concerned, you know, there's an automatic credibility and a trust element. There's no deficit, so far as that area is concerned. Second advantage is the judges are trained in the aspect of decision-making. The limitation which I pointed out to Vyapak yesterday and I requested him that he should do a similar conference restricted to participation by arbitrators and train judges in the art of arbitration. For instance, a judge who was a lawyer who came from the bar and has worked only in the constitutional law or service jurisprudence or criminal law will never have examined the contract act or the transfer of property act or the specific relief act. You begin learning after you have retired from the highest court of the country. They are doing very well. The Indian judges are doing very well. But, you know, it would be much easier for everybody, especially the parties and I think it's very useful to do some kind of a training in the process. I don't want to go on more. Vyapak, over to you.

Vyapak Desai: Yes, I agree. We had a long chat yesterday on this topic and I think your views were very open-minded in that sense. I also agree, I think it's not about inclusion or exclusion of a

certain kind of arbitrators right. I think there is a real advantage of having retired judges because as you rightly said there is, they manage 200 cases a day. How long it can take to end an arbitration, which is just two, three, four arbitrations in a year, right. So I think there is a huge advantage of judicial mind by dealing those cases. I think what possibly is required is a little bit of a mindset issue or an approach issue, right, where looking, when you sit and adjudicate in a Court the aspects are a little different than in an arbitration. I think those are very small and minor tweaks which may be required. And we are seeing over a period of time, I think more and more that we are getting an excellent support from that community which compared to other countries we have a huge requirement in any case. We have millions of cases which can go to arbitrations and not few hundreds what other countries talk about. I think there is a huge amount of demand. It's only a question of how we are able to consistently apply some of the basic tenets of arbitration and that's about it. I don't think we require any exclusion or inclusion in that sense. Whoever is trained, I think is welcome in the process but I don't want to again take too long on this and maybe Alipak you can bring in Professor Boo and back to our discussions and thank you, Justice Mittal for giving your inputs.

Alipak Banerjee: Thank you. So Professor Boo if I may now come to you, please share some lights on the broad IBA Guidelines and also you have acted as an arbitrator in about 300 cases share your

experience. If at the end you could share some light on the recent UK Supreme Court's decision in Halliburton vs Chub, we shall be so grateful. Over to you Professor Boo.

Prof Boo: Thank you. Thank you, Alipak. Thank you, Judge. Thank you, Matt. Vyapak, for including me. I am an outlier, I am glad that I am able to join you today because, just to add onto the judge and non-judge qualification, I think they all add to the menu that the disputants can choose from. I, I think there's no disqualification or pre-qualification for being an arbitrator. But coming back to conflict of interest. I think Alipak alluded to it earlier and gave us actually a quick overview of what the IBA Guidelines are. Let me first just say that it is a very useful tool outside of India. Within India, you have your Schedule Five and Seven Schedule which gives very clear guidelines to the parties, to counsel as well as to the court as to how to deal with a certain situation, the duty to disclose and the duty and the level of proof, in other words, once justifiable doubts as to one's lack of impartiality, independence. So IBA Guidelines are not law, like what you have in India. It is a Guideline. It is meant to help parties in international arbitration, arbitrators in particular to identify areas, aspects of, situations, which they got to make disclosures. At the same time, you also guide the courts when dealing or and tribunals when dealing with issues of conflict of interest whether they should recuse or not. They set the proper standard from which international arbitration outside

India can look to. It promotes consistency and unnecessary challenges so that arbitrators themselves can be educated in those aspects and can then therefore make proper disclosure and conduct arbitration in a way that will not be disturbed by the parties. Of course simply put the list, the IBA Guidelines - four lists, the waivable Red list, the non-waivable Red list, the orange list which is Amber and then of course the Green list. It's like the traffic light, Red List - Stop, don't go, don't continue. Be aware. Okay, you shouldn't cross a red light. So red is warning. I mean, sometimes even if it's red, it may be waivable, but the party who, the only parties who can wave it are the parties, the only people who can waive the right for you to continue as an arbitrator, accept your appointment are the parties. They must agree and they must do so with full knowledge, with full transparency of what the situation is and the circumstance and the consequences of such a waiver. They must only in those situations can Red lists situations can be waived. Orange of course means Amber. Be careful. It doesn't mean go faster. It means you got to slow down and watch and look at a situation, open your eyes and see, is it, will it give rise to doubts as to the impartiality and independence. Green list means go ahead, nothing wrong. You don't need to disclose and you can drive on. Okay. Disclosure or lack of disclosure does not mean disqualification under the IBA Guidelines, but of course, under Indian law you have a Schedule five for disclosure and Schedule Seven for what amounts to possible challenges. Once you fall into those categories the court

may remove you or disqualify you. Here, this is in short what the IBA Guidelines are, it's not law. Okay. Just to make it clear, I must say the IBA Guidelines have to be adopted. In fact, every arbitration I have, in my Procedural Order No 1, we will always remind parties IBA Guidelines, we also adopt the other IBA Rules on conflict of taking of evidence international arbitration and courts in Singapore and in many countries also have made reference to the IBA Guidelines in terms of its, whenever there is a need to, whenever there's an issue of challenge of arbitral independence and impartiality. Talking about the Halliburton case against Chubb. This is quite a recent case. It is quite a common issue actually in England where arbitrators in shipping and in commodities trade often not double hat, but they do multiple arbitrations at the same time involving sometimes the same parties. In that case, it is a case is a shipping related casualty. In other words, there is a casualty in the sea. I think it was the explosion and the Presiding Arbitrator was, in this, in one case between Halliburton and Chubb was appointed as a Chair. He was a presiding arbitrator. He subsequently was appointed in two other arbitrations in which Chubb was also the respondent and arising out of the same incident, same casualty. And he did not make the disclosure. He subsequently when he was asked about it, he then accepted that he breached the obligation. He has forgotten to, he forgot to disclose it to Halliburton. So, so the challenge then is should he continue with the arbitration, which has he breached since he has breached his obligation of disclosure, he

should, he was asked to, he was challenged. He offered to resign, but the matter went to the court and the court had to decide whether he actually lacked impartiality. The court made two important ruling in my view. That is when assessing whether the arbitrator lacked impartiality, the time to assess is the time when the challenge is made at the Court. Okay. I think that means the court rule that having considered his apology, having considered the fact that he has not made secret financial arrangement with Chubb, having considered that he's he come, he finally disclosed and he has, he said that he had forgotten, it's a lapse of memory. Therefore, he was forgiven in that sense by the Supreme Court. And he was not removed, okay. The other observation, the Supreme court made, I think also its relation to all these multiple appointments by arbitrators primarily actually those in LMAA and those GAFTA kind of arbitration. In this particular case, it was not, so the court reminds everybody that reminded everyone that in cases where it is not the LMAA or the GAFTA kind of arbitration, where it is industry practice to have an arbitrator being appointed to the same kind of case, the same kind of a related transaction or to have been appointed by the same party several times, it's not a big issue. In those cases, unless that there is such a practice it is incumbent on the arbitrator that when he's appointed in, earlier in by the same party or later by the same party, whether involved in the same transaction or not should make that disclosure. I think the court is sounding a warning or a good reminder to arbitrators. But what

I find disturbing is that the courts seem to accept that in the GAFTA and LMAA arbitration it should be acceptable. I think this creates an exception for it. I think this will not do it outside London, outside of LMAA or GAFTA arbitration. In fact, if it, if the same scenario would have played out in India before Indian courts, I think the result might be different. I would say that's all I have on the…

Vyapak Desai: Yeah. Thank you. Thanks a lot for that very important aspects on conflict in India. Obviously we still are grappling with these issues and I'm sure this will help the jurisprudence to grow on that. Let me take your two or three minutes time very quickly on the other important aspect which India is still grappling with which is data privacy and confidentiality. I know we are running little short of time, but, that's an important topic and I would want you to at least give your thought process as to how arbitration proceedings will get affected by some of those aspects. We'll share the screen, you have one or two slides. So, Alipak, if you can share the screen.

Prof Boo: Let me just start by saying, I know the crave for personal privacy started only in 2007, but with the data privacy day in Europe and soon it snowballed into a worldwide movement. I think the bill should be up, I don't know when, hopefully it will be passed and it uses a personal data. What is personal data? Personal data, it means anything that any data that is that can

identify a person, his family, his phone number, any information is personal data and that personal data when it's in your hands, you're allowed only to use it for the purpose it was given to you. I mean, for example will be today, for those of you who have registered for the seminar today would have given an email address, your firm's address, sometimes your phone number. Sometimes maybe if you are, if you have to pay for that, I'm not sure where they're paying for it, but it's your pay for it, your VISA card number. These are all these are personal data which the law intends to protect the people who are in possession of that data must carefully defend and protect the use of that data. And in the legislation has been passed all over the world is intended to protect individuals from any improper use of their personal information. Okay. So that is the gist of personal data protection. The duty is therefore on anyone who receives such data and in arbitration, we are, you will find that there are many people, the arbitrator, the lawyer, the counsel, the parties, the witnesses, the people who are doing the document management system, the transcription team, the interpreter, there are so many people who are privy therefore and giving information of who is present, who is involved all this personal information that if it is not controlled or not secured, it can be a breach of the personal data protection laws in different countries. Fortunately, many legislation permits the use of such data if they consent to it. Yeah. They consent to it. In other words, when you sign up for this and you are asked can we use your personal data for your

information you have given to us for other purpose in our advertising or promotion, then you sign it. If you say, yes, means that you have consented to it. At the same time, there are also the laws, most laws and legislation also provide for exceptions. Exceptions, for example, in India you have made exceptions for security issues, public order, crime prevention, investigation, sometimes journalistic pursuits, research purposes. For us in Singapore, we also even protect data, personal data, sorry lift the protection for personal data, if there are historical reasons why we should fine and transmit those information for archival and historical purposes. There's one clear exception that applies to us in arbitration, In India, in Singapore is the exception for use in tacking of evidence and in court, as well as arbitral process. I think here in India you have a specific Section, Section 36 I think. Can we share that 36, which is the, under your Bill, new Bill in India, Section 36 talks about disclosure of personal data is necessarily for enforcing any right or claim and seeking any relief or defending any charge, all posing or defending, therefore any impending proceedings. Proceedings, I believe should include arbitration before the arbitral tribunal. Unfortunately, I couldn't find a definition of tribunal in your current Indian Bill. It would be good if it defines tribunals to include arbitral tribunals. There is a definition for the pure tribunals, which refers to something else that comes out of the personal protection tribunal. But it has got no definition who a tribunal is in India or who the pending legal proceedings include. Does it include

legal proceedings before a tribunal. Okay, so here you are set. On the face of it seems that those of us who are involved in arbitration need not be worried about it, but it's untrue. What I just said earlier, while the arbitration itself, the being, not an entity or an individual, it is a process, in the process of arbitration you can use all this personal data, but those of us who are involved in arbitration has an additional duty and that we cannot pass on that data to any third party, except for the use in arbitration. So in cases it gets very complicated, especially in international arbitration because each of us are subject to the personal data protection laws in different countries. The country I come from Singapore, there's a Singapore set of laws. You are from India, you have Indian laws, and you have the interpreters, you have the parties, you have the witnesses, they all from different jurisdiction. They all have their personal data protection laws. They are now creeping into to control what they can say, what they can keep and that, if they keep in computer systems and must make sure they are secure and that no one will be hacked, hack into it to cause the data to be lost to third parties. So this is what becomes a bit more complicated. For me, I believe that an arbitration administered by an institution, the institution can take charge of that aspect. The institution can cover protocols. You can, it can come up with some guidelines as to how to regulate the confusing affairs when so many parties are involved and subject to mandatory laws, personal protection laws are mandatory. Okay. It's all personal to us. It's mandatory is

imposed on us by the state. Whether your arbitration is in Singapore, in India, in London we all are subject to this. So it becomes a little bit difficult. Of course it is good for us. The arbitral tribunal maybe should get consent from all the arbitrators from all the counsels, from all the parties, from all the witnesses, but imagine everyone having to seek consent for each other, the best thing is to have a document which everybody agrees to. I think, what initiative one initiative I think is laudable is the LCIA. LCIA came out with the Article 30 A in their new Rules, which I think is also on screen for you, where it talks about, they make a provision on data protection. They are aware that in international arbitration there will be so many people involved and therefore it is necessary for the tribunal to make, I think measures to ensure that data is protected and not misuse or abuse. The only thing I thought I wanted to say that while it is good, what LCIA did was it put it in Rules, they put it by crafting in the form of Rules. By doing so, what, and if you look at the Rule itself, it requires actually the tribunal to assist the tribunal shall consider whether it's appropriate to adopt measures. At the same time, it also says that the LCIA may issue directions which shall be binding relating to data security, data protection and security. So once you put such a measure in the Rules and power in the Rules and obligation, mandatory obligation on the tribunal and when the LCIA makes a decision is binding on the parties a little complication may arise. That is what if there's a breach or non-compliance, does it not or subsequently

affect or give rise to a situation where you say that the award maybe challenged or maybe impugned because it is breached the Rules of LCIA and therefore it is the award was not made in accordance with the agreement of the parties or the agreed procedure of the arbitration. This is the problem I see in LCIA. I think it will be wiser for an institution to actually come up with, once to control data protection and security to not make the same mistake but to actually come up practice directions. So can be Registrar's direction or the Chairman's direction. Whatever it is, practice guides, to say, which will be outside of the Rules of procedure. Otherwise it can be a little bit complicated and for the tribunal if I were to be involved, if I am now intending now to actually adopt the administrative direction, let's say, a procedural order, make an administrative direction in relation to such matters separately, rather than to put it in the Procedural Order No 1. I think it will be a mistake to put it in Procedural Order No 1 or any other Procedural Order. I will draft an administrative direction using the excellent guide in the IBA. IBA has another publication that, a draft consultation paper, they are published in February, 2020. It's not meant for citation, but if you go online and search it, you should be able find. There is an excellent format there that recommends the possible directions to be given. And I think that is a good line I would personally adopt it. Thank you.

Vyapak Desai: Thank you, Mr. Boo.

Prof Boo: I was running like a train.

Vyapak Desai: No, but that is important. At least we are introducing two or three very important topics, which requires much larger debate going forward. We are also answering a lot of Q&A on the Q&A chat itself. So I hope, we'll try and answer as many as possible. I'm taking inputs from the other panel members as well. Please bear with us if some of the questions are not answered, but we'll definitely try and answer offline as well. Considering the time restraints, I think we have few minutes left. Alipak, if you want to take the last couple of questions and I would also then invite each panel member to give their general comment to end the session. So over to you Alipak and then we can move to final comments.

Alipak Banerjee: I think one topic which we wanted to discuss briefly was the use of technology. I mean, we are all in a pandemic situation and on this point, maybe I would request Mr. Gearing to share his views. I mean, he was telling us that he has had a great amount of Indian experience as well, to share maybe briefly in one or two minutes his experience and then we'll come to Professor Boo as well.

Matthew Gearing: Yes, Alipak. I think and Lawrence it was extremely interesting on data protection. There' has been massive

new laws, as you say, around the world and keeping abreast of those laws is actually extremely tricky as you are alluding to when you are dealing with a case that touches on a jurisdiction that you're perhaps not as familiar with. You realize that now there is a new data privacy or data protection regime in place in that jurisdiction. How do you deal with that in the context of your arbitration? Alipak, just very briefly in the context of virtual hearings, I mean, put shortly in order to keep the wheels of international arbitration turning during the COVID pandemic, we've all had to get used to doing lots of hearings like this. I've done many hearings in this room for many days as we have all as we will have all done. And there's a huge debate about that and about the appropriateness of virtual hearings. I think, very shortly virtual hearings work extremely well where parties, where parties have access to very good technology, et cetera. There's a very live debate about, whether or to what extent you can conduct very long and complex matters through virtual hearings matters that last 10, 15, 20, 22 days in a recent example. Can you do all of that by zoom? Well, I think the answer is there in certain cases, yes, you have to. Because that's the only way of getting the matter done in a relatively reasonable time frame. But in the context specifically of India, there is a question as to and other countries but particularly in India as to whether in the context of more complex matters how well virtual hearings work where you have witnesses spread far and wide. Particularly if internet connections are not as good as they might be in other places or

people don't have access to the appropriate facilities or quiet rooms to give evidence from. Now that is an issue all over the world but it is also an issue in the Indian context. When you're a tribunal you're balancing all that, sitting on a tribunal you are balancing all these competing considerations of fairness with the understandable desire and the duty to complete the matter as soon as you reasonably can. That's all I would say in that context.

Alipak Banerjee: Sure. Thank you. Moving on, I think we have really run out of time but moving on maybe Professor Boo your thoughts on use of technology, especially in the context of a cross-examination of witnesses. After that I will come to Justice Mittal for her closing comments and on some of the aspects which, I mean some of the new issues which the Courts are dealing with at this point, arbitrability, emergency arbitration, I will request her to share some minutes, a few minutes on that. Professor Boo, first.

Prof Boo: Thank you. Of course. I must first say that I have sitting as an arbitrator. I'm not involved with cross examination except maybe in a witness conferencing, which I conduct very often when it comes to sitting in arbitration. I must say that I have not really encountered much difficulty in that aspect, though I have heard that some counsel are suggesting that no it's difficult to look into the eyes of the witness or see his expression. In fact I think once on remote, like on video, you can see the

expression of the witnesses even clearer because there are full frontal in their face and we can see it better. I don't think there's a disadvantage. Maybe to counsel who may not be able to see the body language as well as in a live situation. But I don't see that as a disadvantage. I think the only downside in my personal experience is that, it's the long sitting hours before a screen and sitting at odd hours across time zones. And sometimes long hearings can give you a jet lag without traveling. That's the only complaint I have. Otherwise I see no downside, the only downside possibly might be video connectivity issues or operator efficiency. If the operator, whoever operating the web, the system, whether it's zoom, voof in China, Teams, WebEx, but not Skype. I don't use Skype. They all work very well operated well and there's good connectivity.

Alipak Banerjee: Thank you professor Boo. Over to you Justice Mittal. I think two issues which we wanted to discuss, one was of course arbitrability and the Supreme Court decision is Vidya Drolia and the second one is, of course the law is emerging. I think they have had a single judge of Delhi High Court opined that emergency arbitration award is akin to an interim order under Section 17 of the Act. Yes, of course the matter is pending before the Division Bench and maybe it will subsequently go to Supreme Court. So these are the two aspects, if you can briefly share your thoughts with us, we shall be very grateful.

Justice Mittal: You know, you have 11 questions in the chat box and we are 15 minutes out of time. So, instead of going into arbitrability generally, I will just advert to what the Supreme Court has said on what is arbitrability. One is that there is important finding that some issues regarding arbitrability can be need to be decided by the court whereas others would be left to the arbitration arbitral tribunal, the competence-competence principles. The <inaudible> which have been held, which are non-arbitrable will include insolvency intra-company disputes, mostly because they're considered disputes which are actions in rem matters regarding testamentary issues, wills, bequeaths, patents and registration of trademark issues. All of these are held to a have been opined to be exclusive matters falling within the sovereign government functions. The principle is though the ominous effect of the adjudication in these cases. Then disputes which arise under specific legislations, which were a forum is created, matrimonial disputes, et cetera have been held to be non-arbitrable. Landlord, Vidya Drolia raised a huge issue with respect to arbitrability of a landlord tenant dispute. The Supreme Court going by the general principle laid down held that the landlord tenant relationship which arose out of the application of the Transfer of Property Act was arbitrable because there was no statutory prohibition to the arbitration. However, the landmark tenant dispute which was covered under specific landlord tenant or rent legislation had to go before the rent control legislation had to go before the Court itself, rent tribunal. And, so far as this

landlord tenant dispute under the Transfer of Property Act are concerned, the Court held that these decided subordinate rights in personnem that arise from rights and they're not deciding rights in rem and awards passed in a landlord tenant dispute under the Transfer of Property Act would be executed. The Act, TPA, Transfer of Property Act did not bar the arbitrability plus the Act had a public purpose. Now, so far as arbitrability the issue regarding arbitrability is concerned, the power of judicial review of the court was very limited. However, the principle of severability and competence-competence mandated that the arbitrary tribunal was the preferred authority to determine and decide all questions of arbitrability. So when the issue is raised before the Court, the Court has to decide on demeanour.

Alipak Banerjee: I think Justice Mittal got disconnected. I think, we have now, if she joins back, I think, will request her to complete her thoughts, but I think we've run out of time. Maybe we can quickly come to Professor Boo and Mr. Matt for the closing comments. So Mr. Gearing, any closing comments I know we had to also discuss the issues in confidentiality of arbitration but due to paucity of time, we could not discuss that. But anything you want to add as your last comment and then we'll after that we will come to Professor Boo.

Matthew Gearing: Yes, Justice Mittal, the fact that she has come and go once or twice does sometimes show the issues of virtual

hearings, at least we are demonstrating that in a live way. Nothing else to say in the light at the time, thank you very much for the invitation and to my fellow panelists and to everyone who has logged on. Thank you

Prof Boo: Thank you, Alipak. I share Matt's observation. I think one of the weaknesses of course is with connectivity and operator in this particular case of course is purely connectivity. And I probably have not addressed the issue of how a tribunal would deal with challenges arising out of data protection laws. I say, I suggested earlier in my view that data protection is administrative and therefore should not be part of the proceeding of the arbitration. I have tried to separate that once you separate that, I think it's easier to handle. Thank you.

Alipak Banerjee: Sure. I think there are a lot of questions. What we will do is we will request MCIA to give us these questions.

Vyapak Desai: Yeah. Also, I think while there are 7-8 questions unanswered, we have answered more than 17-18. We have tried to answer as much as we can and we will endeavor to answer the remaining questions offline but thanks a lot for an excellent participation. We had possibly more than 250, I don't know, unique participants in this program, which is the first one. That shows how successful this India ADR Week is going to be. And thank you to our panelists.

Matthew Gearing: We have lost him now.

Justice Mittal: Alipak you please go ahead. I have finished my time. I think it's not fair to the other speakers and the other. I just wanted to end with the fact that our statutory provisions lack the emergency orders provision, though it has been said that even a foreign party can approach the court for an interim order and seek interim orders and more and more judgments now and courts are upholding and giving due respect to emergency orders which are being passed in foreign arbitrations. Alipak, please go ahead.

Alipak Banerjee: Thank you so much, ma'am. Thank you everyone. Thank you, Professor Boo, Mr. Gearing and ma'am and all the audience for your participation. I will hand over the session to now Trisha who will say the vote of thanks and we will close the proceedings. Thank you.

Trisha Mitra: Thank you very much Alipak. What an opening session this has been. We have had the benefit of having perspectives from the judiciary, from practitioners in India, from practitioners outside India with an interest in India. We really covered the lay of the land. Haven't we? We have discussed the evolution of judicial pronouncements in India relating to arbitration, legislative changes in India, relating to arbitration, we have discussed topical issues such as conflicts of interest, data

privacy, arbitrability. I think that we are off to a good start for the India ADR Week. Let me take this opportunity to thank all our speakers, Matthew, Professor Boo, Justice Mittal and of course the host for the session, Vyapak and Alipak and Nishith Desai Associates. I would request our audience to stay on for the next session which is going to be hosted by FTI Consulting. The topic of that session is the road less traveled on damages assessment, date of assessment, tax, interests and COVID. As a last remark, housekeeping point I have been informed that all sessions will be recorded. For those of you who might not be able to attend one or the other session, please do go online to check out the recordings of the sessions. On that note, thank you very much. I wish, I hope that you enjoy the rest of the ADR week.