MUMBAI CENTRE FOR INTERNATIONAL ARBITRATION

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Session hosted by:
Shardul Amarchand Mangaldas

Session theme:
Practical Tips for making India seated arbitration awards challenge-proof

Transcription of Proceedings

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Yuet Min: A very warm welcome to the second session for today hosted by the esteemed firm Shardul Amarchand Mangaldas. My name is Yuet Min. I am a partner at Drew and Napier in Singapore. I am also part of the Young MCIA steering committee. This afternoon we are very honored to have with us a distinguished panel of speakers. For this session called the practical tips for making India seated arbitration awards challenge proof. We have with us first Ms. Ila Kapoor who is a partner at our host firm. Ms. Kapoor has extensive experience in arbitration under all the major arbitration rules including ICSID, SIAC and ICC. We also have with us Mr. Rishab Gupta who is a partner also at our host firm. Mr. Gupta lists in the firm's arbitration practice in Mumbai and is regularly recognized in Who's Who Legal in the area of arbitration. Also joining us this afternoon is Mr. Sapan Gupta, General Counsel of Arcelor Mittal Nippon Steel. Mr. Gupta was formally also a partner at our host firm. Moderating this afternoon session is Ms. Shruti Sabharwal. Ms. Sabharwal works extensively in the infrastructure and construction sector and she will be navigating with us on the topic for today. Last but not least we have Mr. Tejas Karia who is head of arbitration at Shardul Amarchand Mangaldas. Mr. Karia is listed in Who's Who Legal arbitration as a global leader. We may also be joined later on in the session by Mr. Gopal Jain, senior advocate who is currently held up in court. Without further ado, I will hand

the session over to Shruti. I should mention to everyone that this session is being recorded as well as transcribed.

Shruti Sabharwal: Thank you so much Yuet. Thank you everyone for joining us today. The topic as you had mentioned is practical tips to prevent a setting aside of an India seated award and the session hopefully is aimed to consider what are the steps or risks that could be minimized at the setting aside stage from the perspective of a party of a counsel and of an arbitrator. With that let's get right to it. A very common ground we see in a Section 34 petition is that a party will allege that the tribunal was not constituted as per the parties' agreement. This normally comes down to the way parties drafted their agreement in the contract in the first place. My first question if I could, is directed to Sapan. Sapan as a transactions lawyer, do you feel that arbitration clauses are still midnight clauses? Are they only considered at the fag end of negotiations? And what does the party determine when it is choosing whether the tribunals should be a sole arbitrator or a three member?

Sapan Gupta: Thanks Shruti. Thanks MCIA and co-panelists for having this panel today. Shruti in terms of the dispute resolution clauses in the agreement over a period of time they have become more than boilerplate. Earlier it was a boilerplate agreement. The clauses will get copied and pasted

in the agreements. But now what we see is that it has become a very important clause and as practitioners we are using standard clauses like if we are going for arbitration then we have pre-drafted clauses which we want to put in our contracts, be it arbitration, be it exclusive jurisdiction of courts or any other mechanism that we want to follow mediation is also coming in. Any deviation has to meet specifically discussed, which means that the clauses get little more importance than it was getting earlier. In India, most of the contracts if a banking lawyer is looking at the contract, it will be rare that he will send the document for different specialists unlike in US. The tax clauses will go to the tax guys, RESA clauses will go to the RESA lawyers but here primarily the team which is looking at it unless there is a specific question will really go through the whole contract and use boilerplates for tax and dispute resolution and indemnities and things like that. That's increasingly changing that you are looking at that specifically. The reason being is that when you go to enforce these contracts, stamp duties is becoming one issue because at the time of signing the contract no one is really bothered about stamp duty because everyone is saving the stamp duty and say okay go to the stamp friendly jurisdiction. When you come to enforce it, stamp duty becomes a big concern. Second is availability of proper courts, proper lawyers. If you put a district headquarter as a first court for Section 9 or a seat of arbitration then the lawyers are

not available and that the quality of the disputes and the nature of the disputes is so specialized that the lawyers are available in three or four cities, then it becomes very difficult to take those lawyers to local courts. Thus, you don't get the right presentation. This is outside the virtual court world and the third is the whole infrastructure, the experiences of the judges, availability of the experts, availability of the arbitrators, so the place becomes extremely important. So put all these together. The dispute resolution clause has an important enforcement in terms of all these factors has a cost factor because if you go for a friendlier stamp duty jurisdiction, now you may have to top it up and then you will have to pay it. At this point of time you may reach a commercial arrangement of half-half or the other party pays. But if you wait for the party who is enforcing will have to pay it and then we are also realizing that too many arbitrators if three or five increases the cost, makes it difficult to match the diaries and the pool of arbitrators is increasing. It is not there yet but it is increasing. Sole arbitration is preferred. Both parties can use the same arbitrator. So I think that the clauses are getting much more importance than it used to get and it's always a question whether arbitration will stay or not. Arbitration vs courts, exclusive, non-exclusive and the stamp duty. So this is an important clause now in all the agreements.

Shruti Sabharwal: You are absolutely right. Brings me to the next point which is does institutional arbitration play any role in potentially reducing the risk of a challenge? And Rishab if I could ask you to maybe give your views on this.

Rishab Gupta: Sure. Thanks Shruti. I will answer that question and also I think what Sapan said was very interesting. Towards the end perhaps I briefly comment on what he was saying as well, but just to go directly to your question. See the immediate point to keep in mind is that one has to distinguish between the risk of a challenge versus the prospect of success in that challenge. There is nothing you can do to do away with the risk of a challenge. If a losing party wants to challenge, they will challenge it. You can't waive Section 34 of the Arbitration Act and avoid the challenge altogether. To make it insulated from a challenge that's just not possible. The question really becomes what is it that you can do in order to reduce the prospects of a challenge being made successfully against your arbitration award. Now, the answer to that question put very briefly is, the better the quality of the arbitration award and the better the quality of the arbitration process itself less likely it is that the challenge would be successful. So now if I put your question differently. It effectively is would institutional arbitration give me a better quality arbitration award and a better quality arbitration process such that therefore the prospects

of any challenge, a successful challenge would be lesser? I would say, Yes. On an average, the answer must be yes. That in itself is an endorsement for institutional arbitration which we can discuss later as well. Now why do I say yes, we could go into lots of reasons but in a very broad way I would say three reasons for it. First, you are likely to have a better quality of arbitration panel or better quality of arbitrators. Let's take MCIA for example, because this is an MCIA organized event. In an MCIA arbitration, the choice of the Chair in a three member tribunal lies exclusively with MCIA itself. So they choose the third arbitrator. Now it is very likely that when that choice is made, they would take into account lots of important factors such as the expertise and experience of that arbitrator, his or her availability to devote time to the matter, his or her expertise for that particular matter itself. Now, if you have that kind of an arbitrator on the panel it's more likely that the process and the quality of the ultimate product would be better. So that's the first reason. The second reason why an institutional arbitration is likely to give you a higher quality arbitration process is because the institution itself would ensure that the process moves fast and moves in a way which is consistent with the spirit of the arbitration, the spirit of the agreement and the institutional rules. It is very common for example, in the context of institutional arbitrations that we do that you would call up the institutional secretariat and say that look

the arbitrator is not doing X or Y and then they will do whatever they have to do behind the scenes to push things along. It is not unheard of that the institution would actually tell an arbitrator to that look you get your act along or we not give you future appointments. The arbitrator is more likely to give you a better process if there is an institution involved. So that's the second reason. The third reason is scrutiny that most institutions with certain exceptions like LCIA for example, would give you scrutiny of an arbitration award at the end of it. Now that although it would add some time and that's true for MCIA as well. Although it would add some time towards the end of the process. It would necessarily mean that the quality of that arbitration award would be better. It would not be riddled with certain typographical errors or other kinds of clerical errors which we do see a lot in the context of ad-hoc arbitrations. For all those reasons, I think yes, the prospects of success against an institutional arbitration award would be on average lesser and that as I said is another reason why generally speaking, we should always go towards institutional arbitration. Now, just I started off by saying that I will very briefly comment on what Sapan said. I thought it was interesting when he said that these were traditionally boilerplate. Now you would have experts perhaps in certain specific circumstances look at the arbitration clause. Now that's something which we have all these at least as a firm endorsed very heavily, not just

externally to clients but internally within the firm as well and we genuinely believe that nowadays arbitration clauses and dispute resolution clauses generally have become so much more sophisticated and complex, that it is important that at least in a high value commercial contract you should be involving experts to look at some very basic things such as seat, consolidation and joinder, consistency across various ancillary agreements and so on and so forth. I thought I will just add that point as well.

Shruti Sabharwal: I mean that's right because I think firstly to what you said clients are always asking us why should we go for institutional arbitration. So, I mean I think your answer will certainly help in giving some clarity to parties. When you mentioned prospect of successful challenge, on a related note we see that notice often getting issued in a 34 petition on a slightly different ground which is that a party will claim that it was not provided an equal opportunity to present its case. Why we think this is relevant today is because given the last year and given the fact that arbitrations were mostly conducted virtually, we saw a lot of objections being taken on parties saying it does not give me a full opportunity to present my case Mr. or Ms. arbitrator if you do this by zoom for instance. Tejas if I could maybe ask you that are such challenges you know likely to be taken and are such challenges likely to be successful in a 34 coming up.

Tejas Karia: Thanks Shruti and thanks MCIA for spearheading such a great initiative of India ADR Week. Coming to your question, we have seen in last one year is that the virtual hearing is the new normal and we have almost all arbitrations including the evidentiary hearings and the final hearings happening through virtual mode and like this conference also, it's a whole week of sessions are on virtual mode. This is like a new avtar of arbitration world where you all are going to continue hopefully in this mode as well. At the same time, we have certain great procedural excuses to avoid enforcement and challenge award on the procedural irregularity and the due process is the paramount thing for any arbitration and the award getting setting aside on non-following of due process. This has been a debate over several years is that what is the definition of due-process is equal opportunity a dew process and why you cannot be in front of each other. There could be many things behind the screen or in your room while you are doing the virtual hearings. Are you trying to take an advantage of somebody not being in front of you or somebody who is trying to improve their case by taking the use of the technology. So those are the apprehensions are always going to be there when we are in virtual mode. We have accelerated our transition towards the virtual mode maybe by five or ten years because of COVID. It is a silver lining we have is that we are saving time and cost while doing arbitrations. Most of us have

been doing multitasking because of having two hearings in a day which is if in a physical world not possible. So, the question comes when the award is getting challenged on the grounds of not following a due process or not being given an opportunity to present the case fully. What does that mean? And in practical world how have you seen that it can be avoided. In the process of arbitration, the best way is to have a pre-agreement on the virtual protocol. We have done number of arbitrations now in last one year is that at least before the hearing starts we should agree on the process to be followed. The tribunal can also give suggestions. What are the precautions people should keep in the sense that the connectivity not having multiple devices being used by the parties or the witnesses especially or not having somebody present in the room who is assisting. I just did a five day SIAC arbitration where the witness and the opposite counsel sitting in the same room opposite each other. We didn't object because it was an expert witness and we didn't want to object anything but we got it recorded. In transcribed arbitration, if you have any concern, it's always better to record it as an arbitrator. So later on, a party cannot challenge the award on the basis of such irregularities in the procedure. We have also seen that the arbitrators give opportunity to parties to raise objection during the arbitration process itself saying that if you have any difficulty in presenting your case and if you have any grievance with regard to the procedure followed,

they should be allowed to speak up and that really helps because many times at the end of the hearing we have seen that the tribunal asks that hope we believe that you have been given a full opportunity to present your case. If that gets recorded, that adds to the strength of the award because then the award cannot be challenged on those grounds at least. At the same time, it is the duty of the arbitrator to ensure that both parties are given opportunity in the sense that you can be present at the hearing. You have the connectivity. You have the bandwidth. We have seen in one case Ila and I were doing, we insisted for a virtual hearing before COVID and the arbitrator rejected saying it's not good enough and after six months we got an email from arbitrator saying that let's do the hearing by virtual mode. So that is the mindset change, also we have seen in parties who were resisting earlier and now final this but the time will tell when these awards come in next couple of years whether the courts interfere on the process just because the hearing was on virtual mode. I think the courts should not and will not but the procedural efficacy would be tested only by the courts if the tribunals are careful and they ensure that everything is transparent and all the procedural safeguards are followed. In the ad-hoc arbitration for example, we had a session by IAF this morning and IAF with IAF come up with a virtual protocol. So all the arbitral institutions are having the facility for virtual hearing. The rules are also now getting updated to incorporate

a virtual hearing. There is another advantage what Rishab was saying that have institutional arbitrations, so that what happens is that when you are having a institutional incorporated by way of a reference in the arbitration agreement itself, so the drafting of arbitration agreement is easier. You have the institution to oversee and the rules themselves incorporate the virtual mode. Then you cannot say that you could not present your case fully. That way the drafting of arbitration agreement becomes easier. You have the institution and you have a virtual hearing where you follow the due process and that's where we are minimizing the risk of challenge. That is what we call challenge proof award.

Shruti Sabharwal: Actually, on that note one of the earlier arbitrations we did when the lockdown had just been implemented, in that for due process, the arbitrator and actually asked the witness to lift his laptop and take it around the room so that the arbitrator was convinced that there was nobody else and to maybe you know show him what are the papers on the table and so on and so forth. We certainly have come a long way in just these past few months but in also past few months there has been another interesting development in the Act which is the amendment which was brought about to now say that courts can unconditionally stay an arbitration award where a party can make out that the award was obtained by fraud or corruption. I am just wondering Ila maybe you can

help on this. Do you think that this amendment is likely to us seeing parties take this ground during the arbitration and how do you think courts will react to such grounds being made at the stage of the 34?

Ila Kapoor: Thanks Shruti and thank you to MCIA for organizing this stimulating week. Before I answer the question on the New Ordinance, I just want to share an experience. Tejas is of course talking about due process through virtual hearing but even in general when we are having physical, it's a real balance for the practitioner because recently we objected to a new document being brought in after the stage of document discovery was over and the arbitrator, he held our objection and he didn't allow it but now in the 34 which is going to a court in India. This is being taken very seriously as a denial of his due process to produce his documents. The document itself was not very significant. Looking back, I just wish I had allowed it and saved myself this huge problem at the challenge stage. It is a balance for us also while we are going through it and I just wanted to share that. Shruti you were asking me about the Ordinance which says that there has to be now a mandatory conditional stay if there is a prima facie finding of fraud. Now of course the arbitrator always has the discretion to unconditionally stay the award if he found there was fraud even before the Ordinance. The difference is now that it is mandatory. So that discretion is

taken away. We can be sure that there will be a large majority of cases now that will come in for a challenge which will allege fraud. It's more likely, I think that the fraud that they will allege will be in the getting of the award rather than there will be disputes in the award itself. Now, whether this becomes an omni bus public policy sort of a challenge, I hope not but it will depend on the court. So, we will have to wait and see because fraud has a very high threshold to be met and allegations of corruption are very significant. So it's not that easy to establish this prima facie case. We had a case after the Ordinance where promptly an appeal was filed against an order seeking a deposit and the respondent came to the Supreme Court and said but I had made an allegation of fraud. The arbitrator had not seen all the documents and I did not have, he didn't have knowledge of these other proceedings that is fraud in the making but the Supreme Court didn't have any of it and they dismissed it. So it's a positive sign and we hope they are going to take a very restricted interpretation of this new Ordinance.

Shruti Sabharwal: Absolutely! I think coming to the corruption part of it. I think corruption carries with it so many larger ramifications that I guess only time will tell how parties will use this but Sapan from a party's perspective, what should an arbitrator do, and what should an arbitrator keep in

mind to let the party feel that the party has had full opportunity to present its case.

Sapan Gupta: I think we work in a very interesting environment as far as arbitration India is concerned. That the very natural reaction for most of us is to approach people whom you know as arbitrator or as an expert. Now, does that mean that you are looking for a particular number because your name because you are expecting a favour or does it mean that you are expecting a friendlier environment so that all the parties can work together in a more efficient way than to bicker over things. The second is the arbitration mechanism itself is a formal mechanism but it is less formal than the courts. It just starts from the beginning that the judge or the arbitrator doesn't sit at five feet height than where you are standing but basically sit together and try to arbitrator matter. The process is friendlier and that's where the whole line comes in. Can it move from being friendlier to over friendlier, and then things like favour, my adjustment, my dates all come in. That also is a process of evolution and why? Because there are more practitioners and there are more arbitrators. As the poll is increasing, there are people who don't know each other, other than having a market reputation being picked up. Conflicts are becoming, people are declaring conflicts. They say okay, I have given an opinion. I have worked on something. I have a relative or someone who will be

conflicted. There is more disclosure than before, one people know that it's easier to find. You do Google and you figure out that this lawyer represented this company. You go to Manupatra, uou talk to law firms and the general responsibility. As a result of that, the market is at a stage where it is selecting or electing arbitrators just on the professional competence and not because you know the arbitrator and the disputes are also getting so specialized. That they know that even if you know the arbitrator, he may not be able to follow or he may not be able to fully appreciate the matter. In this circumstance, now how do I tie this up with your question that are parties given full presentation? Now if there is an arbitrator who is professional who recognizes that we are friendlier we have seen each other at the bar. We know each other for 20 years but respects that everyone has to be given equal opportunity to represent its case then it will happen and it is happening. We have rarely seen that you can look at cases where it has been pointed out but arbitrators are also very conscious. They don't want the courts when it goes for the enforcement or the market or the group to know that they have not given full opportunity because if you are not giving full opportunity then all of us know that the principal of natural justice or the audi alteram partem is not followed. There is a legal problem. There is a problem with their own reputation ongoing in the matter. We are increasingly saying that it's no longer

a problem. You may have to say it twice but it's not a problem and the dates then it also comes down to like in courts we don't have fixed times in India. Senior can take two hours, he can take 15 minutes, he can take two days. Judge tells him that okay my learned friend please finish fast but no one really says that finish by now. Where in arbitration that can be done and where people then tend to say that okay if you want to give me half a day more, then you are not giving me the full opportunity to represent myself. Now it is a real argument that you just want to waste time, take dates and then you can't turn around if the judge or arbitrator is not giving you to say that oh he gave me only six hours where I asked eight hours. There has to be a balance between that but generally we are seeking that if the practitioners remain professional to what they are asking. They respect each other's time. Then I think the equal opportunity is no longer a problem in commercial arbitration. I am not commenting on the retail arbitration where you have a financial institution going for arbitrations against its borrowers. They do hundreds of arbitrations in a day and there they don’t give full opportunity. But yes, in proper corporate arbitrations, the opportunity is there.

Shruti Sabharwal: I mean the question really is then to maybe Rishab. That given this change, we have seen as Sapan pointed out you know due process is no longer such a big issue. Can we

still say that parties don't use due process grounds to potentially arm twist a tribunal? Let me just give you an example. For instance, we recently had a hearing where the party himself asked the tribunal that why do you always allow these extensions even though they are way beyond time? Why are you allowing introduction of new documents? And the tribunal responded to say that you may not like it now but you would probably thank me for it later. How should tribunals deal with due process grounds raised during the proceedings?

Rishab Gupta: The funny thing is that all of us I think encountered these situations in three different capacities. The first capacity is when you are acting as a counsel for the party who is seeking that accommodation. Yeah. When you are the one relying on due process to seek an extension. The next day. I am not kidding. All of us face this on a daily basis or on a weekly basis. The next day, you are the opposite party. Yeah. You are the one saying to the tribunal that look these guys are just taking advantage of due process. Yeah. So you are opposing that application. The third day you are sitting as an arbitrator and you have two bickering parties like in your case and you have to decide this and keep in mind what might happen down the road as far as the challenge the arbitration award is concerned. We face all of that on a regular basis. Now, what do you do? Now I mean, there is no straight jacket answer to this but I think there are four

points which I would say you keep in mind. The first is which I think is usually the most effective way to do it and that's another endorsement I think for institutional arbitration is that you agree on a procedural time table upfront at the first case management conference. When I say procedural time table, I don't mean just a procedural time table up to the pleading stage. You agree on a procedural timetable which will take you right up to the end of the final hearing. Now, what that does is the final hearing should be written in stone. Those dates five days, seven days, ten days, whatever it might be, should be written in stone. Things along the line could change by a few days here and there as long as your final hearing dates don't change. Now that ensures that your arbitration is still on an even game. That still ensures that the overall the timetable would not slip even if there are minor slippages across the road. Yeah. Now why do I say that's an endorsement for institution arbitration. In my experience at least and I think most people would agree to this in ad-hoc India seated arbitrations rarely is the case that the arbitration tribunal would give you a procedural timetable for the entire length of the arbitration at your first procedural conference. On the other hand, in institutional arbitration including MCIA arbitrations, you will get it. Yeah. So that's another endorsement for institutional arbitration. That's my first point. The second point is, see ultimately only commercial disputes go to arbitration. There are no human rights cases in

arbitrations and all of that. In commercial disputes you have to keep in mind that time is always of the essence. As an arbitrator, as a counsel for the parties you have got to keep that in mind. That of course should therefore help in determining whether or not that application should be allowed or not. The third thing is again born from experience and this probably answers your question. I have heard arbitrators say that as well. I have said that as an arbitrator as well but the reality is, I have not seen a single case of a Section 34 challenge being successful simply because an application for an extension was not granted. I mean it just never happens. No serious judge, no serious court would set aside an arbitration award because a party was not given five days extra to file a pleading because there was a larger concern about sticking to the time table. It just never happens. Therefore, putting it more informally, arbitrators need to man up and simply say that look beyond a point we are not going to allow these extensions. The fourth point which probably goes closer to what Sapan was saying is that therefore the selection of the arbitration tribunal is absolutely key. Right. And you got to select an arbitrator and in particular you got to push for a Chair if you can who is procedurally robust. If you have a procedurally robust arbitrator, he would not, he or she would not buy into these kinds of nonsensical arguments and give extensions and give slippage willingly. I think those are the points you have got to keep in mind. Now, as we were going

there were questions coming along. I think the couple of questions which directly go to your point. There was a question which states does institution arbitration provide any noticeable help when it comes to frustrating the arbitration proceedings by opposing counsels. That's precisely my point, the institution arbitration does give you that assistance to some extent because you get better more robust arbitrators. You have the ability to call up their secretariat and say that look the arbitrator is just not doing what he or she supposed to do. Give them a call. Perhaps, they would listen to you and that happens all the time. Yes, institutional arbitration far more than ad-hoc arbitration allows you to perhaps have some degree of control and accountability over at least the arbitration process being followed.

Shruti Sabharwal: I mean, that's right. That's exactly what we try and tell clients who ask us whether they should go in for institutional arbitration even though it may be slightly more expensive than ad-hoc. Coming out to maybe a slightly different a more technical point. What are the factors to keep in mind and maybe Tejas just can take this question, to ensure that the form and the delivery of the award is as per the applicable law and when the Act requires the tribunal to render a well-reasoned award. Does this mean that when you sit as an arbitrator you have to give an analysis of everything you considered during the arguments?

Tejas Karia: Yes, the form and substance of the award is very important because what we are talking about is challenge to an award and if the award is not in the proper form, in terms of covering all the aspects which are raised before the tribunal then we may see the interference from the court and that is what has to be avoided at the arbitration stage itself. What we need to do is that ensure that we present the case in a manner that all the points are covered. If there are post hearing memorials that should also cover everything because that is most of the time a very helpful tool to navigate the tribunal towards passing a detailed reasoned award. Many a times after doing that also arbitrators don't capture all the points. They are not supposed to but it should be capturing all the issues which are raised, the broad issues which are raised before the tribunal. That is very crucial because if any point is raised and not dealt with the tribunal that could lead to court setting aside of the entire of the award which is a counter-productive to the whole process of arbitration. What we need to ensure at the time of passing of the award is that all the points are covered. Procedural history is covered because many times we get award which does not have the complete procedural history. It has to be signed by all the members of the tribunal which is quite important because we just received an award which is signed by only two members. We are assuming that the third member is going to give a descent

opinion but there is no reference to that either in the cover mail, so that those are the awards are quite risky in that sense that the court may try and set it aside. The other aspect is also with regard to the stamping because there are foreign awards which come for enforcement in India whether they have to be stamped or there are awards which are there in India whether the tribunal has to stamp it or the parties have to stamp. What is the stage of stamping? Many a times the question comes in whether court will refuse to entertain the 34 petition for setting aside if the award is not stamped? The Supreme Court has clarified that the stamping is more relevant at the time of enforcement and not at the time of the 34 because if award gets set aside then you don't have to pay the stamp duty. Signed award to be received by the parties. We are doing one 34 where the question is that when did I receive the signed copy of the award. Many a times tribunals don't pay attention to this or maybe the award which was received was a photocopy and it was not an original signed copy. So either it has to be signed by the tribunal, all the members of the tribunal and that's where all these issues the institutional arbitration can be a great help because mostly when we sit as an arbitrator for institutional arbitrators we send award to the institution and the institution transmits it to the parties once the fees are fully paid. Those are the things are taken care of by the institution whereas in ad-hoc arbitrations seated in India, we see that many a times this

procedural issues are taken up by the parties to set aside the award which can be easily be avoided and it should be avoided and that's where we should focus that as a tribunal or as a counsel, we should work together with the tribunal to ensure that the awards are not vulnerable because of the procedural irregularity or the form and substance of the award is not accurate. So those things are always to be kept in mind while passing the awards.

Shruti Sabharwal: Thank you for that Tejas. You mentioned stamping of the award. There is also of course a big confusion about stamping of the agreement now. Ila if I could ask you. What really is the position currently on stamping of the agreement and what really is the successful chance of a 34 where the ground is that the award that was rendered was based on an unstamped agreement? What are the chances of success to something like this?

Ila Kapoor: The law on this is as we all know it's unclear because we have the recent case of NN Global which seems to suggest that even if the arbitration agreement is a separable contract, now it's possible that you will have a Section 11. You will actually, you may be able to get your tribunal appointed if the agreement is unstamped but even this case which is yet not final because we will see what the larger bench has to say about it. Even in this case, it's very clear

that you may have your arbitration started or your arbitrator appointed but the agreement, the underlying agreement has to be stamped. You will impound it and send it off to the collector. The chances of actually now coming out with an award where you would have a challenge in 34 that the agreement was unstamped. There is not that much chance of it because you would probably challenge it in a jurisdictional objection before the arbitrator itself. Supposing there was a case where somehow this slipped through the cracks or the challenge that is not adequately stamped. I think that's a very good ground of challenge. Probably under public policy you could argue that the award should be set aside because the underlying agreement is not a valid document.

Shruti Sabharwal: Thank you and I mean, I would encourage the viewers of course to keep sending their questions. We will try and take as many questions as we can towards the end of the session. I think this question is probably best directed to Tejas and maybe Rishab also. As sitting as arbitrators, how do you ensure that your award doesn't travel beyond the scope of what parties submitted to arbitration? And the context for this is really that there are several natures of agreements which are so intertwined with each other that sometimes it's difficult to arbitrate one issue without really looking at another. So how do arbitrators go about this?

Tejas Karia: Yeah. So it's very important that the scope of reference has to be kept into the mind because you can't travel beyond, you are a creation of the contract and the parties have decided to refer some or all disputes to arbitration and we cannot as an arbitrator decide issues which are not referred or travel beyond what is referred. That is something which is to be kept in mind. It is always good to determine the point for determination or sometimes in some institutions we have terms of reference which is agreed between the parties. We have those mechanisms to take care of to understand what is the reference in the matter. Each of those referenced matters should be decided in the final award or the partial award as the case may be. But as a tribunal and as a counsel for either of the parties it is very important that all the aspects are taken into consideration in the final award and nothing is left to be decided because that could also pose a potential risk of getting the awards set aside and it should be avoided. So, there are several judgments which in recently Supreme Court has also defined what is the reference to the tribunal. That is where we have to focus as the arbitrator is that nothing which is in the pleading or in the evidence gets completely ignored. Of course, you cannot go word by word and paragraph by paragraph but at the same time in substance all the points which are raised have to be decided and the tribunal the award should be well-reasoned award. That is what is meant by the quality arbitration

because many times we see that the awards are quite sketchy. They jump from one point to the other without concluding the first point. That's the skill which all of us we are developing and we have to develop and reach at that level. In the sense of when we see the international arbitrations happening outside India and in India there is a slight gap and that is where we have to bridge that gap and ensure that the awards are the best quality in terms of taking into consideration all the issues which are raised before the tribunal.

Shruti Sabharwal: I guess the question is. Sorry, Rishab you want to add something.

Rishab Gupta: No, I think, I agree with everything Tejas said. Just to add one thing to it. See at a practical level, the way you often try to address that is by having the list of issues. Right. So what that does is both from an arbitrator's perspective and from the counsel perspective is to give some sort of direction to the ultimate arbitration award. You have that list of issues decided or agreed between the parties early on in the process. Such that you are certain that the arbitration award is unlikely to go beyond that as Tejas was saying and be nothing is likely to be missed. I think from a practical perspective, perhaps that's something to be kept in mind that you should agree on a list of issues before the

final hearing. That list of issues should be followed quite religiously by the arbitrators making sure that they have reached a determination in respect of each of those issues.

Shruti Sabharwal: If I could maybe direct, since we are reaching towards the end of the session and we do want to take up some questions from the audience. My last question would be to Sapan. The question is really that every party worries about a potential challenge even once they are successful. There is no avoiding that of course but as a party representative, what do you see for the future of arbitration and what are some of the steps that you think a party can take to avoid or at least minimize the risk of a successful challenge?

Sapan Gupta: So in terms of future of arbitration, I think there is a serious activity in the last few years and MCIA is one of the positive outcomes of that. If you look at the whole 96 Act and then we said that from 96 still now there was a minimum activity, leave aside the last few years. In the last 5-6 years there is serious activity on the arbitration front, be it MCIA be the interest of the Indian Bar in the subject, the Indian lawyers being interested in being part of the arbitration outside India, representing in some of the leading arbitrations outside India. Justice Nariman being there in Supreme Court as one of the benches which has been looking at

the arbitration matters and he has really helped the law evolve. I think earlier arbitration came with the bang but it didn't really take off but now I think it's on the upward trajectory and it is really becoming one of the preferred modes for corporate issues. However, the advantages which arbitration brings to the table compared to the traditional court system is still to be realized quite a lot which is from the time perspective where the institutional arbitration timeframes need to actually happen on the ground and then the costs needs to be reduced. If it is not too different than the traditional costs in the courts, so those needs to be really looked at. The more arbitrators, more experts, the practitioners are picking it up. It is basically people walking in all direction most of the major courts High Court and Supreme Court, there are now benches which deals with arbitration matters. There are judges who after retirement are looking at career in arbitration. There are practitioners right from the law school and senior lawyers and upto senior advocates are looking at arbitration in a very specialized field and the whole support to the ADR be it mediation or be it arbitration. We believe that now it is for the arbitration practitioner that how much they want to make of it. Is it to make it more efficient in terms of cost and time, I think it will really come out as an ADR method.

Shruti Sabharwal: Thank you Sapan. I guess it wouldn't be right to talk about at a 34 without talking about the all encompassing public policy ground. So, Rishab of course we know it is impossible to see a 34 without a public policy ground being made out. Do you think one of the ways to perhaps avoid a challenge on this public policy is potentially got something to do with the seat? What are your views on this?

Rishab Gupta: As far as the seat is concerned, of course if it's not India seated then Section 34 by itself is not applicable. And therefore, by definition your concern in relation to public policy, at least as far as public policy defined in Section 34 and thereafter interpreted by the Indian Courts is concerned. That concern goes away which then brings you to a larger point which may not necessarily be the most uncontroversial point as well but as practitioners we see that all the time is when parties ask you that should we choose a foreign seat because that way we can avoid Section 34 and we can therefore avoid public policy related challenges or any other such challenges brought under Section 34. Now, I recognize that this panel is primarily about India seated awards and I recognize that largely there is a massive push towards making India a hub for arbitration and we are all sort of part of it and we are all pushing for it. The reality still remains that in many respects the prospects of a frivolous challenge before Indian Courts is much higher than the

prospects of frivolous challenge being brought in other jurisdictions. For example, Singapore, United Kingdom, Netherlands and so on and so forth and that's for a couple of reasons. One is that in most of those jurisdictions, set aside application would not be admitted very easily. Whereas in India it is almost always admitted. Then of course it goes onto the merits and determination is made. Second, we still have multiple appeals in India. In most of these jurisdictions in Mauritius s for example, there no appeal aside from an appeal to the Privy Council after a Mauritius court has looked at it. The third which I often feel is the biggest difference is that we don't have a cost region. You bring a frivolous challenge, you lose that frivolous challenge but you don't have to pay the other side's costs which is not the case in almost any other major jurisdiction. That is in fact the biggest deterrent against bringing a frivolous challenge on let's say public policy grounds for example. Yes, I think those things are very closely related to seat and unfortunately as a party or as a practitioner advising a party, you still get into those kinds of discussions and very often the outcome might be especially where there is a cross border contract and there is a foreign party award. That you advise the client that you may in certain circumstances be better off by choosing a foreign seat. That doesn't take away from the fact that you could still have a Singapore seat and MCIA rules for example and that doesn't take away from the

fact that India could still be a hub for arbitration because seat and becoming a hub for arbitration I think are two unrelated issues in that sense but you have got to keep that in mind. I think if you sum up all of that, you take into account what was discussed about institutional arbitration and what we are discussing right now. Some of the things that you will always keep in mind in order to reduce the prospects of at least a successful challenge being brought is you have got to keep in mind that institutional arbitration generally speaking is better. You may want to think about the seat. That's the second thing. You have got to pay a lot of attention to the arbitration agreement itself. That's what in a way we began with as a panel. You have got to pay a lot of attention to the choice of arbitrator. The more procedurally robust your arbitrator, the less likely it is that the process would have infirmities in it which would lead to an ultimate challenge. Those are some of the things in mind.

Shruti Sabharwal: That certainly a lot of thought for all our viewers. We do have some very interesting questions but I doubt will be able to take all we take as many as we can. So let's start. Tejas if you can take the first question which is that, can a virtual hearing be sought for as a matter of right in light of the Supreme Court guidelines which said that parties should agree?

Tejas Karia: Yes, that's the challenge we always face is that one party insists for virtual hearing and the other is objecting to it. It's ultimately for the arbitrator to decide the procedure either you have the institution rules which allow virtual hearing then by just incorporating you have the agreement between the parties but in ad-hoc situation, it is the tribunal who decides the procedure after taking into consideration. If you see the sequence of our own Act, you have Section 18 and 19. 18 says we will give you a opportunity to present the case and 19 says you will conduct the procedure the way you like. That is the obligation always on the tribunal that the tribunal cannot force parties but the tribunal can definitely nudge the parties to agree to a virtual hearing and then get an agreement because unless the other party has a very good reason to object to virtual hearing, I don't think the tribunal should succumb to such kind of objections and tribunal has every right to pass an order which is fair and in terms of due process to have the virtual hearing if the situation so demands. So they can't force the parties but it can definitely decide on the objection of the party and rule on the procedure for the arbitration under the powers given to the tribunal under the law.

Shruti Sabharwal: A well-reasoned ruling it should be. Ila if I could ask you the next question from our audience. What

really has been your experience with online arbitration versus in person arbitrations and do you feel there is a space for online documentation or digitization in arbitration?

Ila Kapoor: My experience over the last year is different from what it was at the beginning of this lockdown where I was very excited by how smoothly and efficiently all virtual hearings were to be conducted. We wrote about this how cross examination is amazing. You can do this, you don't need to travel, you don't need to pay for these five-star hotels but after one year of doing everything virtually, I feel little weary and I look forward to in person physical hearings. I think there is just something that you just can't replace which is sitting across from your arbitrator even opposing counsel, even the witness. So if you asked me six months ago, I would be like I love this, we should never go back to physical. Today I will say, I look forward to sitting in those long conference rooms with the air conditioning blasting at me. Apart from that, you asked me whether there was digital platforms I think and in ad-hoc and this close to what Rishab was saying this is a struggle we have had that in ad-hoc arbitrations, really, there is a lot of space for someone to create the kind of digital infrastructure that we see institution so easily provide us which can be used by arbitrator sitting in ad-hoc hearing. There are some softwares

available but they are not being used very widely. So the space is available there.

Shruti Sabharwal: Sapan if you could maybe give us any last remarks on this virtual arbitration. Would you continue to include maybe parties to agree to virtual hearings going forward even after assuming some day this COVID situation is behind us?

Sapan Gupta: It has become like a head and tail. If I want to delay the matter, I don't like virtual. If I want to run the matter then I like virtual. There is no science to it. I think arbitrators have to really assess the situation. If they feel the virtual, physical cannot happen. There can be a test of rejection rather than saying virtual should happen. Physical cannot happen then you can't delay. All of us are now living in this new post COVID world. Earlier we were thinking that things will calm down after six weeks, after eight weeks. Now there is no timeline to this. So we don't know when it will end. The test is a test of rejection and if the physical hearing is not possible then arbitrator should take an independent decision whether virtual hearing should be done or not. It is just kind of Supreme Court to say that okay parties will decide but if they had so much love for each other, they would not have been in arbitration. So that dispute will continue. I think arbitrators will have to really use, the

Rishab’s phrase man up to say that okay, it will happen so it will happen. And the courts are doing it. If you go to courts now, if the judge is sitting and he feels physical hearing can happen, he says physical hearing will happen. If parties create a lot of disturbance, he said okay virtual and he passes order and he goes ahead and its happening across the courts from District Courts to High Courts and even Supreme Courts. Why not just follow that in arbitration as well.

Shruti Sabharwal: Yeah, I think that makes sense. I think things will only become clearer as we go into the future. Rishab one last question as quickly as possible. Can foreign seated awards be set aside in a Section 34?

Rishab Gupta: Yeah. That I can be very quick. The answer is no. It cannot and whosoever is asking it, I will give a separate class on how arbitration law works. There is just one thing that I should say. The answer to that question is very easy. The answer to a different question may not necessarily always be very easy as to what is your seat and is that seat necessarily outside of India and that goes back to drafting your arbitration clause properly. We have all seen badly drafted arbitration clauses where you don't even know what the seat is and then you have a debate or an argument as to where the seat is. The party that ultimately wants to do a challenge in India might argue that in fact the arbitration clause

provides for a seat in India. So get your clause right which is one thing that as a panel we have agreed we have got to invest time into. If you do invest time into that, get your seat right. Then the answer very simply is no.

Shruti Sabharwal: Thank you so much and with that we have exactly hit the one hour deadline. Thank you so much to all our panelists today and big thanks to MCIA for organizing the Week and we are very proud to be a part of this with them and just everyone who has joined us today, please remember that there are two more sessions that will follow at 3:00 PM and then 6:00 PM. We hope to see you for those sessions as well. Thank you everyone.