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What Next for Arbitration in India

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Ms. Dilber Devitre: Hi everyone. So, I was going to greet all of you, welcome you to this session with the traditional good afternoon, but I realized I'm faced with one of the modern-day conundrums that you face with these online sessions, because it's afternoon where I'm based in Zurich, but it's probably evening for a lot of you who are joining us from the Indian sub-continent today. And maybe the day's just starting for our friends joining us from further West. I'm just going to say hello and welcome everyone to this fourth and last session of today of the Indian ADR Week, which is been organized by the, by the MCIA. Last session of today, but definitely not last session of the week. We have a lot of sessions lined up. And, so today we had some fantastic sessions in the morning and quite aptly the session before this one was about the Indian Arbitration Act and the latest amendments in the 2019 Act. And that's a wonderful ground to introduce this session, because this session we're going to be talking about what's next for arbitration in India. With all these amendments that we've heard about and spoken about, where are we heading? What are we doing? Sort of like looking into a crystal ball and we have a very, very eminent set of panelists here today, who’re going to help us resolve this mystery of what's happening and what's going to happen in India in the arbitration in the coming years. So, it's my pleasure to introduce this panel today. All of you. I'll start with the moderator and then just introduce

the panel. So today our moderator is Nitesh Jain, Disputes Partner at Trilegal, one of the leading law firms in India, who is also sponsoring this session. So, thank you very much. He specializes in corporate commercial disputes, international and domestic commercial arbitration, white collar crimes. He has a very diverse practice. He advises clients in various dispute resolution forums including the Supreme Court, high courts, tribunals and before various arbitration institutions. Thank you so much Nitesh and Trilegal again for sponsoring this session with us today. We also have joining us Andrew Battison, who heads the international arbitration practice of Norton Rose Fulbright in Australia and Indonesia. He also specializes in arbitration, both commercial and investment and is often involved in arbitration for the Indian nexus. It will be very interesting to have a foreign practitioner's perspective also on arbitration in India. So Welcome Andrew. And thank you for joining us today. Our next speaker is Ashish Bhan who is also a partner at Trilegal and heads the litigation and arbitration practice. He's also acted as counsel and arbitrator in various arbitrations under various rules including the SIAC, the LCIA, several other rules. He also advised his clients in bilateral investment disputes with India. So, it would be very interesting to hear that aspect in this discussion today, investment treaty arbitration. Also, on the panel is Mr. Darius Khambata, who obviously needs no introduction to anybody, who is working in the international

arbitration circles in India. Mr. Khambata, is a senior counsel at the Bombay High Court and also the Supreme Court of India. And he was the former Advocate General of Maharashtra and the former Additional Solicitor General of India. He was the Vice-President of the LCIA Court and is a member of the SIAC Court. He was also involved in the recent amendments to the Arbitration Act. So that would be a very interesting perspective as well on the panel today. Then we have Mr. Manish Sansi, who is the legal counsel of Vodafone Idea Limited. Manish had an illustrious career for over 25 years in various Indian and multinational companies, including Vodafone, Tata, HCL, et cetera. So he will also be bringing a very interesting perspective to the panel. Our next speaker is Mr. Montek Mayal, who again needs no introduction as he has been on several panels and will be on several panels during this week. Montek is a senior managing director at the FTI Economic Consulting practice. He is the Maths Guru, because he's the financial expert the one who intervenes in all questions of assessment of quantum, financial and valuation issues that often arise in international arbitrations. And finally, we also have on the panel with us today, Mr. Sapan Gupta who currently serves as the General Counsel of Arcelor Mittal Nippon Steel and is the Vice-President of the Arcelor Mittal Group, which is the world's leading steel producer today. He was also a partner in one of India's most prestigious law firms, Shardul Amarchand Mangaldas. And so, he

will combine this very unique perspective and bring that to the panel today. We have excellent speakers here and I'm sure we are going to all have a very, very interesting discussion on what's coming next for arbitration in India. With that Nitesh, I would hand over to you.

Mr. Nitesh Jain: Thank you Dilber. Good evening, everyone. We've got a very interesting topic, which is, what next for arbitration in India? It's a very forward-looking topic. The idea is to discuss issues, topics which could potentially impact the future of arbitration and where we can identify the issues, you know going forward and to see how we can contribute to promote India as a seat of arbitration. So, I won't take much time. I'll straight away go and request Mr. Khambata for his views.

Mr. Darius Khambata: Thank you Nitesh. Thank you, Neeti Dilber, my co-panelists. I would like to start actually by spending just a moment on two men, who we have recently and sadly lost, Justice Nijjar and Emmanuel Galliard, both who contributed greatly to the law of arbitration and both sadly who passed away at young ages. They were both friends of arbitration in India. And I think this is a good point at which we can stop and like the Roman God Janus, the two headed God, one eye looking forward, but the other eye firmly on the past to see where Indian arbitration has come in from and

where it can go to from here. So taking a 10-year timeframe and being taking a very holistic view it's time to look back at a few things. And I would like to pick the three best things that have happened to Indian arbitration in the last five or seven years and three dark clouds as well. And then take you to where I see Indian arbitration going forward. So, the three best things that have happened; I think and this is of course a big canvas. The easier enforceability of awards, certainly in the last eight to 10 years has marked the law of arbitration in India, not only domestic but also international. Domestic awards, the Supreme Court led the way with some seminal judgments and the 2015 amendments took on from there and cemented that view into the Act, laying the ghost of SAW Pipes, a 2003 judgment to rest finally. For Foreign awards we had the ghost of Venture Global, which had failed to recognize the seat theory and which had actually said that an Indian court could entertain a challenge to a foreign award something that was anathema to the New York Convention that was laid to rest in the BALCO judgment. The author of which of course has been or was Justice Nijjar. The 2015 amendments against cemented all of this in and they did something very important. They made a distinction between international commercial arbitration seated in India and purely domestic arbitration seated in India. It's not the first country that has made that distinction. Singapore, of course, has had that dichotomy for a long time. I think it's a

very important distinction our Act has finally introduced. And it's one that is extremely useful and that is, that encourages international commercial arbitration in India. So that's the first area. The second is a general strengthening of the doctrine of competence-competence in India. We didn’t have much of a doctrine before the 1996 Act. Though I dare say our Supreme Court there again had been one of the path breakers. But in the 1996 Act, we got Section 16, which unequivocally accepted this doctrine as part of Indian law. And our courts have been very encouraging of it. We have not only positive competence-competence in the form of Section 16, but also a negative competence-competence. Which as all of you know, is the doctrine by which a court effaces itself in the face of an arbitration. And sadly, that term was coined actually by professor Galliard, who I spoke about a few moments ago. And we have that doctrine now firmly entrenched in Sections 8, in Sections 11 and Section 45 of our Act. All of us are familiar, I think with the judgment of the Supreme Court in the Shin-Etsu case, which was given years ago, under Section 45 in respect of a foreign arbitration. Where the Supreme Court said, it would take only prima facie look as to whether there was a valid agreement which was binding and enforceable in law and which was not null and void. And once it found prima facie that such an agreement existed it would let the tribunals then do his job and not stay the matter or refer the parties to a suit. But the position as regards to domestic arbitrations was

not so clear. Because the same principle had not been followed under Section 8 and indeed the judgments of the Supreme Court in Patel Engineering and Borghara Polyfab, suggested somewhat more intrusive look by a court. That again was put paid to by the 2015 amendment, which again, by express statutory amendment clarified that, when an action was filed and a party came seeking a reference of it to arbitration the court would take on only a prima facie view. And if it was prima facie satisfied that there was an arbitration agreement, then the parties would be referred to arbitration. So that's the second area. The strengthening of competence-competence, which is been a very positive development over the last few years. And the third. And this frankly comes as a surprise to me and I must confess, I expressed negative views about this provision when it was first introduced. And that is Section 29A, which was the provision, which required arbitrators to complete the arbitration within one year extendable by consent for another six months. And there were strong negative views expressed about this provision when it was introduced in 2015. It was not part of the brace of amendments suggested by the committee of the Law Commission, of which as Dilber tells you, that I was a part. But it was there. And there were, of course the drafting left much to be desired in the sense that there were even provisions for penalties on arbitrators for forfeiting their fees, if they crossed limits and things like that. But leaving aside all of that, I think the broad thrust of that

provision has worked. And the proof of the pudding as they say is always in the eating. And we now have a situation where arbitrations are getting completed within quick and manageable timeframe. Something that didn't happen in the past in India. The 2019 amendments of which I must immediately say I was no part of, did two things. It limited that time limit only to pure domestic arbitrations. Again, the dichotomy between domestic arbitrations and international commercial arbitration. So International commercial arbitrations were freed of that constraint. Perhaps on the assumption that they were in any case monitored by an arbitral institution. And that time limit the clock was to run from the time pleadings were complete, which was a more manageable and rational way of looking at things. So, I think all in all one must say that 29A has worked and it was in the balance of a positive provision. The three dark clouds on our horizon. The first has been the replacement of that catch all ground of public policy which had been brought to life by Saw Pipes, with now a new head compendiously termed perversity and irrationality. Just before the 2015 amendments, the Supreme Court had in a judgment sought to introduce an administrative law concept of Wednesbury unreasonableness to a judge, whether an award was against public policy or not. This was of course an administrative law concept, an alien field because as we know the field of administrative laws starts from the premise that discretion vested on executive officials is never unfettered

or absolute and it is subject to various limitations under public law. The same is not true of arbitration where party autonomy rules. Nevertheless, an administrative law concept was introduced. The 2015 amendments caught this in the nick of time. There was a supplementary report from the Law of Commission and a proviso was added saying that in no case would a court look into the merits to review whether or not an award was against public policy. A clear reference to Wednesbury unreasonableness, which would require a look into the merits. So, we thought that was the end of that. But the Supreme Court which had spoken of perversity and irrationality as a head under public policy resurrected it after the 2015 amendments into a ground under the compendious head of patent illegality. Now the problem with perversity and irrationality, which is again an administrative law concept. And to my mind, which has no place in the law of arbitration; is that the test that the Supreme Court has laid right down is whether irrelevant evidence is looked at, whether vital evidence is ignored? Now all of these are fact-based reviews and however disciplined a judge might be in enforcing this test, it will maintain some look at the facts and the merits, which again, should be no-no for arbitration. So, this is an area to look out for. The second is of course, the Arbitration Council of India, which is sought to be introduced by the 2019 amendments. And the notorious qualifications for arbitrators introduced by way of the 8th Schedule. The latter thankfully

has now gone. Although there is a residuary power left to the central government to prescribe appropriate rules and qualifications. We can only await those with bated breath. But the Arbitration Council remains. And the danger of that Council is that there's a danger it may slide into the role of a regulator through this. Because of course in India, we love regulators for all fields. But I don't think that arbitration is quite the correct field to have a regulator in. And the jury is out on whether this is going to happen or not. We'll have to wait and watch. The third dark cloud on the horizon; are the two judgments of the Delhi High Court, which have determined that investment treaty arbitrations are not commercial disputes and therefore the New York Convention and the provisions of our Act that incorporate the New York Convention would not apply for enforcement of investment treaty arbitrations. Now this is serious because India as you know is not a party to ICSID. So, there is no automatic enforcement or implementation of investment treaty arbitrations in India. You have to go via the route of a foreign award in the New York Convention. And if now the New York Convention is not made available then essentially are we telling investors that their remedy is to file a suit based on that investment treaty award, which is a meaningless remedy in the context of an investment arbitration. There are ways of getting around this and I'm sure the matter will be reviewed in appeal and later by the Supreme Court. And one clear signal

comes from our Commercial Courts Act, which has defined a commercial dispute in very wide terms. And which carries an explanation saying that merely because one of the parties to that dispute is the State doesn't mean that it seizes to be a commercial dispute. And I think that's a path forward and I hope that cloud dissipates soon enough. So now that brings me to the last little bit which is the way forward. There's not much times I'm going touch upon very briefly five areas where I see us going forward. One is of course encouragement of institutional arbitration. We've now got some very fine institutions in India. The MCIA of course is one. The Nani Pakhivala Centre, The Delhi High Court Centre, these are, the IMC. These are all good institutions. The question is, can we encourage litigants and parties to incorporate institutional arbitration into their contracts and restrict the role of courts only to post award matters rather than appointments and the like. The second is that we must statutorily adopt the amendments made to the UNCITRAL Model Law in 2006, in terms of enforceability of interim orders by foreign seated arbitral tribunals. In other words, emergency arbitrations and interim orders passed by arbitral tribunals. The Act requires amendment to have clean and easy enforceability qua foreign arbitrations. As far as Indian arbitrations are concerned, the matter is now before the courts and I don't want to make any comment on that. The third area is third party funding of which you are going to hear something today. I think the time

has come to have a regulation. Third-party funding, of course has never been barred under Indian law but we need a regulation to make sure that it is applied in the correct way. The fourth is the introduction and the use of technology and the hardware for arbitration. So we need real time transcription on a regular basis in arbitrations, we need more virtual hearings, which we've all gotten used to in the last one year, because in the future costs are going to be a very major consideration in international arbitration. And these are cost cutting measures. The last is training not only of arbitrators but also the arbitration bar. I've always maintained that we Indian lawyers have a lot of talent. We have great experience of trial court work. We have a great common law background 150 years of recorded common law, ease with English as a Lingua Franca of dispute resolution in India, an independent and innovative judiciary. But somehow many of us have fallen into old methods that are not expeditious, they are not on the cutting line today. So, I think we need to get used to timelines, page limits, no ambushing of opponents, better modes of discovery and the like. So, these five parts forwards is where I see Indian arbitration moving. I think there is a great opportunity for India to have its place on the international arbitration table. The only question before us is do we have the will to do it? Thank you.

Mr. Nitesh Jain: Thank you very much, Mr. Khambata. It’s always a pleasure to hear you and very, very interesting issues that you've pointed out going forward. I now go to Andrew and would like to hear his comments and feedback based on his international experience, that can be helpful. Andrew over to you.

Mr. Andrew Battison: Thanks very much Nitesh. And thanks to my co panelists. It's a pleasure to be here this evening. I, I’ve been asked to give some comments on the investment arbitration regime in India in particular. I think just picking up on a couple of points that Darius made, in particular he referred to. I think that his first good point was the dealing with some of the ghosts of the past. And that may well be a quite a good description of the investment arbitration regime reforms which have been made in India. I'm going touch on those. Otherwise I endorse in terms of institutional arbitration and the points that he made in all of his comments. In terms of the investment arbitration, I'm going to refer to I think four points. One is, a brief comment on the relaxation of the FDI norms in India, at least pre Covid. Secondly, to deal with the reforms that have been made to the model BIT. Thirdly, to just touch on India as a capital exporting country, which I think when we're looking into glancing at the horizon, that's a really important issue to keep in mind. Finally, I would touch on managing treaty claims as a respondent state and best

practice in that regard, which model something that could be adopted for the future. Just turning to the first point of relaxation of FDI norms. It's clear that the trend in India in the last several years is been for growing FDI. I think in terms of figures in 2013, there was roughly 36 billion US dollars of direct FDI. In 2019, just prior to Covid, there was approximately 64 billion. Now Covid-19 of course has made its mark and that will continue for some time, including through the designation of India's border countries as restricted for purposes of FDI. However, what the pre Covid figures show is a growing interest in India as an economy and a market, that at a macroeconomic level globally is very attractive. And it's also one that's been encouraged by reforms in the FDI sector, generally leading to an opening of those sectors, certainly outside of those that are considered particularly sensitive to the state. And so that's permitted greater levels of FDI, enhanced foreign ownership levels and a preference for the automatic rather than approval routes for FDI. Now unsurprisingly, this has led to an increase in commercial disputes and possible treaty disputes. So, it's perhaps not surprising that in the context to growing FDI, there's also been a re-evaluation of the investment treaty regime. So, it's a sort of a calibrated reaction if you like. It's important to note, that India is not alone in this situation. There are many countries looking to recalibrate their investment treaty frameworks. In the face of more and greater FDI as well as to

take account of lessons learnt from past disputes. These are important areas of public policy and economic policy, and they're also politically sensitive. So, when the world eventually emerges from the pandemic a crucial question we all face including as lawyers is; what are the appropriate settings to encourage FDI without unduly stifling legitimate governmental regulatory options? Now, in that regard it's worth looking at my second point, which is India's model BIT and changes that have been made to it compared to the prior one. One of the most visible changes, its actually two. The first of course is the reduction in current BITs that are enforced. I think in round figures it's been 58. All of the old BITs have been terminated. Only 6 new ones have been entered into and there’s these two older BITs that remain. The current Model BIT, this was the second point to note not only just the reduction in scope, but also in terms of the number of BITs in place. Then also what is the content of the Model BIT and of course much has been written on its relatively restrictive approach. Certainly, by reference to India's earlier Model BIT from 2003 and those restrictions particularly apply to qualifying investors, qualifying investments and protections of those investments. Now, historically these changes can be seen in the context of some of the big claims that have been brought against India, particularly in the telecom sector and concerning taxation measures, as well as the challenges of running that arise from

running a federal system. A number of issues occur at a state level before then coming up to be a federal level. Of course, that can make them harder to manage. Now those prior claims have led to concerns of investor bias or potential regulatory chill and then issues around enforcement and the lack of or concerns around enforcement and the like. So far also, India has been respondent to more treaty claims than it has than Indian outbound investors have brought treaty claims. So, one might expect that. I certainly, I expect that to change in the future as more Indian companies look to expand and invest overseas. This is a key point to take away in my view, which is that investment treaty seeks to encourage investment in both sets of Host states. And so, it's important I think for India to keep its options open for its own companies as they venture forth. Now, in terms of investments and restrictions much has been written on the adoption of the extensive and largely closed ended definition of investments on an enterprise rather than an assets basis, which expressly adopts the Saline criteria. The exclusion of portfolio investments of government bonds, the exclusion of claims to money arising from either contracts or judgments awards as well as certain intangible rights. Another point for the horizon to note is that the exclusion of intangible rights is likely to be seen, I think historically is unfortunate. Particularly given the digital economy is fast transforming and things like goodwill and other issues became important and a worthy I suspect of

willing encourage innovation by being protected. Similarly, the investment protection side, you've got, if you like exclusions of what's entered into and covered by investment treaties, and then you've got other restrictions. And then you have restrictions in terms of the protections that are provided under the Model BIT. The Model BIT is notable for some significant absences. Of course, there's no most favoured nation protection. Partly I think by way of a reaction to the White Industries case. There's no fair and equitable treatment protection and where there is at least not as it would traditionally be considered. And where there is one, that survived in a treaty it's to the minimum standards of treatment to customary international law rather than some evolved standard. There's a narrow definition of expropriation in the context of judicial decisions. There's a mere mandatory exhaustion of local remedies prior to commencement. That of course is, it can be a concern to foreign investors into India, given the risk of delay through the court system. There's exclusion of taxation measures and measures of local government, which causes also, I think concern foreign investors. There are relatively tight time limits for commencing claims. And there also some clear obligations or conditions on investors to qualify for the protection vis-a-vis, corruption, for example. I think the latter is it far more difficult to criticize than some of the others. But what that tells you is that although India is certainly seeking and

is growing its FDI, it is becoming far more calibrated and vary of the potential risks that it runs in terms of treaty claims as a result. Now, the flip side of that, and my third point is; Will India, as a capital exporting country, there've been at least two claims, investor state claims brought by Indian parties against respondent states. One recently in Indonesia, unfortunately it was unsuccessful for the Indian party, but it sets I think the beginnings of a trend for what will happen over the next decade, which is as Indian companies go outbound and grow outside of India, just inevitably, there will be circumstances where claims will be brought. As a result, it's important that India have at least a robust network of protections that refer to its own companies. As well as, in order to support their growth and the remittance of profits and capital, et cetera. Finally, just a fourth point and briefly India lacks a designated nodal agency to handle the representation of the state in all investment arbitrations. In my view, that's an error and should probably be remedied through the creation of a single centre. I think that's important. Because if you have a centre of excellence in terms of law and practice at dealing with these claims, and India clearly is going to have an investment treaty regime frame work. It's just more limited than it once was. Then you want to sought of embed best practices and ensure that difficult situations are not made worse. For example, through missed deadlines, et cetera. For example, the Spanish

Government faced many Energy Charter Treaty Claims as a result of changes to its renewable regime. It certainly benefited from having a central body defending them all and being able to pass through knowledge learnt from one case to another. Thank you, Nitesh. That was my brief comments.

Mr. Nitesh Jain: Thank you Andrew. Very interesting to know your views. Now let me go to Manish. I mean, they are the actual users of the arbitration, of course as lawyers, I mean, we have different views in terms of what the problems are, in terms of the procedure, the substantive law. But the actual users are like Manish and Sapan. So, let's see what Manish has to share in terms of his views and the next steps.

Mr. Manish Sansi: Nitesh, Thanks. And thank you panelists for having me over here. I've been asked to speak on the involvement of virtual arbitrations in the present environment. And I think this is the best time to speak about virtual hearings. Past one year's experience in litigation in India has really taught us the importance of having virtual proceedings. And while the initial few months in the previous year went by in trying to overcome and overcome the issues that we were facing the large issues that we are facing in virtual hearing. But I think with passage of time we have really learnt how virtual hearings and how efficiently they can be handled. And to give you as, Nitesh you rightly

mentioned, we are the users to give you an in-house counsel's perspective. I find virtual hearing as something as very very effective, very important. As Mr. Darius also mentioned, the kind of cost savings that it can bring about is enormous. And therefore, without any doubt virtual arbitration are something that needs, to be encouraged and embraced by the fraternity. But then I would rather want to also state that in addition to the cost saving the other, there are other few advantages as well from an in-house counsel perspective, which I can state. One is, that I get the opportunity to explore more and more counsel options for my arbitration proceedings, which is extremely important and essential. And it actually also helps the other side of the bar as in, the counsels also get more and more opportunities. So that’s another big advantage. And, another big advantage that comes with virtual arbitration is that in those proceedings wherein we have to use experts, independent experts, availability and using of independent experts in a virtual environment becomes much easier. And you get more options actually to use experts which is a direct benefit to arbitration proceedings. So that's another big advantage that I see with virtual arbitration. And this is the march of technology. See the fact that virtual arbitration, virtual hearings have really seeped into our system and it will only grow. I think the way forward is through virtual hearings. Yes, there will be certain issues which we will have to further, further sought out like the issues of data

privacy, the issues of confidentiality, how we conduct the cross examination and all. But these are all issues or matters, which can be very well addressed with technology. And I must also tell you, as I speak, there are various service providers within the country who are in the process of developing the platforms, which will only further facilitate and make it easier for the fraternity to use virtual hearings as a matter of process. And in this, I must also tell you, that a few years back, I was part of an international arbitration proceeding and for that proceeding, we have all had to travel. There were three parties. It was a multi-party arbitration. There were three parties who had to travel all the way out to Singapore, all from India. The arbitrators also travelled all the way to Singapore. It was a plane load of people travelling to Singapore for the arbitration and the proceedings over there lasted for just 15 minutes, right. So be we landed there, spend a day over there for 15 minutes and all came back. And now just put that scenario in a virtual environment and you see the kind of advantage that you can really derive through virtual hearings. So, in my view, virtual arbitration is the way forward. And in this the institutions, the arbitral institutions will play a very important and a vital role to make it more and more popular in the form of, in the form of coming up with forward-looking rules, forward-looking procedures and also helping lawyers,

arbitrators’ change and also giving them the facilities to make a virtual hearings even more possible.

Mr. Nitesh Jain: Thank you, Manish. Very interesting perspective. Now, if I can request Sapan for his views. Sapan has been the user. You know I mean, as in-house and as a lawyer. So, it will be interesting to see, you know the problems that kind of from his perspective, what the issues are and what the next step is. Over to you Sapan.

Mr. Sapan Gupta: Thank you. Thank you so much. Thank you. Mumbai Centre for International Arbitration, Dilber, Neeti, Nitesh, the Trilegal team, the co-panelist and Mr. Khambata. The problem is that we follow a protocol that the most knowledgeable person has to speak first. It should be the other way around. No. Whatever we are not able to cover, people can then come and cover. And Mr. Khambata should have done that. I think we should follow that protocol. It's easier. So, thank you. Thank you, Mr. Khambata, Andrew, Manish for giving your views. From our perspective and from a private practitioner perspective, I will start with the recent example, which we faced which actually is in contravention to what I'm recommending today, is that we had an arbitration award against us outside India. And we said, let it come. Let's see where he goes, how much time it takes in the court. What all can we do. We had given him and given the other party

an offer. We had assets in State A, State B, State C. He obviously chose the State where we were registered and filed the case. The matter is going on. So, you use these opportunities as you as it fits in your scheme of things. But on a very generic and at a practitioner level, there are many things which needs to be, to be looked at and it is also a matter of evolution. As Mr. Khambata said that at 29A came, everyone said that 12 + 6 months, how's it going to get implemented? And he was humble enough to acknowledge that he changed his view over a period of time that this was a big help to the whole arbitration as a dispute resolution mechanism. So, arbitration, as I see, is in a state of legal evolution that it is improving. As we see from the 96 Act, which itself was probably the first step in the evolution of this phase. It continues after roughly 25 years. All of us can, of course argue that it took much longer than it should have, but it is moving in the right direction, sometimes slow, sometimes fast. And specifically dealing with what happens after arbitration awards are awarded. Now, the first thing which comes in mind when you look at arbitration as a, as a law student - cheaper, faster, experts, much better than the court system. Unfortunately, all those things which we were expecting or hoping to get of arbitration are on the other spectrum. It's improving, but they are on the other spectrum. And the biggest problem is the enforcement of the award itself. But you still need to go to the court and get it

enforced. So, as I was giving my own example, the first question about the other side was where to go? Because they didn't know where my assets are. So, whether disclosure is important? Yes, it is very important. But is it followed? It is not followed. In Bhandari's judgment, they did define the disclosure sheet, they changed the CPC format to give it more exhaustive view, but we need a larger acceptance of those formats. In India, in general leave aside the last few years, online data being available, the disclosure has overall remained the problem. Even if, even if there is not an issue, the largest of the companies don't disclose, if at all, they can avoid it. So disclosure is the first thing when the parties enter into an arbitration should become part of the arbitration processes, that parties disclose where their assets are and where to look for, if they lose in the proceedings. Then we come to the course, you know, once you have identified and then you say, okay. You have State A, State B, State C. Do I go to all the States? There are different requirements that you can only enforce if the property is located in your jurisdiction. What is the seat of the arbitration? What is the registered office? 2(1)(e) is there, but still, it doesn't really specify or it is not very clear that where the party should go. And you if you choose to go to one court, whether it is defined by seat of arbitration or registered office, it should be binding on other court as well so the party doesn't have to run from one to two to three

courts increasing the cost. Bombay High Court in Global case have highlighted this. So, courts have been doing their bit, but it needs to be more channelised and used in practice. Now when you have not disclosed, first you are doing asset tracing, then you are doing, and then you are running from courts to courts. The question of course of costs comes in. In arbitration the costs are awarded. But in India, the courts normally do not award and they award very low sums, very little sums for covering the legal cost. And from that perspective it should be sort of important to say that the cost will be indemnified under Section 31(A). The cost needs to be indemnified to the parties who were taking advantage need to know that there is a cost on the other side if you keep on perennially moving the matters. Previous panelist has spoken about Karia, about Justice Nariman judgment. That has helped, that will help because earlier it has sought of become a ground Preamble to the Act, which is very well, which is very common in number of Acts India that public policy exception is there. It has been narrowed down significantly. It says that Section 50 is clearly saying that only if there's a refusal then you go to Supreme Court and raise 136. So, in the longer run, I think that will benefit that the grounds are limited on which you will approach the court on public policies. Overall, in midst of all these there's also a little bit of obligation on all of us, as practitioners, as arbitrators, as facilitators. Like I see Montek is there from

FTI. All the stakeholders have to really walk towards using this mechanism, as a mechanism for fast redressal and to reduce the cost and to use the experts. From that perspective, I think practitioners and arbitrators have to play a very, very important role to make it very effective and time bound so that we can really evolve in this area. So, I think Nitesh with these thoughts I will leave for the rest of the panelists.

Mr. Nitesh Jain: Thank you Sapan. And it's actually interesting to, I mean, what Delhi High Courts and Bombay High Courts have done in terms of improving the execution process. Of course, Bhandari is the celebrated judgment. We had something today in the Delhi High Court. On those lines the judgment actually provides what will happen on step one, step two, step three. It's a very logical judgment to follow and it takes away the larger part of the CPC because arbitration itself is a procedural as well as substantive act, right. The Bombay High Court have also said that once if you're doing arbitration in Bombay even if the assets are outside you don't have to go where the assets are. You have done arbitration in Bombay, under 2(1)(e) this is the court. They will facilitate in terms of, you know process, which is absent in CPC. Right? So, interesting views. I'll now go to Montek, you know to understand the expert's view, right? Because, internationally of course, in a lot of arbitration we do have experts but

domestically, we tend to miss the expert, and in the court matters. Of course, right? So, Montek. Over to you.

Mr. Montek Mayal: Thank you. Thank you very much Nitesh. And thank you very much to the Trilegal team for having me on for this panel. I think Sapan said this is as well, I think it's tough to go towards the last because all the main points already covered by the eminent speakers before you. And Darius at a very, very high benchmark at the start. Perhaps what I can do is briefly explain the role of experts. And in some ways it's been a disappointment because it's still something for the future. It should have perhaps happened more by now. In some ways it's a positive trend because I think we have come a long way in the last five to six years. I think with that context, perhaps what I'll do is first briefly explain the role experts play, and then try to discuss a bit about how we fit into the larger dispute resolution process. And perhaps towards the end, when the theme of the today's panel discussion is a few points for the future, which all of us might want to keep an eye out for. So very, very briefly experts, as I said this in the conversation this morning, as well, individuals who have a particular expertise in a particular area or a particular skill set, which are, which can become quite relevant and important in contentious settings in any disputes. Because either they are necessary to opion on certain specific issues that have come up. For

example, commenting on an industry issue, commenting on technology which might be in dispute, or they can bring in certain skills, which are then required for assessing and quantifying damages. For example, an evaluation expert, an accountant, an engineer, a quantity surveyor in infrastructure projects. Essentially experts are witnesses on opinion, they're not witnesses of fact, they're not advocates, but they're witnesses of opinion who can hopefully give information, analysis or evidence, which is then therefore important for the tribunals to consider in making an informed decision on the questions before them. So, what might follow from that brief remark is experts particularly those required for quantifying damages are often required for the more complex cases. When the question that need to be answered are not necessarily straightforward. When there's uncertainty in the outcome, when answering the question requires a more careful review and analysis of wider evidence, it can often and does often span multiple disciplines and subjects. For example, question that are often put to at least damages experts, it could be valuation of businesses and shares. Imagine the context of a joint venture or a shareholder dispute. Imagine the context of investment disputes, expropriation claims, investment treaty arbitrations. Again, those questions require a deep understanding of finance, economics, accounting, or industry to answer the question on valuation. Then you can also have loss or profit calculations.

Now, for example, imagine the context of a termination of a long-term agreement and that long-term agreement disruption might have consequences on the party, on the injured party. Anther questions often put to us or experts are analysing costs or the effect of disruptions and delays on such costs. For example, in the context of construction agreements. Valuation of patents and IP rights, again, quite relevant in infringement cases. And finally explaining and describing how an industry or a market might function could be relevant in many, many different contexts. These are typical questions that are often put to experts. And what is hopefully clear is these questions, like I said, are governed by principles of finance, economics, accounting, valuation or detailed understanding of how an industry works. Experts hopefully can help in analysing such principles and applying a robust framework to answer damages questions put to them. And in doing so offer that technical, that subject matter evidence or analysis, which otherwise might not be available in the dispute resolution process to the tribunals. And that obviously is important in context of establishing assessing damages. Now, in terms of the role we can play, I think what traditionally people might be more aware about are what we call party appointed experts, which is essentially each party or all of the parties might appoint an expert to put forward a claim or to perhaps review and critique the other sides claims. That's the most common form of experts you perhaps see

in arbitrations and litigations today. They're also tribunal appointed experts. So, tribunals also have the power. You know in most arbitration, as just like in India, otherwise or otherwise or institutional needs to appoint experts to help them with questions in front of them. That's rarer but I think in certain jurisdiction on certain issues you find the use of such experts more frequently. You also have dirty experts what we call or consulting experts, which is not necessarily independent experts. They don't necessarily testify or provide expert evidence in the formal process, but are behind the scenes advising the parties and advising the clients on issues within their expertise. You don't yet find experts being appointed as tribunal members as often in India at least as you might see elsewhere. Again that's a role we might play. Finally, the expert determination process is quite common, especially for say post M&A disputes or accounting disputes, where the parties agree to jointly appoint an expert to testify, to clarify and testify, perhaps on matters or to clarify, and perhaps rule on matters, which fall within the form, which fall within the issues, which are debatable in the parties. So those are the normal forms of experts or roles that experts might play in a dispute's context. Of course, all of those roles are described, perhaps certain benefits or certain aspects that need to be dealt further. For example, in party appointed experts, one issue often is raised as is that, is there inherent bias in an expert to sort of focus, or

perhaps push the agenda of the party appointing them. While I think, some of that is true. But I think you will find good experts and true experts, who will remove themselves from that. In, in reality, the role of an expert is as good as a tribunal will see it. If there is bias in the outcome or the biases in the analysis, tribunals will pull that out. When they pull that out, that’s not very helpful for the expert because it can affect their future work. I think there's an inherent self-regulation and good experts want to genuinely give their true and fair opinion on issues put to them. Now, in terms of, I think that's, I'm going to make a remark here about I started the conversation about, in some ways it's been a disappointment, in some way it's been encouraging. You know, there was a survey done last year where LCIA, the London Court of International Arbitrations essentially stated that out of the 300 matters, they heard that year, all of them involved one or more experts. A similar survey done was done for India, where 50% of the parties responded that they never appointed an expert in their matters. That's the contrast you're dealing with in terms of what the state of play currently is in use of experts in arbitration in India. And at perhaps as a remark for the audience who is attending today, in terms of understanding how you might introduce and use experts. There are some fantastic guidelines out there which provide more context of using evidence in international arbitration. For example, the IBA Guideline of taking evidence. Of course, the

CR protocols. Both provide really helpful input in terms of how to use expert evidence in disputes. So, that's the role very, very briefly. I said, my second bucket of points would be around how do we fit into the dispute resolution cycle. Now in many ways, the role we play mirrors the process, which counsel follow, clients follow in their disputes. In my perspective, we can broadly divide the phases where experts get involved into three buckets. The first bucket is what we call early case assessment or a pre-claim assessment. Here you often see counsel and parties bring experts into first to understand what the questions are needed to be answered. What are the damages questions that are to be addressed? What are the possible heads of claims you can pursue? What kind of evidence would you need to support those claims? Are they worth even filing or fighting for? And maybe even forming a preliminary view on those questions? So again, as counsel, as clients, you take a much more informed view of the arbitration and the strategy you might've apply in your arbitration. I'm sure and perhaps Manish and Sapan can support me here, if you have a claim for a hundred million, your strategy is very, very different than your claim is for 5 million. Sometimes you don't generally know the answer where the claim falls, you have a genuine claim for that amount. And that understanding upfront would be quite helpful. The second phase is where you actually, what I can also say perhaps the most money is spent on experts or where really the bulk of the work is done is

your detailed expert evidence. This is where the experts would perform a detailed analysis of the questions put to them on damages or any other questions put to them in the arbitration. And the outcome of that work or outcome of that phase is essentially a detailed expert report, which is then filed in the course of the arbitration or litigation. And that's where the bulk of the work, the detailed work, the calculations, the supports, the research is all sort of performed and then submitted often the course of the arbitration or litigation. The last phase is essentially the testimony phase. This is where you go and you testify. I can perhaps see a little smile coming in Nitesh’s and Ashish’s face because this is where the counsel come and cross examine us. This is what counsel is often looking, looking forward to, when you cross examine the experts. We are called to give evidence. While of course, counsel is looking forward to that, I think it's a great opportunity for experts to create a connection with the tribunal in the court and provide a real help, that gets opportunity for the courts and tribunals to hear from the experts often for the first time. Because until then they have read the name, they've seen the reports, but they haven't really met or understood the expert here. So, I think that's where, that’s where the testimony happens, we oral evidence, there's cross examination. For that, perhaps any support counsel might require closing submissions. So, I think one remark I will make here is, you know, I described this process

because I think that's the way at least we see it. I think it's quite consistent with perhaps how counsel see it. At least in my view, there's a lot of benefit in bringing experts upfront, right? Because like I said, you're able to identify some of the damages issues quite early on and it might end up saving you money because the experts might say, look, there isn't a strong claim for these heads of claims. There's no point wasting time or effort into those heads of claims. Or you know on the other hand, you might find opportunities for experts to say, well! actually, you missed certain heads of claims are quite relevant to your case. And here's the kind of evidence you will need that allows the injured party or the client to prepare their documentation to make sure that evidence is available for support in the course of the dispute. I think as, you know in terms of, at least that's the way I see the role of experts in terms of, I promise my last sought of comment, or at least a brief comment would be looking to the future, keeping with the theme of today’s panel. I think in terms of, at least the way I see it and I would very much welcome any comments others might have on these points is obviously it remains relevant for firms like us for people like me to continue to create awareness amongst counsel and clients and corporates on what exports really do. I think there was a, there was perhaps a little less awareness of the roles they might play in the context of arbitration, litigation. Of course, that remains relevant for the future. I

think we still have to do a lot more, especially when it comes to a mid-cap company or small cap companies or SMEs, which perhaps they're not aware of individuals who exist, who can opine on such issues in the context of arbitration disputes. And the most important point, at least from my perspective and which I believe is quite relevant and necessary for the role of experts to grow and perhaps for experts to be more and more useful to the process is reliance on evidence by the tribunals itself. And when I say reliance or use of evidence by tribunals, they don't necessarily mean always in a positive way. Tribunals could disagree with expert evidence. Tribunals could find expert evidence not helpful in a case, right? That's not the intention always or often but sometimes the evidence is not useful. But I think what is important is to create a feedback loop. It’s important for tribunal to state where they did find evidence to be useful, where they did find evidence to be used in arbitration and how that was informed their final decision on quantum or liability or other issues. Until you create that feedback loop, clients like Sapan or Manish or counsel like Trilegal or Darius will find it, not necessarily understand the cost benefit of using experts, because they might not even know that evidence can be relied upon. So that's a remark I had for the future. I hope we can all comment or use or at least refer to such evidence in the context of awards. Thank you very, very much, Nitesh.

Mr. Nitesh Jain: Thank you Montek. We have got inputs from senior counsel. We've got inputs from foreign expert, from a practitioner, we've got inputs from the experts, the in-house corporates. Let's hear Ashish now. I mean, he'll share experience in terms of what counsel or the lawyer think. Where we are in terms of next steps for arbitration. Ashish over to you.

Mr. Ashish Bhan: Thanks, Nitesh. First of all, let me extend my warm gratitude to all the participants and the panelists on behalf of Trilegal. Let me close the session by sort of giving a brief of what we've heard so far. And of course, it was extremely useful to hear different aspects of, what next for arbitration in India. I do believe that the earlier comments made by Mr. Khambata were extremely important because he could kind of set a tone to this, to this session where you know he gave a very broad picture of, you know what he thought was important for the future of arbitration in India. I think one of the points there and I thought I'll touch upon that is that; You know in India, even though, you know Nitesh, myself and many other lawyers who practice international commercial arbitration or just arbitration, domestic arbitrations, we do tend to do a lot of other things along with it. Which essentially means that we don't have a dedicated bar of counsels who do just arbitration and I think that's where a

lot of it and I can personally speak from experience that I’ve seen some of the top lawyers conduct arbitrations but their expertise lies in courts more so because they are regularly appearing before courts and not before tribunal’s and conducting a trial. An original side lawyer of course, is always preferred, you know in arbitrations. But I think when you have a dedicated bar, it kind of discourages you know part-time, part time practitioners who do arbitrations only on a Saturday to sort of finish the week. But I think what we should be looking at is more of a dedicated bar trying to look at and practice and be active practitioners in arbitration. I think what that would do, would of course, impact positively the future of arbitration in India. We'll have more sort of focused counsels, who are doing arbitrations on a day-to-day basis. I think along with that and I say this with utmost respect to the arbitrators who do conduct arbitration in the India. But I do think that there's a need for sort of having dedicated arbitrators who are just arbitrators by profession and not as part-time arbitrators. I think one of the things that does is that; a) they’re able to, again, it's an experience that could change the arbitration in India where you have dedicated arbitrators, who can look at cases on a much more fast pace I think we all, as practitioners have, had seen that it gets such long dates, et cetera which is sort of that's been one of the reasons why arbitration hasn't progressed to the extent that it should have in the last 10-15

years. I think the need for those more committed specialized arbitrators is also very, very important. Also, I think one of the very important points that was raised by Mr. Khambata and also Manish was, how can we improve our technology? And make sure, you know we are able to bring that on board and ensure that we are able to positively move forward. I think one of the things and I can say that with my own experiences is if we have live transcriptions in Indian arbitrations, even in ad hoc Indian arbitrations, it just changes the game altogether. I think, there's a massive need for having that live transcription in all arbitrations in India. It just makes things much easier and efficient. I think to Manish's point, virtual arbitrations are a way forward from a client perspective. I remember the incident Manish was sharing. I was a part of it and how useless we felt that we went to Singapore for half a day with a team of at least 15 people and maybe 30 people from both sides. And, and it was such a waste of effort. So, I do believe that just having the virtual platform and able to conduct arbitrations on a virtual platform, ensuring that the arbitrators are open to sort of conducting cross-examinations virtually would again change the game for Indian arbitrations. And more so, when we have institutes, like institutions like MCIA and others in the country, I think even now we are getting in there where they're playing a very important role in raising awareness in the country about how arbitrations should be conducted more successfully. So, I

think, we've covered most of it. But one point at which Montek sort of left us with, and that's a very important point and I've been a very strong believer of that the role of the expert is extremely important in today's age. I think I've been able to convince a few clients to understand that, look I don't want to see a claim from you which is which has come to me and said please Ashish defend this. I'd rather have a person like Montek come and explain me the basis of that claim. So that both of us can analyse and see whether this claim is even worth filing or is it worth thinking about or reducing or increasing. I think that preparatory step is the key. Because, you know, I can say that with a lot of experience looking at various kinds of arbitrations and more so in the infrastructure side. You know most of the time they'll have clients who would have a pre-set thought process where they'll say, okay I need a hundred crore claim on this part, on this issue. Now, how is that a hundred crores calculated. You spend hours, you spend days and weeks working backwards to justify that. And I, therefore, I do think that you know the pre-claim analysis is much better than the post claim analysis. Because it makes things easier for all the parties. I think once you streamline and that's why I have been saying this systematically that from the top till the last stage if it's done systematically. I think that's the way forward for us. And I think just to sum it up at the end of it you know we need to also start training lawyers at the law

school level on how arbitration and how to conduct an arbitration is extremely important. I think we as lawyers and I can again go back to my law school and think whether we ever taught or even exposed to things on how arbitrations were conducted. We only knew of it as a fancy term. That is an alternate dispute resolution. It's a need for lawyers and you would see them in different arbitration centres doing arbitration conducting arbitrations over the weekend. But I think just closely working with law schools and explaining them and raising awareness on how arbitration should be conducted is a great step. And I think, institutions like MCIA is been doing a tremendous job in ensuring that at all levels the knowledge is shared. So, I think, all in all I said this earlier in the day in some other panels, that we've seen an immense change in the last five years and that change has been extremely good. But I think, you know we are still five years behind. So, I hope that in the next five years we will be able to talk of India as a prime hub for arbitration. And I think a collective effort by both arbitrators, the judges, as well as the lawyers, would be very, very important to ensure that we reach where we are thinking of reaching in the next five years. On that note, I would like to say thank you to everyone again. It's been a pleasure being on this session and thank you very much Nitesh for moderating it.

Mr. Nitesh Jain: Thank you Ashish. Thank you everyone. I know we have exceeded time. So, Dilber over to you, to just conclude this.

Ms. Dilber Devitre: Thanks so much. Ashish has already done a lot of my work for me, so I'm not going to draw this out any longer. No, it was a fantastic session. I think the takeaway if I can try to summarize it in one simple sentence is, I think we've come a long way as an arbitration centre. In India, we've still got a long way to go but we're on the right track and we're heading in the right direction. And, I think we should continue going down this path. There's good. And there's bad. We have heard all of that today in this session. And, we're on the right track to become an arbitration centre. So, with that conclusion, I would like to thank all our panelists today for all their input. I would like to thank all the attendees. We are almost over 130 attendees today on this session. Which is fantastic. I have a few housekeeping matters that I just have to mention for you to know. Tomorrow, just to know, there is no session at 10 o'clock. We will start directly with the 12 o'clock session, which is on the appointment of arbitrators. I've also been asked to inform you that there will be a recorded message from Justice Malhotra, which will be put up on the MCIA LinkedIn profile, tomorrow at around 11.30 am. You can all have a look at that as well. Thank you so much for this fantastic session. And we look

forward to seeing all of you over the course of this week regularly.