MUMBAI CENTRE FOR INTERNATIONAL ARBITRATION

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Session theme:
Section 11 and the appointment of an Arbitral Tribunal: A True Prologue

Transcription of Proceedings

Technology Partner

Shreya Gupta: Hello everyone and welcome to this session on Section 11 and the appointment of an arbitral tribunal. This session is hosted by Economic Laws Practice. Without much ado, I will start with introducing our speakers. First we have Justice BN Srikrishna. I don't think Justice Srikrishna needs any introduction. He is one of the foremost names in arbitration in India and is actively working towards changing the arbitration landscape. After his tenure at the Supreme Court of India, he has been part of numerous committees and we thank you for all your efforts Sir. Moving on, I would like to introduce Mr. Manish Lamba who brings with him not only his experience as an arbitrator but also extensive in-house experience including at big corporate giants like Bharti Airtel and DLF. It would be very very helpful to have your insights on this topic as well Mr. Lamba. Moving on, I would like to welcome Mr. Nicholas Peacock, who has over 20 years of arbitration experience and has sat both as an arbitrator and acts as counsel to parties and brings a very diverse international perspective to this discussion. Mr. Peacock has worked both with Singapore and UK Law. So welcome Sir. And I would like to introduce Mr. Naresh Thacker who has over 20 years of experience in the world of international and domestic arbitration in India and leads the arbitration practice at Economic Laws Practice. Thank you. Before we start the session, I would just like to point out that this session is being transcribed and over to you. Over to the panel.

Naresh Thacker: Thank you so much Shreya for that wonderful introduction and a very good morning, good afternoon or good evening to all of you wherever you may be joining us from. Welcome to this first ever India ADR week launched by MCIA and to this session which is being hosted by ELP which is titled Section 11 and the appointment of an arbitral tribunal - a true prologue. Now I am quite certain that each one of you has joined us this afternoon for the stellar star cast that we have managed to assemble on the panel and not because of our choice of topic and I admit that I am guilty as charged and this topic is as mundane as can be and I won't fault you for asking if this is a topic requiring an hour's discussion. Well, if you ask me as it turns out in India it yet merits just as much footage as an old Bollywood biopic that almost all of us did relate to in the heydays of the 70mm reel and I am sure you know what I am talking about but on a serious note when I opened the Sunday newspaper, the first article that my eyes fell on was one where the Law Minister when he was addressing a gathering organized by the Bennett universities, School of Law said and I quote him "that India has the potential to emerge as global hub of arbitration" and he mentioned international arbitration. Now I absolutely do not doubt this statement because we are second to none when it comes to expertise and application of mind and to me, it is truly the execution where we always flounder. Let me ask this

question for how much long are we going to dwell on the potential that India has? Have we not been doing just this if not earlier since at least 2012 when the Supreme Court pronounced its decision on BALCO? That for me as well was a turning point in the law and arbitration in the country but what next and that is the question that everyone asks in this country. The law on arbitration in India prior to 2015 has moved one step forward and two steps backwards and all of us know it. Come 2015 we saw a different trend. It now moves one step forward and one step backward. Now because we remain in a constant state of motion, we believe that we are moving forward. What we possibly do not realize and this is to our own detriment, is that while we continue our motion in circles, the world is actually passing us by and this is a sorry state of affairs that even in 2021 we yet just speak of our potential and this is one of the reasons for the choice of this topic. A topic so mundane that it does not deserve a second glance and yet in India we struggle to tame this unruly horse fondly referred to as Section 11. Now, without wasting any further of my breath on this subject and your time and the time of this panel and also trying to decipher the nuances of the topic on my own. Let me quickly turn the heat on the panel. My first question Sir is for you Justice Srikrishna and before I ask this question, I would actually want to give a small pre-face. Though my question is very simple but I do believe that it would yet require a pre-face. Section 11 saga

truly began with Sundaram Finance. It trickled down to Konkan Railway Corporation then was finally settled by SBP and Patel Engineering. Albeit, to my mind somewhat incorrectly where the Supreme Court gave unto themselves and every other court in this country appointing arbitrators expansive powers of scrutiny even before such appointment could ever be made and they allowed the courts to enter into what I believe is the arbitrators domain such as questions of existence of dispute, validity of an arbitration agreement, whether dispute is time-barred and so on and so forth. Then came Bogara Polyfab which narrowed down the expanse a little and then Sir you authored Shin-Etsu Chemicals which according to me laid down the correct test that a prima facie scrutiny and Sir mistake may not. I am not saying this just because you are on this panel. In fact, that 246th Law Commission headed by Justice AP Shah actually wholeheartedly advocated your view and sir 2015 amendment unfortunately did not accept all the recommendations of the 246th Law Commission, yet there was an important outcome and that was an introduction of Section 11(6)(a) where under the scrutiny of the courts were to be limited to the existence of the arbitration agreement. Things did improve post 2015 for a bit but then Sir we had three successive quick decisions that went the other way and then came Vidya Drolia. Well, Sir what can I say a decision which to my mind at least does open up old wounds when it requires the court to do and again I quote the Court "to do an intense and yet summary

prima facie reviews". I have not understood this phraseology but it says intense and yet summary prima facie review of the arbitration agreement and then further says that the existence and validity of arbitration agreement is intertwined. Fortunately, this decision is now before the larger bench of the Supreme Court in NN Global Mercantile. My question to you Sir is what next? Where are we headed on this journey and why is this one innocuous provision so troublesome for the judges? Sir the lawyers obviously want to make money out of it and it's all very good for the lawyers but why would the judges allow this to continue?

Justice BN Srikrishna: Right. Thank you for the pre-face. It was very much needed. Naresh what has happened is this arbitration was supposed to be an informal mechanism of resolving a dispute as opposed to the formal mechanism which the state has by the way of a judiciary. All that they needed was a person with robust common sense and unimpeachable integrity as an arbitrator, nothing beyond them, that would suffice. Nonetheless as a famous Chief Justice in England said it's mattering with law also helps. Now what has happened in these, Section 11 did what, Section 11 says you have an arbitration agreement and you can't agree on the arbitrator or the arbitral tribunal, then you have to naturally go to a third party and they said all right let the Chief Justice recommend putting name and finish the matter. There was also a

provision right from the beginning if you have noticed that the Chief Justice or his nominee or the institution to which he may recommended. If the institution was already there, what would have happened. Let's say MCIA was an institution that was recognized. Now you would not come to Chief Justice at all. Supposing ANP has a dispute about whether the arbitral tribunal should be X or Y. They would go straight to the MCIA or whatever the institution and say please nominate. They would find out somebody and nominate him and feed the matter. Now at the time of nomination, they are not going to think whether this is an administrative order or this is a judicial order. If it is administrative order, is it liable to be challenged under Article 226 whether I am state or not? Nothing was sought they want the matter to go proceed. If you have a judge in position to decide this all these complications. So first he will say, what do you want to find out existence. Even the word existence I don't like. Is there an arbitration agreement? Somebody comes and says I want to arbitrate. The first question you ask do you have an agreement with an arbitration clause? Yes. Show it to me. That's it, then go ahead. Whatever you want to say arbitration clause is bad, no arbitration, not liable to be arbitrator, blah blah blah. Go and blast the arbitral tribunal with it, he will take care of it. Why should I poke my nose into it and there are all kinds of things which have landed as from two judges to five judges to seven judges and then again two judges and then

again five judges and then God knows where we are going to land. This is a mess. I am sorry, I am using very derogatory word. This is a mess that is created, it is self-created mess by the judges themselves. If they would have just let and said, now an ordinary man, if you talk of him and say, is there an arbitration agreement, show me the agreement and say yes it is there or not. He will not say whether it exists, whether it has legal existence or not. Why are you going into all this explicit? That is all that was necessary. Rest of it was all the tribunal would have taken care of it. Why is it so? You have asked me very relevant question because I am a Judge, I want to exercise power, I have a danda. Nick, for your benefit danda is a stick in my hand. I have a danda in my hand. So I must beat somebody who comes to be. The only reason why they are interfering. Simple thing. Now you see what is going to happen. If you say legal existence, question arises. Somebody may say, this is not my signature at all. Or I have been at the end of a gun, I have been asked to sign it or I was given too many shots of whiskey and I was asked to sign it or I was under the influence of drug and I signed it or I was a minor when I was a minor when I signed it. Who is going to determine all, the judges going to determine all this? Then where is arbitration? Arbitration is hundred miles away and may be 10 years away. This was not the intention. Now, all this can be conveniently read before the tribunal. The tribunal will answer every one of them and once for all. Then

make it appealable and appeal judge will take care of any legal issue that is there. This was the simple thing. We complicated it and after all what did Section 5 say? Section 5 clearly said that you should not interfere unless it is actually required under the law. Which law required you to interfere in Section 11? Which provision of arbitration act even today requires you to interfere in Section 11? Noting except the judge made law for their own benefit. That's all that I would say.

Naresh Thacker: Thank you so much Sir and I wholeheartedly agree with what you are saying. In fact, if one was to turn to Section 5 and if the judges were to even spend two seconds at looking at Section 5, it makes it very clear that there is no interference required by the courts in the arbitral process at all and I don't understand how better can the law say this when it says what it says in Section 5 then Section 19, will say that you don't need evidence, you don't need CPC. The courts have time and again kept on saying that there is the least interference is the best in so far as arbitration is concerned and yet continue to have the sort of interference from the court that we see. Now, my second question is actually to Manish, Manish as an arbitration user because that I would truly say that this is a service which is being provided. We are living in times when lawyers provide services so also the courts are actually providing a sort of service.

The arbitrators are providing a service. As a user, what do you think is the quickest path to appointment? Would you say institutional arbitration or would you say ad-hoc arbitration and according to you, why? And if you can also tell us the pitfalls of both or either, if you want to tell us about it?

Manish Lamba: Thanks Naresh. See the quickest and the fastest way is institutional in the present framework. If the institution was to appoint the question whether it is administrative order or it is a judicial order comes to an end that is not required at all and even but now for whatever reason, we will have to live in the realism in India it is sometimes not parties are not agreed to agree on an institution. That is how we have so much of ad-hoc arbitration. If that be the case or let us take for instance under the various statutory arbitrations where the arbitrator is required to be appointed by a party and things of that nature. I personally feel that we have not used technology enough. A very simple answer, now if you look at all the judgments which are there and if you look at them how did they translate into the practicality. Whether you look at it, whether it is an administrative order or it is a judicial order, at the end we have 50 pages of sermon, 25 judgments quoted, everything said and ultimately the end result is the same. A person gets appointed as an arbitrator. Now all that 50 pages and 200 pages of a Section 11 petition is not

required while all that what is required is you need to show that there is an arbitration agreement, an arbitrator needs to be appointed. The entire prima facie case or the entire cases reproduced in so far as those matters are concerned. I believe that it is very difficult for the judges to look for conclusion that they have been asked to perform 90% of the job is administrative in nature. Now this seems to be very derogatory and it has to be, if it comes to, if a judge needs to decide an administrative job also, it needs to do it judiciously and then the entire trouble comes into being. I have examined many orders which have been passed in the last one year. Delhi High Court would have appointed near around about 800 applications would have been dealt with. Supreme Court would have dealt with around about 60 years, one year proceeding this year, this figure would also have been in the same vicinity, if you go by the diary number which is available in the cause list. Out of that 99% of the cases, no qualification has been provided. In 90% cases there is no dispute also whether or not the arbitrator needs to be appointed or not appointed. It's a simple name needs to be given. If this entire process is put into an IA, both the parties if they were to register there on a platform, if they were to register their existence of an agreement and all that what was required was say that we need to push a button and say that a dispute has arisen under the agreement and arbitrator needs to be appointed. All that the IA would do is

in 45 seconds they would come up with a name. If you have a dispute with respect to the same, you can move to the court. Otherwise 99% of the cases would get sorted out. So I think it is not only get into the debate with respect to whether it is an administrative or it is a judicial order or things of that nature. The fastest way is where the parties have not appointed has not chosen an institution and where an intervention is required in most of the cases very easily with a little intelligence it can be given to IA and an arbitrator can be appointed. This is what I see in most of the cases when people go before the court. The court only asks, what is the dispute? If there is no dispute, so the disputed matters can be taken care of rest of all the matters an IA needs to be used for the purposes of appointment. This will take care of the biases as well. Of course, that the algorithm which has been built needs to be fair. If that scrutiny of the process of that algorithm is taken care of and the integrity is maintained for all the States, Union Territories of this country, you need not approach any court. If there is some dispute with respect to the appointment to IA, you can go to the court. It will make the entire system transparent. It will take care of all the biases and it will be very quicker, easier, faster and if there are cases which needs to be, so it be, it will happen. That is fine.

Justice BN Srikrishna: I have only one intervention to make. Naresh let me say this. What Manish says is absolutely correct. Now let's say 99 cases. There is no difficulty. The IA throws out a name, everybody is happy. If there is a dispute even then the courts should not go into anything other than what is your objection to him or her? What is your objection to this X being an arbitrator, what are your objections? That he is known to be a corrupt man and he does not understand anything, his IQ is very low what you are objection? As ordinary person with ordinary IQ with smartening of law should be able to do it efficiently. We are going to whether it should be done and 20 pages of judgment goes into appeals and then the second appeal and Supreme Court, 136 and curative petition and the law gets built. The structure of the law is built. This classic case of the operation being eminently successful and the patient dying on the bed.

Manish Lamba: I have one more reason why our Section 11 petitions so very vehemently contested. There is also one more reason and it's a logic which I have also seen people doing so and I have also suffered. I have been the beneficiary and the sufferer on both ends in so far as domestic arbitration is concerned. The problem is that there is nothing in the entire mechanism in the Arbitration Act and in institution, I can still see that they have an oversight over the entire proceedings. The difficulty is that the arbitrator does not

want to decide the preliminary question no matter how ease or tackle on the face of it would be, before the evidence is led before him entire period of one year plus six months and now 18 months have elapsed and full fee has been paid. The preliminary issue is decided for the first instance and that 18 months is something which you 12 months, 16 months you need to suffer. So therefore, there has to be a mechanism that not more than 50% of the fee would be payable where a Section 16 application needs to be decided and if the evidence is required that will be led in so far as that application is concerned. Practically, this is what I have seen happens day in and day out not with respect to, whether you appoint a retired judge or an advocate or somebody else, this menace needs to be statutory looked into and half of it would be then Justice Srikrishna started off with that some rules may be framed. In those rules, something of this nature in so far as the preliminary issues need not be decided finally at the time of award. This is what most of the arbitrators have seen. Why decide the matter unless we have heard the parties to full and then the full fee has been paid that is a huge big problem. So if at all it has to be made an administrative decision and appointment needs to take place some guidelines and some mechanism needs to be put in place where this preliminary objections are decided as preliminary objections and in the garb not stated that it can only be, it's a mixed question of

fact and law to be decided after the full evidence is led. That's the suggestion which I have.

Naresh Thacker: So two related questions and I think sir this is a very interesting thing which has come out of this discussion and sir I would want to. So what, let me take what Manish has said, what Manish ended with and ask a question around that first and then sir I will come to the other thing. The first question is that when Manish is speaking about getting the preliminary question decided. Now I have a matter in which truly I am struggling because on the preliminary question I know there is a recalcitrant party which has filed a Section 16 application saying that the tribunal does not have jurisdiction. It is on the face of it something which I am fighting against. The tribunal decided that issue as well and today unfortunately that has gone in a 227 to the High Court. Now the High Court unfortunately has granted a stay. This is where the problem to my mind lies. So I don't think statutorily mandating a preliminary question to be decided at the very first instance is the answer because I am sure Nick will educate us on this because internationally as well there is nothing in no law. Is there anything which will say that a preliminary question not to be decided at the very first instance? To my mind, the legislature kept it open to be decided by the tribunal at any given point in time and more so particularly at the end of that when they are deciding when they are giving the final award is so that there is a final

challenge and there are no challenges in between that to my mind was the answer. But sir where is the answer to what Manish is saying.

Justice BN Srikrishna: Naresh. That is why the law has been so carefully tailored that if you, if the tribunal holds that it has jurisdiction, that is not made appealable at all, you continue and render the award. And your decision whether the jurisdiction issue is rightly or wrongly decided will be only appealable in the end. If the tribunal says that I have no jurisdiction then the award is terminated. Award is made. There is a termination award. That is made appealable. This is thing, let me again confess. This is something that happens regularly then you have civil suits. When jurisdiction issues get decided, they get carried to the first appeal, second appeal and 136. When the merit lies in the cold storage for 25 years. This is the reason by the arbitration mechanism avoided all this. Whatever your problem, raise it under Section 16. If he has jurisdiction, he will say I have jurisdiction and carry on with it. If he says I have no jurisdiction, matter ends. Then you appeal, do whatever you like.

Naresh Thacker: Correct. So the related question. The other question that I wanted to ask you sir was again some of the discussion that we just had. Sir we hear this very often and we are told very often that why is the court not interfering

when it's a matter which on the face of it requires interference, so let me sir just give an example. Let's say a person says that I don't want to appoint an arbitrator and the simple reason is because my signature is forged. Section 11 in this situation is filed. Now, if the court was not to interfere in such a situation then you will hear criticism saying that on something which is so on the face of it obvious that the person is saying and on oath. He is signing the petition and it is supposed to be on oath before the Supreme Court and yet you come to a situation where an entire trial has to run for 18 months and monies have to be spent. Don't you think sir in such a situation?

Justice BN Srikrishna: It is a simple thing. If somebody comes to me and says this arbitration agreement and you are the party, let us say Naresh Thacker, it says Manish Lamba. It is obvious to me that it is not signed by you. By no stretch of imagination can you say that your signature reads as Manish Lamba or Srikrishna, you can’t say. So that is prima facie. But if somebody were to say, this is not my signature although it purports to be my signature. It is forged one or that it has been obtained under coercion or it is obtained under administrating some drug to me. Then how do I decide it in prima facie stage, I cannot decide it unless I record evidence. If it is a question of forgery, then I have to record evidence of a handwriting expert. Now if you start doing that. Now what happens to arbitration, arbitration takes

a backseat. Therefore, the right test in all this, forget all this vigorous and summary and all that. Forget all that. Look at it. If it shows you that the signature doesn't matter, give him the benefit of doubt and go ahead and let him take jurisdiction. Let him record evidence and say this is his signature or not. This is the whole theory of competence-competence, otherwise what is competence-competence. If at every stage you have to run to the court and court has to decide as if it's a suit. What are we achieving by this?

Naresh Thacker: So Nick, let me come to you and ask you the same question that you had the same problem which arises in England. A person comes and says that my signature is forged. Parties make an application to the court there. How would the court deal with it? How would the English court deal with this? Would they go into the questions of arguable case? Would they go into the questions of facts? How truly would this be decided in an English court?

Nicholas Peacock: Sure. Thanks Naresh. Thanks for involving me in a very interesting discussion. I do think this is vital. It's not a side issue. If you can't get this arbitration process started, then it's of no use to the parties and it's of no function to society. I think Section 11 and the debate you are having here is absolutely crucial. I think it applies both whether you are dealing with institutional arbitration or

ad-hoc arbitration. I have long been banging the drum for increasing institutional arbitration within India and delighted by the progress being made by MCIA but it's not the only answer because there will always be a thriving ad-hoc arbitration ecosystem in India just as there is in London, just as there is in Hong Kong also to an extent in Singapore. You need to make the process work for all of them. We don't see this very much in London. We don't see it very much in Singapore either. I think there are a few reasons for that. One is obviously the prevalence of institutional arbitration and you are only going to get into the court's interference in appointment of an arbitrator, if you are in a situation where there is no other process to get that default appointment made. If a respondent just says there is no dispute, I am not making my appointment. Where do you go? Now, obviously, if it is pure ad-hoc, you might end up in India in Section 11. A lot of the markets in UK and in other jurisdictions in which I operate, you end up with either institutional arbitration or an appointment process that you can go to. You don't have to go to the court. Indeed, if you go to the court, the court will say look there is a process here for appointment that doesn't involve me the judge making that appointment, go to the LCIA, go to the PCA, go to the ICC and get them to make that default appointment. Most often in London we don't get to the court on these situations. There is certainly a power. That is an equivalent to Section 11, Section 18 of the UK

Arbitration Act allows the court to make an appointment where the parties appointment procedure has failed for any reason and it has a flexible range of options. It can give directions to make appointments, it can constitute the tribunal for appointments already made. It can revoke appointments or it can make its own appointments. When it does so and I think this is the crux of your question. It does not get into the merits of the dispute. It's only asking whether there is a prima facie basis to pass this onto the tribunal. The test that has been reiterated under case law, if the judge says to him or herself, is there a good arguable case here that the tribunal have jurisdiction over this issue and if the issue is, is there a contract with my signature on it, then that's the issue. Someone has got to decide that if there is a dispute on it, it's got to either go to a court or it's going to arbitration and it goes to arbitration, if there is a prima facie argument there that a tribunal should have jurisdiction because that's what the parties have agreed. If there is a good arguable case, the parties have agreed to send it to arbitration. At that point, the court says that's as far as I go. Of you go to arbitration, the tribunal has jurisdiction as Justice Srikrishna said that you then get into competence-competence the whole essence of the arbitration framework that tribunal should be able to decide its own jurisdiction but the court should have minimal touch points with it. Its role is to get this process moving as quickly as possible.

Justice BN Srikrishna: The whole idea is there is an arbitration process available. The parties have apparently have signed an agreement but they are sparing over it. All the judge has to do is pick them up and throw them into the arbitrator's lap and say you go and decide whatever you want to. But if the Judge says no I am going to carry the ball then the matter better ends there.

Naresh Thacker: I do have again a related question to what you are saying Sir. But before that, can I just stay with Nick for a moment and ask Nick a question? Nick what you spoke of and absolutely I have no difficulty. So what you are saying is that the judge would usually say that here are the institution, go to the institution and get this appointment done and they will not get into such issues. Now I do remember and I use this decision of the English courts in Phili Shipping in one of my current matters where one of the questions was, it hinged on fortune and there again the court actually went on to say that we are not going to interfere and we are not going to interfere in the appointment of the arbitrator, we would rather let the arbitration proceed. Now would you have, has the law changed in England or Fiona Trust and Phili Shipping remains the touchstone on which arbitrator appointments even today are done?

Nicholas Peacock: Yeah. Look that Fiona trust, rhetoric of the court will support the parties choice of arbitration of one stop shop. It remains the theme of courts handling of arbitration matters. At all points, the court is there to try and resist the urge to get involved. One party will always be urging the Court to get involved especially if there is a potential to delay and create an appellate route that is going to slow things down. The court's role is just to try and resist that, judges are human. If they see a problem that needs solving with a judicial hat on, he or she is going to want to try and get involved and do justice between the parties and make a decision. The approach that remains try and keep your hands off it as much as you can. The more recent seminal case on arbitral appointment was a case called Silver Dry Bulk and Holbert where a court was invited to confirm an appointment and there you had a situation where one party made start an arbitration, made an appointment. The other side hadn't responded. In fact, they were insolvent and it was rather unique facts that it was continuing at all. The procedure then allowed it that first appointee to become a sole arbitrator and the process to go forward and that claimant then went to court and look will you confirm we have done this right because we don't want later on there to be a challenge over this appointment. The court said no that's not my role here. My role is not to confirm appointments. My role is really hands-off. If the party is chosen procedure has

worked and got your tribunal in place. It's not for me the court to confirm that appointment is properly made and that tribunal has jurisdiction that's for that tribunal itself. Now, of course at the end of the day an award could be challenged or enforcement could be challenged on the basis of the jurisdiction, but that's for another day that shouldn't be slowing down process of getting the arbitration up and running and the tribunal appointed.

Justice BN Srikrishna: I would say Section 11 the default is, don't do anything ask them to go to arbitration, exceptionally maybe 1 in 100 or 0.1 in 100 interfere if you think that it's absolutely necessary. The only problem is the judge interfere then there is a whole course of appellate jurisdiction going all the way at least in India to Supreme Court and then also to the super Supreme Court like a curative petition and things like that. People just get bogged down by that.

Naresh Thacker: Sir an interesting point that Nick made was obviously about the English Courts keeping their hands off and asking the parties to go to the institutions to get the appointment done and sir we all know that you have always advocated about institutional arbitration, being the way forward, in fact that is the trust of the 2019 suggested amendments by you, by the committee headed by you. In fact, we

all understand that Indians continue to be the largest users of institutional arbitration abroad.

Justice BN Srikrishna: Except in India.

Naresh Thacker: Except in India and that's the point sir because just the other day Singapore, SIAC announced that the largest number of case load that they have today in this year as well the year gone by is Indians. You truly need to see the disparity of the users from where India is and who is the next best. I think there is a difference of almost 30-40%, if not more. Now the question Sir, is that certainly in India there is no lack of institutions, we have MCIA, it's a primary Institute, it's a premium institute. If I may say so. Today, the rules are second to none. We have an excellent registry then sir what truly is required to change the scene in India? Why is it that we yet continue to remain in this ad-hoc mode? Is it because everything is looked at from a judicial perspective? Or because cost-wise again, I personally one was to ask me, a client must to ask me, I will say that there is in terms of cost also and in ad-hoc arbitration you may end up with a larger and a higher cost than if it was institution driven but yet I see the resistance from the client and the resistance is not little. I mean, it's quite a lot. What according to you Sir requires to change?

Justice BN Srikrishna: Basically two things are there. Why does anybody want to go to, let's say two Indian parties also love to go and have the arbitration done in Singapore because of these reasons. These reasons is a) the institutional monitoring on that and b) the courts are most reluctant to interfere at any stage and even after the award is made the court will not interfere unless there is an absolutely good case. Now I have known awards which in India would have been admitted for the asking. Singapore court I remember one matter, one party did not turn up on time, we waited for two hours. He didn't come, we had ex-parte. Now in India, judge like me, would have said, Arey, heavens would not have fallen if you would have allowed him one more adjournment. But in Singapore, they just throw him out of the air and say, you are given a time, you did not appear. Sorry we will not appear. You will have to suffer this. If that attitude is there in the court of this country, people will start doing it. We don't do it. We amend the Civil Procedure Code. Tell me honestly has the amendment really worked in practice? Have all the written statement been filed on time and if they are not held are they held ex-parte?

Naresh Thacker: They are not and that’s the truth.

Justice BN Srikrishna: Adjournments are still granted on ingenuity of Indian lawyer in trying to find out a good reason for adjournment.

Naresh Thacker: Absolutely Sir.

Justice BN Srikrishna: This is all problem. These are the reasons why people say it's better that we will go either to England or to Singapore or to Hong Kong or to wherever else Switzerland and take our chance there because at least the judge will not interfere unless it is absolutely sense of worry and even when he interferes the matter will be over very fast. See, the problem with interference here is even if a petition is admitted today God knows when it will come up for hearing. First of all, when will it come for admission is itself a million dollar question.

Naresh Thacker: Sure.

Nicholas Peacock: I think that's a very valid point. I think the downsides to go into court in India are not very high. If you are the respondent and you can come up with something like Section 11 and that's 12-18 months where the arbitration you are resisting is unable to start. I think in other jurisdictions, there can be a much higher downside (A) the decisions might get decided quicker. I am not saying other

court jurisdictions are so much quicker but certainly things like costs. If you go into the London courts, Singapore court, Hong Kong courts with an unmeritorious application on an arbitration matter, you will get thrown out with a degree of prejudice and the costs awarded against you. Those can be substantial and meaningful costs and that can be a big deterrent. So I think cost is a point here and also I think the ability to appeal. I think in many jurisdictions and I mentioned English, power under Section 18 of our Arbitration Act. In theory, it's appealable, you need leave in the court to appeal a decision under Section 18, in practice that just doesn't happen. The appellate courts are not interested in hearing, facts specific appointment questions. I think if you don't have that appeal route, then obviously the potential of delay gets cut down dramatically. I think, cost disincentives and the idea that you don't get to appeal once, twice up to the Supreme Court make this whole thing delayed for the months and years would have a dramatic effect on the willingness of respondents to make these kind of applications.

Justice BN Srikrishna: Ultimately the respondent knows that if he fails, he is going to run up a bill of costs which he will never be able to make. That is the biggest terror that he has. Whereas, here the judge is going to say, I am going to impose a cost of two thousand rupees on it which is less than a flea bite.

Naresh Thacker: So a very interesting question from someone in the audience and let me put this across, I think this is a question that I should put across to you and the question is this that in case of an international arbitration wherein the tribunal is to be constituted of three arbitrators, if the presiding arbitrator is a retired judge of the home state of one of the parties appointed unilaterally by such party, would it not be justifiable ground to remove such a presiding arbitrator on the basis of perceived bias? And I think let's have two views on this topic.

Justice BN Srikrishna: Naresh rules make it clear. Usually I come across the rules which will say the day arbitrator, presiding arbitrator shall not be the citizen or resident of the country in which one of the dispute has arisen. Supposing let's say there is a dispute between an Indian Company and a Swiss Company, the presiding arbitrator can neither be an Indian citizen nor a Swiss citizen. These are normal rules that we have to follow. In fact rules are there. SIAC rule provide for it. ICC rules provide for it if I remember correctly. This question is not something which can be determined if its's ad-hoc, if it's institutional one. If it's ad-hoc one, you don't agree to it, that's all. Because if it is ad-hoc, the presiding officer is the result of 2 person

agreeing, your nominee and his nominee. Why did you agree to it?

Naresh Thacker: So Sir now in this situation, if the Section 11 comes to the courts, what happens?

Justice BN Srikrishna: How would the Section 11 come into the court? Tell me?

Naresh Thacker: Sir because in an ad-hoc arbitration, assuming for a moment it's an India seated arbitration and one person was to not appoint the arbitrator, then Sir would this and Section 11 was to be filed and then argument is raised in the Section 11 court to say that the reason why I have not appointed any arbitrator as of now because I find that the arbitrator appointed on the panel is an arbitrator of the same jurisdiction and I do believe that there is a perceived bias, how would the court in this situations deal with such a Section 11?

Justice BN Srikrishna: Look, I am not willing to buy an argument that if I am an arbitrator in an Indian dispute, I am hundred percent going to be biased in their favour. Nothing of that sort.

Naresh Thacker: Yes and that is absolutely right.

Justice BN Srikrishna: In fact right from White Industries till today you will find that whenever I have said no, I have said no. That's all. The point is this. Assuming there is some substance in what you say, then the institution can change it. Why do you have to go to court? We are talking of an institutional arbitration, isn't it?

Naresh Thacker: Yes Sir.

Justice BN Srikrishna: Institution can say, all right, my rules provide for different jurisdictions, arbitrators in different jurisdictions, so I will not agree to it and assuming it goes to a judge. The judge can also say this. I say, let's be fair. After all what is bias? Bias is not factually approved. Bias is your perception of what is going to happen. If you feel you are not going to get justice, you are entitled. Sometimes we tell the judges also that judge you should recuse yourself.

Naresh Thacker: Naresh I do not recall the outcome but in an Indian arbitration of Pakistan High Court Judge was appointed.

Justice BN Srikrishna: It is possible. Why should the Pakistan Judge be bad? He is good as long as he is honest.

Naresh Thacker: Absolutely. So Manish let me turn to you and let me put a hypothetical scenario to you and let's see, how this turns up. Now your first choice of an arbitrator, nominee arbitrator in your matter, actually let's say is a construction law specialist with a technical background. Now, your lawyer was to inform you that the opposite party has nominated a retired Supreme Court Judge as one of the arbitrators.

Justice BN Srikrishna: Manish will get a walk over in such a case. I can assure you Manish will get unless it was me. I am telling you. I have done a lot of construction things and people are worried, how the hell do you know so much of construction? Because I say I am a Science graduate. I understand technology much better than all of you put together. You are right. If the arbitration agreement requests an engineer then no matter whether it's a Supreme Court Judge or not, he is not qualified. If the arbitration agreement is silent, then it’s your choice, you can have your driver as an arbitrator who prevents you, why do you want a Supreme Court Judge.

Naresh Thacker: Absolutely. Sir that's the reason my question to Manish is that everything is open. Your agreement does not require you to have a technocrat, your agreement is silent on who you can appoint as your arbitrator. Now you have in your

wisdom, you are the GC. You have now decided that your arbitrator ought to be a technocrat and with someone with a specialist knowledge of construction but now your lawyer comes to you. I am your lawyer and come to you and I tell you look but the other side has appointed a retired Supreme Court Judge and I know you and I have had this discussion many times over on our interaction but I want you to put your hand on your heart and tell me. Here that what would you do in such a situation? Would you go ahead with the nominee or will there be a change of heart? Again, I am not saying it will be because you want it. Let me put it this way that there is pressure from your management and your management now tells you the promoters or the Company now tell you but you have a retired Supreme Court Judge on the other side why don't you find a CJI who can be our nominee and then both of them get together and appoint someone who was their senior. Would you want that or would you yet continue with your appointment?

Manish Lamba: See Naresh if I were to give you an honest answer, unlike you I have only one client. That's my management. It's very difficult to go against unless you have very good reasons. So therefore, what happens is that the law firms, arguing counsels, the entire fraternity and ultimately, I am also not as independent as I seem to be. I am also of this entire system but let us take for instance, if there is I know for a fact, I am not sure it's your firm only appointed

expert instead of a judge. So, we get the market news. The point is that if the matter is absolutely hyper technical, then if I were to give an independent choice and I was not to go back to my promoters and never to trust my wisdom, if I have to go back to them, I will go by their advice but if they were to trust my wisdom and if it is a hyper-technical matter, I would not go for a retired judge.

Justice BN Srikrishna: Absolutely correct and that makes sense.

Manish Lamba: But if at all the law firm has an influence on the promoters. If there are certain people that why did you take this kind of a chance. If there are those kind of doubts which should not ordinarily be there then certainly to be, to err on the side of caution and as I told you that I have only one client unlike you who can experiment with many clients. It will be very difficult for me to take a chance.

Justice BN Srikrishna: Ultimately…

Manish Lamba: Question is out to the door of many GCs, many of the GCs complain that why are always retired judges appointed and you are the ones who are to be blamed and you are the ones who nominate. I wholeheartedly take that blame but in many of the cases it's a system manner in which it works. It is

changing. It is certainly changing and this choice was available to me at the time of drafting of the contract. I could have written it over there. In case of a dispute, the matter will go to a person who is a civil engineer. Now there are difficulties in so far as the Indian legal system is concerned. As Justice Srikrishna has said that the petition was not submitted within 30 days or reply was not submitted within the stipulated time and therefore ex-parte proceedings and things of that nature. Those all difficulties are there with those technical judges, the technical arbitrators. That apart, if I want to make that bold choice and if I have to take my management into confidence and when the parties are at the negotiating table it is at that time that we need to deal with these clauses and the time has come that we will move from boiler plate clauses. We have not done that but I am sure the industry is maturing and then they will find wisdom in so far as lease disputes are concerned, in so far as your construction disputes are concerned, in so far as your engineering disputes are concerned or several such major disputes are concerned. When the legal industry, the in-house counsels, the law firms will mature this thing will come out. The day that happens lawyers will be out of job. The business will take care of it.

Justice BN Srikrishna: Manish the situation can be solved. You can always have a clause saying that this will be arbitrated

only by a technical person of this qualification. Now both persons will be technical or three persons can be technical. Now the difficulty arises because they are not familiar with the legal rules, they may slip somewhere. The right thing to do is agree for an appointment of a tribunal's clerk or an associate to be a technically qualified person. If I were to say somebody who has got this stipulation and worked for so many years only can be appointed. That man will tell you that this is wrong. Sir you can't do this and he will advise the person. His job will be to advise them. Ultimately the decision will be of tribunal but at least at all given times he will have the benefit of a good legal advice.

Manish Lamba: But if you look at traditionally how arbitration used to be arbitration in mercantile markets, in merchants they were all done by their own peers?

Justice BN Srikrishna: Stock market arbitration in three months it is over.

Manish Lamba: All these in so far as mandi's, the clothes traders, everybody used to be.

Justice BN Srikrishna: Diamond traders, they used to. If you go abroad.

Manish Lamba: Over a period of time what we lost is that both common sense and impeccable integrity, if all that what was required but that actually departed from common sense and that is why I had said, by slip of a tongue, I had said IA because lawyers understand IA more than Artificial Intelligence.

Justice BN Srikrishna: Correct.

Manish Lamba: I just wanted it to correct also and therefore the time has come when at many places we are not even applying common sense. Now we are talking about finding a solution through artificial intelligence. Therefore, in so far as when these contracts are drafted, these large law firms sit across the table or where the business community sits together. Today we do not have the buy-in of the business community. GCs buy-in we have. We have the buy-in of the lawyers and this entire community and it has become, I think arbitration and justice are two serious affairs to be left to the wisdom of lawyers alone.

Naresh Thacker: Manish we hear you. Let me out of what you are saying there is an important issue which arises and sir we have just heard Manish on various issues but one of the first issues that we heard him on was his argument, if I may say it again loosely. On appointment of judges, retired judges as arbitrators whether it is promoter driven whether it is the

requirement because a lawyer tells you to do so and what not. Now sir this is often a whisper in the corridors but rarely in an open forum is this question ever raised but let me say now as this question of you, Sir appointment on retired judges as arbitrators is this a boon or bane?

Justice BN Srikrishna: Depends on how you look at it. Supposing it really involved an intricate question of law, it will be a boon. Rest of the time it will be a bane because when we bring the unnecessary legalities, we make it formalized so much, so much, so much, so much that everybody including the judges get confused. I wouldn't say it's a simple answer but there are issues which sometimes are complicated which need… Forget all that. Ultimately whether he is a judge or not the arbitrator should have a fair understanding of the legal process. Otherwise he will make a mistake and somebody in the appellate court will say these are not done and that is simple thing. He is not allowed to argue. I mean the rules normally say that each side will be allowed to argue the same number of hours that the other side has been given. Somebody argues for 10 hours, to give another fellow some 3 hours, I don't want to hear you. Elementary mistake. This doesn't require too much of law but you require at least this common sense that you should treat them fairly. Somebody says you have given me ten days for filing a reply, he says I will give you only two days for reply. Obviously it is wrong.

These are the areas where a lawyer or a judge will be able to look at it objectively because he is not influenced by the parties thinking but if he is influenced by the parties thinking then he is a bad arbitrator.

Naresh Thacker: So Nick. Now this is not unheard of English courts as well or rather it is not unheard of in England may not be as common as it happens in India but still retired judges do get appointed arbitrator.

Justice BN Srikrishna: I have sat with some of them.

Naresh Thacker: Absolutely Sir. It is not unheard. It is just in India that we have now got. It has become a fashion to disparage a retired judge at every point in time in an arbitration to say that why should it be constituted of a panel of retired judges. Why should we have only a panel of retired judges? In fact, sir even I have had one instance of retired judge from the House of Lords.

Justice BN Srikrishna: I have sat with House of Lord judges.

Naresh Thacker: Absolutely. Sir. Sorry. To Nick this question. What do you think is different than between what transpires in India vis-a-vis what happens in England. Do you see a qualitative difference when, let's say you have retired judges

sitting in England vis-a-vis retired judges, a panel of retired judges sitting in an arbitration in India and I am sure with your experience in both the jurisdictions you have done enough work in both jurisdictions, can you tell us what is the qualitative difference that you see in a panel of retired judges where you arbitrated in India and when you arbitrated in England?

Nicholas Peacock: Yeah. Look absolutely retired judges take a lot of appointments in England. There is nothing fundamentally wrong with that. A good lawyer is a good lawyer and often judges do bring an excellent, brilliant legal mind and a real judicial mindset to make decisions. I think what often we see in the London market in particular, it is competitive. Retired judges come from the bench and make themselves available for arbitral appointments, some quickly get taken up and get very busy, others less so and often the difference is not about the quality of the legal mind which if you have come out of an Appellate Court either the UK or India is going to be pretty high. It's about when you adapt yourself to the arbitral process, whether you think you are still in court or whether what we say is I am now doing a different job. It's a party's process. I will be guided by the LCIA, the ICC, the tribunal chair and often a good piece of wisdom is that if you are straight out of the Supreme Court, you don't go in the Chair. I know often it's very hard for the parties to resist putting

the most senior person in charge of the procedure but actually you want the most experienced arbitration practitioner in charge of the procedure, put the brilliant retired Appellate judge on the wing and give them a chance to see how arbitration is different to court litigation and I have had tribunals where we have had retired English Supreme Court Judges alongside retired Indian Supreme Court Judges. There is no inherent difference there. It's all about how you make the arbitration process work.

Naresh Thacker: So one of the panelists has asked this question. Let me put it across to Nick. If an order was to be passed by an arbitral institution, I don't know what it means, what the query means when she says that if an order is passed by arbitral institution but I take it that assume I am saying, I think what she wants to say is that if an appointment was to be done by an arbitral institution, would that be subject to challenge and will that therefore prolong the process of appointment often of a tribunal and would therefore that take that much more longer?

Nicholas Peacock: Yeah, well it shouldn't do because if so for example you have LCIA clause, default appointment a party fails to appoint and LCIA makes that appointment and you get that tribunal in place. There's no scope for the English court in this scenario to hop in and say let's investigate that

appointment because as I have just said the whole point of English courts power stop at is there a good arguable case that the tribunal has been constituted and should hear that dispute. Of course, at the end of the day, there can be a challenge on jurisdiction under Section 67 in English scenario. If the tribunal has not been constituted according to the parties' arbitration agreement or if it's exceeded his jurisdiction in some way, that award can be susceptible to challenge and party always has that right at end of the process. In the meantime, it doesn't get to invoke the courts and involve the courts in questioning whether that LCIA appointment has been properly made because so long as it crosses that threshold very low threshold test, that tribunal should carry on and decide its own jurisdiction including the issue of whether it's been properly constituted.

Naresh Thacker: Thanks so much Nick. I think we have come almost to the end of our time. Shreya can you tell us, if we have one more. If we can take one more question.

Shreya: Yes we have come to the end of our time. I think we can close with one last question.

Naresh Thacker: So Nick. I will let you have the final word on the subject. Is there a lesson that you can offer from either London or Singapore for Section 11 situation in India and what

do you think needs to change to reduce the Section 11 problems and delays?

Nicholas Peacock: Yeah. It is about judicial attitude and we have a judge on this panel who has shown an admirable attitude to steer clear of this and keep their hands off. I think hands-off is one point. The legislation doesn't require the court to get hands on. I think as I said maybe a great use of adverse costs may be a greater deterrent from the courts and fundamentally question it's a difficult one but the appellate rights, the ability to take these cases on appeal and on appeal again. I think is problematic because it just generates so much delay. Maybe, some of the Indian system need to look again whether such extensive rights or appeals should be allowed on these kinds of decisions.

Naresh Thacker: Thank you so much Nick and thank you to my esteemed panelists for sharing their views on this panel today. With this we have unfortunately come to the very end of time for this session. I hope all of you enjoyed this discussion and will take home bites of the issue within this discussion and within this not so innocuous provision to chew on. We have heard our panelists and I personally have always believed that we one last thing that I would put across is that we have always spoken about this appointment of judges as arbitrators and I said this that we say it in a very

disparaging manner. To my mind, it is wrong because it is not the appointment of retired judges which is the problem. I think is the choice that you make as the party because if you make a wrong choice, then it's truly horses for courses. If you made a wrong choice, then you suffer the consequences of the tribunal that you have. If you made the right choice nonetheless even if it means that you have three retired judges on the panel, your arbitration can run absolutely smoothly. I can tell you today arbitrations are running their course even within the 12-month period as what is mandated within the law in India and we are running very smoothly and things are happening. So, it truly needs a change of mind from all stakeholders. We just cannot continue to disparage judges on this. I think as parties, as lawyers and as judges, all the stakeholders need to come together and they need to improve this system of arbitration rather than all the time wanting and hankering for a change of law because you may continue to ask for change in law. Legislature may continue to change the law and tinker with it. The more they tinker with it, the more us lawyers will find problem with the law and the more we will see to it that the matter goes to court. So, with that, let me thank you all for being such a patient audience and until next time. Thank you.

Justice BN Srikrishna: Thank you. Thank you Naresh.

Shreya Gupta: Thank you sir. Thank you everyone. Before we sign off, we have three more sessions scheduled for today at 2:00 PM, 4:30 PM and 6:00 PM. The details of these events are available on the MCIA LinkedIn page. We hope that you can join us for those events as well. Thank you.

Naresh Thacker: Thank you Shreya for being a fabulous MC. See you all. Bye.