Lifeline of Arbitration session - 1

Sunil Mawkin: Well, good afternoon, everybody, and thank you very much for joining us in what is the first of this year's edition of the YMCIA webinar series on the lifeline of an arbitration. By way of introduction, my name is Sunil Mawkin, and I am a counsel in international arbitration team at Allen & Overy in London. I'm delighted to be joined today by to my fellow young MCI committee members, Kyongwha Chung, who's a counsel at Covington and Burling in New York, and Rohit Bhat who is a senior associate in the arbitration team at Freshfields in Singapore. This is the first in a five-part series of seminars, which we'll be running through to the end of the year, where we intend to go through and provide some guidance on the various steps in arbitration, commencing today with how to draft an effective arbitration clause, and in the remaining four sessions, we should be covering how to manage and strategize in the pre-dispute phase, the commencement of an arbitration, procedural steps in an arbitration, and then finally, the post-Award phase and enforcement. We're conscious that people may have questions as they go through. There is a chat function available on the Zoom. If you put any questions there during the course of our presentation, then we will try and answer as many as we can at the end of the presentation, depending on time. So, turning to our topic today, which is drafting an effective dispute resolution clause, on our agenda for the next hour or so, question… can everybody see the slides?

Rohit Bhat: Not yet, let me just put them up on screen Sunil…

Sunil Mawkin: Thank you very much, Rohit.

Rohit Bhat: Can everybody see them now? Not yet, okay. I think that should work?

Sunil Mawkin: Fantastic, so, our topic today is drafting an effective dispute resolution clause. I'm turning to the agenda for the next hour, so plan is to take you through five, five key steps. Firstly, underlying the underlying transaction and then the choice of forum. The common question as to whether you should go for arbitration or litigation and what the different kind of pros and cons are to both approaches. Looking specifically at arbitration clauses; the key requirements in drafting arbitration clauses with different applicable laws that apply kind of substantively, procedurally, and during arbitration proceedings. And then finally, considerations in choosing the seat of your arbitration. So, starting first with the understanding of the underlying transaction- As disputes lawyers our engagement is often at the very outset of the transaction, where we're asked to assist in advising the transactional teams on the appropriate dispute resolution mechanism to be adopted in a particular transaction document or suite of documents. Giving proper thought to this at the outset of the transaction, can really

help make life considerably easier at the dispute size. The number of cases that myself and my fellow presenters have acted on where there has been issues that come up procedurally, because of the way in which a clause was drafted, or confusion in the way a clause has been drafted, are numerous. And so, getting it right there outset of the transaction can really save a lot of time and cost for the parties in the dispute. We've broken this down into kind of five key things to understand. I just thought I would, I would say few words on each of them, individually. The first is understanding the very basics of the transaction documents. So, what is the subject matter of the documents? Is this for example, a finance transaction? Is it an M&A deal? And then secondly, you know, how many documents are we talking about often in kind of commercial transactions that we deal on? There isn't just a single agreement, but there's a whole host of relevant transaction documents. So, take a finance transaction, you've got related security documents, intercreditor agreements, etc. and they all fit together to assist our clients and the various other parties in managing their legal interests. And so, when you are considering an appropriate dispute resolution mechanism, it's important to have regard to how those documents all fit together, and what the structure of the transaction is. That's really important, particularly in an arbitration and as we'll come to a bit later in the presentation, we'll be talking about concepts like joinder and consolidation and how to bring in additional parties and disputes, under other agreements. The second is, is really understanding who the parties are to that particular document or suite of documents, and really understanding the... the nature of our clients. You know how many parties are there thinking about a dispute, you know, could they be co-claimants? Codefendants? If there's, you know, a number of buyers, a number of sellers, for example, on an M&A transaction, what is their legal status? Are they you know, incorporated companies? Is there any nexus to state entities, which can be very relevant when we come to kind of waiver of immunity type clauses? And then very, vitally important for disputes is where they are legally domiciled, and where their assets may be based. And the last one in particular is very relevant for enforcement purposes. So, understanding where any enforcement action or attachment action would need to take place, is really important to understand from the outset, to ensure that you're protecting your clients' interests.

The third criteria is... is the relevant negotiating position of the parties. And the first is, for example, the respective bargaining power. Taking a finance transaction, for example, in a lender borrower scenario, it's likely that the borrower is... is to have significantly less bargaining power than an established lender. And therefore, that is going to influence the way in which that lender will be able to influence for example, the choice of dispute resolution forum. A lot of major banks, for example, have fairly well-established procedures and credit control committees who require certain... require the dispute to go to particular forums. And so there may be much less bargaining power. In M&A, JV, kind of construction context, there's more freedom to a more negotiation that can take place about some of these calls. Fourth criteria is to have regard for potential disputes, it's obviously very difficult at the outset of a transaction to

properly understand what might go wrong, or be it you know, as a dispute lawyer, through experience, you have some idea of the likely claims that may arise. Similar in finance transaction, for example, you know, more likely you're going to have a claim from a lender against the debtor for non-payment. Although, in recent years, we've seen a lot of claims the other way through kind of mis-selling type of claims. In the construction industry, it's very common. And you know, a lot of contractors have a lot of a reputation for being very litigious. So, it's likely that there's going to be more claims from contracting parties. And having regard for that, at the outset of transactions well, as well as considerations such as the likely value of disputes, and that may just be a feature of the value of the underlying transaction, again, helps you to properly consider the appropriate dispute resolution mechanism for your clients, and to make sure that come a dispute, the mechanism, be it in terms of the number of arbitrators, the procedure, if you're keen on having any kind of expedited procedures in place, are proportionate for the type of dispute that may arise under that contract. And then finally, is to consider the kind of key clauses that you'll often be asked to either apply on or to draft. And we'll come on to these in more detail and really is a feature for the remainder of this presentation. But looking, for example, at your governing law clause, your arbitration or jurisdiction clause, as... as you may choose, and then particularly looking at other clauses that are relevant to the dispute. And one thing we see, you know, fairly often in commercial transactions, particularly in the M&A context, and also in construction, is an appetite for explanation clauses. And what they mean is that before you get to your ultimate forum, you have to go through a number of steps. The first often being meetings between senior principals. Secondly, maybe you know, some form of mediation, and then at times, either as a standalone or as a further step is, is expert to termination. And we see these very often and often our transactional colleagues think these are a good way of trying to prevent a dispute. But as disputes lawyers, we encourage you to be fairly critical when you're looking at these and thinking, well, this is actually stitched in the resolution of the dispute? Or does it just add additional limbs that one must get through before you can actually get to the final forum, which adds to cost and complexity of the proceedings, and can also create some jurisdictional hurdles before you can actually get to your final forum to resolve the dispute. Finally, and I've touched on this, in parties having regard to the nature of the parties is very relevant when you're coming to think about things like waiver of immunity clauses. And if there's any kind of state nexus to any of the parties and particularly counterparties to your client, then ensuring that you have adequate protection in the form of immunity both from immunity from suit, so, ability to be sued, but then particularly immunity from execution and attachment against their assets. So, turning to the next slide, this really is just a quick recap on the two key clauses that we're often asked to look at— the first being the dispute resolution clause, and that is the clause which determines where your dispute will be will be resolved, i.e., in which forum. And we'll come on to the...the different types of dispute resolution clause on the next slide. But that will be the you know,

will determine the forum the way a dispute can be resolved and can only really be trumped by certain specific subject matters, I exclude a dispute. So, as I'm sure many people on this call are aware, there are certain categories of disputes that aren't arbitrable. In India, for example, that includes kind of matrimonial disputes some insolvency related issues as well. And that's fairly common throughout the world in terms of different legal systems. The second is the governing law clause, and that determines what substantive law a court or tribunal must apply to determine the dispute, and to determine the party's rights under those contracts. It's critical of both contractual and not non contractual rights. And I mean, this slide says that agreements with an international element should include a governing law clause. And I go so far as to say actually, that that all agreements should include a governing law clause. It's particularly important in an international context, where there could be any debate as to what governing law would... would apply, we have international counterparties. But I think in terms of best practice, every agreement should have a clear governing law clause as to what law, a tribunal court should apply when determining the parties' respective rights. So, turning to the next slide, and looking at the different forums and the way you may express your dispute resolution clause, and the pros and cons of each approach, the first is an exclusive jurisdiction clause. So, you say all disputes must be finally resolved, or submitted to the courts of the London High Court, or the Delhi High Court, etc. That is, that provides the most certainty for parties. It's clear where proceedings have to be brought. And that's ... that's true for both parties. Reduces, therefore, the risk of challenge on the basis that there are unfavorable rights in favor of one party to another. And in the EU context, in particular, we had due to the Brussels regulation in the EU, the ability for parties to try and delay proceedings by bringing strategic claims in certain courts who are very slow to deal with them, and ultimately, decline jurisdiction. What we used to call the Italian torpedo, providing an exclusive jurisdiction clause helps get around that, because there's no question that any other courts do not have jurisdiction. The main drawback of that approach is... is a lack of flexibility, you are kind of constrained in a way much bring... bring the disputes. And it's also important to think quite carefully about, you know, where your counterparty is based, whether there may be a strategic advantage to them of... of you know bring disputes in that particular forum. And secondly, is non-exclusive jurisdiction clauses. So, this says, you know, we can bring disputes in the High Court of London, or any other court with jurisdiction. And that is, you know, beneficial in that it gives you flexibility and that it will apply to both parties. There's a reduced risk of challenge. But the main drawback of that approach is uncertainty. It's very difficult at the outset to determine what courts may... may otherwise have jurisdiction in protecting your dispute. So as a party to that transaction, you know you could find yourself being sued in the court, which you didn't foresee at the outset of agreement. So that's the main disadvantage. We then move to arbitration. So... sorry, right here just one...about the arbitration so all parties can only arbitrate before the tribunal in a chosen seat. And that's really what we're going to focus

on for the remainder of this presentation. But that brings certainty as to where proceedings will be brought. So, you are kind of restrained as you would be for exclusive jurisdiction clause. But the main benefit is... is your benefits on enforcement due to the New York Convention. The drawback, though, is a potential lack of flexibility. You can't go to courts for substantive matters. You can for certain interim relief, depending on the relevant jurisdiction. And there are also certain limits from tribunals powers. So, while a court, for example, can impose penal consequences on a party who wasn't complying with the relevant requirements of the proceedings, for example, evidence, refusing to attend tribunals lack that power. And that can be a drawback if you've got a particularly difficult Counterparty. The final option is hybrid or asymmetric jurisdiction clauses, very common in the finance market. And these are clauses which provide that you borrower can only sue in a particular court, for example, the English courts. But the other party i.e., the lender can sue in English courts or any other court with jurisdiction. For the benefiting party, that's really helpful because, you know, they have certainty as to where they can be sued. So, they can only be sued in that example in English courts. But they have a lot of flexibilities is where they may sue the counterparty and there may be strategic benefits to that in a lender borrower scenario, because you see where the borrower's assets are. The main risk of these clauses are the risk of legal challenge. There's been a rise of litigation, particularly in in France, Russia and Indonesia, where there has been concerns raised the enforceability of these clauses, for example, on grounds of public policy conferring rights on one party that the other doesn't have. That I'm also aware that there has been some cases in India on this, although a number of courts have gone kind of different ways on whether these clauses are allowed. But for the non-benefiting party they are pretty disadvantageous, because you don't have the same benefits as to where you can go. The last slide I just wanted to touch on is just some analysis and trends. From... from the White & Case, and Queen Mary study on arbitration. Right, if you don't mind, just get into the next slide? Which is a choice of arbitration versus litigation. And I think this provides an interesting outlook on... on really the growth of arbitration. So, Queen Mary University in conjunction with White & Case do a study that comes out every couple of years. And looking at kind of market players clients, also law firms, at you know, what forums their clients are choosing. And there's been a really big rise over the years in international clients, cross border clients, using international arbitration as the chosen choice. Here, in the most recent study from from earlier this year. 59% of respondents said they use international arbitration, together with a with a different form of ADR to choose, you know, mediation or something like that, and a further 31%, which is using arbitration. So really, benefits of arbitration outweigh litigation. And the main reason for that is, and this is from a slightly older study, unfortunately, they didn't have the same survey results in the most recent one. But I think it's still applicable. And the main reason is, is of clause enforceability. As we will come to shortly, one of the real benefits of arbitration is the enforceability of awards. It also, you know, concerns about

certain legal system, national courts and uncertainty provided by certain courts. And another one that I'll touch on just in the interest of time and flexibility. And what we've seen a lots, in the recent months during COVID-19, is the flexibility that arbitration offers through the technology, virtual hearings, etc., which were much more common, has placed arbitration, at a real advantage to court systems who have had to adapt where proceedings tended to be much more formal and in person. And so, arbitration has an advantage in flexibility, in the flexibility that it offers, both in terms of the conduct of the proceedings, and also in procedural flexibility, the ability for the parties to develop the procedure to accommodate, you know, the limitations that we've had in in the sense of, of COVID-19. There is a few others there, such as the selection of arbitrators, very common in arbitration proceedings for parties to be able to select their own arbitrators and implement that. And then the other more big one is confidentiality. Arbitration proceedings tend to be confidential unless the parties choose otherwise. And that's your real-world advice. Pass over now to Kyongwha who's going to talk about the arbitration clauses in a bit more detail.

Kyongwha Chung: Thank you Sunil, good afternoon to most of you good morning to some of you joining from my part of the world. I am Kyongwha Chung and I am a member of the NCI steering committee. It's my great pleasure to speak at the first YMCIA webinar series on lifeline of an arbitration. Today I'll be discussing the fundamentals of the drafting of an effective arbitration clause, in particular on arbitration clauses and governing law. Before we discuss the must haves of an arbitration clause, let's see what are institutional and ad hoc arbitrations. An institutional arbitration is an arbitration administered by an institution such as the MCIA, some common arbitral institutions or ICC International Chamber of Commerce, LCIA- London Court of International Arbitration, SIAC Singapore International Arbitration Center, to give you some examples. Ad Hoc arbitration, by contrast, is an arbitration which is not administered by an institution. So, the parties will therefore have to determine that all aspects of the arbitration themselves. For example, the number of arbitrators appointed to as arbitrators, the applicable law and the procedure for conducting the arbitration. In arbitration conducted under the UNCITRAL rules is one of those examples. The chart on the slide that you see discusses the differences between an ad hoc and institution... institution and arbitration. For study from the appointment of tribunal, ad hoc for the ad hoc arbitration, it will be done by the National courts if the arbitrator is chosen by the parties fail to appoint the president. But for the institution arbitration, they will be done by the institution according to its rules. For ad hoc arbitration administrative support and Award scrutiny will be none. But for institutional arbitration, those supports will be provided by the Secretary of the institution. Comparing the speed between the ad hoc and institutional arbitration, institutional arbitration tend to be faster because in most of the institutional arbitrations, there is a case counsel who manage the case. Costs is also one of the factors for ad hoc arbitration, there's no limit, but for institutional arbitration,

they tend to have a schedule of fees included in those rules. Emergency arbitrator, emergency arbitrator is one of the recent sort of a mechanism that's been implemented to most of the institutional arbitration. It's a temporary sole arbitrator appointed by an arbitral institution to address the claim for emergency relief pending the formation of an arbitrary... arbitral tribunal. Simply put, it's equivalent to provisional protective measure proceedings before domestic courts. So, as you see, MCIA also has the rule on emergency arbitrator in rule 14 in its 2016 rules. Next slide, please. Before starting discussing the fundamentals of the fundamental components of an arbitral... arbitration agreement, I just wanted to touch upon the 1958 New York Convention. The full name its formal name is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is one of the key instruments in international arbitration. The convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration Awards made in other contracting States. There are around 160 contracting states as of now, and the blue color on the map shows the nations which have ratified the Convention. India, we have the cursor on India there, India signed the convention in 1958 and ratified it in 1960. From the very beginning of the New York Convention. New York Convention is very important because it provides the foundation for international arbitration to become so popular as an alternative dispute resolution mechanism. Without enforcement power, an arbitral Award could be just a mere piece of paper, but with the New York Convention, an arbitral Award can be enforced by courts of any contracting States. Now, let's move on to the must haves of the arbitration clauses. This slide is quite dense. So, we'll start from the left side. The type of arbitration agreements- arbitration agreements can be made in different forms. First, it can exist as an agreement separate from the main contract. Usually, it happens when an arbitration agreement is entered into after disputes have arised. Second form is the most common type- an arbitration agreement can be included as a clause of the main contract. However, do remember that an arbitration agreement is severable from the main contract, which means that the arbitration clause is valid and enforceable even though the main contract becomes invalid and unenforceable. The last form is an arbitration agreement being incorporated by reference. It can be inferred from documents, related agreements, correspondence and acts of parties. Now we'll be moving on to the must haves of an arbitration clause. As you see on the slide, there are six components that should be included in an arbitration agreement. The first one is a commitment of the parties to arbitration in writing. Commitment to arbitration in writing, all of those are quite important here. The writing requirements comes from the Article 2.1 of the New York convention. The agreement itself should be presented in a writing form. The commitment with regard to the requirement of the commitment to arbitration, a split clause such as providing an option between a mediation and an arbitration should be avoided, as in some of the jurisdictions such as... this type of split... split cause becomes invalid. And it's preferable to have the commitment to arbitration in an imperative language.

For instance, it can state any disputes arising out of or in connection with this contract, including any question regarding this existence, validity, or termination, shall be determined by arbitration. The second component is the governing law of the contract. The governing law of the contract should be stipulated whether as part of the arbitration clause or in a separate provision of the contract itself. The governing law here is the substantive law which governs the rights and obligation of the parties, which is different from the procedural law of the arbitral proceedings. We'll be discussing some of the various applicable laws in arbitration in detail later. The third one is the number of arbitrators and the appointment mechanism. In general, the number of arbitrators agreed by the parties is either one or three, and for obvious reasons, it is relatively cheaper as an odd number. Institutional rules usually include a clause on the default number of arbitrators. For instance, Article 7.1 of the MCIA rules states that unless the parties have agreed otherwise, a sole arbitrator shall be appointed. And also, parties can include the qualifications of an arbitrator in the clause. However, overly prescriptive qualifications should be avoided, as it will be really difficult to find someone who meets those standards. Fourth, moving on to the upper part of the slide, the fourth component is the seat of arbitration, which is one of the most important parts that will be also discussed in detail by Rohit. The seat of arbitration, usually stated, as the name of a city is a place where the arbitration is considered held from a legal point of view. This is distinct from location of the hearings, which is the venue of arbitration, which indicates the place where hearings take place. Hearings, we have usually have a rights hearing, probably only one in most of the cases at the... towards the end of an arbitral proceeding, and those hearings are generally held in the seat of arbitration unless there's a need to change the venue, such as for the convenience of the parties. For instance, we're probably back in around like 10-15 years ago, most of the contracts that was entered into by Korean parties, they used to enclose Singapore, as those... the seat of arbitration. But in many cases, we ended up having both parties to seated I mean, most... most parties, and most of the witnesses and parties being in Korea, so in those cases, we used to change the venues. Now the seat, because the seat itself has been already included the arbitration clause, you cannot change the seat. But in most of those cases, parties agree to change the venue because of the convenience of having parties and witnesses based in Korea. The seat of arbitration is important, because it anchors the arbitration and the law of the seat of arbitration becomes the procedural law of the arbitral proceedings. The courts at the seat of arbitration oversee the proper functioning of the procedural aspects of arbitral proceedings and can set aside the awards at the end. Considering the enforcement of arbitral Awards, it is important to choose a place of country... choose a place of a country which is a contracting state of the New York Convention. The fifth component is the applicable arbitral rules. Arbitral rules provide procedural framework to arbitral proceedings. Institutional rules are often preferred in high value disputes for simplicity. In specifying the arbitral rules, we should not mix and match arbitration rules and arbitration institutions, unless there is

a specific reason to do so, for instance, generic MCIA rules administered by the ICC. It causes a lot of confusion and also a lot of tedious fights between the parties. The last part is the language of arbitration. It might seem like an unnecessary component, but it becomes really, really important in the procedure. The language here refers to the language of the proceedings. So, how the proceedings should be conducted and the submissions itself... themselves. So, people easily assume that the English language contracts will be conducted in the arbitration arising... the disputes arising from the English language contract could be conducted in English, but this is not a safe assumption in cross border transactions involving parties from different countries. A party which is reluctant to participate in an arbitration can make the proceedings very difficult by insisting on proceeding in several languages. I do have some examples, some experiences of using that as a delay tactic, where there is no clear agreement on the language of the arbitration. So, shall we discuss more about the applicable laws of arbitration? As you see from the slide, there are three different types of applicable law in an arbitration agreement. First, is the substantive law of the contract or non-contractual obligations, such as misrepresentation, negligence, or restitution. The substantive law refers to the governing law or the proper law of the commercial contract. Usually, this is a national law of one country, but not necessarily. For instance, in the US, it's usually the state law, the law of each respective state. Second, is the procedural law of arbitral... arbitration proceedings. As previously discussed, the law of the seat of arbitration governs the procedural aspect of the proceedings, and it provides default procedural rules, supplementing any chosen arbitration rules, and it governs the challenges to jurisdictions and awards. The last one is the law of the arbitration agreement. This law governs the existence scope, validity, interpretation, and effects of the arbitration clause. It is often not specified, but it is best to specify in the arbitration agreements and it is also desirable to match with the law of the seats or the law of the contract. Possible addons. We have discussed the must haves of arbitration agreements. But in addition to those, we could have some possible addons. Could we move on? Yes, thank you. There are many you could add depending on the type of agreement and the type of disputes that you expect them that arise from the agreements. Fast-track arbitration, consolidation enjoying their provision complimentary mechanism mediation expert determination, because arbitration itself is an alternative dispute resolution, but you could mix-match with mediation or expert determination in some of the cases. Among those our only focus on consolidation for now, because of the time, interest of our time. So, consolidation refers to consolidating preexisting arbitrations into a single arbitration. Joinder refers to adding, joining, another party to an existing arbitration. The result is the same with more than two parties involved in a single arbitration. MCIA rules have a provision on consolidation. Should we move on to the next slide please? Thank you. If you look at the rules, the requirements for in consolidation is either the parties should agree to consolidate several preexisting arbitrations or all of the claims in several arbitrations are made under the same arbitration agreements.

In deciding whether to consolidate in 5.3, counsel will take into account among other factors are the one or more arbitrators have been designated or confirmed in more than one of the arbitrations? And if so, whether the same or different arbitrators have been confirmed. This requirement arises from the parties' agreements, which is the one of the pillars of arbitrations. 5.4, the counsel will decide to consolidate two or more when it decides to consolidate, it will be consolidated into the arbitration that commenced first. With this, I will hand over to Rohit to discuss the seat of arbitration, which is one of the most important components of arbitration agreements. Thank you.

Rohit Bhat: Thanks, Kyongwha, thanks Sunil, for your presentation in the first part. Hi, everyone, my name is Rohit and I practice international arbitration at Freshfields based in Singapore. And like Kyongwha said, I'm going to take you through the seat of arbitration. Now, Kyongwha mentioned that the seat is extremely important. And we will get to that but before that, I wanted to start with this study, which was the 2021 Queen Mary study, which Sunil mentioned earlier, which did a survey on the preferred seat of arbitration. And what you will find here is that India is not one of the preferred seats. London and Singapore is at the top of the list, and that's where most international parties prefer to seat their international arbitration. So, let's move on to find out why that is. And before we do that, let's go to why a seat actually matters. So, our seat is a key factor in any arbitration and Kyongwha mentioned this briefly. It does various things, choosing a seat determines the law governing the relationship between the tribunal and the courts. So, if you need any order supervising the arbitration with respect to taking care of evidence, etc., you will go to the courts at the seat. It determines the court which has the power to set aside an Award and I think this is one of the most crucial aspects of choosing a seat, because once you choose to see that it could be for example, a seat in New Delhi, then the Delhi courts will have jurisdiction to set aside the Award that is rendered by the arbitral tribunal. So, you would want to choose a seat which is arbitration friendly, that respects arbitral awards, which is efficient, which takes very little time to decide set aside applications and is consistent in its approach. So, for all of these reasons, it's important that you pick your seat carefully. And you discuss it with their client, you negotiate this with your counterparty and ensure that the seat that you pick will... will benefit the arbitration process in the future once there is an award. Now, this was also touched upon briefly- there is there is a distinction between seat and venue. And it is an important distinction to keep in mind because oftentimes we see arbitration clauses which don't specify a seat but specify a venue which is a different concept than a seat. A seat is... has a legal significance. So, it's the juridical seat or the legal seat, which has a significance with respect to how the arbitration is governed, and where the Award is challenged, whereas the venue is, it's a location of convenience. Kyongwha mentioned that in some contracts, you will have Singapore as a seat and thereafter the venue could be a different jurisdiction where the parties find it convenient to be in one

place to conduct the arbitration proceedings itself. Even if the venue is in, let's say, country X, let's take the example of parties decide to arbitrate in London for convenience of location, the seat could be a completely different jurisdiction. The seat could be in Singapore. So, it is possible to have a different seat in a different venue. But from the perspective of drafting arbitration clauses, what is important is that parties get it right and clarify that the seat or the legal seat or the juridical seat is country X or city X, and not doing so will result in the courts having to interpret and look at the intention of the parties to gather where... where the seat... to gather where what the parties' intention was with respect to the seat of arbitration. So, if parties don't distinguish between seat and venue, Indian courts have come up with certain tests for determining the seat of arbitration. So, the two cases that you see on the right-hand side, here are Roger Shashoua and Mankastu, determines the test to be applied for deciding the seat of arbitration in circumstances where there is ambiguity in the contract with respect to the seat of arbitration. So, for example, in Roger Shashoua, it provided for London venue, which the Indian courts then held was... the Indian courts interpreted that to mean that the parties have chosen the seat itself as London, because the parties are also in addition to choosing London as the venue also had chosen a supranational set of rules, which is, which was the ICC rules in that particular case. So, the parties had to interpret the contract, look at other aspects of the contract, and thereafter determine that even though the parties had only chosen London as the venue, their intent was actually to choose London as the seat. Now, the courts would usually perhaps come to the right conclusion by interpreting the contract and looking at the intent of the parties. But this is not something that you would want to leave to the court, it's too important a choice for the courts to decide. So, it's important that you decide as a contractual party or as a lawyer advising your client, you will need to decide beforehand where the seat is located. The two other points here are important. The first is Indian parties and a foreign seat. Now until a few months ago, there was some ambiguity on whether two Indian parties can choose a foreign seat, and it was possible to interpret if two Indian parties had chosen a foreign seat. There was great risk that the Award would be set aside. In 2021, the Supreme Court delivered a judgement in which they held that two Indian companies which had agreed to a Zurich seated arbitration under the ICC Rules, had a valid arbitration clause and upheld the choice of seat of these two Indian companies. They held a party autonomy should prevail, and that enforcement of such an award will be under Part II of the Indian Arbitration Act which deals with a foreign seated arbitration. There... there is still some ambiguity on whether to Indian parties can choose a foreign substantive law. But for the purpose of the present presentation, what is important is that two Indian parties can choose a foreign seat. The reason I mentioned this is that usually, when you think about choosing a seat, you think that this is relevant only to an international commercial arbitration. But given this judgment, the choice of seat is also relevant to a domestic arbitration with... with two Indian... Indian parties. So, this is something to keep in mind in every arbitration. And the last

section here which is the bottom right-hand side box, even if you choose an India seat, which city do you choose, and does it really matter? The Supreme Court judgement at BGS SGS held that the choice of seat is akin to an exclusive jurisdiction clause. What this means is that it's the courts at the seat, which will have supervisory jurisdiction with respect to setting aside of the Award, for example. So, within India, if you choose Delhi seat, it's the Delhi courts that will have jurisdiction to decide a Section 34. So, you will need to carefully consider which court you want to go to once that Award has been delivered. Because there are some courts, which may be slower, there are some courts that may be more efficient. There are some judges who may be more commercially minded. So, these are strategic considerations for lawyers and clients keep in mind in deciding which seat even within India. So, moving on to India as a seat of arbitration, you saw on the first slide that I showed you with respect to seat, India is not a preferred jurisdiction. And there are various pros and cons to choosing India as a seat. I'll deal first with the pros. And the first one is timeline; the Indian Arbitration Act specifies that an award has to be rendered within 12 months. Now, I'll caveat this by saying that it is extendable by the parties' consent, and oftentimes this is extended multiple times. So, this timeframe is not... you most... most cases, we will see that the time frame is extended once or twice. So, 12 months is not a hard deadline. But the fact that there is a deadline under the Indian Arbitration Act is an advantage because oftentimes, we see even an international arbitrations and investment arbitration awards not being delivered for years together, which defeats the purpose of arbitration. So, this is a positive step under the Indian Arbitration Act, which provides for a specific timeline. Now enforcement is also an advantage. The award is enforced as a decree of the court under Section 36. And provided it is not challenged if it is challenged that it's subject to the challenge proceedings. Emergency arbitration is not something new or just... just a couple of weeks old, where Justice Nariman's decision in Amazon versus Future, where he held that an SIAC emergency arbitration, in a Delhi seated arbitration is enforceable under the Indian Arbitration Act in part one. Now there is still some doubt on whether an emergency arbitration award delivered in a foreign seated arbitration by which I mean in an arbitration seated outside India, is enforceable in India or not, which really, if parties are keen on having emergency arbitration, then they will seriously have to consider choosing an India seat, because the judgment calls that an India seated tribunal, which delivers an emergency arbitration award will be enforceable in India. So, this is a crucial aspect to keep in mind going forward, I think. And lastly, challenge an application to set aside the award, which is also required to be disposed of within one year, as per section 34 of the Indian act, and these timeframes are useful. But again, as I mentioned, in the cons, this timeframe is not strictly adhered to. So even though the Act provides for a time frame, it oftentimes we find courts taking 2/3/4 years to decide to challenge which... which is really the downside to having India as a seat of arbitration. So, let's jump straight into that- what are the cons of India as a seat? The first I think, and most important is lack of consistent... consistency in Indian case law. There

has been a historical trend of judicial interference with awards. It started I think, with Bhatia International and Venture Global, which, which applied a unique test to even interfere with foreign awards, which is awards seated outside India. But there has also been a historical trend of interpreting, for example, public policy in the enforcement of awards or in the setting aside of awards expansively to include grounds such as patent illegality, which results in… which gives the power to the Indian courts to even go into the merits of the dispute and look at the merits and then set aside on on on the merits the fact that the arbitrator… arbitrator or the tribunal got the merits wrong, that there has been in the recent past an effort by the Indian Supreme Court to change this historical jurisprudence. The Indian courts have now narrowed down for instance, the grounds for setting aside an award, but we'll have to wait and see whether this approach is consistent. And the lack of consistency is a key factor for international parties in choosing an India seat. The second is lack of consistency in arbitration legislation. There have been a series of amendments which I will deal with on the next slide. lack of experienced arbitrators- we do find that we have some very good judges who sit as arbitrators in Indian-related arbitration disputes. But we don't yet have a specialized set of arbitration specific judges who deal only with arbitration cases that approach cases, I think, with different… different mindset. And that is something that is important. But the positive news is that we are seeing that developing, there is today move to develop an arbitration bar. And with that, will come experienced arbitrators as well. I already dealt with strict timeframes for setting aside applications and how they're not dealt with, how they're not adhered to, and also the patent legality ground which gives the court wide power to set aside an award. I mentioned that the amendments have come in from 2015, but they haven't been consistent. For example, the 2015 amendment had some very positive moves by the Indian government with respect to timeframes and ease of enforceability. But then the 2019 amendment, while it did contain some positive steps, it also contained amendments such as Section 87, where it sought to clarify a certain aspect of stay of arbitral Awards pending challenge. Fortunately, that was struck down by the Indian Supreme Court, the 2019 amendment also had an 8th schedule which dealt with qualifications for arbitrators, which cast some doubt on whether foreign lawyers could sit as arbitrators in India seated arbitrations. But fortunately, that was also done away with in the 2021 amendment. But the 2021 amendment added a provision which allowed Indian courts to unconditionally stay an award where it is prima facie satisfied that the arbitration agreement or the making of the award was induced by fraud or corruption. People have argued that the prima facie standard is a loose standard, and that arbitration award should not be interfered with, based on a prima facie standard. So, so, these… these are examples of the lack of consistency, even with respect to arbitration jurisprudence, even though most of these amendments did try to change the law for the good. But there needs to be some consistency going forward. With that, I think, given that we only have five minutes, I'm going to open… open it out to both Kyongwha and Sunil, to deal with some poor examples

of arbitration clauses. We have here, and maybe maybe I will deal with the first one, which is Enercon versus Enercon, where it says at the venue of arbitration proceeding shall be London. And like I mentioned, it's important to specify the seat of arbitration, not the venue. And this language here is quite confusing. It also says that the provisions of the Indian Arbitration and Conciliation Act shall apply, which is again, confusing because it doesn't specify a particular rule, but it specifies that the provisions of the Indian Arbitration and Conciliation Acts will apply. This is inconsistent with possible intent that the seat be London because if the seat is London, then it's inconsistent to say that the provisions of the Indian Arbitration & Conciliation Act will apply. So, this is just one example of a poorly drafted arbitration clause. There are other examples. And I think, Kyongwha & Sunil may have examples based on their own experience. So, Suni, Kyongwha?

Sunil Mawkin: Yeah, I mean, just... just picking up the Sulamérica case, which was one of the key cases in the UK, which really, as much as English law, which really kind of determined the rules for interpretation of clauses where there isn't a clear distinction on what the seat will be. So... so here you have a very poorly drafted clause where dispute is governed exclusively by the laws of Brazil. You then have a submission to the exclusive jurisdiction of the courts of Brazil by a provision that says if they fail to agree on the payment to be made under the policy, you refer the dispute to arbitration under the ARIS arbitration rules, seated in London, so you have a clear conflict there between exclusive jurisdiction of the courts of Brazil and the seat of the arbitration being London. An English approach is... is to look at what the try and understand what the parties intended by looking at assumption to the seat but... but also the surrounding clauses like the governing law clauses, etc. to try and determine what the parties really intended for the submission of disputes. And this picks up actually on a question that's been raised from our participants here, which is, won't the seat determine the impeccable, the acceptable governing law? Or can they be different? I mean, the short answer to that is yes, very much that they are different. Sometimes, the governing law, if there isn't a clear determination of what the seat might be, the governing law, depending on the legal system may help the court in interpreting what the, what the seat should be. But that is no means certain. So, very often, particularly in the Asian markets, due to kind of commercial bargaining power, you know, local law implications, we have agreements where the parties may choose a less preferable governing law for commercial reasons, such as Vietnamese law, Indonesian, or etc. But we deliberately choose to isolate their disputes to a, what we would say, a more preferred forum. So, for example, submission of disputes to Singapore. And the benefit of that is that if there is a dispute about the party's rights, underlying obligations, that will be resolved in accordance with in that example, Indonesian law. But the procedural law that will be applied to the arbitration will be Singapore, and Singapore, we know is a very robust country, very pro-arbitration. And so, any kind of local law antics

that may happen will... will not because the Singapore courts, outside supervisory jurisdiction will take a much more pro arbitration approach. So, I think in the interest of time, unless Kyongwha has any further thoughts on that, I mean, here, you can see on the slides, there are just some other examples of pretty poor, poorly drafted clauses.

Kyongwha Chung: It is certainly out in the interest of time, should we look at the most perfect model clause then? There you go. This is the model clause of the MCIA. Should we see whether this clause includes all the most haves that we have discussed so far? The first sentence says any dispute arising out of or in connection with this contract, including any question regarding the existence, validity or termination, shall be referred to. And, finally, it has a final requirement their result by arbitration, in accordance with the arbitration rules of the Mumbai Centre for International Arbitration, which rules are deemed to be incorporated by reference at this clause. This includes commitment of the parties that to an arbitration in writing a second sentence, the seat of the arbitration shall be, it includes the seat. The third sentence, the tribunal shall consist of one/three arbitrators. It has the number of arbitrators. The language of the arbitration, fourth. Fifth, the governing law of this arbitration agreement, and also the governing law of the contract if they are different, but in most cases, they will be the same. So just one last point on the name of the of the institution. There are many people who just assume that there'll be only one arbitral institution in one country, or maybe in one city or something, they will just write arbitral institutions in, I don't know, Singapore, Mumbai, or something like that. But there could be several arbitral institutions in a particular city, so it's better to check the official name of the arbitral institution when you draft a clause. I think that concludes our presentation today. Shall we get the chat?

Sunil Mawkin: Brilliant, we'll find a follow up and first to say is thank you very much to all the participants that have joined us today. We hope you found that informative and useful. And as I mentioned at the outset, this is the first in a series of five presentations and seminars that the Young MCIA steering committee have arranged over the next couple of months throughout the end of the year. So, we very much hope that you will join us again for the next ones, which will be coming up and you'll see announcements from the MCIA on when they will be in timings and how to register. So, thank you very much to you all, and have a very nice evening, morning, afternoon for those and a very enjoyable weekend.

Kyongwha Chung: Thank you.