

INDIA ADR WEEK DAY 3: MUMBAI

Too much, Too Little or Just right?: Rethinking Scrutiny of Awards Across Jurisdictions

04:30 PM To 05:00 PM IST

MODERATOR

Ms. Shreya Jain - Partner, Shardul Amrchand Mangaldas

SPEAKERS

Mr. Abraham Vergis SC – Founder & Managing Director, Providence Law Asia LLC

Ms. Kanika Goenka – Partner, Shardul Amarchand Mangaldas

Hon'ble Mr. Justice (Retd) L. Nageswara Rao –Former Judge, Supreme Court of India

Mr. Sudhanshu Swaroop KC – King's Counsel, Twenty Essex

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1 **HOST:** Kindly be seated. We'll be starting our next session in ten minutes. The topic of the
2 session is "Too much, Too Little or Just Right?: Rethinking Scrutiny of Awards Across
3 Jurisdictions." The session will be moderated by Shreya Jain. The panellists include Abraham
4 Vergis, Kanika Goenka, Justice L Nageswara Rao and Mr. Sudhanshu Swaroop. Thank you.

5 **SHREYA JAIN:** Good afternoon everyone. Welcome to the panel discussion, the last panel
6 discussion for today on the topic "Too much, Too Little or Just Right?: Rethinking Scrutiny of
7 Awards Across Jurisdictions." This session is sponsored by Shardul Amarchand Mangaldas
8 for this ADR Week today. My name is Shreya Jain, I'm a partner in the dispute resolution team
9 at Shardul Amarchand Mangaldas, and I'll be your moderator for today. The topic we are
10 discussing today is the scrutiny of supervisory courts in review of arbitral awards. We often
11 hear the words minimum curial intervention, minimum judicial intervention being thrown
12 around as a key ingredient of what constitutes a good Arbitral seat. However, as practitioners
13 and users of this system, we all know that it's not as simple. Seats could provide a very critical
14 oversight mechanism in Arbitrations, particularly at the stage of challenges to Arbitral Awards,
15 and they bring confidence to the users in the arbitration process. The question, therefore, is
16 one of balance, what and how much scrutiny should be applied by Courts, which is what we'll
17 focus on, further today in today's session.

18 So without any further ado, I'd like to take this opportunity to welcome our panellists for today.
19 They really need no introduction, so I'll keep it very brief. So, I have Justice L Nageswara Rao,
20 former judge of the Supreme Court of India. He is also a former Senior Advocate and Solicitor
21 General of India and sits as an Arbitrator in domestic and international arbitrations, both *ad*
22 *hoc* and under all major institutional rules. To his left, we have Sudhanshu Swaroop KC. He is
23 a Barrister and King's Counsel at Twenty Essex Chambers. He specializes in arbitration,
24 commercial disputes, as well as public international law matters. To my left is Abraham Vergis,
25 Senior Counsel. He is the Founder and Managing Director of Providence law Asia, Singapore.
26 He regularly appears in domestic and international arbitrations as well as Singapore courts
27 and the SICC. He also sits as an Arbitrator and Mediator. And last but not the least, the lady
28 at the centre, we have Kanika Goenka, Partner at Shardul Amarchand Mangaldas. She also
29 focuses on domestic and international arbitration and complex global commercial litigations.
30 Prior to joining SAM, Kanika worked for several years in the dispute resolution team at major
31 firms in Mumbai.

32 So, in terms of structure for today's panel, this would be a free-flowing discussion without any
33 formal presentations by any of the speakers. The idea is to have a free-flowing conversation
34 and end with some questions from the audience. I will briefly introduce the topic that we are
35 discussing today and then ask our panellists a few questions. And we'll try and reserve the last

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ten minutes for audience questions. So today's discussion would follow two themes. The first theme, which we'll begin with is the standard of review to be applied by the Curial Courts when reviewing an Arbitral Award, particularly when the award is challenged on jurisdictional grounds. And the second theme, which we'll end with, is the power of a review court to modify Arbitral Awards, a topic we are all very familiar with based on recent developments. With this, I'd like to move on to the first question, and if I could request Justice Rao to weigh in on this. Sir, in your view, what are the risks and considerations that need to be balanced by a supervisory court when reviewing arbitral awards?

JUSTICE L NAGESWARA RAO: Thank you, Shreya. I see a number of buyers and members of people [UNCLEAR] from outside the country. I was asking Shreya as to whether I should speak about the domestic arbitrations and what the courts do here, as well as what the domestic courts do in international arbitrations and enforcement of awards as well. She said, it could be a good idea to speak about [UNCLEAR] what are the considerations that are taken into account for regulating awards even in domestic arbitrations. The lawyers of India might know what I'm going to tell you. The others might be.... This might be news to... The structure of Indian courts is such that we have about 34 Supreme Court and we have 2079 High Court Judges, and over 25,000 judges at the subordinate judiciary. Out of these 25,000 judges, there are about 4000 district judges and additional district judges. Review of arbitral awards, including any of these 4000 district court judges, district court as well as the additional district courts and [UNCLEAR] jurisdiction like Bombay, Delhi, Chennai and Kolkata including Shimla [UNCLEAR] arbitral awards. The considerations for supervisory Courts while reviewing awards is clearly laid on in the Arbitration Award Act 1996. They need not search further. The Amendment that has been '96 Act in 2015 on the sort of our commission recommendations, makes it very clear that there should be minimum intervention to transfer arbitral awards, so the intervention in Arbitral Award by supervisory Courts is restricted to only those grounds that are mentioned in the Act, and no further. And wherever there is some confusion, assuming some ambiguity as to the tasks to the terms that are used in the provisions in the Arbitration Act, like Section 24 says that the wherein is permissible on grounds of patent illegality. There might be a problem of understanding patent illegalities. What is the scope of this patent illegality, whether court can interfere or not? There is sufficient guidance from the Supreme Court in terms of judgments that were given to the Supreme Court as to what exactly is patent illegalities. There is absolutely no problem in understanding the scope of patent illegality. If evidence is not there at all, if there is a misreading of evidence. There are three, four instances that have been given in at least four, five judgments as to what patent illegality is.

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The Supreme Court had a chance of looking into the awards of the supervisory courts in taking into account that wherein considerations for interpreting an award. It has been repeatedly seen that interference on merits is not permissible because that is the legislative mandate. It is very clear, insofar as the domestic awards are concerned, that there is some leeway for the supervisory courts to interfere on this ground of patent illegality, which is not available for international awards.

There are international arbitrations where, the seat is India, they're also covered a path in the Arbitration Act. But the Act makes it really clear, that patent illegality is not a ground for interference. Supervision is also not a ground. Then the ground is only jurisdiction, which means that the arbitral agreement is non-existent. Or the constitution of the Arbitral Tribunal is not made properly. Arbitral Tribunal on the traverse is beyond the difference made to them. So these are the grounds which have been mentioned. Apart from certain grounds, that are available to your party. The party says that have not been heard by Principles of natural justice and thereafter, public privacy laws which are available for a domestic award.

Now, moving on to enforcement of awards because enforcement of foreign awards also not only courts in Mumbai or Delhi, they go to any district court because wherever the assets are situated, enforcement proceedings are initiated, they might be going to any district court in any corner of this country. So, Section 48 clearly lays down as to what are the grounds for enforcement and recognition of Arbitral Awards, and there has been clear interpretation of this provision also by taking into account the objects and reasons of the 1996 Act by the Supreme Court. And there is no review on merits, even when there is a ground of public policy that is taken. Because public policy is one ground which is permitted even by the New York Convention. But the court has said on a plain reading of the provision that there cannot be a review on merits. If you said and done, what is the problem, then the problem arises in law being very clear but law not be understood by the judicial officers. As I said, there are about 800 districts in this country. So whenever [UNCLEAR] is taken, an application, which is trying to setting aside the award, more often than what I hear from legal professionals that courts would try to enter into the merits of the award.

I heard recently a Judge of the High Court speaking in a public function, saying that we listen to the nug and know what to do. This is not what has to be done. The risk is that every judge, though he is legally trained, though he is told that the approach has to be a judicial approach, though he also knows that the discretion that he has to exercise in judicial discretion and not these personal discretion according to his whims and fancies but still there is a tendency of the [UNCLEAR] objects and reasons for the 1996 Act. And the risk apart from all these considerations, which I spoke about. The risk is not because of a judge not understanding what

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1 he has to do. Most of the judges who are discharging these functions of a supervisory authority
 2 are legally trained minds. If not now, after a few years, they should know what to do. The risk
 3 is to the institution of arbitration in this country. The risk is for encouraging arbitrations in
 4 this country. You need supervisory courts. It's not as if arbitration should be just left alone.
 5 The very reason for supervisory courts being there is to give an assurance to parties who choose
 6 arbitration, that, if at all, there is something wrong, the courts are there. And when I said
 7 minimal interference, minimal interference is not no interference at all.

8 So there is a need for training of all the High Court judges and the District Court judges. It's
 9 not that. It's not being done. The National Judicial Academy regularly trains High Court
 10 judges. We have on 4th October, there's a session. I'm going to the National Judicial Academy
 11 to train High Court Judges in arbitrations. What is it that they have to do? What is it they
 12 should not do? And there is a need for every one of us, as I'm talking about judicial officers,
 13 and we're talking about even legal professionals as well, to be abreast with the latest position
 14 of law, to follow the law and ensure that the interference is limited. Because taking into
 15 consideration, all these factors which have been mentioned in the statute and judging,
 16 whenever an application for set aside is being filed is a great job done. The risks that are
 17 attached to it is when a judge traverses his powers. Every judge knows what his powers are.
 18 Powers come from the statute itself, so this is what I can say on the risks, because there is no
 19 risk in an individual. The person who goes to court is at risk, the institution is at risk.

20 **SHREYA JAIN:** Thank you, sir. This is extremely insightful. And some of the things which
 21 you touched upon also sort of directly play into the theme that we are going to touch now,
 22 which is approaches and standards of review to be adopted by in the Indian context here,
 23 district judge or a High Court who's sitting as a curial judge over an arbitral award. While the
 24 grounds of challenge to arbitrate awards like Justice Rao just noted are largely harmonized
 25 across modern law jurisdictions, including India, there are differing views on what standard
 26 of review should be applied by the Court when an award is challenged, particularly on
 27 jurisdictional grounds, and this question is particularly relevant for jurisdictional challenges
 28 because of the principle of competence, competence which we are all familiar with. This entails
 29 two fundamental ideas, one being that the Tribunal has the power to decide its jurisdiction,
 30 first, before any court can rule on it. And the second that, given that it concerns the Tribunal's,
 31 own ability to hear the case, it cannot be the final arbiter of this decision, as that would become
 32 a classic case of pulling ones oneself up their own bootstraps. And on this basis, several
 33 jurisdictions, both Civil and Common law, have applied a different standard of review to the
 34 jurisdictional questions known as the *de novo* standard. In practice, this entails a few key
 35 questions for the reviewing court. What is the evidential value of the Arbitral Tribunal's
 36 decision? Is the party who's challenging the award entitled to a full rehearing of the case? And

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1 if so, can the party go as far as introducing new evidence for the first time before the review
2 court? These are just some of the questions, we look to our expert panellists for ideas and sort
3 of views on what is the trend in their respective jurisdictions. And we'll start with the English
4 position first. And on that Sudhanshu, if I could request you to take us through what is the
5 standard of review applied by English courts to challenges to Arbitral Awards and in
6 particular, jurisdictional issues? And what is really the rationale behind applying different
7 standards, if that's the case?

8 **SUDHANSHU SWAROOP KC:** Thank you. Where an arbitration is seated in England,
9 there are three ways to challenge an arbitration award in the English courts. The first of those
10 is an appeal on a point of law under Section 69 of the English Arbitration Act '96 and in that
11 regard, there are just five brief comments I want to make. First, Section 69 provides that an
12 appeal on law can only be made “on the basis of findings of fact, in the award”. So, recently in
13 the Supreme Court case of *Sharp vs Viterro*, the court held that that meant either there had
14 to be an express finding of fact in the award or a finding that could be inferred, but only where
15 that inference was inevitable from the express findings, it was insufficient if an inference was
16 merely reasonable. And on that basis, they said the court of Appeal was wrong to find a
17 variation of a contract which the underlying arbitrary Tribunal had not found. Secondly, in
18 order to get permission to appeal on a point of law, you have to show either that the finding of
19 the Arbitral Tribunal was, "obviously wrong", that Section 69, alternatively, that appointed
20 one of general public importance and that the finding is open to serious doubt. So, that is a
21 very big obstacle to anyone trying to challenge a point, an example of general public
22 importance for example will be the construction of a Standard Form Contract which is in
23 widespread use. Third, even where the courts give leave to appeal on law they take a very
24 hands-off approach the words that are often quoted in these cases are the words of Bingham
25 Jay, as he then was in a case called *Zermatt Holdings*, which says that the courts do not
26 approach awards “with a meticulous legal eye”, endeavouring to pick holes, inconsistencies,
27 and faults in awards with the object of upsetting or frustrating the process of arbitration. And
28 that thinking applies all the more if the arbitration is a trade arbitration for example, an LMAA
29 shipping arbitration or a GAFTA commodity arbitration. The court will defer to the reasoning
30 of trade experts. Fourthly, in practice it is rare for a Section 69 appeal to succeed. For example,
31 in the year, '23 to '24. There were 52 applications in the English court to appeal on a point of
32 law. In ten of those cases, permission was granted. And of those ten, only one was successful.
33 I should add, out of the 52, 19 are pending, but you can still see ten permission granted, only
34 one successful. Fifthly, around ten years ago, there was a very spirited debate about whether
35 we needed to reform our appeal on point of law. On one hand, you had Lord Thomas, who was
36 then the Chief Justice who argued we did need to reform. In particular, he said that the

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1 development of the common law was being stifled because of the number of commercial
 2 disputes that were being determined in Arbitration without ever being ventilated in court, and
 3 therefore, without the publicity that you get in court. In response to Bernard Eder, a former
 4 High Court judge argued that he was totally unpersuaded, that private litigants should be
 5 forced to finance the development of the common law by pursuing appeals to the High Court.
 6 He observed that otherwise the logical extension would be to prohibit any party from settling
 7 any case where there was an interesting point of law issue. And I observed that our recent 2025
 8 Act amendments has not sought to change the structure of 69 in any way. The other area
 9 Section 68, jurisdiction challenges. So, in these a party can object to the Tribunal that it lack
 10 jurisdiction. A Tribunal can make an award on substantive jurisdiction and then that award
 11 can be challenged in the court under Section 67. The traditional position in England was set
 12 out by the Supreme Court in a case called **Dallah**. Where the court said that any such
 13 challenge on jurisdiction in the court was potentially by way of a full rehearing, even if there
 14 had already been a full hearing in front of the Tribunal, they said. Furthermore, any ruling of
 15 the Tribunal on jurisdiction did not bind the court and indeed had no legal or evidential value.
 16 And part of the principal basis for that was said to be that if the Tribunal actually did not have
 17 jurisdiction, then its award should be of no status in a Court. That was subject to one overriding
 18 principle of waiver, which is, in any event, a party, if you had an objection on jurisdiction, you
 19 were obliged under Section 73 of our Act to make that jurisdiction objection promptly. And if
 20 you didn't do so, then you would lose the right to raise that particular objection in court. We've
 21 just had a recent amendment, the 2025 Act, and that Act provides a power for the Civil
 22 Procedure Rules Committee of England to implement new rules of court to avoid a
 23 jurisdictional challenge becoming a full rehearing. In short, the new Act reaffirms the basic
 24 obligation to raise any ground of objection to jurisdiction promptly. It provides, then that rules
 25 of court may be made finding, to the effect that new evidence that was not afforded Tribunal
 26 on jurisdiction may not be considered by a Court unless a party can show that it acted with
 27 reasonable diligence and failing to put the evidence before the court, and it provides the new
 28 rule showing finding that evidence that was heard by the Tribunal must not be reheard by the
 29 Court. The principle for this new approach is said to be both competence, competence actually,
 30 the recognition of Tribunal does have the competence to rule on its own jurisdiction and also
 31 one of due process that once, when the Tribunal makes that jurisdiction, it does so where both
 32 parties have had a right to put their full case. So the court seeks to strike a balance and find
 33 that. And that the new regime will operate on the basis that the finding of a Tribunal does have
 34 some status in English court. And finally, just briefly, Section 68, seriously regularity, this has
 35 been described by the House of Lord in the case of **Laso**,[UNCLEAR 8:15:48] the leading case.
 36 At a long stop only available in extreme cases, where the Tribunal has gone so wrong that
 37 justice calls for the matter to be corrected. And again, these are very rare. And in conclusion,

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1 as I've said, whether it's point of law, jurisdictional, serious, irregularity there are really serious
2 obstacles in English court in challenging an arbitral award. This can mean in some cases, the
3 errors go unremedied, but that is the price that commercial parties choose to pay for finality
4 and for certainty as Sir Michael Karcher, a former court of Appeal judge, said some years ago,
5 remember when parties agree Arbitration, they buy the right to get the wrong answer. Thank
6 you.

7 **SHREYA JAIN:** Thank you, Sudhanshu. Those are all words to live by. Just want to ask you
8 one follow up question on a point you touched upon, which is the recent amendments and in
9 particular the change, the power given to the rules committee to depart from, say, the *de novo*
10 review set out in **Dallha** given that the decision in **Dallah** was such a seminal sort of
11 precedent, not just in the UK, but a lot of common law jurisdictions. What do you think
12 prompted this shift away to a bit more deferential approach, if I may say so?

13 **SUDHANSHU SWAROOP KC:** 2025 Act was made as a result of a Law Commission
14 Report, and that Law Commission Report was based on widespread consultation from
15 international law firms, barristers and others like insurance companies, all of whom are
16 involved in the arbitral process. And I think, firstly, there was a general sense in practice that
17 this can just involve a very costly rehearing of a matter that's already been decided once as a
18 matter of practice, but also that there were strong principled reasons that have been ignored
19 in **Dallah** for this new approach, namely competence, competence and also the due process
20 point that you've already had a fair hearing once. Why should you get the second bite of the
21 cherry. So, they wanted to strike a balance between the **Dallah** approach and the new regime.

22 **SHREYA JAIN:** Understood. Thank you for that. If I could now move from the UK to another
23 common law jurisdiction, which is Singapore and Abraham, you're sort of an expert here how
24 does Singapore law deal with the question of standard of review? Are there different standards
25 applied for different grounds to challenge awards? And what do those standards entail in
26 terms of what evidence can be led before the supervisory court?

27 **ABRAHAM VERGIS SC:** Thank you for that, Shreya. Very good evening to everyone. It's
28 great to be back in Mumbai. So in Singapore, we have essentially the standard of *de novo*
29 review when it comes to jurisdictional challenges. And as far as all the other traditional scope
30 for challenges, whether it is scope challenge or fair hearing challenge or breach of natural
31 justice challenge, there we are really looking more towards the process that was undertaken at
32 the hearing, as well as the conduct and the determinations made by the Tribunal. So there, it's
33 not going to be a *de novo* hearing. It's really going to be focused on what actually transpired
34 in the hearing as is. Right? Now, coming back to jurisdictional challenges, when we say it's

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1 going to be a *de novo* hearing. We took that language from **Dallah** but we sort of put a new
 2 spin on it in the sense that when we say that the decision of the Tribunal on jurisdiction has
 3 no legal and evidential value and therefore, the matter should be re heard *de novo*, how we've
 4 interpreted in Singapore is like this. We say that the Tribunal's decision in having no legal or
 5 evidential value means that the Singapore Courts can now look at the question of jurisdiction
 6 afresh, completely unfettered by the way in which the Tribunal had gone about deciding the
 7 issue. Although in Singapore, the Courts take the view frequently that the decision of the
 8 Tribunal and how it arrived at that decision is something that the court would look at with
 9 interest and very carefully. It has no binding value, but it is something that the Court will take
 10 on board as a matter of judicial assistance, right? But it is free to make its own independent
 11 decision on that outcome. So that's the first point. The second point is, what do we mean when
 12 we say that the matter will be considered *de novo* or afresh? We have basically, in essence
 13 taken this view that not every case will it be required for the court to have an entirely new
 14 hearing and take on oral evidence and cross-examination of Witnesses. In fact, in most cases,
 15 there will be no need for that. Instead it will be in exceptional cases where the Court may
 16 consider that based on the basis of the challenge, it may be relevant to take on board further
 17 evidence, and if necessary, to actually conduct a trial on this issue. And that's an important
 18 distinction. The Singapore Courts, if I can boil it down, we take a very pragmatic approach
 19 when it comes to jurisdictional challenges. We have judgments that go to the effect that now
 20 with verbatim transcripts, the court hearing the matter would have access to the same evidence
 21 that was before the Tribunal, and therefore this negates or militates against the need for the
 22 court to have an entire hearing on the same evidence. So, the fact that you've got verbatim
 23 transcripts is a point in favour of not rehearing the whole thing. And secondly, when you make
 24 an application for jurisdictional challenge, under our rules you're supposed to put in, not just
 25 the Arbitration Agreement and the Award, you're supposed to put in the entire record of
 26 proceedings, which includes pleadings, Witness Statements, submissions as well as
 27 transcripts. And so the Singapore Courts have said now that we have all of this entirety of
 28 documentation that was before the Tribunal when it made this decision, this should be, in
 29 most cases, sufficient for us to consider the issue. And that's how we have proceeded with this
 30 question of *de novo* hearings. I bring now to your attention a case that actually came out of
 31 arbitration held in India, where I was instructed with Indian Counsel to challenge in the SIAC
 32 in Singapore and that was the case involving **Reliance Infra and Shanghai Electric**. And
 33 there what had happened was Reliance Infra having lost the arbitration and had an award
 34 entered against it for about \$130,000,000. Sought to challenge the Tribunal's jurisdiction on
 35 the basis that the Guarantee Agreement upon which it was sued was not signed by any of its
 36 people, and the signature of its employee that's ostensibly on the document is a forgery. And

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1 therefore they say *non est factum*. There's no agreement, and therefore the Arbitration
2 Agreement that's contained therein was not valid and enforceable.

3 Now, the argument was that that particular employee at the time of the arbitration had left
4 Reliance Infra and joined Adani Group and therefore was not in a position to assist in the
5 matter and was refusing to come forward as a Witness and without that person's evidence they
6 were not in a position to run the argument of fraud. And additionally, they said that all their
7 records showed that none of them had ever had this document in existence in their records.
8 So, there was this entire question of whether this new allegation of fraud and forgery in the
9 signature would invalidate the agreement to arbitrate and therefore be a basis to challenge
10 jurisdiction. And interestingly because all of this was put into the Affidavit in support of the
11 jurisdictional challenge, the SICC which heard the matter, actually agreed that there would be
12 a trial on this issue of forgery. And as a consequence, you had three Witnesses of fact and two
13 expert Witnesses that actually were cross-examined in the course of a three-day trial. And as
14 far as I know, this is the first instance in Singapore, at least, where you actually had a full trial
15 on the issue of forgery in the context of a jurisdictional challenge. Of course, to balance the
16 prejudice to the award creditor, the Court imposed incredibly strict timelines, Singapore style,
17 if those of you who are familiar with it. And just to give you a sense of it, we had a three-day
18 trial, five Witnesses, including two experts and we basically had to spend half a day with
19 opening statements, two and a half days with the cross-examination. And after lunch on the
20 third day, the Court asked that we go directly into oral closing submissions, no written
21 submissions. You just submit orally at the end of this three-day express trial. And the court
22 issued its decision on the matter three weeks later. Right? To give you a sense of it in
23 Singapore, the SICC President has said in user Counsel meetings that SICC is committed to
24 have all challenges to jurisdiction and all these enforcement challenges dealt with within six
25 months. That's the KPI that they want to dispose of these challenges. And so for those of you
26 who have ongoing matters and are concerned about challenges in Singapore, six months is
27 about what you can expect in terms of the time it will take to conclude at least the first round
28 or the first instance before the SICC. In our case, the matter took something like eleven
29 months, but exceptional because of the need for the trial. So, that's an important point to bear
30 in mind. And I give this example just to make another point, which is Singapore has a strong
31 reputation for being very pro arbitration. And I discovered recently in a trip to Dubai that
32 actually, the DIFC Court is even more stringent than Singapore. I discovered, for example, that
33 in the last 21 years of the DIFC court's existence there's actually never been a successful
34 challenge to an award either for jurisdiction or for any other basis no award has been
35 overturned in Dubai. So in Singapore, yes, we have a very strong pro arbitration stance, but as
36 in this case demonstrates in the appropriate case, the Court will at least entertain the argument

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1 and if necessary even hold a mini trial but as I've demonstrated, it will happen very, very
 2 quickly. Now, as far as the other grounds were challenged, again, the basic rule in Singapore
 3 is... again, we take a very pragmatic approach. It's minimum curial intervention, but if I can
 4 summarize it this way, whether it's a scope challenge, or whether it is fair hearing challenge,
 5 the Courts are not going to accept what the court describes as disguised attempts at substantive
 6 merits challenge. Right? So, if you look at the recent decision of Justice S. Mohan in the
 7 ***Swayer and Asus case***, he gives several examples and that's a great case to look at where
 8 the court sort of dissects all the complaints or breaches of natural justice and what have you,
 9 and strips it down and says, look, you're really just complaining that the Tribunal didn't agree
 10 with your arguments, and that's not going to be a basis for a challenge. As far as Singapore is
 11 concerned, we never question the correctness of a decision. We are only concerned to ensure
 12 that the bargain that the Parties had signed up for when they signed an Arbitration Agreement,
 13 which is to be part of an arbitral process that is fair that is impartial and that is equal, that
 14 bargain is upheld. We are not interested in the correctness of the merits of the decision. Thank
 15 you.

16 **SHREYA JAIN:** Thank you, Abraham. These are great stats to have on hand, and they've
 17 inspired me to have a DIFC practitioner next time on the panel, too. If I could just ask you a
 18 very quick follow up question. You've heard about the recent English amendments. Do you see
 19 Singapore adopting a similar approach in terms of legislative amendments?

20 **ABRAHAM VERGIS SC:** So, Singapore has actually recently put out a public consultation
 21 in view of the amendments in England and it is now looking at a couple of issues, one of which
 22 is whether the *de novo* hearing standard needs further clarification. My own personal view is,
 23 I think our approach is already quite tight. That I don't see a need to tighten it any further. If
 24 you will, as I said, the default approach is most of the time you wouldn't need a full-fledged
 25 rehearing. But in exceptional cases, we will allow for it. And to my mind that has worked pretty
 26 well. There has also been questions about whether there should be... Let me just see if I have
 27 it here. Whether there should be the determination of the governing law of the Arbitration
 28 Agreement? In Singapore, the position used to be we look for express choice, implied choice,
 29 or what law has the closest connection. Now we are considering the English position which is
 30 simply to take the law of the seat as the governing law of the Arbitration Agreement. Yes. And
 31 then the question of whether there should be appeals on points of law and there the question
 32 is whether it should be with leave of court. And interesting question is whether it should be
 33 confined to points of Singapore law or whether we would even consider an appeal on points of
 34 Foreign law? And the third modality, they're looking at on this point of law is whether they
 35 should now give Parties an option in their Arbitration Agreement to opt in for a reservation of

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1 a right to appeal on points of law. So, in other words, to throw it to the Party is to decide
2 upfront whether they want to consider this as an opt in add-on, if you will.

3 **SHREYA JAIN:** Very interesting issues, and we'll wait to see the position that Singapore
4 ultimately takes. Finally moving on to the Indian position. Kanika, could you let us know how
5 the Indian Courts have dealt with this question, if at all, on the standard of review of different
6 grounds of challenge under Section 34, including a focus on jurisdictional challenges?

7 **KANIKA GOENKA:** Thanks, Shreya. Sir has touched upon this and I would very quickly
8 elaborate the position in India, of course, the Indian Arbitration and Conciliation Act of '96 is
9 based on the Model law and the grounds that are available to challenge your award or to
10 enforce a foreign award, again, mirrored Model law. The grounds that are available to set, you
11 know, to challenge an award under Section 34, or which are available under Section 48, which
12 essentially deals with enforcement challenges are largely kind of split into two. So, the first set
13 of the first bucket, as it were, is essentially your procedural and jurisdictional challenges.
14 Incapacity of either party, invalidity of the Arbitration Agreement, or natural justice, a party
15 didn't have enough opportunity to present its case. Or then you have the second bucket, which
16 is essentially substantive challenges, your public policy. Just like in Model law, the Indian
17 Arbitration Act sets out the grounds for challenge, but it doesn't tell you what the standard of
18 review is, and to ascertain the standard of review, you would have to look at jurisprudence.
19 And there is honestly quite... It's a long story, the Indian jurisprudence on what the correct
20 standard of review is and it sort of dates back. So, very quickly, the position pre and post 2015
21 is quite difficult, as sir also said. Pre 2015, the public policy bucket had become very, very wide,
22 and you had multiple judgments dating from **Renusagar** and successive judgment sort of
23 expanding on the interpretation of public policy, which ultimately resulted in a very wide scope
24 for courts to actually interfere. So you had **Renusagar**, which in the context of foreign
25 awards, defined public policy very neatly. In three buckets, fundamental policy of Indian law,
26 interest of India and justice and morality. However, many judgments that came later, **ONGC**
27 **vs Saw Pipes** added a ground of patent illegality, which meant ignoring vital evidence,
28 ignoring terms of the contract. And as recently as 2014, you had the judgment of **ONGC vs**
29 **Western Geco**, where concepts like the Wednesbury reasonableness were added as a
30 supplementary ground almost, where an award could be set aside if the Tribunal's decision
31 was capricious or arbitrary. So these, as the grounds widen the standard of review, the scope
32 of interference became more inclusive and almost like, pretty much a review on merits. But
33 what's important is that up until this time, jurisprudentially, there was no distinction between
34 the two types of challenges procedural and substantive, and they were all sort of decided on
35 similar grounds. And similarly, there was no distinction between how set aside challenges
36 under 34 and applications to enforce the awards were decided. It was all pretty much the same

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bucket. This sort of changed in around 2015 when there was an amendment to the law. In fact, the stated objective of the amendment was to ensure that there was no review on merits. So the test like Wednesbury reasonableness etc., was removed and the grounds were tightened, limited grounds. They tried to bring the definition of public policy more in line with the **Renusagar** test, in an international commercial arbitration so touched upon that as well. The award could not be set aside on patent illegality, and even in domestic awards where the ground of patent illegality is available to you. That was a very narrow determination. You could not review the awards and merits, for the first time, the act actually says that. So, there was a very clear shift, but interestingly in 2017, there was actually, for the first time, a shift in how the courts started treating challenges under 34 and 48. And what you had there was about four or five. This is in the Delhi High Court, which essentially said that there is a difference between jurisdictional challenges and those challenges which are on substance, and both those challenges cannot be dealt with in the same way. So there were decisions like, I'll name a couple **Cruz City vs Unitech Limited, Value Advisory vs ZTE Corp.** Where the courts relied on the UK decision in **Dallah** and essentially said that when there is a challenge to the Tribunal's jurisdiction, the courts would have to look at the issue *de novo*. There wasn't a very clear indication of what the *de novo* review would entail. Value advisory said that the party should have an opportunity to introduce fresh evidence but this essentially was the position in 2017 and also currently where we are at, where essentially there is a clear dichotomy between the standard of review employed in an application under Section 34 and the standard of review applied in a jurisdictional challenge under Section 48.

SHREYA JAIN: Interesting. It's interesting also to see that the Delhi High court seems to have taken that sort of proactive stance in distinguishing. If I could just ask a follow up now from a comparative perspective. You've heard about the recent change in the UK amendments brought to amendments and of course, Abraham touched about the pragmatic approach with Singapore has taken. At the same time, they're also contemplating discussing this issue by way of legislative amendments. Do you think basis these changes in common law jurisdictions, which India follows closely, can we expect to see a shift in a legislative approach in India? We've heard of the amendments which were floated last year, but we haven't heard anything on the standard of review in those amendments.

KANIKA GOENKA: I think the *de novo* review. It's almost on a spectrum, as it were, on the one hand, you have the standard of review pre 2025 in England, where it was based on **Dallah**. There was a wide right to introduce evidence, and I would say on the other end, you probably have Singapore, where there is no right to introduce fresh evidence. And India currently, at least as far as Section 48 Jurisdictional challenges are concerned, is probably somewhere in the middle. Where we're headed, Shreya, to answer your question, I think the

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2019 Amendments to the Arbitration Act are very telling. So if you look at how Section 34, read pre 2019, the section was prefaced with, and the arbitral award may be set aside if the person on jurisdictional grounds, if the person making the application furnishes proof that any of the jurisdictional defects exist in the award. This was deleted by the 2019 Amendment and replaced by the words “establishes on the basis of the record of the Arbitral Tribunal”. So there is a very clear shift in 34 that we're not going to allow fresh evidence of course, there isn't any indication on what the standard of review will be, but if you read that with the sort of lack of judicial precedent on the issue, I would say when 34 jurisdictional challenges are concerned, the legislature doesn't seem to want to change things up. And as far as Courts are concerned, there are a few pending decisions where this issue may likely be decided. But how in what way that will go, your guess is as good as mine. As regards Section 48, there hasn't been a similar amendment, for enforcement challenges, a party can still sort of furnish proof in respective jurisdictional challenges. Now what proof includes is. I think is neither... It isn't sort of the **Dallah**, it doesn't stretch as far as **Dallah** expected it to. And there is some sort of indication in various judgments of the Supreme Court. And one particular judgment, the judgment in **MK Global**, sort of explained how this would work, and a party would certainly not have the right to sort of conduct a fresh trial at this stage. But if there is some evidence that for some good reason could not be presented before the Tribunal, the party has the right to present it in an Affidavit, and the court will decide the issue based on the Affidavit without affording the Parties a chance of cross-examination unless absolutely required. So, *de novo* in its extreme form you don't really see that happening here, at least for Section 48 where suppose we're moving towards extreme deference to the Tribunal and Section 34 is an entirely at different matter.

SHREYA JAIN: Thank you. Thank you for that. And if I could now just request Justice Rao to sort of summarize the takeaways for us from this theme. We've heard about *de novo* review being a spectrum where in its most extreme form, it looks like fresh evidence can be allowed, a complete rehearing can happen, etc. And then you have a more differential pragmatic approach where you don't go as far in terms of questioning, how the Tribunal ruled on jurisdiction. Do you see a comfortable middle ground between these extremes that countries such as India can adopt?

JUSTICE L NAGESWARA RAO: As Kanika was saying, that our Act does not contemplate *de novo* hearing. We have Section 16 in our Act where applications are filed before the Tribunal about the jurisdiction of the Tribunal on various grounds. And as an Arbitrator doing domestic matters, we see every third or fourth case there is an application filed under Section 16. And as is followed in other countries, the Parties have to wait till the award is passed because there's no appeal provided against an order passed into Section 16 dismissing it. Even when the

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1 matter goes to court and when an application for setting aside is filed, there's no way a party
 2 can insist on a *de novo* hearing in respect of a jurisdictional objection. That's also heard on the
 3 basis of the material that was produced before the Arbitral Tribunal. And as Kanika was saying,
 4 there's only a slight indication in Section 48, where the court has divided the grounds in
 5 Section 48 for enforcement of a foreign award into jurisdictional objections, into objections of
 6 public policy and into objections where a Party might have been affected by notice, not being
 7 issued, etc. That's the maximum that has been done. And there's no indication also in the
 8 recommendations made by the TK Vishwanathan Committee as to what is the move that
 9 they're making by introducing a provision for a *de novo* enquiry. But one aspect which is
 10 considered by them and a recommendation made is that an appeal has to be provided against
 11 an order that is passed by the Tribunal under Section 16, dismissing the objection during the
 12 arbitral proceedings itself instead of waiting till the end. But the middle path, as you were
 13 asking me, I think, is the Singapore path. Even **Dallah** has been watered down now by the
 14 2025 Act, where there are limited circumstances in which a *de novo* inquiry is done, even by
 15 the 2025 Act amendment of Section 69. But under the Singapore Act, as Abraham was
 16 mentioning, a Party has to show to the court as to why evidence has not been led before the
 17 Arbitral Tribunal in respect of jurisdiction. So I think that should be a middle path.

18 **SHREYA JAIN:** Yeah. Thank you, sir. With this, we move on to sort of the concluding theme
 19 of today's session. No discussion on review of awards can be complete without talking about
 20 the recent Supreme Court decision in **Gayatri Balasamy**, which went into the question of
 21 whether a Curial court can modify arbitral awards under Section 34 of the Indian Arbitration
 22 Act. We are all very familiar with the decision. We've read a lot of reports on it, so I won't
 23 introduce the facts and the reasoning in detail, but jump straight to some questions on it.
 24 Justice Rao, now, if I could again sort of request you for your views on the decision as a whole,
 25 but especially the question of whether you think it strikes the right balance between competing
 26 considerations such as consent of Parties, finality of an arbitration proceeding, and efficiency?

27 **JUSTICE L NAGESWARA RAO:** Though modification of an award is existing in various
 28 well-developed jurisdictions where courts are given the power to modify. In 1996 Act
 29 categorically deleted such a provision, which was there in the 1940 Act. In 1940, Arbitration
 30 Act permitted modification of an award by the courts which has been expressly deleted in the
 31 1996 Act, and I personally feel that the majority was not correct in saying that an award has to
 32 be modified. The majority was struggling to balance between principles of equity and justice.
 33 And on the other hand, what it says jurisdictional fabric of Section 34. When the legislative
 34 mandate is that there cannot be a modification or a variation of an award, introducing such
 35 modification through a judicial verdict is not permissible is my personal opinion. You were
 36 asking everybody as to whether they have read or all of you must have read **Gayatri**

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1 **Balasamy**, but I'm not sure whether you know the facts of the case. Gayatri Balasamy was
 2 working with ISG Nova soft about 20 years back, 2006. And 2006, he filed a case of sexual
 3 harassment against certain superior officers. In 2007, her services were terminated and there
 4 were cases filed of extortion and defamation. Then the matter reached the Supreme Court. The
 5 Supreme Court asked the Parties to go for arbitration. there was an Arbitral Award in her
 6 favour for about two crore rupees to start with. Two crores is about 230 thousand USD. The
 7 matter went to the court in Section 34, it was reduced to 1 crore 68 lakhs. The matter went to
 8 the Divisional Bench, it became about Rs 60,000 because the courts proceeded on the basis
 9 that they had the power to modify the award. When the matter reached the Supreme Court,
 10 you saw the Supreme Court judgment in the Constitutional Bench but she has not got any relief
 11 till now. 20 years. When people go for arbitration, apart from anything else, they want finality
 12 to the dispute. When party autonomy is the basic rubric of arbitrations. When people want
 13 arbitrations to be conducted in efficient manner, you cannot let a party go to a court and get a
 14 modification. You have a second run of an appeal before the High Court, and then thereafter
 15 the Supreme Court and every court keeps modifying the award. I think that is not what is
 16 contemplated even by the Legislature and it says it's only an award which can be annulled. I
 17 understand that the majority was of the opinion that this would save a lot of time and expense
 18 to Parties because once an award is nullified, then the Parties are back to the position before
 19 in which they were situated before the dispute started, which would mean that they would
 20 have to start the arbitration all over again. These are considerations that are taken into account
 21 by the Division Bench. But the Division Bench definitely did not really help in interpreting
 22 Section 34 of the Arbitration Act by only taking into these considerations but giving an
 23 opportunity to all courts in the country to start tinkering with the award. As I said, when I was
 24 speaking on the first point, and I said, even when I was sitting in the Supreme Court in a few
 25 judgments, the law is very clear. It's only the interpretation of the law that has become very
 26 difficult now. When there are several people who are not really trained. See, every judge in this
 27 country does every other job. It's not as if we have, like in England, you have a Commercial
 28 Court where judges only do commercial work. Here you take a district judge. A district judge
 29 does criminal trials. He hears civil appeals. He'll also take up special court matters. And there
 30 is no uniformity of a district judge sitting only in commercial matters for a long time. We have
 31 commercial courts, all right, but still there are frequent transfers. So, this is a problem in
 32 people not being able to understand the scope of what is the power that is given to them. The
 33 Supreme Court said that only in limited situations can the court modify. They refer to three
 34 situations, one of which is interest, which is a very important component. As I told you, the
 35 amount that is reduced now when **Gayatri Balasamy's** case itself. It has become Rs.
 36 60,000 from 2 crores. We do not know what the Supreme Court is going to do with that? So,
 37 this is only leaving the door ajar which would give scope for Arbitral Awards not becoming

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1 final at all. I agree with the minority view of Justice Vishwanathan that the court has to stick
2 to what the Legislature says, and then we cannot do whatever is contrary to what the
3 Legislature has said. That's my personal view.

4 **SHREYA JAIN:** Thank you, sir. That was very insightful. As you touched upon the fact that
5 the text of the Indian legislation actually is silent on whether there's a part to modify, and in
6 that sense only gives the option of setting aside upholding the award. But the court still found
7 interpretive routes to say that look, yes, it can be modified, but an extremely limited
8 circumstances. Sudhanshu, one of the things the Indian Supreme Court did was to actually
9 consider the position in the UK. And Singapore, and the fact that in some of those instances,
10 the statute actually provides for modification. Could you tell us what is the position today
11 under English law on whether a supervisory court can modify arbitral awards. And in what
12 situations is that allowed?

13 **SUDHANSHU SWAROOP KC:** I can deal with this quite quickly. There's no general power
14 in the English court to modify or vary an arbitral award. The 1996 Arbitration Act provides
15 that where there is a successful jurisdiction challenge under Section 67 or a successful appeal
16 on a point of law under Section 69 then there are a range of remedies that the court can give,
17 and one of those remedies is varying the award. The other remedies include confirming the
18 award, remitting the award to the Tribunal, in whole or in part for reconsideration, or setting
19 aside the award in whole or in part, depending on the exact facts and the precise respect in
20 which the court said the Tribunal erred. Then variation might be one of the... That might be
21 the option it goes for.

22 **SHREYA JAIN:** And it's only limited to that specific sector.

23 **SUDHANSHU SWAROOP KC:** Yes.

24 **SHREYA JAIN:** Interesting. Abraham, if I could now come to you for the Singapore position.
25 Where do you stand on this issue? And as a separate follow up, insofar as enforcement of
26 awards is concerned. What issues do you foresee with enforcing arbitral awards which are
27 modified subsequently by the seat courts?

28 **ABRAHAM VERGIS SC:** Okay, so in Singapore, the position is quite clear. A Supervising
29 Court only has the power to uphold the award, set aside the award or remit it back to the
30 Tribunal for reconsideration. Our courts do not have the power to vary or modify the award.
31 So, it's quite clear for us that under the IA, that's the position. The position taken by the Indian
32 Supreme Court, let me say with respect, I agree entirely with Justice Rao's analysis, and I will
33 give you additional reasons why the position that Justice Rao is taking is, in my opinion, the

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1 correct one. One issue is this, how do you enforce internationally an award that has been
 2 modified by the seat court. If you look at the New York Convention, I think it's Article 4. It
 3 talks about how if a Party wishes to have an award recognized and enforced, it has to supply
 4 certified true copy of the award and a copy of the arbitration agreement. There is in the
 5 language of the New York Convention, no possibility of submitting for enforcement an award
 6 together with a seat court judgment that has modified that award. So the question you're faced
 7 with is when you're trying to enforce a modified award made out of India, outside of India,
 8 how is the Enforcement Court going to take to it, right? And my submission is, at least in
 9 Singapore, I doubt that the court is going to find that it has the power to enforce such an award.
 10 Even if interior court entertains the possibility of enforcing such an award. Such an award, in
 11 my opinion, again is subject to public policy concerns and due process concerns. For example,
 12 was there sufficient due process given to the other Party at the seat court hearing, there's a
 13 question of whether there's a breach of autonomy, i.e. Is this the approach that the Parties had
 14 signed up for? Or were they when they were seeking to arbitrate the matter, expecting the
 15 matter to be decided on the substantive merits only by the Tribunal. So, I foresee the spectre
 16 of inconsistent judgments globally in response to any attempts to enforce an award that has
 17 been modified by the seat court.

18 **SHREYA JAIN:** Yeah. Increasingly leading to more complex issues. And, Kanika, if I could
 19 request you to wrap up your takeaways from this theme, given the increasing complexity now
 20 of cross-border disputes. We heard about the risk of conflicting decisions on enforcement set
 21 aside and now modified awards being thrown into the mix. What practical steps do you think
 22 Parties can take to ensure there's more predictability? And is there a way in which arbitral
 23 institutions and Arbitrators can contribute to reduce the need for judicial scrutiny?

24 **KANIKA GOENKA:** So, of course, cross-border disputes inherently exposed the arbitral
 25 award to multiple jurisdictions. You have your seat court enforcement, in some cases, different
 26 places where your interim application would be filed. And, of course, there's a risk of
 27 inconsistent standards, we've seen that in the panel with just three jurisdictions in play. And
 28 from a practical perspective, there are a few things that the Parties themselves can do, a few
 29 are very obvious. Be very deliberate in choosing your seat, at least then there's predictability
 30 where your seat is concerned, reset, setting aside arbitrations modification. In similar way in
 31 choosing the law of the Arbitration Agreement, choosing your governing law. These laws will
 32 invariably come into play when you're setting aside application was being heard and leaving
 33 no ambiguity on that front is just going to eliminate those aspects of litigation. Third is sort of
 34 building in institutional rules that provide for scrutiny of awards which provide mechanisms
 35 that enable Parties to approach the Tribunal itself to correct errors. So you have institutions.
 36 I mean, the MCI has procedures and the SIAC has procedures in where a party can approach

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1 the Tribunal to correct certain types of errors, computational errors, typographical errors.
 2 These sort of will reduce the risk of your annulment challenges. And lastly, it's slightly harder
 3 in practice, but this is something that we try to do. When our corporate partners approach us
 4 and ask for help when we're drafting Arbitration clauses, but you try to sort of anticipate where
 5 your enforcement challenges will lie. Where your award will be in. First, try to identify your
 6 counterpart these assets. That way you'll get some sense of what your enforcement record of
 7 that particular country looks like. And you'll be able to map out, at least vaguely, what a dispute
 8 would look like under that agreement. Now, obviously, it's not possible to pre-empt every
 9 potential issue but predictability comes with foresight, and these are the sort of things the
 10 Parties should do actually, to ensure that you're as dispute proof as possible.

11 **SHREYA JAIN:** Thank you, Kanika. These are very helpful and practical suggestions we can
 12 all take away. We are past our time limits and therefore, if I have the commission of the
 13 organizers, we can just take one audience question. If there's any. If, anyone has a question to
 14 our panellists on these topics? Okay, I think we have a very disciplined audience. So time to
 15 wrap up and head for the drinks. Thank you, everyone, for your excellent and enriching
 16 insights into these issues. I think you've done a commendable job in navigating and breaking
 17 down these very complex issues into sort of key takeaways that our audience can take back for
 18 future. And I'd also like to thank the MCIA and the organizing committee for their tireless
 19 efforts in organizing the ADR Week, which has now become a highlight for the Indian
 20 Arbitration. Thank you.

21 **HOST:** Thank you very much for an interesting session. This brings us to the end of Day-2 in
 22 Mumbai for the India ADR Week. We will be having a short break, following which we will be
 23 having a short session, short inaugural session for the IPBA Arbitration Days, after which, at
 24 07:00 p.m., we will be having a keynote address by Justice Revati Dere. And then drinks and
 25 dinner later. So, I would request you all to stay back. Thank you.

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~~~END OF SESSION 5~~~

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