

IPBA ARBITRATION DAY: MUMBAI

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Challenges of Enforcing Arbitral Awards

MODERATOR

Vyapak Desai, IPBA Arbitration Day Host Committee Member, Mumbai

SPEAKERS

Justice Nageswara Rao, Retired Judge, Honourable Supreme Court of India

Swee Yen Koh SC, Partner, Wong Partnership, Singapore

Colin Johnson, Managing Director, Alvarez & Marsal, London

Taeko Suzuki, Partner, Nishimura & Asahi, Tokyo

TERES

1 **VYAPAK DESAI:** Welcome back and good afternoon, everyone. I hope there was enough
 2 time for interactions over lunch. We had specifically kept at least an hour and a half, so that
 3 people don't feel there was no time... Is it better? Yeah. Okay. So, coming back to the sessions
 4 today. The third session which we are going to talk about with keeping the overall theme of the
 5 conference in mind is on the issues or the challenges for enforcing Arbitral Awards. Now, in
 6 general, there are obviously many challenges when we look at Arbitral Awards enforcement
 7 mechanisms. Each country's experiences are very different. When it comes to India, obviously
 8 most of the discussions as to what doesn't work in India, actually is in reference to the
 9 enforcement rather than other things, because I think enforcement gets more trickier because
 10 it requires basically court assistance and interference, right? It's not that during Arbitration,
 11 where the court can support or court can interfere. This is purely a court issue. You are already
 12 out of Arbitration in that sense.

13 So, obviously a lot of issues that we keep talking about is in reference to enforcement. So, we
 14 thought, one, the topic in itself is relevant. Two, there are unique issues, particularly
 15 International Arbitrations, because the Arbitrations may have been conducted in a particular
 16 jurisdiction and enforcement is happening in multiple jurisdictions where it was not otherwise
 17 seated. And we have seen those examples, several of those examples in most of us, most of our
 18 careers dealing with International Arbitration. So, in itself, it was an important topic and with
 19 the theme related to global conflicts and what is happening around the world in geopolitical
 20 situations, countries taking different stand depending upon their allegiance to certain policies
 21 or certain jurisdictions. I think enforcement becomes even more trickier because it goes to the
 22 root of the assets in a particular country, while it may be still a private dispute. So, with that
 23 background, we thought this is a relevant topic and hope we can make some headway into
 24 what are the issues we face today, and more particularly, what issues we are going to face in
 25 future.

26 So, with that, let me introduce the panel for today's session. So, we were very pleased when
 27 Justice Nageswara Rao said yes for this panel because as I said, this is all about courts in
 28 particular, right. And who better than Justice Rao, who have spent several decades as a
 29 Counsel, and he was one of the few who straight away was elevated to Supreme Court of India,
 30 which is rare. And he is back into the practice and now also affiliated with 39 Essex, London
 31 Chambers set and continues to do a lot of Counsel work, Arbitrator work and advisory work
 32 across the jurisdictions while he's... I understand he's based in India so far.

33 Then we have Swee Yen. She is a Senior Partner with Wong Partnership in Singapore. She is
 34 also a Senior Counsel as we designate in India. She's also Senior Counsel designated in

TERES

1 Singapore, I think you are very few or first or I don't know women or from partnerships getting
2 designated. Maybe you can talk about it. I don't know.

3 **SWEE YEN KOH SC:** No, no, there are from law firm... so, it's different from India. So, even
4 if you work in the law firm, you can be designated as a Senior Counsellor because we have a
5 fused profession. So, both solicitors and barristers but yes, we do hope for more females.

6 **VYAPAK DESAI:** Good, good, great. So she is, obviously very entrenched in Singapore and
7 Asia litigation. But I see her more in India these days than in Singapore. So, that makes her
8 views even more interesting. And then we have Colin Johnson. He is a Managing Director with
9 Alvarez and Marsal and we thought it's important to have his view on enforcement rather than
10 lawyers just talking about enforcement because ultimately, you want to see money in your
11 bank and the asset getting traced and the valuations or the damages actually translating into
12 something fruitful for what you set out for at the start of the Arbitration. So, he'll obviously
13 bring a perspective. He's based in London, but his work obviously takes him to all across the
14 world.

15 And then we have Taeko Suzuki from Japan. She is a Senior Partner with Nishimura & Asahi,
16 based out of Tokyo. I obviously have a very different background, and knowing her, she has
17 spent two years in India. When I was at Nishith Desai and she was with Nishith Desai on a
18 secondment. So, we have spent a lot of time together, talking on several different topics, not
19 enforcement at that point in time in particular. So, maybe today is a good day to do that. And
20 again, she has a thriving India practice. So again, she's possibly very important so far as this
21 topic is concerned. So, I've taken a little more time than required, but it was important to know
22 who you are hearing from.

23 With that Justice Rao, if I can come straight to you. I was talking to some foreign lawyer in the
24 morning and says, he said, look, there is a lot of tension when it comes to enforcement in India.
25 There are different experiences which people have experienced when it comes to enforcement
26 and while, at least in my earlier career, when people used to talk very negative about it, I used
27 to say, look so far as India is concerned, we were faster than Singapore because at least in one
28 case, which was the ***Daiichi Ranbaxy***, the challenge was pending in Singapore Court of
29 Appeal and Delhi High Court actually not only recognized the Singapore seated award, but
30 went ahead and actually disbursed certain portion of the award pending the challenge in
31 Singapore High Court. So, we were faster than Singapore in that matter, but that may be one
32 case to talk about, but what's your experience so far, particularly with your extensive
33 experience both at the Bar and the Bench.

TERES

1 **JUSTICE NAGESWARA RAO:** Thank you, Vyapak. Good afternoon, everyone. It's high
 2 time that this feeling in the arbitral world about India being a very unfriendly arbitral
 3 jurisdiction, especially in matters of enforcement, needs to be dispelled. Yes, historically, we
 4 had problems. I'll briefly tell you as to what we had gone through. One of the serious concerns
 5 when it comes to enforcement is interference by court and delay in courts. This was one aspect
 6 which was being talked about when it came to enforcements. India is one of the first
 7 signatories to the New York Convention in 1958. Thereafter, in 1961, there was a legislation
 8 that was made for recognition and enforcement of foreign awards. And that was repealed when
 9 the 1996 Act was made on the basis of the Model Law.

10 When the 1961 Act was enforced, there was a judgment of the Supreme Court in a case called
 11 **Renusagar** and the Supreme Court interpreting the expiration public policy, which is
 12 normally the problem, which is referred to as an unruly horse, which gives scope for
 13 interference by courts, even in enforcement of awards, because enforcement is dependent
 14 upon public policy of domestic jurisdiction where an enforcement of an award is made and the
 15 New York Convention doesn't place limits on public policy. So, public policy was interpreted
 16 in **Renusagar** by the Supreme Court to be having a limited scope in respect of three issues,
 17 fundamental policy of India, interest of India and morality. These are three grounds which
 18 were, according to **Renusagar**, public policy would come in. After the 1996 Act, there was a
 19 judgment of the Supreme Court in **Saw Pipes** interpreting public policy in Section 34, which
 20 is relating to domestic arbitrations and our applications filed for setting aside the awards. As
 21 the language of public policy in 34 and Section 48, which deals with foreign awards, is the
 22 same, there was a judgment of Justice Lodha, in **Phulchand** later saying that the same
 23 interpretation of **Saw Pipes** would be made applicable even to foreign awards. That's where
 24 the problem started. So, public policy scope was expanded, and then when petitions were filed
 25 for enforcement, courts started looking into the awards though everybody knew that this
 26 should not be a review on merits, but on grounds of public policy they were not permitting
 27 enforcement of awards for a short time. Then we had the Amendment of 2015, which made a
 28 clear departure from what was being followed earlier. Public policy was defined, and it was
 29 made very clear in the provision itself that even to evaluate whether there is fundamental
 30 violation of law and principles, there cannot be any determination of merits that's what the
 31 law says. And thereafter there are judgment after judgment of the Supreme Court which has
 32 come, which said that enforcement bias should be there for the courts and it is only in limited
 33 circumstances that the enforcement can be refused. Especially a judgment of Justice Nariman
 34 in **Vijay Karia** where he dealt with the entire law and then he interpreted Section 48 in such
 35 a manner where he said, that if somebody is opposing an enforcement on grounds that are

TERES

1 mentioned in Section 48 and even makes out a ground it is still open to the court to enforce
2 the award in spite of a ground being made in respect of certain issues.

3 Justice Nariman in **Vijay Karia**, he had identified three groups of points that are mentioned
4 in Section 48(1), are jurisdictional grounds. So in this judgement, Justice Nariman says, that
5 if there is a problem relating to the constitution of the Arbitral Tribunal and there are other
6 points of jurisdiction that are raised, then it is a case where the court would not exercise
7 discretion, but would follow the law and then look into the award as to whether such a ground
8 has been made out. If it is a ground relating to public policy, even then, there's not much of a
9 discretion in the court. But there is another group which relates to a prejudice that might be
10 caused to a Party, a Party might say that I was not given an opportunity, so this award has to
11 go. If no prejudice is caused to the Party in spite of a Party saying that I was not given an
12 opportunity the court can still go ahead and enforce the award, that is where the discretion
13 has been given to the court and the provision itself says that the award may... Enforcement of
14 an award may be refused if the grounds mentioned therein are proved by the Party. So, that
15 'may' has been read as 'shall' only in certain circumstances. Otherwise, the discretion is left
16 with the court. So even if a ground is made for refusal, a court still has the power to enforce
17 the award. So, this itself shows, this interpretation itself shows that there is complete
18 enforcement bias in certain judgments that have been given by the Supreme Court, paving the
19 way for enforcement to be favoured and the courts not interfering. And after the 2015
20 Amendment has been made pursuant to the recommendations made by the Law Commission
21 of India, the earlier ground in **Renusagar** which relates to interest of India has no meaning
22 and sense according to the judgments of the Supreme Court. And Fundamental Policy of India
23 is also restricted now. And whatever is left to morality that also it says it is the basic notions of
24 morality which may be a ground for interference with an award.

25 So, with whatever has been stated by the Supreme Court at least in the metropolis, wherever
26 enforcement applications are filed, I see that in the recent years interference by courts are
27 limited. Earlier yes, I have seen certain delays especially in courts outside the metropolitan
28 cities in enforcement because, as you all know, enforcement petitions are filed in districts also
29 in this country. We have about 800 districts, so wherever the asset is situated an application
30 for enforcement is filed. There is an imminent need for even applications for setting aside
31 awards and enforcements have to be restricted to High Courts at least, that would be less
32 complicated, because you have trained judges in the High Courts who would understand
33 actually, what the objectives of the Arbitration Act are and ensure that enforcement of awards
34 are done in a timely manner as well. Otherwise, you go to a district court and file a petition for
35 application for enforcement, there are all sorts of grounds taken and application might get
36 stuck for a few years. That is because of the peculiar problems that we have in this country.

TERES

1 But as I have told you what has happened from 1961 onwards, we have gone through a phase
2 where the courts were a little insensitive to the enforcement applications that were being filed
3 and interference of merits was being done after the legislature has ensured that there's an
4 amendment that is made to the 2015 Act. And the proactive stance taken by the Supreme
5 Court, which is followed by the High Courts as well, especially Delhi and Mumbai. Now, I don't
6 think we are lagging behind in enforcement and whatever is said outside this country about,
7 oh, it's very difficult to get your award enforced in India, might be a misnomer.

8 **VYAPAK DESAI:** Earlier, we had good experience, but it's only getting better. And as I was
9 trying to differentiate, for enforcement, there are two stages, recognition and execution. I think
10 what we have done excellently well over a period of time is on the recognition part. I think
11 possibly we need little more work on the actual execution part. But Swee Yen straight away
12 coming to you. Your experience in Singapore or is it everyone just gives and ensures that award
13 is adhered to rather than you have to really go to enforce.

14 **SWEE YEN KOH SC:** I think when it comes to enforcement in Singapore, obviously, we go
15 by the New York Convention, which means that it's a very straightforward process to get
16 enforcement of a foreign award. You file an *ex parte* application, you have the Authenticator
17 Award, and you get an order in terms. So, that's the general process from what I was listening
18 to in your introduction and listening to Justice Rao, that I thought we should really talk about
19 when we talk about challenges of enforcing Arbitral Awards is to understand and to appreciate
20 that the challenges in enforcing an Arbitral Award is not just simply because of the fact that
21 each enforcement court takes a very jurisdiction specific approach as to whether they would
22 enforce it because the public policy is decided by the enforcement court depending on what
23 the enforcement court says is its own public policy. But it's also that interaction and the
24 difficulties it has when it interacts with the setting aside court. So, your example that you
25 stated right at the start when you said that enforcement was successful, and in fact, it went all
26 the way to execution while the challenge was pending in the setting aside court in Singapore
27 is one which just recently, Justice Troy Lee Ming in a High Court decision in Petro, Vietnam,
28 refused to grant an anti-enforcement injunction while the setting aside proceedings are
29 pending. And why is it that I highlight this as an example? Because I think when it comes to
30 enforcing, Arbitral Awards, one must be very alive to the fact that, number one, do I first take
31 an active approach of trying to set aside the award, because what are the repercussions that
32 follow from trying to set aside an award. And those of us who are in Singapore, and this is a
33 case that's related to India and familiar with the Deutsche Telekom and in your case would
34 know that the Singapore Court of Appeal actually laid down the principle that as an
35 enforcement court we would apply the principles of transnational issue estoppel, which means
36 that if a Party had argued the various grounds in the seat court in that instance, it was Geneva

TERES

1 and had lost those arguments in the seat court, that party is not entitled to reargue the same
2 points in the enforcement court.

3 **VYAPAK DESAI:** Like in [UNCLEAR].

4 **SWEE YEN KOH SC:** Yes. So, it was a very clear case where the Singapore Court of Appeal
5 as an enforcement court we will apply the principles of transnational issue estoppel. So, when
6 you as an enforcing party or as a lawyer advising a Party to decide where is it that you're going
7 to enforce the award, you also need to consider what is the approach that the enforcement
8 courts would take, would the enforcement court apply principles of transnational issue
9 estoppel, would the enforcement court apply even the primacy principle which is something
10 which the Singapore Court of Appeal recognized. So, for instance in civil law jurisdiction where
11 you do have a concept of as estoppel the Singapore Court of Appeal still feels that you should
12 give primacy to decisions of the seat court, because if that enforcement court recognizes such
13 principles you would and may be very slow to apply to set aside an award where you feel that
14 the chances of setting aside that award are extremely low, because if you feel in those
15 arguments in the setting aside courts, then when you go before an enforcement court which
16 upholds these principles, you are going to face challenges, and I think this global idea and this
17 concept is something that we must pay more attention to. It's the same way as let's say, if you
18 have a positive award, instead of resisting the enforcement, what about taking active steps in
19 enforcement and then getting a positive decision from an enforcement court and then bringing
20 it to the setting aside court. Which is what was done in one case, which is known as the *Sacofa*
21 case. So, in that instance, a concerned Malaysian law, they tried to enforce the award in
22 Malaysia and there were grounds that were argued that said that the award should not be
23 enforced because it was patently illegal under Malaysian law. They successfully resisted
24 enforcement in that case. So, when it came to Singapore, setting aside the question is so what
25 is the effect of the decision of the enforcement court on the seat court in Singapore when it's
26 setting aside. And I think it was Judicial Commissioner, Alex Wong. He said that because this
27 was a foreign issue, and it dealt with questions of equality under Malaysian law, even as a seat
28 court, we would respect the decision of the enforcement court on that issue. But on the
29 arguments of breach of natural justice, we would, as a seat court still have the primacy to
30 decide what we would do. So, to me, what makes this enforcing Arbitral Awards and the
31 challenges. The challenges is knowing how to coordinate, knowing how to coordinate the
32 setting aside the enforcement and in which jurisdiction. So, that to me is really the most sort
33 of dynamic part of this process.

34 **VYAPAK DESAI:** Yeah, no, I remember that famous judgment. I don't remember the Parties,
35 but it was related to Hong Kong and Singapore on the second bite to the cherry...

TERES

1 **SWEE YEN KOH SC:** The escrow, active and passive remedy.

2 **VYAPAK DESAI:** Passive remedy. So, other than Singapore, Malaysia any other
3 jurisdictions that you think are unique in the Asian region that you may want to throw some
4 perspective or maybe.

5 **SWEE YEN KOH SC:** Yeah. So, perhaps a quick one. I mean, one of the jurisdictions that I
6 saw that had a huge change from the time I started practiced now is, and I don't want to review
7 the number of years, but it's been decades. So, it's China. So, when I first started trying to
8 enforce a foreign Arbitral Award in China. It was extremely challenging. It was challenging for
9 various reasons that Justice Rao perhaps had alluded to various reasons which we found
10 difficult to understand because it was clearly a good foreign Arbitral Award in met other
11 requirements. China is a party to the New York Convention, but in the past ten years, statistics
12 even though not former statistics, but from our own practical experience from speaking with
13 Chinese lawyers, I think the success rate of enforcement is more than 90%. And that's because
14 even in every district in China, where we go to enforce in the city itself, it's not really like a
15 federal, but it also has a city and then the overall system. When it comes to an Arbitral Award,
16 the lower court has to report to the Supreme Court. So, let's say if you decide not to enforce a
17 foreign Arbitral Award, you have to give a report as to why. And that has really changed the
18 percentage of successful recognition. And the jurisdiction that I face the greatest challenges
19 and that is, and I say you need to plan ahead and really plan for this jurisdiction is Vietnam.
20 So, there's a lot of Vietnamese arbitrations we've gone through very good processes,
21 including... let me tell you what do they use in Vietnam to refuse enforcement? Public policy,
22 that it is contrary to the Fundamental principles of the Vietnamese law. And often Vietnamese
23 Arbitral Award, they don't get enforced because of questions of service. They say that you did
24 not properly serve the Respondent in the course of it. They say that this Contract is not
25 enforceable because it doesn't have a wet ink signature. The original Contract on which you
26 sued on it's not enforceable because it deals with question of real estate, which they say is a
27 Vietnamese public policy. So for us now, whenever we deal with Vietnamese Parties, we now
28 pre-empt these issues by doing certain steps, ensuring service, ensuring red ink signatures. So,
29 that I find this the most challenging, but again, you have to plan ahead and work with good
30 Vietnamese Counsel.

31 **VYAPAK DESAI:** So, Colin coming to you, and you are possibly the major stakeholder when
32 it comes to the enforcement stage, both from a valuation, from asset tracing and ultimately
33 looking at really getting what you were originally thought while getting into the Arbitration.
34 So, what's your experience so far, particularly from the region that you represent.

TERES

1 **COLIN JOHNSON:** Yeah, I think... This is working? I think for this first round, I'll focus
2 perhaps more on some of the updates on the enforcement side in the UK, and then we can
3 come back on the broader some of the broader picture. And I guess the first thing, of course,
4 this being the joys of the complications, of the UK. I'll probably talk more about England and
5 Wales than I will about the whole of the UK, because Scotland has its own regime. Because I'm
6 going to start off with the International Arbitration Act 2025. It's hot off the press in one sense.
7 It's been talked about for a while when it actually came into force on the 1st of August this year.
8 But it's for England, Wales and Northern Ireland. So, if you're looking at Scotland for
9 enforcement, the first thing is, don't look here, go to the Scotland Arbitration Act 2010. But I
10 think I'm going to talk about a few different things and a couple of rejections, even in terms of
11 enforcement. Key point, I think, is that the UK remains very pro-enforcement with a high
12 threshold for intervention. So, I picked out a few that are different. The vast majority will be
13 running straight through in terms of the Act various areas where the new Act can actually
14 enhance enforcement. So, in terms of Section 67, which is our challenge for lack of jurisdiction,
15 the Parties now can't raise an objection or rely on evidence that was not before the Tribunal in
16 the Arbitration. So, it stops that second bite to the cherry in quite the same way where the
17 same Counsel, or often new Counsel, suddenly come up with new ideas when it gets to
18 enforcement in terms... Wait a minute, we've got this now. We can think about this. No, not
19 anymore. That now is prohibited so unless you can prove that you could not have done so with
20 reasonable diligence in the original hearing. So, there is still a get out clause for the very smart
21 lawyers. And there's plenty of those around. The other thing in terms of Section 67, the
22 challenges are no longer a full rehearing of the case. So, those will both have significant impact,
23 I think, in terms of number of challenges and the way that they're taken forward. Another thing
24 in terms of the enforcement side there's now an explicit ability to enforce orders from
25 Emergency Arbitrators so that's obviously going to be helpful when you've got that sort of
26 situation to go through. It's also clarified the ability to issue orders against third parties that
27 are not actually named in the Arbitration to be able to gather and or preserve evidence where
28 you need the request to call for that. It's now made clear in the new Act that that's exactly what
29 can be done, and the courts can do that so that there are no clear questions. And then equally
30 there's a clear right of appeal for third-Parties that are subject to such court order all of that
31 comes through. What's also been made more explicit is a right to actually send awards back to
32 a Tribunal for reconsideration when there are challenges on jurisdictional grounds and the
33 amendments have got the court with clear list of the remedies that are available to them. So,
34 two of those specifically that are new remitting the award to the Tribunal in whole or in part
35 for reconsideration or declaring that the award has no effect.

TERES

Now, those are some of the things that are flagged. Another thing, there's only a couple more in terms of this that it makes clear the governing law of the Arbitration Agreement will be the law of the seat of the Arbitration unless the Parties expressly agree otherwise. And that's because we had a case, ***Enka vs Chubb***, that some of you may have seen referred to a few years back that caused all sorts of kafuffle in the UK market but that's now being clarified. And another point that's been brought out again because of an earlier case ***Halliburton vs Chubb*** is around the Arbitrator's duty to disclose circumstances that might reasonably give rise to justifiable doubts as to the Arbitrator's impartiality that's now set out as a legislative requirement and is now mandatory as a continuing duty of disclosure. So, those are some of the key issues, I think, in terms of the new Act that will actually impact on Arbitrations. One point to note is that unless the Secretary of State states otherwise I haven't seen that as yet. A grant that I'm not the practicing lawyer. Some of the others that are practicing UK lawyers may have actually seen it. But unless the Secretary of State states otherwise, this is only for new Arbitrations, not those that have already commenced. So, if you want anything relating to an existing Arbitration you need to look back to what was the position before this came into force.

Then, there's been a couple of cases recently that I thought might be of interest for this audience in terms of enforcement. The first one was actually from July this year, and it's the ***Star Hydro Power Limited vs National Transmission and Dispatch company*** case. Star Hydropower won an LCIA Arbitration award against a company in Pakistan, but before it sought to enforce, the National Transmission and Dispatch company filed proceedings in Lahore to seek partial recognition and enforcement, otherwise known as can we agree this bit and discard the rest... the English Court of Appeal and I understand these proceedings can even be viewed online. We're getting to that stage now of things being put on YouTube type of procedures. They reversed the High Court decision that was granting an anti-suit injunction and basically what they argued was, in terms of the Court of Appeal award, that the Pakistani proceedings were not merely an application for recognition, but actually a challenge to the award substance. That challenge to the award substance is under the exclusive jurisdiction of the English courts as the seat of Arbitration, and therefore, should not be permitted under the New York Convention. And that's why they allowed anti suit in terms of that case, so that was no longer able to go forward as a challenge to the jurisdiction, enforcement could proceed.

Second interesting case, maybe particularly for this audience is April this year, ***Devas vs India*** in the UK High Court, and that was actually holding that ratification of the New York Convention does not, on its own, result in a waiver of state immunity under the UK State Immunity Act 1978. So, this was a claim by Devas Multimedia Private against Antrix, owned

TERES

by the Indian Government's Department of Space and a Contract for lease of part of the S-band spectrum. And there are also Investment Treaty cases, which led to a Damages Award in 2020 that the investors then sought to enforce in the English court. They obtained it without notice. Enforcement order, which India then challenged and they claimed immunity from the jurisdiction of the English courts. Under Section 1 of the State Immunity Act and that the Arbitration exception to immunity was not applying, as India had not agreed to submit the relevant disputes to Arbitration. That's Section 9.

The second part has actually not been decided yet. That was actually not argued before these courts. But in terms of the question of whether there was prior written agreement under Section 2(2) of the State Immunity Act in the UK, the court essentially decided that that was not the case so they looked at the pure point of law on that, and they decided that it had not actually, by entering into the New York Convention, India had not given a waiver of immunity in that sense, because the waiver of immunity and the words of the judge must always be expressed, and expressed in a clear and recognizable manner as by an unequivocally agreement. Now, the judge then did then go on and say, the conclusion I've reached is not intended to contradict in any way the enforcement friendly aspect to the New York Convention, which is its purpose and the reason for its success and which has been consistently upheld in the English courts. It simply recognizes that International jurisprudence holds the State immunity occupies an important place in international law and international relations also has to be taken into account in deciding the narrow but important issue of what state has by treaty, given its consent to waive that immunity. Now, that may not be the end of the story because there is both leave granted to appeal and because the Section 9 question is still pending under the proceedings, but for now, at least, that's clear now, there are a couple of others, but I think time works for me.

VYAPAK DESAI: Yeah, I think we'll come back to you on that, but quickly coming to Taeko and obviously Japan obviously surprises us with all unique and different experiences otherwise as well. But what about enforcement?

TAEKO SUZUKI: Sure. These days, a lot of multinational corporations looking at enforcement in Asia general ask us the question, whether Japan, is it a good idea to enforce or their award in Japan? I would say that if you look specifically located on the identified asset in Japan, the answer will be, yes, I'm having that reservation and keeping that topic to the next round because that's going to be more interesting. But when it comes, we do have UNCITRAL Model based Arbitration Act and we recently did an Amendment 2024 that now you don't have to produce every single Japanese translation with the court when you are enforcing the award. Earlier in Japan, we have a statutory obligation that you can only use Japanese in courts. That

TERES

1 means that you need to translate every single paper and a contract even, governing contract
2 into Japanese. But now at courts restriction, you can run away with I think that reduces a lot
3 of time, maybe two months' time for enforcement.

4 Now courts in Tokyo and Osaka has a jurisdiction for all over Japan for Arbitration
5 Enforcement, which also means that you have a better chance of having English speaking
6 judge who can waive that English translation requirement. Yes, so long as you can identify the
7 assets, Japan will be relatively easier, good destination to enforce your award.

8 **VYAPAK DESAI:** So you said it's the second question is more interesting. Maybe we can go
9 straight to the second question on identifying the assets.

10 **TAEKO SUZUKI:** Sure, sure. In Japan, there's no US style discovery system, so you can't try
11 to fish for information whether the targets may be having an asset and we do have a disclosure
12 requirement obligation under the law but that only kicks in when you have a court decree. That
13 means that you can't really search for information and asset through court system. You can
14 only do the formal channel to search for the asset. Then someone like Colin can support on the
15 intelligence effort pre-litigation or pre-enforcement stage. But that's when you face a difficulty
16 because I think you'll be looking at the most chatty Japanese you might ever see but as you
17 know, I think we are known to be that the silent and very quiet people on this planet. So,
18 Japanese don't chat on the street and they don't give you information of where the assets may
19 be, so maybe you can put a touch upon. So, I also do enforcement in India, and I'm always
20 amazed to read the reports because Indian people do talk.

21 **VYAPAK DESAI:** Do talk. They talk a lot.

22 **TAEKO SUZUKI:** Yeah you see your difference when you... asset search or any intelligence
23 work in Japan. Japanese people do not talk like that. So, these are the challenges that I might
24 face, not in the regime, but only the practice, how people work.

25 **VYAPAK DESAI:** So, that was a direct comparison on India, Justice Rao. So, we are now
26 going into the execution part of the enforcement and obviously that's where I think you have
27 seen a lot of experiences otherwise, but asset tracing and actually getting asset into the court
28 and getting to the judgment creditor or the award creditor, what can one expect when they
29 look at India and with all the different issues happening globally, whether it's worth doing a
30 little different way of execution from a law perspective or from a strategy perspective?

31 **JUSTICE NAGESWARA RAO:** Insofar as recognition and enforcement is concerned, which
32 all of us were talking about in the initial round, that's slightly different from execution, which

TERES

1 you're asking me. Tracing assets and then actual execution being undertaken. That appears to
 2 be still a problem, according to me, in this country. We'll have to find ways and means of some
 3 solution insofar as actual execution of decree is concerned. It's all right, I have an award which
 4 is recognized and say enforced. There is no requirement, strictly speaking, of filing another
 5 application because you can say that, yes you can file one application and then you can enforce
 6 it. But the actual enforcement again becomes a problem. Assuming I go to the Bombay High
 7 Court and then file a petition for recognition and enforcement. Yes, it has been ordered and
 8 then if the assets are all over the place in India, then you'll have to start finding out where the
 9 assets are and then going and filing an application for execution there. And in India the adage
 10 has been that you are getting a decree is not even 10% of the job done. Getting it executed is
 11 actually the major problem and the execution petitions on the civil side also take years,
 12 sometimes 10 to 15 years. There is a need for CPC to be amended there, but when we are talking
 13 of International Arbitral Awards being enforced, there is no reform that is actually thought of
 14 even in the recommendations made by the T. K. Viswanathan Committee. At this point, I think,
 15 has not been dealt with yes, I think there is a need to actually look at it because ultimately the
 16 person who has an award, he goes through this enforcement and recognition, and thereafter
 17 he doesn't see the colour of money, there's no point. So, there is a need for some reform there.

18 **VYAPAK DESAI:** Swee Yen...

19 **SWEE YEN KOH SC:** Yes. I wanted to say that when it comes to execution, that is the part
 20 where in Singapore, we do have what is known as an examination of judgment, debtor
 21 proceedings. That's when you can ask questions ask to produce documents of the judgment
 22 debtor. And it's not just against the individuals. Let's say if it's against a company and you have
 23 an award against a company. You can ask questions as long as you manage to serve the EJD,
 24 they call it EJD order on the Director office of the company and that service of that order can
 25 also be done outside of jurisdiction. So, sometimes you may be dealing with a foreign company.
 26 It's not resident in Singapore, but you know that they have assets, or you know that there's a
 27 jurisdictional hook. So, you can then get an examination of judgment debtor order and then
 28 serve the order on the office or director who may be outside of the jurisdiction, but once you
 29 successfully serve, if he or she does not turn up for the examination of judgment debtor
 30 proceedings then he or she may be held liable for contempt of court. So, it is actually quite a
 31 powerful tool, this examination of judgment debtor proceedings. And of course, the other
 32 execution modes that we have includes writ [UNCLEAR] proceedings. And we all know the
 33 most difficult aspect of execution is always identifying the assets. So, a lot of times our clients
 34 have start the process where even before, and particularly for cases if third-party funders are
 35 involved, even before they decide to commence an Arbitration, they would first hire an asset
 36 investigation firm to look and to see where the assets and where these assets potentially can

TERES

1 be found. And I think this is particularly in the case and you touch on some investor state
 2 cases. But I think this is particularly important when it comes to suing a State and wanting to
 3 enforce the award against the State because the commercial purpose and having to show that
 4 the assets has been used for commercial purpose is extremely important. And at least across
 5 the Common law jurisdictions the tests and the tests that we have to overcome when it comes
 6 to assets being held by a State-owned entity versus the State itself, is a very strict ...hemisphere
 7 test. Where you essentially have to show that the State had such control over the State owned
 8 entity. It is an exceptional circumstances where they appears the view to allow you to enforce
 9 against the assets of the State owned entity. When you have an award against the State and
 10 you need to show that the assets of the State owned entity were used for sovereign purposes,
 11 so it is extremely challenging in that space so to me, I think it's always about planning ahead,
 12 because, like, what you say, what's the point of getting an award without the actual dollars and
 13 cents and we also then try to see whether there's extra judicial means for instance public
 14 pressure for instance looking at different types of assets intellectual property rights, trying to
 15 garnish accounts, garnish debt of third parties. These are all the sort of different perspectives.

16 **VYAPAK DESAI:** [INAUDIBLE] in that sense. While we all know asset tracing, we all know
 17 the importance like Swee Yen said it's important to do it beforehand rather than at the end of
 18 the award situation. But what I want to know Colin, can give us a quick view on that. Has
 19 anything changed because of the changes in the geopolitical environment? Is your strategic
 20 advice different than what it was earlier?

21 **COLIN JOHNSON:** Okay. I'll pick up sort of the changes in sort of the geopolitical side and
 22 then the advice, because there are two different points, I think there. So in terms of the
 23 geopolitical side, there's some very clear changes. Anything that is Russia, if you have a
 24 potential Russia award, forget it. That's essentially the message. We've gone through this,
 25 we've looked at it in terms of people that have actually got the award will anybody fund it? Will
 26 anybody actually support it? The answer pretty much is 'no', you're not going to get the money.
 27 So, if you are looking at assets that are in Russia, then that's not going to happen. So, that's
 28 the key one, I would say, in terms of the international geopolitical side right now.

29 **VYAPAK DESAI:** Sure.

30 **COLIN JOHNSON:** On a broader level we do see in a number of countries greater resource
 31 nationalism, greater protectionism and that can spill over into the enforcement side. Maybe
 32 not officially in terms of they may not actually change the legal structures. But in terms of
 33 pressure that's put on judges or the way that they're actually portraying some of the
 34 enforcement type activities. So, I think there is that. So those, I would say that's sort of the key

TERES

1 changes. In terms of the sort of advice that we give, I think there's three key areas that I would
 2 pick on. One is, obviously, yes, the asset tracing. But don't wait until the end of the proceedings
 3 to actually do your asset tracing. You need to do it before you start proceedings. Doesn't mean,
 4 you have to do every last part of it. But if you find that you have assets that are to take the
 5 extreme example you've got a ship, you've got a plane in the abrasion... I think there were ships
 6 involved, you actually need to know where they are. So, you can go in, seize them, stop them
 7 from moving. Because in terms of mobile, assets they're very obvious. But equally, when you
 8 get to the bank accounts and the transfer, who's got the actual cash. Where do we need to stop
 9 that. That sort of thing you need to go in from the outset because it's going to affect the way
 10 you actually structure your case, where you actually file, how you file, if you actually do that
 11 properly. But I'd actually go a step further because we talk about the asset tracing, but in a
 12 number of cases we actually see it where we get cases that we wish we'd been involved earlier
 13 because actually you've got the Group of Companies you're focused on Company B, and
 14 apologies that there's not names here, but I think you'll understand why there's not. You're
 15 focused on Company B, but the assets are over here in company A. Or you're focused on
 16 Company B but actually there were different parties involved over time and your claim is
 17 probably more against Company C, because the one who actually probably did you harm is
 18 Company C, not Company B. So, there's a whole set of questions around okay, where from
 19 your side, if you've got different companies or different individuals, who actually suffered the
 20 harm when, who was causing the harm when, who's got the assets, where have you got the
 21 strongest case commercially not just legally, because it doesn't matter if you've got a really,
 22 really strong case against B, if all the assets were in A, and so it's actually understanding those
 23 and putting them together.

24 And then the final one, I would say is just of course, damages always come at the end. Quantum
 25 is always at the end but actually, don't let that mislead you. It has been a ground for cases not
 26 to be enforced if the damages have not been properly considered or if the causation aspects
 27 have not been properly considered. So, it's make sure at the start, make sure in the beginning.
 28 Make sure at the end that actually, that's covered. When I say the end, when you get your
 29 award, look at it specifically in terms of the damages side. Check with your damages expert
 30 whether this actually covers the issue or whether that in itself may be challenged. And for
 31 anybody... I don't think we have time to go through it all now, but **Worldwide Minerals**
 32 **versus Kazakhstan**, they got rejected twice before the UK courts on enforcement, both
 33 times for damages related causation related issues that I think is a very good example of the
 34 problems you can have.

TERES

1 **VYAPAK DESAI:** So, we still have about 10- 15 minutes, as per the. But are there any
2 pressing questions that the audience wants to ask? Because we obviously have many things to
3 talk about. Anybody who has a comment or a question to any of you?

4 **LARS MARKERT:** I have one comment. Hello, this Lars from Nishimura in Tokyo. When
5 we talk about enforcement of Arbitral Awards, we always talk about the Arbitration
6 friendliness of jurisdictions and I'm sometimes a bit surprised because for some people,
7 Arbitration friendly is if you enforce everything. And you never set anything aside and
8 unfortunately, I think the Japanese courts go a bit in that direction for me, Arbitration friendly
9 is if you look at the awards, you apply your legal principles and you apply them well. And if the
10 awards do not match those principles you refuse to enforce and you set aside. I think that
11 sometimes gets a bit lost in the discussion in this need to promote your own jurisdiction. And,
12 for example, Singapore is, for me, jurisdiction where I'm always impressed because there are
13 quite a number of set asides or refusal to enforce, but when you look into the reasoning, 80%
14 of the time, I'm convinced. And I say...

15 **VYAPAK DESAI:** I think Justice Rao...

16 **JUSTICE NAGESWARA RAO:** Yes, I agree with that, but I had experiences in Japan where
17 I felt like this needs to be set aside completely wrong, but. The cause where they know we are
18 patient, friendly. We don't look at this. Yeah, I think justice I agree with you there are countries
19 where not even one award that's been set aside. I don't mind speaking about it DIFC. Not even
20 one award has been set aside till now. People speak about non-interference, because, as you
21 rightly said, that they do not want to be said to be. An unfriendly jurisdiction, especially the
22 country where you are now so that's the reason we keep saying that we do not interfere in
23 courts, but that doesn't mean that in India there is no interference. Even at this stage recently
24 there was a judgment of the Delhi High Court where they refused to enforce foreign on the
25 ground that the Tribunal traversed beyond the preference which is a ground that is available
26 for interference. So it happens, but it should not become a habit. I think you are right.

27 **SWEE YEN KOH SC:** Yeah. So if I could just pick up on Singapore, I think, last, I sort of
28 summarized the position. We are pro Arbitration, but we have stepped in and intervened. To
29 set aside various awards, I think there is a recent example, which maybe many of you in the
30 room have read about, is what they call the cut and pace award, and it's been set aside two ICC
31 awards set aside, in that particular case. The courts decided that there was a real concern of
32 an appearance of bias because of the Tribunal Members not coming in with an open mind or
33 having prejudged the issue. So, it is about intervening at the right time for a while when I went
34 to many conferences, constantly, people were sighting this decision of Justice Stephen Chong,

TERES

1 where he said that 20% of setting aside of applications are successful. And people misquoted
 2 him and said and cited this first paragraph of his judgment and said, how can you call
 3 Singapore pro Arbitration jurisdiction that 20% of the setting aside, applications are
 4 successful. But that is where the fallacy lies. Because, number one, they didn't read that
 5 paragraph carefully to see that it's 20% of reported decisions. There are many, many cases in
 6 Singapore and we don't have this mandatory requirements, where you have to issue a written
 7 judgment. So, for instance, there are many cases which are found and which are setting aside
 8 application, and they just don't issue a judgment because they just dismiss it. So, those are not
 9 reported decisions. And then when he says 20%, of the reported decisions. These are the cases
 10 where there's judgments, and when you read across, most of the awards that are set aside tend
 11 to be on jurisdictional grounds. The breach of natural justice there are a couple. But these are
 12 the ones that you find much rarer in Singapore. But I echo what Lars said.

13 **VYAPAK DESAI:** Yeah, so I'm told we are coming very close to the end of the session and
 14 there is a break which I should not encroach upon. But I would let the audience encroach upon
 15 their own break. If there are any questions or comments?

16 **AUDIENCE:** Hello. Yes, question on enforcement and also challenges to enforcement,
 17 because, of course, very often you get an award and the Parties both read it, and then there
 18 can be a race between the Parties won to start actions to enforce and the Party who's lost to
 19 start, actions to challenge and one response to an action to challenge is to try and seek security
 20 for that action. And I'm conscious of in this jurisdiction, Section 36 was amended a few years
 21 ago to remove the automatic stay on enforcement. And in theory, the courts now have power
 22 to grant the security. I'd be very interested to know to what extent that is being employed in
 23 India, and we're seeing that and also any other jurisdictions where that might be relevant.

24 **VYAPAK DESAI:** It's very well implemented. In fact, most of the Indian lawyers would say
 25 that at least for a person who is trying to enforce, it's a pretty big relief because that is actually
 26 creating situations for settlement early on, rather than unnecessary litigation going on because
 27 the cost of litigation otherwise was very limited for a debtor to not pay for it. So, that change
 28 in amendment has really made a big difference in the way the enforcement in India is
 29 happening. But again...

30 **JUSTICE NAGESWARA RAO:** In this country, wherever there is a money decree in a civil
 31 suit, and there's an appeal filed against the money decree, the rule is that the judges would say
 32 you pay 50%. You deposit 50% if your appeal is to be heard, in petitions that are filed under
 33 36, the courts have been adopting the same principle. Most of the courts are directing,

TERES

1 depending upon the case, 50% and sometimes even more 100%. And their permit, I think the
2 creditor to withdraw the money also sometimes.

3 **VYAPAK DESAI:** If the Debtor gives a Bank Guarantee or some sort of countersecurity, the
4 Debtor can actually use the money. So, originally in India, the best financing arrangement was
5 to have a debt and not pay because the money that you put it in your bank or use it for your
6 business gets you better returns than paying to the Creditor, but that has now changed.

7 **SWEE YEN KOH SC:** Yeah, so, I think that's very interesting because well, you see,
8 Singapore, we say it's a pro Arbitration jurisdiction. In my personal experience, I've made
9 many applications to ask for security to be paid in of the quantum of the award because they
10 are trying either to set aside or to delay the enforcement or to set aside the enforcement order.
11 It's not being granted. So, you see, that's where you see they are moving so much better India.

12 **VYAPAK DESAI:** Please come to India. So, maybe we can end the session here and we'll
13 come back unlike other conferences, I think we are running very well on time. So, if we can all
14 come back by 3:15. We'll actually start the session as per the schedule, which is rare, but let's
15 continue doing that and please join me in a big round of applause for the speakers. Thank you.
16 Please, I would request everyone to be back before we could again have to try and get you back
17 by 3:15.

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19 ~~~END OF SESSION 3~~~

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