TERES

**INDIA ADR WEEK 2026 – 11 SEP 2026**

**SESSION 2**

**TRANSNATIONAL ISSUE ESTOPPEL AND PARALLEL PROCEEDINGS**

**SPEAKERS:**

**MODERATOR, MAYANK MISHRA, PARTNER, CMS INDUSLAW**

**JAYANT MEHTA, SENIOR ADVOCATE, DELHI HIGH COURT**

**KUSHAL GANDHI, PARTNER, CMS (UK)**

**STEVEN LIM, ARBITRATOR AND BARRISTER, 39 ESSEX CHAMBERS**

**URVASHI SAIKUMAR PATHAK, SVP & LEGAL HEAD, AXIS MAX LIFE INSURANCE**

**ANUSHKA MANSHARAMANI:** I request everyone to kindly be seated. We will begin the next session in the next two minutes. Thank you. We now move to our second session of the day hosted by CMS INDUSLAW. As disputes increasingly span multiple jurisdictions, Parties often find themselves navigating parallel proceedings between different courts and Tribunals, raising the complex questions about the binding effects of findings made in one forum on subsequent proceedings elsewhere. This intersection of transnational issue estoppel and parallel proceedings continue to challenge both practitioners and adjudicators alike. Our second session takes a closer look at this very issue, with title as "Transnational Issue Estoppel and Parallel Proceedings". The session will be moderated by Mayank Mishra. He will be joined by Jayant Mehta, Kushal Gandhi, Steven Lim and Urvashi Pathak. I would now request our Moderator and panellists to kindly come up on stage. Thank you.

**MAYANK MISHRA:** Good morning, ladies and gentlemen. It's a pleasure to welcome you to this session on "Transnational Issue Estoppel and Parallel Proceedings". As you know, international disputes today rarely remain confined to a single jurisdiction. A dispute typically may begin with an arbitration, say, seated in Singapore, and award may then be challenged before the courts at the seat, and then the enforcement proceedings may be sought in various jurisdictions, including, say, the seat court in India or in UK or elsewhere. And this creates a deceptively simple question that when an issue has already been decided by one court, should another court be permitted to decide it again? Now the intuitive answer appears to be equally simple that, yes Party should not ordinarily get multiple opportunities to litigate the same issue. But international arbitration makes the question much more complicated. We have different courts, we have different procedural laws, different concepts of public policy, sovereignty, seat code primacy and own views, different views, courts often hold different views of their own authority as to what they can and cannot do. Now this certainly creates tensions between a few aspects which pertain to any commercial adjudication, which is like finality versus fairness, judicial committee versus national sovereignty of courts, seat court primacy and the enforcement court's autonomy.

Now, for the discussion today, we have an exceptionally well balanced panel to explore these questions. And just to move to introducing the panellists, let me first introduce Steven Lim of 39 Essex Chambers. Steven is a renowned Arbitrator. He's conducted arbitrations, more than 100 arbitrations, international arbitrations. He's based off Singapore. Steven brings to the discussion the perspective of one of the jurisdictions that has been at the forefront of development of transnational issue estoppel in international arbitration.

Next, we have Mr. Jayant Mehta, whom most of you may know, is a Senior Advocate and somebody who has credible expertise in constitutional, commercial and arbitrations matters in India. And to Jayant, I would be fielding more questions about the adoption of this principle by the Supreme Court in the recent decision of ***Nagaraj***. So, it's a pleasure to have you.

We also have Kushal Gandhi, Partner at CMS in the UK. Kushal brings the English law perspective to our discussion, particularly important given the long development of English jurisprudence on issue estoppel, *res judicata*, abuse of process and recognition of foreign judgments. Kushal, welcome. By way of caution, I must say, I must declare, Kushal is also my colleague across the CMS network.

And finally, I am particularly pleased to have Urvashi SaiKumar Pathak. She's Head at Axis Max Life Insurance with us. Urvashi brings something which is sometimes missing from discussions of an arbitration doctrine, which is the perspective of a sophisticated commercial user of the system. And ultimately, it is Urvashi and the clients who actually end up paying for what we are going to discuss today.

So, moving on, let me just begin with... We are now somewhat, post ***Nagaraj,*** we are very familiar with the expression "transnational issue estoppel". And let me just start with you Steven, at its simplest, what is transnational issue estoppel? Is it just a common law doctrine of issue estoppel which travels across borders, or there is something conceptually different about it?

**STEVEN LIM:** Thank you very much. Thank you very much, Mayank. Let me just take a slight step back before going into the difference on the common law on domestic issue estoppel and transnational issue estoppel, I'll just take a broader view of it. The concept of estoppel, *res judicata,* cause of action estoppel and issue estoppel is a very... The concept of issue estoppel or *res judicata* is very well accepted throughout all jurisdictions in the world. It also traces back to antiquity. According to my reading, you can trace it back to Roman law. And it rests on a very, very simple principle of fairness, which is there has to be an end to dispute to litigation. And importantly, no person should be taxed twice with the same claim. If once a claim has been decided, he shouldn't be forced to have to relive it like Groundhog Day over and over again. So, that's a very, very basic principle. And I wanted to go into that to lay the foundation to say that, well, we're going to talk about the common law. This is well accepted in almost all jurisdictions in the world, including the civil law. We can't forget the civil law if we're talking about international arbitration, because it covers both the common law and the civil law.

But then, with that introduction, I'll jump into, focus then on the common law, how it's been applied specifically in Singapore, which is the brief that I have, and explain how it's been developed. So, you might all be familiar with the common law concept of issue estoppel, and there's some criteria that are applied to make sure that it is applied, fairly. One is obviously talking simply about just domestic issue estoppel, the prior judgment, the one that is said to give rise to an estoppel must be final and conclusive on the merits. It must be given by a court of competent jurisdiction. Importantly, there must be commonality of Parties to the prior proceedings. So, it can only arise if the same Parties who are involved in the prior proceeding. And the subject matter of the proposed estoppel must be the same which had been finally decided in the prior. So, that, you're all familiar with that.

So, taking that then into the transnational stage, the principles are pretty much the same. So, in that sense, Mayank, it is a development. It's not a rationally a radically different concept; it is a development to fit into the international context. So, what are the requirements and I'm looking specifically as the requirements as developed by the Singapore Court of Appeal in the case of ***India and Deutsche Telekom*** is that, first of all, the foreign judgment must be capable of being recognised in the jurisdiction in which the estoppel is to be asserted. And this is then broken down into three different elements. One is, is that foreign judgment final and conclusive? So, you see importing again the elements you see in the domestic context. Does it originate from a court of competent jurisdiction that has transnational jurisdiction over the Party? Once we introduce the international concept, we get this concept of transnational concerns, which is, is there some transnational basis on which that other court had asserted jurisdiction, and this would include, you know, that the Parties had been present in the foreign jurisdiction, they had voluntarily submitted to the jurisdiction of the foreign court or they had agreed to submission to jurisdiction in the foreign court. So, there's a little bit more analysis going to the issue because of the transnational element. And also, that it not be subject to any defences to recognition on the transnational basis. And these would include contravention of public policy of the forum in which the estoppel is sought to be enforced. If all that the foreign judgment was obtained by fraud and breach of natural justice, I mean, fraud and breach of natural justice, as you know, is an overarching concern in almost all areas, or it would amount to the direct to indirect enforcement of a foreign penal revenue or other public law. This comes from the concept of public international law. So, these are mostly the additional elements that are introduced into this concept primarily to take into account the transnational nature or application. And then the other principles are, as you see in the issue of domestic issue estoppel, which is that again must be commonality of Parties and the subject matter of the estoppel must be the same as that which had been decided. So, the structure is basically the same; that just brought on additional elements which cater for the transnational basis.

Just before I leave this, I want to add one other element which is also arisen and it might become relevant as we discuss this further, which is the exception to the application of the principle. It is quite a limited exception, but it is an exception that the decision, the foreign decision that is to be relied on is not a perverse decision. And by that, what's meant by that is that it's not at variance with generally accepted principles of private international law as applied by the jurisdiction in which the estoppel is to be asserted. So, that is an exception. I think it's something that will become relevant later if we're going to delve further into it, but that would be the introduction for now.

**MAYANK MISHRA:** Right, thanks. Thanks, Steven for that. So, just as a short follow up, Steven, do you think the real rationale for this is, lies in finality of the issues which are being decided, or is it based on committee or it is simply to just avoid a practical problem of having inconsistent decisions?

**STEVEN LIM:** I think this is why I wanted to start with that, with the digression into the very basic principle, which is I think, it is based on a very fundamental concept of fairness which applies in all systems of law, which is simply, there must be some finality to any kind of dispute. And importantly, the reason for that is, no person should be subject to being continually subject to the same suit over and over again. So, that's what it is. The comity aspect comes in in the in transnational nature of it, in the sense that there is now a move for comity throughout all courts, and the courts now want to be seen as having comity with other courts and trying to arrive at narrowing differences that you find between different legal systems across the common law and also with civil law as well.

**MAYANK MISHRA:** Great, thanks. Thanks, Steven for that. So, very quickly moving on to Kushal, how has the English approached this development?

**KUSHAL GANDHI:** Hi, can you hear me okay?

**MAYANK MISHRA:** Yes.

**KUSHAL GANDHI:** Thank you, and good morning everyone. It's a pleasure to be speaking at ADR Week alongside some distinguished panellists from Singapore and India. As Steven says, you know, when we talk about this topic of transnational issue estoppel, we're really talking about a fundamental challenge facing modern International Dispute Resolution. Commercial activity is increasingly borderless, disputes are not. The English law approach is very similar to what Steven has said. There are really four familiar requirements to the recognition of issue estoppel. The issue must be identical, and here there's been some recent jurisprudence where the courts have sort of clarified that really, the issue in the earlier proceedings need to be necessary and fundamental to the earlier decision. And we'll come on to build on that in the discussion. The second pillar is that the Parties must be the same or at least sufficiently connected. Thirdly, the earlier decision must be final and conclusive. And fourthly, the decision must have been made by a Tribunal of competent jurisdiction.

Now historically, those principles were developed in a domestic context. However, in today's world, the more interesting question is whether determinations made outside England can have preclusive effect before the English courts. Increasingly, the answer is, yes, English courts have become more willing to recognise that commercial Parties operating in an international environment have a legitimate expectation that issues conclusively determined in one jurisdiction will not be endlessly relitigated elsewhere. This again reflects, I think, a modern principle of international litigation comity. But then again, you know, Mayank, to your question earlier, I think comity is not blind deference, right?

**MAYANK MISHRA:** Right.

**KUSHAL GANDHI:** It is it is not surrounding jurisdiction to foreign courts, rather it is recognition that courts in different jurisdictions are engaged in a common enterprise of administering justice and should, where appropriate, respect each other's final determinations. Now this becomes, I think, quite important when we consider parallel proceedings which arises particularly in the context of enforcement proceedings as well, where really enforcement proceedings engage local public policy and due process considerations. And I think, you know, courts remain reluctant to abdicate their own responsibility to ensure that enforcement is lawful and fair.

And again, as Steven said, it's this balance between fairness and finality and the challenge really lies in striking that balance. There are some recent developments in England that sort of illustrate this exercise, you know, there was a recent decision where the court confirmed that issue estoppel can arise from determination made by foreign courts, including in the context of cross-border enforcement and state immunity, and the court emphasised that ordinary principles of issue estoppel can apply to foreign determinations where the relevant requirements are satisfied. What is significant about that development is not just the result; it just reflects this broader judicial recognition that international disputes cannot be approached purely through a domestic lens.

**MAYANK MISHRA:** Thanks. Thanks, Kushal, that's fairly instructive. Now turning to India, and that question is now to Mr. Mehta. Is ***Nagaraj,*** the decision of the Supreme Court in ***Nagaraj*** really a new doctrine in the Indian arbitration jurisprudence, or is the Supreme Court applying familiar principles of res judicata issue estoppel simply in a transnational setting?

**JAYANT MEHTA:** Well, first of all, good morning all. And I can understand that you're spending your weekend here. So, I'll be quick and I'll be brief, and I'll of course, call out Mayank for breaching issue estoppel. We had decided that he's not going to ask me any questions but he has. So, now coming to the answer, Steven and Kushal have already laid out the principles. And what I believe is that the principle is iterated in ***Nagaraj*** but it's not new to our jurisprudence. It was always existing in our Code of Civil Procedure in the form of *res judicata* and constructive *res judicata* as the courts developed it in Section 10. But that was in the context of a domestic proceeding. It was of course taken to a trans-border dispute under the principle of comity of courts when Indian courts held that they need to respect the determinations by foreign courts. So, in that sense, the principle of transnational issue estoppel has been, in Indian jurisprudence, for some time now, for a long time now, I would say, and it's been iterated. But what is important is ***Nagaraj*** brings that principle into the domain of arbitration, but there is an important aspect that we must not miss, and which is this, that in ***Nagaraj,*** the principle came to be invoked in a specific context and to therefore, understand the principle or its applicability out of context would be suicidal, would do a lot of damage both to the learning and to its application.

So, the context in ***Nagaraj*** was factual. The context was that the challenger to the enforceability of the foreign award resisted enforcement on the ground, that there was a violation of the provisions of the Companies Act in directing what it felt was a buyback of shares. They also said that... They argued that the issue decided by the Arbitral Tribunal could not be a subject matter of Specific Performance under the Specific Relief Act. And there were other factual issues of authorisation, etc. Now it is those issues and the most important word here being "issues" that came to be decided by the Tribunal or the seat court, and therefore, the Indian court would not go into. But since you asked me this question, I must also highlight before I end that the very structure of the Indian Arbitration Act is based on Model Law and New York Convention.

Given New York Convention's clear position that in enforcement jurisdiction is not looking at the merits of the award, it is not reviewing the award on merits, and that is a position which is not just clearly stated in the statute, but even by our courts in various judgments. So, therefore, there can be or can't be any merit review by an Indian court. The question that ***Nagaraj*** raises is that if they can't be any merit review by an Indian court, where then is the question of issue estoppel? Now mind you in ***Vedanta,*** the Supreme Court had clearly stated that regardless of the determination by the seed court about the correctness or otherwise of the award, an Indian court would look at the foreign award from the perspective and prism of Section 48 of the Act, which is an independent substantive provision granting jurisdiction to an Indian court to look at enforceability and not correctness; enforceability of the foreign award. Now I'm

TERES

wondering as to how will the principle of issue estoppel apply to enforceability? Because the seat court or the Tribunal is not concerned with enforceability of the award, or for that matter, the three or four aspects that stand out in Section 48, which is from the perspective of whether the public policy of India would allow the Indian Court to recognise, and thereafter, to proceed enforcing that award. Surely, neither the Arbitral Tribunal nor the seat court is concerned with testing the award on the basis of public policy of India. So, therefore, application of issue estoppel in the context of a factual review understandable outside of factual review questionable.

**MAYANK MISHRA:** So, before I bring Urvashi in, Mr. Mehta, just to follow up because that was a very instructive and nuanced answer. As a follow up, would you characterise this as a doctrine operating within the fold of Section 48 or as a principle which operates before we reach the merits of a 48 objection? Because the doctrine, to some extent has preclusive effect and not a presumptive effect, as in on the points it has decided, as in...

**JAYANT MEHTA:** Yeah, Mayank, that's a very interesting question. And I see that you insist on asking questions when I... when we had agreed that you will not. But to answer that, I don't think it resides within 48, that's my view. I think, as Steven said and I think as Kushal also iterated, it's a principle of fairness, it's a principle that would encourage an Indian court to say, Mr. Objector, please don't involve me, even indirectly. The emphasis being on the word "indirectly", even indirectly into commencing... engaging into an exercise that would involve me into looking at aspects that have been finely and factually settled by either the Arbitral Tribunal the seat court. But that's where it stops, and I don't think it can be carried beyond that to say the Indian court should not engage itself with... if there are genuine issues and arguable points on public policy, it has to, and it must, independent and regardless of the principle of issue estoppel.

**MAYANK MISHRA:** Thanks. Thanks for that. Now just putting the doctrine aside for a moment, and this question is to Urvashi. Why should an in-house legal team be concerned about any of this?

**URVASHI SAIKUMAR PATHAK:** That’s a very interesting question, Mayank. So, taking a step back, when we look at an Arbitration Clause from an in-house perspective, the EEEs that usually we look at, so, one is Efficiency of the jurisdiction, Effectiveness in terms of cost and Enforceability of the award. So, in a very simplistic way, if I put it for a business, winning an arbitration and recovery of money are two different things, I may have a $100 million award today. But if the counterparty is able to successfully resist it at every stage when I'm trying to enforce that award, I'm basically moving from one stage of litigation to another. And this also has a practical balance sheet issue, if you ask me, because an award where I don't have certainty in terms of the finality or the enforceability, it's a contingent asset for me, whereas the cost that I'm incurring in terms of enforcement, in terms of the litigation costs and in terms of the management costs, that is now in current. So, that is the reason why issue estoppel is so important because it brings finality to any litigation that we actually enter into. And it actually is the core of arbitration. That's the reason we go in for arbitration so that, you know, we don't have multiple litigations in multiple jurisdictions.

**MAYANK MISHRA:** Thanks. Thanks, Urvashi, Let's move on to just discuss a hypothetical situation here. And of course, it has all the limitations of it being hypothetical example. So, the panellists can assume things what is missing in this hypothetical while answering. So, say there is a Singapore-seated arbitration which produces an award. The debtor challenges it in Singapore, loses. The creditor seeks enforcement in India. Now the debtor raises essentially same or similar objections under Section 48. And Steven, that question is to you. From your perspective, what do you think should an Indian court do because I know Mr. Mehta's perspective.

**STEVEN LIM:** Well, my first point is actually, I wouldn't try to presume...

**JAYANT MEHTA:** Depends on who I'm appearing for.

**STEVEN LIM:** I should say that, let me qualify what I'm going to say by with the preface that I wouldn't presume to tell what the Indian court should do, but applying the hypothetical you've given, the hypothetical is actually isn't that hypothetical, because it was the fact situation in ***India and Deutsche Telekom*** and I think similar situation in the Indian case as well. So, the fact situation is this, that an award has been passed and a challenge was brought to the seat court to try and challenge that award and the seat court has rejected that challenge. So, it comes to the enforcement jurisdiction. In one sense, actually, the role for the enforcement jurisdiction is a little bit easier here. It's a much more difficult issue if the seat court has set it aside and then it comes to the enforcement jurisdiction, and it is a much more difficult issue as to whether the seat court can still enforce or not, you know. It will take more than 30 minutes to discuss that if we're going to get into that. So, taking a step back again, and looking at what we're dealing with here, first of all, this enforcement would come under the New York Convention as Jayant was mentioning. This is the whole structure within which we are discussing this topic that the New York Convention is now, I think, signed up by 172 jurisdictions. It is the foundation for International Arbitration in the world today.

And what does the convention require? The convention actually requires states to give recognition and enforcement to Arbitration Agreements and arbitration awards and to give maximal enforcement and recognition. So, the convention actually doesn't put limits on what the court should do as to put limits to what the court... the court's ability to enforce. If the court wants to enforce an award, the convention says nothing against that. The court... what the convention actually puts brakes on is when a court wants to refuse to recognise an agreement and that's where the brakes are. So, it's to some extent it's a much easier job of what you have is an award that hasn't that has survived challenge and it makes it easier than for that court if it wants to agree. But coming more down to the to the practicality, then you'll be looking to see what are the challenges that are brought and in in the hypothetical and not so hypothetical, in the sense that in ***India and Deutsche Telekom.*** The challenges were the very same challenges that were brought before the Tribunal, the very same challenges that were brought before the seat court and they're trying to raise it again. So, it's they're trying to be third time lucky, but then you focus on that and you see these are the same challenges. One aspect you want to look at in the context of international arbitration to see what are these challenges because the Convention, particularly if you look at Section 5 of the New York Convention, it's roughly broken into two parts. The Section 5(1)(a), 1(a) to (d), four subsections which deal with sort of what general which deal with the what the convention would allow a court to refuse enforcement on and this is common throughout all the 172 countries that sign on to the convention because that's what the convention requires. So, you look at that. Are these within the... do these challenges fall within heads under Article 5(1)(a) to (d)? If they do, then they're exactly the same principles that every single jurisdiction is meant to apply under the New York Convention. So, that brings the commonality of issues here. That's the commonality of issues. These are the exactly the same issues that have to be grappled by each of the courts under the New York Convention, and that's where the issue estoppel may start to bite because you can see that they've been dealing with the same issues.

And in fact, the ethos of the convention is that that again, has to be some level playing field, some commonality. And I'm very influenced by the work of Gary Born on this and you know, he says that they really should be generally accepted principles that all courts should apply when applying the Convention. That's one part. The other part of Section 5 is Section 5(2) that deals with two exceptional circumstances. One is arbitrability and public policy. And the New York Convention makes it very clear that the question of arbitrability is for each jurisdiction to decide. Each jurisdiction decides for itself what is arbitrable or not, and that is the special escape mechanism in the Convention for a jurisdiction to say I'm not enforcing this Arbitration Agreement or this award because it is not arbitrable under my own law. And that's perfectly fine and acceptable under the Convention and of course public policy, every jurisdiction is entitled to define its own public policy and to apply its own public policy. So, that's for me that's the first divide. Are you under within what the Convention regards as generally applicable throughout all jurisdictions that apply the Convention, and for which a sort of common level playing field is meant to be applied to have uniformity in the application of the

TERES

Convention? Or are you in that exceptional area of arbitrability or public policy which the Convention leaves entirely to the court, each jurisdiction to decide what rules it wants to apply in that context? And that would be the starting point for me.

**MAYANK MISHRA:** Thanks. Thanks, Steven, for that. Kushal, just bringing you in here. Now what I hear from the panel is that okay, identity of issues is something which is a prerequisite before the principle can apply. Now when we talk about issues, it can be not purely factual, but it could it also have elements of legal bases on which you decide whether a Party is bound by an award or not. For example, say, non-signatories being bound. There could be different perceptions of how far non-signatories can be bound in different jurisdictions. So, the question to you is that when it comes to identity of issues, how does the English law approach that?

**KUSHAL GANDHI:** Thanks, Mayank. And you know, again, here, it's about making sure that the issue is identical. So, it's not about necessarily demonstrating that the issues are different, but it's upon the Party relying on issue estoppel to show that the issue is identical. And what the English courts have done recently is they've sort of said actually this is a very narrow point, in the sense that what needs to be demonstrated is that the issue you're relying on to have issue estoppel about needs to be fundamental and necessary to the earlier decision. So, there might be sort of procedural matters, there might be certain building blocks, there might be certain facts that aren't... that don't go to the heart of why the decision was reached, in which case they're not... they don't even qualify for issue estoppel to apply. So, it's really it's about, (a), identifying the issue very precisely and narrowly and very being very tight about it, but (b) also showing that that particular issue or those set of facts or that legal point goes to the heart of the decision. Because if you can't do that, then really I think we come back to the sort of policy discussion that we were having earlier, which is it really then fair to prevent a Party raising those points if those matters didn't go to the heart of the Tribunal's decision, they didn't go to the heart of what the court was deciding because actually they didn't matter to the decision as much.

**MAYANK MISHRA:** Right. So, are you suggesting there can't be a constructive transnational issue estoppel, in the sense that, you know, it ought to have been raised at the seat but not raised, and therefore, can't be opened?

**KUSHAL GANDHI:** I think, I think, it's a good question. And I think it will depend on how the pleadings were done. This is where I think practitioners and, you know, we'll come on to discuss this, have the responsibility in how cases are pleaded and argued. And, you know, trying to sort of, be too clever in saying, well, actually maybe I'll hold back on some of these points because I might raise them at enforcement to try and might backfire, because actually,

TERES

you might be better off raising it. So, I think I think construct... trying to say, well, this issue ought to have been argued, and it was maybe argued. I think you might struggle in front of the English court with that is my current view based on the sort of you know, the recent decisions, but...

**MAYANK MISHRA:** Right. Thanks. So, to Mr. Mehta here, how do we decide whether two issues are actually the same issue? For example, when two courts may be applying say different legal systems to the question, right? So, if a seat court decides a question and say, under Singapore law as to who may be bound by the Arbitration Agreement and the enforcement court is asked to decide one say, under Indian law and for this hypothetical, you may ignore the fact that you know the laws may be similar. So, has the same issue been decided when it comes to the enforcement court?

**JAYANT MEHTA:** Oh yeah, I think Mayank, that's a very, very interesting question. But just sort of taking a leaf out of what my good friend here said. Kushal was mentioning about what the approach of English courts would be. In fact, if you look at ***Nagaraj,*** in my understanding of that judgement, the Supreme Court goes on to apply constructive issue estoppel in ***Nagaraj*** without saying so. One of the aspects that was raised before the enforcement court was about concealment of certain documents, and the Supreme Court said, why is it that you did not raise this issue before the Tribunal or before the seat court? So, they do seem to have raised or invoke the principle of constructive issue estoppel. But coming back to the question that you put to me, let's assume that the legal position in the two jurisdictions is different. And the seat court which is applying the curial law tests the award on the basis of what its legal position or the principles are, it's bound to do that. So, in that situation, I don't think it really changes significantly, because Indian law recognises that as far as Arbitration Agreement is concerned, it would be governed by the curial law. Arbitration proceedings are concerned, they would be governed by the law of the seat.

So, therefore, they would defer to the adjudication by a foreign court, if there is one, as to whether Party A or Party B is not, in that sense, a veritable Party bound by the award or not. So, yes, the Indian court would defer to it, unless it can be shown, and which I think will be very, very difficult exercise given your example, that I may be a veritable Party as per Singapore law, but I am not a veritable Party when it comes to Indian law, and therefore, please don't enforce the award against me. I think that that argument is bound to fail, yeah, unless, unless...

**MAYANK MISHRA:** Of course, we are on hypotheticals so...

**JAYANT MEHTA:** That's right, yeah, that's right. I think that argument is bound to fail.

TERES

**MAYANK MISHRA:** Right. So, thanks Mr. Mehta. And Urvashi just from perspective of a business that has spent years winning an arbitration, would you prefer a strong seat primacy principle that all issues and objections to the award be front loaded and decided at the seat? Or would you be worried about losing the ability to raise a genuinely important local law objection at enforcement stage?

**URVASHI SAIKUMAR PATHAK:** Instinctively, from a business perspective, it has given me finality. If I have fought a arbitration for years and I've got an award in my favour, definitely, finality is something that I'm looking at. But from a business perspective, again, I don't think it is... business interests are served if I say that seat supremacy is the only thing that one is looking at. Because as a multinational, today, I may be an award creditor, but tomorrow I may be award debtor. And unless the enforcement court also has the flexibility, say if you know there is patent illegality, or like Mr. Mehta said, we're not going into facts. But if it is against the settled principles of law, then definitely we need to have that flexibility. And Mayank, you would know, I mean, we had this one arbitration which went on for years it was an International Arbitration and then the award came out, which was completely against the settled principles of Indian law and we had to actually go and challenge it. It took us two years in the High Court. But at the end of the day we got what you know, was what we were trying to enforce. So, it is important. I mean, finality is important, definitely, but that flexibility to the enforcement court is also required.

**MAYANK MISHRA:** Thanks. Thanks, Urvashi. So, now let's move on to something from the sequential proceedings of seat and then moving towards to enforcement to something which can be genuinely parallel, where two courts are being asked to control the arbitration process itself. And we have seen very inventive litigations in our jurisdiction. So, just to take a classic example, Kushal, say one Party goes to a national court for an anti-arbitration injunction, other goes to the seat for an anti-anti-arbitration injunction at that point, what do you think is left of comity or... Yeah, your views?

**KUSHAL GANDHI:** I actually approached that sort of slightly differently. I don't think it's right to put the responsibility, and ask the questions of the court to say, right, what are you going to do about comity here? I actually think responsibility there lies on the practitioners. Actually, it rests with us when we're seeking to bring these sorts of parallel proceedings because we think we're helping the client gain some strategic advantage. Actually, the question we should be asking is, as officers of the court we have duties to the court, and we have duties to our clients to act in their best interests. And actually, is it really in their best interest to engage them in parallel proceedings, in multiple jurisdictions, expending a lot of money? To

Urvashi's point you know, it's three she, as she said, it's about efficiency, effectiveness and enforceability. And actually, are you serving your client's best interest in doing that?

Now there might be some situations where that might be correct, in which case you do go to the Tribunal, you do go to the Tribunals, you do go to the court. And I think the way the common law is developing in this space is quite interesting, I think because it's... In arbitration are sort of starting point has always been around Kompetenz-Kompetenz, right? It's about being letting the Parties, it's Party autonomy, Parties have chosen arbitration for a reason that should be respected, the laws of the seat should govern it. The arbitration should be determined by the Tribunal, and if you want supervisory court functions you should go to the court of the seat. But I think what is happening is, around public policy, around enforcement, around fears around that, around the divergence that has emerged, we're now seeing this need for sort of anti-anti-suit arbitration injunctions. And I think that the tide will turn on that. I think the judicial tide is in fact turning. At least in England it certainly is I think judges are very reluctant to try and avoid Parties breaching the arbitration agreement as it may be, including in an insolvency context, including an enforcement context. But I think it's one of those spaces where actually, I certainly feel responsible as a practitioner to bear the responsibility even more before I put the responsibility on a court to, sort of, make a determination on that. And I would call upon all practitioners to sort of think about that a bit more.

**MAYANK MISHRA:** That's interesting, right. So, Steven, to you, as in, from the perspective of, say, a Tribunal's Chair, how would you perceive, if there are these parallel proceedings going on, etc., what should the Tribunal do in terms of asking the Party to continue the proceedings even if they have been restrained by some orders? What's the approach of the Tribunal?

**STEVEN LIM:** Yeah, so, I think to put a bit more meat on the question, I think, Mayank, what you're saying is that, say there has been an anti-arbitration injunction granted, and the question then is what will the Tribunal do? Well, I suppose it depends to some extent on where, who has issued that injunction. If it comes from another court, not the seat court, some other court, it's a little bit easier to deal with. Because particularly, if it's the court say of one of the Parties, then it becomes a little bit easier to deal with. The injunction usually bites on the Parties, not on the Tribunal or you know, if it was an anti-suit not on the court either, usually bites on the Parties. So, the first thing that the Tribunal would do would be to look at the Parties and say, what do you say. If for some reason both Parties say, oh, well, given this we don't want to continue with this at this point of time, maybe they'll ask for a stay while they resolve it, whatever to some extent we're driven by what the Parties want.

Now, if let's say the scenario is, it's a... it comes from the court of which is the nationality of the Respondent. And you ask... we ask the Parties what do you want to do, and of course, Respondent says obviously, we can't continue because of this, but Claimant says we want to continue, then Tribunal has to make a decision on this. With regard to anti-arbitration injunctions, it does happen, and we've seen reports of various jurisdictions including very sophisticated arbitration-friendly jurisdictions like England in the past have issued anti-arbitration injunctions. But there is a... certainly, I think, a very good argument, and again, I rely on the work of Gary Born for this to say that it is actually not in line with; it is in breach of the New York Convention. Because the New York Convention is a multilateral instrument under which each jurisdiction, each court has its own obligation to enforce Arbitration Agreements and arbitration awards. And an anti-arbitration injunction has the effect of preventing... a Tribunal, has the effect of preventing other courts from exercising its obligation under the New York Convention. And on that basis, I think very cogently, Gary says, that actually almost, virtually, all anti-arbitration injunctions are in breach of the New York Convention.

I mentioned that because then coming back to the role of the Tribunal, which again has its role under the Convention, what would a Tribunal do? I think, I would say, if the... if we have a situation where Respondent is saying you can't, because my home court has issued an injunction, the Claimant wants to continue, I would say very likely the Tribunal will continue. It becomes a bit more problematic if it's the seat court that has issued this. But there have been instances of Tribunals who do continue despite that. And I mean, when I made the comment about the anti-arbitration injunction being in breach of the New York Convention, it applies as much to the seat court as to any other court. Some possible things you could do is to move the venue of the arbitration. You could even try and move the seat, although... Someone actually did try this and he ended up in trouble with that so there's a cautionary tale to that but there are things that one can do I do think though, there is an obligation on the Tribunal to, in the spirit of the Convention, to act in the spirit of the Convention and to continue in the face of an action which is seen to be in breach of the convention.

**MAYANK MISHRA:** Right. So, from the Indian side, Mr. Mehta, and given what Steven just answered, where do you think should the balance lie when an Indian court is asked to restrain an arbitration abroad? Because these tactics of changing seat are... can potentially open a Pandora's box later.

**JAYANT MEHTA:** Mayank, let me answer your question by giving you an example. In fact, two examples. So, I had this occasion of arguing a matter before a judge, and I said, well, this proposition is now settled. And the judge surprised me by saying, "Wait for my judgment." So, the trouble that we have as lawyers is that the judgement or the law is settled until the next judgement comes. And why do I say that? You see, the position in Indian law was, I would say, settled when it came to issuing anti-arbitration injunctions. The pitch was very, very narrow. You had to demonstrate grave injustice or complete absence of Arbitration Agreement for an Indian court to issue an anti-arbitration injunction, until a situation came which I am dealing with recently. A Singapore seated arbitration between an Indian Party and an Omani Party was going on, and in that arbitration, certain challenges came to be laid before the seat court in Singapore by the Indian Party. And the accepted position of the Parties was that Singapore is the seat. Now jumping guns, the Indian Party files a suit in India to injunct the arbitration. When the Omani Party is served with that suit, Omani Party files an anti-anti-arbitration injunction suit in Singapore. The Indian court proceeds to grant an injunction and so does the Singapore Court. Singapore court injuncts the Indian Party from proceeding with its suit in India. The Indian Party nevertheless proceeds with that suit. And the Singapore court then issues an order on contempt. Facing that order on contempt, the Indian Party comes to Indian court by... files another suit and says contempt petition by Singapore court is wrong, and you should injunct it. The Indian court injuncts it.

So, therefore, you know the law is settled until you see the next judgment. And we've had very inconsistent approaches on this. So, I think there is a lot of substance and merit in what Kushal was saying that it is... it's also not just the responsibility of the courts, whether the seat court or the enforcement court, but also the responsibility of us as Counsels who are also invested in ensuring that the system progresses in a healthy way to ensure that our... that the clients we represent act within the within certain norms. But then as lawyers, some of us have to do what we have to do, and the advice given to the Indian Party here to some extent was successful because Indian courts granted two injunctions; one on arbitration and second on contempt. And arbitration has been a non-starter since; it's been a year. But I'm sure the tide would turn soon; we're going to be arguing the appeal very, very soon.

And as Steven said, the principles are within the New York Convention, you must respect it, until of course, Trump signs off from New York Convention and which...and he may, if he hears about it too soon. So, yes, but the principles are there, we must respect... the enforcement court should respect that it is not within its domain to supervise the arbitration and it is the exclusive preserve and domain of the seat court. And that's a fundamental principle that has to be respected and recognised and reiterated. But as I said, wait till the next judgement.

**MAYANK MISHRA:** Right, thanks. Urvashi, just one last bit from you on this. From a client's perspective, is such an injunction ever the right commercial answer or does it simply multiply cost and delay? I know the answers can be tough.

TERES

**URVASHI SAIKUMAR PATHAK:** Short answer, it reduces duplication. But it also, I mean, from a business perspective, I would say, from my in-house Counsel perspective, it also front loads a lot of risks for us. Because if I know that I don't have another shot at it in terms of, you know, Counsel selection, evidence, objections to be raised, all of that I have to decide now; it's very current. And in terms of cost as well, I mean, you have to go and tell your management that there is a significant cost that I may have to incur for an arbitration in Singapore so that tomorrow, three years down the line, if there's an enforcement in India, it has a different outlook, right? But so, I would say yes, the doctrine definitely reduces the overall litigation by reducing the repetitiveness of issues being raised.

**MAYANK MISHRA:** Right. Now just to moving to very different kind of parallel proceedings, suppose you have finally won an award and before you can realise the award in terms of enforcing it, the debtor enters into insolvency. Now, my question is to you, Mr. Mehta, here, what happens when an award which has taken years to obtain runs straight into insolvency proceedings against the debtor?

**JAYANT MEHTA:** My answer is, God save you, and that's an honest answer, because insolvency is a different terrain. It doesn't respect, or it doesn't have to observe the principles of the Arbitration Act or the difference between the seat court or the supervisory and other jurisdictions or enforcement. It's only concerned with insolvency of the corporate debtor. And if there is moratorium, it is bound to be under Section 14, if the insolvency proceedings have commenced. An award holder is no more than a creditor who stands in the queue, doesn't have any preferential right just because the person has an award, but you stand in the queue, whether, I mean... and it depends on your status as a secured and unsecured creditor, but you, you are in the queue, nevertheless.

**MAYANK MISHRA:** Thanks. Keeping an eye on the clock, I'll just pose the question to both Kushal and Steven here. From the English and the Singaporean perspective, how does an insolvency stay interact with an Arbitration Agreement in those jurisdictions? Is there a balance struck somewhat differently or are pretty much in the similar way?

**STEVEN LIM:** It's a difficult question, actually. And I assume you're talking about a live arbitration that's going on and then you have an insolvency on one of the Parties?

**MAYANK MISHRA:** After the award. After the award.

**STEVEN LIM:** Oh! you are talking about after the award. Right. Well, you know, my answer would be the same as Jayant really, I mean, you know, what can you do and actually, from the perspective of the Tribunal, it's like I've issued the award I'm functus, you know, it's not... it's not nothing that the Tribunal can do to try and enforce that what is done. You unfortunately into a different regime because...

**MAYANK MISHRA:** Yeah.

**STEVEN LIM:** Its insolvency regime and the arbitration regime is different. The arbitration regime is a private matter between two Parties. That is the foundation of jurisdiction under that, and the insolvency regime is a more public collective regime to try and call in the assets in in a for a *pari passu* distribution amongst the creditors. So, unfortunately, I think the insolvency regime takes over; I don't see any scope for the arbitration regime to somehow interfere in that.

**MAYANK MISHRA:** Kushal.

**KUSHAL GANDHI:** I think, I'd sort of say, my first thought would be possession is 9/10th the law. So, if sort of award debtor has assets outside the jurisdiction in which insolvency proceedings have begun, then you might try and see whether you can enforce relatively quickly in that jurisdiction before the Insolvency Office holders have tried to sort of get recognition of the insolvency proceedings and/or the moratorium in that jurisdiction and try and secure those assets as quickly as you can by way of enforcement. Now, you might not be the only one in the race, there might be others there as well; so, trying to sort of, you know, identify assets quickly and have an enforcement strategy ready in the run up to an award is critical preparation, I would sort of say, and that is what might be game changing from what you're doing.

**MAYANK MISHRA:** Right. So, thanks. That should be for parallel proceedings for today. Now, just coming back to the transnational issue estoppel and just an open question to all of you. What is the biggest limitation you think in the application of that principle, something which would otherwise something aid finality, but what would be the biggest limitation on transnational issue estoppel applying as we would want it to, say, in Singapore?

**STEVEN LIM:** Well, let me put in the context of a more difficult fact situation than the fact situation we've been discussing in ***India and Deutsche Telekom*** and the Indian case, ***Natarajan***. Those are easy cases, as I said, because it was a situation where challenges had been refused and effectively, it was a what was upheld to be a valid award. And the question is what is the enforcing jurisdiction going to do? With regard to that, it's easy to apply issue estoppel in those circumstances because you are taking the easy route, you are enforcing an award. The more difficult situation is, if there had been a either a refusal of recognition in another jurisdiction or even more problematic perhaps a set aside in the seat court. So, the award to some extent has been impugned, and then this comes before another court, an enforcing court, and the question then is what is the court to do then? Do you apply issue estoppel? There is possibly an argument coming back to what I talked about the New York Convention being a multilateral agreement that, particularly if it concerns the validity of the Arbitration Agreement, then arguably there is an obligation on each jurisdiction because of its obligation to give effect to valid Arbitration Agreements to consider whether… in fact this agreement is valid. So, that's a much more difficult situation than the one we've been dealing with so far.

**KUSHAL GANDHI:** I think the biggest limitation is the inability to have an international standard on issue estoppel. I think this is one of those areas where it's inherently impossible, I think, because it's so linked to what each jurisdiction might think.

**JAYANT MEHTA:** And to me the... It's the unruly horse. We have undefined dimensions of public policy, and that could mean, at some point of time, public policy which obviously, overrides the principle of issue estoppel. That could lead to a lot of rough weather.

**MAYANK MISHRA:** Right. So, thank you. Thank you, all of you. And I think what today's discussion has demonstrated is that transnational issue estoppel is ultimately about much more than estoppel. It sits well poised at the intersection of several fundamental principles of international dispute resolution like finality, comity, Party autonomy, independence of the enforcement court's mandate and of course, public policy which overrides it. So, I would like to really thank all of you, all the panellists; Steven Lim, Jayant Mehta, Kushal Gandhi and Urvashi for bringing four very different but complementary perspectives to this discussion. And thank you all for joining us for this session. If there are any questions, please be free to raise them.

**JAYANT MEHTA:** There is no issue estoppel on that.

**MAYANK MISHRA:** I guess so, I think they all are absorbing the insightful thoughts which have which have come from all four of you. So, thank you so much. Thank you everyone. That will be all for this session. Thank you.

**ALISHA SHARMA:** Thank you so much to Mr. Mishra and our panellists for such a rigorous and thoughtful discussion. I would now request the panel to kindly step forward for a group picture. Thank you.

……………………………………………………………………………………………………