INDIA ADR WEEK 2023 DAY 3 - MUMBAI

SESSION 4

ARBITRATION A ONE-STOP FORUM - AN ILLUSION OR A REALITY?

2:00 PM To 4:00 PM

Speakers:

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HOST: May I request everyone to please be seated? We'll be starting with our next session soon. We now have a session with JSA Advocates and solicitors on arbitration, a one stop forum, an illusion, or a reality on the panel. We have Mr. Dhirendra Negi, Partner, JSA, Advocates and Solicitors, Mr Steven Lim, Arbitrator & Barrister 39 Essex Court, Mr Zal Andhyarujina, Senior Counsel and Ms. Clara Tung, Managing Associate at Linklaters.

DHIRENDRA NEGI: Good afternoon everybody. Can you please all settle down so that we can start early otherwise ep has given an open thread she will close the session and we'll have nothing to talk about. So thank you so much. If you could kindly have your seats please. May I start please? Okay. Thank you everybody and hope everybody had a nice lunch. And we're all full of energy and expecting that nobody's feeling sleepy now after the break. But anyway, moving forward, the topic of this session is 'arbitration a one stop forum, is it an illusion or a reality?' How did you get to this topic? It was in 2007 when the English Code of Appeal used the expression that there is a presumption in favour of one stop, arbitration. Now this was a case relating to bribery, and a stay was sought on a civil action brought by one of the parties. Few years down the line our own Supreme Court of India in 2016 if I'm not wrong echoed the same sentiment and said that arbitration should be one stop forum. In fact, may I just quote that line 'the Supreme Court said the duty of the Code is to impart to that commercial

understanding that means a one stop forum is sense of Business efficacy.' Now from 2007 to 2016, and we are now in 2023. So we thought it's time for some reality check, whether arbitration is serving the purpose, and whether this arbitration a one stop forum, is it really something which is there in reality? And is it something that what the parties want and what the arbitration community is giving to them? If I am a businessman, let me put myself in a businessman's shoes. He enters into a deal there's a transaction. And in the end is a boilerplate, usually a boilerplate clause, saying that if the disputes arise, then we will go to arbitration instead of going into the courts. Now the question is why? Because I have been told by the legal community the arbitration community and many others that arbitration is far superior than going taking your disputes to the courts. It is cost effective, it is timely and the award which is passed is binding and very seldom that the courts interfere with the awards. But when I as a business person, go through arbitration and try to invoke the remedy, it's not that simple and we all know it. Starting from the point of the Constitution of Tribunal, the time that is taken in, the arbitration the arbitration procedure being becoming a mirror of court proceedings and ultimately the question of enforcement. And we are many such issues which arise. And then one wonders, if it is it really worth it? Is arbitration really worth it? So to cut short this introduction we -- our esteemed panellists here are going to discuss some of the points concerning this topic, and then ultimately we'll sum up as to whether arbitration is really a one stop forum, and is a convenient forum to the satisfaction of the unfortunately, we had one of the panellists as a client and I personally wanted him to speak for his view. For some reason he could not make it to this panel, but anyway. The panel that we have today needs no introduction. But as a matter of courtesy I will start with the lady, Clara Tung. Clara Tung is with Linklater, and she is a young, bright lawyer and she focuses on energy and technology sectors. I hope you didn't mind me calling you young, right? She's currently in London, but she does her practice in Singapore, UK and India, and she has done a lot of arbitrations under all institutions as well as ad hoc arbitrations. And has worked as law clerk with the Supreme Court of Singapore where she clerked with Justice of Appeal and current and former Chief Justices of Singapore. Sitting to the right of Clara is Zal, and Zal needs no introduction. Whatever I say would be less, so I'll skip it and, next to Zal is, of course, Steven Lim. Steven Lim, as you all know, is a barrister and is an arbitrator. He has done so many arbitrations, so many arbitrations. And when I looked at his CV, I said, oh, my God, like how can a person have so many operations with so much of experience. But I think it was a good choice. Thank you so much Steven for being here. I think we have some learnings from you, from your experiences, especially your experiences arbitration, for the practitioners, as also for the arbitrators that were all about experience because law is always there but arbitration has its own world. So that's so much for the introduction. And we hope to finish within an hour, or maybe even earlier. And let's start going on this.

Zal, I'll start with you. Sorry, this is in the context of mostly from the point of Indian arbitration universe where predominantly till date we have a penchant for ad hoc arbitrations. I understand that the winds of change are blowing and we are progressively moving towards institutional arbitration but not really that so much. And given the fact that we don't know when the new amendments, 2019 amendments concerning the appointments will come into effect, let's assume that they're going to be here. I mean Section 11, as it stands is going to be here, and it's going to be there for a long time to come. So before a person even invokes the arbitral, or at the time invokes the remedy of arbitration, the first hurdle in the Indian context is regarding the Constitution of the Tribunal. I will give a notice of arbitration. Other party for some reason or the other doesn't appoint his arbitrator. And so I have no other remedy but to go to the courts. I as the party would expect that I showed the court the Arbitration Agreement and the court would immediately appoint an arbitrator so that my arbitration starts early. When it will finish the different matter, but at least it will start early. In that context I will take you and probably a lot of people here would be familiar with the judgment of ***Vidya Drolia***. And we'll take a pause at that point in time of the development of arbitration in India. The court said normally all the disputes all the questions regarding the existence validity etc. must go to the tribunal except for certain circumstances which are there in the judgment. Now I'm not going to so much into the correctness or whatever. Everybody has their own views regarding the judgement. What I would like to know are your views. Does the judgment tries to achieve a balance between one party trying to start the arbitration and the other party trying to resist the arbitration? And secondly, if this is correct, then is this kind of a balance really necessary? Or should we -- or should all the disputes immediately go to the arbitration?

ZAL ANDHYARUJINA: Thank you Dhirendra. Thank you for that brilliant introduction. First of all, where you said almost nothing about me. Much appreciated. But no, Dhirendra is a good friend of mine so permit that little sort of joke before we kick off onto more serious things. So Dhirendra, I think it's important in the context of the Constitution of the Tribunal and the appointment provisions under the Act to actually know what was happening before the previous amendments which have come about to the Act. The sort of ground reality which many in the room have faced is, of course, that there was an interminable delay before the court actually appointed the arbitrator. So the normal ingenuity of lawyers in India, sort of prevailed and several jurisdictional objections were always raised at the appointment stage before the courts. The courts in the early days of the act entertained them at great length past lengthy judgment, so on and so forth. The contours of Section 11, were then narrowed down by a series of judgments by the Supreme Court. I think the judgment which perhaps did the best job of doing that under the old regime was a judgment, which is known as ***Boghara***

Polyfab, where actually one of the best arbitration judges, Justice Ravindran did a pretty good job in saying that you can raise a narrow set of disputes before the court at the appointment stage, which we look at. But the rest have to be considered by the arbitrator once the arbitrator stands appointed. We don't have to, of course, discuss the sort of competence, competence principle. This is a sort of expert audience, and they'll all know about it. So the idea being that whatever jurisdictional objections you have, you will rightly raise before the arbitrator, and he will decide his own jurisdiction. Unfortunately the ***Boghara Judgment*** also was not uniformly followed by all the High Courts. And as you know that for domestic arbitration, the appointment procedure is that you go to the relevant High Court or to the relevant originating court. So the act came to be amended and came to be amended in my view, quite, on a salutary basis where they sort of further brought down the scope of discussion at the stage of the appointment of the arbitrator stage. ***Vidya Drolia***, the last of the judgments which have now dealt with that. Incidentally ***Vidya Drolia*** nowadays an authority for almost every proposition under the Arbitration Act. It's a long rambling judgment which has been written by the Supreme Court, where he discusses many, many things not only the aspect of appointment. But on the aspect of appointment the judge who writes the leading judgment sort of homes in on a principle which is now being called the Deadwood Principle. And what it in effect means is that the Judge will examine the defence to ascertain whether actually the petition is really deadwood, in the sense that it's so obvious and so manifest on the face of the petition that the arbitration shouldn't take place. Pretty much everything else of any level of complexity goes to the arbitrator. So I think that he did strike the balance correctly. Reasons I think are not difficult to see. The whole point of arbitration is to be quick, expeditious, pragmatic. The starting point of arbitration was proving to be a considerable hurdle in the Indian context. So I think the amendments read with ***Vidya Drolia*** has more or less solved that problem. If you now are a part of a Section 11, application in the High Courts, it's dealt with fairly briskly. The change in culture, which that amendment was to have brought about is on display now regularly in courts. And something that I spoke of yesterday in both the sessions that I was participating, and actually, it's part of a broader change that Indian courts have now exhibited when dealing with arbitration cases. I think they have all realized and learned from the mistakes of the past. I think that Indian courts are now painfully conscious of the fact that they've got a lot of bad press. And they are keen to redress that situation. So I think in conclusion I would say that it strikes the balance properly. There was not much of a balance to strike, actually, truth be told after the amendment, because if you read the amendment quite literally, it doesn't allow a lot of debate at the Section 11 stage, but it got it right. And it's always useful to have a pronouncement for the Supreme Court. My one reservation against several of the arbitration judgments, including ***Vidya Drolia***, is that I would much rather that they didn't use extraneous language, which is not used in the statute.

So the use of the word deadwood, which is not a term of art... has now resulted once again in those very ingenious lawyers who sort of spent many hours with the section level defence stage. Now going to the question of what exactly you should mean by deadwood. But I'm not sure that they will have a very long rope. As I said, I think the patience of the arbitration court and courts in India has now worn thin on this aspect. And I think it's pretty obvious what is deadwood means something that's just not going to fly. So in answer to your question I think that ***Vidya Drolia*** has struck the balance. And I think that the courts who are dealing with these type of applications have properly understood it.

DHIRENDRA NEGI: Thanks Zal. Now Steven following from what Zal said talking purely from the point of arrogant patients and not institutional arbitrations and you have worked as an arbitrator in so many jurisdictions. And of course you have so much experience and knowledge about what happens across the jurisdiction, not only in the East, but also in the West. What has been your experience as compared to the Indian scenario about which you are well aware of, that in respect to the Indian arbitrations, do parties really spend so much of time. Is there so much of case law floating around, two judges, three judges, five judges, seven judges deciding only a question of appointment. So would you like to share, at least to our benefit what is the status around jurisdiction?

STEVEN LIM: Thank you for that question Dhirendra. Well, let me approach this with an anecdote, which is when I first started sitting in India and I had to dig into it. Did I see concerned place of stamp duty before NN Global went up the various benches in the Supreme Court. And I had to dig into these judgments. I think actually, it was the ***Garware Wall*** judgement that Justice Rohinton had written, and it was an eye opener for me to see how Section 11, is dealt with. And as Zal mentioned, the various changes in Section 11 legislatively as well, to limit the scope. It was an eye opener to me because in all the years that I practiced in arbitration it had not appreciated that the appointment of an arbitrator gives rise to so much litigation. It doesn't happen. With that as an introduction let me explain why that is the case. First my reference is to Singapore. So the reason that much ad hoc arbitration in Singapore that requires a default appointment by the statutory appointing body. There is ad hoc arbitration in Singapore, but most of it happens in the construction sector and it happens where there is an appointing body as part of the scheme that actually makes the point. That you do get a point of how that's dealt with in Singapore now is that two legislative Amendments. The Court has actually made the precedent of the SIAC Court the appointing authority in Singapore. So it then becomes appointment of an ad hoc arbitrator becomes more of an administrative function. Because it's not a judicial function. It goes before SIAC Court. I have been appointed in arbitration and I get a letter from the SIAC saying you have been

appointed by the President and there is no judicial process around it. There are certainly no judgments around it because it is made by the President. What does the President do when he considers what he does as under the SIAC Rules, would consider whether *prima facie* there is an Arbitration Agreement. If there is then he will make an appointment. Any jurisdictional issues, and there are jurisdictional issues when the appointment is made, it is then left to the Tribunal to be done. That is one approach.

The other approach in England and it's not very different from how it's dealt with in India. In fact the leading case on that is the case of the ***Silver Dry Bulk and Homer Hulbert*** which is cited in ***Vidya Drolia*** It's one of the cases cited. The English court takes in that case to be appropriate. It is the standard should be met is a good arguable case. The judge made a point to say that a good arguable case is a low standard. He wasn't setting a high standard. It's something that can be argued, but it doesn't have to be shown that it's more likely than not that it's going to succeed. So they set a pretty low bar. There isn't so much case law about this issue. I had to look into this because I wasn't aware of any off the top of my head. It doesn't come up very often. In fact, the case that I cited ***Silver Dry Bulk and Homer Hulbert,*** it wasn't actually a case by appointment of an arbitrator in an ad hoc arbitration. It was a case where the Tribunal had been appointed and in a case where the Respondent wasn't participating. And the Claimant then went to the court to ask the court to confirm that the Tribunal had been appointed validly. And the court actually said, Well, actually, that's not what Section 18 of the English Arbitration Act is for, and then she declined. But there was one case that was referred to in that it's the case ***Noble Denton Middle East and Noble Denton International***, where it was a case under Section 18, which was an appointment. There are not many cases that come up under in England and in Singapore, dealing with the question of appointment of ad hoc arbitrators. Before I move on, and I think you would want to hear from Clara, let me just make some comments about the bigger issue that you've raised, which is what is the balance between the Court and the Tribunal in terms of dealing with this question of jurisdiction. It is actually a complicated issue because of the way the New York Convention is structured, which ultimately is the foundation. I'm talking here primarily about international commercial arbitration, leaving domestic arbitration out of it. The way the New York Convention is structured, which is the foundation for the modern system of international arbitration is that ultimately, the courts reserve the right to deal with the question of jurisdiction on the Tribunal. Is there an Arbitration Agreement? Is there a valid Arbitration Agreement? So the question that arises in that context, should there be, as in some jurisdictions which is in India, Singapore, and other jurisdictions which are the Court, when dealing with the question of validity of the Arbitration Agreement, either an appointment of an arbitrator, or also when granting a stay of litigation proceedings in favour of arbitration.

Should there be deference to the Tribunal or not? Singapore and India and many other jurisdictions take that approach. When I've looked into this further, and some of you may know Gary Bourne, who is one of the leading commentators in arbitration, one of the leading arbitration practitioners. Gary took a different view to say that there shouldn't be either an approach, which is there should be deference to the Tribunal at that stage or alternatively, that the court should go into a full view. But it should depend on the facts of the case. And the reason he took that position is something that you raised, which is what is the equity and justice between a party, that says there is an Arbitration Agreement and wants to enforce that and a party that says there isn't an Arbitration Agreement and doesn't want to be dragged into an arbitration. And he says in that sense, the equities are fairly balanced. Both parties have an interest. The party that wants to enforce the Arbitration Agreement as an interest but the party that says there isn't an Arbitration Agreement is entitled not to be dragged through an arbitration and have the court decide it. Because ultimately, the court has the function under the New York Convention to decide jurisdiction. So it's a difficult question. Has India got it right? India is along with many other jurisdictions that actually gives deference to the Tribunal by saying that it would take more of a prima facie view of things. I was up at five this morning with Jed Lake, and had the opportunity then to go to ***Vidya Drolia***. It's a long judgment and reading through it, there's nothing that I can say that's wrong about the judgment and the analysis. I can see that there's good reasons and going to ***Vidya Drolia***, it cites lots of authority in all different jurisdictions, England, the US and commentators as well. You can't see anything that's wrong about that. But people still complain about the appointment of ad hoc arbitrators in India. It's not the law that is the issue, but other factors that you have. I heard this afternoon someone complaining about how long it takes in the Mumbai Court for Section 11 to be heard. I hear things are better in Delhi. Many people have said that. So it's not a question of the law. It's a question of more in particular jurisdiction, how the courts are functioning? There are other issues at play. It's not the law that you're grappling with.

DHIRENDRA NEGI: No, but Steven, given the peculiarity of a particular jurisdiction, like you said Section 11, it may take years for a Section 11 to get decided. And knowing the particularity of your own jurisdiction shouldn't it be better to mould the relief or live up to the expectations? And why can't the Tribunal decide the same questions which a court can decide? See that's what bothers people. If I have agreed to an Arbitration Agreement, why can't the Tribunal decide that issue? So on that point I'll first take Clara's views on that. So Clara, what do you think this balancing act and the fact that when parties have agreed for an Arbitration Agreement, why can't the arbitrator decide all those questions which sits beforehand and cuts the deadwood as what Zal referred to?

CLARA TUNG: Thanks very much Dhirendra. And I have considered this question from sort of the same angle as Steven, when he first started his introduction, he mentioned looking around for case law on arbitrator appointment disputes in the UK and Singapore. And the short answer is that there actually just isn't. And perhaps that in and of itself illustrates a little bit of the difference between the jurisprudence that has grown up here and that in many other international contexts. And I would hesitate to say that it is not indeed the case everywhere that arbitrator appointments are not an issue, but in the jurisdictions that I have practiced in, Singapore and the UK definitely, it is just not one of those issues that tends to crop up, or rather that parties have found it worthwhile to make crop up in an arbitration. And that probably has a few reasons, one of which is the very light, touch approach that the relevant national laws have in relation to appointment of arbitrators. So in Singapore, Singapore Law, basically, the Arbitration Act is essentially nothing about the qualifications of arbitrators to be appointed. It's the Model Law. And it stays that parties are free to determine the qualifications, the relevant qualifications. And that in itself gives perhaps less ground and less basis for parties to then raise that as an issue. There are other gateway issues to do with the Constitution that can be raised. Obviously jurisdictional issues, validity of Arbitration Agreement. But the appointment stage just doesn't quite... it is not an issue that is often disputed. And then the other aspect would be as I think we've all mentioned the fact that there is a fallback of institutional arbitration. So in most cases in Singapore and the UK we've seen its institutional arbitration and in the event that parties are not playing ball and the appointment mechanism falls away, then there is a default. A fallback that the institution will go ahead and do it. And so the jurisprudence has really been in relation to, and I think that that is where perhaps the question lies, the dispute has then been on the party's consent. So what have the parties agreed to in relation to the appointment mechanism and the validity of the Arbitration Agreement. So, a lot of the jurisprudence in Singapore is about the validity of the Arbitration Agreement and whether or not it's a valid clause, whether it is a pathological clause. And I actually think that that is where the jurisprudence should slant, because arbitration is a creature of contract. And if we want to understand how this industry is going to grow up and what clients want how clients want to decide their disputes, then the time and energy we should be spending as an arbitration community is on understanding contracts law and not on arguing about appointment mechanisms. So I do think that, not just sell up Singapore or anything, but I do think that when the law is turning to lawyers, read our textbooks and understand what is a central authority, and is there an employed consent and is this the way you draft a contract such that the clause is not pathological. That is where we want to grow our jurisprudence. So yeah, that's my answer.

STEVEN LIM: Can I answer that? The question you put, which is why can't Tribunals decide that the answer Tribunal can and should decide it. The thing is, the court and Tribunals both have a concurrent duty to decide the question of jurisdiction. In the case that I'm dealing with. I had to deal with this issue because there was a question of a joinder of non-signatories which I know you want to come to later. In that case, proceedings were brought in the Malaysian court, which was not the seat. What had Malaysian court to do with question as to whether these parties were signatories or not. I was an arbitrator sitting in Singapore. I was asked to stay the arbitration pending the decision in the Malaysian Court. So I had to look at the issue and consider the issue, and came to the conclusion with authority that Tribunals and the courts have concurrent duty right to determine jurisdiction. So I said, I'm not staying the arbitration because whatever the Malaysian Court decides is not definitive on the issue. And even if whatever the seat court decides, and there was authority as well, is not definitive of the issues, in the context of an international arbitration, I have to say. In the context of an international arbitration, because at the end of the day the courts have the duty to decide it, but so does the Tribunal and the Tribunal and the court both should decide the issue. That is squarely to answer the question that you put.

DHIRENDRA NEGI: Thanks Steven. Just coming back to Zal, this we are in India all very hopeful that one day institutional arbitration will really take up and everybody will go for institutional arbitration so we don't have all these kind of issues. And this is what the amendment to Section 11, looks for and they are saying that now the institutions designated by the High Court or the Supreme Court would make the necessary appointment. So this whole debate about validity, existence, arbitrable, not arbitrable, will go at the stage of appointment. But at the same time we have two provisions, Section 8 and Section 45, meaning where if a party starts a civil action then the Court may or may not refer the parties to the arbitration. So how would these two different worlds, one world of Section 11, where there is no question of getting into existence, validity and the other world where the court is seen of a civil action and the other party moves an application saying, please refer this matter to arbitration. We have an arbitration clause here. So do you think there's going to be a conflict or people which fight like look how the law has changed so you should also change and don't go back to the philosophies laid down by the courts earlier?

ZAL ANDHYARUJINA: Thanks Dhirendra. Just before I sort of tried one for that question. I just wanted to comment on something that Steven said actually which I think would be a salutary approach for our courts to adopt. I did say in answer to the initial question that one criticism that I did have of ***Vidya Drolia*** was that it didn't formulate the test correctly. During Steven's answer, he pointed out that the English Courts in different circumstances they

were asked to answer the question, they first formulated a test the good arguable case test and then they answered that test. I think that's an important point for our courts to bear in mind and especially our Supreme Court. They must remember that actually they are laying down the law for the other courts. And of course, for the litigants. And if I were writing in the Supreme Court, I think one of the things that I would go at great pains to do was to first formulate the test correctly and then answer it. So nothing wrong with ***Vidya Drolia***, we all agree, could have been shorter perhaps. And in all those hundred odd pages, that they actually discussed the law from various jurisdictions, to my mind, they missed doing that most important task of actually setting down the correct test in legal terms and not in sort of non-legalistic language. So that is just the comment I want to make on the point that we made. And that was sort of teased out by Steven's answer as well. The other point, which also ties into my answer to this question is what both Clara and Steven spoke about, the fact that actually because of the entrenched nature of institutional arbitration in, let's say more developed arbitration jurisdictions or jurisdictions which have been doing commercial arbitration longer than us, is that this whole question with regard to appointment of arbitrators loses its judicial character and it actually becomes an administrative task. It is not entirely atypical for our courts to say things and forget about them. And I fear that this has also happened in the context of administration, because many of us do know that in the fairly early days of the dispute with regard to Section 11, I think the judgment called ***Swiss Timing*** if I'm not wrong. In ***Swiss Timings*** the Supreme Court very clearly said that Section 11 judgments don't have precedential value because they should not be regarded as the exercise judicial function. Or Administrative function it seems to me that most courts have lost track of that principle since then and written long and lengthy judgements which of course, the Supreme Court itself in ***Vidya Drolia*** which is widely regarded as a precedent. But I think it is important to bring about that distinction to say that appointment should now translate into an administrative function and not a judicial function. So of course if we have the appointing institutions recognized and taking effect, I think that we'll have a much quicker and speedier way to actually appoint arbitrators. We won't have sort of the scope for lawyers long, lengthy legal arguments. And we won't have scope for judicial ramblings on the part of the Court as well. So I do think in theory that yes, that would be a big improvement in the area of appointments. The only reservation that I have there, is that when -- I do practice in many Tribunals, also which are manned by a judicial and a technical member and I do sometimes find that the technical member always lacks a holistic approach to the problem. I often find that they are solution oriented, but not viewing the problem in its entirety. So I fail to see how that could be a problem in the context of appointment, because appointment is a sort of binary task. Right? Either you appoint or you don't appoint. And you appoint X or you appoint Y. So in my view, I think it should be a considerable improvement. It should speed things along. We will,

of course lose what Steven rightly said the really passing of the baton between the courts and the Tribunal in the sense that if you make it an administrative function, it's pretty much then going to be for the Tribunal to decide all aspects of jurisdiction once the appointment takes place. But to your point Dhirendra, I think that might be a good way to approach it in India, where the courts are very overdone. Getting a hearing takes a long time. Even disposing of a Section 11 takes a look. So maybe an indigenous solution that will work well in India is to have an administrative appointment and to send things straight to the arbitrator.

DHIRENDRA NEGI: Thanks Zal. Now this was a little bit discussion on the Constitution of the Tribunal. The first hurdle which the parties in India or any party dealing with any Indian seat of arbitration often experiences. But moving forward, there is one critical issue though, which doesn't arise often, but whenever it arises, it gives a lot of pains to both the parties as well as the Tribunal, and that is the issue of joinder of non-signatories. Now I may not be wrong in saying that law is more or less as it has developed, particularly in India. It goes on to say that in certain circumstances a non-signatory can be included as a party to the arbitration. And I believe so is the, so is the attitude of the courts even in other jurisdictions, it may be subject to a correction. But my first question on this point would be is something very basic. And this is for you Steven to answer. Do you think this whole concept of joining a non-signatory is really anti critical to the concept of partied autonomous at least consider it from the point of view of the party which is being joined not from the perspective of the Claimant who wants some relief out of that non-signatory.

STEVEN LIM: The short answer to your question is no I don't think it is anti-critical to question of party autonomy. Joinder of a non-signatory can only take place within certain, I would say rather limited constraints. And it's an issue that I have a case where there are non-signatories and the question is being whether they can be joined. As Clara mentioned, an Arbitration Agreement is a contract just like any other contract and we all can accept that under contract law a party can accede to a contract. So a contract can be signed between party A and party B, but subsequently party C can either become an additional party to their contract, or can replace party B. And that's one of the situations in which a joinder may happen. Again applying contractual principles, that in accordance with contractual principles of whichever is the governing law of that Arbitration Agreement, that that party has become a party to the Arbitration Agreement. So joinder can only take place in the limited circumstances where a party which is a non-signatory which has signed an Arbitration Agreement has become a party to that Arbitration Agreement. There are other contractual principles that are relied on. You have a famous case in ***Chloro Controls***, which deals with the question of whether the group of companies under it can apply. Doesn't apply everywhere. It is part of Indian law.

It is in that limited context. And the reason why I say it is not antithetical to party autonomy , is because what ultimately would govern the question of joinder is, was a contract created in this case, the Arbitration Agreement was that created between the party that wants to bring the non- signatory and the non-signatory. That's what defines the issue ultimately at the end of the day.

DHIRENDRA NEGI: Steven, I'll come back to you on this point that you said. But before I do that, Clara that what are your views and do you have any experiences where you saw or you experienced the struggle of a non-signatory and the signatories before the Tribunal or before court.

CLARA TUNG: Yeah. Thank you. So, Steven mentioned something. Which, of course, it's trite that an Arbitration Agreement is just a contract. But I think when I was thinking about this issue it did strike me that the reason why I think we experience so much sort of pain and contention. Well it's not really pain, because there are clear contractual principles to guide this analysis. But the reason why we feel conflicted, maybe, is because an Arbitration Agreement, while it is just a private bilateral contract between Party A and Party B, there is that sense that it also sits somewhere in the wider framework of the administration of justice, and that there should therefore be in some quarters, people say some element of borrowing from court procedure to make sure that this function is working as a efficient and one stop shop administration of justice. So in the court context there would be no issues with joining any party that was regarded as required to be -- required for the efficient disposal of the case for example, under Civil Procedure Rules. But in the arbitration context and there is a temptation of many arbitration practitioners and Tribunals or legislators or even drafters of institutional rules, to feel that some of that element should be borrowed into arbitration so that every party that is related to the case in some way should be able to be brought in. And so there is that little bit of tension I feel between the respectful party autonomy as central to arbitration, but yet the fact that arbitration is also within a wider framework of the administration of justice. But then coming back to whether it is an antithetical, the joinder issue is antithetical to party autonomy, I think that as long as the analysis is always grounded in contractual consent looking at what the parties intended then it would not be. But there are scenarios where and I'll read two where it may be that the law is strained into areas where it's not actually looking at party consent. So in terms of party consent all your usual sort of grounds of adding a non-signatory as a party would be agency or estoppel or implied consent. And these are not, these do not do violence to the antithetical party autonomy because you're basically interpreting on the facts. The issue is just evidential whether or not on the fact the third party, as it were, has actually had actually expressed an intention to be part of the Arbitration Agreement. I think

the most contentious issues would be as Steven mentioned, the Group of Companies Doctrine and perhaps the second would be, the second would be the concept of third party funders which is now becoming more a very key issue, and the third would be perhaps related, the question of whether institutional rules should be drafted so as to conceive or allow the joinder of the nonconsensual joinder of third parties. So in terms of the joinder of parties who are in a group of companies, I think there is a recent Delhi High Court case actually where Justice Yashwant Varma, I think who is a great judge, decided that the Group of Companies Doctrine was in that particular case should not be applied in that it would do violence to the principle of the consensual basis that is so entitled to an Arbitration Agreement. And I think interestingly, that the parties who had sought the joinder actually referred to an earlier case, which I think is GMR, where it was decided that the Group of Companies Doctrine would apply and Justice Varma said that, oh, that was a different case because that was a case that was conducted under the SIAC Rules. And the SIAC rules do provide for joinder. However, the SIAC Rules don't provide for joinder of non-consenting parties. There is a consultation going on right now where they are considering, I think adding a third limb to the test to say that you can join parties where it is necessary for the efficient disposal of the case, which i.e. means broad enough to include a non-consenting party. But at the time GMR was decided and in fact the President do not allow for joinder of non-consenting parties. So I'm not too sure where that lies. But basically the point is that it can be that principle in particular straight into the area where it would be joining a party who in spite of not there's no contractual intent to be part of the arbitration they are being drawn. And then the second point would be what I've touched on, which is then, should institutions be thinking that they should therefore include a limb in their test joinder, which then could open the door in this recent case to allow courts to say well then joinder should be allowed.

DHIRENDRA NEGI: Thanks Clara. What you raised is an interesting point. See, apart from the question of party autonomy, and as was noticed in that judgment that you referred to, the question also arises as to who is going to decide that whether a stranger can be included in the arbitration. Maybe for the courts, courts can pass such orders, but there's the Tribunal which is a creation of will and agreement, does it have power to include a third party in the ongoing reputation between two parties? And in that judgment, the Court used the expression that the arbitrators cannot create jurisdiction. And this Steven connects to your point that in certain cases it is possible to ultimately decide that the third party of the non-signatory had agreed for the creation of a contract where it would be included ultimately in the arbitration. But the point which is being argued these days and quite a lot is from where does the... before we come to the institutional part, that's a different thing. But how does essentially and fundamentally an arbitral Tribunal gets the power to include a third person in the ongoing

arbitration? So, Zal my question to you is do you see there is on the one hand, we broadly accept the principal yes in certain circumstances, parties can be included. And if there is a matter before court, be it for the appointment of the Section 845 Courts can pass such an order and say no, such parties can also be included. And whereas the Tribunals do not expressly the power at least. So how do you think this differentiation? Is it really is it really called for the Tribunals are really helpless. And there is no way Tribunals can tell to the parties when you go to the court, we can't do anything given what Delhi High Court judgment which Clara referred to.

ZAL ANDHYARUJINA: Thank you Dhirendra. Well I have to confess that I have always struggled with third party joinder in arbitration and I think I do share some of the sort of theoretical and philosophical reservations philosophical in the sense the philosophy of arbitration and party autonomy against joining third parties. It does seem at a theoretical level to be something which is at least it does run contrary to the concept that both parties will agree that they will decide the disputes in a particular manner. But I have experienced this, of course, many times as counsel in arbitration. There is a trying practical need to actually join third parties and arbitrations if the whole process is not going to be frustrating. I think that whole joinder of non-significant third parties is a Doctrine that is based on pragmatism and the need to actually completely and fully decide the dispute. We're going to have many, many commercial arbitrations frustrated if we don't actually evolve an acceptable Third Party Doctrine. Those cases which Clara spoke about, Steven spoke about, and which are well-known they sort of come quite close to where the philosophical objection meets the pragmatic need in the sense that this sort of underlying theory behind all those cases is that the third party is really not so different. And in one sense the third party is the counterparty to the arbitration. So I think that the practitioners and the courts have all recognized this pragmatic need, and it's not perfect. But I think that we are coming close to an acceptable Doctrine, which is restrictive in nature and has a considerable threshold to be crossed, to actually join non-signatory third parties as I said, I think that it is actually a doctrine which is informed by sort of the practical reality of arbitration and commerce today. ***Chloro Control*** I think has always been a difficult chapter to understand. Unfortunately, it's not only me who sort of struggled with ***Chloro Control*** at various times I'm sure many in the room know that ***Chloro*** has now been doubted by our former Chief Justice. It's now been referred to a larger bench for reconsideration. I'm not sure about the status of the matter but ***Chloro*** itself, the principle of ***Chloro*** as a stepping stone led to several other judgments, which slightly expanded the scope of ***Chloro***, and once again, I think we'll have to await the judgment of the full bench on where ***Chloro*** finally lands. Do they uphold it, or do they change it a little, or what they do with it.

But it was a very confusing judgment to say that you've got to locate the mother agreement, and then you've got to sort of do all of that

DHIRENDRA NEGI: And it was a fact specific. But they included a lot of principles were floating around all of them are captured...

ZAL ANDHYARUJINA: At a practical level it's always been sort of read by both sides in their favour so a little of what I said before. I don't think the test was properly tightly formulated. It's a difficult task, but hopefully they'll do a better job when it comes out of the full bench doctrine. And of course, as Clara spoke about, we have sort of a slightly different doctrine also, the Group of Companies doctrine, which has also been now been used to join third party signatories. So I think that yes, it's necessary. But we are going to have to wait and see what the determinative test that we're going to use to join third parties is. I think it's also very confusing under the Indian domestic regime, that in Section 9 proceedings, you can always join third parties. But in Section 17 proceedings sorry, just for our foreign visitors. Section 9, being the interim measure that you make to the Court, as opposed to the interim measure application, which you make to the arbitrators. It's a very, very confusing situation where in the Section 9 proceedings, you can join third parties in Section 17, you can't. I tried very hard to persuade an arbitrator a few months ago that with the statutory parity that was born within Section 9 and Section 17 by a specific amendment that the two stood on the same footing and that he could now reach out and join a third party in Section 17 as well. I failed, and I think the challenge to that failed as well. So the position at least. And there's a deferring position across several courts. But the position, at least today, remains somewhat confusing picture. You can definitely join a third party who doesn't have to satisfy any of these requirements for the purpose of getting effective relief under Section 9, you can't do it under Section 17, and if you're going to do it in the arbitration, then you have to apply this somewhat sort of difficult to understand. ***Chloro Control*** test or the Group of Companies Doctrine. So state of the law, I think could be clear, could be better and hopefully we'll get there. But in summary, I think it's a discussion which needs to be had. And I think it's the solution which needs to be found.

DHIRENDRA NEGI: Yes, I agree there with you and possibly maybe some kind of legislative enactment would be required because situation as it stands today, and this question is to use team if you and I enter into an Arbitration Agreement can we say Zal will be the sole arbitrator and he will do A, B, C things, and we hereby confer the power authority upon Zal to include any third party in the arbitration if the need arises. Is that agreement, an ad hoc agreement good enough? Or does it serve the foundation of the authority for Zal as an arbitrator to call

the third party and say hey listen, I've got this authority from this agreement you have to join. And I think prima facie I'll give you an opportunity later, but prime facie I think you are a part. Does that confer?

STEVEN LIM: The agreement that you described this ad hoc agreement, would only bind you and me as the party. So what we're doing effectively is saying, we agree that we will arbitrate not between us two but any other third party that is prima facie a party to the Arbitration Agreement. That, however, does not include the third party. So it doesn't give Zal the power to go and say you are a prima facie, party C, a party to Arbitration and I can join you. I don't think it works that way. The institutional rule dealing with joinder as a procedural aspect not as a substantive aspect. What I mean by this is that if you look at the institutional rules of joinder, all of them reserve the position that the joinder whether by the institution or by the Tribunal under the rules is without prejudice to the Tribunal's decision on jurisdiction, so that issue is reserved. Just because the party is joined it is joined only for procedural matters. That the party then participates in the arbitration as the opportunity in the arbitration to makes its case, including as to whether the issue was properly joined or not. So the ad hoc situation that you described it would ultimately require, I would say still, the agreement of the third party. There's nothing in ad hoc agreement that binds the third party. It only binds parties, A and B.

DHIRENDRA NEGI: No. Because I'm asking it because in some of the institutional rules like ICC I am sure, it is purely consensual. I don't remember the rule, but it says expressly, that it has to be with the consent of the, I think the parties and the party who's being joined in otherwise arbitrator has no power. But in contrast to that the institutional rules of SIAC and Hong Kong Arbitration Centre, take a two-step procedure. First the third party can be joined if either the parties agree or if the Tribunal or the Registrar or the Secretary General whatever it is called, takes a prima facie view that yes, third party. This Arbitration Agreement covers a third party and then as a next step, like you said, the final decision goes to the arbitrator. Don't you think this is an indirect way of expanding the jurisdiction of the arbitrators mainly because it's an institutional rule? What I can't do under an ad hoc agreement can I do it through the by way of institutional rules? Because ultimately, it'll be the Tribunal who will be deciding whether it has jurisdiction or not. So, this difference in approach of the different institutions, don't you think that would leave parties a bit confused as to where do we stand. And especially when there is a multi-party transaction, whether different kinds of contracts with different kind of entities may be connected or affiliate companies? So I again come back to the fundamental question, are we really overstepping when we feel that yes, arbitrators should in

circumstances and without any legislative backing, should be allowed to include third parties and pass orders against them?

STEVEN LIM: The institutional rules as I said, it only gives the power to join as a procedural issue. It doesn't decide a substantive question as to whether or not the party is probably a party to the Arbitration Agreement. The institution who takes the place of the ad hoc agreement that you described in effect, by agreeing to these rules, you agree that a third party may be joined if that third party is prima facie found by the Arbitration Agreement. Again, it doesn't bind the third party. It doesn't give the Tribunal the power to say third party you must commit. The Tribunal can say and usually situation where between party A and B, it may be that Claimant has brought a claim against Party B, Party A claim and brought claim against arbitration and Party B says no, we have to have Party C involved because Party C is in the Arbitration Agreement. So the institutional rule then deals with the situation at least between A and B to say that A cannot object to say no, you can't bring in party C so long as party C is the arbitrator can make the determination or the Tribunal, the institution can make the determination that Party C is prima facie bound. Then at least between A and B, you can't complain. Whether Party C then decides to participate or not is a question of the party C. They can decide not to participate if they want to. So in that sense it's not creating anything which is not in, which is that different from the ad hoc agreement. Ad hoc agreement gets to the same point, except that you must have Party A to expressly agree to the arbitrator to say that we consent to any other third party coming in. The slight difference being then that in the institutional case, even though there wasn't that expressly saying by agreeing to the rules you have actually consented to it. So Party A cannot say no, I don't agree to have Party C involved because of whatever objection, because you have agreed to the riles, and then leave the Tribunal to make a determination or for the institution to make the determination whether that party is actually a party to the arbitration. It is prima facie a party to arbitration with a caveat as I said all along that it reserves the question as to whether that party is actually properly a party. So whatever joinder happens under these rules remains subject to the point that whoever is joined or whichever party even the two party A and B, you join. C, party A can still say yes, he's now joined, but we still say he's not a part of the Arbitration Agreement. And that issue is still decided by the Tribunal.

CLARA TUNG: On your question as to whether the Tribunal or the Court should decide there is that tension there because it's a little bit chicken and egg. Who is going to decide this issue over these three parties when one of them arguably should not even be part of this process at all. But I mean, I think that is the case with a lot of... and it comes down to a jurisdictional challenge where the remedy for the third party, who is then arguably wrongly joined, never

have been part of the party at all should then take up his relief before then the court, because the Tribunal at the first instance will have the decision over its jurisdiction over that third party, of competence, competence. But then there is the recourse to look to the courts and say that there is no jurisdiction over me and then there is setting aside at the setting aside stage or the enforcement stage. So actually this was precisely the issue in the Singapore case of ***Astro and Lippo*** which has turned out to be sort of a leading case on the two bites, sort of the choice of remedy principle where it said that someone who wants to challenge jurisdiction can have two turn to do it. They can do it at the initial stage when the Tribunal issued its jurisdictional award and that was a joinder case. It was the Astro Group against the Lippo, the Indonesian Lippo Group of Companies over some telecom, sat-tower, satellite services and the Lippo Group parties were joined to the arbitration and award rendered against them even though they were not party or signatory to the agreement. Then they tried to challenge jurisdiction. Rather they did not challenge jurisdiction, and they just didn't participate. The award was rendered against them and then they thought to set it aside. And the question was, should they have raised the jurisdictional challenge earlier by not having raised it, had they waived their right to then challenge the award. And the Singapore Court of Appeals said, no. You get two turns to do it. One is active remedy where if an award is again on jurisdiction against you can challenge it at that stage, or you can just sit on your hands. You don't have to incur legal costs. Just sit there and wait for them to come and try and force it against you, which they then did all over the world. And then they ensued all these settings and resisting enforcement, which the Singapore Court at least found that they were entitled to do it. And then the Hong Kong Court, also did the same. I think it's an incomplete solution in that it's not nice and supposed to be joined to an agreement or bound to do something purportedly bound to be involved in a proceeding that you never agreed to, but like Steven said it's sort of practical and administrative solution so that the dispute resolution process can continue and then you ultimately at the end of it or in the midst of it have recourse to get yourself out of it through the mechanism of the arbitral rules they are. And I think then it comes a little bit down to a combination of the rules and the seat of arbitration. What does the governing law that governs the arbitration say the recourse to dispute jurisdiction where can they raise it. So that's between the Tribunal and the courts. I think it would be a little bit of both the Tribunal and the jurisdiction the courts when it comes to jurisdictional challenge.

DHIRENDRA NEGI: Zal, there is a quick question for you...

ZAL ANDHYARUJINA: Shall I? I just want to point out that what Clara said is very much the position in India today. A party who's joined as a third party obviously has choices to make. Does it enter the arbitration? Does it protest? Does it wait and await the outcome of the

arbitration because of course, no award may be passed against you. And in the event that an award is passed do they raise a challenge to the arbitration award on the third party as well. So that's pretty much our position as well. I suspect it's pretty much the position in most arbitration jurisdictions as well, because you are dragging the third party into the arbitration and the third party is not the signatory. But what I did want to actually comment upon Dhirendra was, your sort of illustration which you gave us about whether there could be a solution along the lines that parties A and B go for an arbitration with a provision that the arbitrator will be free to join an appropriate party. I said this in the beginning and this is my experience with arbitration in India. I think there is a crying need for clarity on many aspects of arbitration. And I think that could not be more true for third party joinder. So, I would argue against such a solution. I would argue for a solution where the test should be carefully, legalistically formulated by the Supreme Court and we now have an opportunity for that to be done. So I think that's the best possible outcome for the third party solution.

DHIRENDRA NEGI: Thanks. If I may just come back to that quick question related to this but not really on the point. See, now we have the IIAC in place. And this Central India International Operation Centre has been constituted under the Act and it has been given power to regulations. Now regulations have come into force. It is conduct of arbitration regulations. I think India is only country which has this kind of a setup. And coming to the point of joinder it has a similar provision as what is there in the SIAC. It's two step procedure. First, prima facie view and then the question to be decided by the Tribunal. But my question to you is that being an act done by the arbitrator under a regulation do you think it will give opportunity to the parties to go before the Writ Courts and challenge all these kind of decisions which doesn't suit them merely because everything has been done under the... just a thought came to my mind when I was going to these regulations because otherwise that's the stand and it'll open up the Pandora's Box. It'll do more harm than what is.... Do you think that the possibility which could happen?

ZAL ANDHYARUJINA: Once again just to reiterate what both Clara and Steven have said, I take it that the IIAC's power is going to be to procedurally call in the third party for the hearing, before the arbitrator, before the joinder actually takes place in the sense that it's an administrative body. The joinder of third parties is a complicated legal question. So I take it that the regulation will say that in certain circumstances we call in the third party, and the third party can then be heard or whether you should be joined or not? That's right? But your point with regard to...

DHIRENDRA NEGI: Just an apprehension you know...

ZAL ANDHYARUJINA: I just want to address that actually. So gratifyingly, I have noticed over the last several years something once again I said earlier that Civil Courts and the writ courts are now very cautious about interfering in arbitration matters it's almost impossible to get a writ issued in an arbitration matter for obvious reasons, we don't often have state instrumentalities on the other side. And just for our foreign visitors, the writ petition is effectively an application for judicial review, sort of analogous to the application for judicial review. So one is the non-interventionist aspect that the courts have now taken and rightly so. The second is, of course, our act has a specific provision which argues against court intervention, which is Section 5. So Dhirendra, I, for one have many apprehensions about the sort of future of arbitration, but I don't think an overbearing writ court is one of them. So I think that the writ courts have matured. I think they've understood arbitration a little better. They've understood that arbitration is best served if the writ court doesn't inter meddle in arbitration. So I don't think we'll have that.

DHIRENDRA NEGI: Thank you sir. Moving, I think we had quite a good discussion on these two points, but quickly moving one aspect, which is again, very unique to the Indian arbitration is the time limit for passing the award. So this will be a very quick . What is your experience, that has it really been? Has it proved itself out?

ZAL ANDHYARUJINA: To my experience has been very difficult to pass the award in two years. In my most junior days, I used to do a lot more of domestic arbitration and that included a period by this amendment had come about .I found the whole arbitral process and the sort of culture of arbitration in India made it a great challenge to complete it in two years. And the sort of main culprit in all of that, of course, was the evidentiary state of the arbitration, which my experience in Indian arbitration is that it is given too much time. Counsel are given too much latitude and there is another urgent need in this area where the arbitrator should first work out what is the need for oral evidence. My own experience in closing arguments is that a lot of that time is wasted. Counsel, very infrequently actually referred to the oral arguments in India. Commercial matters can be decided in large part based on documentary evidence as well. So given these factors, the culture of conducting the arbitration, the culture of not interfering with Counsel when they're doing a lengthy cross examination. I think that limit has been quite challenging. There are frequent applications in the Supreme Court, in the High Court for extension of time. But I don't think it should be amended. I think our culture should change and we should seriously work on how we can finish the arbitration within that period of time. I don't know. I'd be interested to hear what Steven and Clara think on a two year limit to finish a heavy commercial arbitration? Is that workable or can you do it?

STEVEN LIM: Very quickly. I think it's difficult to put each every case into the same straight jacket. It really depends on what case. There are cases you can finish within months and there cases which you will struggle to finish it within 2 years, including passing the award. So it's difficult to put every case within that straight jacket and say that this is the standard that all cases have to meet.

CLARA TUNG: Yeah. I think from experience and from the point of view of Counsel, it is always a positive thing when the proceedings are conducted in a very, under the expectation that there is at least a timeline, a point of reference for the parties and Tribunal to work towards even if that timeline is soft. And I think the Indian position right now is that there is a soft timeline for commercial, international commercial arbitrations. There was a time when the timeline was hard, and we had an arbitration that was literally conducted within that timeline. It was started in late mid-2017. The whole thing was over by 2019. A multibillion dollar PSC arbitration that was completed within that time because of a) hard timeline under the Indian law and b) a robust Tribunal that proactively managed this case. That was very, very positive for at least the parties wanted to get it done. I think now that it's been, I wouldn't say watered down, but changed to become a soft timeline. That's still valuable in that there are many arbitral rules out there. Not that many governing laws, but arbitration rules that do impose the soft timeline. The LCIA has a 3 months' timeline for the award to be rendered. The SIAC is also considering having a soft timeline but the position is that at least it gives parties the point of reference. And it gives the institution if there is an institution, some basis to crack the whip and to say, even if then it's the timeline is extended somebody needs to apply for the extension. It's not just an open book. As to whether two years or six months or 18 months is the correct thing, I mean I would defer to the illustrious Tribunal members here but all there is to say, I think three months and six months is very short. And the SIAC is right now contemplating a three month streamlined procedure. I barely even know the arbitration notice has been served against me in three months, but a three month procedure for low value claims or urgent claims and there is the expedited procedure. So in the absence I suppose of a governing law which has imposes a timeline, then have a look at the institutional rules and the expedited procedure. That's actually very popular with clients. A lot of our technology clients choose arbitration specifically because of the expedited procedure. As to whether it actually goes to it, actually to be honest, there are very few that actually come down to expedited procedure. That six months' timeline never get tested. But at the outset there is that expectation that if we have a dispute, we'll resolve it very quickly which is quite valuable.

DHIRENDRA NEGI: Well, I can tell in this discussion without my experience that this provision of setting a timeline has been really very helpful as far as the arbitration that I've had for the domestic arbitration. And I have noticed there has been a change in the mindset of the arbitrators as well be it a member from the judicial background or a technical person. At least they drive the parties to finish it faster and I do all these construction related matters where there are voluminous documents. And when you are forced to do something, you find a way out. Okay. How do I capture all this information and how do I present it well? Then you start working under pressure. And my experience has been that it has been quite beneficial. Yes, there are always cases where things drag on, but with that ladies and gentlemen, thank you so much. Well, at least I enjoyed moderating the session. I hope you also had a good time. We have five minutes? No? Please. Okay, one minute we have. If you have any questions for this panel, please feel free. One minute.

AUDIENCE 1: Hi. Good evening. I'm Shivang, I'm a third year law student at MLU Mumbai. I had a question to Zal sir, you mentioned about the impleadment of the third parties and the case that Ms. Clara mentioned regarding the Adopri logistics. You differentiated between section 19 and Section 17, if we delve deeper into it. So when we talk about the Civil Procedure Code under Order One, rule Ten, we talk about the impleadment of the parties. So the Court Rule on the aspect, saying that the court has the power, however, the power that is conferred to the civil court cannot be conferred with the arbitral Tribunal. So we talk about getting a statutory interpretation or clarity on that aspect. And how do you think that the statute should clear on the aspect of the civil Court's power being conferred to the court, however and not to the Tribunal?

ZAL ANDHYARUJINA: I do think the important thing to bear in mind when we are talking about the Court, which grants interim measure of protection under the Arbitration Act, is to remember that it is not performing as a civil court. The concept of the civil court is a much wider concept where the Court has a range of plenary powers to decide the issue. The Arbitration court is just that actually it is the Court deciding, it is a court performing a specific statutory function as the arbitration court. So I think it would be a mistake to conflate the two concepts. But it is a mistake often made, I find and in one sense, I mean, it is a mistake which has led us to the situation where we think that because it's the court that grants the relief, you can join third parties, but the Tribunal can't. So that's a very good question. I hope that's somewhat something of an answer that we have to view the court differently when it sits as the arbitration. Thank you for your question.

~~~END OF SESSION 4~~~