# INDIA ADR WEEK DAY 4 – DELHI

## SESSION 3

## DE-RISKING INTERNATIONAL ARBITRATION

**12:00 PM To 1:30 PM**

**Speakers:**

David Elsberg, Founding Partner, Selendy Gay Elsberg

Vivek Tata, Senior Associate, Selendy Gay Elsberg

Divyam Agarwal, Partner, JSA

Gopal Jain, Senior Counsel

Anurag Sharma, General Counsel, MakeMyTrip

**VIVEK TATA:** ... And we have the benefit of multiple perspectives we've had in house perspectives, international perspectives, and Indian Perspectives on how to do that so before I get started with questions. I wanted to turn it over to the panellists so that they can introduce themselves. And you can learn a little bit more about them Anurag you on the start?

**ANURAG SHARMA:** Hello, hi. I think hi, I'm Anurag Sharma. I am General Counsel for MakeMyTrip. I've spent around now over ten years in-house. Before that I was a Counsel. I worked with various law firms. I worked with companies in General Counsel for companies like Abbott Biocon. I also work for a Singapore based Fund when I was in Myanmar and I was in New York for a couple of years and I worked for that fund. Currently I've joined MakeMyTrip and I'm a General Counsel.

**DIVYAM AGARWAL:** Good afternoon, everyone my name is Divyam Agarwal. I'm a partner at GSA I am also an advocate on record in Supreme Court. I am an English solicitor as well, having higher rights of audience on the civil side I'm a Registered Foreign Lawyer in Singapore International Commercial Court and Arbitration is the line chair of my practice. I'm really looking forward to this session

**DAVID ELSBERG:** Hi, I am David Elsberg, Founding Partner, Selendy Gay Elsberg. I started out my career at Wachtell, Lipton, after that I switched to litigation arbitration. Only firms I was at Quinn Emanuel for about 14 years, and then nine partners and I broke off, and we formed our current firm, where we do a lot of litigation and arbitration on both sides of the…. So we act for plaintiffs. We also act for defendants, claimants and respondents

**VIVEK TATA:** Great. So in order to sort of kick it off, what I was hoping we could do was ask each of the panellists to identify some of the risks they want to talk about today. And then we're hoping we can also get some feedback from the audience and understand what risks you're concerned about in engaging in international arbitration. And then we can have the panellists discuss those as well so when we just start throwing out ideas of some of the risks that we see and that we're trying to avoid maybe we'll go this way this time.

**DAVID ELSBERG:** One of the things that we run into a lot is when there are documents that you need in connection with an arbitration, and they can be difficult to get for all of the reasons that people are familiar with so say your involvement in a dispute where you're claim has something to do with something that happened inside of a company your contractual counterparty. So you didn't work inside the company. and your claim depends on what happened inside the company, and maybe affiliates of that company that are not subject to the arbitration clause. What do you do, how do you get the documents you need when there is an individual or entity that is not subject to the arbitration clause and that individual or entity is also in a far flung location beyond the jurisdictional reach of the Arbitrators?

**DIVYAM AGARWAL:** So this topic, I'll just take a step back to mention that when Vivek approached me saying that we need to speak on de- risking of international arbitration the first thought that came to me is that you're asking a lawyer advice on how to de-risk a dispute. So it was quite an [UNCLEAR] exercise for me, but I managed to do some bit of a homework on it. So why we decide to opt for arbitration? It's a speedier mechanism, it's more efficient in its approach, it's a set procedure and the enforcement is easier than going through a rigmarole of a Court proceedings. Now let's flip all these things and see what are the ways or what are the issues which can actually attack any of these advantages of arbitration, then that would straightaway give you the risk. So any exercise where there is some sort of an abuse of process, multiple proceedings forum shopping, there are enforcement risk involved, so all those risk will straightaway attach and make the arbitration, more so an international arbitration with risk. So, the idea of today's panel discussion is when we had a discussion briefly yesterday also is to find out that how do you mitigate these risks? What steps you can take to actually de-risk an international arbitration and we will be discussing that in this session.

**ANURAG SHARMA:** Hi. So I'll just try to give a bit of an in-house perspective. Right? See the way an external lawyer looks at arbitration that could be slightly different from in- house lawyer looks at. We see arbitration differently. If you are working for one company generally, maybe you'll have a couple of big arbitrations that you have which you'll be dealing for maybe 40 50% of your time. So for us, it's about setting expectations in the management, having clear ideas about timelines, predictability about outcomes. So, if I look at those aspects, then for me, it starts from the very beginning, because when you look at arbitration clauses, sometimes and sometimes arbitration clauses are drafted by in- house lawyers, probably who are not well versed with the way arbitration works. So< they are not drafted the way it ultimately plays out. Right? So that becomes a big issue. So, I think it starts at contract drafting. You should draft clear clauses, clear mechanisms for appointment of Arbitrator. You should be flexible. You should see where the enforcement is going, you should be able to envisage that in case you have to go for enforcement, where will you get your claim from? Is the right entity signing the agreement? Sometimes you might sign agreement with an entity which doesn't have assets, the main companies, the companies where the assets are might be different from the company with which you sign the agreement. So those are the aspects that you need to look at it. I would say even go a step back a step back further. You should really evaluate whether you need international arbitration, or does normal Court proceedings work for you better because in some cases you have arbitration proceedings, but maybe if it's a foreign company, maybe there you don't face delays in terms of litigation. So if you have litigating capacity in that jurisdiction, then why have arbitration at all sometimes. So I think these are the issues you should look at. When you look at choice of law, you should be flexible I think everybody just think, let's have neutral laws, let's have neutral jurisdiction, all those things. But I think those questions need to be looked at a little deeper. Sometimes maybe the choice of law of the country with which you are signing arbitration might work in your favour. It's possible supposing many European countries, they impose much more stringent law on the vendors, right than Indian law. Maybe that country's law suits you better in terms of choice of law, in terms of choice of forum maybe you can go to the other country. Neutral jurisdiction is not necessary all the time. So, you have to look at it, which option works best for you.

**DIVYAM AGARWAL:** Just to take an Anurag's point further on drafting of an arbitration agreement, I have three observations to make. One is that and which is the most common one that when you are drafting such clause do you opt for an institutional arbitration, or you offer an ad hoc? Because unlike US, India still, majority of arbitrations are ad hoc, which are happening with the Government or with private parties. But one of the risks which I highlighted in my introduction was consolidation of proceedings. So what happens is multiple

proceedings are initiated in various jurisdictions just to thwart the main arbitration and having an institutional, institution on board, like, for instance, an MCIA or an ICC, MCIA for instance has this Article 5, where they provide that parties can by consent agree upon consolidation of proceedings. India has quite a settled position right now where it's not driven by the statute, but there is a judicial precedent of ChloroControl, where they have stated that if the issue is exactly identical and there is a sort of parent and a child relationship in the agreements and it's actually going, has the same subject matter then parties can consolidate, while that ChloroControl right now has been referred to a larger bench, it's gone to the Constitution bench. But one point is that when you have, looking at clause, you also need to factor in those steps that whether an institution is going to add an advantage. Even like for that matter, Emergency Arbitrator. That is something which is prescribed through an institution, an institution like a SIAC or an ICC or an MCIA, if they are there, they can help you out with setting up an Emergency Arbitrator. Point number two is the agreement itself, whether you would want the Arbitrators to be appointed. If it's a complex dispute or if it's a technical issue, what kind of an Arbitrator you would want to have? Like, for instance, a construction matter, having technical issues involved would you want a judge, a retired judge having a judicious mind, or you would prefer some technical person? But again, that if your arbitration clause is itself prescribing for that, it takes you further. And the last point on it is, and then I hand it over to David is that multi- tier clauses. Now what happens is again taking a que from construction arbitration, there are Dispute Resolution Boards that has been appointed. But what happens is that party gets stuck in that dispute resolution or a Mediation Board, and they don't move forward. So, when such clauses are drafted if a fixed timeline and a fixed procedure is prescribed, it will ensure that (a), it's an effective way of resolving dispute before arbitration, and even if it is not helping out in parties to resolve at least it will end at a particular period of time so that parties can straightaway jump into arbitration.

**DAVID ELSBERG:** I was mentioning earlier the problem of needing documents in an arbitration, particularly documents that are held by a non- party. How many people here are aware of something called Section 1782 under US Law that, under some circumstances allows you to get documents from the US for use in a proceeding in India? I see one tentative hand. One on the table as well. A few people, a few shy people sort of saying maybe. And how many people have heard of the US Supreme Court case that came out pretty recently that narrowed the ability to get documents through 1782? Nobody. One person. Okay, so one brave person. What's your general understanding of what that case said?

**AUDIENCE:** [INAUDIBLE]

**DAVID ELSBERG:** Yes. So a lot of people who follow this, they saw the US Supreme Court decision and the US Supreme Court decision says guess what, all you practitioners who have been using 1782 to get documents from the US in aid of your arbitration in India, people read the US Supreme Court decision to say sorry that's the end of that, you can't do it anymore. But there are still ways to get documents from the US for use in your Indian arbitration, despite the US Supreme Court decision. Has anyone encountered any ways to do that? Because the articles that have come out have basically said, oh, this is the death note. Good luck trying to get documents from the US. So, there are a couple of ways that you can do this. And one of the most powerful ways to do this is under Section 1782, it is enough, if you are contemplating a legal proceeding. So if you have an arbitration and you want to get documents or maybe it's, you've been trying, you can't get them. You can contemplate a litigation that is going to take place in India. You don't even have to file it. You're contemplating one. Under the Case Law, there is a line of Case Law that says you can get documents under Section 1782 in the United States if you're contemplating a litigation, so you go into Court in the United States, you say, I'm contemplating a legal proceeding in India, I need these documents for that legal proceeding. You get the documents. After you get those documents, they're in your hands, you have those documents. And what do you think happens if you then decide I'm not going to bring this lawsuit? You can still use the documents. You can take those documents and you can use them in the arbitration. So that's just one way and there are also other ways to get documents from the United States and sometimes also from other countries even though there's this US Supreme Court case that has generally been interpreted to mean this is the death knell for 1782, in connection with commercial arbitrations.

**VIVEK TATA:** So I think before we move forward, I think oh, we have there a question. Please. Absolutely. No. Please. Jump in. We'd love to hear what is of interest to you.

**AUDIENCE 2:** [UNCLEAR] a US Court and say in my arbitration and you commence I assume some sort of legal proceedings to take advantage of 1782, yes? Would that not be in breach of your arbitration agreement?

**DAVID ELSBERG:** No. So the way that it can be done is you have an arbitration and you want documents in aid of that arbitration. The proceeding that would be anticipated or proceeding that was actually brought would be a proceeding that involves the subject matter, involves the types of documents that you want to get but it would be a proceeding that is not captured by the Arbitration Clause. So for example you could think of anything. There could be the production of a product. There could be a use of computers. There could be think

of any category that you're interested in. You may have an Arbitration Clause between the two parties that says any disputes arising out of or relating to this contract is going to be subject to arbitration. You may also have separate contracts with that company or there may be a torque. There could be other bases to bring a legal proceeding that are outside of the scope of the arbitration clause and will allow you to use the planned proceeding as a basis to say, I'm planning this proceeding. I need documents in connection with that proceeding and I'll mention another way. You're trying to get documents, the documents that you want are held by let's say an affiliate of the entity that is your adversary in this arbitration. They're separate companies. The Arbitrator does not have jurisdiction over that other entity. At least if you are arbitrating under New York Law, or if you're arbitrating in the United States, you can get documents from that affiliate. And you can even get documents, let's say that the party, your adversary, is a subsidiary and let's say the parent company is located in Switzerland. Pick your country. The way that it works, at least under US Law, the test is not whether the entity has the legal right to get those documents. The test is whether the entity has the practical ability to get those documents. So, the way it would work is you would say, hey, Arbitrator, I want the documents from Company X. The other company says, sorry, I can't get them for you. I'm just a little subsidiary, I can't order my parents to give me anything. I don't have the legal right to get it. And then you say to the Arbitrators, well, wait a minute, the test here is not do you have the legal right. The test is do you have the practical ability, and if you look Arbitrators, just look at the documents that have been produced. When it came to the underlying transaction that's being litigated here the subsidiary sure didn't have any problem at all getting documents from the parent. The parent was involved in the transaction in- house Counsel was overlapping. Did you notice? The emails have the same suffix. They're using the same email server. And what the Arbitrator can do is say, yeah, you're right, I don't have any jurisdiction over that parent entity. You don't have any legal right to get those documents, but I do see you have the practical ability to do it. And I do have jurisdiction over you. I have jurisdiction over you, the party to the litigation. And I'm telling you right now that if you don't manage to produce these documents from your parent, even though I know you have the practical ability to do it, it's really going to affect my view of this case. I'm really going to have a good idea about what those documents might have shown. So that's another way you have documents that are very important and there's a way to do it even when there's a lack of any legal right to do it.

**DIVYAM AGARWAL:** This is quite interesting because in India, whatever document production exercise, even for third parties, not many people use it, but there is a provision in the Indian Arbitration Act, Section 27, which permits the parties to take aid of the Court in furtherance of the arbitration. But that's like once you are into the arbitration and taking your example forward that you would want the parent to produce some document, parent is not

party to the arbitration then you can use 27 to approach Court, in which jurisdiction the parent is. But what you mention is a situation where it's like a pre arbitration. Actually the dispute has not culminated into an arbitration at all right now and you are taking aid of the Court in producing something.

**DAVID ELSBERG:** With 1782, you could do that. You could say I'm contemplating. The other situation I was talking about is, obviously, you're already in an arbitration, and you want the documents of an affiliate and this happens a lot where you say, I need these documents, and the entity in the arbitration says, oh, I'm sorry that's held by my affiliate in Zurich. Can't get those for you.

**VIVEK TATA:** So I think we've heard a lot about discovery. And before we get back into what happens during the arbitration, I wanted to return to something that Anurag had brought up in terms of contract drafting. Right. So you're at the very, very initial stages and maybe the internal team is drafting a contract. And what are some of the things they need to be thinking about when they're putting that contract together, even going to elements like which party is signing the contract. So before we, I have some questions on that for the panel. But before we go to those, does anyone have any other risks or concerns that they have with international arbitration that you'd like the panel to address? No one?

**AUDIENCE 3:** [UNCLEAR] We've seen in that particular case, there were subsidiary agreements which tied to the principal agreement. But what happens and I would like the panel to discuss this also, what happens when there is an assignment or a transfer that happens within companies belonging to the same Group of Companies that then, later on can say that we don't have agreements tying us to the principal agreement and therefore, we're not parties. And that leads to multiplicity of proceedings, because they then shift the blame to the other entity. For example, A entity says, we've transferred it to B, B says, no, now we've transferred it to C. They have some agreement. But now, when you try to add them as parties that could lead to multiplicity. And they say this is not the right, or we are not the right party. And we have not been part of the arbitration because you not made us party when invoking the arbitration. So now I would...I have question.

**VIVEK TATA:** When we're answering, I think also it'd be very helpful if there's things that people can do, even at the drafting stage, too, to avoid.

**DIVYAM AGARWAL:** Yeah. So exactly the point I was about to make, that if the arbitration clause and the underlying contract is worded in such a way that it binds down any assignees

as well then in that case by virtue of that assignment, they have stepped into the shoes of the party concerned. So then they cannot escape the obligations of the contract, which would also include the dispute resolution mechanism. So if, let's say, taking your example forward of A, assigning it to B, B assigning into C. In that case, if suppose a dispute arises and you're able to establish that assignment of the entire contract, including that arbitration clause, has happened then you can very well go after the C, on that ground itself that assignment has happened, and you are now the necessary party for all practical purposes, However, let me nuance your example itself, what if that the real asset against which you have to go, let's say the subject matter, continues to be with Party A, and the assignment actually happened to defeat that arbitration process itself? So in that case you can very well argue that Party A, which is the party who's holding the underlying subject matter or the relevant asset for the arbitration, must also be made a party to the proceeding, dehors the fact that they have assigned the rights under the contract to C.

**AUDIENCE 3:** Thank you.

**AUDIENCE 4:** [UNCLEAR] I think that would be relevant. One of the relevant things as far as when we go for production of documents. What is your take on that?

**DAVID ELSBERG:** The way that, in my experience, Courts have dealt with that is through protective orders, confidentiality orders that have tiers. So, for example, if it is super, super confidential trademark patent type things, you may have a confidentiality order that says this is going to be stamped Attorney's eyes only. And if it's super sensitive the only way that you can view it, the other side can view it is they do not get a copy of it, they have to go into a room where the documents are located. You cannot bring a phone or any other instrument that has a camera in it. You can sit there in the room with a monitor from the other side and those people are also bound not to say anything to anybody, not tell their client what's in it. It's only outside Counsel and only on a basis that you can view it, not take it.

**AUDIENCE 4:** So we are looking at a very restricted access. That's what you are saying?

**DAVID ELSBERG:** Yes. And there are gradations of it. Some documents you can just stamp "outside Counsel's eyes only". And that would be for something less sensitive than, say the recipe for Coca Cola.

**AUDIENCE 4:** Thank you.

**DAVID ELSBERG:** And just back to the point. There was a question about, how do you bind entities. This, for anybody who is writing a contract that might end up being interpreted in the US, please remember this phrase 'present and future', 'present and future'. This is a big deal that comes up and people do not think about this. In the United States, there are jurisdictions, including New York. If you have a contract and this contract, and the contract says, this contract, which includes an arbitration clause is binding on X company and all of its affiliates, subsidiaries and so on, partners, just the whole list of things. There are jurisdictions like New York, which say that sentence which refers to binding all of these related entities, it only binds the affiliates and other entities that were in existence at the time the contract was written. If one of the entities creates a new subsidiary the day after the contract is signed, a year later, an affiliate is created. The assets that you care about are transferred from one affiliate that existed during the time of the contract into an affiliate that did not. You can have all sorts of problems. And this is a trap. This is something that people fall into all the time. Because people look at the paragraph, this is binding on affiliate subsidiaries and so on and the natural reflex is to think, well, of course, that's going to apply going forward. And in some jurisdictions in the United States, that's true. In other jurisdictions in the United States, there's no automatic rule. And you end up getting into a battle about did the parties actually intend for future created subs or affiliates to be included. And as I mentioned in other jurisdictions, there's an automatic rule if you didn't include present and future, you're going to be out of luck. So just adding those words or you could say the opposite. Present and future are excluded. If you don't do that you could end up with a big fight, as a sort of side litigation, along with the major subject matter of the litigation.

**VIVEK TATA:** And I think on the subject of drafting these terms and third parties to your question about consolidation, I think the flip side of that or one related issue is on third party rights to enforcement and also enforcing against third parties. And so we've had a situation where a third party tried to intervene on the basis that it was getting the benefit of some of the arbitration contract. And so I think when you're talking about contract drafting clearly delineating the rights of third parties not only with respect to the subject matter of the contract but also with respect to the arbitration clause itself can be really critical. So what are some of the other issues that I think... go ahead.

**AUDIENCE 5:** [UNCLEAR] specially international arbitrations, where they are multi-party arbitration, agreements, where probably there are A , B, C, D parties and the dispute is only between A and C, while B and D are as such, not disputing parties. So how do you de-risk B and C being unnecessarily dragged to such a litigation or arbitration between A and C or vice versa

or they wanting to join and you don't want, A and C don't want them to be on the board or not. So any comments on this?

**DIVYAM AGARWAL:** So, if, I'll break your question into two parts. The first is with respect to if you don't want them to join but limit their involvement, so what we use is as and it's a very common phrase in India, necessary and a proper party. So you can always delineate them from the necessity part of it. You're not seeking claim against them. They just made a proper party to ensure that the requirements of the arbitration clause and the contract are honoured. So when you confine your reliefs against let's say the party C, and B and D are just being added as a party because that's the requirement of the clause then that takes care of the position. The problem happens is with your second point where they want to join in the proceedings and you don't want them to be there and a situation arises where they also claim a right which is like trickling down from their parent. Let's say if C is the parent and B and D would want the same pie. That's one of the issues which ChloroControl had dealt with, which is now before the Constitution Bench of India and Cox & Kings. They are going to discuss that aspect, but essentially the objective was that if they are able to demonstrate that they are affected by the subject matter if they are able to in your example, A and C are not able to delineate from B and D when it comes to the subject matter, then they would be made as a party to the proceeding. Else you can only restrict the proceedings between A and C if you are able to demonstrate that that subject matter while the overarching agreement may have their involvement. But the subject matter is not something which is relevant for B and D and then you'll be able to do the delineation.

**AUDIENCE 5:** The general problem, which is there, multiple agreements, is that suppose A is the Claimant, A Claimant, and C is the Respondent. A joins them as a proper party. But C, then, it being a party Respondent files a counter claim against D and B, which were otherwise joined by A, which is a Claimant as a proper party, and therefore it becomes a multi- party, three way four way, it can just multiply, that is actually some risk which you really run in international arbitrations, because then the question of jurisdiction, seat, everything comes in.

**DIVYAM AGARWAL:** Which is why the drafting of the clause gains the most importance.

**AUDIENCE 5:** So you generally don't, in an arbitration clause, you generally don't give one Arbitrator per party. It's a composite of a particular group who can then appoint and that also lacks very specific, having stated in as many words that this is the group which can appoint collectively one Arbitrator. So it's all, I mean in drafting if you can resolve anything to that extent.

**ANURAG SHARMA:** Just to add to what you are saying. I mean I don't have a solution for this, but see the other way around also might be equally tricky situation where you have multiple arbitrations, which are aggregating the same set of facts right on the same assets and that is what where the consolidation of arbitration proceedings. Much is being said about it. Much is being written about it. That whether you can do many rules, ICC Rules and other rules have brought in the concept of consolidation of arbitration. So those rules are there. But still, there are very strong questions about whether the parties actually consented to consolidation of arbitration. Although once we are chosen the rules it's implied that you have consented, but then there is also top of consolidation across in different jurisdictions, following different rules. What do you do with that? So that is a very tricky situation. But ultimately, we have also seen situations where there have been different awards by two different Arbitral Tribunals on the same set of facts. And then parties have found it difficult to enforce their arbitral awards. And that is why this whole process of I mean, I'll leave it to David to add, but that is something, that's a new area. One situation is where you don't want them to join, but the other situation is you might have multiple arbitrations on the same set of facts, and then you are stuck with how to enforce if there are contradictory awards.

**DAVID ELSBERG:** So one way if I understand that the situation you're describing. One way to protect against it is have a clause in the agreement that says there shall not be consolidation of arbitrations, absent written consent by all parties that would be involved in the consolidated arbitration. And a lot of the arbitration firms, their rules, say it's the party's contract that governs. So there are default rules that will allow the institution to decide the question of consolidation. But if the parties had buried that, that will be respected. Another thing that you could think about doing is everyone knows a problem in arbitration can be once you're dragged into the arbitration, it's very rare that a panel is going to grant a motion to dismiss at the outset. So your client could say, what the hell am I doing here, right? I have a statute of limitations defence. And not only that, I'm the wrong party, right? The name of my company is Acme Inc. But really they should be suing Acme Corp. which is a completely different company. But a lot of Arbitrators, you got to sit, you go through discovery, you go all the way through the end, and then they issue an award. Not great for your client who had to sit through all of that. One thing you could think about doing is in the arbitration clause include a mechanism that allows for early disposition at the threshold for certain types of motions. And write it in a way so that it's clear to the Arbitrators. Yes, we really mean it. We're not just saying you can do it, but written in a way so that you eliminate any, the usual presumption that threshold motions will not be granted. One type of thing you could put on the list is, this is the wrong party, right? That there's a claim, but this entity is the wrong entity. That is something

that should be subject to a threshold motion. And you could also add to that that the motion should be decided in the same way or under the same rules, that it would be decided in the relevant Court. So that if you're right, as a matter of law, the Arbitrators have a little bit less flexibility in saying yeah I get it, but I'd rather that everything just slides through to the end of the hearing.

**VIVEK TATA:** Sticking for the moment with contract drafting. We've talked about a couple of different things third parties and some enforcement risks. Anurag I'll throw this to you. But what about things like fee shifting and rights of appeal? Are those things that your team is thinking about when they're drafting contracts? Should they be?

**ANURAG SHARMA:** [UNCLEAR] take injunctive relief or not, whether you provide specifically for certain things. Sometimes you leave an exception for specific performance, but things like that. Obviously, the thing is the problem comes from the fact that when you are drafting an arbitration clause or any contract for that matter it's a corporate lawyer who's doing it. It's the in- house lawyer who's doing it. They are not looking at an eventual dispute, right? So 99.9%, maybe even more than that contracts would not go to arbitration. Arbitration clause will be a dormant clause for 99.99% of maybe whatever percentage of contracts. So people don't pay attention to arbitration clause. It's not on top of the agenda for the business guy who's negotiating the contract. The corporate lawyer probably sees other things like caps, liability and other issues as more core than the actual arbitration clause, and because they haven't had that much experience, sometimes in terms of arbitration, so they adopt basically a template- based approach. The contract was initially used for something. At that time input was taken from the arbitration law front. Now that template is being used. You have set negotiation positions in terms of okay, we'll keep venue neutral. We'll keep jurisdiction neutral. Okay, we'll go for Singapore arbitration, whatever. And you are not thinking those things through because every business deal is different. The way you are going to get into, somewhere it is more likely that you'll face a claim, somewhere it is more likely that you have to make a claim. And things, you have to take different calls for those business deeds. So I think thinking through the arbitration clause, understanding the business, what is going to happen in the transaction, where the assets will be, whether you are likely to be a Respondent or a Claimant also matters. So what position you take, I mean on an arbitration clause. But I don't think those aspects are thought through many a times. And that is why during drafting phase, you have to pay attention to everything.

**DIVYAM AGARWAL:** On the point which Anurag made, on securing assets, a lot of times what we've seen is the draftsmen, they haven't gone through the fact that where are the assets

actually situated. Like, for instance as an example if it's a foreign party entering into a contract with an Indian party and the assets are in India then it will be beneficial for that contract to have a specific mention that the interim measures of protection provided under the Indian Arbitration Act is available to be exercised by the party if it so requires, because we have a provision called Section-9, which allows you to approach the Indian Court to secure that asset during the pendency of the proceedings and it becomes a relevant exercise just to ensure that you don't end up with a paper decree.

**VIVEK TATA:** So let's say now we're past the contract drafting phase. The arbitration is now in process and you discover issues arising in the arbitration. I'll give you one example. You discover or you have reason to believe that one of the Arbitrators has a bias or a conflict. What are some of the things that you can do at that time or what should you be thinking about and where should you be seeking relief? Let's start with that example.

**DIVYAM AGARWAL:** The Indian Arbitration Act has two specific set of schedules, which prescribes, which are somewhat overlapping, but if you fall under one schedule, it's an automatic disqualification, and if you are in the second set of schedule, then it's not on a disqualification in itself, but it becomes a matter for disclosure by the Arbitrator itself. And the provisions prescribed under the Arbitration Act are quite robust. They permit the parties to approach the Tribunal, they can approach the Court, they can challenge the appointment on the ground of inherent bias if they are able to demonstrate that. If they are falling in any of the schedules. because sometimes what happens is that there can be a situation where you realize that the disclosure made by the Arbitrator actually turns out to be incorrect. And they automatically get hit by a particular schedule, which results in their disqualification. So steps can be taken. We have Section 12, 14, which prescribes that you can go after the Arbitrator if you are able to demonstrate that you are falling in that schedule.

**VIVEK TATA:** David anything to add from US?

**DAVID ELSBERG:** Similar from the US.

**ANURAG SHARMA:** I think I'll just, because you talked about that one. Now the arbitration has started, right? We are talking about that phase and see the buyers phase, obviously, what Divyam says, as an in- house Counsel, what the challenge that we face once the arbitration has started, I would say, is to keep the energy levels high, right? Initially, when the arbitration starts, everybody from business, even the external law firm are driving the process. Everybody is interested. The energy levels are high. But once the arbitration starts, I think a fatigue sets

in and then it becomes just the in- house Counsels, may be more or less. The business is more or less, they have accepted what it is, okay, they have made their provisions and they are now busy, they are now focusing back on the main business and the law firms, obviously, they have multiple cases. But as an in- house Counsel, what I feel is what you need to pay attention to while the arbitration is going along is to keep the energy levels high, keep the focus there. Avoid a fatigue being set in and pay attention to the details, right? For example, is it taking too long? Do we have the expert witnesses that we need? Do we have them? Are we making enough use? I mean, are filings being delayed unnecessarily? So that is what I will say that as an in-house Counsel, during arbitration, to keep it, to keep the energy levels high, to keep things moving.

**DIVYAM AGARWAL:** Just one point. It's also sometimes what happens is that it's also about perception. So a client or a business person who is intrinsically involved and when they have as Anurag pointed they are charged up. They have that energy. Any and every reaction of the Tribunal will be read by them to mean that they are acting in a biased manner. So that's where the lawyer must step in and actually educate the client that when there is a bias and when there is something which is just like human behaviour and not something which will directly hint at there being a bias under any of the schedules.

**VIVEK TATA:** I think just one thing, I'll add. It's not just I think the US perspective, but generally, but certainly in the US is that Courts will expect that you act if there is a bias early. In other words, one of the biggest risks is that there is a bias whether or not it's something that is listed in the schedule. If there's some real reason for concern, you have to pursue it and you cannot wait. Because I think if you wait till after the arbitration, the Court, any review in Court will just say, look, you waived your right to act on this and to that end, I think one thing that we've seen is you have to continue your diligence into the Arbitrators as the arbitration is going, because Arbitrators can gain disqualifications as the arbitration is happening and to Divyam's point, they're supposed to disclose it. But if they fail to do so, again, that could be a waiver, because the Courts will expect you to be paying attention an following up doing your investigation things like that.

**ANURAG SHARMA:** I have just one question because when you go raise a question about an Arbitrator's bias, right. aren't you just making him more biased if you fail, right? How do you deal with that situation? Because maybe he has a little bias. Or maybe we are reading him wrong. But once we bring in those proceedings, then we fail then obviously the bias is going to become stronger. Right?

**DAVID ELSBERG:** Yeah. So a couple of things. One, I agree with you. If you shoot at the King, you'd better kill him. Right? The only other thing that I could say, is, or I guess two things. One, the manner in which you do it, right? So you can write something in a respectful way that also is preserving your right to argue it later. None of these are great solutions, but the only other thing that I would add is I think sometimes there is a perception that when a party files a motion to disqualify it may have the opposite effect and what I mean by that is, I think sometimes there is a perception that now this Arbitrator is going to bend over backwards to make sure that this Arbitrator does not do anything that looks like the Arbitrator is favouring the other side. So, if there's a discovery dispute and it's a close call, the Arbitrator that's been accused of bias, maybe the Arbitrator thinks you know what, this is a close call. I've already been accused of bias. I'm not going to give them more ammunition to say that I am biased. I don't know, does this really happen? That's getting into the mind of an Arbitrator. But I've heard discussion of it. Maybe it happens. Maybe it doesn't. Maybe the Arbitrator bends over backwards for you through the whole proceeding, and then they rule against you. I don't know. But at least there is this possible psychological effect in the other direction.

**VIVEK TATA:** But I think it has to be sort of you have to know what the risks are and have to advise the client, of course. And I think also to add to David's point, it also could educate the other members of the panel. So if you have a wing Arbitrator who has a potential bias and you write a motion to disqualify it or you raise the issue, it might influence the way the Chair is thinking about that Arbitrator and their sort of contributions.

**AUDIENCE 6:** [UNCLEAR] you've spoken about the drafting, you've spoken about discovery. I'm an in house Counsel. One of my greatest concerns in an international arbitration is that I'm going to be exposed to a lot more costs than what is in my local country when I even draft the clause and agree to a neutral jurisdiction outside India. So what would you suggest would be some kind of a cost control? What kind of Arbitrators should we go for? What kind of a law firm should we go for? How do we control those costs in an international arbitration? Because for me, that is the biggest risk that I'm spending far more than what I'm going to get out of that arbitration.

**DAVID ELSBERG:** There's a lot that you can do, and a lot of it has to do with the way that the arbitration clause is drafted. So maybe the most important one is including specifications about what types of discovery will and will not be allowed because the United States is crazy if you get an American lawyer, their idea of what discovery should be is the ocean. Find everything in the ocean that's what's relevant. And that is usually the biggest driver of the costs in an arbitration. So including a clause that is very specific about the scope of the arbitration

can dramatically reduce the costs. Another type of clause that can reduce the cost dramatically, this is not appropriate for all cases, but for many contracts you can include a clause that limits the time frame. So it says from the date the arbitration is commenced through the hearing, the merit's hearing, all of that has to take place within 90 days. 120 days. Whatever time frame you want the way that it works, whether it should or not is the more time there is to litigate the more litigation there will be. It's very rare that a law firm says the discovery period is three months, but I finished it in a week. Right? The work tends to fill the amount of time. Another thing is you can say that we're going to have one Arbitrator, we're not going to have three. So now your Arbitrator costs have gone down. You can say that for discovery disputes or all disputes other than the merits hearing, if you have a panel of three, only one of the three Arbitrators is going to be hearing the disputes. You can be careful about the location of the hearing itself. So that you're not having to ship people off on an airplane and stay in hotels once you get to the arbitration. You can also include in an arbitration clause that video is going to be fine. If you have far flung witnesses that it can be expensive flying them in, putting them up in hotels people have been using especially since Covid people have been using video that can dramatically cut down. Another thing you can do is you can cut out certain types of written submissions. You can just say, look, we are not going, there will be no merits briefing, you could even get rid of it you want to a prehearing brief. You can say there'll be no post hearing brief. You can get rid of as much of that as you want to get rid of. So those are some of the types of things that can be done. Yes.

**AUDIENCE 6:** Also, I feel, what do you think is the impact of cost, determining deciding the cost that will be paid to the Arbitrator while addressing bias? Because I have often seen that a lot of times once the arbitration starts, then the fees of the Arbitrator becomes an issue. Maybe at the time of maybe filing of a counter claim. So then how much the Arbitrator will additionally charge for the counterclaim, et cetera. And then when you bring it up before an Arbitrator, then there is a slight I won't say bias, but a slight leaning towards an irritation towards the side that is fighting for the costs of the Arbitrator. How do you propose that? My question is basically, how do you propose you deal with such a scenario?

**DAVID ELSBERG:** I guess, one way would be to have an agreement upfront. I'm not sure if that's addressing your question, but you could have a schedule up front that says, here's what it's going to cost if there is a counter claim or here's what it's going to cost if there's a cross claim. Is that addressing your question or is that?

**AUDIENCE 6:** Yeah. To a large extent, because the Indian Arbitration Act provides for that as well, that you can opt in for the schedule of fees of the Indian, under the Indian Arbitration

Act, but often parties negate to do that. So in that scenario, how do you propose that such a scenario we address?

**DAVID ELSBERG:** I'm just making this up sitting here. But I suppose another thing you could do is you could have an arbitration clause that says in the event, either party has an issue with cost, the way that will be presented is there'll be an intermediary, who will receive, you can just designate anybody that both sides trust, that person will receive the submission from either party. It will then be presented to the Arbitrator without the Arbitrator knowing which side is the one that is making the argument about fees.

**DIVYAM AGARWAL:** Just to address both the questions. Another aspect is and which is often overlooked because that's the perception in the market. Have an institutional arbitration as the governing provision. Because three things will happen. One, that your fee schedule is capped versus the claim you have made. Second, Arbitrators are penalized if they don't follow the strict timeline prescribed by the institution. If they unnecessarily drag because what often happens in ad hoc Arbitration is that the Arbitral Tribunal is charging per session per hearing and it just goes on ad nauseam. So that's point number two and point number three is that when you have these rules in place, they also ensure that whoever is a losing party is made to pay the cost for the winning party. So you are able to recover those costs ultimately. The cost are capped and you are able to also ensure that it's been done in an effectively timely manner.

**AUDIENCE 7:** Just a [UNCLEAR] question to what ma'am has commented upon is in US, is there a process because under Indian Arbitration Act, under Section 12, there's a mandatory requirement of disclosure which Arbitrator will have to make. So is there a process in US which is followed where you make discoveries with respect to the independence or biasness or prospective biasness, which could arise prior to appointment or some process in those lines to actually allay the fears of biasness.

**DAVID ELSBERG:** Yes. So the major arbitration institutions in the United States have rules and a procedure. And at the very beginning of the arbitration when each side submits a list say of the Arbitrators that they would like to consider the very first thing you do is each side will designate, here the Arbitrators were interested in. You receive generally a packet of information from the Arbitrator, arbitration provider, and it includes a standard checklist, a standard form, and there'll be a list of questions. So for example, has the Arbitrator acted as a lawyer for any of the parties within the past ten years? Is there any family relationship between the Arbitrator and any of either the parties or the lawyers? And it's a pretty good checklist. It goes on for usually over a page. And if the answer to any of the questions is Yes, then the

Arbitrator candidate is supposed to give a short essay answer that explains what is the nature of this potential conflict. And an important thing on top of that, because it does not happen as often as I sometimes think it would, those arbitration institutions will allow you to submit additional questions. So, there's the form questions but you may have another ten questions that you like to ask or that in this particular situation you want to ask. And I've never had an arbitration form or provider say, no, we're not going to give that to the Arbitrators. The Arbitrators tend to, tend to answer those questions.

**VIVEK TATA:** Just one addition to that is, David was talking about arbitration institutions in the United States like the AAA and so forth, but it's not automatic. There isn't, to my knowledge a statute that requires that sort of disclosure specifically and so we actually we have had situations including recently where we have had to pursue the Arbitrator and say can you please disclose the following thing. So you have to be proactive, especially in the ad hoc context. So, I think, now turning to, we have one more question.

**AUDIENCE 7:** If I may add one more point that may be open, one more risk that may be open to discussion, I think, one other issue that is often faced is with respect to the choice of laws, choice of forum. So like, for example, in India you have the seat, the place, etc. In the UK you have the governing law of the contract, governing law of the agreement, you have the seat of the arbitration. In US, choice of law is in itself, a very wide field. What's your opinion upon that? How would you propose that, we de-risk that?

**DAVID ELSBERG:** You have to be super, super clear. And not just super clear consult a lawyer in that jurisdiction, because there are jurisdictions that have what I call magic words. There was a decision, this is an example from New York, where I practice. There was a decision called Diamond Waterproofing, that didn't get a lot of publicity not a lot of people paid attention to it. But what Diamond Waterproofing said is, if you have an arbitration, you have a provision in an arbitration clause and that arbitration clause says, this agreement shall be governed and construed by the laws of the State of New York without regard to conflicts of laws, principles that phrase that says disagreement shall be governed and construed in accordance with the laws of the State of New York, that has a different meaning from a phrase that says, 'this agreement shall be governed, construed, and enforced in accordance with the laws of the State of New York'. Adding or taking out that word and enforced created a very, very important consequence where if you included the word, phrase 'and enforced', that meant that New York State's arbitration law will control and not the Federal Arbitration Act and there are differences between the two. And it is not always the case that the Federal Arbitration Act is going to trump or displace New York law. It only trumps when the Courts

determine there's an actual conflict between the two systems. So, you need to know, any normal person is not going to think to themselves, oh, well, if I say governed and construed, but I don't use enforced there's going to be this divergence in results. So, if you are in touch with someone who's in the jurisdiction that you care about, they should know that the magic language that you need to put in so that there aren't any, there aren't any surprises. And in terms of levels of specificity, it's good not only to know the magic words, that need to be used in that jurisdiction but also, it's generally a good idea to be clear about the law applicable to arbitration because there can be confusion sometimes when all you have is a general choice of law provision that says disagreement will be governed, construed. You can say this agreement will be governed by New York Law or whatever it is. And then just to avoid any question you can say the arbitration, or the arbitration rules applicable to the arbitration shall be whatever it is you want to, whatever it is it is that you want to designate.

**VIVEK TATA:** Do you have anything to add?

**DIVYAM AGARWAL:** Almost, David has pointed out, but essentially and we in India, know that there is governing law, substantive law, law of the seat, the Curial law. So it's advisable not to have a conflicting laws. Too many laws are going to create a mess in any case. So, if there is an underlying law under the contract, unless and until you have an exceptional reason to do so, try having your substantive law, as well as the law of the seat marry with the governing law.

**AUDIENCE 8:** Just here. Just another question. Whatever the law you mentioned in the agreement will obviously govern the law of the contract or the arbitration, and possibly the Curial law as well. But how far in agreement you find those magical words that x law, x countries or x proper law jurisdictions law would always cover the enforcement law, especially when it's a foreign award? So for example new York seated Award, when comes to India for enforcement, it would be then the Indian Law, which would take over. But how would then you see under an agreement if you provide that still the New York Law would be applicable for the enforcement of a foreign award in India. Whether any thoughts on that?

**DAVID ELSBERG:** I don't know. I don't know if that works or, it's a great question. I don't know if a foreign Court would respect enforcement mechanisms. And a reason I say I don't know is, it's a great question that it goes to what are the limits of a contract. So when you're agreeing to the Rules of Arbitration, you're creating your own Tribunal and you and your counterparty can decide here's how we want it. But now we're getting to, by contract trying to control what a Court will do, right? Because enforcement has to do with the power of a Court and the procedures that a Court follows to enforce within its jurisdiction. There's a somewhat

similar issue that has come up in the United States, which is, what if parties want to alter the standard of review that a Court will apply to an arbitration award. Let's say the default is it's going to be very deferential. You can only vacate it for this or that reason. Sometimes Courts say I don't care what you guys contracted to. I'm a Court. I am not a party to your arbitration. My powers and obligations come from the Legislature and from common law. So my answer is I don't know, but I have a guess which isn't worth anything.

**DIVYAM AGARWAL:** But in India, I think that position is quite settled because of the fact that and I'll try to keep it short, we are the only one sitting in between you and lunch. The India position is more governed by, there is a decision of BALCO which clearly stated that Curial law or the law of the seat is the centre of gravity. So if there is any kind of a conflict, the seat will prevail over any other governing law or the substantive law. So that's somewhat been taken care of in India. But yeah, it's obviously important.

**AUDIENCE:** [INAUDIBLE]

**DIVYAM AGARWAL:** So enforcement is more governed by the fact that, where you are actually enforcing the assets of the like in India, it's there that if the assets of a defaulting party is situated across India, you can file multiple proceedings and obtain simultaneous relief so long as your award is satisfied.

**VIVEK TATA:** Well, I think Divyam, this raises something I think you had wanted to mention, which is just interaction between arbitration and public policy. So, you have an award, but there's a conflict with public policy generally. And how do you see Indian Courts dealing with that?

**DIVYAM AGARWAL:** Again, that's a very important topic on de- risking because every country has its own meaning of public policy, how they perceive it, how they react to it. India, they raised this decision of Vedanta, where Supreme Court has stated that it has to be viewed in a very narrow compass. You cannot elaborate it to include anything and everything. Because it's not sort of a defined term. People used to say anything which they would want the challenges to maintain, they'll just simply say, public policy. So now it's a very narrow, restrictive meaning, which actually goes to the heart of the controversy. And it actually shocks the conscience of the provision itself, is what is to be considered. Nothing further.

**AUDIENCE 8:** Just to answer David's query with respect to whether you can limit a review. So there's a judgment of Supreme Court of India, ***Vijay Karia***, where the Supreme Court has

stated that certain kind of reviews, which are in the nature of public policy, are mandatory and any party could not contract out of it.

**DAVID ELSBERG:** It's very interesting. In the US it's the same . And to add to your point, it's also, Courts have also made clear that there are only narrow circumstances under which you can invoke public policy to avoid exactly the situation you described, where any Judge can have their own sense of what should be public policy. In the US, it has to be tied to some existing body of law. So if you can point to a statute, if you can point to a regulation, if you can point to some principle of existing law, that's the restraint on a Judge. So a Judge can't just say this makes Mcwheezy, I'm going to say public policy.

**DIVYAM AGARWAL:** Just to, another interesting point I must share because he mentioned about ***Vijay Karia***, interestingly in India, the position with respect to domestic award is that you cannot seek a modification of the award. Whatever the Arbitrators have decided, either you are satisfied or you accept it. You cannot modify it. There is a decision called [UNCLEAR]. Where what Supreme Court did they exercise their jurisdiction under Article 142 of the Constitution to modify the award. But in Vijay Karia's case for a foreign Arbitral award, they said that you cannot even exercise the inherent jurisdiction of Supreme Court to modify a foreign award. That's just not permissible. So it's an interesting...

**VIVEK TATA:** That is a result of sort of limitations in the New York Convention, or is that just matter of...?

**DIVYAM AGARWAL:** New York Convention and the fact is that unlike a domestic award, which is sort of treated as a decree of the Court, foreign award, their view was that it has been decided by a foreign Tribunal you cannot interfere even at the Supreme Court level in order to give a different meaning to it. Either you can have it set aside, partially set aside, which is another issue, which is vogue right now of severability. Or you can straightaway have the Arbitrator Award enforced.

**VIVEK TATA:** So you mentioned severability. I think maybe given that we're very close to time, maybe if you just want to say a few words on that, I know you'd want to discuss that later.

**DIVYAM AGARWAL:** Yeah. So severability, it has become an interesting topic because recently Delhi High Court has passed a decision called ***National Highway Authorities of India versus Trichy Construction***. In that what they have decided is that you can sever a

bad part of the award in order to and you don't need to actually set aside the entire award even if they have a particular issue. And I did a piece on it that you can actually have a similar position for enforcement of foreign Arbitral awards, where you can only enforce the foreign award to the extent that it is compliant with the Indian Law, and if there is any particular provision or a claim of the foreign award which, let's say is opposed to public policy of India then you sever that particular portion and only proceed with enforcing the rest of the award, which is not opposed to the policy.

**VIVEK TATA:** And I think in the US, one of the things that we have seen when we're talking about awards is asking the Arbitrators to if they are going to issue multiple parts of an award to do so and be very clear that they are partial final awards. And that's very important for enforceability because otherwise Courts will just not take it. So with that any questions from the audience before we break for lunch? No? Thank you so much. Thank you.

**~~~END OF SESSION 3~~~**