INDIA ADR WEEK DAY 4 – DELHI

SESSION 5

PANEL DISCUSSION ON 'REFORMS IN INDIAN ARBITRATION LAW: WHAT TO EXPECT AND GLOBAL BEST PRACTICES?'

5:00 PM To 6:00 PM

Speakers:

Shreya Aren, International Arbitration Associate, Debevoise & Plimpton, London; Co-Chair, Steering Committee, Young MCIA

Hyunah Park, Partner, Yulchon LLC, Seoul

Shouvik Bhattacharya, Senior Associate, King & Spalding, London

Arush Khanna, Partner, Numen Law Offices, New Delhi

Mayank Mishra, Partner, Indus Law, New Delhi

Manmeet Singh, Partner, Saraf & Partners, New Delhi

Dharshini Prasad, Counsellor at Willkie Farr & Gallagher, London

Aditya Jalan

SHREYA AREN: Good evening, everyone welcome to the official young part of today's event the Young MCIA part of the program. It's a real pleasure to welcome you all here just to give you a brief background about Young MCIA. We are the young arm of the MCIA and as it says on the podium, it's about the next generation of arbitration in India. And we have got a great packed program for you today, but to start off with some opening remarks, I'm going to invite Gauhar Mirza from Cyril Amarchand Mangaldas.

GAUHAR MIRZA: Thank you hello and good evening, everyone Shreya has already given the welcome speed, so I will quickly come to the point firstly again. Welcome to this session. It's an amazing session. Of course. Two parts. First is, of course, a panel discussion where we will discuss reforms in the Indian arbitration law, what to expect in the global best practices.

Obviously, we have been speaking about this, but this panel will, of course, have a very different view the panellists. I will quickly give an introduction to the panellist. Hyunh Park He's a partner at Yulchon LLC, Seoul, Shouvik, our friend from London, Arush Khanna, Mayank Mishra and Manmeet Singh from Saraf and Partners for the second session. Of course, it's a debate which is around the confidentiality is the biggest roadblock to legitimacy of arbitrary process. So there'll be a debate and the debate will be between Dharshini Prasad who's a counsellor at Willkie Farr & Gallagher, London, Aditya Jalan, who's also a young MCIA member and Rebecca James. So all of these people are going to keep you entertained for the next 2 hours. And of course, we have Mr. Ritin Rai, who needs no introduction. He will be there for the second round of course. So with this I would like Shreya to and Shreya will be moderating the panel first. So Shreya, I think I will be passing on the baton to you and have a good session guys.

SHREYA AREN: Thanks very much Gauhar, for that kind introduction, we're just settling down. And as Gauhar mentioned, the topic for today's panel is about the reform of the Indian arbitration law, which has been announced in recent months. And what we will be doing today is we're going to be talking about what has happened in the last few years in India, so talking about the 2015 amendments, talking about the subsequent amendments that have been made and then we will also be talking about the constitution of the 2023 Expert Committee. We will then be talking about the topics of reform and what we think will be covered in those topics. And then we will have two panellists from other jurisdictions, and unfortunately, Hyunah hasn't been able to join us today because she's got Covid. But we very fortunately got Daniel joining us instead from Singapore, so he will be giving us a Singaporean perspective and then we've got Shouvik, who will be giving us the UK perspective. So what I'll do is each of the panellists is going to give a presentation, and what I'll do is I will introduce them as they start their presentation. So the first panellist that we have today is Arush Khanna, who is an advocate and legal consultant, enrolled with the Bar Council, Delhi. He started his practice in 2012 after graduating from the Symbiosis Law School in Pune, and he's done his Masters from the National Law School of India University, Bangalore. He co- founded Numen Law Offices in 2019, which is a multidisciplinary law firm having its offices at New Delhi and Bombay. He specializes in commercial disputes in arbitration, insolvency, real estate projects and infrastructure. He has advised and represented several Fortune100 multinationals as well as top Indian companies before several Courts and Tribunals across India. So over to you Arush, and you will be talking to us about the amendments in 2015.

ARUSH KHANNA: Well Shreya, at the outset, I'd like to express my gratitude. It's an absolute honour to be sharing the dais with my colleagues and friends and addressing this

gathering at this YMCIA event at the India ADR Week. Before we speak about the amendments that roughly I think the ball got rolling about eight years ago, we must roll back the years and understand the problems that were plaguing the Indian arbitration regime. Now I'll first roll back to 2002, where the infamously famous case of ***Bhatia International***. The ruling was out that said Part 1 was to apply to foreign seated arbitrations as well. A year later, we had yet another infamously famous ruling of ***ONGC versus Saw Pipes***, which read into 34 the ground of patent illegality. And since ***Bhatia*** was good law back then, patent illegality found its way from 34 to 48, thereby creating obstacles in enforcement of foreign awards. Thereafter there were other several red flags as well like delay, excessive interference of Court, independence of Arbitrators, until almost 2012, where we had the famous case of ***Balco***. And a year later of ***Sri Lal Mahal***, where Balco held that Part 1 of the Indian Arbitration Act would not apply to foreign seated arbitrations and the ***Sri Lal Mahal*** case held that patent illegality was not to be construed as a ground to resist enforcement under Section 48. So propelled by these two rulings, I think the lawmakers were compelled almost to bring about certain reforms and for ease of reference and I'm pretty sure that most of the young and the young at heart in this hall right now are aware of it. I'll try to compartmentalize the amendments very briefly into three stages. Pre invocation, post invocation pre award and post award. When we come to the pre invocation stage, the first noteworthy amendment is the stage of reference. Section 8 of the Arbitration Act. Now, before the amendment, the Courts had a wider canvas to probably make even a roving inquiry into tribal issues surrounding the arbitration agreement post the amendments, the canvas was narrowed and a *non obstante* clause was introduced that said that if the Court is of the view that *prima facie*, there is an arbitration agreement, the reference has to be made. Unless the Court finds that an arbitration agreement *prima facie* does not exist, they will refer the matter to arbitration. Then we come to the provision of interim reliefs. I think most of us are aware that before the amendments, parties would go into sleep mode after getting an interim order from the Court and it would be kept in abeyance almost and people would even abandon the prospect of invoking arbitration. That changed after the amendment. There was a timeline circumscribed within which a party has to invoke arbitration after getting the interim relief from the Court. And also there was another noteworthy change to 9, of the Arbitration Act, which says that once the Tribunal is constituted, you are not entitled to move the Court unless you find that the remedy before the Tribunal is not efficacious. So moving the Court was a rare exception, as opposed to being a norm pre amendments. Then we, of course, come to the stage of appointment of Arbitrators. That scope has also narrowed 11(6)(A), which came about and then was removed four years later. But that also said that the Courts would be confined to only see the existence of an arbitration agreement. So the Court who's not considered to be, I mean, the colloquially speaking the Courts were acting as an administrator rather than an adjudicator at the stage of

reference. Now we come to post invocation. I think conflict of interest, independence and impartiality of Arbitrators was a big red flag in our arbitration regime before the amendment and the amendments to 12(1), of the Arbitration Act and the incorporation of Schedules 5, 6 and 7, I think what a real game changer. At this stage. Before accepting appointments, the Arbitrator had to state whether he or she has a relationship with the matter at hand or with any of the parties. There are extensive guidelines laid down in Schedule 5, which give rise to justifiable apprehensions as to the Arbitrator's independence. And of course, Schedule 7, is like a red line. If you fall in those, then you are ineligible for appointment. Even the procedure for challenging an Arbitrator was more robust in that sense. Coming to the conduct of the arbitration we had some noteworthy amendments under 23 and 24 of the Arbitration Act. 23(4) was introduced, wherein pleadings had to be concluded within half a year, from the date the Arbitrators received a notice for appointment, and 24(1), the proviso to 24(1), was made it very clear that exemplary costs could be imposed on parties if they are seeking adjournments, which was absent before the amendment. I think that was noteworthy. What was again, very, almost like the highlight of the amendment was the introduction of 29(A) and 29(B). Because I think one, one major issue was the delay. We were seeing arbitrations going on for years, awards not being enforced years after the award has been passed, so 29(A) made it very categoric in save and accept cases of international commercial arbitrations. A arbitration will have to conclude within a period of one year from the date of completion of pleading. That was a little later in 2015. They said that one year from the day the Arbitrator enters upon reference. So there was a minor change there. I don't entirely agree with that change, but it is what it is for the time being. 29(B), came about which is fast track arbitrations where I think a very important change came about that the concept of orality in our advocacy is too preeminent right now. I think written advocacy has not given a lot of importance. But 29(B) makes oral hearings again, a very rare exception so I thought 29(B) and 29(A), were very, very important amendments. The regime for cost and interest we now have a very robust regime of cost follows event where cost includes things like legal fees, institution fee, administrative fees. It's no longer the traditional concept under 35 of the CPC where nominal cost will be awarded for the asking. There are proper hearings on cost and it's become a very important component of an arbitration and to stall frivolous claims and counter claims in the process. Coming to post award of course, patent illegality was incorporated under 34(2)(A), but not the one which was laid down in ***ONGC***. In fact, they took inspiration from ***Renu Sagar***, a judgment passed almost now, maybe 29, 30 years back, wherein it said that it will not entail a re-appreciation into the merits of the matter. So it is a very *prima facie* view of what is patently illegal. And that's also only in India seated arbitration only in Part 1, 48 you don't have that. Then in enforcement we have now the Pay to Stay concept unlike the earlier the pre amendment, where even if a notice was issued in an application challenging an award that would tantamount to a

stay of the award. Now the Court can impose conditions including the principles incorporated under order of 41, Rule 5, where if an amount has to be, order 41, Rule 5 of the CPC, that is, wherein if any amount is to be awarded that that part of that amount, or the entire amount has to be first made payment to the Court before, as a precursor for getting a stay on the award. So, I mean largely speaking, this is like a bird's eye view of the amendment of I mean, I've tried to keep it as brief as possible, but they have streamlined the process, but we're still work in progress in that sense. We still have important reforms that await us. And I'm sure in the follow up questions we will be diving into those as well. But for the time being, I think that was the first noteworthy amendment almost 20 years after the Act was passed. So a much needed change. And we'll speak about the reforms in the follow ups. Thank you. Shreya.

SHREYA AREN: Thank you. Arush, that was really useful. So, Manmeet, coming to you next and obviously, Arush has given us a really good overall perspective of the changes that were made. So from your perspective, what is the current arbitration regime in India, and why do you think there's been this need for more reform in 2023? And just before you speak, I'll quickly introduce you. So Manmeet is a Senior Partner at Saraf and Partners, having close to two decades of experience and he's also part of the management committee of the firm. He leads a team of partners and associates across the Delhi and Mumbai offices and has a renowned expertise in dispute resolution of the firm, including both arbitration as well as litigation. He's considered a market leader for disputes resolution practice in India, and he has extensive experience in handling complex and high value commercial litigations, arbitrations and insolvency matters. So over to you, Manmeet.

MANMEET SINGH: Sure. Thanks for having me here. Now when looking at the notice inviting comments from stakeholders which was issued by Government of India to get an understanding as to what was in the mind of Government of India. It's very interesting. If you look at point 3, it reads and I quote, 'Device strategy for developing a competitive environment in the arbitration services market.' Now I think these words are indicative of the intent of the Government and I intend to look at the macro picture here. Now we understand that so far arbitration has been looked at in India as being important in the context of improving ease of enforceability of contract and reducing the burden of Court. But if you look at the words used by the Government here, 'device strategy for developing a competitive environment in the arbitration services market for domestic and international parties.' Now what it appears is that the Government is recognizing that time has come to develop India as a platform for arbitration market in a more international global manner. We have the position of law as the two Indian parties today can offer a foreign seat. Now obviously, over the last few years it is a matter of fact that some of the Indian arbitration work where one of the parties may be an

Indian party, has certainly moved offshore. Now, one I think the Government is trying to see how do we retain more of that work onshore. But also, I think we have to aim higher today. We have to look at whether we can become a platform like some of the international global financial centres are and try and attract some of that work to India. And I think that's the biggest case for reform that we have to retain a lot of that work in India and also try and get some of that offshore work to India, to the extent we can develop India as a jurisdiction and offer it as a platform for international arbitration. Now we know and a lot of these statistics are widely known that India is going to be a $10 trillion economy by 2030. There's a lot of excitement nationally about where India's economy is going. Now with that, there'll be a lot of attendant disputes, resolution work and a lot of that will head towards arbitration. Now it would be a travesty if India as a jurisdiction because of its legal issues is not able to retain that work in India. There's a lot of good work which has been done by MCIA and some of the other institutional players. But that needs to be supported by way of enabling legislation. And I think that is what we should expect from this Expert Committee which has been set up. Now there is also this whole thing that we have a large talent pool in India, and we should therefore look to de-clog all possible hindrances which come in the way of liberalizing and making sure that all stakeholders are able to participate in India as an international arbitration platform. To that extent, I feel we should not fear foreign law firms coming in. I think that's only going to help India develop as an international commercial arbitration market. And it would certainly deepen the pool of talent available within India. We have seen globally that human capital, Indian human capital has dominated over the last 15-20 years. And I think it's important that we allow a lot of that to happen in India as well. So that people and companies feel comfortable in having their disputes being arbitrated upon in India as a jurisdiction. And I think what is very important is that we also consider, if we need to have a separate statute, and that's also one of that's part of the terms of reference. Point 10 on the Terms of Reference reads, examine the feasibility of enacting separate laws for domestic arbitration and international arbitration. And I think the Committee should certainly look at examining whether we need a separate statute and there are arguments on both sides of it. But if we are to look at the macro picture and then work backwards, I think perhaps there is more of a case for having a separate statue for international commercial arbitration, then probably not. And we have to realize that arbitration services can be not just, today it is seen as one part of the disputes profession, but it can become an important part, important contributing factor for the economy as well. And I think Government of India is looking at looking at that as well. When you look at some of the international financial institutions, the whole model is that people should come and spend the money they spend on dispute resolution in that city. So, you take a flight from here with one of the Singapore or UK carriers, you land there, stay in a hotel there. A lot of the money that gets spent there should be retained in India, and it'll add to the economy. A $10 trillion

economy will certainly can certainly support a big part of dispute... arbitration can become a big part of the economy. And I think we have to look at dispute resolution as an important contributing factor to the economy. Now, of course there is more and more, there is a case for greater and greater institutionalization of arbitration in India, and I think the Committee is also going to look at some of those issues. We need to have checks and balances in place on all stakeholders, including Arbitrators, to make sure that delays, which are endemic to arbitration despite the introduction of various reforms, don't happen. We need to make sure that the Court process, we have a commercial benches where a Court gets designated as a commercial Court, and a commercial bench but the Judges come and go as the roster changes. So some of these issues must be looked at by the Committee and I'm sure they will be looking at that. So the overarching, the North Star of the Committee should be how do we make India as a jurisdiction where we are able to retain a lot of this work. We have, every year, hundreds of professionals coming and joining, hundreds of students joining the profession every year. To be able to meet their aspirations over the next 10, 15, 20 years, we need to make sure we are deepening this market in India. There is a lot of talk these days of how AI will bring in efficiency, may also take away some of the jobs. Therefore, all the more reason to make sure that this work stays here. And I think what the Committee is going to do will go a long way in determining this issue. Thank you so much.

SHREYA AREN: Thank you Manmeet, and I think particularly relevant for the Young MCIA is point about human capital and talent and how that needs to completely be complemented by the relevant legislative framework. And so we've now heard Mayank, from Arush and Manmeet, who have put forward kind of explained the framework Manmeet gave us the perspective on how it's talking about professional services and development of professional services. So just coming to you and I'll introduce you quickly before I ask you about the question I have asked you to answer. Mayank Mishra has nearly two decades of experience as a dispute resolution lawyer, focusing on commercial disputes and arbitrations. Mayank is at Indus Law. He's acted for and advised various Indian and foreign businesses, investors, public sector enterprises, and financial institutions in a wide variety of commercial disputes. He has extensive experience in commercial arbitrations both domestic and foreign, and he's conducted foreign seated, international commercial arbitrations under various institutional rules in Paris, London, as well as Singapore. He is listed as a recommended lawyer for dispute resolution in the Legal 500 Asia Pacific Guide 2021 and 2022 and the Benchmark Litigation, Asia Pacific Guide lists him as a litigation star. So Mayank, what do you think the Committee is going to be talking about what do you think are the substantive reforms that we should probably expect for them to come up with?

MAYANK MISHRA: So thanks, Shreya and Young MCIA to have for having me here. Now speaking and taking que from what Manmeet, spoke and Arush spoke about what the situation was and what the current scenario is of the arbitration in India, I think there are a few things we need to focus on. And I'm going to talk about basically three things. One is a post award support which the Court needs to give to an award, right? Because at the end of the day when despite the 2015 the 2019 amendments, that, those have expedited the challenge to the award be considered, maybe quickly. But once the award passes the muster of a 34, it only is an executable decree. The next match starts with the execution itself, where we have to lean on Order 21 of the CPC. Now I'm just giving you some statistics, which is like, as of this morning, there are about 51,000 execution petition spending just in Bombay High Court and Delhi High Court. 51,000. Now, trust me I am not making up those numbers. Those numbers are from National Judicial Data Grid.

Now amongst these execution petitions, there would be approximately 10 to 15%, I would say arbitral awards, which have now become executable as decrees. So I think one aspect of the reforms which the Committee must look at, which the Government must look at is to ensure that the person who has got the award in his favour gets to realize the fruits of the award in a realistic time frame and not be lost and get queued up in the stack of execution petitions lying as and before Indian Courts. Now how can we do that? So, a few things which of course we can have your thoughts also on is like whether have a fast- track summary procedure for execution of awards. Because most of them, vast majority of them would be essentially money decrees, money awards. Second, I think if we can have, as Manmeet also suggested and Arush hinted at that, to have maybe dedicated, specialized Courts, changing of roster example, we have experience of even foreign awards, enforcement petitions getting rolled over. Every Judge changes after six months. And then it's a *de novo* hearing. So that's one part of what as in maybe we can have separate Courts, or a fast track process which takes care of that. The second thing which I think which will really aid is to have some kind of default set of rules because vast majority of Indian arbitrations even today, unfortunately for MCIA and others, is not institutional. It is ad hoc. So we need to have some kind of default procedural rules, which will guide those ad hoc arbitrations aimed at simplifying rules of taking evidence, simplifying rules of document production, as in maybe also providing for emergency procedures, expedited procedures on those lines, lines of what rules maybe MCIA has, et cetera. But if that can be added to the Act as a Schedule of default position, of course, subject to party autonomy, parties can choose not to apply that, that will go a long way in removing the ad hoc ism of the ad hoc arbitration. I don't know whether Committee is actually looking. I think there is a particular forum which did recommend some kind of model rule some years back. Third thing I would essentially say that we should and the reform should look at giving some kind of legislative

support to adoption of technology to make arbitrations more cost effective and time efficient. Those things would be very important. These rules, these default rules can incorporate that the default tools can also incorporate maybe certain provisions providing for joinder and consolidation. In an ad hoc, multi-party arbitrations, we do not have the concept of consolidation of arbitration, although they exist in suits. You can consolidate suits, but you cannot consolidate ad hoc arbitrations. So at default rules if they provide for that would also go and aid that process. Of course where common questions of law and fact which arise. Good model can be maybe the Australian Commercial Arbitration Act. I think they provide good ground, good legislative grounds for facilitating maybe a consolidation and joiner of parties, non-signatories. So for me these are three I'll leave it that. Thank you.

SHREYA AREN: Thank you Mayank, and just kind of asking you one follow up. In terms of technology, what do you think is the, what are you contemplating? Are you talking about virtual hearings? Virtual filings? Is that, because it's kind of become the norm anyway. So codifying that or are you thinking about something more extensive?

MAYANK MISHRA: Something more as well, because if arbitrations tend to get maybe document heavy, we could adopt procedures with e-discovery. We do not need to be dependent on that heavy paper and there could be other things like for example, despite the fact that we are having most hearings these days through VC, when it comes to trials, examinations, most parties are still saying that, no, it's not good because maybe the witness is not under sufficient pressure to get rattled or whatever. But yes, so adoption of technology, and once in case of a cross examination, if both parties do not consent to have that cross examination through virtual mode, the Tribunal is left with nothing but to have it necessarily physically. As in there is a debate whether as in some people don't like it or may find it it's not very efficient. That's a debatable question. But yes, something towards that. Second, adoption of technology, as in what I mean is also like may be for low value claims you can use technology or adopt technology to maybe crunch bleedings in a particular format. You don't need to necessarily have pleadings, subjective pleadings drawn by everybody. I'm not talking about all arbitrations, but there are recording in progress which happen with in case of PSUs.

SHREYA AREN: Thank you for that, Mayank. So we've heard now about the Indian perspective and what we can expect to see in the Indian arbitration reform. But what can we then learn from comparative jurisdictions who've also perhaps done similar things in the past or are considering doing similar things now? So we'll turn now to Daniel, who's going to give us a perspective on the Singaporean reform. And we're really fortunate to have you, Daniel, despite all your visa issues. So thank you so much for making it and subbing at short notice.

Daniel just to introduce you quickly before you gave us the Singaporean perspective. You're a Director in Dispute Resolution at Drew and Napier. You practice civil litigation and international arbitration. You handle a wide range of matters, including complex disputes in construction, banking and finance, infrastructure, corporate and commercial disputes. You also act for clients in relation to investigations by various regulatory authorities in Singapore, and you're also an author of Singapore Civil procedure. So, very, very interested to hear what you think and what you think India can learn from what Singapore has done.

DANIEL: Thank you, Shreya, and very happy to be here. Thanks for having me. So in Singapore, the main legislation which governs international arbitration is the International Arbitration Act, which was enacted in 1994. This incorporates the UNCITRAL model law. And over the years the Government has been making steady advances and significant changes to the law to strengthen the international arbitration framework in Singapore. One of the latest amendments was done in 2020 whereby we introduced the default mode of appointment of Arbitrators in multiparty situations. So the Act in Singapore was amended to introduce a default mode whereby Arbitrators will be appointed in multiparty situations where parties agreement does not specify the procedure that would apply for such appointments. So, basically it would be applicable to ad hoc arbitrations as Mayank mentioned earlier. The act previously, before the amendments only provided for the default appointment of three member Tribunal in cases where there are two parties. So now post amendment it clarifies that the default procedure will apply in multiparty situations. These amendments help to aim at the objective of making arbitration more efficient in Singapore, especially when there are situations where parties cannot reach a consensus on the appointment of Arbitrators, and that results in delay. In my view, the amendments that were recently put in place in this regard, bring us in line, bring Singapore in line with the major institutional arbitrations of the world, like the ICC, LCIA, HKIAC. All of these arbitral institutions provide for the rules in this institution, provide for the appointing authority to have the power to select three Arbitrators and three member Tribunal where parties fail to select a co- Arbitrator amongst themselves. Another significant amendment that we made to our Act in 2020, was to recognize expressly that the Arbitral Tribunal and the High Court have the power to enforce obligations of confidentiality by making orders or directions. Before the amendments, this wasn't expressed. Of course, the power is always there. It's just that it wasn't expressed. When the Amendment bill was read in Parliament in Singapore, the Minister stated that this doesn't codify the confidentiality obligations, but it's meant to strengthen the party's ability to enforce the existing obligations. So interestingly I did a little bit of research. I think Hong Kong is one of the few jurisdictions in the world whereby confidentiality is codified. So in Singapore, we are not quite there yet although the amendments do expressly, now make it clear that the Tribunal

and the High Court have the power to do so. Some other amendments which have not come into force yet, but we were considering in Singapore are quite interesting. There was a consultation paper put out in 2019, where the Ministry of Law in Singapore sought comments on whether there should be provisions to allow a party to the arbitrary proceedings to appeal to the Singapore High Court on a question of law arising on an award provided, of course, that parties agree to do so. And the second significant amendment that was being mooted was for parties to agree to waive or limit the annulment grounds under the Model Law or the Arbitration Act. These are interesting changes, of course, if it gets implemented, but there's currently no indication of whether or not Singapore law is going to be developing that way. I'll briefly touch on another area of amendment, which we did in 2017, and that is changes to facilitate third party funding. This was done in 2017, based on observations that third party funding played a major role in institutional arbitration and international arbitration over the last decade. Third party funding involves the funding of a claim by a party who is unconnected to the dispute. The party who is usually the Claimant, uses the funds to cover the cost of, legal cost and the dispute and if the claim succeeds, the funder will usually take a cut of the sum recovered. If the claim fails, too bad, the Claimant doesn't need to repay the funder. That's the risk that the funder takes. Before the amendments in Singapore it wasn't entirely clear whether or not third party funding would be permitted, and that's because of the Common Law rules of maintenance and [UNCLEAR]. So in 2017 we made the amendments to abolish these thoughts and to make it expressly clear that it's not illegal or contrary to public policy for a qualifying third party funder to fund international arbitration. There are, of course, guard rails and certain requirements that the funders must meet and I won't go into that. We have also recently amended the SIAC Model Clause to specifically state, to give parties the option to specifically choose the Singapore International Commercial Court as the supervisory Court of Arbitration. The SICC is a division of the Singapore High Court and the benefits of choosing the SICC as the supervisory jurisdiction would be the availability of international Judges who sit on the panel as well as more attractive cost recovery regime. One, I guess one last thing I would mention is I was following with some interest the Supreme Court of India's recent decision in ***NN Global Mercantile*** in April, 2023. In that case, I see some reaction from the crowd there. In that case, the Court held that an arbitration agreement which is not duly stamped in accordance with the Stamp Act, would be non-existent in law and completely unenforceable. In other words, if a party fails to pay the stem duty under the Act, neither the party to the contract nor the Court can rely on or will give it back to the agreement to arbitrate. When I saw that I thought this raises quite interesting questions about the interplay between the Stamp Act and international norms like separability, the doctrine of separability and competence. So according to this principle, as you would know an arbitration agreement is a separate agreement, and questions about the invalidity of the underlying contract are not

supposed to affect the enforceability of the arbitration agreement. These principles, at least in Singapore, there are quite well established and they've been affirmed by the Singapore Court. We don't have a similar Stamp Act that operates like that in Singapore. But I thought it'd be interesting to see how a Singapore Court might deal with these issues if it ever comes up.

SHREYA AREN: Thanks, Daniel. As we've been doing ADR Week this week, the Supreme Court has actually been hearing an appeal on the ***NN Global*** matter, so in the last couple of days. So it'll be interesting to see what they say about that.

DANIEL: Yeah, we're watching that.

SHREYA AREN: Yeah. But as you were speaking, Daniel, something occurred to me, which actually, I hadn't connected the dots before. But Singapore is very much also been on the forefront of mediation along with arbitration. And India has just also passed or, has passed the Mediation Act, which will come into force soon. And I was just wondering how in your experience and in Singapore's experience the kind of parallels between mediation and arbitration have worked? As in how have the two, because Singapore was kind of leading on both fronts, mediation as well as arbitration. So how have you seen that intersect, really?

DANIEL: Well, mediation is really voluntary. So it depends on whether the parties have the intention and the desire to mediate. In most of the cases that I deal with fortunately or unfortunately, the clients have no desire to mediate. They go straight to arbitration, and they go all the way full steam ahead. So that's been my personal experience. But I do acknowledge that in Singapore we've been having a good push towards mediation, and I think there's been some success there.

SHREYA AREN: Right. Thank you, Daniel. That was fantastic. So coming to Shouvik now. And while India has been doing its own reform, the UK has also been considering reform to its Arbitration Act and also of 1996, which has been ongoing now for the last year or so. And we've been hearing a lot about that in London. So Shouvik, do you want to tell us a bit about what the Law Commission has decided and any inspiration that India can take? And just for Shouvik's presentation, can we have slides up, please? I'll quickly introduce you while the slides are coming up. Shouvik Bhattacharya is a senior Associate in King & Spalding's market leading international arbitration Group. He also advises plans on issues of US Federal and state law with a transnational focus. Shouvik's cases are cited in a, seated rather in both Common Law and civil law jurisdictions, although I'm sure they're cited as well. And he has broad familiarity with the various institutional and ad hoc rules. He's represented clients also

before the European Court of Human Rights and has advised on cases before the Court of Justice of the European Union. In 2022 Legal Business ranked him a next generation leader in international arbitration. Shouvik , can you tell us a bit more about the UK's arbitration reform?

SHOUVIK BHATTACHARYA: Yeah. Thank you, Shreya. And thank you to the Young MCIA for having me and one of the advantages of going last is I've gotten to hear and be inspired by all the things people have said. So I'll try to respond to some of those as I go through my slides. My slides are really a cheat sheet for me to structure this somewhat, because the topic of the Law Commission Review. I wasn't quite ready, but that's fine. The topic of the Law Commission Review is something that has been much discussed. And it's a huge event in the lives of arbitration lawyers. International arbitration lawyers in the UK for sure. But I think in general, because of the number of international arbitration contracts and international arbitrations where English law or English law, adjacent law applies. And it's a culmination of many, many years of open questions, developments, debates and I hope to go over some of those with you today. So, as Shreya said, like the Arbitration Conciliation Act, here, the Arbitration Act in England and Wales, States, from 1996 it intentionally departed from the UNCITRAL Model Law, and then 25 years later, in 2021, the Ministry of Justice in the UK asked the Law Commission to review the Arbitration Act And as Manmeet was speaking, I was looking at the Terms of reference that the Ministry of Justice gave to the Law Commission and it's in starkly similar terms. It says the Commission and the Department recognized the value of arbitration to the UK economy and resolved that the review should be conducted in a manner which aims to enhance the competitiveness of the UK, enhance the competitiveness of the UK as a global centre for dispute resolution and the attractiveness of English and Welsh law as the law of choice for international commerce. So the motivations for that review are very much the same as the things Manmeet was pointing out. In some ways, the review is probably motivated by the fact that England and Wales has kept this Arbitration Act pretty static for so long, whereas many other jurisdictions have changed, developed, and arguably modernized their arbitration laws much more. So this is, in these conferences, we always talk about how to make India an arbitration hub. And this is really an attempt, I think, for England and Wales to remain an arbitration hub and it's very intentionally focused in that way. So if we go to the next slide, please? So I'm just laying out the brief timeline of the event because I think it's interesting how this review unfolded. So it starts in January 2022, and in September 2022, the Law Commission publishes its first consultation paper. It lists 38 consultation questions, and right at the beginning it says that most things are working fine. England and Wales has been such a hugely successful jurisdiction for arbitration. Everything is mostly great. We are not doing root and branch reform, but here are some slight suggestions. And

then when it opened it up for consultation, consultation closes in December 2022 and it says it receives 118 consultation responses. Those responses go up to more than 1100 pages and at a remarkable feat of understatement it says engagement has been broad and the responses were often detailed. And I think the Law Commission was unprepared for arbitration lawyers and the proclivity for argument and so then in response to this, the Law Commission also says it reviewed 38 articles, publications and commentaries that a lot of us in this room perhaps either contributed to or updated, either critiquing or supporting various features of the first consultation. Can we go to the next slide?

SHREYA AREN: Can we go to the next slide please?

SHOUVIK BHATTACHARYA: The second consultation paper following this comes in March 2023. There are now six consultation questions. Then this second consultation closes with 60 further responses and 20 pieces of commentary published again supporting or critiquing this. And finally last month we got to see the final report and draft bill. Unfortunately, the draft bill does not list how many articles have been written about it since, but I can assure you it has been prolific. So instead of repeating what everyone has already said, I thought I would give you somewhat high-level responses and take you through big pictures, what the Law Commission recommended, and then look at a couple of the ways in which they reach their decisions, which might be helpful as we think about how to reform arbitration legislation in general and also with respect to India, specifically. So if we could go to the next slide, please? So this is how they summarized what they set out to do. Which is, there's this broad consensus that everything is great. It's all roses. But here are a few recommendations to make it even better. So if we go to the next slide? So it's 189 pages long. And it has 19 recommendations. And I know we are all inundated with a lot of legal writing about arbitration, there are lots of treatises around, there are lots of sources we can go to, but I would commend this document to everyone as just a really plain spoken introduction to lots of important issues in arbitration. The kinds of reforms they ultimately recommended, range from minor, which were just consistency across different provisions, arguably minor, which was codifying what Case Law had already decided, for example, disclosure obligations in ***Halliburton v. Chubb***. And then potentially very major, which is effectively overruling through legislation. ***Enka v. Chubb***, and the method of determining the law of the arbitration agreement. But before I recommend it to highly, as I was listening to Manmeet and Mayank speak, I also realized that the lessons of the English Arbitration Act maybe, should be taken with some tempered enthusiasm in India. And that's for two reasons. The first is as Mayank said that are 51,000 execution petitions spending in Indian Courts. So just as a point of reference in the Law Commission Report at one point the Law Commission says there has

been so much conversation that there are too many arbitrations happening, so the English Courts are not able to effectively develop commercial law. But don't you worry. The commercial Courts are really robust and thriving. And that's because every year there are 800 cases filed. So just the scale of what is happening in the UK, and here, is so different that, I think, maybe when we go through these we should really think about what makes sense in the context here. And one of the things that made me think of was when Manmeet said, maybe it does make sense to have a separate arbitration act for domestic arbitrations and international arbitrations. One of the Law Commission's recommendations here was to repeal these optional sections in the UK English Arbitration Act, which related only to domestic arbitrations. Again, that makes sense in the context of England and Wales as a jurisdiction, most of the arbitrations there are probably international anyway, but it probably makes less sense here. So when we're thinking about being inspired by other jurisdictions, I think just the scale of what we're talking about here is so different that we should probably do that with some humility. And I'll try that as I go through this. If we could go to the next slide, please?

So this is just showing you some of the recommendations as they start out and then also the bill that goes along with it. I think it's really interesting, the ways in which the Law Commission has structured the document. When we think about persuasive arguments or as advocates who are trying to persuade a Tribunal, we think about what are the sources of authority that we should appeal to, and I was really interested to look at what were the sources of authority that the Law Commission was appealing to. And that might be interesting when you think about what are the sources of authority, the review that is going to happen in India is going to appeal to. One of the key sources of authority was what was the general consensus from the consultation? Did most people agree with what the Law Commission said?

In almost all cases, the Law Commission went with what the majority agreed with, and they fairly represented the dissenting views but the consensus was a pretty important point. The second one was, what is working practically. Is there a practical need to change something? Fine. There might be something that's somewhat ambiguous, but if changing, making one small change is going to lead to other cascading changes that you haven't foreseen and lead to other collateral litigation, we look at some of the language there, then maybe it's fine as it is. Don't try to solve a small problem and make a bigger problem. And then finally there was also, at times, in the way in which the Law Commission approaches Case Law. I thought I don't know how to say this, they said it, they had a very interesting approach to Case Law. The ones that they liked were discussed at length and they said the English Arbitration Act is already consistent with these provisions, even though the consultants then came back and said, you're reading of [UNCLEAR], for example, makes no sense but then the cases that they didn't like, they really went in for it in a way that was very interesting to me, it was almost like an appellate

Court review of recent judgments of really esteemed, English judges. So if we go to the next slide? This Arbitration Act is really great, the report is really great because it has all the hits, all the things we've been talking about. You're talking about separability? This has you covered. Confidentiality? This has you covered Summary disposal, confidence, emergency arbitration, basically, every big issue that we've talked about in arbitration, that are live issues, this does a really good job of considering them, synthesizing the different views and providing, providing a reasoned way of thinking about it that may be helpful to other jurisdictions. It also has the biggest arbitration cases coming out of England and Wales and pre sustained treatment of those cases, even if not always correct in some ways. I'll take you through some of the major findings now. First on discrimination. If we could go to the next slide, please? So this was really controversial proposal. And also one of the Law Commission's first consultation paper's biggest proposals. It's something we all agree with. There should not be any discrimination. When you appoint an Arbitrator you should not discriminate on the basis of protected characteristics such as age, sex, nationality, all of the protected characteristics. I think we can all agree there should be no discrimination. So the Law Commission thought it was making a pretty anodyne statement when it said we propose, making it a statutory rule that there shall be no discrimination in appointment of Arbitrators. Consultants come back, and there's a whole host of responses. The primary one, the Law Commission picks up on is it's very normal in international arbitration to have the nationality become a discriminatory characteristic because if there are parties from two different nations, the arbitration agreement frequently says it shall be from a neutral nation, not from any of the appointing parties' nations. So the Law Commission says, okay, we hear that. So maybe we will try to codify that as something that we can say you don't discriminate, except for if you do it on the basis of nationality, that's okay. Well, as you can imagine, everyone then had issues with that. Because then the question becomes, how do you determine nationality? Is it just where the person is living? Some people live abroad in a certain jurisdiction and have close ties to that jurisdiction, even though they're the national of another nation based on their passport alone. So I really enjoyed this section at 4.58 where you just see this existential angst of the Law Commission, which tried to do what it thought was this really great public good, which is to prevent discrimination. And then it just ties itself into knots. It says, 'our original proposal, deliberately narrow, nevertheless, prompted objection is that it needed an exception and when we propose the exception, it prompted further but different objections.' And I think one of the things that I took away from this is, yes, there is this very important public good of antidiscrimination but there's this equally other very central tenet that comes in whenever we talk about arbitration and that is party autonomy and party consent. And so as long as you're not able to challenge a party's freedom to choose who it wants and interrogate that in any meaningful way, it's going to be really difficult to get discrimination statutorily enacted. Or antidiscrimination statutory

enacted. So ultimately, the Law Commission says it reluctantly chooses not to put this into the statute. And I think it's interesting because it's one of the first very public grappling with what to do about equality and arbitration and can you have a legislative solution to it because we've seen a lot of conversations around that at the policy level, through organizations and advocacy groups. If we could go to the next slide, please? This is one of the biggest changes to come out of the Law Commission Report. I think all of us have had some experience of thinking about what is the law of the arbitration agreement, including, if any of us did the Vis Moot or participated in coaching anyone to do the Vis Moot or judged a Vis Moot, what is the law of the arbitration agreement? How do you determine it? What does ***Enka v, Chubb*** say? These were all major issues that were going around and circulating and in a pretty remarkable turn-around but supported by the majority of the consultants, the Law Commission said, we need to make the Law of the Seat the default arbitration agreement unless the parties expressly agree what the law of the arbitration agreement should be. And the reason they do it, quoting from a lot of law firms who are represented here and elsewhere and their consultation papers is, when parties choose to arbitrate with the seat, say in London, we expect that the laws of London will apply to that arbitration agreement. So it's based on party expectation and it was to avoid, as they said, satellite arguments. If we could go to the next slide, please? I think in the interest of time, we'll go to the next slide, please. This idea of trying to prevent satellite litigation and guerrilla tactics was a key driver of a lot of the ways in which the Law Commission thought about what it should do so. For example, to go back to discrimination, allowing antidiscrimination to be statutorily enacted would be a parties another way to challenge arbitral appointments without a good faith basis. And it's really difficult to remedy, for example. And they go through an example. It's very difficult to remedy a discriminatory appointment. Say you file a case saying that Arbitrator was discriminated, appointment was discriminated on the basis of sex. So a male Arbitrator was appointed when an equally qualified female Arbitrator should have been appointed. But then what is the remedy? If that is upheld, what is the remedy? Because if you then choose a female Arbitrator, you are arguably again discriminating on the basis of sex. And there's no easy answer the Law Commission therefore eschews it. But it also says it doesn't seek to open further such satellite litigation or guerrilla tactics. If we could go to the next slide, please ? Another way in which it sought to do this is through changes to Section 67 and Section 67, it said in its initial consultation that evidence will not be reheard saved exceptionally in the interests of justice. But in its review then it took out the word exceptionally because again, parties could argue about what does exceptionally mean and it wanted to avoid that kind of satellite litigation. I think I will close with that provision, but I think this document is really remarkable in its breadth. And I think it makes for interesting reading, even if you disagree with its ultimate conclusions. And I think

it gives a lot of thoughts and pointers for the ways in which to think about reforming arbitration laws.

SHREYA AREN: Thank you so much, Shouvik. That was a really comprehensive review of what the UK has done. And just then to a final question to all the panellists. And actually it's two questions. One is if you had to choose one reform that India should make, which is top of your list, which one would that be? And then the reverse of that. If you hope that there's one reform that doesn't get passed, which one would that be? So Manmeet, can I start with you ?

MANMEET SINGH: Sure. So one reform, which I think should definitely be there, is what I also briefly touched upon earlier that have permanent judges, at least for some period of time in Commercial Courts that does not relate directly to Arbitration Act, but has a great impact on arbitration. And one reform, which I feel that we should not be particularly focused on again, going back to the terms of reference. There is a reference to having a cost effective regime. Now we all worry about costs of arbitration. And that is primarily on account of, in India, the costs that senior advocates we have to pay for. But the cost for the cost of Arbitrators, I feel, is not something that we should worry too much about, because if we want good professionals and we want good, dedicated Arbitrators, then we should be focusing on predictable outcomes, efficient processes rather than focusing too much on costs. So that's something that I would like to, not see get too much focus.

SHREYA AREN: Thank you, Manmeet, Arush what do you think?

ARUSH KHANNA: Well, the one reform I would like to see incorporated in our statutory framework would be that of emergency arbitration. I think the terms, arbitration or other Arbitrator and awards under the Arbitration Act could incorporate within its ambit emergency arbitrations and emergency award. I think Amazon and Future have paved the way, but they only apply to Part 1. What about the foreign seated arbitrations in that sense. So I think, yes, emergency arbitration, I think, I do think it's imminent. I do think it's likely to happen in the near future, but that is one reform I'd like to see and the one reform I'd not like to see is the judgment passed in ***NN Global Two*** to be retained. I think it needs to be revisited and during the course of the ADR week, I think the hearing is going on. I think it concluded today. I think it's going to resume again. So let's hope for that. So yeah, one reform and one...

SHREYA AREN: Hopefully suspicious that it's happening during ADR week, so hopefully. Mayank, what about you?

MAYANK MISHRA: So I told you the first two, n umber one. So left with the third, I would say a model set of default rules we would want to see. If those come about. I think that's going to help a lot. What would be the contours of those default set of procedural rules, even if they are not too prescriptive, it's fine. But there has to be something. It will help taking away ad hocism out of that ad hoc arbitration, which is very prevalent in India. As to what I would not want to see I totally agree with what Arush says that ***NN Global*** should not be legislated in any form. It should be done away with because I just don't see the point as in I'm on the other side of the line here, of having a requirement of stamp duty before even an Arbitrator can be appointed. Second, I think maybe we are of not seeing, I think it's a very difficult one. So maybe confidentiality provision should be retained, that's what I would say. And you're going to have a debate on that after this. They should be done away with.

SHREYA AREN: Thank you, Mayank. Daniel what about you?

DANIEL: Thanks, Shreya, In terms of reforms that I would like to see passed, I suppose third party funding will be an interesting one. Major leading arbitration centres in the world, like London, Paris, and Geneva, have frameworks that facilitate third party funding. I think that if this were to be instituted in India it will certainly open up the market further, there will be a lot of businesses that would have meritorious claims to put forward, but for one reason or another, especially in this post Covid world, they may not have the financial resources or they may not want to take the risk on of pursuing such claims. So I think it's a good thing if third party funding were to be instituted. In terms of reforms that would not like to see I agree with my co panellists. I don't have anything further to add on that front.

SHREYA AREN: Okay. Thanks, Daniel. Shouvik final thoughts .

SHOUVIK BHATTACHARYA: On the reform I'd like to see I think it's something quite minor, which is Mayank also touched on, which is an affirmative permission for consolidation to take place in arbitrations because I think and beyond the Group of Companies doctrine, because I think that would probably be something that could use some clarity. Something that I don't necessarily want enacted I think we were just talking about a lot of the arbitration agreement and ***Enka v. Chubb***. I think it would be helpful for there to be more judicial analysis and maybe some more judgment. So I think maybe don't codify that through the act and see how Courts here decide that question, and then a further review of that can take place.

SHREYA AREN: Thanks, Shouvik. So we've heard from our panellists today, and thank you very much for your very interesting presentations and thoughts. And we've heard a lot about

different reforms that can and should take place. I mean some of them perhaps will happen by the judiciary even before we need to go to the legislature about them and submit them, perhaps will probably be overlooked but I guess it's a space you just all have to wait and watch. But as Mayank already plugged in for me, and I didn't tell him to do this. But we have a very interesting debate coming up next. So please do stick around for that. But before that, can you please join me in thanking the panellists.

~~~END OF SESSION 5~~~