INDIA ADR WEEK 2023 – DAY 5 DELHI

SESSION 2

INTERIM MEASURES IN ARBITRATION AND THEIR ENFORCEABILITY IN INDIA

10:00 AM To 12:00 PM

Speakers

Justice UU Lalit, CJI (Retd), Former Chief Justice of India, Supreme Court
Justice BN Srikrishna (Retd), Former Judge, Supreme Court
Justice Deepak Verma (Retd), Former Judge Supreme Court
Ashwini Kumar, Senior Advocate, Former Union Law Minister
Kailash Vasdev, Senior Advocate
Milanka Chaudhury, Partner, Trilegal

HOST: The topic is "Interim measures in Arbitration and their enforceability in India." On the panel, we have Honourable Mr. Justice U.U. Lalit, former Chief Justice of India Supreme Court, Honourable Justice B. N. Srikrishna, former Judge of the Supreme Court, Honourable Justice Deepak Verma, former Judge of the Supreme Court of India, Mr. Ashwini Kumar, Senior Advocate and former Union Law Minister, Mr. Kailash Vasdev, Senior Advocate and Mr. Milanka Chaudhury as the moderator, Partner at Trilegal. Over to you, sir. Thank you.

MILANKA CHAUDHURY: Thank you so much. Good morning, ladies and gentlemen. Thank you for joining us this fine Friday morning. I am Milanka Chaudhury, Partner at Trilegal. We are here today to, thanks to MCIA with a highly distinguished panel for an invigorating discussion on interim measures granted in particularly foreign seated arbitrations, with a focus on reinforcement in India, the law around which is still developing in our country and what is necessary to bring our laws at par with those in foreign jurisdictions to make India not only an arbitration friendly country, but a wide Court jurisdiction. We'll open the floor for a Q and A at the end. But first, to guide us through the maze we have with us today a panel of legal luminaries who do not really need an introduction. But since I've prepared for it, I'd like to formally introduce the panel. We have with us Honourable Justice Mr. U. U. Lalit, former Chief Justice of India. In his long tenure as a Judge of the Supreme Court, Justice Lalit has authored multiple landmark judgments on a plethora of issues. In the

sphere of arbitration, Justice Lalit has authored several notable judgments, such as ***Perkins Eastman Architects, DPV versus HSCC***, deciding the legality of unilateral appointment of Arbitrators, ***Quippo Construction Equipment versus Janardan Nirman*** deciding the appropriate stage for raising objections as to the venue of arbitrations. ***Purushottam versus Anil*** holding that reference to an arbitration agreement to reference in an arbitration agreement to an Arbitration and Conciliation Act 1940, after the 1996 act came into effect, would not render the arbitration agreement invalid. Then we have with us Justice B. N. Srikrishna, former Judge of the Supreme Court. Apart from ordering a myriad of judgments like say in its ***Shin-Etsu Chemical versus Aksh Optifibre*** interpreting Section 45 of the Arbitration Act. Justice Sri Krishna has also tirelessly championed reforms in the legal system. Also, amongst others, Justice Srikrishna has served as the Chairman of the Committee of Experts on a Data Protection Framework for India, and the Chairman of the High Level Committee to review the institutionalization of Arbitration Mechanism in India, where he has recommended many groundbreaking reforms for making India the preferred jurisdiction for arbitrations. Then we have Honourable Justice Mr. Deepak Verma, former Judge of the Supreme Court. Apart from being part of various notable judgments during his tenure as a Judge for almost 30 years, he has acted as an Arbitrator in over 100 domestic and international arbitration proceedings under both ad hoc and institutional arbitration rules like ICC, LCIA, SIAC, ICA, DAC, ICADR, et cetera. Justice Verma has served as a Welfare Commissioner for Bhopal gas victims, the Ombudsman at Delhi District Cricket Association, Ombudsman at Hyderabad Cricket Association, et cetera. Then we have with us Dr. Ashwini Kumar, Senior Advocate and former Union Minister of Law and Justice. He has a lifetime of experience in policy making, serving on various Parliamentary Committees and represented India at United Nations General Assembly, the United Nations Security Council and World Economic Forum. He is also a prolific author having authored many books on a variety of subjects. Dr. Ashwini Kumar also holds the distinction of being the youngest Senior Advocate designated by the Supreme Court, and also the youngest ASG. Then we have Mr. Kailash Vasdev Senior Advocate. Mr. Vasdev has been appointed as *amicus curiae* by the Delhi High Court, in Court on his own motion, air pollution in Delhi matter. Mr. Vasdev was also part of landmark judgments like ***Narayan Prasad Lohia versus Nikunj Kumar Lohia***, wherein the Supreme Court held objections related to composition of Arbitral Tribunals must be raised before the Tribunal itself, and recently in ***Cox and Kings Limited versus SAP India Private Limited,*** wherein the issue of applicability of Group Companies that doctrine to arbitration proceedings was referred to a larger bench. Thank you, Sirs, for being with us here today. So I'd like to start the session. I promise that this will be a very interesting and engaging section and we would invite everybody to ask questions whenever they feel like. First, I would like to start with Justice Srikrishna. Sir, in most international arbitration, arbitral institutions,

Emergency Arbitrators have been provided for, and their orders and awards have been recognized in many jurisdictions. Should India also formally recognize this [UNCLEAR] of Arbitrators?

JUSTICE B. N. SRIKRISHNA: Thank you Milanka. See, look at the reason why emergency arbitration is thought of. Normally what happens is arbitration proceedings and Courts run parallelly. And there is this recourse is always available for a person, for a party from arbitrary proceedings to the Court in case of urgency. Now this, all over the world causes a little bit of difficulty because Courts are all said and done, clogged with all kinds of causes, not necessarily arbitration alone. And arbitration is thought of as a substitute for Court litigation so that things can go, move at a rapid pace. Therefore a situation may arise when formally arbitral proceedings have been commenced as a result of filing the application for arbitration, invoking the arbitration. But yet the Arbitrators are unable to come together and meet. In such a situation if there is an urgent interim release necessary, then there will be no other recourse except to run to the Court. Now, our Arbitration Act was so designed that Section 9 gave this power, before, during and after, you could approach the Court. But same problem here again. Courts are so congested that they don't have time to take up matters even if they're adjunct. I mean, we see that every day in the Court, in every High Court, all over the country. The institutional arbitrations came out with a solution. They said, look, if this is so what we can do is even before the arbitral proceeding commence and Arbitrators are in a position to come together and commence the proceedings, if some kind of an emergency relief is necessary or by way of interim relief we will have the rules amended in such a manner that it will provide some kind of a succour to the party. The interesting thing is the law there goes parallelly with this. The law recognizes the orders made by this Emergency Arbitrators under the rules of SIAC, or any institution, to be recognized as an arbitral Tribunal, whether it is in Singapore or Australia, wherever such laws are there. Now unfortunately, in India things move at a very slow space. Way back I think the Law Commission 246, Law Commission's report said yes, it is necessary. High time they gave a draft amendment and said Parliament should amend this in such a manner that this arbitration, Emergency Arbitral Tribunal will be treated as a Tribunal for the purpose of Section 17 of the Act. Our '96 Act. Nothing happened. Again. I think it was in 2013-14 or '15, this, the High Level Committee that you referred to chaired by me. We considered it and said, hey, look, the Law Commission has recommended it. This is what is being done all over the world. And it is high time you do it so that there is no difficulty, although there was a stray sentence there saying it's perhaps possible to interpret Section 17 in such a manner that Arbitral Tribunal definition could include an Emergency Arbitrator. Now Supreme Court in that ***Amazon*** case did a wonderful act of judicial interpretation, and picked on this, I didn't know, when I read it, I was surprised. They picked on this sentence

used by our Committee and said even the Committee says so. Look, there are infinite problems otherwise. What is happening is, what are you doing, you are rendering nugatory Section 9's power of this Court. The power of the Court is already there. Is it necessary to have this? Why not quietly say by an amendment that Arbitral Tribunal includes an Emergency Arbitrator where permitted by the rules. Or if agreed to by the party. That would have been the end of the debate at all. Now because Parliament was unwilling, or Parliament was not willing to accept this suggestion of the Law Commission, the suggestion of the high powered Committee, the judicial discretion had to be used in that. And judicial creativity came to the fore. And the law in our country has now been made on par with the law everywhere else by this kind of judicial creativity. Now, even now, there will be some difficulties that arise because of this. The interpretation is honestly, although I am bound by it because it is a Supreme Court judgment, academically, I would say it's very strained. Not strange, but strained. Well, that is the way if the Judge meets a decision, meets a situation where Parliament is unwilling to move and he finds that people are not getting justice, he finds a way around it. And that is precisely what has happened.

MILANKA CHAUDHURY: That is very interesting, and it does really take care of a situation where the Arbitral Tribunal is seated in India, but that may not be sufficient to take care of a foreign seated Arbitral Tribunal because that will become...

JUSTICE B. N. SRIKRISHNA: If it's a foreign seated Arbitral Tribunal it depends on the law of the country there. Now, if you're in Singapore, you can immediately go to the Court and the Courts recognize this as possible. If it's Australia, yes. Or in any other jurisdiction the Courts, rather the law recognizes them as to be equal as an Arbitral Tribunal and the order to be enforced under the Curial law. Here it is a peculiar thing. If it is seated in, for example, take the ***Amazon*** case. It was seated In India but the parties chose to move, Singapore Tribunal. Why that has happened? Have you ever thought of it? Why should the parities, whose arbitration has to happen in India, run to Singapore? That is exactly the reason. If you had avoided Singapore the point I would have, would have been very simple here.

MILANKA CHAUDHURY: So one question to you, sir. Is Section 9 of the Arbitration Act a viable substitute for the Emergency Arbitrators?

JUSTICE B. N. SRIKRISHNA: Look, ultimately, Section 9 is really an answer that India has given. That you have a problem, take for example, let's say Arbitral Tribunal has been constituted. Let's say there are three Arbitrators appointed who are very much in Delhi, and they have been appointed. One of them falls sick and he cannot attend the proceedings for 15

days under medical advice. Now in such a situation, there is an Arbitral Tribunal. The Tribunal cannot act. The situation is one of emergency, somebody who wants urgent relief. 9 was available. He could have walked into the Court, to Delhi High Court and said, hey, look, this Arbitral Tribunal is constituted but they can't function because of this probable reason. Then please give me relief and it should have been granted. And I'm sure the Court would say, all right, we are giving you a temporary relief, subject to confirmation by the Tribunal, which is happening daily. Unfortunately the Courts are so crowded that your application for interim relief itself will not be taken up for quite some time. That is the, that is the difficulty which they Emergency Arbitral Tribunal will be able to overcome. First of all, arbitration was intended to work from the difficulty of standing in Court for long term. Now again, standing in the arbitration Tribunal for long time is sought to be overcome by an emergency arbitration. Now at that time there is no point in telling the Court is available, jurisdiction is there. This is a kind of a solution for a solution.

MILANKA CHAUDHURY: Right. This question is for Justice Lalit. What should be the criteria for appointment of Emergency Arbitrators and for the grant of emergency relief in your view?

JUSTICE U. U. LALIT: First of all, thanks for inviting me to this particular session. And you have heard very eloquent expressions from Justice Srikrishna. He's somebody who was chairing the Committee. So therefore he knows the subject, he knows it quite well. So it will be a travesty to be speaking after him and then trying to say something different. But let me now place my case before you. See, what he said is absolutely right. The Courts are getting clogged. So therefore, an alternate dispute resolution, which is arbitration. The Arbitrators, their brief perhaps, I think as for reasons A, B, C perhaps they can't get constituted or can't hear so therefore, Emergency Arbitrator. And naturally the qualifications for Emergency Arbitrator would be absolutely identical, which the, perhaps I think the Arbitrators must have. Say, for instance, if it's an engineering contract, and if the contract actually specifies somebody to be well versed in field of engineering, or if it is something, say, QC or a King's Counsel is required to be an Arbitrator. Normally, all these Emergency Arbitrators must also have the same profile, same kind of qualifications. That goes without saying. But perhaps in a given case, if it can't be as Justice Srikrishna said that the Arbitral Tribunal is not getting constituted, maybe for reasons ABC, including the qualifications of the Arbitrators, then in a given case, perhaps I think, and these could be the institutional arbitration rules and they may even provide for such emergencies, that perhaps the qualifications may also get to a certain extent, relaxed. But let there be clearcut institutional rules in that behalf and the appointment be made by the institution wherever these matters are actually lying before that institution. As

Justice Srikrishna said, many of these institutions, say, Singapore International Arbitration Council or London or Zurich, most of these Counsel, most of these institutions have their internal rules. And so far as the appointment of the Arbitrator, including the Emergency Arbitrator. On the question what would be the qualifications? Number one, so far as possible, same qualifications. If not available, then in tune with, or in accordance with the rules of that particular institution.

MILANKA CHAUDHURY: Thank you, sir. My next question is to Mr. Kailash Vasdev. Sir, what is your opinion on the need for Emergency Arbitrators in ad hoc arbitrations in India?

KAILASH VASDEV: Milanka thank you for inviting us to participate and sitting with three Honourable Judges, who are well versed for the jurisdictions of arbitrations. I think we will be learning a little and going from here. On the issue of emergency arbitrations, imagine a situation that you are in Court. The bench doesn't assemble. So you always have the opportunity of making a mention and going to another bench on the same day. In emergency arbitrations, we should take it in the same light. An Arbitrator is not available, the rules must provide for the appointment of an Emergency Arbitrator on that panel so that the matters can be taken up because by the time you go to Court, maybe the emergency is over. Like, for example, releasing of a ship, impounding of aircraft. These are the issues which are now coming into international arbitrations. Where do you have the time? One has to look at these things in the perspective in which arbitration, international disputes are growing. The Committee reports of Justice Srikrishna, the Law Commission reports earlier, the repeal of the older Acts, the coming in of the 1996 Act, taking in a part of UNCITRAL, then being amended four times over. You see, these are developments in the law which we have to look at. So therefore, emergency arbitrations have now become absolutely necessary and Emergency Arbitrators should be a class by themselves who can be called upon from a panel in case of need. I mean that's my view because you cannot run to Court, you do not have time. So what do you do? You invoke the rules of the institution which has brought in this arbitration and seek immediate relief by having this kind of a situation. My concept of an Emergency Arbitrator is not because you provide for an emergency arbitration therefore this, you have to give interim relief at a point of time when necessary. Delays don't help. In many a case, they don't help.

MILANKA CHAUDHURY: That's absolutely correct Sir. My next question is to Justice Verma. Would the burden on Courts be decreased if Emergency Arbitrators are formally recognized? What's your view on this?

JUSTICE DEEPAK VERMA: Thank you. Thank you. Thank you very much. Yes, certainly. Given my personal experience, what I have noticed that whenever an interim application, may be of urgent nature is filed before the regularly appointed, legally appointed Tribunal, it takes lot of time, lot of time. Maybe for interim application the hearing lasts for nine sessions, ten sessions, eleven sessions, and number of judgments are cited. So many pleadings are placed before the Tribunal. Then obviously if so much arguments are advanced, then Tribunal also takes a lot of time to decide such application. So the very fact of having emergency relief, that gets defeated. So according to me emergency arbitration is considered to be most popular and it has to be there. It gives immediate relief to the party before the subject matter of the dispute or evidence is destroyed by the other side. So this is what I feel is a necessity of the day. And the best part is, for that, you don't have to go to Court or to seek any formal appointments before going to the Court. There can be an Emergency Arbitrator. He can start functioning. In many of the international arbitration it has taken place. Many other... even Delhi High Court has got its own rule rules. Yeah. Many other places have got their own rules, though there's no specific provision in the Act. No doubt, both of them had recommended that yes, there has to be some provision, but so far it has not there. So according to me, it is definitely going to reduce the burden of the Tribunal, as Kailash has rightly said that you don't get the time in the Court to get your matter listed or to get it heard. So where the party can go, then? They must have some relief. So that is the only way, that an Emergency Arbitrator has to be there, so that he can decide the question of most importance where the parties, other party acts fast and destroys the evidence or destroy the subject matter of the litigation. So to safeguard that, I believe that it is going to reduce the burden of the Court. Thank you.

MILANKA CHAUDHURY: Thank you. Thank you so much Sir. My next question is to Justice Lalit. As the objective of arbitration is to fast track dispute resolution and minimize Court intervention, would it be prudent to introduce an appeal provision against emergency awards?

JUSTICE U. U. LALIT: I don't think so. That will actually complicate things. See first and foremost there is a regular institution as a Court, which is available under 9. The 9 itself, is appealable. Then there is an interim direction or interim award passed by the Arbitrators that can also be challenged. Now if you have one more line, which is, say, Emergency Arbitrators, and then take the matter through the channels of appeal, then perhaps the entire intent of the legislation, that is to say, expedite the process will get completely lost. So therefore theoretically, your emergency arbitration's determination will always be subject to and will get merged in as and when the Arbitral Tribunal is regularly constituted. So therefore one can have certain areas to be ironed out, the creases to be ironed out as and when the Arbitral

Tribunal gets constituted. So therefore let us not complicate things and we have three rungs of appeal and then take the matter right to the logical end at every juncture. That will completely elongate the process. The Emergency Arbitrator, take it, is a substitute for the Court depending upon the exigencies of the situation. So therefore those quote unquote exigencies should not get lost in the dreary kind of appellate process. That's my view that it should not be made appealable.

MILANKA CHAUDHURY: That's interesting. Because ultimately these emergency awards will again go before the regular Arbitral Tribunal and any problems can be sorted out at that stage. So there's no need for any separate appellate provisions. My next question is for Justice Srikrishna. Do you believe that foreign jurisdictions recognize Emergency Arbitrators? Because the recourse to Court for interim relief is not easily available or Courts do not easily intervene in those jurisdiction?

JUSTICE B. N. SRIKRISHNA: That may not be so actually. See they recognize emergency arbitration as a part of the institutional setup. See the whole idea is try and reduce litigation in the Courts. That is the whole philosophy for having arbitral jurisprudence. Now if that is so, for every small thing that happens on the ground of exigency, if you have to go knocking on the Court's doors, you are unnecessarily elongating the process which you started off to shorten. Now, it may not be necessary. I'm not willing to contribute to the theory that foreign Courts don't necessarily interfere. They may interfere, because that's a matter of judicial discretion. Now, for example, if it had happened only under Section 9, would this question have arisen? Let's say our Courts were free enough to attend to it. There is an emergency Tribunal is not constituted, or Tribunal is constituted and is unable to meet. Somebody moves the Court under Section 9. Now can you say that Court will not act? Court will act, of course. Even now the Courts are acting. But the only thing is, action in the Court has become slow because of the backlog. Now coming from Bombay, I know what is the situation in the Bombay High Court. Even [UNCLEAR] orders people standing queue like they stand queue in the Supreme Court for mentioning the matters. And poor Judges sit there till 08:00, 09:00 or some of the very conscientious Judges to hear and dispose of this, as many as possible at the cost of their own health. That is the situation in the Court. Now on top of it, you want him to say okay, now this is arising out of arbitration, Arbitral Tribunal is not able to, so you take this also. It's unfair. At least from the Indian point of view, it is absolute necessity. So if your intention is to lessen the burden on the litigative process in Courts, then such a power should be, equally be available. Now whether it is made available by Parliament or by the judicial interpretation, doesn't make any difference. It really is a salutary thing. That is why the academic thinking was, the Law Commission's thinking was the same, the high power

Committee thinking was the same. But if nothing happens, if mountain does not go to Mohammad, Mohammad has to go to the mountain, or something like that. So the mountain has been somehow circumvented in this matter.

MILANKA CHAUDHURY: Right Sir. So I'll move on to Justice Lalit. The general sentiment regarding emergency arbitrations is in favour of its implementation, and we hope that the requisite amendments are made and brought into force in the near future. The need for emergency arbitration is also in alignment with the dream to make India a hub for international commercial arbitration as it will act as an added benefit for the foreign parties to choose India for arbitration, But there is another very important aspect that is related to emergency arbitrations, and which is its enforcement. In fact, not just enforcement of emergency awards, but also enforcement in India of interim awards passed by foreign seated Arbitral Tribunals has been a concern of parties to a foreign seated arbitration. Sir, what are your views on the intricacies involved in the enforcement in India, of emergency awards and other interim measures and awards granted in foreign seated arbitrations?

JUSTICE U. U. LALIT: See, let us understand what has ***Amazon*** done? The Supreme Court's decision in Amazon. That was India seated arbitration. International Commercial Arbitration, but India seated arbitration. And therefore by definition the first part would certainly apply. The first part of the Arbitration Act of 1996 definitely would apply to such arbitrations, which are India seated arbitrations, or even domestic arbitrations. Then one has to see the definitions. The award would include the interim award. Correct? And therefore it was easy for the Court to say that if it is India Seated arbitration, going by the rules or the regulations of the concerned institution under whose auspices, the arbitral proceedings are to be conducted, if the rules do permit appointment of an Emergency Arbitrator, then the appointment can certainly be made. So that's the crux or that's the fulcrum of that judgment. But then the problem arises if there is no India seated arbitration, and if it is a foreign seated arbitration. Now we have two very beautiful cases. One decided by Bombay High Court in that ***Avitel***, and the second decided by Delhi High Court in ***Raffles***. In both these matters, there was a determination made by an Emergency Arbitrator in foreign Seated international arbitrations. Whether such determination by the Emergency Arbitrator would per se, become enforceable, unfortunately, our law does not make any such provision, because Part 1 of the Act in which all these definitions, including Section 17, occur do not apply to foreign seated international arbitrations. So therefore there is a fundamental, a wall that you actually sort of bang into and one has to overcome that. So one way in which the matter was sought to be overcome before the Bombay High Court was, to file Section 9 before Bombay High Court. Now that's a travesty, because what you do is because Courts are clogged, to de-clog the Court

you have Emergency Arbitrators and the determination of that Emergency Arbitrator in order to make it enforceable in India you have to go through the channel of, which is the regular channel, which is Section 9. And have you seen that judgment? Beautiful judgment. But running into what, 110 paragraphs. So therefore, again, what is the whole idea or the purpose behind this? The Court can't say that because the Emergency Arbitrator has held so and so, so and so, so and so, so therefore, I passed this order. That would be, you would be going purely abdicating your function as a Court. So therefore, it had to be freshly determined, and it had to be determined by the Court, which means that it's a duplication of the exercise. So therefore, ultimately, what did the party achieve? Secondly, there is always a possibility that though the Emergency Arbitrator may have granted you relief, the Court may not grant you. The Court may try to modify or try to sort of narrow down certain areas, which again would mean that there would be a tremendous amount of contradictions and [UNCLEAR] sort of inconsistencies. And that is something which needs to be avoided. When I spoke about Bombay High Court's decision, Delhi High Court also goes on the same point. That is Section 9, which was preferred before Delhi Hight Court's Justice Vibhu Bakhru's judgment. Now that's, according to me, perfectly all right, jurisdictionally. But theoretically, for a party to be going through two rigmaroles of proceedings, it doesn't serve the purpose, and it may lead to various inconsistencies. Supposing, for instance, there is a determination by the Court saying no interim relief, what are you going to do? Then you'll have to climb up the ladder and take it, take the matter through the appellate process. So you're multiplying the proceedings for something which is actually purely interim or *ad interim*. So therefore to my mind there needs to be number one, the recommendations of Srikrishna Committee must be accepted immediately. The recommendations made by the Law Commission in 246th Report must be sort of implemented as early as possible, or there must be some way in which we interpret that the definition which is award must include interim award must also apply so far as the foreign sort of determinations are concerned when it comes to foreign seated arbitrations. Unless and until that interpretative process is undertaken I don't see any reason that perhaps, the way shown by Bombay High Court and Delhi High Court may be the appropriate way given the circumstances, given the fact that you are actually bumping into tremendous roadblocks, but the idea should be to remove those road locks rather than sort of move around those roadblocks. That according to me perhaps is the problem area, and that problem area needs to be sort of addressed as early as possible.

JUSTICE B. N. SRIKRISHNA: See, there is jurisdictional...Jurisprudentially is speaking. there is a reason why this problem area is created. International law permits the decree of one Court to be recognized in a foreign Court. Now that is done because of the treaties that are available. But please note that no such treaties, which are available, even under the Civil

Procedure Code here or elsewhere, do not permit interim orders to be recognized. Now it was strange that in the Arbitration Act, it should not have been permissible. That is why it was kept out. Part 2 said, we will not talk about interim orders, but they do recognize foreign awards, but subject to whatever the qualifications are, there 45, 46, 47, 48. Therefore the problem will be unless law recognizes and enforces foreign interim orders, we are going to have this kind of a roadblock, which, of course, creative judicial minds can always overcome that. But then why not take the right royal path and amend the law and make it very simple as Brother Lalit suggested? Instead of doing that, we are going round about the whole issue.

JUSTICE U. U. LALIT: Unfortunately, we all have been rendered constitutionally incompetent to render ,to go that interpretative path.

MILANKA CHAUDHURY: Yes. So that the recommendation of Justic Srikrishna to amend the definition of award to include the foreign interim awards also, so that is very interesting because I think that will really take care solve the problem completely. But in the ***Amazon*** judgment, the route that was taken was the Section 17 rule, right? So if it, India seated, that's why that is why it was taken in the 17 route. Now if the award definition is amended, then it will all open. It will include both India as well as foreign. Subject to that. Correct. So I think that is the most viable suggestion. My question is to Justice Lalit again. It appears that interim orders, including emergency awards granted in foreign seated arbitrations, primarily, out of persuasive value when their enforcement is being sought before Indian Courts. However, what parameters should Indian Courts bear in mind to act in aid of foreign stated arbitration so as to prevent misuse by unsuccessful parties trying to avoid such enforcement of interim orders altogether?

JUSTICE U. U. LALIT: See, we must understand the scope of the matter. You are now dealing with a stage which is interim stage, correct? There is only a determination made by a foreign Tribunal. You are right that we consider when it comes to enforceability of the award there may be certain questions whether this is something which satisfies, which goes along and on the right side of our public policy and so many questions can arise. But according to me, if it is an interim award, and there is a determination made by a Tribunal, which is a privately constituted Tribunal, where parties are *ad idem,* then the Courts could not get into and get into the mode of dissecting and getting into the factors which perhaps would weigh at a final stage. At that juncture, the idea is to preserve the property. The idea is to retain certain things. The idea is to maintain certain status quo pending final determination by the Arbitral Tribunal. So therefore, being conscious of that fact, the fact that you are at an interim stage,

what you must do is you must weigh in favour of the enforcing the awards made by the Arbitral Tribunals, though they may be purely interim orders, correct? Purely that.

MILANKA CHAUDHURY: That's right. So my next question is to Justice Verma. For meaningful and quick enforcement of such interim orders passed in foreign stated arbitrations, do you believe an amendment in the Arbitration Act is necessary, or does the present system suffice?

JUSTICE DEEPAK VERMA: Thank you very much, thank you very much. Milanka. Yes. I believe that amendment is required for enforcement of interim orders passed in foreign seated arbitration, as the judgment pronounced by Honourable Supreme Court of India in the matter of ***Amazon*** has been so nicely discussed and narrated before us. But the matter when it went to Delhi High Court in the matter of ***Raffles*** that has caused a lot of difficulty because having gone through the emergency arbitration and then if you are required to implement it in law in India, or executed in India then you find it difficult. It can't be done. Because there is no specific amendment to the Act. And that is why the party was required to go under Section 9. They said no, it can't be recognized. So according to me necessary amendment in the Act is a must. And so that even the emergency awards passed by, pronounced by Emergency Arbitrators, they are recognized and they should be made to be executed in India. Otherwise the very purpose of such awards would be defeated.

MILANKA CHAUDHURY: Right, sir. Thank you very much. I'll now move on to Dr Ashwini Kumar. Sir, we have discussed enforcement of interim measures in foreign seated arbitrations. But as far as even domestic arbitrations are concerned, what do you think should be the extent of judicial intervention in appeals against interim measures passed by Arbitral Tribunals under Section 17 of the Arbitration Act?

ASHWINI KUMAR: Well, I have listened with great interest, the very learned discussions that have preceded my session. But to a very specific question that you have posed to me as regards the scope of intervention, that is clearly circumscribed by Section 34 and 37. Now 17 and 9 are interim measures which are decided upon by the Tribunal or by the Courts concerned, depending upon the facts before them, depending upon the justice of the cause before them, depending upon very well settled principles on the basis of which interim measures are to be granted. But when it comes to the scope of challenging those measures, I don't think particularly in domestic arbitrations, there is any scope of ambiguity after the settled position of law in that regard. And the latest one of Justice Narsimha sitting with the Chief Justice in ***Konkan Railway***, which reaffirm [***UNCLEAR***], ***Vedanta***, and number of

other judgments that the 37 appeal circumscribed necessarily by the conditions in Section 34 which brought down or dissected to the last level means, unless there is perversity in the determination of the interim measures, unless they are so wholly arbitrarily and grossly unjust, Courts should not interfere. And I think I'm inclined to agree with this view of the Courts because as all the panellists have said, the entire purpose of arbitration is to expedite justice, not to elongate it. Now if 37 and it has been stated by all the Courts, the 37, 34 are not appellate jurisdictions, per se, these Courts do not sit as Courts of appeal on merits. They only sit on the, sit to decide on the basis of statutorily prescribed limited parameters, which have since found judicial interpretation. And they have been, as I said, the skeleton of the law in 34 and 37 has been clothed by judicial adjudication and judicial decisions. So in the progressive march of the evolution of arbitration law and the credit for which must go to our Courts, we are clear about one thing that if arbitration as a system of dispute redressal has to have credibility or success, it must lead to speedy, expeditious and fair decisions. Now the only criticism that I hear, and that's a very major criticism. We can't escape it, and we can't run away from it because we know it as a matter of fact that the arbitral procedure in the country, particularly when it relates to domestic arbitration and I would say, even in respect to the enforceability of international awards, is a never ending procedure. Now the whole idea of limiting the appeals to one appeal and then, of course, go under 136 to the Supreme Court was to cut down Court intervention. That should be the purpose. That was the purpose. And it is rightly so the purpose. But when it comes to decision making, I don't even blame the Courts because they are clogged and as very eminent jurist Silva used to say, in Court, “justice delayed is justice denied, but justice hurried is justice buried.” So now some people may say and in the context of the emergency arbitration also, and the Judges are absolutely right when they say that you can't elongate it by introducing levels and levels of appeal. But what if, let's assume that an interim emergency award by an Arbitrator is perverse, on an assumption, let’s test the case. Should you say that even there, you should not go in and appeal because it will delay the process? Well, if the justice delayed is justice denied, justice hurried is justice buried. And sometimes interim measures have a very substantive effect and the other proceedings become redundant if the interim measures, if the interim award continues to survive till after the Arbitral Tribunal has taken a final view, until after an award has been given. So the fact remains, that as far as the scope of judicial intervention is concerned, it should be limited. And I think Courts do try very hard to find if there is a gross perversity or not, and that has been the burden of the judgment of all the Courts. So that I think answers your question.

MILANKA CHAUDHURY: Yes, sir. So I think you're right. Justice hurried, is justice buried. But yes, this is also interesting that the Courts have already dealt with this and have held that it's the test of Section 34, which is a very rigorous stress test, which has to be applied for this.

My question is to Justice Verma in this, In cases where the Arbitral Tribunals do not comprise of members from the legal fraternity, do you believe that some degree of Court supervision/ intervention is necessary?

JUSTICE DEEPAK VERMA: To be very honest with you, I say no. And no such intervention is warranted by any Court. Actually giving you again a personal experience in the matter, I have had many different Arbitral Tribunals where one of the members, he was not a legal practitioner, he was basically an engineer but after retirement or maybe during the course of service, he thought that better way is to become an Arbitrator, because no specific qualifications are prescribed in the Act. It is the choice of the party. It's a party's autonomy. So I have seen a number of Arbitrators, who were not earlier advocates, they were not doing anything about law, but they became excellent Arbitrators. Who has not heard the name of Dr. Markanda. He was not only a wonderful senior arguing advocate as far as the arbitration matters are concerned. But he also proved to be a very good Arbitrator. So it is not necessary, that Court intervention is required, or Court supervision is required. For what? If the Tribunal is satisfied, if the parties are satisfied that the Tribunal is going in accordance with law as per the provisions which are in existence under the Arbitration Conciliation Act 1996 then, in my opinion, no supervision, no intervention at that point of time is required to be done by the Court. Thank you.

MILANKA CHAUDHURY: Right Sir. My next question is to Mr. Kailash Vasdev. Is the present mechanism for enforcement of orders granted under Section 17 sufficient?

KAILASH VASDEV: The present system is a total departure from the past and it can be made very effective. Section 17 orders have to be implemented like Section 9 orders have to be implemented. Here I just want to bring in a bit of a note for you. Our arbitrary proceedings were carrying on for years till the amendments came in the schedule, fixing a time gap. From 1981 onwards, the Courts have been saying arbitration should be expedited. It should not become an arbitration slump, is the word used in the judgment in 81. Subsequent to that, the intention has been to expedite on this without coming to a situation where an interim order carries on for years together, because the arbitration is continuing. The emergency orders are good, they are necessary, they're in the interest of justice. But continuing them is not in the interest of justice, because it has an impact. It affects the rights of parties. It affects goods. It affects the properties which have been secured. It affects financial arrangements. It affects all sorts of things. So moment an interim order is passed, emergency order, as we call it, must also lead an immediate disposal of the main dispute. Otherwise you, should I say kill the cat. You don't get any relief in the long term. Because say there's a money claim. You have injuncted

somebody from encashing a bank guarantee. You've taken steps for a particular direction and the arbitration then carries on for years. So the money value which you eventually receive at the end of the arbitration is not worth the money which has come to you. Therefore, this delay aspect is something which Arbitrators, forget what the law says, we who appear before Tribunals, we who are Arbitrators, must ensure there is no delay in disposal. Carrying on arbitration for three years, four years, five years, at the end of the day is, defeating the very purpose of the Act. That's a way which I have, and it's time that we all look at this also. Thank you.

MILANKA CHAUDHURY: Right Sir. So I think that's very interesting, and we all, I think have heard the panel members saying that this is the need of the hour, the Emergency Arbitrators and their awards to be recognized in India, and something needs to be done very soon in order to make India a viable arbitration destination.

ASHWINI KUMAR: I just want to make one point with respect to emergency arbitration, since I didn't say anything. Because you're going to open the session to questions, so I wanted to just make a point. See emergency arbitrations as Justice Srikrishna rightly said, have now been recognized by virtue of what he called and rightly so strained interpretation. I think if we need to introduce emergency arbitration, all you need to do is to amend Section 2 and to say, Arbitral Tribunal and arbitral award. This is what it would mean Arbitral Tribunal would include institutional arbitrations or Emergency Arbitrators. The question that will need to be clarified is that, when we are talking of emergency arbitration, when the contracts are signed, which include the arbitration clause, there should be, emergency arbitration should be envisioned, so as to say that they are by the consent of parties, or a specific reference to an institutional rules made which have the provision for Emergency Arbitrators. Only then will it work. The other point which is necessary and that is necessary because essentially arbitration is consensual. You create a forum of your own choice, and it should not be said later that in view of expediting justice we have introduced beyond the consent of parties or beyond their contemplation, the concept of an emergency arbitration, because of the happening or not happening of a particular event, like some Arbitrator taking sick. Therefore, that ambiguity cannot be there because that will raise a jurisdictional issue as to the Constitution of the Tribunal. People could say it is forum, *non-juris*. So that kind of an argument should not come. So when we are talking of the need for emergency arbitration, and I wholly support that view, it must not be a tinkered kind of a mechanism, by Courts deciding a particular way in a particular case. I know the ***HSBC*** judgment and ***Avitel*** judgment and High Court have this logic to what they've said. They've said it is an implied kind of thing. But I still believe that a legislative, clear legislative choice and decision is the need of the hour. Because otherwise

some Court will take a contrary view after four years and said this is the wrong decision because it is clearly in my view and issue of strained interpretation. It is judicial lawmaking, which happens all the time and there's no difficulty with that. And I think when despite the recommendations of the 246th Commission and the High Power Commission of Justice Srikrishna, a conscious view of inaction has been taken, that is a legislative choice in not introducing emergency arbitration. So in that view of the matter, irrespective of the justice of the cause, I think we should also have some kind of restraint in judicial law making when it comes to commercial law.

MILANKA CHAUDHURY: I think we can now open the floor for a quick Q and A session. We would like to take any questions that you may have on the floor. Yes.

AUDIENCE 1: Justice Verma pointed out that several sessions are taken while deciding applications for interim measures. What can lawyers do to make the process more efficient?

JUSTICE B. N. SRIKRISHNA: [UNCLEAR] this is like a bail application. Now, whoever, at least in, when I was a young lawyer, I never heard of bail application judgment go into 200 pages and 300 pages or bail applications being heard for weeks and weeks together. Bail application was there and say yes, I'm granting bail, I'm not granting bail, I'm putting these conditions. Finish the matter. Same thing with emergency. What else? In fact, Brother Lalit said something on which I have a little difficulty in accepting it. Who can be an Emergency Arbitrator? Now, emergency arbitration is not going to decide an engineering dispute requiring an emergency, engineering. Emergency only means that you don't immediately stop him from doing something, he's going to destroy the whole thing. That is all that is going to come. So tell him. All right, hold the status quo. Don't destroy it. Don't sell off the shares. Don't sell out, liquidate the securities. Don't liquidate the bank guarantee. These are things which any ordinary lawyer, ordinary Arbitrator can do. It doesn't require me having a Ph.D. from Massachusetts Institute of Technology. So at that stage, what do you have to argue? The basic thing. You go back to Civil Procedure code. What? You remember no? I have forgotten all those three principles that we used to reiterate. Is it necessary? Injustice? *Prima facie* case? That's all. Balance of convenience. That's it. People have forgotten Order 39 completely. 136 is open now all the time.

MILANKA CHAUDHURY: Is there any one?

AUDIENCE 2: Good morning, Sir. My name is Pranav Malhotra. I'm an advocate practicing in Delhi and involved in arbitration proceedings quite a bit. My question is that when we

already have provisions for interim measures, Section 9, now, if we produce another provision, say in the arbitration clauses or by an amendment to the Act to include emergency provisions as well, wouldn't it become a forum for all advocates to then directly go for emergency arbitrations and create a flock over there? What we are facing currently with the Courts, the same issues we'll face with the emergency arbitration. Accordingly the question is that what could be the scope of such emergency arbitrations? Like, what are the conditions, like in a [UNCLEAR] petition in India, we have very specific conditions. It has to be admitted on these grounds. Otherwise, it's not. Similarly for emergency arbitrations, could there be such a qualification which distinguishes it from interim measures in itself?

JUSTICE U. U. LALIT: See what you say is right. There is a provision. Section 9 has been designed and has been incorporated in the legislation precisely for that to give some interim solace, correct? We are not disputing that, that is your default option. No doubt about that. Take for instance, if there is ad hoc arbitration, not under the auspices of any institution, there are no rules which speak of any kind of emergency arbitration, I am going on the assumption the clause for arbitration in the original agreement does not have any provision for emergency arbitration, correct? So then you have only two recourses available to you. Section 9 which is the Court or Section 17 which is after the constitution of the Arbitral Tribunal. We are now, as Justice Srikrishna in his opening address said, there could be certain situations where even before the constitution of a regular Arbitral tribunal there would be certain exigencies which may require emergent orders. Now in that situation your Section 9 becomes only platform where you can ventilate your grievance. Now that is precisely why, at times even the Civil Courts also may not have that kind of time frame, which is available at their disposal to decide your applications as early as possible. Most of the institutional arbitration rules specify that emergency arbitrations or emergency awards shall be dealt with within, say, five to 15 days. Now that's the minimum possible time, which perhaps would be devoted to see that some interim solace can be granted. Now, wherever there are institutional rules, naturally, that's a forum which is available, even with respect to domestic arbitrations, or say, India seated arbitrations, no doubt about it. So therefore, that is creating one more avenue. And one more avenue in the sense it is through the Arbitral Tribunal itself. So therefore, that is only to say that in case there is an emergency situation, in case the situation demands it, then there is one platform which is still available to you. Now, theoretically, what you say is right. One may, party may choose to go under Section 9. As a matter of only a possibility, one party may go through emergency arbitration. One party may choose to go through Section 9, but therefore, the institution arbitration rules must actually be very, very precise, correct? But that's a matter which, let us not get into that at this juncture. Okay. Thanks.

AUDIENCE 3: My name is Kishan Daga. I am not from the legal stream. I am from the engineering stream, but I have layman's questions like, if foreign seated ICC arbitration passes an interim award which is final on the issue which it rules against an Indian company, can the foreign party come to India and enforce the award against the Indian party?

JUSTICE U. U. LALIT: So that is exactly what the situation which was contemplated by Bombay High Court and Delhi High Court. Correct? They found, they found I'm saying, so far as foreign seated arbitrations, ***Amazon*** would be an answer when it is India seated arbitrations. For foreign seated arbitrations, there is unfortunately, no statutory framework or a slot where you can straightaway go and enforce that kind of direction or award. Having seen that particular difficulty the way forward was utilized by Bombay High Court through Section 9, correct? Section 9, nobody can stop that. That's a jurisdiction which is still available. But imagine the plight of that man or the party who had succeeded before the foreign Tribunal, he has already got a determination, now as you said, that perhaps on an issue, there is a determination and he comes here again, through the channel of Section 9, and supposing, God forbid he loses on that count, what's the kind of inconsistencies that we will be then actually faced with? Therefore, the solution is that whatever is that determination for the interim stage, must be taken to the logical conclusion. And that logical conclusion can always be, that is to enforce those directions to the extent possible. These are always interim directions. So therefore, interim directions will be subject to whatever the Arbitral Tribunal, regularly constituted Tribunal may decide. So therefore, a party who may be aggrieved may certainly have one more channel or one more avenue open to it through the regularly constituted Tribunal as and when that emergency order can be placed before that Tribunal. So therefore, my personal view is that it should be made enforceable. Unfortunately, what my idea doesn't have the statutory backing. So therefore, the statutory backing as Dr. Ashwini Kumar said, Legislation must now actually step in and Legislature must step in and make the appropriate amendments to the Act. If not, there is some kind of judicial creativity which must also be encouraged to be taken to the logical end, just as ***Amazon*** found a particular solution.

MILANKA CHAUDHURY: Thank you so much. So as of today, there is no way to enforce it. It's only through a new legislation to be introduced. But of course, Section 9 can be filed to enforce it in India. Any other question? Yes.

AUDIENCE 4: Good morning, everyone. I am Gurjit Narula. Advocate practicing before the Delhi High Court. I have the honour to ask a question before this erudite panel today. Everyone is aware of the recent judgment of the Honourable Supreme Court regarding stamping of the arbitral agreement. No, it is with regard to, we are aware that it's pending, the arguments have

been concluded yesterday itself. The only question is that was primarily regarding Section 11. How would, so to say the Supreme Court in the same matter, they are okay with the judgment of the five Judge bench, the Constitution bench and they are in agreement with that. How would it affect the Section 9, the liberty we have under Section 9 of the Arbitration Act? because that would anyway fall under the stamping of the Act.

JUSTICE DEEPAK VERMA: In fact the matter is already sub judice. I know it, that it has been heard finally, yesterday. It has to be pronounced before 31 December in any case, otherwise, one of the learned Judges who was part of this is going to demit the office. So we have to wait till then. At least I would not personally like to commit on that. Sorry.

AUDIENCE 4: What do you say about Section 11 please?

JUSTICE B. N. SRIKRISHNA: What difference does it make? The issue is the same, no, whether it is an agreement with regard to 11 or 19 or whatever, the question simply before the Court is, is the arbitration agreement, which is a clause in an entire agreement invalid because the whole agreement is not adequately stamped or not stamped. Correct. Now, three Judges decided it, they decided one way. Then five Judges overrule it. Now, seven Judges decided. They may overrule and go back to 3 or they may not. It all depends on ultimately what the Supreme Court says. Whatever the Supreme Court says is binding on you and me. However much you may like it or may not like it, however much academically criticise it, write articles against it...

KAILASH VASDEV: His question is very interesting. He says, supposing your stamping is not proper, in view of the existing law, can you invoke 9? Because if you don't have a valid agreement...

JUSTICE B. N. SRIKRISHNA: You can't.

KAILASH VASDEV: That's right. That's the answer which he wanted.

AUDIENCE 4: I'm grateful for that.

JUSTICE B. N. SRIKRISHNA: [UNCLEAR]

AUDIENCE 4: Because you were discussing about interim measures, the entire, Section 9... the premise of Section 9 gets lost because of that stamping. That was the only question.

JUSTICE B. N. SRIKRISHNA: [UNCLEAR]

KAILASH VASDEV: It's an invalid agreement. So you can't invoke that.

AUDIENCE 4: So again, we are back to square one in the Court then.

MILANKA CHAUDHURY: Any more questions? So I think we can then close the session. I would like to express my deepest gratitude to our remarkable speakers. I'm also grateful to the MCIA for organizing this week long event, which allows us to have a robust exchange of dialogues and view on pressing issues in the ADR field. In the spirit of legal pursuit, let's carry forward the knowledge and insights we have gained today and continue to contribute to the cause of making India the one stop destination for arbitrations. Thank you all. Thank you very much and have a good day.

KAILASH VASDEV: On behalf of all of us, Milanka, thank you for having us. Thank you.

MILANKA CHAUDHURY: Thanks a lot. Thank you.

~~~END OF SESSION 2~~~