INDIA ADR WEEK 2023 – DAY 5 DELHI

SESSION 4

2:00 PM To 4:00 PM

EVENT HOSTED BY IPBA DISPUTE RESOLUTION AND ARBITRATION COMMITTEE

INTRODUCTION TO THE IPBA & TOKYO CONFERENCE: MANJULA CHAWLA, PARTNER, PHOENIX LEGAL.

Panel discussion 1 : Judicial intervention in enforcement of awards -

Speakers:

Tejas Karia, Partner & Head, Arbitration at Shardul Amarchand Mangaldas, India

Abha Malhotra, Advocate, Delhi High Court

Gautam Bhatikar, Partner, Phoenix legal

Senthil Dayalan, Partner, Dentons Rodyk & Davidson

Priti Suri, PSA Legal

Panel discussion 2: Third party funding in international arbitration - trends and challenges.

Speakers:

Nusrat Hassan, Managing Partner, Dentons Link Legal

Ajay Bhargava, Partner, Khaitan & Co.

Naresh Thacker, Partner, Economic Laws Practice

Neeti Sachdeva, Registrar and Secretary General, MCIA

Badrinath Durvasula, Ex Managing Director and Legal Advisor, Essar Group

Shweta Bharti, Senior Partner, Hammurabi & Solomon

PRITI SURI: Good afternoon, everyone, Manjula, thanks for that fantastic introduction to the IPBA. Really hope I want to resonate what she said and really hope that many of you will be able to attend join the IPBA as well as attend Tokyo, and subsequent conferences. Moving on to our first panel discussion of the day, which is after lunch I'm guessing a lot of you, a lot of you will feel sleepy, but I promise we have a very, very exciting set of panellists who are

experienced in this sphere. So, to my left is Abha Malhotra, who's a very, very seasoned litigator at Delhi High Court with ample experience behind her. To Abha's left is Tejas. I think everyone in the room should know Tejas. So, I'm just going to stop there. To Tejas's left is Gautam. Again, someone who's extremely seasoned and experienced and he has come here from Bombay. He's a partner at Phoenix Legal. To Gautam's left is Senthil, who has travelled from Singapore, and he is going to provide an international perspective to this particular panel discussion. Before I actually start and get into the whole Q and A part of it, I would like to request the panellists to provide a very brief introduction about themselves. Abha?

ABHA MALHOTRA: I hope I'm audible. I'm Abha Malhotra, Litigator for Government as well as for Commercial personal disputes. I've been senior counsel for Union of India. But my heart lies in arbitration. Member of DIAC done some courses from SIAC. and I'm also a mediator with Samadhan, as well as I've been called to lecture at various universities. So, that's in brief my resume.

TEJAS KARIA: Good afternoon, everyone. This is Tejas Karia, I'm an arbitration practitioners and partner and head of arbitration at Shardul Amarchand Mangaldas. I'm also a member of Court of Arbitration of CIAC. And do a lot of International and Domestic arbitrations across the various sectors, including Infrastructure, oil and gas, hospitality. It's pleasure to be part of this panel, of course, last minute. But it is great pleasure for me to join the panel

GAUTAM BHATIKAR: Good afternoon, everybody. My name is Gautam Bhatikar. I'm partner at Phoenix Legal. I am based out at the Bombay office. The primary practice areas for me is commercial litigation, to a very large extent, focused on infrastructure, maritime, Oil and Gas and fairly covering larger portion of the International trade practice. To a large extent, arbitration has been part of my practice especially domestic and to some extent international as well, considering the international trade practice.

SENTHIL DAYALAN: Thank you. Good afternoon, everyone sent you from Dentons Rodyk's in Singapore. My areas of practice are generally commercial disputes. I split my time between arbitration and litigation in Singapore with a particular focus in the maritime space as well as construction. So, shipping, International Trade, energy sectors I don't think I should bore you with anything else. I think let's get started with the panel. Thank you.

PRITI SURI: Thanks, everyone. Okay, so, topic today is "judicial intervention in the enforcement of awards", I think everyone is aware of the fact that the 2015 Amendments

brought about a significant change in the perception of arbitration in India and this system has actually developed extensively since then.

The idea of India, which has come under a lot of flak over the years that we are not pro arbitration, we have lot of challenges as far as the procedure is concerned, as far as proceedings are concerned and as far as awards are concerned. So, my question to the panellists is that, in your view, the amendments that have been introduced since 2015, have they created a shift and have they moved towards minimizing intervention of the judiciary in this process, so that not only a simple perception, but actually the business feels that India is edging towards a pro arbitration friendly ecosystem? Gautam, would you like to say something?

GAUTAM BHATIKAR: Thank you. I think if you look at largely, the amendments that took place in `15, `19 and the recent one in `21, the sections that have been either amended or changed to some extent, are modified or repealed have been quite significantly focusing on the judicial intervention part. If you look at the 2015 amendments you had amendment to Section 8, 9, 11, 34 and 36. So, 8 dealt with applications relating to the arbitration agreement itself. So, to a large extent now the word may has shifted to and changed to shall. So, at the time when the arbitration applications were issues relating to arbitration agreements used to come before the courts. Courts used to start looking at various other things, including the existence of the Arbitration Agreement. But now it's confined to only checking whether there is an Arbitration Agreement in place and going forward in that manner, where to a large extent the shift has been from a more judicial, it's more like a mandatory thing rather than it was more discretionary at that point in time. So, if you look at Section 9, also, to some extent, the changes to Section 9, has been... earlier, the Section 9 was before, during and after, with the insertion of the new amendment. There has been... the 'during part' has been fairly modified to the extent of, when the Arbitral Tribunal is constituted, to avoid interference of Courts on the issues relating to interim relief and pushing it back to the Arbitral Tribunal only and in places where it's slightly on the writ jurisdiction concept, where if there is no efficacious remedy, you are going to get from the Arbitral Tribunal, you can come to the Court. Then you go to Section 11... Section 11 again is quite parallel to the Section 8, to the extent of appointment of arbitrators. Again, you can't go behind. You need to only see the existence of the arbitrary the Arbitration Agreement and go ahead, go ahead on that basis. Then 34 and 36 again has been, the scope has been narrowed. Earlier the scope was too wide. People used to just lead Public Policy, and it will take years to actually eventually decide. But now that Public Policy concept has been reduced fairly. Even in the '36' concept, the elimination of automatic stay has also gone down. Earlier, people used to file and the scenario used to be that as soon as you file a 34, it used to be customary that it has automatic stay. So that's gone away to a fair

extent. Now coming to the `19 amendments, I think there has been an … Arbitrary Institutions that are coming but not yet framed. I think we'll have to wait and watch how it shapes up, which is going to be fair amount of a control over the arbitrations as a whole, to find out whether are they going in the right direction. So that possibly might go away from the courts and this body might look at how the arbitrations are being framed up. Then if you come to 2021 Amendments, which is more with Section 36(3). Now, here I have a slightly different view. If you look at 33(6), which is talking about fraud and corruption, unfortunately even though similar provisions are available, here, now the issue relating to going away from the court it's going the reverse. You're going more towards the court. Because the word *prima facie* is there. And because of that word *prima facie*, what is going to happen is eventually everybody is going to run to court for that… calling it fraud. And as Indian lawyers, we love leading fraud every now and then. So, you will have that problem even for the international Commercial Arbitration. So, this is as a sum up of how things are. It's a bit zigzag, but I think we are going in the right direction.

PRITI SURI: Thank Gautam, very interesting. I'll come back to the whole fraud piece a bit later on. Tejas, would you like to share some insights?

TEJAS KARIA: Yeah, certainly. So, I was part of the Law Commission Committee while we were drafting 2015 Amendments. The whole purpose of these Amendments, as we all know by now and 8 years have proved that the purpose has been achieved, as Gautam says, and we are going in right direction is to reduce the intervention of the courts. And the only criticism which we were facing across the jurisdictions is that Indian courts are interfering too much into the arbitration process. And we have achieved it to a great extent. We have Section 5, which limits the judicial intervention other than what is provided under the Act, and we have now clarity with regard to lot of Provisions of the Act, which because of the judicial pronouncement we were creating issues with regard to whether Indian Courts can grant interim relief in foreign seated arbitration. So, we have now the Amendment says that 9, 27 and 37 is available for foreign seated arbitration unless it is expressly excluded. So that whole controversy about Indian Court's jurisdiction in setting aside of the Foreign Award has been eliminated completely. Also grant of interim relief, we have made Section 9 and 17, identically awarded there. Earlier before amendment, there were difference in the language. So, we can say that the Tribunal can grant the same relief, what the Court can grant, under Section 9. In 17(2), we have introduced that award… Interim orders passed by the Arbitral Tribunal would be enforceable. And we are going to discuss about the **Amazon future case** as well in some detail. So those are all welcome Steps to reduce the Court intervention. We have defined the Public Policy now in our statute. So, both under 34 we have now the definition by way of an

explanation inserted into the Public Policy, which is the old **Renu Sagar decision**, which we had a narrow definition of Public Policy, which we have. And now, we have very few courts interfering into the award unless there is patent illegality, or which shocks the conscience of the court. Especially in the Delhi High Court, we see that the courts are not interfering in the awards unless it is extremely necessary. 34 then challenge have become very difficult. We are seeing now in more and more cases, enforcement and challenge go hand in hand, because as we heard that there is no automatic stay. Parties have had to even deposit 100% of the awarded amount, and that has also led to settlement. Rather than having frivolous challenges against the, ...because if you are out of pocket at the initial stage itself, then the incentive to challenge and buy more time goes away. So that's something we have achieved successfully and we have seen in practice also now. Eight years is a very good time that we can say that yes, there are lot of impact in terms of reducing the court intervention. Something still, we need to achieve in terms of reducing the time for hearing the court applications. We have huge pendency's for appointment of an Arbitrator. Now we have this stamping issue, before the Seven Judge Bench yesterday is reserved the order. And hopefully the law will be corrected that 'at the stage of appointment you don't have to go into the stamping aspect and you can leave it for the arbitral Tribunal to decide it.' The **N.N. Global** created some confusion. So you have to also give 100% credit to our courts that within less than two to three months we are now looking at correcting any mistake which may have happened in the previous order. So hopefully we will get some clarity on that as well. So again, the message is to reduce court intervention. Wherever it is necessary, please not exercise jurisdiction. The role of courts is basically to support and supervise and not to replace as an appellate court. And as we all know, it's not an appeal, it's only an application for challenging the award. So, there is a very limited jurisdiction of the court and we are comparing ourselves with jurisdictions like Singapore and London. And we need to bring in that uniformity. We need to have specialist benches, which can then decide the arbitration related matters who are well versed with the Law of Arbitration. We can expedite many of the pending cases which are pending. And as far as appointment is concerned again as we heard, we can delegate it to the Arbitrator Institutions. We have very good Arbitral Institutions. And Sections 6 (A) and 6 (B) has been added by way of 2015 Amendments. Of course, 2019 Amendments recommends deletion of 6 (A). Because there is no *prima facie* finding by an Arbitral Institution. You have to just appoint the Arbitrator, but 6 (B), talks about that delegation of power to appoint arbitrator by the Court to the Arbitral Institution will not amount to delegation of judicial interventions. Section 11 has been extensively amended. The timeline of 60 days has been put in there as well. In 34, we have 1 year timeline. So even we are putting timelines on the court to expedite the whole process of the court intervention. So, in my view, we have achieved a lot. We can do much better. But yes, I agree with Gautam that we are on the right direction.

PRITI SURI: Thanks, Tejas, very insightful so there is overall consensus that we are moving in the right direction. Senthil as a practitioner in Singapore, what has been your experience both in Singapore, as well as in India, in this context?

SENTHIL DAYALAN: I'll preface everything by saying that, "don't think I'm in the best place to comment on Indian Practices. But I'll definitely share with the Singapore experiences come from." So, as far as Singapore is concerned, I think it's well known that we have taken the approach that minimal curial intervention, right? Right from the get-go, it's always been the courts are not going to interfere and we want it that way. Because, at that point, we were looking to build Singapore up as a 'Dispute Resolution hub' as an 'International Arbitration hub.' What that has meant is that our courts have really taken a very hands off approach with challenges to arbitration awards and over the last 15 years if you just review the cases that have come out, they also take that attitude to other aspects of applications to court in respect of arbitration. So just taking one example that Gautam raised, which is I believe it is the interim relief, right? There was an amendment in 2015 on interim relief. So, in Singapore, the court has the power to make in interim reliefs, as does the Arbitral Tribunal. But the courts take a very hands-off approach more so than India. I think at this point in time because it's not just interim reliefs that can be sought from a Tribunal that's already been constituted, right? The Singapore position goes further to say that, "as long as there's an Institution involved, so no matter that the Tribunal is not even constituted yet.... As long as there's an Institution involved and that Institution has rules that allow for such interim relief, then don't come to the courts. Stay with the Institution." That's what parties have chosen. And that's where you go, right. And this has played out in a way to the prejudice of some parties at times. So again, another simple example is "emergency operation." Right. You seek emergency relief because you need urgent relief. And I think, I won't be being too modest when I say that Singapore courts are extremely fast in granting that interim urgent relief. Like if I was to file an application for a freezing order or a search order, I could get it within a day or two. Right? But now, because the courts are saying, "you have chosen to go to arbitration under a particular Institution, and that Institution provides for emergency relief, go there and ask for the relief." But what the courts don't appreciate is that the reliefs or the rules under those institutional under the institution generally envisage 7 to 14 days before you get your relief, right? Very different from what you get in the courts and I mean, arguably, you could say that parties have chosen that. Right? But if you look at it from the perspective of one the practitioner and two from the client's perspective, it is a problem for them. Because they're being forced to wait for their relief and I'm not sure that's the best position to take? I am not criticizing our Singapore courts, but I'm here. Probably I'm safe a bit. But again, the point I make is that I think that Singapore

not just the rules or the statutes, but the judicial attitude has always been hands off. If you have chosen arbitration as your mode of resolving a dispute, then go there.

PRITI SURI: Thanks, Senthil, it's very interesting. I'm so tempted to mention a couple of stories, but I will control my urges. Just one point that I want to take from what you had said about an 'Emergency Arbitrations'. So essentially, where we stand in India, is that if we look at the 'Amazon case,' there has been a tendency of Indian courts to go towards to respect party autonomy as well as we are moving towards hopefully and 'Institutionalized Arbitration versus an ad hoc arbitration'. So now, coming back to the **Amazon case**, in this particular case, the Supreme Court actually upheld the award. And here what they were trying to do was they were supporting the **Arbitration Act** Provisions as well by basically ensuring that they were not interfering, okay? So, do you think India is ready for this? Tejas, would you like to talk a little bit more about this particular case and what it means in the evolution of the jurisprudence in this regard?

TEJAS KARIA: Definitely. So, what... In India, we had a problem, in 2015, `19, both amendments is that, we suggested to amend the definition of Arbitral Tribunal to include Emergency Arbitrators. Somehow, that amendment was not accepted and we don't have a definition of Emergency Arbitration or any concept of Emergency Arbitration in our Act. Whereas all our Arbitrary Institutions, including MCIA and other Indian institutions, have provisions for Emergency Arbitration. The question comes is that whether what happens after you have an order from Emergency Arbitration because it's not an order passed by the Arbitral Tribunal, which is defined under the Act? Therefore, it is not an order under Section 17. And also, it is not an order of the court, because it's not enforceable. So, we had that issue for quite some time. And whenever we had a foreign seated emergency award, we had to go to Indian Courts and file a separate application under Section 9. So, we had **HSBC and AEL** in other cases where we had to go back to Court under Section 9, in the case of **Amazon** it is a great achievement for us, because what we could not achieve through legislative amendment, through judicial pronouncement, we have been able to achieve that. And what the court has held is that order passed by the emergency arbitrator is as good as an order passed under Section 17 (2). Which says that the order passed by the Arbitral Tribunals are enforceable as if it's an order passed by Court. And there's a 'deeming section' there. And we have extended that deeming section of the orders passed by the Arbitral Tribunal being the orders of the Court to also Emergency Arbitration. This has helped us in many ways. One is that Emergency Arbitration is a tool which helps to get the within less than 14 days. Whereas if you go to court under Section 9, we have to wait for long time and again, if you have selected the rules which provide for Emergency Arbitration, that's a great way to protect the subject matter of the

arbitration. Which also promotes Institutional Arbitration. Because if you want to go for Emergency Arbitration, it has to be Institutional Arbitration, which is where the institution appoints the EA and the order passed by EA is now enforceable. So, there is no problem as such, in going in that, and that debt reduces the burden of the courts also. When you have to go to the jurisdictional court or wherever the seat is there, you have to go to that court for getting the interim release. And the judges are always not that quick as the emergency arbitrator, who can just be appointed for that particular purpose to achieve this. So, this **Amazon judgment** has really helped us in bringing that clarity. As far as enforceability of Emergency Arbitrators awards are concerned. And now at least we can say that for India seated arbitration, we have a clarity. The only problem comes where the seat of arbitration is outside India and there, we are proposing to change the definition of the Tribunal or to say that in addition to the orders passed by the Tribunals in India, the orders passed by the Tribunals outside India also, Emergency Arbitrator will also be enforced in India. For that we will have to add the amendment to our Section 2. And if we can achieve that, we can get a clarity. The other way to do is just introduce the definition of Emergency Arbitration and get the clarity. But at least for India seated arbitration we have now the clarity is due to this judgment. Thankfully.

PRITI SURI: It's a huge step forward, in my opinion. Gautam, any thoughts?

GAUTAM BHATIKAR: I think see, I'll not get into the judgment because Tejas, has already covered it. I think what we need to look if you have to grow as arbitration hub or institutionalized to an large extent, the arbitration procedures and rules? The way forward would be 'try and reduce the judicial intervention. Increase the party autonomy.' Because that's the whole idea behind the Arbitration Act coming into picture. Maybe in the 19th century onwards. The whole idea was 'go away from the court and start your own, so-called private resolution of disputes'. And if that were to happen, then at every stage, whether judicial intervention comes into play, there has to be reduction to a very large extent. But at the same time, there has to be some judicial sanctity to be taken care of as a supervisory body, which I think things are going in the right direction, with Legislature and Judicially working together simultaneously on different cases and putting the law together. I think generally we are in the right track. But what eventually will happen is what is the time we are taking and eventually how things are looked at by international corporations investing in India, or having disputes or otherwise a contractual obligation between Indian... Indian parties? And the next level would be then two international parties to choosing India as arbitration hub. I think that should happen eventually. Like, how Singapore is.

PRITI SURI: Not sure whether it will happen in my lifetime, but yes, that's the eventual goal. Senthil, any best practices from Singapore that we can emulate over here?

SENTHIL DAYALAN: Well, I was going to say "Singapore is the best practice in this." But yeah, happy to share a few examples. I think this goes slightly beyond the legal aspect and more into the logistics of it. Right? But if you look at the time taken to enforce an arbitral award, for example, in Singapore, you make an application to register the award, and then there's a fixed period. I think it's 30 days where an application can be made to set aside within that period of time. And once that period is over, and then you go ahead and you have it registered as an order, and you enforce it. Right? So, you're looking at a time frame of a matter of weeks, maybe a few months. Now in a jurisdiction that can do that, then you automatically increase the attractiveness of the jurisdiction because the procedure or the process of getting an award is only one aspect of the consideration for parties. It is the practical outcome, which is, "can I get my money?" And, I think in that sense, Singapore had that end in mind when it came with the idea that look minimal curial intervention, and in fact in the Parliamentary debates, when they were enacting the Arbitration Act, they were very clear. Singapore is an undeveloped… or at that time was an undeveloped jurisdiction as far as Arbitration is concerned. And so, to make it attractive to international businesses to come there, we have to follow what the international standard is. And at that time the Model Law said, these are the only means by which you challenge an Arbitral Award, right? So, by adopting that, arguably we enhance the attractiveness of Singapore and today where we are, you couple the limited scope for challenge plus the speed at which our courts move. I think that is one of the main reasons why people come to Singapore.

PRITI SURI: Utopic.

SENTHIL DAYALAN: Exactly, well I wouldn't go so far, right. Because there are other issues with that approach. Which is the fact that there is no 'right of appeal'. And I think, there's been some talk on the ground that, "look a limited right of appeal may be warranted". Right? Whereas at this point, everyone comes to Singapore thinking, okay, I get an award in Singapore, or in an arbitration award, and I have to enforce in Singapore, it's a done deal. And it'll be done within a matter of weeks or months. I have things to share on what the talk on the ground in Singapore is and how we want to actually move away from being so efficient. Because, actually, it ties up with this topic. Because you guys are trying to push towards 'minimal curial intervention', whereas we are now trying to push for 'some curial intervention'. In the UK, Section 69 allows parties a 'right of appeal' on an opt in basis.

We want that on the ground. Because there is value in an appeal. You don't want a situation where parties are stuck to an award and there's absolutely no chance of rectifying a problem, right? Someone got it wrong on the law, but you can't amend it. You can't change it. Whereas if you have… and again, this ties in with party autonomy… If you have a right to challenge an award… limited right. Ostensibly, limited right to challenge an award on a question of law, then you value getting it right over getting it done. And I think there is some value in that. So while we are talking about how India wants to push to toward being as efficient, and as effective and attractive an arbitration hub. I think you also need to balance the fact that you should want to get it right more than just getting it done.

PRITI SURI: Very interesting. Very interesting. I think we can actually have a session just on that one piece. It's a fairly exhaustive discussion. So, moving on to ***Renusagar***. Everyone in this room is obviously aware. I'm assuming that you're aware of ***Renusagar***. I think what we would like to now discuss is that the judgments that have been rendered since ***Renusagar.*** Obviously not all of them, but the key important judgments in this particular space where judicial intervention and using Senthil's language, a hands-off approach versus a hands-on approach. Abha, would you like to take us through a little bit of the high-level overview of how the courts have examined this issue?

ABHA MALHOTRA: Yeah, sure. Thanks. ***Renusagar*** is if I may call it a lamp on the street, which has directed the contours of the enforcement of foreign affords qua Public Policy. It has narrowed down the sphere. And the 3 basics…. I don't want to read out because I'm giving a bird's eye view. But the 3 basic judicial principles incorporated in ***Renusagar***, were 'Fundamental policy' in comparison to 'Public Policy' of India. Fundamental Policy of India or second interest of India, and third justice and morality. Now this judgment, one must remember, came almost 20 years ago, even before the **`96 Act** was enacted. And it is a testament to our Court's maturity of being hands-off. And narrowing down the interpretation of Public Policy, which juris across jurisdictions have called an unruly horse. And it's not just India, it's jurisdictions like UK, US, even Singapore to some extent which is grappling with the concept of Public Policy. There's an unending debate on that. So ***Renusagar***, put to rest a lot of the jargon, if I may say so. And created a narrow path. And soon thereafter, we had in 2011 a case by Supreme Court in the case of **Phulchand Exports**, which expanded the purview of Public Policy under Section 48. So, that expansion created again, question marks. Because what ***Renusagar***, had done was to narrow down the scope. Then we have the famous case of **BALCO**. I'm just giving you rundown of the cases…Am I audible? Yeah. Okay. ***BALCO*** of course, we all know gave a very pro-enforcement stance, and it held very categorically that part one, which relates to the domestic awards, would not be applicable to part two or the foreign

seated arbitrations. And thereafter in 2014, we have a series of judgments coming from the Supreme Court that sort of opened up the pandora's box in the sphere of Public Policy, starting with ***ONGC versus Saw Pipes***. Everyone knows about that case and they introduced of course patent illegality by way of that judgment. And patent illegality would be anything in contravention with the terms of the contract. In contravention with the Act or in contravention with the provisions of law. So, these three aspects within the patent illegality sort of again, broadened the horizon of public policy. Now there was a lot of public criticism of this judgment because we had famous jurists like just Fali S Nariman going to the extent of saying you might as well scrap the **`96 Act** if you're going to interfere and everything, et cetera. So, this was criticized publicly. Thereafter we have a turnaround by the Supreme Court in the ***Shree Mahal versus Progetto Grano Spa*** in this again, they did again come with the pro enforcement stance. And they said that we should keep in line with the New York Convention. And we should get into the pro enforcement stance if we have to respect the New York Convention, et cetera, and this case actually was challenged under that concept of patent illegality under Section 48, which is the conditions for enforcement. So, they said we will not apply the rule of patent illegality, and we will narrow down Public Policy going back to ***Renusagar***. That's why I keep calling ***Renusagar*** as the lamp. That sort of defined the contours. And as he rightly, said it was after ***Renusagar*** that the Amendment in 15 came, incorporating those three fundamental judicial principles. Thereafter the ***ONGC versus Western Geco International*****,** again in 2014. And this case, the Supreme Court studied where it could possibly annul an award and it decided to take a hands-off approach. So, it followed a hands-off approach to the extent of not annulling the award, but it introduced something called the Wednesbury's principle of reasonableness. Now this again was widely criticized and it was soon followed by the case of ***Associated Builders versus DDA***, which again followed ***Western Geco*** of.... Wednesbury's principle of reasonableness. And the aftermath of ***Western Geco***, as well as ***Associated Builders***, which were departed from ***Renusagar*** , was that the Law Commission, in the 246 report not only criticized the inclusion of the Wednesbury principle of reasonableness but then they came through with an amendment. And the explanation, too, that was added to both 34, as well as Section 48. Which says, “for the avoidance of doubt the test as to whether there is a contravention with the fundamental policy of India shall not entail a review on the merits of the dispute.” So, this was a welcome step by the Legislature, I would say. Bringing back into focus ***Renusagar***, so ***Renusagar*** has been coming back whenever there's been a digress and after the latest amendments, we have the case of ***Ssangyong Engineering and Construction***, which is the first one to the post amendment. And they said, “it would be illegal to sort of review the merits of the case.” And they decidedly took a very hands-off approach. But then, of course, once you have the good, you come back with the bag. So we have the case of ***Vijay Karia*** as

well as ***NAFED versus Alimenta***, which were again criticized because they observed that foreign awards are subject to Public Policy of India, and the courts can decide the quantum of interference, et cetera. And the Supreme Court in that case of ***NAFED***, refused to enforce the foreign award on the grounds of it being opposed to Public Policy under Section 7 of the Enforcement of Foreign Awards Recognition Act**.** So, we see a turnaround coming. But then of course we have good news coming back again it's been back and forth, back and forth. Now we have the ***Government of India versus Vedanta*** coming in 2020, 3 judges of the Supreme Court discuss the regressive stand taken by the Supreme Court in these two cases and held that minimal interference is the course to stay and they have now to put it very briefly come back to where we started in ***Renusagar***. So, this is how it's been a back-and-forth match, really with the Supreme Court. But just to give credit to our Supreme Court, this deliberation of public policy our Indian Supreme Court is not the only one which is grappling. All jurisdictions are grappling. There was a case in Singapore where enforcement was denied because the Singapore Court of Appeal said that the seat of arbitration was wrong. So you have that happening even in jurisdictions like Singapore, which are supposed to be the most pro arbitral jurisdictions. Of course, you have them in UK and US as well. And I close with the remark that what ***Renusagar***, did for the amendments coming in. Let's hope this future ***Amazon*** case does to another amendment, so that we have a legislative mandate saying that even the interim award could be enforced. I'll take rest on that.

PRITI SURI: Thanks for that detailed, exhaustive overview. Sorry to put you on a spot on that one. It's so difficult to put an overview to this. Tejas, Gautam, anything to add very quickly because we are running out of time, I see.

TEJAS KARIA: No. So, we have come a long way and we have seen the judgments over a period of time but what we are experiencing now is that the courts have also kind of accepted a fact that we cannot interfere into the arbitration award on the ground of Public Policy, which is again a very narrow ground, which was again expanded and then reduced. The scope was reduced. So, we have seen a complete evolution. And we were discussing the same thing in a committee formed by the government headed by Mr. P K Vishwanathan, and whether we should now change the law and make it more simplified. But the view was of the members was that the judgments are clear enough and we should leave it for the courts to decide. The only suggestion I have is to have a uniform applicability of Public Policy by doing the training of the judges. And we have National Judicial Academy, and we have the State Judicial Academies, where the judges need to also understand in the commercial side is that what are the limitations and the test, as we know, is that it should shock the conscience of the court when it comes to receive the award or it has to be so patent illegal, which does not require any other

reappreciation of evidence, or examination of the facts on merits. So, it has to be very clear case for setting aside. And if there are two views possible, then of course, the court should not replace its view with the view taken by the Arbitral Tribunal. And that is why we have heard and seen that Singapore is successful because the courts completely have a hands-off approach, and we need to adopt that very strictly, in my view.

GAUTAM BHATIKAR: Maybe a few seconds may be the time is running. Largely what actually is needed is striking a balance between the Arbitration and the Court. Unless you strike a balance to the extent that what is the inquiry the court needs to do into arbitration, or what is the role they need to play? Either it's supervisory or how to step into? Or rather getting behind the award initially during our earlier days we saw, courts getting behind the judgment, even for a matter, if you just write Public Policy, without even thinking what it is you used to get a stay automatically. Which has now gone far back. Now we are looking at something which is much more robust and developed. At the same time, we can't go the Singapore way, which is more scary. So we have to strike a balance, that's what I wanted to add.

SENTHIL DAYALAN: Okay, so very quickly, I know we started by saying, Public Policy is a wild and unruly horse. I have a different term, which is I think, is the "Refuge of the desperate." Right? Because I think at the end of the day, you can't fit your case into one of the established grounds for setting aside. Then your last resort is really, to say Public Policy. And I think, where Singapore has taken a stand or at least the way we've done it is very early on. The Court of Appeal set the tone, which is that Public Policy is not Domestic Public Policy, it is a very narrow scope. Very narrowly scoped. And it must shock your conscience or injuries to public good, wholly offensive.... That kind of language. So, it must really be something of such an outlier type of situation that the award should not be enforced. So, over the years we have seen a number of cases where parties have alleged Public Policy. But if you were to really dive deep into the cases, these are actually just challenges to the merits. Right? Errors of fact. Errors of law. Not being allowed to produce documents or rather to seek discovery or documents, stuff like that. And the courts have thrown it out. In fact, I think in 2022 we have one High Court decision which said that, "even if an award has been partly or fully satisfied in another jurisdiction, it doesn't mean that the Singapore court will not register the award as a judgment in Singapore", right? So, at the end of the day the courts respect their award and they respect the process and I suppose it works. And which is why Singapore remains as attractive as it is.

PRITI SURI: Thanks. It says time's up but I do have an... okay, fine, so fine. I'll summarize. Okay yeah, so questions? Do we have time for questions? Yeah. Okay. Two questions. Anyone has any question?

AUDIENCE 1: Senthil what is the percentage of ad hoc and institutional arbitrations in Singapore? Are there some data on that?

SENTHIL DAYALAN: Okay so my understanding is there is no such data available publicly. I believe that the institutional arbitrations, there are statistics, because the Annual Reports that are published, we're looking at about 3-400 cases, I think as of last year, that's for SIAC. SCME is very little. But the ad hoc ones, ad hoc arbitrations, are not exactly vogue in Singapore, right. We tend to go the institutional route because there's a lot of certainty. I understand that the Indian experience is a lot different.

AUDIENCE 1: Yeah, it's completely on the opposite side and that's the concern when we speak about judicial intervention and enforcement. I'm talking about even domestic. The fear is with ad hoc arbitration. If you're going to go down this way blindly... I go back to what you said earlier is that if there is no some kind of filter where the courts are taking a complete hands-off approach in an ad hoc world like India, where the arbitration is mostly ad hoc, I think it raises a lot of questions. Because frankly in my 30 years of experience, I have seen awards which shouldn't wipe, no chance can stand the test of any legal principles. And those are the kind of awards where you are very concerned which... let's get things done over ...let's get the justice done.

SENTHIL DAYALAN: I think one nuance that didn't come out here given the time is the fact that in Singapore, or rather jurisdictionally we do differ in certain ways... In Singapore, domestic arbitrations do have the right of appeal, a limited right of appeal to the court. That's statutorily provided for. That right was not provided for under the International Arbitration Act. So, in India, as I understand, the bulk of the arbitration is domestic arbitration. The bulk of the arbitrations are ad hoc arbitrations. So in such a situation I don't see why there should not be a limited right of challenge to the courts? But again, it's a question of balance, right? In Singapore. Now we are pushing for a right of appeal in International Arbitrations. So, it's a question of where you want to draw the line? And as far as Singapore is concerned, at this point the Government has not gone far enough to introduce a right of appeal for International Arbitrations. Up to you guys.

PRITI SURI: That's the cue for us to stop. Okay. So, I will not have any closing remarks, but just want to thank everybody and particularly Tejas, who just got roped in at the last minute. And thank you for agreeing to do this. Thank you, everyone for providing deep, valuable insights and we'll continue the discussion over there. Thank you.

Panel discussion 2: Third party funding in international arbitration - trends and challenges.

SHWETA BHARTI: .... So, we have a very interesting lineup of speakers. Hi, I'm Shweta Bharti, I'm. The Senior partner at Hammurabi and Solomon, and I'll be moderating the session today. We have with us, Mr... let's start in this order. So, we have Mr. Naresh Thacker, He's the Senior partner at Economic law Practice. We have Mr. Badrinath Durvasula, He's the Ex. Managing Director and legal advisor at Essar Group, and he has been former Head Legal Larson & Toubro, Adani Group, Reliance and HCC, Mumbai. We have next Ms. Neeti Sachdeva, the Secretary General and Registrar at MCIA, and she does not need any introduction at all. Next to Neeti is Mr. Nusrat Hassan. He's the Managing partner at Denton's Link Legal, Mumbai. And next to Nusrat is Mr. Ajay Bhargava, Senior partner, Khaitan & Co. So, as you can see, none of the speakers actually need an introduction. And therefore, I think I'll start with the topic immediately. So, it says, 'Third party funding in International Arbitration, trends and challenges.' Now, third party funding, so far as India is concerned, has been a matter of discussion since 1876. While I was doing my research, I realized that in 1876 the previous Council had given an observation with respect to third party funding being permissible in India. So irrespective of whatever we have been thinking about with respect to third party funding being restricted as a champerty, as in as in maintenance is all something probably which does not have a backup in terms of law. Legally, in India, there are no Statutes which really restrict the third-party funding. So, 'what really is the reason why it has not picked up?' is something that we are going to discuss today. And how are we going to increase the third-party funding, in that sense, in the International Commercial Arbitration? So, if we look at as I told you, the history does not restrict the statutes, does not restrict the third-party funding. There are different judgments which have been passed by different courts, including the Supreme Court of India. And that is something which is very interesting that I observed that even in the case of ***Bar Council of India versus A K Balaji***, in 2015, the Supreme Court has said that, "there appears to be no restriction on third parties that is non lawyers funding the litigation and getting repaid after the outcome of the litigation, along with specifically excluding lawyers from adopting the role of funders." So, while it does exclude the lawyers from the role of being a funder? There's no such restriction as such. So, with that kind of observation by the Supreme Court making the law of the land, it is interesting that why still, the third-party funding has not taken off as a concept? Now, there was one instance which was observed by the honourable Delhi High Court, and I'm sure the speakers are going to talk about it is the case of ***Tomorrow Sales judgment***, which was passed in 2023 in May of 2023 for that matter. And there, in fact, the court had in fact, given a lot of emphasis on third-

party funding being essential to ensure access to justice. So, with that background and coming straight to Mr. Badrinath Durvasula, because he was as a General Counsel of HCC. In fact, he has been the pioneer in the sense with respect to third party funding, where his company had then entered into an Agreement with a consortium of investors, which was led by BlackRock to monetize an identified pool of arbitration awards and claims for a consideration of 750 crores for which purpose, a special purpose vehicle had been created. Similar arrangements we have seen also in the cases of ***Patel Engineering and Era Engineering***. So, coming to you, Badri ji, and I would want to understand from you, what are the expectations from the industry in the context of time versus cost versus opportunity? And what are the typical kind of disputes which the industries would like to offload and in the context of third-party funding?

BADRINATH DURVASULA: Thank you, Ms. Shweta, for the wonderful introduction. I think I'm singularly fortunate enough to be working with HCC, Hindustan Construction Corporation at that point of time and when the deal has happened. But today Disclaimer is that whatever I'm going to talk, it's what is there in the public domain and what has happened behind is something I'm not supposed to talk. But nonetheless, I'll give you the flow about what has happened. Today, if you look at any kind of a construction, kind of a contracting be it Larson & Toubro, be it a kind of HCC, Those who are dealing with the PSU, NHPC, NHA, NTPC et cetera. There are a lot of Government Contracts which are there. Today, per se if you talk about it, the major litigants in the country are the PSUs that's the Government of India. So that be the case today the companies who are working on the frontal, they have to bear the brand because every matter goes into some kind of a litigation. Every Contract translates to at least four to five litigation aspects of it. So these are the companies now, today, the company, the HCC, is the one which is there in the public domain. Another is a Patel Engineering is the one which are there in the public domain. There are numerous companies, including Larsen & Toubro, who are facing huge number of litigations and they have to encourage substantial cost as well as they need to spend their resources on this. And they need to block their balance sheet. Also, all the three things are now completely kind of a bottleneck for them to handle that. So today the third-party funding is the one which would facilitate. In fact, if Shweta ji's, interaction says about it, there is no bar for the third-party funding. But there is no facilitation. Also, for the third-party funding. I think the rest of the panel will speak about it, how to facilitate. But the point is, if we have a third-party funding, what's going to happen is that we will optimize on our cost that means the company will not have to deploy its employees to handle the kind of litigation. They would not unnecessarily budget the cost for the kind of legal expenses, which are uncertain. And then third, most important thing is the timing. Because as you know, that any kind of a little arbitration dispute to anything else, it would take about zero to at least five to ten years. That's a kind of a span, we are looking at. The company is not sitting

here to handle this kind of a dispute. They wanted to offload. So that's where every company's perspective is to avail the third-party funding. That's a kind of an industry demand, I'm saying it, it's an industry demand. Government can do it, and it can be facilitated. That's what we look it, as a kind of an opportunity to optimize on our strings to earn on the business rather than spend on the litigation part of it. That's what we look at.

SHWETA BHARTI: Well, thank you so much. Actually, it gives us an industry perspective. And Nusrat, now, I am coming to you. Because what we heard from Badriji. And what also, the Delhi High Court says that it would enable the ease of justice. So, in that kind of a context, will third party funding help in promoting arbitration as a means of resolving disputes in India? What is your take on that?

NUSRAT HASSAN: Thank you. Thank you, Shweta. I think the answer to that is definitely a Yes. I mean, I'll just take a couple of data points just to understand why your question, why am I saying it definitely a yes. So, India's plans for infrastructure is $1.4 trillion in the next 5 years. We are going to become the third largest construction industry by 2025. Now this is going to raise a lot of arbitration cases and trust me, the infra companies are always starved with cash because they need huge funds because the sector is such. The question really is are with this kind of arbitration cases which are likely to come up where let's forget arbitration cases, disputes which are going to arise where are they going to be resolved? If you ask this question to yourself, you will say, of course, arbitration. Now the next question is, how are you going to resolve these arbitration disputes? Because most of these companies, the reason is I'm saying this because we are discussing the third-party funding. But let me answer the first question, is why this is going to help and promote arbitration? So, what happens is first is, it improves Access to justice. Now, when there is a third-party funding, there is... that you will immediately face cases, I mean, probably, many of us would have experience. At least I have experienced, where companies have given up cases because they don't find it affordable to pursue them. Secondly, most of them will sometimes come to you and ask for a success fee which is not permitted by the bar council, for us to take Success fess. So, first thing what it would do is, improve Access to justice. Second is it mitigates financial risk. How is that.... you know, substantial amount of time is spent and resources are spent and there is no guaranteed outcome. So, typically, when third-party funding happens, it's a non-recourse kind of funding. So therefore, the risk reduces for the company. So, today, an Arbitration, if it's a large Arbitration, the lawyer's fees can run into millions of dollars. So, these millions of dollars is a... becomes a large amount of money on the balance sheet of the company. Now, how do... where the third-party funding... the next thing... what happens is that it mitigates the risk.

And in third party funding what we've seen happen around the world is that there is a certain test and filter which takes place, whether these cases are meritorious enough to be funded or not. So, there is a test which also happens. Which improves the kind of matters which go into arbitration. Then there is, of course, what provides is a faster resolution, because these third-party funders have a kind of a supervisory role all the time. They ensure an efficiency which comes into this ADR process. Then, of course, a lot of these funds are answerable to their investors and these investors want to ensure that you are funding companies and you're following those processes in arbitration where there is certain ethics code of ethics which are always maintained. So, when the third-party funder steps in, there is also quality of arbitration and code of ethics, which are followed, which I think provides substantial benefit to the ADR process. And of course, one of the.... and as the ADR Process, arbitration is chosen, you naturally will reduce the, you will reduce the reliance on the Indian courts and that would reduce the burden of the courts in India and provide more efficiency in the arbitration So I'll pause here for a minute because there are... you speak a little bit more.

SHWETA BHARTI: Sure. No, thank you so much. And one thing that has stuck to me is that you mentioned that third-party funders probably are going to have a supervisory role. Once they are going to have a supervisory role. And this is something on which there was an observation made in the ***Tomorrow Sales Judgment***. I'm coming to you Ajay on this. Where it held that a funder could be held liable for adverse cost where.... could not be held liable for adverse cost where it was not a party to the Arbitration Agreement or the Arbitral proceedings. In this kind of observation, which was given by the honourable Court, do you think that a funder should be implemented in execution proceedings, when the funder is not a part of the Arbitration Agreement?

AJAY BHARGAVA: So, I think this is a very interesting aspect and just to apprise everyone if you are aware or unaware now this SLP has against the High Court order has just been filed last week. So, we'll soon know the outcome, the view of the Apex Court. But it's a very interesting thing because historically people have been sponsoring litigation. We have seen it in courts for years and years, especially the ones on real estate. Every mat... property issues. But now, when we talk about implement... and say execution in the absence of law, on this point either we go back to contracts or we have some law in place to fasten liability on funders. So, the way it is now, in my own view, having seen the orders of the High Court, I don't think you can implead a third-party funder in an execution especially in a case where they are not a party to the arbitration. And here very Interestingly the arguments which were made in court, which appeared to all of us to be very basic that how can you implead somebody who's not a party to the Arbitration Agreement? So, obviously, you've not invoked the arbitration against

that entity. The party is not a party to the entire issue, arbitration. And then in execution, the answer is that costs were awarded in favour of the other party and since the funder has funded the Claimant side of the case, they would have gained out of it. Hence, it's an investment for them. Therefore, for securing cost, I want to implead them. So, it's a very difficult thread to follow. Really. But it may have appealed to the High Court judge who heard the matter singly, that "yes," because if a person has a vested interest apparently in the Arbitration or the claim or the awarding of the Claimant's claim at the end of it. Then he can't just simply say, "I will be only party to the reward, but not the risk of it." So, that may have appealed. But then again, interestingly in law our Appeal Court said something different. They went on the very simple concept that if you are not a party you were never impleaded as one, then you can't be impleaded in execution. But the law on that luckily will now be resolved once the SLP is heard. And we see how the courts interpret this in the absence of any legislature. So that's my view on that Shweta.

SHWETA BHARTI: Sure. Thank you. Now coming to you Naresh, because we have heard all the interesting perspectives with respect to third party funding. In fact, in one of the judgments the Kerala High Court had observed that a champerty is illegal only when the object of the agreement is illegal, or if the conditions of the Agreement are violative of the principles of equity, justice and law or good conscience or the Agreement discloses an unconscionable bargain. So, whether a transaction is unconscionable or not, it will, of course, depend upon the facts of each of the case. So according to you, what is the proportion of the amount which is paid to the funder or investor from the recovered amount would be deemed to be so excessive that the arrangement is categorized as extortionate and unconscionable in case of a favourable outcome?

NARESH THACKER: Thank you. Shweta, to begin with. First thing that we must recognize is that unlike UK, where champerty was looked at very strictly, in India's, Champerty's Agreement, in that sense.... And that's exactly what the Kerala High Court says, that "it's not illegal or void". The question truly is that what are the inequities that one can find? What are the inequities that one can get out of a contract to make it an unconscionable bargain and those terms are the terms that the courts would usually look for. There is no one size fits all answer. One cannot say that if the proportion is 50-50, then it is an unconscionable bargain. In fact, on the contrary, there has been a decision in as far back as in the 1960s, late 1960s, where a 50 exactly a 50-50 bargain, the court held that in a situation of this kind where if the funder has actually brought in money and he is taking a claim and has also.... he is also taking some kind of a punt on it. Well, the punt is a very loose comment to make for something of this kind, because if you are truly taking a punt or if you're taking a gamble, then the Courts

are going to look at it very strictly. When I use the word punt and a gamble, here is a third-party funder who's actually put his money in. He does not know what the outcome truly will be. He's done his due diligence, but he... but you know, as many due diligences as we do of a matter. We all understand that you know, the best matters you who want to lose and the worst argument may win you the worst matter. It's always a chance that one takes in court. So, what truly happens is that where someone has brought in money, has taken that kind of a punt that I'm talking about on a matter. The courts have usually held that. So far as he's not a rebel rouser. So far as he's not someone who's going to actually proliferate litigation. He's not there to do that. So, take example of a PIL, a PIL is... what is a PIL? It is one kind of third-party litigation funding, but we all yeah. And we all understand we all understand what happens in a PIL, because there are numerous PILs, which are actually Private Interest Litigation rather than a Public Interest Litigation. And these are the kinds of things that courts are looking for. And I remember way back when our CJI was in the Bombay High Court, one matter did come up before him as a PIL. It was against one of the Cricketing bodies, not the BCCI, but one of the other cricketing bodies. And the question raised by him in open court was that "is this a PIL?" And he went after the person who had actually signed the PIL, to say that, "who are you funded by? From where have you obtained the fund? What is your interest in in the petition of this kind?" So that is what the courts are truly looking for. So, in situations where... let's say you could have a situation where you've got what you asked for, and then you are levying an interest on that money. Would it be an unconscionable bargain? The courts have named that as an unconscionable bargain, because you got what you had contracted for. But now you are levying an interest on that amount as well, and you're trying to gain something more out of it. It's an unconscionable bargain. In a case where I remember a matter in the Bombay High Court again, where it was an issue concerning a group of farmers, 25% is what was to be taken away by the so-called funder. Obviously, it is not the third-party litigation funding that you and I understand. It's more of in the [UNCLEAR]. when you go, you have the so called *thekedars* as who we understand they were the ones who are funding it. The 25% what was being taken away in a situation of this kind, the court had held that it is unconscionable bargain. And that such is a situation where we have to step in our conscience is challenged, broken, and therefore we will hold that this is not something that is right. So, you started off by saying that it will depend upon facts of each case and exactly that is what happens. So Indian courts are not going to... one thing is clear that third-party litigation funding in India is something which is acceptable. It has been accepted like you rightly mentioned. Since 1876, and even before that. But courts have been very careful. They have always kept an Eagle's eye on what sort of agreement is being entered into? Who are the counterparties to the agreement? What extent and what proportion of money is being sought to be taken away? And for what reason is that money being taken away? So, these are the things that courts will usually ask

when deciding upon what proportion of the money truly represents or does not represent a conscionable or an unconscionable bargain.

SHWETA BHARTI: Thank you for giving a completely different dimension to this third-party funding as a concept. I think that's an interesting take on that. Now, all of you, as the industry leaders for the legal industry, have a sense of accepting the fact that third party funding definitely is going to help litigation or arbitration in that sense that it would take care of a lot of issues. Even after all of this and all of the positive attributes that I did here from Nusrat and from Naresh. And also, if you look at the other jurisdictions and I'm coming to you Neeti, with this question, because if we look at Hong Kong, if we look at ICC for that matter in 2021 has accepted a third-party funding, as in their rules. And also, for that matter, SIAC has introduced it in their rules since 2018. So, with these institutions already accepting this third-party funding as a concept, what do you think? Are the trends and approaches in institutional arbitration that have taken towards third party funding and could institutions frame rules for third-party funding with no underlying legislation in India? Because that I think is the general sense that I get is that because there is no legislation in India and therefore probably third-party funding has not been able to take shape as it should have. So, do you think that that is probably the right approach?

NEETI SACHDEVA: Thank you so much, Shweta. I'm just trying to see that when should I wear the MCIA hat and when should I drop it in answering this question. Let me begin by this. That when Shweta started to talk about it. Naresh spoke about 1960s. We've been having third-party funding. Nobody has said a no to it. Then why is this still a topic? Just because we can do conferences like this and have another session or there is something more to it? Right? So, what are the trends that we are looking at it? When I was doing my research to be speaking here and I said that let's just look at least which countries have legislated. It very Interestingly. There are only three countries which have come up with a legislation on third party funding. We all are aware about Hong Kong, we are aware about Singapore, and the third one is Nigeria. And they're wondering that is it really required to have an underlying legislation to it? But then let's look at what about the institutions? Of course, HKIC was probably one of the first ones to have its rules on third party funding, SIAC has it. As far as we know that CAM-CCBC has it, CTAC has it. Then you have [UNCLEAR 23.33] Milan Chamber of Commerce, they have it as well, but they don't have an underlying legislation for it. And of course, in 2021, ICC came up with it and ICC very clearly said that the duty to disclose third party funding is on the party. MCIA has it? Not yet. I need to wear that cap and come and say that we don't have it. But of course, we framed our rules 7 years back. We just completed seven years, a couple of days back, we are revising our rules now. And I'm hoping that when the Rules Committee is putting

all of this together it's definitely in the mix to see that has the time come for India to have or at least the Institution in India to have a third-party funding? Of course, when you have the draft rules, they will be out for public consultation. We would love to know your views on that as well. There whether the Indian rules should have it or not? What we clearly know is this that third party funding is out of the dusty doctrines of champerty and maintenance. They don't exist. Then why an underlining legislation we keep talking about? What I can come up with one thing is that when you talk about this duty to disclose, right? There is a third-party funder involved. A party has a duty under the existing rules, they should disclose it. But what about your Funding Agreement itself? Do you just disclose the fact that, "yes, I have an x, y, z funder." And just leave it at that? Can then the Arbitrary Tribunal go a step forward and have a disclosure on the funding Agreement? And if they go ahead and tell you to disclose a Funding Agreement, then are you in the breach of your contract with your funder because most of the Funding Agreements provide for a confidentiality provision and say that you can't disclose this funding arrangement, whether I'll take up 40% of the decree till or the awarded amount, or whether I'll take up the 90% of it is something between the party and the funder. So to answer your question, Shweta my personal view, I wouldn't say for the MCIA, my personal view is that that having a legislation back up these questions makes the arbitral institutions rules easier, otherwise being in the jurisdiction that we are in India. And like Naresh said, you never know what goes to the court and how it is interpreted these questions may just make the life more difficult. We don't want a situation like Emergency Arbitration, right? Where it's existed for so long. Institutions have it. And then you need it to be tested to see where the courts go on that.

SHWETA BHARTI: Right. Very interesting. And I would want to put this as a question to audience as well. Do you think that there is a legislation required with respect to third-party funding? Or if yes, then Please raise your hands. Which means there are only handful. I think about 15 people who are wanting the legislation and the rest, I assume, do not want the legislation. That is absolutely possible. But then I would want to understand this from the panellists, maybe Ajay, you would want to throw some light on whether there should be a legislation or you think that self-regulation is the best way forward in this regard?

AJAY BHARGAVA: So, in my own view, it's a Commercial Contract. If somebody wants to fund, why call someone a third-party funder and make it larger than life? Take a loan. All of us know if we have to contest. We know the estimate of cost borrow money. It's a simple Loan Agreement, having an interest. Nobody will have any kind of issue with that at all. So, in my view, to make a law out of it and complicate life is not done, but that's just me.

NEETI SACHDEVA: I think Ajay, I understand that you're alluding to the fact that one could just take a loan and maybe your brother sister, anybody could just give you money as well that "go file the case." But then in the arbitration circle, aren't we looking at questions of conflict of interest? Which always becomes with respect to an arbitrator as well. If you do not know who's funding what their trend has been... and then all of a sudden, imagine when you are at a stage of closer to an award you sprung up with this or this entire arbitration was funded by so and so. And now I have a problem of arbitrator to be replaced, which is not unheard of, right? So, in that sense, to at least have certain set of regulations to have a framework within which you work maybe not over regulate may just add on to the, may just probably take away some work from the lawyers not to argue in the court.

NUSRAT HASSAN: I will just add to what Neeti has mentioned. Our experience as lawyers would be that wherever there exists, no legislation, it's very dangerous, in a country like India. In India, there has to be clearly a legislation where if you don't prescribe, then you are getting into deep waters and it is dangerous. I would agree with Neeti, I know, what you mean by that but...

SHWETA BHARTI: .... not respond to this.

NARESH THACKER: No, so, I agree with what Neeti says. I think there are two paths to this. To my mind. I do agree with what Ajay.... in the manner in which Ajay has put it. Yes, it's a Contract. And give a free flow to the contract but nonetheless, there has to be regulation in and around how the contracting is to be done, what are the confidentiality measures, how much of confidentiality or otherwise. And like Neeti, mentioned how would the courts otherwise understand whether it's an unconscionable bargain or not, without possibly going into the contract? So, we have this in now... Arbitration that.... Well, everything about arbitration is going to be confidential. But if there are requirements of law then that confidentiality will have to be given up and you will have to then bring in those circumstances there's confidential documents as well. And it could very well be that you bring it only before courts. And the courts will in that sense, while we have heard this from the Supreme Court that documents in envelope is not the way forward, but in situations of this kind, you may need the documents in the envelope. So therefore, "how much of regulation?" is also going to be the key. In India we have no half measure for things and that's the problem. When we regulate the pendulum swings from one way to the other. Either we will say that when we regulate everything, we will look into everything per se, which truly does never work. Because in that situation everything will fall apart or it's the other way around where we let people self-regulate. And I'll give you the best example in that is, I remember the point in time when I

used to do a lot of tax matters and that was when the regulation was by the authorities, “And for everything you could raise a point to say that, but you the authority was there and you looked at my assessment. And therefore, how are you now raising an issue with what I have done?” And today the pendulum has swung exactly the other way around. You look at your GST, you look at Income Tax, they now talk about self-assessment. And it's a problem. The moment you come under self-assessment regime everything that you do, even if the regulator has had a look at it, you are in trouble. Because you are the one who was asked to make the declaration. You are the one who has actually gone ahead and made the declaration. How much you've disclosed, how much you've not disclosed? Everything becomes a problem. So, there are no half measures, as I said in India, and that's the reason for anything and everything that we do, the regulation that we are talking about will have to be a nuanced regulation. And it will have to be in simple English. Otherwise, in India, again all that we lawyers do is fight on what is the interpretation of a Provision?

SHWETA BHARTI: You are taking away our jobs. Badriji, you would want to say something?

BADRINATH DURVASULA: I just say something in re-joinder, because see already in India, we have so many laws then we have regulators. And one classic example, which I always share is our own **Arbitration Act**. Earlier, we had a suit appeal... Supreme Court. Then comes in arbitration, you have the award objections, appeal, then Supreme Court. Thanks to our amendments. Now we are in a zone where things are time bound, apparently. We on our own add layers after layers, which is good for lawyers. So, no complaints have a law, no problem. But my only view is each time there's a new law like you just observed again that goes into court for interpretation. So, we have the draftsman of the laws, whatever they feel best they added. And then we have case after case how to interpret that? Which goes on for years. So also, to add one example which I always also share. Ours is one of the great places where we have a law, “please wear a helmet or you'll be penalized, because if you don't wear a helmet, your skull will crack.” So that's the kind of laws we have. So, in my rejoinder, I don't need a law on this.

SHWETA BHARTI: No. Absolutely. And I'm in agreement with you because I personally also feel that we are over regulated. In that sense, we have too many legislations for too many things. And I don't know how much of it actually comes into play when it comes to effective implementation of it and more so because in the other judgments, judgments after judgment that Abha, was actually talking about. That only shows that we have been over regulated in those sections and provisions and then also we have no light in the day. So, I personally am

also of the same view. Badriji, now coming back to you. Because I think it is important to understand from the industry perspective, what are the impediments of the companies which have been negotiating with the funders on the third-party funding? And where lies the obstacles in terms of bucketing the disputes that are to be offered to their third-party funders?

BADRINATH DURVASULA: I think this is a very practical experience which you asked about it. Usually when we go for... the just look at I'll cite some numbers. So that you can also do the kind of brainstorming whether the deal is a good deal or a bad deal as such? I mean, no deal can be a good deal unless and until it comes in your favour. But otherwise, the numbers are that there are about 150 to 200 kind of litigations in various stages, right from notice initiation to that of appeal lending in the Supreme Court. There are about.... it's a factual data. There are about 200 litigations or the potential litigator situations. And the amount which is at stake is about 5000 crores. So if I win all the litigations, I would get about 5000 crores. But if I don't, if I don't win all that's a different call. And the probability is that 50-50, that 2500 crore is something one can be reasonably sure about it plus interest on it. So obviously it would work out 3500 crores. These are the numbers. I'm just giving it to you. So, against a potential 3500 crores. When you go for the negotiation for the third-party funding, they try to give you as little as 1000 crores. Is there any meaning in it? Look at the numbers, look at the way in which I have been skewed. So, it's about 1000 crores visa be a potential 3500 crores with interest element in it. But ultimately there really struck for about 1750 crores. Is it a good deal or a bad deal? I'll leave it to your good self and the kind of a wisdom. You think about it. A potential 5500 crosses, 1750 cross that has been given with a caveat that certain things will be exempted and certain things will be given back, whatever it be. These are the kind of a number signals which we are swimming. So, in this context, at least there is somebody who has come in a limited way to one or two companies out of hundreds of companies which are now in queue for the third-party funding. At least one, two companies could do it, and some individuals, some firms are doing it. But other than that, today the matter is not open. So, what I would simply look at it is from the Government facilitation is that... They can as well give a notification. I'm not looking at a situation of amending a law or proclaiming a law or anything as such. They can give a notification that for all that matters related to litigation and this thing, it's a permitted way. Something like a notification can be given or a directive can be given or kind of a direction can be given by the Government. That's something which we industry, we look at it from the Government so that it would facilitate the process. Now, when it comes to kind of negotiating and bucketing, these things, negotiating and bucketing, these things, the claims what we try to do is that I'm speaking from the industry. What we did to do is that where we are potentially not winning are the ones which we would like to bucket. But from the third-party funding side, what we are potentially winning is the ones which you would like to take.

And what we are not winning is what they would not like to take. So that be the case. There is a question of mix and match we need to play around with it. Either you go with 100% or you go with some can choose kind of a modalities between these buckets of litigations. So definitely when we do it, we knew for sure that those which are in the nascent stage of litigation is something which we'll cut it out and which are in a mature phase, either at the High Court level or the Supreme Court level or the final arbitral award part of it, that is something which you would like to put it up. So that, there is a value optimization in the efforts of the company to release the money. Now there is one point borrowing a loan versus structuring there's a structure which need to happen. How does it happen? Does it happen directly? Because today, with the kind of scepticism we are in, that the third-party funder cannot be disclosed by virtue of the private.... the Disclosure Agreement, which is confidential to itself. We need to come into some kind of an arrangement because there is no clarity on the.... there's no clarity on the surface. We need to come into some kind of an arrangement whereby the best way is to create a kind of an SPV. Into SPV, all these things are taken and that's one structure which is recommended. That's how we go about it. So, coming to the bucketing and concluding my short take on this is that, it's a very difficult thing to negotiate TPA. Don't think that the TPA comes costly and TPA comes to your advantage. TPA comes with many, many caveats. And these caveats are built, not by the TPA people. But the law firms, which are advised in the TPAs, that's another aspect, I wanted to put it out. So, I would request the earnest legal firms over here, as well as the members on the panel to see that, this is somehow facilitated and the positive outlook is given for the TPA to become a success. So more than the Government legislation, it's legal firms and it is a Courts. They need to take a collectively positive look to the TPA to make it successful and meaningful.

SHWETA BHARTI: So, one last question and that goes for all the panellists because I think we are running out of time. We only have two minutes left. Ajay, this is first to you and then probably Nusrat could add on this is, would TPA have the capability of turning Arbitration entirely into an investment business? So, that is the question for you and Nusrat for you, it would be whether it is going to be possible in the sense that there are a lot of third-party funders outside of India. So, whether it is possible from the **FEMA** perspective to be able to do this kind of a transaction? So, these are the two questions for Ajay and Nusrat and Naresh, you can add on wherever you think that you would want to respond to.

AJAY BHARGAVA: Yeah. So interestingly, we all know that the entities which are doing all this are either investment banks or hedge funds or corporates. I don't see it is a different thing than any other investment people can assess commercially whether it's worth investing in this venture, project or anything. The other aspect is that in a way... so, where I am in favour of

this exercise is that a person investing will surely get a case evaluated and there and then will give the right picture to the person seeking funding whether you have a case at all. And that will maybe inspire them not to litigate as much as we do in India. My only thing was that on the other aspect, we have the litigation in courts. We have arbitration. We have onshore, offshore. Whether this will work in the larger scheme? But in my view, it is a pure investment. It's pure Commercial Contract.

SHWETA BHARTI: Nusrat?

NUSRAT HASSAN: Yeah. So, I agree with you that this is a Commercial Contract. So, most of the funding firms are international firms. So, when international.... so if there is any funding that is to take place for a domestic arbitration, I'm just talking about arbitration. Since you're talking about ADR, it is not possible under FEMA. Because FEMA, there are several things which kind of makes it almost impossible under FEMA to fund a domestic arbitration. Because neither is neither is this put in a certain sectoral. There is no sector in which it will fall into, nor does the definition of it falls under definition of investment. Because investment can only happen in securities. Neither can it be a loan, because then the ECB regulations come in. So under... presently I don't see there is a lot of interest. I must add there is a substantial interest. Anand and I think during COVID must have met several, we did a lot of joint presentations to a lot of companies. And I think there is a lot of there is a lot of challenge, many challenges but one of the big challenges, how are they going to bring the money in and how are they going to take it out? FEMA doesn't define it. At the moment. There is nothing. So really what we need to do is push there is quite clearly, we have to talk to either the Commerce Ministry or the Finance Ministry or the RBI. I think it may be the RBI because if it is closest to the financial services, then RBI will regulate it. That means that RBI has to come out with the policy. Otherwise, it's just a contract. It's a third-party funding. There is just an Agreement. It's known as a TPA. So, that's difficult.

NARESH THACKER: I'll just take one moment of this and I'll take the point that Nusrat made, and I'll take it forward. Look at it from a slightly different perspective under Foreign Exchange Management Act. Under that act, there are just two possibilities. Either it's a capital account transaction or a current account transaction. And depending upon the sort of agreement that you enter into, it will fall under either. So, if it's a debt and I'm just taking a situation of a debt. If you take a debt, it is clearly a capital account transaction, and also from a tax perspective, it will have a hit. Because yes because the treatment that you actually give to your Agreement, basis that whether it's a capital account transaction or a current account transaction? And therefore, whether it's permitted or prohibited? Because if it's a capital

account transaction, it's prohibited. And on the other hand, a current account transaction would be permitted unless prohibited. So how you craft your agreement will tell you where you will fall. To from a tax perspective as well in India, nothing is simple, as I said. You look at it from a tax perspective. There are two entities that you're looking at. One is the entity which is being funded, the other is the entity which is actually going to take the money away. If it's a capital receipt, then what is the implication of tax for the person who's actually getting the money? And from that perspective as well, your FEMA angle may change. Because, if it is something which you have, which domestic party has brought in kept within it, does not affect his asset or liability. It will not fall within the capital account transaction. But if it does from a tax perspective, FEMA also will kick in and there will be a problem from a FEMA perspective as well. So whole lot of things need to be thought through. Maybe the Master Circular, like you rightly put it. You can have the Master Circular, RBI can come up with a clear guideline can tell us which way to look at, but even so, to my mind the crafting of the agreement will become extremely important, both from FEMA as well as from tax perspective.

SHWETA BHARTI: Thank you. Thank you so much. And with this, I bring an end to this session. It's a very interesting session. I definitely learned a lot from the panellists. I'm sure all of you also have done. And I'm sure there would be a lot of questions in your mind, which I would request you to take offline because we are running short of time, we have already exhausted all our time that we had. Thank you so much for being so patient. And thank you to the panellists for such interesting answers. Thank you.

~~~END OF SESSION 4~~~