INDIA ADR WEEK 2023 – DAY 6 DELHI

SESSION 3

12:30 pm to 01:30 pm

ENFORCING ARBITRAL AWARDS IN INDIA – WHAT CAN FOREIGN PARTIES REALLY EXPECT?

Speakers

Ms. Paula Hodges, Head, Global Arbitration Practice, Herbert Smith Freehills
Mr. Amit Sibal, Senior Advocate, Supreme Court of India
Mr. Atul Sharma, Executive Chairman, Dentons Link Legal
Mr. Joongi Kim, Professor, Yonsei Law School
Mr. Ritin Rai, Senior Advocate, Supreme Court of India; Door Tenant, 7 King's Bench Walk
Mr. Vijayendra Pratap Singh, Senior Partner & Head Litigation, AZB & Partners

MS. PAULA HODGES: Good afternoon, everyone. Thank you so much for staying. I know there is apparently a competing sporting event about to start, but I can assure you it's not going to be as exciting as this panel. We're really going to try and throw in some yorkers. There's going to be lots of shots hit to six. And we're sure we're going to have some silly mid-off from the audience. So please, please do stay. I've got my colours of who I'm supporting with me. I did suggest to the panellists that they have their faces painted, but they weren't too keen on that. But I'm sure we're going to have some fun in talking about enforcing arbitral awards in India and what foreign investors can really expect. So I'm going to be very quick with the introductions because there are some very famous speakers today. So going from my left we've got Amit Sibal, who of course, is a Senior Advocate in the Supreme Court of Delhi, but also a member of Three Verulam Buildings in London. Then we have V. P. Singh, who is, of course, the Head of Disputes for AZB in Delhi. Then Atul Sharma, who's the Executive Chairman of Dentons Link Legal. We're very lucky to have Professor Joongi Kim from Seoul, who is both an academic in Yonsei Law School, but also of course, a very well-known Arbitrator and then we have Ritin Rai, another senior advocate but also a Door Tenant of 7 KBW. And I don't think there's any one else hiding down the end Ritin it's such a long table. So in terms of format, each of the panellists is going to introduce a topic for no more than five minutes, and I'm going to be very strict with them. And then another of the panellists is going to make a comment.

And that's where the fun will start. And each of them will introduce a different aspect of enforcement. V. P. Singh is going to start by setting the field. Then Amit and Ritin are going to talk about challenges to enforcement, public policy, fraud, all those really interesting topics. Joongi is going to focus on investment arbitration awards, which are a special category all of their own. And then at Atul Sharma is going to talk about interim relief and give you some practical tips at the end. Because we're short of time we're probably going to keep questions to the end. But if anyone has a really burning question as we go, please put up your hand. But over to V.P. now, to let us know the current status of enforcement in India.

MR. VIJAYENDRA PRATAP SINGH: Thank you, Paula. I have five minutes and I have a cricket match to go to, so let's keep it quick. Enforcement in India, is pretty much like an Orange. Why? Because if you've got your fruit right, you will get the juice at the end. You may get it pulpy if you like it pulpy. You may get it to stream through, which is much easier to handle, but it all comes down to what is your arbitration clause? Where are you seated? And how are you going to enforce? And that is effectively what the trend with respect to enforcement of awards is. And it's not just foreign awards, you should equally talk about awards that are effectively dealt with by what we would call Indian Courts under international commercial arbitrations. And this is where I would call it A Tale of Two Cities, because the act, as it presently stands, is the best of times and the worst of times. It's the best of times for a foreign award coming into India, which we welcome into India. It's called Atithi Devo Bhava. You are a friend. You are a guest. Please come into my jurisdiction. I will give you a limited, and what I would call a more constricted looking because all is well, as long as it's been upheld by the seat, irrespective, whether it's upheld by the seat as well, because it's a foreign award, I don't believe I need to look in. And that Laxman Rekha has been effectively reinforced, statutory. Now why do I call it the worst of times? Because the Indian Act effectively flatters to deceive for any international commercial arbitration seated in India. It promises people some fun at the root through expedited enforcement for what you would say, interim measures like an EA order or an order for Tribunal, if the arbitration is seated in India, and gives you more bite and teeth effectively with the amendment to the Act. But that's only at the root. Unfortunately, when it comes to the fruit, which is where you show the money effectively, we found that the Indian experience has been lacking. And this is despite the fact that the International Commercial Arbitration's train has been put on what I call the fast train. The domestic arbitration, so if I were to calibrate what I call the waterfall, there is the foreign award which is enforced fastest, there is the international commercial award, which is almost as slow as a domestic award and then there's a domestic award. So you have the aeroplane, you have the fast train, and then you have the local passenger. Now, unfortunately, there's so many local passengers that the fast train doesn't really get tracks. And if it doesn't get tracks, it's actually

stopped in the track as well. So while we've seen a lot of statistics coming out of London saying what the commercial Court does, if you do a similar statistic based analysis, you will find that Indian Courts are enforcing more. Now the question comes down to as long as it is good, we effectively follow what we call the sausage approach, which means you don't look at what parts go in. As long as it doesn't violate 34 or 48, it's good to go. Now that I believe, I actually believe is positives. Why? Because we've got 43 million cases waiting there. Do you really want to add another 5 million there? And the answer is no. And if that is how we have to do it, we need to be clear that we get the right Orange. Is your Orange and Orange, which is a foreign Orange? Or is it *desi santra*? And if it is a *desi santra*, you need to ensure that at least it should be organic, which means it's international commercial, because you may get a better chance at money. So ladies and gentlemen, as I say, it's a tale of two cities with respect to what I call the enforcement of awards and how we welcome, everyone. So the theme for today is Orange and Atithi Devo Bhava, which means you won't get anything better if you don't choose smart because it'll never be Apple juice. And second and most importantly, please be careful about where you seat it because what you get at the gate may not necessarily exist when you're coming to the finishing line. So please choose smartly and there are good signs and green shoots coming up because with the new amendments that is being talked about, you are going to find a lot more of the three A's. Accountability, Acceptance and Arbitration. Accountability from Arbitrators in terms of time, effort, and availability. Acceptance in terms of what you are calling arbitration innovation. And arbitration which actually was what we are all here for, which is get the damn thing started, and get it finished, in a manner that it results in a [UNCLEAR] award. So that's what we are going to see. And the last piece is we are finally, hopefully, not going to have any more Judges of the Supreme Court sitting in a larger number to tell us that we can possibly arbitrate. So that's where we are. I'm sure I have a minute left. Ritin, it's all up to you.

MS. PAULA HODGES: Spot on. Well, and now I've got all sorts of metaphors going through my mind. I'm thinking, one of my sons likes orange juice that's smooth. The other one likes it with bits in it. I don't know how we bring that over to arbitration. Maybe it ties into the sausage analogy. I'm not sure, but luckily, I'm handing on to Ritin now to make a comment and then tell us a bit more about the public policy issues you may face.

MR. RITIN RAI: Thank you, Paula, and thank you, MCIA, for having me on this panel. I think Paula promised you yorkers, sixers, boundaries. What she didn't clarify is that that's all going to come from our first Speaker. So I might not be as colourful as V.P, but I'm going to try my best. I do want to take on V.P. when he says there are these three different tracks, the aeroplane, the fast train and the local train. And to make this point that I actually think a

foreign party is equally well placed when arbitrating what is international commercial arbitration seated in India, as it is dealing with a foreign award in a seat outside India. And I'll just come to how I explain that. The reason for that is because I think the Government has actually understood that to boost investor confidence and to get foreign parties into India, they need to create two separate regimes for domestic arbitration in India. So now, for example, a domestic arbitration, which has only two Indian parties, has also the ground of patent illegality to challenge an award. But if a domestic award arises out of an international commercial arbitration, that head of patent illegality is not applicable. I think there's an issue there as to whether that can even be done, but the truth is that today an international commercial arbitration seated in India, faces the same constricted level of challenge under Section 34 as a foreign award does when enforcement if it is sought to be done through Section 48 in India. And along with the Government's push, I think the big optimistic point for arbitration in India is how the Courts view this. I think our Courts are not unsophisticated to deal with commercial disputes. If you look at our Commercial Courts Act or our IP division in the Delhi High Court, our Judges today can deal with commercial disputes. But I think uniformly, our Courts recognize that they have a problem of numbers. They simply cannot deal with the vast majority of cases that come before them. Service Law, Criminal Law, Public Law and commercial stuff and that is why Courts are actually leaning more and more on the arbitration community. So I think the big positives for arbitration today and for foreign parties is, there is a push from the Executive and the Legislature. There is also a push from the Judiciary. The other positive is Courts which international commercial arbitration or foreign parties enforcing a foreign award come to. They now come only to the High Court to the respective High Courts. Which is why VP, I'm hoping your analogy is that local trains are running on their own rail track, whereas these fast trains actually have High Courts to go to, which are not as clogged as the local trains are running on. And even for domestic arbitration, if you look at how our Courts have now allowed a seat to become effectively a choice of exclusive jurisdiction of Court, you can now have a foreign party that has a dispute which arises wholly, let's say, in the state of Andhra Pradesh. But they can choose a seat in New Delhi, where they may perceive that the Courts are more commercial, are more sophisticated. So that's the other positive I want to just respond to VP on. And finally, in India, I can say this with my 15 or 18 odd years of dispute experience, I think the sophistication of all the stakeholders is increasing year on year. And I don't just mean Counsel like VP or Amit, I mean Judges, as in the Arbitrators, and the Judges who are hearing arbitration cases. So I think these are all positives and foreign parties should take that away even as they are deciding ultimately whether to have that *desi santra* or the foreign sun kissed stuff. Although VP, you did forget Make in India. I think, or maybe you had it in response. But I would say this at the outset, therefore, that foreign parties needn't be as concerned as one was earlier with arbitrating in

India. You can choose your seat, and therefore, you can choose your Court. And there are certainly some High Courts in this country which are very proactive, very commercial. But let me now come to what I was to talk about, which is the ground of public policy, as a ground to resist the recognition of a foreign award, or indeed as a ground to challenge an international commercial arbitration seated in India. India will always remain an interesting place and if you blink for a while you will miss a development in the law. And that's been the same with public policy. We started in 1985 with the ***Renusagar*** judgment, and always understood public policy to be of three limited heads. It was against the fundamental policy of Indian law. It was against the interest of India, and it was against justice or morality. And that was all very good till ***ONGC versus Saw Pipes***, where the head of patent illegality was introduced for the first time. And then that got compounded with ***Bhatia***, which said that foreign awards can also be tested under Part 1. So now you had a decision like ***Venture Global***, where a foreign award was being tested on the head of patent illegality. And if that wasn't bad enough in 2011, you had ***Phulchand Exports*** which said that even under Section 48, the term public policy included the head of patent illegality. So things were going quite downhill through that little period, but then the reform started. First with the 2014 decision in ***Sri Lal Mahal***, which overruled ***Phulchand Exports*** bravely by the same Judge who authored ***Phulchand Exports***. So now patent illegality was no longer ahead under Section 48. And then you had ***BALCO***, which overruled ***Bhatia***, and so now foreign awards were totally immune from Part 1, unless the parties had decided to bring in some aspects of Part 1. And all this led to further clarity when the 2015 Amendment came in. So after that point in time, you had much more clarity that, for a Section 48, the head of patent illegality was not available and even for a Section 34 for a domestic award international commercial arbitration the head of patent illegality was not available. With that statutory provision, Section 34 and Section 48, let me just spend a couple of minutes on what the three heads of public policy are, and let's start first by recognizing that today's definition of public policy is even narrower than ***Renusagar*** because the head of Interests of India no longer is part of the definition in Section 34 or 48. And my submission is or my understanding is that the definition is now narrow and has broadly been understood to be such by the Courts and their decisions. So the first head of the award being in conflict with public policy, is, if the making of the award was induced or affected by fraud or corruption, or is in violation of the confidentiality provisions of our mediation clauses. I think that's a fairly narrow ground. I think everyone would accept that if the making of an award is vitiated by fraud or induced by fraud that's a good ground to refuse recognition or indeed to set aside the award. And I think our jurisprudence is quite clear that fraud is not to be lightly inferred. It has to be properly pleaded. That head is fairly narrow. The second head is the head of fundamental policy of India. And again, if you go through the judgments in ***Associated Builders*** or ***Ssangyong***, we have a clear, narrow definition of fundamental

policy of India, made further, narrow or clarified further in the ***Vijay Karia*** judgment. The one area of concern which I will flag is that fundamental policy of India also includes disregard of the orders of superior Courts, or ignoring the binding effect of judgments of superior Courts. And that certainly seems a little bit of a problem because read literally, any judgment against any award which is against the judgment of a superior Court may be suspect. But again, I think we have to read that in the context in which the judgments have been written. These will also be judgments of superior Courts that deal with public policy or public interest. And finally, we also have a very narrow ground of being against the notions of justice or morality. As the Supreme Court told us, this is now also the most basic notions of justice and morality. So again, narrower than ***Renusagar***. I'll pause in a minute. Just to make the point that a good example of how foreign parties can take can be reassured is whereas in the older regime we had FERA or violation of FERA being a ground to not recognize a foreign award, today we've got a host of decisions saying FEMA is no longer a matter of national policy or fundamental policy, and therefore even awards in violation of FEMA are the being recognized or enforced. I'll stop there because I know I'm running time and I'll participate in the discussion that follows later. Thanks.

MS. PAULA HODGES: Thank you for that whistle stop to it because I know public policy is always one of the more amorphous topics, and we're going to stay with that now. And Amit is going to focus on a couple of more topics in more detail.

MR. AMIT SIBAL: So the two opening batsmen have done the power play. It's been an exciting power play. We now enter the middle overs and we hope to keep amongst the rest of us the momentum going and the run rate high. And let me focus the spotlight Paula, on one small aspect that Ritin mentioned which is the fraud challenge to foreign arbitral awards. And yes, Ritin, that's right. It would seem to be a narrow ground. And the ground, literally is the making of the award was induced or affected by fraud or corruption. And you'd think that this then is focused only on whether in the process of making the arbitral award, there is fraud or corruption in the arbitration process. But what if there is no fraud or corruption in the arbitration process or the arbitration proceedings? What if, after the award is delivered, the award debtor finds that there is fraud or corruption in procuring the contract or the transaction that leads to the award? Is the award that results from such a transaction or contract in conflict with the public policy of India? The question is important because how the Courts deal with this question will show how they balance the competing interests in finality of arbitral awards and party autonomy on the one hand, and the interest in preventing fraud on the other. Now, broadly speaking, the English Courts have given the answer that while fraud or bribery is against public policy, a contract procured by fraud or bribery is not necessarily

unenforceable. Now, the Indian Courts, in a recent judgment in March of this year in ***Devas versus Antrix***, answer this question quite differently. They refused to enforce an ICC award directing Antrix, an Indian Government entity directed to pay, which was directed to pay USD1.2 billion to Devas, a company in India but ultimately held in the US, for wrongfully terminating its contract for Spectrum for multimedia services. And they set aside the award on the ground that it had emerged in winding up proceedings brought by Antrix against Devas after the award was delivered, that Devas had colluded with officials of the Indian Government and Antrix to get a sweetheart deal for Spectrum fraudulently, which really ought to have been put up for public auction. And the winding up was upheld by the Supreme Court which upheld all the allegations of fraud in his judgment and said that yes, Devas was rightly, wound up and said and it's worth quoting what it said. "If the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas every plant that grew out of those seeds, such as the agreement, the disputes, arbitral awards, et cetera are all infected with the poison of fraud." Now there are several features, but I'll highlight three that make Devas particularly interesting. One is Paula, there was no allegation that there was any fraud or corruption in the process of arbitration. There was also no trial of the allegations of fraud. It also didn't seem to matter to the Court that the fraud may have been discoverable during the course of arbitration because criminal investigation by the CBI of Devas commenced much before the arbitral award. And I think that's because the Devas judgment proceeds on a fundamental line of jurisprudence in Indian law that fraud vitiates all solemn acts and the judgment interestingly attained finality only Friday last week when the Supreme Court dismissed the final challenge in a special leave petition by Devas. And of course, the Court in Devas was dealing with a challenge to a domestic award. It's true, but the wording of the fraud challenge is identical in foreign awards. So I think the judgment is still important for enforcing foreign arbitral awards. And why is it important? Because it actually raises a possibility that you can have a London seated arbitration where the award is challenged before the English Court and the challenge, based on the contract being procured by fraud, is rejected by the English Court. But the award then travels to India. And based on Devas, the Court might refuse to enforce it here. Now, some would say that that's only a remote possibility, that Devas was a peculiar case where the Indian Government had been asked to pay 1.2 billion to an ultimately US held company in an arbitral award and that the Supreme Court happened to give clear and unequivocal findings, upholding allegations of fraud, which then bound the High Court when it was deciding the challenge to the award. And maybe it's too soon to say that Devas will be the defining approach going forward, but we need to come back to the question perhaps that I originally asked, which is, how do you promote finality of awards while preventing fraud? And interestingly, I was at a conference in Mumbai a month ago where Lord Leggatt had visited us and he was asked... sitting Judge of the UK Supreme Court, and he was asked, well, how would

you define public policy in enforcing arbitral awards in the UK? And I'll give you the essence of his answer. It was really one sentence. He said, I'd say that the public policy in enforcing arbitral awards in the UK is overwhelmingly that arbitral awards must be enforced. Now I would agree with Ritin that by and large and especially when it comes to foreign arbitral awards, the message from India's Supreme Court, Devas notwithstanding in the last several years has been to affirm the same principle, and that I would suggest that we can find the middle path in the context of fraud, even in India to say at least that if a party could, with reasonable diligence, have raised allegations of fraud in the course of the arbitration and failed to do so, they ought not to be permitted to raise them after the award is delivered. There are several other interesting issues to discuss, and for that I'll hand over to Professor Kim.

MS. PAULA HODGES: I was just going to say that. Before you do, we've been handling a case where our client lost and it was only on losing, that they did more investigation and found possible fraud in relation to the award of the initial contract and have been resisting enforcement all around the world on that basis, and they have had different decisions in different jurisdictions. It's a very live topic, so one to watch. But Joongi over to you now, please

MR. JOONGI KIM: Thank you, Paula. It's a great pleasure to be here. I've been off the cuff, I've been trying to think of a citrus analogy. So if, I was thinking if our oranges are the commercial arbitration and maybe a grapefruit might be investment arbitration. Grapefruit being a little bit larger, investment awards tend to be bigger, and maybe a bit more bitter particularly for the sovereign when they're on the word debtor. And I was also thinking, of course, maybe a bit more exotic. But then I learned just off the cuff that there's the chakotra and robab tenga and jambora, which apparently are close to the great [UNCLEAR] I'm not sure. So for investment awards there are various types of course and we'll focus on just some BIT awards. based on a treaty and I guess to add more to the analogy, probably not airplane, not fast track and not even regular track, probably whether there are tracks or roads is probably more in dispute. When I met a senior Indian jurist and he asked, me, what are you doing here and what are you speaking on? And I told him I'm speaking on this topic of what do foreign parties really think. And his words were, foreign parties shouldn't really think about enforcement of BIT awards in India. So there's a dispute and there's a divide. Of course, many of you that are keen practitioners will know of this divide within the Indian Courts. There's the view of the Delhi High Court. And then there's the view of the Calcutta High Court and the Gujarat High Court. And of course, there's also dispute as to whether what they're saying about BIT Awards is dicta or not, [UNCLEAR]. So the view of the Delhi High Court is that the commercial reservation that India made when they joined the New York Convention excludes BIT awards. Therefore, under the Indian Arbitration Reconciliation Act BIT Awards based on

a treaty cannot be enforced, because they've been excluded, because they're not commercial. However the other Calcutta and Gujarat High Courts find differently and generally speaking, Courts around the world do have a very broad interpretation of commercial and the original drafters of the New York Convention actually also contemplated a pretty broad definition of the word commercial, and many jurisdictions I would go so far to say most jurisdictions tend to include that BIT awards can be enforced through the New York Convention despite the commercial reservation. There is a notable, another country within our region that also takes a similar stance as India, which is China. China, of course, different from India, is not a Model Law Country, though. But China's People's Courts has issued what they call like a directive, basically saying yes, commercial reservation BIT works cannot be applied in China under the New York convention. So that's where we stand. Of course, you have the revisions in the Model BIT in India. And whether this will be cleared up by the Supreme Court the Indian Supreme Court, we have to wait and see. The limited time that I had, I wanted to add one point on the fraud. So one question, interesting question that comes up is the use of new evidence. Particularly evidence that comes up after the award, particularly at the set aside or enforcement stage and actually there's a diverse view on this issue among Courts and actually, I don't know if this is I have to look at a bit closer, but Civil Law countries tend to be more generous on this, particularly France and Germany, that if new evidence arises, that perhaps discusses fraud, that that can be included and can be a basis to exclude and to deny enforcement, whereas there are other jurisdictions, many Common Law jurisdictions but one exception is Switzerland, which takes a much more restrictive approach that we have to be conservative, and we have to limit ourselves to the record. I'll stop there.

MS. PAULA HODGES: VP, I think you were going to make some remarks in response.

MR. VIJAYENDRA PRATAP SINGH: Joongi is right that India has taken a slightly different [UNCLEAR]with respect to investment treaty arbitrations. The Indian reaction to investment treaty arbitrations is pretty much like India's reaction to most of what I would call English food, which is, it's food, but it's not quite to my palate. So the reason why I would say that is, Paula, no offence meant there, none whatsoever.

MS. PAULA HODGES: You'll have to come to my house.

MR. VIJAYENDRA PRATAP SINGH: I would stand corrected. I would stand corrected on that. But in terms of what I would call, and the reason why I do the English analogy, is our first BIT was with England, and it followed the late 19, early 1990 BIT models. And when you had that model language was very, for the lack of a better word was very primitive. There were

concepts which were being discussed, but were not necessarily defined. So like a good Indian, I like my food with a little bit of *tadka*. So now the Model BIT effectively does put in what I call the seasoning. How does it put in the seasoning? It puts in the seasoning effectively by saying that you insist upon crisper language. What kind of language do you want? What kind of what kind of promises are you making? And when it does this, it does this with two legitimate claims. One, that a Federal Government's ability to take care of its social obligations trumps its promise to investors. And two, I will not promise you something which I would not otherwise be in a position to uphold. So how does the Model BIT deal with this? It deals with this by making five exceptions. There are more. But I'm just focusing on the five. It moves from an asset based description to an enterprise based description, it excludes taxation because death and taxes are two things that even the BIT model cannot help you on, the most favoured nation status is because we know our friends, but we don't want to have more friends than we know and we effectively turn around and say that any benefits come in when you show me the money. So it's effectively what I call resolve for India, rather than resolve in India. And the last bit is resolve in India, which is exhaustion of local remedies, which is what you need to do five years off. So effectively, it's like you are in a date. You have to play it out till dessert before you can really leave. The bill necessarily may or may not come to you.

MR. AMIT SIBAL: I just wanted to add something to what Professor said on the evidence bit. So it's interesting that in the provisions for the fraud challenge the whole public policy bit in the challenges to foreign arbitral award starts with where the Court finds that the award is in conflict with public policy. These words are important because they were picked up in the Devas versus Antrix judgment to say that the Court can find fraud even when it's not part of the arbitral record because the Court can find fraud on its own. Interestingly in the first part of the challenge to foreign grounds for challenge to foreign arbitral awards, the words used are where the party furnishes proof of various things, for example, invalidity of the arbitration agreement. And there, as you can well, imagine, parties picked up on that and sought at times to lead long drawn evidence to delay the enforcement of arbitral awards, saying that, well, we're entitled to lead evidence, like in a civil suit. So that obviously raised alarm bells in the Supreme Court. And then in ***Gemini Bay***, Supreme Court says, no, just like the Parliament has amended those words in Section 34 to change "party furnishes further proof" to "party finds in the record of the arbitral Tribunal", we will read the words "furnishes further proof in the grounds for challenge to foreign arbitral awards" to "finds in the record of the arbitral Tribunal." But that is restricted to the first part of grounds of challenge, but not the second part, which is public policy. So there remains a door open to find that there is fraud outside the record of the arbitral Tribunal.

MS. PAULA HODGES: And realistically, I think if there are fraud allegations on the table, the Court will look at it carefully, whichever jurisdiction. And that's probably right, if we still believe we're all here trying to achieve justice. We move on finally to Atul who's going to talk about interim relief.

MR. ATUL SHARMA: Yeah. Thanks, Paula. But I'm tempted. I will not go away from VP's analogy of fruit juice. In his analogy it's all mixed up, and that's when it comes to the award, whether a domestic award or an Indian award, international award, or a foreign award. Once it has passed through the gate of 48 or 34, it's an award. It's a decree. So that's where you get the ABC. Every time I walk down to the hotel for breakfast there's this juice called ABC. So that's the mixture of apple, beetroot and carrot. So now when you have gone through that funnel of the award becoming a decree, obviously you need to have a valid and enforceable regime which can help you convert that award into money because the proof of the pudding is in its eating. We're talking of food today. So I'm tempted to make that statement as well. What exactly are you going to do with that award is the question. I'm going to talk about two or three aspects of that. And first, is the injunction, the post award injunction is something which ultimately falls in the lap of the Civil Procedure Court, because then it has to be enforced under the Civil Procedure Court, Order 21 Section 37 to 72, which forms the part of the common pool of enforcement procedures. In my experience, one thing which we have not done as practitioners as well, and clients, when I started reading, again reading the provisions of the CPC this morning I realized that there's nothing wrong with it. In fact, we always make an excuse of saying that that is an impediment in enforcement. No, that is not an impediment. If you go through that, it's the biggest part of how it gives the tools to enforce an award, because it has now become a decree. So in that circumstance, what you're going to do is something which you follow the whole thing to the hilt. The difficulty is that we always fall short of doing our bit in finding the assets, getting the injunction, getting the attachment. And that's where if we look at the AB part of ABC there is a distinction when it comes to foreign award and in domestic awards, there is a clear-cut distinction between enforcement, and recognition. So, in fact, a foreign award is recognition. But ultimately, once you pass that first gate of 48, then you are going to enforce it under the local jurisdiction. Unfortunately, we have not done enough exercise on asset tracing side of it. As professionals we don't have the ecosystem of really chasing those assets. There is no jurisprudence which we have effectively evolved. When I started looking, I found an excellent judgment of the Madras High Court, where the issue was that for an enforcement of a foreign award the Court went to the extent of tracing. There were two sets of shareholdings of that entity, which was holding the shares here in India, of an entity in the UAE. One was the direct shareholding and the second was a beneficial interest not recorded within the ROC Records for the purposes of recording that, even the Board had

not taking note of that. They went on to the extent of saying that look, so far as we are concerned, we are going to treat this as an asset which needs to be injuncted and when I tried to trace back as to what has happened to the judgment, it is still pending. The stay continues. There's an attachment. It was a chartered party dispute and all those shares stand attached in, by the Madras High Court and it's pending in the Supreme Court, the stay continuing. That is one part. The second part is again, I go back to what Amit said with regard to going back behind the award. And the difficulty is that we have this tendency of again going back to ABC and mixing the whole thing, because if we look at the whole gamut of cases, whether it's ***Vidya Drolia***, whether it is in relation to the fraudulent practices we tend to mix the issues of enforceability with jurisdiction, and that's a mixture which always creates a problem. And in fact, the mindset if you keep all these awards in separate buckets probably, we can overcome this problem. But this whole jurisdictional challenge, which ***Vidya Drolia*** has laid down in the judgment, where we try to keep on making distinctions between... and that's an antithesis, because we say that certain awards are reserved, certain matters are reserved for certain Tribunals. That is, a dispute in relation to a tenant dispute. Tenant- landlord. And we went on extended it to say that yes, we discussed the whole law, but then we came back to the conclusion that it is arbitrable. It is that *khichadi*, as I would like to call it, which is creating all the problem in our understanding and sifting through the whole process of enforcement as well. And that is something which we really need to look at. We need to sift all the ABC and really make it worthwhile. The second part is that we have not had a regime for really monetizing those. We have been talking of, ***Balaji*** talks of third party funding. We recognize we don't have any mechanism wherein we can bring in a regime where you legitimize a structure which allows you to repatriate those proceeds, and you can really monetize those rewards. I understand there was a session yesterday on third party funding. I don't want to get into the nitty-gritty of it, but that's something which is completely lacking, and we need to revisit to whole thing in terms of having a very clear cut regulatory regime by the Reserve Bank, by the Central Government, the Ministry of Finance, whosoever it be, to give that legitimacy to clubbing all those awards. They've been instances. They've been attempts, but they've not been very successful.

MS. PAULA HODGES: Thank you Atul. Amit, there were a couple of points you were going to pick up on.

MR. AMIT SIBAL: Yeah. Thank you. Thank you, Paula. So I just wanted to share some learnings I had in a recent case I was involved in. It's a small part of what Atul is talking about. Once you have, you're in your aeroplane, you have a foreign arbitral award. You are looking to land at Delhi airport or Mumbai airport. You want to land smoothly, but if there's no airstrip,

then you're nowhere, right? What I'm talking about is you want to ensure that the substratum of the award is not reduced to a dead letter. If the award data is in India and has assets you want to enforce against those assets. So if you're say a US company like the case I was involved in, company called Medima and I think Ritin was involved also at some stage, you want to enforce your foreign London seated ICC award against an Indian entity. The entity is in financial distress. Do you have to wait for crossing the line passing the *Agnipariksha or t*rial by fire of satisfying a Court that the award is enforceable, crossing the line of Section 48 before you get interim protection? Or can you straightaway file a Section 9 petition for an interim measure for a deposit of money before an Indian Court? That's one concern. The second concern is, do you have the same ability to get those interim measures as a holder of a domestic award has? So both of these issues came up in the case of ***Balasore versus Medima LLC***, and the judgment of the Calcutta High Court brought great clarity on both counts. Calcutta High Court held that the assets, of course of Balasore were fully encumbered. It granted Medima the interim relief ordering a deposit by the award debtor of money in Court. The award debtor fought that right up to the Supreme Court and Supreme Court refused to interfere. But two points to remember in terms of practical points. Of course the purpose of the interim relief is ultimately to secure enforcement of the award. So at some point, even if you file a Section 9 beforehand at some point you will want to follow it in due course with an enforcement petition. Else you might stand to lose the interim relief that you obtain. So in the ***Medima*** case when it went to the Supreme Court and it was taken by the award debtor, the Supreme Court, of course, dismissed their petition, but did record a statement by Medima that within four weeks it would file for enforcement of its foreign arbitral award. And the second practical point to remember is that even in that Section 9, it is possible for the award debtor to attempt to show the Court that ex facie the award is not enforceable on Section 48 grounds. For example, if it has not been served notice of the arbitration and it's possible that the Court might entertain those pleas and therefore, you want to be sure you're ready for all of that else the Court might say that ex fascia until you satisfy a Court under Section 48, we will decline interim relief. Now the other aspect is of course, the 2015 amendments have a special carve out in the portion of our Act that deals with enforcement of domestic awards, saying that for a foreign arbitral award, a holder of a foreign arbitral award can avail of interim measures that are available for domestic Awards provided that the parties have not opted out of the Indian regime. And so, of course, picking up on that lawyers started to argue, resisting interim measures to secure foreign awards. Then parties have opted out. Of course, they've opted out. They've chosen foreign law to govern the dispute. They've chosen a foreign seat. They've chosen foreign institutional rules like LCIA or SIAC. So of course, they've opted out and they should be denied interim relief. Well, ***Balasore*** as I said, that is obviously not the case. The whole purpose of the carve out in the 2015 amendment was precisely where a party has a

foreign arbitral award, having made those precise choices, should have the ability to effectively enforce their foreign arbitral award in India. And that's why the carve out is there in the first place, and therefore, we will find that there is an opt out only in the situation where the opt out is specific to Section 9, the provision for interim measures, and where the opt out is clear, unambiguous, unequivocal. And this was not the only judgment. It followed a line of judgments in the Delhi High Court, ***Raffles*** and Bombay High Court in ***Ercon*** [UNCLEAR]. And I think that's a very significant step, positive step towards the enforceability of foreign awards in India. Now, having said all that, given that these kinds of concerns, these kinds of pleas are raised, again another practice point is if you do have a party to a contract that has its assets in India, it might be a good idea, in any case, to have an affirmative adoption of interim measures that are available under the Indian Arbitration Act, in your dispute resolution clause to avoid maybe a one year delay in your application. Thank you.

MS. PAULA HODGES: I'll just hand to Atul.

MR. ATUL SHARMA: Just one, three, revolutionary suggestions. Make it mandatory to file an affidavit of assets before you go in for a challenge. Create a regime for registration of charge if the judgment letter or the award letter is a corporation and get the charge registered with the ROC. These are something which can really be deterrent for, and ensuring that the awards are not paper awards. Thirdly of course, all New York Convention signatories are not covered for the purpose of enforcement under 48 because there's no notification under 45. So therefore, if you're a signatory New York Convention, in fact, I have a similar... I came across a situation where India and Dubai a UAE has a treaty recognizing awards passed in UAE, but in the absence of a notification under 45, you can't enforce it.

MS. PAULA HODGES: Thank you for those practical tips, Atul. I'm going to go back to London with a lot of comfort to pass on to my international clients about enforcing awards in India. Now I realise that lunch is beckoning. There's that little cricket match as well. But are there any questions or comments from the panel? I think the hand at the back shot up first.

AUDIENCE1: [UNCLEAR]

MR. VIJAYENDRA PRATAP SINGH: See the Government is the biggest litigant in our system. So the track quality is defined by the Government. So if you want to get the biggest litigant to follow a discipline, you will generally find the others follow or fall in line. The Government started doing that incidentally because we had the *Vivaad se vishwas* too, where they tried to sort away legacy awards, but did not include investment treaty award because of

the commercial exception and had a cut-off date. The problem is that because there's so much in the system, a private party, unfortunately bears, a, backlog because of the numbers before it, b, the private party fights it more vigorously than the Government does. It's the rule of three. If you are a Government lawyer, you'll have to work three times as much and are paid one third. On the other hand, a private party will pay its lawyers enough and will keep them going. And Medima was the case in point. It actually went right up to the Supreme Court on that issue. So that's how I see it. The Government needs to effectively get its act in order. You should have a national arbitration or a litigation policy which says, don't fight everything. Because they also have what we call the taint of the three C's, the CAG, CBC, and CBI. Once that goes out, I think you will have a lot more getting done.

AUDIENCE2: Sorry, on this theme of seeds and plants growing out of them, if you had a seed from a Californian orange planted in India, with the same DNA why is it that we still treat it as a local *santra,* and not as a foreign arbitration in our context? Do you think it's appropriate that the Indian Legislation makes a distinction between domestic seated arbitration and foreign seated arbitration when really what you need to be looking at is what is the DNA of it, and to assume that all India seated arbitration is necessarily less sophisticated, and to assume that it's only your California oranges that are more sophisticated? Isn't that doing disservice to the domestic lawyering community?

MS. PAULA HODGES: Ritin, would you like to take that one?

MR. RITIN RAI: Look, I think it's a very fair question. But I think the issue for the Legislature is the sheer diversity of arbitrations in India. I mean, typically, the arbitrations that we're talking about in this room are of a certain size, kind, sophistication. But the Indian Arbitration Act is obviously dealing with all the arbitrations and those could be much less formal, in some cases, values could be much less, Arbitrators could be very different from the Arbitrators that we may be talking about. So I think the problem really is the sheer diversity of the arbitration, which is why at least this one distinction has been made within domestic arbitration, which is, if it's a domestic arbitration seated in India, is it an international commercial arbitration? As in is there a foreign party? And to the extent there is a foreign party, the grounds of challenge of that arbitration are different, do not include the ground of patent illegality. The time limits that we have are not applicable. I have some concerns about that. Because I think to your point it almost disrespects substantial or significant Indian domestic arbitration. But I think the imperative of actually trying to persuade foreign entities to come into India to have contracts that will be enforced perhaps to arbitrate in India and even over time, India might become a destination for arbitration, even for arbitrations, which

are not which do not have an Indian connection. So I think for now the balance has been struck. But that's the balance struck for now, which is that, arbitrations which have a foreign DNA seed, whether in the form of arbitration seated in India or a foreign award are being treated differently and as Atul said, they are being treated differently till the point they actually become a decree. After thy become a decree of cost there is the Civil Procedure Code which is identical for a suit or a domestic award with Indian parties. But I think at least we've started to make some distinction there as much as we can.

MR. AMIT SIBAL: Just to add to that, I mean there is, sorry, if I may?

MS. PAULA HODGES: Be very quick.

MR. AMIT SIBAL: Yeah, very quick. Very quick. We'll make it a T20. So just to add to that, that while the CPC is of course available, ***Kandla Export*** and ***Amazon*** are very significant step because they make clear that when you are enforcing an arbitral award using the provisions of the CPC, the appeals that are available otherwise under the CPC are not available because only appeals that are provided for under the Arbitration Act will be available.

MS. PAULA HODGES: [UNCLEAR] answer. Well, look, thank you all. There was one more question? Nandini? I'm sorry. This was really a T20, not the 5-day test match. But here's to more international arbitration in India, regardless of who the parties are. Thank you for being such a great audience. And please, please thank our panellists.

~~~END OF SESSION 3~~~