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India Arbitration Week 2022

Session: Emergency Arbitration - a brief history, a comparative look and how it works in India

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SPEAKERS NAMES:

1. **Akhil Shah**
2. **Matthew Gearing**
3. **Sapna Jhangiani**
4. **Zal Andhyarujina**

Speaker 1

Hello, everyone. Our topic of discussions today morning, this morning is Emergency Arbitration, a brief history, comparative law and how it works in India. We have four speakers who will be deliberating on the other issues aspect.

First is Mr. Akhil Shah KC, he's an established advocate in the world of international arbitration, who also accepts appointment as arbitrator. He has considerable experience of appearing in national and Ad-hoc Tribunal in a broad range of disputes. Examples of his work include, acting for party to a joint venture investment in the **[inaudible 00:00:52]** Telecom Industry in India, in ICC arbitration proceedings acting for counterparty to international sale of goods contract in India. In LC Arbitration proceedings and acting foreign national airline in an ICC Arbitration concerning the redelivery of commercial passenger aircraft. Akhil is ranked by the legal 500 for his work in International Arbitration, where he is described as calmness, personified and quietly persuasive advocate with huge experience in the field.

A second speaker on the panel is Matthew Gearing KC. Matthew is highly regarded arbitration lawyer who acts as counsel and sits as arbitrator. He has particular experience of acting in arbitrations involving Indian parties, with examples including acting for Nissan Motor Company in a claim against Union of India, pursuant to a 2011 Comprehensive Economic Partnership Agreement between Japan and India in connection with investment incentive sums owed by the State of Government of Tamil Nadu and acting for BG, which is now part of Shell Group and Reliance in UNCITRAL arbitration against UNEF India and doesn't have two production sharing contracts. He's vice president of LCI Court, and panel member of SIAC, HKIAC and KLRCA panel of arbitrators. He's also ranked by chambers and partners and the legal 500, including within Asia globally. Prior to joining Fountain Court, Matthew was a partner at Allen OB for 16 years.

We have Zal Andhyarujina in Senior Advocate. He's a prominent Senior Advocate at the Indian Bar based in Mumbai. He has a large and diverse commercial practice with a focus on a cross border disputes. He practices in Bombay High Court, the Supreme Court and various tribunals including Secret Resampled Tribunal, National Company Law Tribunal, National Company Law Appellate Tribunal, as well as International Arbitration. His experienced includes acting in arbitrations for parties in numerous contractual investment construction, infrastructure disputes,

including several jurisdiction challenges. He has also appeared in many important arbitral challenges and enforcement matters in court. Zal joined Fountain Court as a door tenant in March 2021, so I had the privilege to brief Zal in couple of matters, so I know him very well that way.

Then we have Sapna, she's QC in English barrister and an advocate and solicitor in Singapore. She's engaged with Attorney General's Chamber in Singapore. Sapna represent AGC as an advocate helps train AGC officers in advocacy. She shares her experience expertise in handling international commercial arbitration and mediation disputes. Sapna was previously partner at Client-Go in Singapore, specializing in international arbitration under various arbitral rules, including those SIAC and ICC. She is the first female lawyer in Singapore to be appointed as Queen's Counsel in England. So, with that, I hand over the floor to the other speakers and the moderator.

Matthew Gearing

Good morning, everyone. It's Matt Gearing here. Thank you very much for joining. Thank you very much to the MCIA for hosting us this morning. Unfortunately, we can't be at least I and **[inaudible 00:04:47]** and certainly can't be in India at the moment, but the advantage of technology as we have it today is that we can at least join you virtually and we're going to say something this morning about the Emergency Arbitrator facility of the Emergency Arbitrator concept. I'm going to kick off, I'm going to say something about its background, and then going to pass on to Sapna, who's already been extremely well introduced and who I'm very grateful to for joining us from the Attorney General's Chambers in Singapore.

Sapna is then going to pass on to my colleague, Akhil who's up like me, it's a similarly early hour in the UK and Akhil, in turn will then pass on to Zal, who will finish things off. As we go along and everyone is I think, very familiar with this by now you have a Q and A function on your screen. So, feel free to ask questions, and we'll do our best to deal with those either along the way, or quite possibly more likely at the end of the session, but please do fire away with those. So, let me then kick off Emergency Arbitrator or as we say, in abbreviation EA. I was reading I must say in a very excellent blog by someone called Victoria Clark, who is a principal knowledge development

lawyer at Bryan Cave Leighton Paisner and she said in an excellent piece and the PLC blog that I read yesterday written about a year ago.

The Emergency Arbitrator is officially a teenager, and I will explain in a minute the facts as to how it has officially become a teenager. The question before us this morning is whether it's a troublesome teenager or a well behaved and useful teenager. My proposition and I think the proposition of my co-panelists my co-speakers, is that it is the latter, it's a well behaved and useful teenager, so not at all to the usual teenager, one might say. So, let's go back then, when I started practice in the mid-90s, there was no such thing as an EA, an Emergency Arbitrator, if you wanted interim relief, in support of your international arbitration, or sometimes perhaps to derail or stop or disrupt whatever reason good or otherwise, your international arbitration, you had to go to a domestic court, either the court at the seat or a court where the relevant assets were located or the relevant commercial activity was going on.

And then in May 2006, hence the teenager points in now some 16 years ago, it was actually the ICDR the International Centre for Dispute Resolution, who first broke cover if you like on this, they introduced a new procedure into their rules, into their 2006 rules, whereby parties could come along and seek emergency interim relief from what they called what they named an Emergency Arbitrator, before the Constitution of the Arbitral Tribunal and since then, most major arbitral institutions, I think, in this order, the SEC, Stockholm Chamber of Commerce in 2010, SIAC also in 2010, the HKIC in 2012, HKIC in 2013. Indeed, it's something that I did when I was in charge of the rules at the HKIC in 2013, and the LCIA in 2014 and CIETAC 2015 and of course, now we have a very good Emergency Arbitrator provision in the 2016. MCIA rules, Article 14.

So, essentially, what we now have, at least in major institutional sets of rules is that it is the common feature, it's a standard feature. And it's become something that someone will naturally think about at the start of any matter. There have been questions there were certainly were questions in the context of the ICC rules about its applicability, because when the ICC bought it in, because it was seemed to be a relatively dramatic amendment. It only applied to agreements to arbitrate entered into after the date of the ICC rules, other institutions took a different view and made it backward looking if you like, so it would say they bought was when they brought it into

their sets of rules that would apply to any arbitration commenced, under the new rules, even if, as would naturally be the case, the agreement to arbitrate predated those rules at the start.

But any in any event, all of those points are really just points of academic arbitral interest if you'd like, because we now have a situation quite clear clearly, whereas I say most of the if not all of the major sets of institutional rules are embracing the EA concept. So, the next question is, how popular are they in practice, and this, I must say, I find interesting. I've managed to dig out some figures on the use of EA's and essentially, what I found figures for the LCIA, ICC, HKIC and SIAC and interestingly, SIAC finds the highest percentage use of Emergency Arbitrators. So, in SIAC cases, an Emergency Arbitrator is appointed in some 3% of cases. And in the ICC, this is in a sample size MCIA over four years and it's some 2.6%.

Those are the two institutions with the highest incidence of EA's. And the LCIA and the HKIC, at the moment, at least, are down at note point 5 and note point 6% respectively. And that is I must say that is consistent with my own experience as a counsel and as arbitrator that the EA is a phenomenon that is popular, particularly popular in Singapore, Sapna will may well wish to say something more about that and generally popular around Asia, I think it's at the moment less popular and less used in Europe and European seated cases. My LCIA stats may be consistent with that, but in any event, it's something we can explore in discussion, if people find it interesting.

So, next question very briefly, how does it work? Well, it's extremely simple. You think you have you as claimant to indeed, as respondent think you need urgent interim relief, you apply to the institution in the first instance, and you have to get over a threshold. And the threshold is usually urgency or, in fact, usually exceptional urgency, in Article 14.1 of the MCIA rules, you have to show exceptional urgency. And if the institution agrees that you have showed exceptional urgency, which is in fact not such a steep threshold, I think in most cases where an EA application is made to an institution, in my experience, it pretends to be granted, someone is appointed.

In reality, what happens is the institution frantically scrambles around behind the scenes to find someone who has a lot of time on their hands at very short notice. The EA is then appointed again, depending on the rules, the EA then immediately consults with the parties and has to produce a decision normally within 14 days, the time limits differ slightly, but that is about the

market standard. So very briefly, what are the advantages and what are the problems? And this is again, something we may wish to pick up in discussion. The advantages, I think, are at least three-fold. Firstly, it is quick and simple for reason is that I have explained.

And secondly, of course, it's confidential, so it just reproduces a usual feature of arbitral proceedings unless, of course, the parties have agreed that the proceeding won't be confidential, but it tends to be confidential alongside the main arbitration itself. And thirdly, and this may be more controversial, but in my experience, EA tends to be interventionist, they tend to want to help. So, I tend to think you may be more likely to get relief from an EA as claimant applicant, if you like them from a particular domestic court. Now, of course that depends on the domestic court, but I do think that EA's wants to help.

So, in my experience, I do tend to think that if you are able to put together a Cogent Application for relief, then the EA will be looking for ways to grant the relief not necessarily all the relief that you seek, but I do detect an interventionist instinct sometimes. What are the problems with it, then? The problems I think, briefly are five-fold. And I'll just essentially list them and deal with each one briefly and again, we can take them up on discussion if needs be. Firstly, the probably the principle one is the enforceability question, if you get an order, if I'm right, that your EA wants to help you, and there is an interventionist tendency is all you get at the end of the day, an order written in water as it were.

Is it essentially a piece of paper and no more than that, I noticed that it was going to say something about their legislative position in Singapore. I should just say that in Hong Kong, when the rules were bought in 2013, the arbitration ordinance was amended. And if any of you are really interested, I'd encourage you to look at Section 22 B3, it's rather clumsily named, but it's a very interesting section, it defines an Emergency Arbitrator and it provides that the court can enter judgement in terms of any relief, ordered by an Emergency Arbitrator, both in Hong Kong and outside of Hong Kong.

So, you could have an Emergency Arbitrator proceeding in Mumbai and then in respect of relevant assets, or some other nexus in Hong Kong, you could ask the Hong Kong Court to give effect to it under 22 B3 as an order of the Hong Kong Court, as though it was an order of an Emergency

Arbitrator made in Hong Kong. So that's what I say about in enforceability. The second point is availability and finding appropriate people to act as Emergency Arbitrator. And I say that partly wearing my **[Inaudible 00:17:20]**, well, in my institutional roles as well as my practice role.

There is a heavy burden on the arbitral institution, and the staff, the Secretariat of an arbitral institution, when a request comes in to find someone with appropriate experience, seniority, and other criteria, who are willing and able to act at short notice because they can be extremely burdensome. As claimant counsel, you tend to have had the opportunity to prepare your application for at least a week or so respondent will often have a legal team, you on your own. You could in theory, I think get the Secretary to assist you. But you as Emergency Arbitrator, you tend to be on your own, and it can take off take up an awful lot of time.

The last EA I did, as EA rather than as counsel several months ago, I ended up spending 75 hours on the file over two weeks, you never quite know, but you essentially have to be prepared for a sort of a tsunami of paper to hit you and I think that is an issue that institutions find when they are running around trying to find an appropriate candidate. And the third disadvantage is obvious, and it is just a reflection of the arbitral, the broader arbitral proceedings that then not applicable or effective, or basically in third party situations. The fourth and Akhil may touch on this in due course, is that at least in some jurisdictions and the UK is one there can be or there is an overlap or a confusion with available court powers to give interim relief.

And there is a debate raging in the UK at the moment about the interplay between the Emergency Arbitrator and an application made to the court under Section 44(5) of the English Act for interim measures. I'll say no more about that, but we can come back to that if we want to. And fifthly, the relief that you would get if you were successful in whole or in part before your EA is only provisional. Now of course interim relief itself is only ever provisional in that it only ever lasts until you get your final award, but it's even more provisional. It's doubly provisionally if you like in that orders that you get before your EA if you are able to get an order, then full to be confirmed or set aside by the main tribunal.

So, sometimes indeed, in many cases, you end up having the debate twice, because you have the argument before the EA and then when you get to the main tribunal, you are asking you have

to ask the main tribunal to continue the relief, and the unsuccessful respondents to your application will be asking for them to set it aside. So, those very briefly are my five disadvantages. I have three advantages and five disadvantages, that's misleading, because as I say, I think the Emergency Arbitrator is not so troublesome teenager, I think it's a useful and well-behaved teenager, but I will be interested to see now what my fellow speakers wish to say or have to say about it, and I think we go next to you over in Singapore.

Sapna Jhangiani

Thank you so much, Matt can I just say at the outset, what a pleasure it is to be here and to participate virtually in India, ADR week, I hope to make it in person next year and thank you to my friends at Fountain Court and thanks to you Matt for inviting me to be part of this panel. First point, Singapore, a very popular seat for Emergency Arbitrator applications. We heard the statistics from Matt. I think around 3 years ago, I had the opportunity to drill down into the statistics for EA applications before the SIAC. And I recall that the majority of applications involved Indian parties, which I think is quite interesting. Singapore being a very popular seat for Indian parties, so I wonder if that explains the high number of EA applications.

And the SIAC, maybe we can hear from Zal about the importance of interim relief to Indian parties in particular. So, I'll just briefly touch on three points, enforcement of Emergency Arbitrator orders and awards in Singapore. Secondly, the importance of enforceability of EA decisions. And lastly, the overlap with court measures and essentially does the availability of EA relief before an institution essentially preclude you seeking interim relief before a court. So, enforcement in Singapore, the way in which EA decisions are enforceable in Singapore is through the definition of Arbitral Tribunal at Section 2 of the International Arbitration Act. I think we're almost the only statutory regime that expressly clarifies that an Emergency Arbitrator is to be considered an Arbitral Tribunal.

The only other example I can think of is the New Zealand Arbitration Act and ultimately, if you look at Section 12 (6) of our act that provides that all orders or directions made or given by an Arbitral Tribunal, in the course of an arbitration shall be enforceable in the same manner as if they were orders made by a court. Now an important point here, enforcement in Singapore just as in

Hong Kong covers both orders as well as the awards. Now perhaps we can hear from our columnist in a moment, but my understanding is that in England, it's only awards of an Emergency Arbitrator that are enforceable.

And I know that the Law Commission is consulting on potential amendments to the Arbitration Act **[inaudible 00:24:05]** at the moment, it will be interesting to hear from our keel, what the proposals are in the consultation paper in relation to whether or not that needs to be tweaked and whether we need more enforceability of Emergency Arbitrator relief, perhaps the enforceability of orders and directions as well. Just one point about enforcement in Singapore, it's very speedy. I think a couple of years ago, before the Amazon and future retail decision in India, I conducted some research on the way that Emergency Arbitrator decisions in Singapore has been enforced in India indirectly through an application for interim measures and I think we'll hear from Zal about this no doubt in a moment, but there were a couple of cases one is HSBC holdings and Avitel.

And the second is the raffles design case, now, interestingly, in those cases, if you look at the HSBC case, for that, to find its way through the Indian courts and ultimately for the Emergency Arbitrator award from Singapore to be indirectly enforced through a fresh order for interim measures ordered by the Indian Court, it took a year. In Singapore, the same EA award was enforced in less than three weeks. Similarly, if we look at raffles design, it took a year and eight months for indirect enforcement in India and that enforcement of that EA award in Singapore took four months. So, what I'd be interested to hear from Zal about is how the new mechanism for enforcement of EA awards, as decided by the Supreme Court in Amazon and future retail, how does it work? Is it quicker than indirect enforcement? That can be a point of discussion for later.

Moving on to my second point, why is enforceability important? And I think the important fact to bear in mind here is that according to users, it is important. If we look at the latest Queen Mary University White & Case Survey that was carried out in 2021. There was analysis of the popularity and appeal of various of the leading seats in the world. And users of arbitration were asked what adaptations would make other seats more attractive to users. 39% said that the ability to enforce decisions of Emergency Arbitrators or interim measures ordered by arbitral tribunals would make seats more attractive.

So clearly, this is an important to users. I often think of enforcement being important to us as normally outside the seat, but if you bear in mind that many of the leading and emerging seats in the world or top financial centers, I think the option to have Emergency Arbitrator awards issued in the seat enforceable there is quite important. Last point, looking at the overlap between court ordered measures and emergency relief, we have a similar provision in the International Arbitration Act in Singapore, as you have in England, ultimately, Section 12A of our act mirrors Section 44 of the English Arbitration Act.

So, to seek court ordered interim measures, you have to show both that the matter is urgent, but also that the Arbitral Tribunal has no power or is unable for the time being to act effectively and ultimately, as held by our court of appeal. Ultimately, they've made very clear that the court will intervene only sparingly and in very narrow circumstances such as where the tribunal can't be constituted expediently enough, or the courts coercive enforcement measures or need it, or the arbitral tribunal has low jurisdiction. So, for example, what you're asking for is orders against the third party. So, I think where institutional rules provide for EA relief, I think the courts are going to be reluctant to order relief in those cases unless, say, relief sought against third parties.

Sorry, relief is sought against third parties because you have to show that the tribunal ultimately cannot effectively order the same relief. I mean, it may come down to what does expediently and, but I think most EA provisions in institutional rules provide for an award within 14 or 15 days of the appointment of the EA. Some arbitral rules expressly provide that a party can apply to court for an interim order, but I query when a court is deciding whether a tribunal is able to order effective relief, whether or not what the rules say and whether they think that interim relief by the court is precluded. I'm not sure how much of an impact that is going to have in the courts deciding whether or not the test is actually met.

So, with that I shall leave it there and I look forward to hearing from Akhil about the current position in Wyndham Wales.

Matthew Gearing

Thank you for that. Now, over to you, Akhil.

Akhil Shah

Thank you very much, Matt. And thank you very much Sapna. And thank you for those questions that you've passed my way, which I'll try and answer as well. I'd like to say thank you for allowing me to speak this morning and, likewise, I hope to be with you in person on the next opportunity. So, I'm going to talk briefly about the position in England and I'm going to give some thoughts on why you would choose to apply to court as opposed to use the EA route. Look at the circumstances in which an English Court would look to deal with an application and grant relief. And finally, I'm trying to illustrate that with a sort of case study of an experience I had quite recently, while naming their names.

So, why would you go to court rather than use the institution's EA? And typically, that's because the EA route is unlikely to actually assist in your particular circumstances. So, for instance, there may be a question of timing, the urgency of the relief you need is such that by the time the EA institution is able to appoint, or the institutions able to appoint an EA, and that EA is able to give a decision, it may be too late, that's usually quite a strong reason. The second, I think Matt touched upon this is jurisdiction over third parties, obviously, the EA can't have jurisdiction over third parties, but there are some forms of relief where you do need to touch on third parties. And the classic example is a freezing order, where you'd want to be able to serve banks, for instance, with the order.

And you also then have to look at the institution's rules and whether the EA has the jurisdiction to grant the relief that you're seeking. So, for instance, if you're in the territory of an anti-suit injunction, will the EA be able to order that? And I think another important element is if there is dissipation of assets, for instance, you may want to go without notice or an ex-parte basis. And again, most Arbitral Tribunals won't commit that when we're using the EA process. And the final point is on the question of enforcement, obviously, if you have a court order, that gives you the ability to use contempt proceedings as a tool of enforcement. And equally with the EA route in

England, as Sapna pointed out, you have a tribunal order, which is not directly enforceable and so that presently creates a disadvantage with Trump trying to enforce it.

Now at the Sapna right, the Law Commission is looking to investigate whether this should be reformed, and I think there are two questions out there, which the Law Commission is has posited. The first is really whether if an EA is orders of war, order is ignored, that EA can issue a peremptory order, which is still ignored allows you to go to court that seems to me to be quite a slow process, if you're highly urgent scenarios, or secondly, whether there should be an amendment that allows an EA to give you a party permission to go straight to court for relief and I think that's the one that the Law Commission slightly favors that, if you have any views then do try and add to the consultation?

But there obviously, as Matt indicated disadvantages of going to court. One, I think, if confidentiality is your key concern, then court proceedings, even though they're trying to anonymize names, there's always a risk to confidentiality. And two, there is always the court process can introduce delay and cost, so those are considerations against trying to go to court. So, when will an English Court contemplate assisting a party? Obviously, the scenario ones in are that you have signed up to an arbitration agreement where the institution allows for an EA to be appointed. Now, the availability of that route doesn't necessarily preclude an English Court from giving assistance to a party.

The relevant rules are set out in Section 44 of the Arbitration Act and its sub-section 1, which is that, firstly, that the court has similar powers of making orders as the Arbitral Tribunal. Then sub-section 3 in cases of urgency, the court may on the application of a party, make such orders as it thinks necessary for the purposes of preserving evidence or assets, that for if there's no urgency, then it's left to the tribunal, unless the tribunal gives permission to apply. And then sub-section 5 and the one that's caused all sorts of problems in England is that in any case, the court shall act only if and to the extent that the Arbitral Tribunal and any other institution or person vested by the parties with power in that regard has no power was unable for the time being to act effectively.

And so that provision was considered in a case called Gerald Metals a few years ago, and I'm sure everyone in the audience is familiar with it, or at least the upshot of it, but in a nutshell, what

their case has been taken for authority. And if you do a search of the various legal websites, you'll get this as a proposition that emerges from it, is that where an EA regime exists to appoint an Emergency Arbitrator, and that Emergency Arbitrator could act to give the relief sought, then that precludes an application to the court.

Now, if you actually look at the current law commission, consultation paper, and in particular, from pages 62 onwards, you'll see a very careful and closely reasoned dissection of the Gerald Metals case, to say that actually that orthodox view that has been sort of proposed and advocated is wrong, and Gerald Metals, in fact, on its own facts, which were quite unique, meant that decision float, but that's not necessarily the correct position. So, in Gerald Metals, for instance, there'd been an application for freezing order against one party and that had failed.

The Tribunal had then dismissed an application, and it was that dismissed application that was then brought back before the court, which is why you can see that the court then considered that it shouldn't intervene in that scenario. In any event, the Law Commission is looking very closely at whether Section 44 (5), should be removed as redundant, because Sections 44 (3), and Section 44 (4), seem to provide for regulation as to when you can go to court. So, it seems to me that Section 44 (5), may well not survive the Law Commission, but obviously, one then has to say, okay, so what, how does that actually work in England, suppose, and here's where I have a sort of case study, which to give you a feel for the sort of scenario that can come up.

Suppose that you have a contract with an ICC Arbitration. And we know that the ICC has the Emergency Arbitrator provision, and one party to your contract as stated intention to terminate that contract by giving the requisite contractual Gnosis. And the notice period is going to be shorter than the time available for the ICC, EA process and just to give you a flavor for what a party is going to look for the ICC, EA process allows two days to appoint an EA. And then once an EA has appointed and have the file transmitted, the EA has 15 days to reach its decision.

Now, that's a very short period of time in the scheme of things and as Matt explained in his presentation, is a very heavy workload, but nonetheless, if you have a contractual notice period that is shorter than that window, the EA route is not really going to help your client in that situation. And so, the option that you're then left with is that if you want to preserve your contractual rights,

and try and stop the attempt to terminate, you have to go to the court process. And you have to set up an application, but under the Arbitration Act for interim relief from the English Courts, that's a hard-edge solution that's available. In the particular example here, it wouldn't be a circumstance that you could justify going ex-parte because the contractual notice window is not going to be shortened.

So, you've got a defined period of time and so in fact, you begin to see quite an interesting interplay between the threat of court, the EA process, and the how the different parties in this scenario react. So, one possibility is that by the party seeking the court application will write to the other side and say, we don't agree with what you would do. But if you persist, or unless you give an undertaking, we're going to court, and we'll go in give you very short notice. Now, that may prompt the counterparty to say well see you in court, that's quite high risk, or it may offer the undertakings to give time to preserve the arbitral process and so, in this particular case, there was an initial undertaking given to allow the emergency opera process to be used, so the window was extended to allow that.

And then ultimately, in fact that was then extended to allow for the formation of a tribunal allow the Tribunal to deal with the termination. So, you can see how the in a particular scenario and where it's sufficiently urgent, the power of the court process can be used as a tool, either to protect the parties by getting the interim relief, or by allowing for consideration of the EA process and extending the time, so that actually becomes a useful weapon within the policies dispute, and they can retain the institution they've agreed to resolve their disputes. So, that was an example of how it can work in practice. I'm sure there may be more questions about Gerald Metals, but I think we'd all like to hear the position in India and so I'll hand over to Zal.

Zal Andhyarujina SA

Thank you very much, Akhil and Thank you Matt, Sapna for your thoughts and reflections. We must thank the MCIA for organizing the series of seminars, and I do hope that all of you will be able to travel to Mumbai next year, or next year seminars. And especially for you, Matt and Akhil, I do hope that we are the same time zone next time around we do this. I don't know it's very early for both of you, especially to talk about arbitration Emergency Awards. So, we have a very

interesting landscape that has been developing in India for the last several years concerning EA's. Sapna mentioned, three of the important decisions, which I propose to talk about the Amazon decision of the Supreme Court in 2020.

We have the HSBC decision, which is a decision of the division bench of the Bombay High Court, which was sometime in 2014. And we have the Raffles decision of the Delhi High Court, which was a judgement in 2016. The dates also give you an impression about when and how Emergency Awards have become an important feature of arbitration in India. Emergency Awards have not been strangers to the Indian arbitration scene. In fact, many of our institutions MCIA for example, the DCIA, the Madras High Court Arbitration Centre all provide for Emergency Arbitrators and for Emergency Awards. But we have seen lately several cases with regard to their recognition and enforcement of such awards.

The most important case perhaps is the Amazon case, which I'm going to speak about shortly. But as I mentioned earlier, there have been other cases. Sapna suggested that I should speak about the effect of the Amazon case, as I read the Amazon case, actually, it really concerns Emergency Awards in the context of Domestic Arbitration. It still doesn't really grapple with the difficult question of enforcement of Emergency Awards arising out of foreign awards and our foreign tribunals. I speak about that shortly as well. So, the Amazon judgement, the Amazon judgement is a judgement of the Supreme Court and some of the interesting features of the Amazon judgement was that the court was considering an arbitration where the governing law was Indian Law. It was a Delhi seated arbitration under the SIAC rules.

So therefore, it was a part one institutional arbitration. And Emergency Arbitrator had been appointed, who granted various injunctive reliefs and also found that a third party could be proceeded against under the Indian Group of Companies Doctrine. The issue arose in Indian courts with Amazon filing a petition under Section 17 (2), of the Indian Arbitration Act, read with provisions under our Civil Procedure Code for enforcement of the injunctions, which had been granted by the Emergency Arbitration. Amazon's case was that the injunction, which had been granted by the Emergency Arbitrator, we're being floated by the future group. Future raised several issues of maintainability for such a petition.

The first was that Emergency Arbitration is not recognised under the Indian Arbitration Act. The second was that the Emergency Award could not be considered to be an order under Section 17 of the Arbitration Act. Section 17 of the Arbitration Act, as you probably know, is the provision which allows the Arbitral Tribunal to grant interim reliefs in domestic arbitrations. The more wide-ranging argument that was made by the counsel for future was that the Act does not contemplate any Emergency Arbitrator at all. And the definition of the Act, the definition of an arbitrator under the Act, which is section 2D, did not take into account Emergency Arbitrators.

It was also pointed out by the counsel opposing maintainability that the Law Commission in his 246 reports, and in fact suggested such an amendment namely including Emergency Arbitrators within the definition of arbitrators and to bring it within the fold of an arbitration award and that amendment had not been carried out. So, the petition was first filed in the Delhi High Court, the single judge in the Delhi High Court passed a resounding and clear judgement, upholding the maintainability of the petition, and thereby effectively saying that Emergency Arbitrators were very much a part of the Indian Arbitration Act.

The matter proceeded in appellate division of the Delhi High Court, or the division bench where it was stayed, it was then taken by Amazon to the Supreme Court. Now the Supreme Court has passed a very clear, well-reasoned judgement, in which it held that in fact, there was nothing contrary in the act to exclude Emergency Awards from being treated as part of the scheme of the arbitration. The Supreme Court relied upon party autonomy as one of the pillars for its reasoning. And in several places in the judgement, it says that an essential aspect of party autonomy is that the parties should decide how to conduct the arbitration. And if they choose to go to an institution, which permits Emergency Awards to be passed, and that should be respected.

It grappled with the opposing counsel's suggestion that the 246 Law Commission recommendation had not been adopted. And what the Supreme Court did was quite interesting. It said that, well, it was a recommendation and whether it was adopted or not, was not really relevant. And then it went on to say in very emphatic language that in fact it should be adopted. So, it dropped a very broad hint to the legislature to say that it was now time to clarify the position, and in effect to adopt Emergency Arbitrators as arbitrators and as a legitimate arbitration award into the end.

It also relied upon an earlier recommendation, which was made by a high-level committee looking into uncertainties and arbitration in India, headed by a former judge, Justice, B. N. Srikrishna, which actually pointed out that there was a great deal of uncertainty with regard to the status of Emergency Awards in India, and that the Law Commission recommendations should be adopted by Parliament and legislature. It affirmed that recommendation, and as I mentioned to you quite well emphatically stated that the parliament should take the necessary steps to bring it into our act.

The Supreme Court also did a quick survey of recognised arbitration jurisdictions. And it found that the international practice was in favor of recognizing such Emergency Awards and suggested that India should also do so in accordance with this international practice. And it also paid attention to sort of the elephant in the room and one of the problems we have with arbitration in court namely that Indian courts were very congested, they required to be decongested and section 9 applications have gone a long way towards congesting Indian courts. So, as a matter of policy, also, the Supreme Court thought that it was a good idea that we should integrate the system of Emergency Awards into our arbitration.

So, we have clear, well-reasoned judgement, effectively recognizing Emergency Awards into the act, but it does leave several questions which are unanswered. The first among those was posed by Sapna actually, we really don't know how much of this judgement is going to be applied in the context of foreign arbitrations, because Amazon at the end of the day was a Domestic Arbitration. The reasoning of the judges, suggesting that an Emergency Award is really an order under Section 17 of the Act. Namely, the power of the Domestic Arbitrator to grant interim relief suggests that it will be difficult to use this reasoning to extrapolate it or to apply it to foreign awards.

What is the position now with regard to foreign Emergency Arbitrators passing orders, and they're enforceable? Unfortunately, the position remains unclear, as Sapna you rightly mentioned, the two leading judgments are the HSBC judgement and the Raffles judgement. The HSBC judgement seems to suggest that the best way to go about enforcing such an Emergency Award would be to file a Section 9 petition in an Indian Court. So, as you're all experts, you're probably

aware that Section 9 is the provision by which the Indian courts grant interim measures of protection in arbitration matters.

Matt referred to it as well. It's not an ideal scenario, because obviously, first you have to go through the rigor of getting the Emergency Award, then you've got to file in Indian Court and pretty much go through the same exercise once again, under Section 9. The objection which was raised to the Section 9 petition that was filed in HSBC case, was that like every other foreign award, in fact, it is necessary to go through the process of enforcement to have the Emergency Award recognised in India.

So, that was an interesting and complicated objection that was raised the judge in HSBC case sidestepped it by saying that well, I don't have to decide it here, because usually they come here by a Section 9 petition, and pretty much said that is Section 9 petition is free standing and as long as a party can make a Section 9 petition under the Act is entitled to do so on the basis of an Emergency Award as well. Left open the question without deciding it really, of whether they were bound to go under 48 for enforcement of the Emergency Award. In foreign awards, once again, I'm sure that some of you are aware of it. The applicability of part one is dependent upon whether the parties at the time of the arbitration agreement expressly or impliedly, excluded pathway.

So, it's difficult to see what would happen if there was an express exclusion of part one, how that party would file a Section 9 petition the answer seems to be that part one would not be available and therefore, the Section 9 group would not be available. And that in fact, takes me to the second decision, which is the decision of the Delhi High Court in the reference case. Now, that was exactly the situation in the Raffles case, where it was arbitration which was governed by Singaporean governing law SIAC rules, and it was seated in Singapore.

The Emergency Arbitrators award was sought to be enforced effectively to a Section 9, but the Delhi High Court held that in fact, Section 9 was unavailable, as the choice of Singapore governing law had effectively excluded part one of the Arbitration Act. It was an implied exclusion, that the judge arrived as. The judge arrived at what is by any standards and extremely impractical solution, which was that to act upon an Emergency Award parties in India had to file a suit on the

Emergency Award. Now, the sort of delays with regard to the Indian court process in suits are well chronicle by now.

It seems to be very cold comfort to suggest to a foreign party that he must come to India and file a suit on an Emergency Award to actually get any relief, but that's the conclusion that the judge in the Raffles judgement. Another interesting feature actually of the Amazon judgement is that it notices both HSBC as well as Raffles but doesn't comment upon it. The sort of unspoken implication is that the Amazon decision was very different circumstances from the decisions that were passed in HSBC, as well as Raffles. So, in the ultimate analysis, I think the position remains thus. The situation remains unclear with regard to Emergency Awards passed in foreign arbitrations.

I think that Matt referred to this that there is a certain duplication of effort, either by filing a suit or by filing a Section 9 petition. The third possibility is also not closed out that you actually have to enforce it under the enforcement provisions, under the Arbitration Act. Fortunately, we have some clarity with regard to Emergency Awards under part One. And there is a clear recognition of the fact that they form part of our arbitration system. One or two comments on that, we have to really ask ourselves, what Emergency Awards are really going to add to the domestic arbitration system. One of the things that we are able to do very swiftly in India, is to approach the courts under Section 9 for interim, we are able to do that quite quickly and courts are quite ready to plan for this as well.

There is a judge who is normally well versed in arbitration under the present way in which assignments are given, he pretty much does this full time. So, that is my preferred way of actually getting interim relief in all domestic arbitrations and it seems to work quite well. The powers of the judge include the power to reach out for interim relief to third parties, which is always difficult for the domestic tribunal. So, there's a question mark, in my mind about how much emergency arbitration is actually going to be used in India, when the judge under Section 9 is available. There's also a question mark, which remains about what is the Emergency Arbitrator actually adding to the reliefs that the Tribunal can grant under Section 17.

Obviously, the Emergency Arbitrator sort of enters the picture when the Tribunal has not been formed, but for all intents and purposes, the Amazon judgement equates the arbitrator under Section 17, to the Emergency Arbitrator who is appointed, in the sense that he seems to think that the Emergency Arbitrator is no different from the arbitrator under Section 17. The distinction under the rules that the emergency arbitrator would really cease to be an arbitrator, once he passes his award, etc., has not been discussed at all in the Amazon judgement. So, it leaves a few questions unanswered with regard to domestic arbitration, as well. One of the things that I'd like to comment on which Matt, you spoke about and Sapna, which you spoke about.

Well, I already mentioned, Matt, actually, domestic courts in India, are available for interim relief and arbitration matters. They are fairly interventionist and as I mentioned to you, they seem to be the best forum to actually reach out for getting effective relief against third parties. The law with regard to domestic tribunals reaching out to third parties remains extremely unclear in India today. There is no settled authority, which actually says that the arbitrator can do that, using his powers under Section 17. It's a question mark, because under the recent amendments to the Arbitration Act, the powers of the arbitrator under Section 17 have been equated with the powers of the court under Section 9.

I tried to do it recently in the domestic arbitration, I met a lot of resistance from the arbitrator who eventually ruled against me, and said that he can't join third parties, even for the purpose of interim relief in a Section 17 application. Sapna, you spoke about the importance of interim relief to Indian parties, hugely important for the simple reason that arbitrations are not always concluded swiftly in the Indian context and the interim arrangement is a matter of great importance till such time as the award is actually. Indian courts have increasingly now become non-interventionist when the award is passed.

But the speed with which awards are delivered still remained something that I think that we can improve despite various amendments to our Arbitration Act suggesting that it should be done in a time bound manner, various extensions are still granted, and arbitrations don't really conclude. So, those are my comments and that is our experience with Emergency Awards in India.

Matthew Gearing

Thank you, Zal and thank you, Akhil and thank you Sapna for that quick tour around the world of different jurisdictions. It seems we're out of time, so I'm being told no time for questions, but hopefully, there is some interesting, I'm being told maybe just another two minutes. So let me just ask one quick question setting and let me start with you. Do you think the gist of what Akhil was saying was that the court does have a role to play in the grant of interim relief.

The Law Commission in England even suggesting getting rid of Section 44 [5], as you well said, effectively, these same words are used in the statutory provision in Singapore. And do you think the pendulum has swung too far towards the EA? And do you think essentially, the EA, or the ability to go to the court should be presented as sort of equal **[Inaudible 1:01:38]** equal options if you like?

Sapna Jhangiani

I mean, I think that's a great question that I think you said, when you introduce this topic, that when you and I started practice in arbitration, you had a choice as to where you want to seek relief. And there could be many good reasons for wanting to seek relief from the court, which I think Akhil touched on. We now are now in a position where we've got this wonderful innovation of EA relief. But essentially, I think that it makes it very difficult to go to court. I mean, Akhil you very clearly set out some of the circumstances where you may be able to go to court, but I think it's difficult, and I think you have to have a lot of faith in the EA system because it does limit your opportunity to go to court.

I've heard and I haven't seen this myself, that parties are beginning to exclude EA provisions and of course, if you do that, and you exclude the EA provision in your contract, then you haven't got this problem of not being able to go to court. I mean, you still have to prove urgency and of course, we have expedited procedures, etc., which we won't get into, but maybe we will start seeing people who may really think that they'll want interim relief at the time of any dispute, if they think that far ahead and even think about disputes when they're agreeing their contract, who may be excluding EA relief.

Matthew Gearing

Yeah. You see the LCIA rules and various other sets of rules have provided expressly that the presence of the EA relieved doesn't mean that an application can't be made to court. That's really interesting, because that's a sort of a contractual attempt to rebut the statutory provision, if you like.

Sapna Jhangiani

Instead of courts pay any attention?

Matthew Gearing

No, I know. Okay, we are certainly we've slightly run over our time. So, I think we're now understandably being told to wrap up. So, thank you very much. Again, Sapna and thank you, Akhil, thank you, Zal thank you to the MCIA for hosting us this morning.

Zal Andhyarujina SA

Thank you, Matt.

Speaker 1

Thank you, all the speakers. It was very insightful information, and we look forward to the next session and with some further development, especially from Indian perspective, and we'll do net again soon. Thank you.

Matthew Gearing

Thank you.

Sapna Jhangiani

Thank you.