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Session: Show me the Money: Navigating Investors through uncertainty and disputes

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SPEAKERS NAMES:

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2. **Ankur Sharma** : Associate General Counsel, Amazon Sellers Service Pvt Ltd
3. **Dipen Sabharwal KC** : Partner, White & Case
4. **Karthik Balisagar** : Senior Managing Director, FTI Consulting
5. **VP Singh** : Partner, AZB

Trisha

Well, good afternoon, good morning, good evening to everyone based on where everyone is. Welcome to the second session of the last day of the India ADR Week 2022. Today's event, this session, is hosted by AZB & Partners and the topic that the panel in front of you will be discussing, is “Show me the Money, Navigating Investors through uncertainty and disputes”. And as you can see on the screen in front of you, we have a fantastic lineup of speakers and a moderator. So, starting with the moderator who will be guiding this discussion, we have Abhijnan Jha, who is a Partner at AZB & Partners. We also have on the panel Ankur Sharma, who is the Associate General Counsel of Amazon Sellers Service Private Limited. We have Dipen Sabharwal KC, who's a partner at White & Case. We have Karthik Balisagar, who is a Senior Managing Director at FTI. And we have VP Singh, Partner at AZB. Without further ado, I hand over the floor to Abhijnan.

Abhijnan Jha

Thanks for that, Trisha and I hope everyone can hear me, and see me as well. Ladies and gentlemen, this is very different from, I think the usual sessions that you would have here. This is shorn of all legal niceties and technicalities; we focus on really a very core issue. And I'll tell you a familiar story. Suppose there is a foreign investor who invests in the India story, and unfortunately for him, he gets embroiled in disputes, what does he do? How does he navigate through these issues? And how does he ultimately get to the final outcome, which is getting to the money? Now for that we have a fantastic panel, and they've all been introduced, I'm not going to introduce them anymore, but what I will do is tell you that I plan to divide the session into 3 parts.

The 1st part, we will have opening comments from each speaker and in the 2nd part, we just try and pick up on certain themes and ask for comments from each speaker, and finally, we leave some time for questions. And I would invite everyone to start sending in your questions right away, so that we can pick up some of them.

So, my first speaker is Ankur Sharma. As Trisha introduced you, Ankur, you are the Associate General Counsel of Amazon, you have been at the forefront of disputes at Amazon, for the last many

years. Ankur, this is an unfortunate scenario for any investor to be in, but unfortunately, a familiar scenario. As a client representative, how do you plan in such situations? How do you navigate through these issues? And what is the outcome that you are looking at, when you're faced with such problems?

Ankur Sharma

Thank you Abhijnan, thank you MCIA and AZB for inviting me. I think it's a very interesting question Abhijnan, I think as you used the right word, it's unfortunate event or circumstance to go into litigation. But assuming that day has come, I think broadly in my mind, we look at 3 broad buckets, when we look at doing or staging any litigation, in this event. 1st important thing is what is the effectiveness of the litigation process we are picking up. 2nd is what will be the efficiency of the process, and then the last is, which is more important at some point, is what will be the economics of this process. And I will just spend some time on each of them.

The 1st one is, where we often call, and this is not true for any investor, this is true for any party who enters into litigation is, what is the certainty of litigation? Are we in a position to predict the litigation and the potential outcome, based of course on the merits of each case? How do we do that is, by choosing the forums. For example, in this case, what we're debating is courts and arbitration, depending on the region, depending on the country you are in, what is the pros and cons of each forum, which is based on many other factors. It could be judicial precedence, it could be existing workloads, so on and so forth. So how do you pick up the right forum, is the 1st crucial part and a lot of weightage, in terms of the 3 buckets go into this bucket to say, which forum is right.

And that ties up into the 2nd important phase, it is the efficiency of the process. The efficiency of the process, I would like to highlight more on the timing and the speed of the process. Timing and speed also is heavily dependent on the predictability of the proceedings, predictability the way the litigation is going to unfold. And therefore, this becomes the 2nd biggest important factor when we talk about potential litigation and how you are going to stage that litigation. Speed, again, has dependence on many things. First can be of course, the cooperation of the parties, it could be

availability of the members if you're choosing tribunal, domestic tribunal, international tribunal, so on and so forth. So various, again, pros and cons, we delineate to that level of data.

The 3rd important factor, which I think is overarching in some sense, is the ability or external factors, which could influence the process, or the outcome of what we're trying to drive. In this instant case, for example, it could be the jurisdictional law, or the law of the jurisdictional courts, who have supervisory capacity of that process and for example, if the courts are hands off, they are not ready to engage, and they follow a very hands off the wheel approach, then the process will be far more faster.

On the contrary, if the arbitration law of that country, for example is evolving, then the courts may want to engage more to set up the right law, and therefore, that will now take more time, so on and so forth. And therefore, this may be more time taking process, as compared to a process where the law is more established, and the jurisdictional courts are way ahead in terms of setting the right precedents for the law to evolve. So, I think in my mind, these are 3 broad buckets, which we should or rather any party should strategize when we think about meeting this unfortunate event or staging or litigation, so on and so forth.

Abhijnan Jha

Thanks for that, Ankur. Dipen, I'll move to you, and this is something that you routinely do. As someone based away from India, but having a keen interest in India related disputes and perhaps being on the other side of Indian promoters, how do you advise a foreign investor in terms of the strategies that they should adopt, the remedies that they can consider, in getting ultimately again, as the topic says, the colour of money?

Dipen Sabharwal KC

Thank you Abhijnan, very happy to address that. So, in my experience, foreign investors who have had, fortunately or unfortunately, considerable experience of arbitrating or resolving their disputes arising out of investments in India, now have a fairly well trodden playbook. They have learned

through bitter experience of the last 25 years, that Indian courts can be fairly interventionist, when it comes to Indian seated arbitrations. Hence, the usual offshore arbitration clause in most India deals, where the arbitration is seated outside India, and it is seated typically either in Singapore or London, those two being the two most popular choices for offshoring arbitrations concerning Indian matters.

And historically, that was very much a defensive move by investors internationally, who believed the Indian courts, because they suffer from delays and because of the logjam that is often there, and until recently, where there have been some very progressive judgments of the Supreme Court, especially after the amendments to the Arbitration Act, historically more interventionist when it came to issuing injunctions and interim measures. The idea was, if we have decided to delocalise our dispute, we should try to delocalise it from the ambit of Indian courts as well. So that is very defensive.

I think the most sophisticated investors, have again learned through bitter experience, unfortunately, that it is not enough just to think defensively, but actually to think more offensively to say that yes, you choose to offshore your arbitration, but then make the most sophisticated choice about where you offshore your arbitration. Whether you choose Singapore, whether you choose London, whether you choose Paris or you choose any other seat, you start thinking about the remedies and support that you can proactively get, from the courts of the seat of the arbitration, to ultimately help you in the enforcement of an award. Because what international investors learnt was yes, you can go to Singapore, yes, you can come to London, but if you have an Indian respondent who has assets largely or exclusively in India, you eventually have to come back to Indian courts.

You have to be in the Delhi High Court. You have to be in the Bangalore City Civil Court, trying to execute your award, trying to enforce your award and then you would also have some Indian promoters or Indian counter parties, who would have assets outside India as well, sometimes in offshore tax efficient jurisdictions such as the BVI, Cyprus, the Cayman Islands, and the idea was how do you actually go to those jurisdictions and enforce the award?

And there the supervisory courts, or the seat to the arbitration, English Courts, Singaporean Courts can actually have a big, big role in helping the investors actually see the colour of the money, at the end of the day. And I'm very happy later on, to talk through my own experience of certain specific remedies, that are available to international investors that they've had the benefit of, and which I think everybody who is advising investors should be counselling them on, to get the best possible outcome for them.

Abhijnan Jha

Thanks for that Dipen, and before I move to VP, Karthik, let's take a slight detour and ask you to don your hat of an economist, and tell us that, where do you see the next disputes coming from? You know, we've just gotten out of the COVID 19 pandemic, we are entering into what perhaps is going to be a global recession. Where do you think investors need to be wary about, and how do you see India in this entire scenario?

Karthik Balisagar

Thanks, Abhijnan and thanks AZB and MCIA for inviting me. So, I might just take 4 minutes or 5 minutes to explain, because if I knew exactly what was going on, I would probably be sipping a Martini in Seychelles; I don't, like many others. So, if you ask me, from my vantage point, looking at economic and financial issues, there are 3 structural matters that one needs to bear in mind, and this will probably help you understand the changing world order we live in. 1st, the west has a huge deficit balance sheet, they're running huge deficits. And these deficits are for multiple reasons, you want to show economic might, in front of a threat from other countries, it is also ageing population, we'll come to that. 2, there is unequal distribution of wealth and income, and it's reached its maximum, I think. That will create a lot of internal conflict.

And 3rd, we have the issue of rising superpowers, challenging the US order. I'm not saying this is right or that is wrong, you have rising superpowers outside of the western world. So, I think this paradigm is new. However, it has repeated many times over. You had the British system, you had the Dutch system, you can go back in history, there's always rise and fall of empires, including the

Chinese and the Indian, if you go back 1000s of years back. So, this paradigm is always there. Now, how do nations react in such circumstances? They always fall back on economic might, and how do you have economic might, obviously, from an economic principal perspective, either you increase productivity, or you increase capital.

Now what has happened, I'll just give you some figures. Let's take US for example. There was roughly about $20 trillion of credit in the US in 2002. Today, we're 20 years down the line, it's $90 trillion, which means huge amount of money has been printed, not printed, but these are digital currency, it's in circulation, and what is the form it's taken, it's taken credit. So, there's a lot of credit and debt in the system and unfortunately, when you have these huge credits that pile on, there's only one thing that happens, there are cycles. There is a long-term debt cycle and a short-term debt cycle. I think we are reaching probably at the peak of the long-term debt cycle, which normally takes 75 to 100 years. And the short-term debt cycles normally is 5 to 7 years.

So, when that happens, you have pain. and that's inevitable. Now, I was just reading BBC Now, Royal Mail is making 6000 people redundant and this is just the start. So, you have things like cutting of spending, then moving into restructuring - cutting of debt, because there's too much debt that's piled on, and that leads you to wealth distribution questions. So you increase taxes, who are you going to tax more, who you're are going to tax less, that leads to internal conflict. And finally, you have recession coming in. I'm not saying it's going to happen today or tomorrow or six months, I don't know, but I think we are at the precipice, and it might happen in the next 2–3-years' time.

How severe I have no idea. Now, I'm setting the tone for what I'm saying next, is where does that lead into disputes? Now, one of the things that I mentioned was, there's a lot of debt that is being circulated. So, any corporate having huge leverage, or any nation that has huge leverage, you will have stress building up. If the terminal rate, which is the US 30-year bond rate goes up to 5, 6%, which is what has been predicted, this is going to take toll on a lot of debt that is sitting on the corporate balance sheet. So, you will see a lot of restructuring related, insolvency related disputes starting up maybe end of next year.

This will also promote a lot of resource nationalism, because long term contracts with certain nations will be at stake, so nations with high debt, high foreign debt will start rebalancing their long-term contracts which are resource rich, so you might see things like expropriation, or sovereign debt crisis. Again, these are disputes that you should look out for. Now, the other question I have is efficiency versus resilience. So, climate change was a big resilience factor, and I hope that doesn't get lost, but you see what's happened, when there's a lot of credit and money in the system, everybody's happy. So, governments give subsidies, the corporates are, swearing by these programs and you have clean energy being funded, but when the credit supply shrinks, which is happening now, the question will be asked, how much profits should corporates keep? Should we give this level of subsidy?

These are questions being asked, these were asked in Spain, these are being asked in Mexico, these are being asked in Scotland, so you have these issues. Then you have the Ukraine war crisis, so you have a supply shock, globalisation has sort of shrunk and the recent sanctions by US on semiconductor industry, is going to pick up and have some supply side ramifications in terms of contracts. So what's coming out of that; I read an FT article last night, which said, a lot of suppliers from the US are not allowed to give inputs to semiconductor businesses in China. So, this is going to have a downstream impact on the tech industry. So again, we see supply shocks, both on the energy side and semiconductor side hitting us.

There's talk of aluminum sanctions as well, so we don't know, that could also probably materialise soon, and that might have some supply shock on the contract side. So, these are sort of issues that we need to be aware of. From an India context, I think India's probably in a safer space, I would say, although we would be sort of subject to US sneezes. So, we need to be careful when we don't have deep markets. So, we might take some advantage, because of the issue of sanctions on China, but we're not deep enough. The biggest issue for India would be currency, managing foreign currency and foreign debt. If we can wade through that issue, we should be fine, but I would keep my eyes on corporates that are highly leveraged and exposed to foreign currency on input costs.

Abhijnan Jha

Right, so Karthik that that was very illuminating, and I think that sets up and we can go back to VP. VP, this is a familiar territory. We get into a situation, where India's a whipping boy in these conferences, but what about the last 2, 21/2 years? There have been some significant highs, some lows, but in your experience, are we on our way to a credible arbitration friendly jurisdiction?

VP Singh

Thanks, Abhijnan and while there is a lot of doom and gloom that's being talked about, it's always a boom for disputes lawyers, because invariably whenever recession hits, you find out how many have been just fuming with a smile and it's in that context that you start looking at that end of the agreement, which we look at, which is effectively the closet from behind. Everyone else in the world looks at in agreement from the cycle onwards, disputes lawyers and courts will use the **[inaudible 00:19:30]** range, which is that's the last thing that goes in and the first thing that you would face, the moment you hit a dispute. So, we are seeing resurgence of sorts, with respect to Indian courts recognising that an institutional framework or request for arbitration, which takes you out of an Indian court, is no longer a jealously guarded territory.

So, they are happy to let go and they are happy to go ahead and let go in the hands of a institutional arbitration system. And you'll see this with the manner in which the Supreme Court has, over the last 18 odd months, dealt with appointment requests. They have handed it over to local champions, which is local arbitral institutions like MCIA, who have a global flavour in their rules, to take over and hand hold parties through defaulting positions in the course of the dispute resolution process. And I think that's a very solid message to the world at large, that don't take just the last contract that people saw, but take the contract, which is the best suited for you and that contract in my mind as to be a contract governed by institutional arbitration.

And I don't need any further authority on it, than what we saw in the Amazon fight, where we had Justice Nariman candidly turn around and say, well, emergency arbitrators are an idea whose time has come, because we have a backlog in our courts. Therefore, a Supreme Court judge, the first Supreme Court ruling on emergency arbitrators comes not from a sophisticated arbitration

entrenched jurisdiction, but from India and why does that happen, because India recognises that the arbitration process is significant and in parallel, and not just a precondition, which will then bring you back to the first leg in a dispute resolution process.

So, keeping these two things in mind, which is certainty of the process through an institutional setup, coupled with the fact that the Indian courts have recognised that they don't need to be jealous about a counter system or an alternate system coming about, is seeing us get to a place where we have a few blushes, but for a change, they are a blush of joy. There may be a lot of learning around how we can do it better, but the fact still remains that institutionalisation instead of internationalisation and what I would call the increase in the role of institutional arbitration, through institutes like MCIA, will help us go ahead and match the world, not just in keeping Arbitration Weeks, but in ensuring that arbitrations are run professionally.

Abhijnan Jha

Thanks for that VP and I think, that ends segment one, which were really opening comments. And I'll just pick up on some of these themes that each speaker spoke about. Ankur, you touched on certainty, efficiency, and effectiveness and I am just tying it with what VP talked about, how has the experience been in terms of emergency arbitration as a process? What are the positives that you've gained, and what do you think the challenges are?

Ankur Sharma

Thanks, Abhijnan. So, I think, speaking generally, the message which came out from the recognition of emergency arbitrators in India, was clearly promising and positive for litigation, as I think what VP was alluding to in India, as a jurisdiction. I think in in my view, the concept of emergency arbitrator is not an alien, it existed in some other forums, including the courts. What emergency arbitrator does is two important things in my mind, one, it sets the right direction for the litigation to proceed. So, it's a prima facie view, of a subject of litigation, and therefore to get a prima facie view, in some sense sets the direction of the litigation. Unless there are material changes to the circumstances of the case or similar other issues, more or less, the direction would continue so on and so forth.

The second important thing, which I think we are challenged to some extent in the arbitration process is saving the subject matter or protecting the subject matter. What emergency arbitrator also does positively and promisingly is take steps to protect the subject matter of litigation. So, two important pieces, protecting the inherent subject matter for which the dispute is being done and the second part about giving some direction, which gives a very good colour, if you may, to the parties to litigation, and unless there are material changes, more or less, it picks up the same rhythm so on and so forth. So, in summary, I would say it's a very promising and a positive development and to add to VP's point, this is a material step forward, to take India towards a arbitration favoured jurisdiction.

Abhijnan Jha

Thanks for that, Ankur. Dipen, let's look at the counter narrative. I think even now foreign investors would be very cagey in choosing India as a seat and going ahead with it. So, therefore, the familiar choice to them would be to take seats like London, Singapore, or even Switzerland. You spoke about perhaps certain remedies, that investors can think about, while protecting what Ankur said the subject matter of the arbitration, or the subject matter of the award. Could you speak a little more about that?

Dipen Sabharwal KC

Definitely. So, Abhijnan, I think a lot of the courts in these popular seats such as London, Singapore and elsewhere, have had considerable experience in aiding parties in enforcing their awards and offering some pretty innovative remedies. And I want to just share one case study, this is all in the public domain, it's all reported judgments. I represented international investors, Crewe City, which was really a spinoff from Lehman Brothers Real Estate Partners Investment Group, who had invested in real estate projects in Mumbai, together with Unitech.

That investments went sour. Crewe City brought certain enforcement, certain contractual rights, Unitech resisted. We had three parallel LCIA Arbitrations, we were acting for Crewe city, we won all of those arbitrations. And we got LCIA London seated awards against Unitech and Unitech related

entities, of the order of magnitude of $300 million plus interest, and with the passage of time because Unitech and related entities resisted paying the award, and took any and all argument that they could refuse to pay up, that amount climbed up to $500 and $600 million.

Now, I just want to give an example of what we did, using remedies available from international courts, to help assist our client to see the colour of the money. The first is we went to the English courts, and we got what is known as a disclosure order. Where if you think you're up against a party that is hiding its assets in multiple foreign jurisdictions to avoid paying a debt, or avoid honouring an arbitration award. We got an order from the English high court under Section 37 of the Senior Courts Act in the UK, seeking a worldwide disclosure order, requiring Unitech and related entities to file affidavits disclosing every single asset that they own, everywhere in the world, not just in India, but in every location in the world.

And, you know, it was a fairly novel remedy, because of the question whether the English courts could actually have order disclosure of foreign assets. Previous case law had said you can order the disclosure of assets within jurisdiction, but the English court said if there is an award that has been handed down by a London seated arbitration, the English courts have jurisdiction over the respondent, because by submitting to the jurisdiction of the arbitrators in a London seated arbitration, they're deemed to have submitted to the jurisdiction, the supervisory jurisdiction of English courts, and English courts, on that basis, exercised that jurisdiction to issue a worldwide disclosure order.

Once we got a worldwide disclosure order, we immediately followed up and got a worldwide freezing order and said all of these assets are frozen. It's a good old fashioned Mareva injunction that everybody's learned about in law school, and we got a worldwide freezing order to prevent the dissipation of those assets. The third thing that we did, which was also a fairly innovative and unprecedented order, is we went and applied to the English court to appoint a receiver in England by way of equitable execution of foreign assets of Unitech.

So, for example, to the extent that Unitech and Unitech entities had assets in the Isle of Man, in Cayman Islands, in the BVI, we got the English court to appoint a receiver and we got one of the big

accounting firms to act as receiver for that. And effectively, they would manage Unitech's foreign assets to make sure that our clients award was satisfied. And again, that was unprecedented, but effectively what the High Court in London did, it allowed our application and said look, it's irrelevant if the assets of Unitech are located in the UK or abroad. Ultimately, what matters is the English courts have jurisdiction over the respondent, and the demands of justice favoured the appointed receiver in line with English public policy, that arbitration awards need to be complied with and enforced.

So, these are just examples of the kind of things that courts can do, potentially, to help support the enforcement of arbitration awards, to make sure that arbitration is just not an academic process that we argue cases, and we have this wonderful 325-page award, but there is no money to show for it. And what I would really urge is, as counsel who advise clients, such as Ankur, and for clients like Ankur, when they are thinking about where they want to see the arbitration, a lot of focus tends to be on institutional rules, are SIAC rules better than LCIA rules?

And sometimes the discussion is, is some institution cheaper than the other institution. I think a lot more focus needs to be, how aggressive and how supportive can the court in that jurisdiction be, because ultimately, that's going to make the difference in you showing the money. The fact that whether you have shown 3% and shaved off the institutional fee costs, in my view is not and should not be a material consideration.

Abhijnan Jha

Thanks for that, Dipen. Going back to VP, VP we were speaking about tactics, and you've been on the other side of Indian promoters sitting in India. And over the last few years, you've seen a range of guerrilla tactics, that Indian promoters employ in India as well, to defeat the proceedings or defeat the award, and you never really get to resolution of a dispute, which is what arbitration should be about. Coupled with that, foreign investment in India is still a regulated sector, so how do these tactics play into possibly regulatory issues, that Indian promoters can sometimes take up, in order to stifle an arbitration proceeding?

VP Singh

So always remember, when you're playing someone, it's like cricket, if you're playing someone in their home ground, you should know at least whether you're going to get a green top or you're going to get something that's going to spin. So, how do you prepare for that, you prepare for that by getting a good landscape of what the Indian regulatory position is, because market practice may not be an answer when you go to court.

The two things that have happened over the last five years, which I think are positive for us, has been while we are an exchange control governed economy, the fact is that at least with respect to arbitrations, and maybe depends in part responsible for it, we've seen the ghost of FEMA being exorcised. We've finally seen it, starting with Crewe City ending with Vijay Karia**.** Hopefully, we'll also see a goodbye to it sometime in our other matter, we will find that foreign exchange regulatory issues are standalone, and they have to be dealt with independently, while they do not come in the way of an arbitral process or an enforcement process, in seeking recourse against breach of agreements. So that's been one positive piece.

The second positive piece that we've been able to notice, is a trend where the Supreme Court has repeatedly recognized, what I call the Indian way of doing business. And why do I call it the Indian way of doing business? I call it the Indian way of doing business, is when they're looking at the concept of consent, in the context of arbitrations, as being something that reflects the actual reality, and not the legal setup-oriented understanding of how consent has been obtained. And where do I come from when I say this. Let's take the evolution of the Group of Companies Doctrine in this country. You will see that from a non-signatory being completely a no-go area. We've been going there more consistently and why is that so?

It's so because international business tactics or business transactions, require you to do business in a particular manner where say, for instance, the intellectual property of that businesses is housed in a particular entity, which is different from the entity that's entering into the agreement. The court recognises this to be a part of a common understanding or a large understanding. The second thing

that you have seen, is the fact that Indian entities usually are promoter driven, promoter owned, and therefore have a strong promoter labour right across entities.

You may have the same person sitting in different capacities, but KMP capacities, across various entities, all of whom may have multiple agreements, but not the same agreement with one party. In such a situation, the court has started to look at either agency, attribution, commonality of interest or commonality of business, in terms of a larger concept, while looking at the concept of control as well as looking at the concept of consent. And which is why you've seen from Chloro-Controls onwards, right up till discovery, a clear consistent path, which says a group of companies or the concept of what I would say, an enlarged concept of consent exists.

There has been some amount of misgiving, or I wouldn't say misgiving, there has been some amount of thought to pause in the Cox & Kings vs SAP judgement. But if you read the judgement clearly, in particular, Justice Surya Kant's view, you will find that they are very clear, that it is an idea whose time has come. Namely, consent is an idea which will be seen in terms of economic reality, rather than legal entities. And I do hope that the Supreme Court continues with that trend. Because it's not a case of manufacturing consent there, it's a case of recognising consent, and I see Indian courts moving in that direction more frequently, therefore, cutting down the number of places that people can hide.

The last and the most important factors, if you've chosen a litigation strategy, that has been alluded to, how you can use litigation strategy as a good counterfoil to moving forward, you will be able to move ahead. I would say that use the conjunction of the commercial courts route coupled with the choice of a jurisdiction where commercial courts are active and there are a fair number of them, for example Delhi, as a base to go ahead and start looking at an action. Therefore, coming back to what I started, look at the tadka before you look at the underlying food. Because when you are looking at finding a recourse to see your money, the tadka will give you a flavour, a direction and a nature that you will go to, and that's how you will meet up to Ankur's ask of his 3 Es,, economy, effectiveness and efficiency.

Abhijnan Jha

Right, and Karthik, staying on with that theme of efficiency and effectiveness. Ankur and VP spoke about emergency arbitration, which is really a tool which is deployed right when arbitration starts. I think something which is not perhaps talked about, or most litigants miss out on, is the appointment of an expert before even initiating a dispute. Is that something that you agree, that we need to be more as clients and counsel, we need to be more alive to the appointment of experts in determining how much money are we really talking about, rather than initiating a dispute and then figuring out, perhaps to our disadvantage, that maybe it's not worth it at all.

Karthik Balisagar

Thanks, Abhijnan. I think, as we all know, quantum is the poor cousin of liability. So, sometimes we are an afterthought, and I think that is changing. The way I sort of compartmentalise in my mind, on quantum is, you have a breach that needs to be proven under law, that's the first pillar. The second pillar is a causation, where you have law and expertise that's needed. And then downstream, you have quantum, but then you need all these three pillars of frameworks talking to each other and I'll give you, anecdotally one example.

So, we had in our London office, we had someone coming in, who owns a huge bank, in some part of the world. And he was really angry with what had happened to him. It was a multi-billion-dollar bank, something in the range of 500 billion, and there was a regulation that was brought in by the regulator, the central bank, which sort of created losses, that was the story. And then we sat back and said, okay, that is fine, we understand what you're dealing with. So, the next question is, do you know how to value a bank?

And we said, yes, we know how to value bank. That's not a problem, but we need to understand what the breach is. So, we said, look, we have seen some of the banks in this part of the world, most of these banks have lost value of 70 to 80%, which is comparable to yours. So, why are you saying that something was done, just so that the value of your bank is lost? And then he got a bit finicky, and he said, okay, and he looked at the law, and he said, okay, what do we need to do?

And then the next question was, what were the actions taken by the regulator prejudicial? The first question. Second question, was the causation, did the action taken by the bank actually cause loss or was there an economic stress in that part of the world, which led to the loss at the same point in time? So, these are important questions, that one needs to assess and ask, before jumping into conclusion of, oh, can we get a loss of profit? Can we do a valuation of this, and just arrive at a loss? I think that the loss framework is entirely dependent on the type of breach, and we see this even in M&A.

Are you talking of breach of warranty, the standards are different, is it a fraudulent misrepresentation? Standards are different, the way you approach a valuation for these kinds of situations is entirely dependent on the breach, or that you're claiming under law, for example. So, I think it is generally a good practice to bring in experts a little early and have informal conversations on the framework, you don't have to appoint them completely, and maybe even get a preliminary assessment done and see where that goes. Obviously, all of this needs to be done, keeping independence in mind, because you can't give one opinion at the beginning and say, oh, now you're appointed as an expert witness, can you go on the stand and change your opinion at that point in time.

That's not possible, and that's bad practice, and that should not be allowed. Notwithstanding that point, I would strongly encourage, for the reasons I just mentioned, that it would be good if we are at least brought in for informal discussions, or even a preliminary assessment, that needs to be done. And I'm happy to share that, that sort of habit has started in the recent past, maybe last two, three years, we are being brought a little early than, we have the last two months, we need to find the Statement of Claim, can you put the quantum as well. So, we are seeing a change, and I would strongly encourage clients and counsel to consider that.

Abhijnan Jha

That's very interesting. And Dipen, one follow-up question to what you said a little while earlier, about the position of the economy. We know litigation funding is a big thing all over the world. Do you think that perhaps maybe impacted with the downturn in the economy, in the global economy?

Dipen Sabharwal

That's a difficult question, I will try and answer. I think litigation funding per se, has done a great service to the disputes industry, and I think nobody should shy away from that fact. The question I have, and I don't have an answer, honestly Abhijnan. The question I have is, given the credit explosion that happened, there's a lot of dry powder, there's a lot of money supply. And the interest rates were abysmally low, so investors were seeking returns from alternate investments, and litigation funding is one of the streams, there are many other such streams.

So, the question then becomes, if you have base rates moving from 0 to 6%, or something like that, of magnitude, what is the downstream impact on riskier investments, A? B, is there as much liquidity as was there 10 years ago, with liquidity drying up slowly, it's not yet there in the market, liquidity is fine in the market, there's still a lot of private equity money, a lot of family money out there. But will this level of liquidity continue to exist, going forward in the next five years? I don't know is the answer. There's a very likely chance that that might dry up given what's happening. And also risk perception on such investments will have to change. We are seeing interest rates that we have not seen in the last 15, 20 years in the west.

And then if you're talking about investing in litigation funding is a bit like, it depends when you enter, is bit like betting on a molecule. When it's at the lab stage, do you bet that this will go clear clinical, phase four and get marketed, who knows, you don't know, there's a risk of failure in between lab and going to market and there's a lot that happens between that stage, those periods. So, if you ask me, litigation funding will get more creative, if they enter in at the stage of award, if they take over the award and they want to enforce it, those are different dynamics, there's more certainty there.

Again, I wouldn't say a lot of certainty, depends on asset tracing and things like that, how easily is it enforceable, what jurisdictions are talking about, but if you're talking about traditional funding that is coming right at the Statement of Claims stage, it might be difficult, it might not be difficult, it will be circumstantial, it'll be fact dependent, honestly. But I see generally stress building up in the investment community around this and I think the perception of risk will change risk and reward.

Abhijnan Jha

Right. Again, coming back to and I find this really fascinating to what Dipen and VP are saying, and putting together two different narratives. I'll give you an example, I'm in the Delhi High Court trying to enforce a consent award, a foreign award, but consent award and from what we've experienced is that well, the other side has pretty much no case, it's a consent award, they still challenged it, what ends up happening is that the process kills the result.

So, VP and Dipen from your two very different perspectives, one is the Delhi High Court and the other could be the English Commercial Court. What do you do, in the context of enforcement in India, one obviously would be a direct strategy to be employed in India and something, which complements that outside India, so why don't you the both of you speak about that?

Dipen Sabharwal

Sure, I'm happy to go first, I just share the English Commercial Code experience. So, there is a lot of empirical research that has been done. The sections under which you can challenge an award is Section 67 and 68 of the English Arbitration Act, that came into force pretty much the same year as Indian Arbitration Act of 1996. So they're like, a Manmohan Desai film, these are twin brothers separated at birth in very different jurisdictions. And it's interesting to see how they have turned out, because we've just had 25th anniversary for both of those legislations, and both of them were trying to implement the same UNCITRAL model law, right, so they had the same gene pool as well.

And it is fascinating that, how challenges to arbitration awards were dealt in the UK. So, I have no shame to admit, have sometimes been on the losing side of arbitrations, and you want to challenge

an arbitration award. So, you file a challenge before the commercial court. What the commercial court in London does is, it says file your challenge on paper and in 75% of the cases, they will dispose of your application on the papers itself. So, effectively, you will file your application, and within a week or 10 days by email, and by post, you will get a two-page order from a judge of the commercial court saying I have considered the grounds for your challenge, and I do not find any merit to this challenge, your application is dismissed.

So, you're effectively not even given a hearing. It is as simple as that, and then I think only if the prima facie grounds are compelling, are you then actually given a proper hearing and actually, arguments are allowed. And the probability of success of overturning an award before an English court is less than 5%. And as I said, the vast majority of them are going to be disposed of on the papers, within a matter of two weeks. If it goes before the court, it typically takes anything between 6 to 10 months to get a final order.

Once you get an order from the commercial court, the court of appeal is going to be extremely reluctant, unless you could show that there's really interesting question of law, or you could show that there are conflicting authorities, will you get leave from the court of appeal to actually go and file that challenge. So, my advice always to clients who are unhappy with results is, very happy to file a challenge, but you will find out that the prospects are low, and if you simply want to buy some time, the process, at least in England does not even enable you to buy some time to frustrate or delay the enforcement of an award.

VP Singh

So, as you said, going to Manmohan Desai, “Mere Pass Maa Hai” we forgot ki “Maa same hai dono ki”, which is why we forgot that we had the same parentage, which is why our experiences were different. Fortunately, now DNA has come up, and courts have started seeing now, which is the number of challenges that go up under 34 and 48 are much larger than you would find in any other part of the world. Second, you will see that the dual system of objections to an award, where we've said make in India and made in India, make in India and enforce in India, have a different standard, has led to Indian courts being a lot more permissive towards upholding foreign awards.

Does that mean that make in India does not get a time of day or time of play? The answer is no. What we do is we followed what I call "Aao Hamare Desh Main," which is effectively a tourism slogan, but we've done legal tourism, where we have said that if you are seated in India, we will give you the benefits say in the case of an Emergency Award of a 17 (2) immediate enforcement. You don't need to go through the rigmarole of jumping through the hoops, and compliance is going to be assisted and not be supervised by a court. Now, when you do all these things, it helps you go out and say that the parentage shows that you have a good structure in place. What it needs is the culture of saying no, and no to what?

No to the fact that you will want to interfere. And why should you say no, because parties choose the poison they want to live with, whether it be court, whether it be an arbitration, but once that choice is made, you need to respect that choice to the fullest. And you should see Indian courts doing that more often, and I've seen at least the metros carry that flag really well. So, you've seen the presidency courts in Bombay, Calcutta, Madras, carry it forward. Delhi, according to me, being the test case for a court on how you should be looking at arbitrations.

There may be the odd interventionists interludes, but the good part is they are seen more as the exception, and in fact, not to be the rule. So, the numbers may be a lot higher than what the Dipen says, but our numbers are on account of the fact that there is historical baggage, which comes even under the 1940 Act. Our 1996 Act numbers may actually be quite similar, but India teaches you two things with respect to a litigation. First, it teaches you patience, so with respect to a consent award based challenge, you have to play your case management role, effectively, as **[Inaudible 00:51:20]**.

You have to play before the ball, or you have to read the ball off the hand, rather than off the pitch, because you need to then know how to play it. The second piece is that you need to know that you win in India not because you're a good lawyer in India, you win in India, not because you win always, it's how quickly do you get up after you've had a setback. And increasingly, we're finding people who have done this regularly, coming up and hitting back harder, so that is how I see India accommodating for the new green shoots, but in the same old law, and I think that's a positive sign.

Dipen Sabharwal

If I may just come in very, very briefly, I think the one thing that I should say, because I'm sitting here in London, and I need to be careful, because I don't want to sound too downbeat on India, I have to say, the quality of judgments, especially coming out of the Delhi High Court in the arbitration space in the last five years, some of them have been truly exceptional. I think the Delhi High Court has really set the benchmark.

I think that the quality of judgments coming on arbitration out of the Delhi High Court today are superior, and I know that this is an MCIA event, and I'm conscious that there are people from all over India, I think are really setting the pace, and something that the other High Courts can really look and derive inspiration from. And I think I have myself, on the Crewe City case, spent a lot of time the Delhi High Court before the judges, and there are plenty of judges in Delhi High Court who are extremely sophisticated, who completely get the context of arbitration, the purpose of arbitration, they understand the spirit of the Act, and they're committed to upholding that. And I think, long may that continue and hopefully that spirit is going to be pervading across all the various High Courts in India.

Abhijnan Jha

So that, and we truly hope that is the position. So, I think, we have only five to seven minutes for questions, and let me just straightaway move into that. And I think the first question that has been asked is something that is coming up now rather frequently. And I'll ask this to both VP and Dipen. You have seen that, in the recent past, foreign investors also consider the avenue of a Bilateral Investment Treaty Arbitration, especially when they're not perhaps getting results, or they're facing unfortunate situations in India. And of course, we can start off from the White Industry, so White Industry saga. So**,** what has been your experience there? And how do you think India's model BIT, and whatever has happened post that, plays into this entire situation? Dipen, VP, either of you.

Dipen Sabharwal

No, I'm happy to go first. So first, I need to make a disclosure. I act for the Republic of India in a number of investment treaty related enforcement actions outside India, so I have to make that disclosure first. I think the thing which I would say, is that White Industries, in my view, and this is my personal view, is a very dangerous precedent. For those who are not familiar, White Industries essentially look at the enforcement of a commercial award and the process in India, which went on from the Calcutta High Court, the Delhi High Court and the Supreme Court, is a process that lasted for many years.

And there was an investment treaty award that was handed down in White Industries, which said that the actual denial of justice or the prejudice that the investor has suffered, as a result of the Indian courts not enforcing the award, that in itself is a breach of the investment treaty, and therefore, the Republic of India is liable for damages.

Now, there have been entire seminars conducted on White Industry, so I will not go to chapter and verse, it's fair to say that it is a controversial decision, and you can read lots of commentary on it. There have not been, since White Industries, many other cases, which have been brought against India on that basis. There is one going on right now, again, I'm involved in that, so I won't comment on it, but again, I would not be surprised if more people tried their luck to somehow convert the commercial awards against Indian entities and state-owned entities and try to convert that into investment treaty awards.

Because from an investor, you're getting two bites of the cherry and secondly, you're going up the balance sheet of Republic of India, as opposed to the balance sheet of a company. So, foreign investors will see this as part of the menu of choices that they have, when it comes to the remedies they wish to seek.

VP Singh

Yes, I agree with Dipen. Again, a disclosure from me, I went to the Parliament on the model BIT and I know what the view there is. And two things do stand out. The first is the Indian government has learned from its previous experiences, and has said that while it has honoured awards, where it feels that it has an issue with an award, it will not fight on a tied hand basis, and I think you can see that with the involvement of the firm, White & Case with the defence, the government is serious about its position. The second thing that you do come across is the fact that the BIT approach is available to someone usually who's leaving the country.

If you are going to live in this country, you cannot go and use the BIT approach. Or you use it with a certain degree of circumspection, because you will find yourself at some places, whatever you gain on the curves, you will lose on the straights. Because the government has its own way of ensuring that its balance sheet is balanced. So, A, if you are exiting, the chances are there it is an option, B if you're bought into the India story, and you're staying in the India story, I don't see it as an option. But what it tells us, is if the cooking of the award is good, the ability to use the BIT structure will be more difficult.

And as you know India's practically whitewashed it's old BIT structure, the modern BIT it is the new way forward, so with the exception of the sunset period, where people are really holding on to it, but they are like, you are going to see a problem. The problem on the BIT issue is slightly different. We are a capital exporting country. We are not going to sophisticated countries. Therefore, Indian companies are going to now start looking at this as an option, and at times I want to ask the government a question, as to why is it that they don't have the same protection, that maybe other capital exporting country manufacturers or industries do? And that's a concept and a call for later for a different conversation.

Abhijnan Jha

Right. I think we have time for one more question. So, I will just pick out from the questions that have been asked. Karthik, I'm sorry, I know these questions perhaps may have been done to death, but I'm going to ask it anyway. As an expert, obviously, will have to deal with, various governing laws on damages. Obviously, your analysis would change, depending on the governing law, but coming back to India, because certain heads of claims perhaps don't have much precedential value, or don't have much legal basis; do you employ a different analysis for an Indian governing law situation, or would it be the same or it's really based on instruction that you get from counsel? Because I know the standard answer is that it depends on the instruction of counsel, and it's not something you want to get into, but practically speaking, how do you approach it?

Karthik Balisagar

You've given the answer, partly, but I'll try and sort of formulate it differently. Look, as I said, we are downstream economic analysts, and we don't determine what law needs to be applied and how it needs to be applied. We just work out what the numbers look like. Now, some of the questions that I see on Wrotham Park and loss of opportunity, that's also true of some of the civil law jurisdictions in Latin America, which I'm also familiar with in terms of, you can't apply probably even loss of chance in certain circumstances, in certain jurisdictions, when you're not allowed to, and that's not a remedy, you cannot just do it.

As an economist or a valuation expert, you just can't do it, this is a question of law, and we'll have to do what law allows us to do. So, the question ultimately boils down to okay, if you have compensatory principles that need to be employed, you will go back to the often-suggested route of what is the counterfactual? What is the actual? What is the contemporaneous documentation, and you estimate the loss. I don't think good experts should get into the question of what is fair from a law perspective, I think you're trading outside your area of expertise and experience.

So, I would stick to a simple answer that, as long as it's compensatory principles, I would probably use these principles, sometimes it's liquidated damages, so then you will get into what the contract required, so it's contractual driven damage. Wrotham Park, negotiating damages is a difficult concept and only in certain cases, it's allowed even in UK, under English law, and I'm sure Dipen can speak to it. But if you ask me, how can it be fairly addressed in disputes, it is a difficult question. The experts are not there to assist on matters of law.

Abhijnan Jha

So, I think we are out of time, and I will leave it here. So, thank you everyone, for this fascinating session, what we tried to do is, pack in a lot of issues in an hour. I hope we've been reasonably successful. And I think this session is going to be available as a video recording later. Thank you, everyone. Thank you to the audience. Have a great day and cheers.