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Session: Where could Indian parties choose to arbitrate – a comparison between Switzerland, India, Dubai and Singapore

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Speaker 1

Good afternoon, everybody. It's my absolute pleasure to welcome you all to this India ADR Week session, organized by the Swiss Arbitration Centre. I'll just say a very few short words on the Swiss Arbitration Centre, and then hand over to the moderator and the panelists. So, just for your information the Swiss Arbitration Centre is an independent International Arbitral Institution that provides high quality arbitration and mediation services worldwide although it is based in Switzerland, under the Swiss rules of arbitration and mediation. You can find all this information on the website of the Swiss Arbitration Centre, easily accessible and completely available for everybody to access.

So, from there, we can move on to today's theme for today's discussion, which is where could Indian parties choose to arbitrate, and we will be discussing a comparison between Switzerland, India, Singapore, and the UAE. This is, of course, a very topical theme given the rise of both international and institutional arbitration in India today, and as more and more Indian parties turn to arbitration, their choice and the options that they have in choosing their seat become more important.

I won't say any more about this topic, I would just like to very quickly present our moderator today, who is with us today, Zarina Pundole. Zarina is the General Counsel of Shapoorji Pallonji EPC Division. She has over 20 years of experience in dispute resolution and negotiates a variety of complex cross border transactions and infrastructure projects, in this position. And with her experience in dispute resolution and as a user of international arbitration, I think Zarina is well placed to navigate us through this discussion. So, without any further ado, I hand over the virtual microphone to you, Zarina. Thank you so much for accepting our invitation and look forward to this discussion very much.

Zarina Pundole

Thank you, **[Inaudible 00:03:03]** those are very kind words. So, this afternoon, we have some very distinguished and very seasoned arbitration experts from Switzerland, UAE, India, and Singapore. And each of them will first give you a sort of overview of their jurisdiction, how arbitration is dealt with there, and try and bring out some of the unique features that they've got. And then we'll have a small round of questions and see if we can identify what the differences are and what are the pros and cons of each of these jurisdictions.

I'm going to introduce them from west to east, starting with Felix. Felix Dasser is the President of the Swiss Arbitration Association and a Partner of the Swiss firm Homburger, specialising in litigation and arbitration. He is a Professor at the University of Zurich for private law and private international law and lectures and publishes regularly on international dispute resolution, so a warm welcome to you Felix.

Our second panelist Thomas Snider is from the UAE. Thomas is a Partner and the Head of Arbitration of Al Tamimi, based in the Dubai office.

Our third panelist is Sanskriti Sidana, she's a Senior Associate in the Dispute Resolution Practice at Cyril Amarchand Mangaldas.

And our fourth panelist is Koh Swee Yen from Singapore. Swee Yen is a Senior Counsel and a Partner in the commercial and corporate disputes and international arbitration practice of Wong Partnership, LLP headquartered in Singapore.

Please join me in welcoming each one of them. I'll hand it over to Felix now. Felix, the stage is all yours.

Felix Dasser

Here we go, arbitration Switzerland, I start with two statistics from the ICC, that are beyond suspicion, that they are not particularly Switzerland friendly, than Paris. But Switzerland is actually one of the most popular seats for ICC arbitrations worldwide. In the last available year 2020, it was the most popular one actually. Sometimes, the others are a bit more popular, but overall, it's very popular and the same applies to the applicable law, actually. Swiss substantive law is very popular. It is the most popular civil law in ICC arbitration; it is only beaten by English law and the various UK laws, and you see here the Switzerland with the red lines.

Now, why is that so? For one thing, Switzerland has a very long tradition of arbitration, International Commercial Arbitration in particular, over 100 years or so. So, people know what they're doing, and people are known to know what they're doing, and they are used to tailor the proceedings to the needs and expectations of the parties from all over the world, since a long time. And the arbitration law and policy is very liberal. That's a guarantee of the right to be heard and of equal treatment, but everything else is basically up to the parties.

Arbitrability is variable to define. Any financial dispute can be arbitrated, and arbitration agreements are held to be valid if they conform to just one of several possible laws. So, we normally don't have the problem that the English have, that the French have, when they have a conflict about which law is applicable on a fresh agreement and they come to different conclusions, as to the validity of the arbitration agreement. In Switzerland, arbitration agreements are valid, period. And we have the full support by the Government, and by the judiciary, I will tell you a little bit more in a second.

Then contract law in Switzerland is extremely liberal, and you have a code, but people can read it quite easily, it's unlike a German code or a French code, which is something pretty difficult to understand. The Swiss code is written in plain language, and it's also available in English and in official translation by the Federal Government itself. So, it is very accessible, much more so than English case law, or French or German statutes.

It's also very liberal. It's all about party autonomy, when you sign a contract, that's it, you have to fulfil it in good faith, if you cannot escape. So, and on top, when you have any question about Swiss Arbitration, Swiss Mediation, Swiss Law, you find everything on one website, *swissarbitration.org*, you will also find Swiss Arbitration Centre there. Now setting aside applications, this is pretty unique, if not really unique in the world. We only have one instance, you go directly to the Federal Supreme Court, one chamber that is specializing in arbitration.

You don't have a hearing, it's a written procedure on the applicability of certain legal grounds, but we don't discuss the facts, it's just about the law. So, it only takes about 6 months, and then that's the end of it. In a complex case, it can be a little bit longer, but it's very, very rarely longer than one year, typically it's 6 months. And the chance of success of an application to set aside, is just 7%. The Swiss Judiciary trusts the arbitrators and step in only when it's absolutely necessary, so that's probably uniquely arbitration finding.

And everything goes under the heading of Swiss pragmatism and efficiency. We try to tailor the proceedings to the actual needs of the users, whatever they are, where they come from. It depends on what the parties want, and when the parties want to have 3 English cases, and English law, then, of course, it will be quite different than if they choose Swiss arbitrators or from elsewhere, so it's really under the control of the parties. Swiss petitioners have an international outlook, many of them have also started in a common law jurisdiction, and they try to mix common law and civil law approaches to procedure.

So, for example, normally very extensive memorials in a similar styles are there, so that everybody knows upfront what the case is about, but then we have better statements and cross examination, there are more common law style, but more shorter and more efficient. We also have some document production, but reasonably limited, it's not the US kind, so that is, it's everything about efficiency. And if the parties so want, we are willing to help them find a settlement at the outset, not at the outset, but early on; providing them with our initial assessment of the strengths and

weaknesses of the case. It is totally unprejudicial, informal, but it helps the parties to assess their chances and then either settle or at least streamline the later submissions.

With that I think, I've shown you a little bit about Switzerland, and pass the floor back to Zarina.

Zarina Pundole

Thank you, Felix. That was quite enlightening. Thomas, if you will.

Thomas Snider

Great. Thank you, very much and good afternoon, everyone. It's a real pleasure to take part in India ADR Week albeit virtually. My task, in the next five minutes, is to persuade Indian users that the UAE is the best place to seat their arbitrations.

The UAE ratified the New York convention all the way back in 2006. I'll come back to that point in just a couple of minutes. We have 3 arbitral jurisdictions here in the UAE, and those are a combination of a civil law jurisdiction and two common law jurisdictions. The first of these jurisdictions is the UAE as a whole, we often call onshore UAE, and their arbitrations proceed under the Federal Arbitration law, which, after some delays, and too much fanfare came into force in 2018. It is largely based on the UNCITRAL Model law, UNCITRAL recognises it as such. And interestingly, it was one of the first arbitration laws to contain specific provisions that expressly allowed for the use of electronic forms of communication to be used in the arbitral process. And remember, this was in 2018, 2 years before COVID hit, so at least in that respect, it was a little bit ahead of its time.

We then have the two common law jurisdictions in the UAE. The first is the Dubai International Financial Centre, it's an economic free zone here in Dubai, where I'm sitting currently, that has its own set of commercial laws, its own court system, and its own arbitration law, which came into force in 2008, and is also recognised as UNCITRAL Model Law compliant. The third arbitral

jurisdiction in the UAE is down the road in Abu Dhabi, that's the Abu Dhabi Global Market or ADGM. It too, like the DIFC, is an economic free zone with its own set of commercial laws and its own court. Interestingly, whereas the DIFC Court is comprised of a mix of both Emirati and international judges from common law jurisdictions, the ADGM Court is I believe, fully staffed by common law judges from around the world.

The ADGM arbitration regulations, and despite the fact that they are HUD regulations, they function as effectively a national arbitration law. The ADGM arbitration regulations came into force in 2015. There were some amendments made to them in 2020, relating to various aspects. I think 3 of the more noteworthy ones are, amendments relating to the use of technology in the arbitral process, the requirement relating to the disclosure of 3rd-party funding arrangements, and interestingly, I think the inclusion of a summary disposal process, or an early dismissal type process, you're starting to see such mechanisms emerge in the arbitral rules of some arbitral institutions, but this is the first example of an early dismissal or summary disposal mechanism that I'm aware of, in what is effectively a national arbitration law.

The ADGM arbitration law is also recognised as being UNCITRAL Model Law compliant. If you look back over the last, I would say, four years, a fairly significant shift, albeit a gradual one, in the courts in the UAE, and I think they are becoming much more arbitration friendly. They took the passage of the new law in 2018, as a policy shift towards the UAE being more arbitration friendly, and we are seeing courts setting aside arbitral awards in fewer and fewer cases and being more active in terms of enforcing foreign arbitral awards.

When it comes to the enforcement of foreign arbitral awards in the UAE, there is a sort of an expedited process that was put in place with the passage of Cabinet Resolution number 57 in late 2018, **[Inaudible 00:16:46]** new law. And at least in theory, and I understand, most of the time in practice, the foreign arbitral award can be brought directly to the execution judge, who is to make a decision on enforcement in just 3 days. I think in practice, it may take 7 to 10 days on average, but it's pretty close. That decision is appealable, to the Court of Appeal, but it is really designed to speed up the arbitral process.

I think I'll close with one little wrinkle, and I am going to be very limited in what I say about this, because at the end of the day, this is more of an Indian procedural law matter than it is a UAE matter, but as many of you will know, in early 2021, India designated the UAE as a reciprocating territory under Section 44A of India's Code of Civil Procedure, which as I understand it means that UAE court judgments can be executed in India, as if they had been passed by a district court in India, and I'm relieved to see some speedy nod, I hope I'm getting this right.

However, my understanding is that, the UAE has not been designated as a country where the New York convention applies, despite the fact that it ratified the New York convention in 2006, as I said at the outset, and so there is a bit of a wrinkle there in terms of enforcing UAE Arbitral Awards in India, but maybe we can come back to that a little bit later, let me stop there. Thank you.

Zarina Pundole

Thank you, Thomas. Now I'm going to let Sanskriti take it.

Sanskriti Sidana

Thank you, Zarina. And good afternoon, everyone. I am Sanskriti Sidana and I'm filling in for Shaneen Parikh, who is unfortunately held up with an ongoing hearing, and was not able to join the session today. Any mention of arbitration or litigation in India, naturally sparks the concern of judicial delays, which undeniably is an important issue, but for the moment, I would like to park that and just focus on what makes India attractive for parties selecting their seat of arbitration.

Firstly, being a common law country, I think India has the benefit of extensive jurisprudence spanning over a century, which has kept up with the changing realities of the commercial world. Indian courts also frequently rely on judgments of courts from other common law countries, such as the UK, Hong Kong and Singapore, on several contemporary issues, and they have persuasive

value. For instance, Justice Cooke's decision in the Shashoua case, has been affirmed in several decisions of the Supreme Court, when plagued with the seat versus venue debate, and thus it has become embedded in India's jurisprudence.

Secondly, the law governing arbitration in India, is based on the UNCITRAL Model Law, and is therefore in line with the international standards and practice. However, recognising that the law enacted in 1996 was in need for an overhaul, due to a phase of extensive judicial intervention at every stage of an arbitration proceeding, the parliament amended the law 3 times in 2015, in 2019, as well as in 2021. Now, the aim was clear; it was to make India a preferred seat of arbitration in this region. To give a few examples, in 2015, parties to foreign seated arbitrations were given the benefit of applying to Indian courts for interim relief before, during and after the arbitration, unless their agreement provides otherwise. It is noteworthy that in India, interim relief can be obtained very swiftly by parties by virtue of these 2015 amendments.

The applications for interim relief are heard by the High Court having jurisdiction to decide the subject matter of the arbitration, and therefore most matters are adjudicated by judges with significant commercial experience. When it comes to picking the seat across India, Delhi and Bombay are frequently chosen as the seat, on account of their sophistication and the pro-arbitration approach of the judges in these jurisdictions, but even other cities in India, such as Bangalore, Chennai, and Hyderabad, are climbing up the ladder of preference, owing to the strong presence of PE and IT sectors there.

Now, next to curb the endemic delays and conclusion of arbitral proceedings and related court proceedings, the Act was amended to prescribe a timeline for expeditious conclusion of domestic arbitrations. This strict timeline was not made applicable for international commercial arbitrations, because the assumption there is that they will be managed by an arbitral institution and will therefore be run more efficiently and systematically rather than ad hoc arbitrations, which were very common for domestic arbitrations in the country. Now, these provisions have certainly had a positive impact, on the pace at which arbitration proceedings are being conducted in India now.

India also borrowed from the IBA guidelines, and conflict of interest of arbitrators and incorporated them in the schedules of the act and crucially, the provisions for challenging arbitral awards were further explained to emphasize the narrow scope of interference of courts, on the grounds of violation of public policy of India. Now, this was intended to effectively undo the wide scope of review that was adopted in prior judicial pronouncements, to set aside arbitral awards. And even the patent illegality challenge was limited only to domestic awards, and it has further been clarified that merely an erroneous application of the law, or by re-appreciation of evidence, awards cannot be set aside anymore.

There are several other amendments that have been made to the 1996 Act, but due to shortage of time, I won't be going into more detail on this right now, but I will be remiss to not mention some recent judicial precedents that have cemented India's pro-arbitration approach, with courts making every effort to preserve party autonomy. For instance, in the PASL and GE case, the Supreme Court settled the position that two Indian parties can choose a foreign seat of arbitration, recognising party autonomy as the ruling and guiding spirit of arbitration. And indeed, our discussion today, has been made possible because of the Supreme Court's ruling in this case.

Then next, even in the Amazon and Future Retail case, the Supreme Court ruled that in an India seated arbitration administered by an arbitral institution, where the rules provide for Emergency Arbitration, such an Emergency Award would be valid and enforceable and would be treated at par with awards made by tribunals under Section 17 of the Act, which provides for interim relief to parties, by the arbitral tribunals.

This position changes though, where the Emergency Arbitration takes place in a foreign seated arbitration, such orders or awards are not directly enforceable. The usual practice is to apply to a court for interim relief in the same way that the party has applied to an emergency arbitrator and courts have, if satisfied on the merits, passed orders similar, if not identical to the emergency arbitrators orders. So, in a way, approaching the courts directly for interim relief if your agreement so allows, maybe a better remedy for parties under Section 9.

Finally, I think India also offers parties the benefit of comparatively lower costs of conducting arbitral proceedings. It is no secret that the ever-increasing costs of international arbitration are becoming a major concern for parties. And in the 2018 QMUL survey, 67% of the respondents viewed cost as the worst characteristic of arbitration. I think India offers an advantage in this regard, and with the development of global-standard institutions, such as the MCIA, I think parties can access world class institutions, services, maybe even in India, at a considerably lower cost.

Now, in summary, I would just like to say that over the last few years, India I think has made great strides in transforming the global perception, of it being an arbitration unfriendly jurisdiction. Yes, there are some bumps on the road and including the one that was just pointed out by Thomas, but I think India is competing at par with robust arbitration jurisdictions of the world, and efforts are being made in every facet for it to be able to do so. And I think ultimately, the onus is also on us, as practitioners, to change the way arbitration proceedings are conducted in India, and further improve the situation, thank you.

Zarina Pundole

Well said, Sanskriti, thank you. And last, we have Swee Yen from Singapore, Swee Yen?

Swee Yen Koh

Thank you, Zarina. Let me just pick up on one point, which Sanskriti just mentioned, which is the Supreme Court decision in PASL Wind Solutions, which affirmed the rule that Indian parties can choose a foreign seat of arbitration. This has made the position clear, and in fact, is one of the points, which I rely on, as I seek to persuade you today that Indian parties should choose Singapore as the seat of arbitration.

Number one, the Supreme Court decision confirms that you can choose a foreign seat, what then makes Singapore unique and different? Of course, I go to the point of Singapore's position, as a result of its neutrality, independence and impartiality. So these are very key factors, where foreign

investors and companies, if they are entering into a contract transaction with Indian parties, would want to look at in deciding the seat of arbitration, because any sort of attempt to have the arbitration seated in India, may be seen by the outsider or by the foreigner, as giving the Indian party a home advantage. So, my colleagues from Switzerland, and the UAE would then say, well, we are also neutral, independent and impartial.

So, I will then respond to them and say that, what then makes Singapore closer to India, is not just because geographically we may be closer, but we had the same common law regime as India. So, Indian parties will be familiar with the common law regime of Singapore, and also very importantly, language. So, in the Singapore courts, as they do in the Indian courts, and in the Indian contracts, English is the language of choice, which does mean that if you do move on to, for instance, a setting aside application, if you need interim relief, given by the courts, in support of the arbitration, language is going to be no barrier.

The other thing that I would also mention, as a second point, which I say makes Singapore unique, is the strong support of the legislature. The legislature has always moved very fast, when it comes to amending legislation to be supportive of international arbitration. During Singapore convention with Minister Shanmugam said, what makes Singapore unique is this ability to consult and to be able to pass legislation in the span of just one month. And we can see that, in the way and how quickly we moved, to pass legislation to support 3rd party funding, when we learned that one of our competitors Hong Kong, was already in the strong and late phase of 3rd party funding, we then caught up and passed the legislation ahead of time.

What also makes Singapore unique in the sense of the legislation, is that much as we are all Model Law countries like UAE, like Switzerland, like India. Singapore doesn't just simply adopt the Model Law position. So, for instance, under Article 63 of the Model Law, it states that a party can appeal a positive jurisdictional ruling, but it's absolutely silent on whether party can appeal a negative jurisdictional ruling. In the Singapore International Arbitration legislation, after going through a public consultation period, we decided that it was actually pro-arbitration to allow appeals against negative jurisdictional ruling, and the rationale for this is, if the parties have

decided to go to arbitration, and the tribunal gets it wrong, and the tribunal decides no, I have no jurisdiction.

And if that is a wrong decision, it is only pro-arbitration to allow the parties to be able to challenge a negative jurisdictional ruling, so that they will be able to persuade the court to say that's wrong. The parties want to go to arbitration, tribunal made a mistake, so let's move forward and let me appeal this decision. So, I think this makes Singapore quite different from many other Modern Law jurisdictions, which do not allow an appeal against a negative jurisdictional ruling. And I would also say, the other part which makes Singapore as a seat extremely attractive, is the default appointing authority.

So, in a situation where there is no default appointing authority, where the parties might have gone for ad hoc arbitration without an institutional rule, the Singapore legislation designates the President of the SIAC Court as the appointing authority. And if we look at the SIAC panel of arbitrators, you'll find more than 500 arbitrators from over 40 jurisdictions, with more than 30 or 35 of them from India. And the third thing that I want to end with, in support of my motion to persuade you to choose Singapore, is the strong support that the judiciary has for arbitration.

Felix made a very interesting observation, when he said that the judiciary is pro arbitration, and he gave us statistics of 7% of successful setting aside of awards. In a recent Court of Appeal decision, Justice Steven Chong noted that, over the past years perhaps the percentage for setting aside is about 20%. If we do a comparison with Switzerland, one we come to the preliminary view that, oh, Singapore is not pro-arbitration, if there's a 20% of setting aside of awards, but I say the 20% of the statistics actually speaks to the country and speaks to its support for arbitration. A pro-arbitration judicial system only works if the judiciary is prepared to intervene in the right cases, prepared to intervene when the grounds for setting aside are made up, and prepared to intervene with this breach of natural justice.

We all, as arbitration practitioners, know the importance of due process and procedural justice in international arbitration. The fact that the Singapore courts are prepared to roll up their sleeves,

look into the arbitration record, and step in at the right moment, when there is something wrong with the arbitration procedure, or when any of the grounds are made up, I think, is actually something that speaks well, of a pro-arbitration approach. Of course, the judiciary is also very prompt at issuing interim relief in aid of arbitration, including issuing subpoenas for witnesses to testify, issuing subpoenas for the production of documents, all very pro-arbitration.

I hope to engage further in more questions and answers to persuade you more, thank you.

Zarina Pundole

Thank you, Swee Yen, that was quite an eye opener and really well thought out, shall we say, argument in your favor to take arbitrations to Singapore. I'm going to start off with a few questions. I think, I'll start off with Felix. Felix, you mentioned very clearly, saying that the Swiss contract law is it's pro-parties, it allows for parties to make their own decisions on various things, but at the end of the day, it is a civil law versus common law. You don't see that there would be some conflict there, or some problem in terms of an Indian party, understanding where the Swiss law wants to take it?

Felix Dasser

Okay, I don't see any problem. In the contrary, the advantage of Swiss law is that it is accessible. I mean, common law is not the same all over the place, there are differences and to find out the differences, that's my experience, is very tricky. You will very often need to have a Kings Counsel, to elucidate on the intricacies or case law that nobody has heard outside of their jurisdiction. In Switzerland, you can read it in English, the case law is clearly spelled out in the Federal Supreme Court decisions, well-argued and there are many books about it, you have a lot of literature, explaining the Swiss contract law, point 1.

Point 2, it is very pro party autonomy, so you don't really need to know about Swiss law with contract law, because you can be sure that whatever is in the contract, it will be upheld. There

are limits, of course, the limits of abusive law and cheating, you know, fraud and all of that, which are met of course in any jurisdiction, also in English law obviously, but that's about it. So, you don't have to deal with intrusive provisions that you find, for example, in German law, or some abstract concepts that you sometimes find in French law. So, all in all, I think Swiss law, that's probably the reason why it is so popular worldwide, not just in arbitrations that have the seat in Switzerland, it's also time and again chosen in arbitrations that have their seat elsewhere.

Zarina Pundole

And Thomas, you also touched upon the fact that in Dubai and the UAE, you have some civil law, so would that also be somewhat in consonance with what Felix told us?

Thomas Snider

I think that's right. You know, the UAE Civil Code is largely based on the Egyptian Civil Code, which in turn is based on the French Civil Code, so a lot of these similar themes you'll encounter here in the UAE.

Zarina Pundole

Okay, thanks. Sanskriti, I also want to touch upon something that you and Swee Yen have both echoed, in terms of jurisdictional challenges and how the courts perceive that. Now, Swee Yen made the point that the Singapore courts will roll up their sleeves, where there is a requirement, they will go into either a positive or negative. So how does the Indian court perceive that?

Sanskriti Sidana

In terms of jurisdictional challenges, if the arbitral tribunal rejects a plea, saying that it does not have jurisdiction, and if it rejects the plea that it does not have jurisdiction, then it may proceed to pass an award and then the law does not provide for an opportunity to appeal that order

immediately. However, parties have the opportunity to challenge that award, at the final award stage, when they are filing a challenge and the setting aside proceedings and again, they raise the issue of jurisdiction at that stage. However, if the arbitral tribunal takes the position, that it does not have jurisdiction to go ahead with the arbitration, then the aggrieved party has an immediate remedy in the form of an appeal to the court.

Zarina Pundole

Right. Swee Yen, is that is that similar to Singapore?

Swee Yen Koh

No. Actually, the position in Singapore is that you can challenge both a positive jurisdictional ruling, which means that when a tribunal says I have jurisdiction, and you can also challenge a negative jurisdictional ruling, where the tribunal terminates the arbitration and says, I have no jurisdiction over this dispute. So, what happens in those instances, where the tribunal says that I have no jurisdiction, you can then bring the matter to the Singapore courts, and that application has to be filed within 30 days of that decision, and you'll be able to get a ruling from the High Court, in terms of timing is about 6 months within the time of you starting that case, you probably will be able to get your hearing, and to get a determination from the court.

If the court then gives a declaration, that the tribunal has jurisdiction, the parties can then go back to arbitration and proceed with the arbitration as is. And this is where I say that the **[inaudible 00:38:28]** and goes beyond what the model law requires. And for me, I see this as pro-arbitration because much as you can challenge, the tribunal can also get it wrong, when the tribunal says they have no jurisdiction, particularly in investment arbitration matters, where a lot of it, for instance, deals with the consent of the investor, whether there's an investment whether the investor is a foreign investor.

Sanskriti Sidana

Zarina, if I may.

Thomas Snider

Go ahead, Sanskriti. I wanted to jump on as well.

Sanskriti Sidana

Yes. I just wanted to clarify one thing. I think, in India negative jurisdictional decisions, yes of course, you have an immediate opportunity to appeal those, but I think the rationale behind not allowing for an immediate opportunity to appeal for positive jurisdictional rulings, is to allow the arbitration proceedings to go on without any hindrance, and if the parties don't want to raise that issue of jurisdiction at the challenge stage or at the setting aside stage, they may have the option of doing so, at that time.

Zarina Pundole

Thomas, did you want to say?

Thomas Snider

Just very briefly in the UAE, the Federal Arbitration Law and the DIFC Arbitration Law, do follow the UNCITRAL approach on this? So only positive jurisdictional findings are let's say appealable. The ADGM arbitration regulations, I think there is an argument to be made under Article 27, a negative jurisdictional finding could be tested before the courts. It's not stated, as clearly as it is in the Singapore International Arbitration Act, in relation to negative findings, but it does say that if the arbitral tribunal rules on a jurisdictional objection, the court may determine any question as to the substantive jurisdiction of the tribunal. So, that's probably broad enough to capture a negative jurisdictional finding, though, as far as I'm aware, this hasn't been tested yet.

Felix Dasser

Maybe just a comment from the Swiss perspective, one thing that I didn't mention, is that the Swiss Arbitration Law is totally different from the Model Law, it was developed at the same time, but they consciously did not consider the Model Law at the time, or the Model Law was being drafted. And even 3 years ago, when we revised the Swiss Arbitration Law, and there was a Member of the Expert Group advising the Government on this, they did not even look at the Model Law, because although the model law is decently arbitration friendly, Swiss tradition is much more arbitration friendly than that, so that we have much more pro-arbitration provisions.

For example, with regard to jurisdiction, it's a matter of course, since years in Switzerland that you can, actually have to challenge jurisdictional decision, for or against the jurisdiction, by the arbitral tribunal, right then and there. You cannot even wait until the final award, and then challenge the jurisdiction, because you've waived your right. So, if a tribunal decides on its jurisdiction, you have 30 days to challenge that decision and then it takes a few months, and then that issue is cleared up once and for all.

Zarina Pundole

Okay, so in that sense, it's a pretty tight timeline for the party to follow, but at least that's good to know. Felix, you touched upon the fact that, at some point in time in the arbitration, settlement procedure and settlement could be taken up by the arbitrator itself, could you elaborate on that?

Felix Dasser

Yes, I have to do so, it's a very unique position, although I just heard yesterday, I am here in London and was on the panel yesterday evening, and there was a lady from the Court of Appeals, and she told me that they have something similar now in the courts, where the judges provide some unprejudicial advice on how they see the case, at an early stage and that's exactly what we

are doing. If, but only if, both parties or all parties wanted to agree, then the arbitral tribunal is often willing to provide some initial assessment, not telling the parties no this claim looks good to us. The second claim that's a problem, it's set of limitations. The third claim, you have to rely on witnesses, we have seen witness statements, that will be tough for you, and so forth.

So that the parties know very well where they are, and that is normally done after the first exchange of memorials, with documents and witness statements, so the tribunal has a pretty clear view about the case, although there might be further developments, there will be a second round of memorials, new allegations affect new evidence, and there will be a hearing, so things might change and the tribunal is very well aware that they might then change opinion, but on certain points, like for example, application of a certain provision of the law, they will not change their opinions, because there are more factual allegations or more witnesses.

No, it's a point of whatever Swiss Law, English Law, whatever and they say that that's how we read the law. And that helps the parties, and then very often then the parties realise, that it's not a 0 or 100, it's somewhere between 30 and 40. Let's settle at 35 and go on with our business, or if they don't settle, they at least know how to focus on the next memorials. So, we do not normally engage in summary disposition, early determinate disposal or pretty much determination, because we tell the parties where we are, and then the party's kind of adapt, and we don't need any specific motion of summary disposal that, again, takes time and money, thank you.

Zarina Pundole

Thank you, Felix. That was that was pretty insightful. I have a question up for all the panelists. How expansive or restrictive does your particular jurisdiction look at, when they interpret arbitration agreements? I'd like any of you all start there.

Thomas Snider

I'm happy to jump in on this one, because I think this is one area where, at times there are some challenges in the UAE, and in particular, I think in terms of the authority of a signatory to bind a party to arbitration. The UAE Federal Arbitration Law does expressly require, that a signatory must have specific authority to bind a party to arbitration. And so, as a result of that, a party does need to be careful when entering into an arbitration agreement with a UAE entity, the counterparty needs to make sure that the signatory does have the specific authority to bind the party to arbitration.

Now, there are some sort of presumptions that will apply in this regard. For example, there is a presumption that the General Manager of a UAE Limited Liability Company has the inherent authority to bind the LLC to arbitration. However, that authority can be removed from the General Manager, in the company's articles of incorporation. So, it really behooves a party entering into a contract with a UAE LLC, to request the LLC is articles of incorporation, at the time of entering the arbitration agreement, to ensure that power of the General Manager hasn't been removed.

So, we do see cases where, you know, sort of you go through the entire arbitration, and then at the set aside stage, the award is set aside on what would strike many of us, especially common law lawyers, as an overly formalistic requirement. That said, we can point to some examples of UAE court cases, where the courts have done their best to sort of overcome this issue, for example, relying on theories of estoppel and the like, to protect the arbitration agreement. So, I think the overall trend is moving in a positive direction, but this still remains a hurdle here in onshore UAE.

Swee Yen Koh

If I could just chime in on the Singapore position, as you may probably expect, we have put up a very expansive definition of arbitration agreement. So, an arbitration agreement is simply an agreement by the parties to submit to arbitration, certain disputes which have arisen, or which

may arise between them, in respect of a defined legal relationship by the contract or not. And we specifically amended our International Arbitration Act, to say that an arbitration agreement, while it must be in writing, it will be considered as being in writing, if it's content is recorded in any form, whether or not the arbitration agreement or contract has been concluded already, by conduct or by other means.

So, in other words, you could have an arbitration agreement as concluded by the parties, by reason of their conduct, but because it's recorded somewhere in writing, and it could be in an email, it doesn't have to be like an arbitration clause in a contract, the court will still find that, it satisfies the requirements of an arbitration agreement.

Zarina Pundole

Sanskriti, would you like to add anything to this?

Sanskriti Sidana

Yes, sure. So, even in India, arbitration agreements are interpreted extremely widely, and notably, under Section 8 when the amendment was made last, even parties to an arbitration agreement, or someone who is claiming through or under him, can be referred to arbitration. Now, this issue, of whether a party is claiming through or under a signatory to an arbitration agreement, has been an interesting one in India, to say the least. Over the years with Judge-made law, 3rd parties have been made a part of arbitration proceedings, on the basis of certain factors that were postulated by the courts, which kept increasing. And now ultimately, the Supreme Court has recently referred this issue, of what can be construed as a person claim through or under a party towards the arbitration agreement, to a larger bench, to clarify the situation. But in several instances, non-signatories have been made parties to an arbitration proceeding as well in India.

Felix Dasser

And from the Swiss perspective, as to the form, an arbitration agreement has to be evidenced by text, but that in Singapore, an email will suffice. And they also have unilateral arbitration clauses. A unilateral clause, in a will or testament, in a trust document or articles of association, suffice as to the form. As to the substantive validity, there's a two-prong test.

The first test is whether the parties really wanted to waive a constitutional right, to access to a court, and that's a strict test because party autonomy means that the parties really wanted arbitration. So only if the courts are convinced that yes, they wanted arbitration, the first test is fulfilled. And then comes the second test, what is covered, what is the scope of that arbitration agreement, and there the courts are very generous under Swiss Law. In case of doubt, everything is covered, so the idea is to avoid, if ever possible, a split of a jurisdiction unless the parties explicitly agreed otherwise, thank you.

Zarina Pundole

Thank you, I want to touch upon interim release, because that's something that quite a lot of us practitioners want, or other users want to know about. So, in terms of interim reliefs, how easy or difficult is it in your jurisdiction, your various jurisdictions to get something like that? And how do you go around enforcing it?

Swee Yen Koh

Perhaps, I'll just kick off, because Sanskriti mentioned the Amazon case, for which a matter was involved in, and in that particular instance, there was an India seated arbitration, even though it was under the SCIA rules, and because it was under the SCIA rules, the SCIA rules had these provisions for emergency relief, where the emergency interim relief can be granted by the tribunal. So, that was what happened in that instance, where the parties just simply did not go to the

Singapore court to seek the interim relief, they started the arbitration, they went under the emergency arbitrator, they then went to India, and because is an India seat arbitration, they could enforce it, there and then, without going through the Section 9 rules.

What about, if you are in a situation where there is really great urgency, and it is a situation where you can't go under the emergency relief provisions under the institutional rules, because you do not want to give the other party notice of the application. So, you will see that most emergency arbitrator provisions in the institutional rules would have a provision allowing the other party to file a responsive reply. So, there'll be times, even though very tight timelines set for parties to actually have a right to respond to the application. So, in a situation where you're looking for freezing injunction, and keeping it secret is critical, and you do not want the opposing party to have any notice of it, because they could perhaps simply just move or transfers funds outside of the bank account, you can still apply to the Singapore courts under the International Arbitration Act.

So, if you're able to show that the tribunal is unable to act effectively, and the tribunal is unable to act with a particular power, then you can still persuade the court in that instance, that even though this is an SIAC arbitration, if I go now emergency arbitrator, it'll be too late, the other side will be given notice. So, I need to come through to the Singapore court, to get such a relief. So, that is something, so you sort of have both, you look at the institutional rules you look at the Singapore court, it is seated in Singapore and then you decide which works better for your situation.

In the sense of enforcement, which was the other questions Zarina you had, we have amended our Act, such that emergency relief is enforceable before the Singapore courts. So, if you need to have it at first, we have amended the definition of tribunal going to include emergency arbitrators, so that it will be enforceable.

Felix Dasser

Switzerland's also very arbitration friendly in that respect. Of course, the tribunal can issue interim relief. It can even do so on ex-parte basis, under the Swiss rules, for example, there is a provision

that allows in exceptional circumstances, to grant interim relief on ex-parte basis even, although that will be rare, but it is possible. The alternative always is to go to the courts, you can also go to court to ask for interim relief. And you can also have an interim relief decision by the tribunal, enforced by the courts.

You can also, we have a new provision, allowing foreign arbitral tribunals to come to Switzerland to enforce a procedural decision, like for example, so taking evidence in Switzerland, for the benefit of arbitral tribunals. And the courts here will, for example, subpoena witnesses to appear before a Swiss arbitral tribunal, if the witness does not appear voluntarily. So, everything is basically available, that parties would need in terms of interim relief, thank you.

Thomas Snider

Broadly speaking, it's the same position in the UAE, all three arbitration laws that we have here, empower arbitral tribunals to issue interim measures, and of course, allow for parties to go to the court for this as well. One interesting development in relation to this, is that earlier this year, the DIAC, the Dubai International Arbitration Centre, issued a new set of procedural rules, and they contain provisions on emergency arbitrations. So, that's a relatively new development in this neck of the woods.

If I can, just very briefly, that sort of relates to another topic here in the UAE, that I was going to mention in my opening comments, but I didn't, we did have a situation last year where Dubai issued a decree, that effectively merged the DIFC, LCIA into DIAC, the Dubai International Arbitration Centre that resulted in some ambiguity, I think we lacked clarity.

We've sort of moved past that, at this stage, and it's clear that any existing DIFC, LCIA cases that were already registered prior to March 2022, will be administered by the LCIA in London, and any new cases filed on the basis of the DIFC, LCIA arbitration agreement will be administered by DIAC. But I think it's important for parties to bear in mind, that going forward, they should not be

using the DIFC, LCIA in any new arbitration agreements. Apologies for sort of going off course there, but I wanted to get that in.

Zarina Pundole

Thank you. We are almost at the end of our session. So, I think we'll quickly wrap up. Thank you very much panelists for this insightful session. We've learned quite a bit; I've learned quite a bit and hopefully we will touch base soon.

Speaker 1

Thank you also, from my end from the Swiss Arbitration Centre, thank you to all of you for being here and for participating in the very insightful discussions, and tips on arbitrating in each of your jurisdictions. We won't declare a winner for today, let's just say that everyone's a winner. And just one more message from the MCIA, that I have to convey, is that this session has been recorded and you can find the recording as well as the transcript on the adrweek.in website, I am sure if you Google this, you'll get it immediately. So, if you've missed anything, if anything you'd like to hear again, please feel free to listen to the recording. Thank you everybody from my end and hope to see you all soon.