INDIA ADR WEEK 2023 DAY 3 - MUMBAI

SESSION 2

ARBITRABILITY OF SHAREHOLDER DISPUTES: TIME TO PUSH THE ENVELOPE IN INDIA?

10:00 AM To 12:00 PM

Speakers:

Kanika Goenka, Partner, Shardul Amarchand Mangaldas

Shreya Aren, Associate, Debevoise & Plimpton

Shaneen Parikh, Partner, Cyril Amarchand Mangaldas

Nidhi Parekh, Head of Legal, Essar OGDSL

Siraj Omar SC, Co-Managing Director, Dispute Resolution, Drew & Napier LLC

SHREYA AREN: Good morning everyone. Thank you for joining us today for the Debevoise & Plimpton panel which is on Arbitrability of Shareholder Disputes, and the question we are asking today is, whether it is time to push the envelope in India. And may I just start the panel by giving a brief description of what we are thinking about when we are talking about this today. So the Indian Supreme Court's decision in Booze Allen has long established that while disputes *in rem* are in-arbitrable, disputes *in personam* are typically arbitrable. However, this is complicated by the fact that some *in personam* disputes may have remedies that cannot be granted by Arbitral Tribunals. And one such remedy is the statutory protection of the interests of minority shareholders from oppression and mismanagement. So even with the rise in shareholders disputes in India, it appears that parties to those agreements cannot arbitrate their disputes when it comes to oppression and mismanagement. So they therefore need to turn to the courts when it comes to those issues. And this is in contrast to the position in the UK and in Singapore where shareholder disputes in all their myriad forms are arbitrable. So as India continues to make strides to position itself as a jurisdiction conducive for effective and efficient adjudication and arbitration, could a next step be to clarify Arbitral Tribunal's ability to adjudicate these shareholder disputes involving issues of minority shareholder oppression or company mismanagement. And a crucial part of this issue is also related to the law governing the Arbitration Agreement, which also we'll touch on today. And these issues have become particularly relevant in the context of the recent decision in ***Anupam Mittal versus WestBridge*** where the Singapore and Indian Courts have taken opposing views. So

we'll be considering some of these issues with the panellists today, and I'll briefly introduce the panellists.

So to my right, we've got Kanika Goenka, who's a Partner based in Shardul Amarchand Mangaldas's Mumbai office, and she focuses on domestic and international arbitration and complex commercial litigation. Before she joined Shardul Amarchand Mangaldas, Kanika worked for several years in the dispute resolution team at Vashi & Vashi and Bharucha & Partners, Mumbai. She regularly represents clients in arbitration seated in India, as well as outside and conducted under different arbitration rules and governed by different laws across a wide range of industries. And especially for our purpose today, she has particular experience in shareholder arbitration. So we'll be very interested in hearing your views about that. To my far left we've got Nidhi Parekh, who's a qualified lawyer and mediator with 16 plus years of enriching work experience. She's currently working as Head Legal with OGDSL and Essar Group Company and her career spanned across various sectors such as oil and gas, ecommerce, power, information technology, etc. Nidhi we're be very grateful that you're here and we look forward to your views. And to my left is Shaneen Parikh who's the head of international arbitration at Cyril Amarchand Mangaldas. Shaneen specializes in and has extensive experience in complex commercial disputes, often with cross border issues involved. She focuses on arbitration and has represented clients in domestic, international and foreign seated arbitrations under the rules of various international arbitral institutions and also in ad hoc proceedings. Shaneen also has extensive experience in commercial litigation, having represented parties in various High Courts across India's Supreme Court as well as the NCLT, which we will definitely be talking a lot about today. And significantly for today's panel, Shaneen regularly acts in complex, often cross border post M&A private equity and shareholder disputes involving in relation to exit rights, valuations, corporate governance, fraud and oppression mismanagement. And last but certainly not the least we've got Siraj Omar, who is the Managing Director, Dispute Resolution, Drew & Napier in Singapore. He has an active trial and appellate practice in the Singapore Courts and has litigated many landmark disputes before the Courts. He also has an active international arbitration practice, regularly appearing as counsel as well as sitting as an arbitrator, serves in the Board of Directors of the Singapore International Arbitration Centre and is a member of its Board Executive Committee, and he is also Fellow of the Chartered Institute of Arbitrators.

So, with that brief introduction and thank you very much all of you for being here. Looking forward to a great discussion today. I'm going to ask Kanika to kick off and just actually, as a housekeeping matter, we're going to spend some time on questions, but we hopefully will have ten minutes or so at the end for questions. So we really look forward to hearing from you as

well. But to kick us off, Kanika, can you briefly explain the concept of arbitrability and why it's relevant, particularly in the Indian context?

KANIKA GOENKA: Thanks Shreya, and thanks for having us here today for this very topical issue. Obviously, we're going to be discussing ***Anupam Mittal*** at the later part of the session but the root of the matter is the concept of arbitrability. What is arbitrability? You briefly touched upon Booze Allen when you were speaking. And the Supreme Court in Booze Allen essentially said that arbitrability is divided into essentially whether a dispute is within the scope of the Arbitration Agreement or within accepted matters because essentially, arbitration, being a creature of contract, parties can contract out of certain disputes. That's not really what we're concerned with today. We're looking more at subject matter arbitration and which essentially is the determination of whether a dispute ought to be resolved by a Tribunal or ought to be resolved by courts. Now, if you look at the Indian Arbitration Act, it touches upon arbitrability Section 2, Sub-section 3, says that the provisions of Part 1 of the Act, which deals with Indian seated arbitrations, will not affect any law for the time being enforced by which certain disputes may not be submitted to arbitration. But the Act doesn't really specify which matters will not be arbitrable. So the determination falls to our courts, and which is where we've had the Supreme Court in Booze Allen, and subsequently in ***Vidya Drolia***, expanding the concept of arbitrability explaining it to us. And like you said in Booze Allen the Supreme Court essentially said that you have matters *in rem*. Largely matters *in rem*, and matters *in personam*. And while this isn't a very watertight, compartmentalization the general idea is while disputes *in rem* will not be arbitrable, and you know, that takes you to anything like criminal matters, matrimonial matters, testamentary issues etc., disputes *in personam* would ordinarily be arbitrable. However, there are various statutes which require that certain disputes *in personam* be decided by Tribunals that have been constituted for the purpose. So, and you know examples of that are of course, your consumer disputes, landlord tenant disputes, which under Indian law require courts to adjudicate the issues. And one, of course one of these buckets is O&M disputes which although deal with essentially disputes arising between shareholders, require that the NCLT formerly, the CLB and now the NCLT look into these disputes. So essentially, we're in a place where you have disputes which concern two parties, but which the arbitrator cannot go into. Now, why is this concept of arbitrability so relevant today? Obviously, from the perspective of Indian seated arbitrations under Section 34 of the Act, an arbitration can be set aside if the subject matter of the dispute is not arbitrable. But what's also very interesting, and we're going to be discussing this further is under Section 48 of the Act, which actually deals with enforcement of foreign awards. The Indian courts can refuse enforcement of foreign awards if the subject matter of the dispute is not arbitrable as a matter of Indian law. So you might have a case and that's probably what

we're going to see down the line in ***Anupam Mittal***, where the Tribunal holds that the subject matter is arbitrable as per the law governing the Arbitration Agreement, which may not be India, but the Indian courts may applying their own law, essentially hold that that dispute isn't arbitrable. So it is very important to understand the different laws governing arbitrability and which is why we're having the discussion today.

SHREYA AREN: Thank you for that Kanika. Just picking up on something. And when we were preparing for the panel, we spoke about this. And you said you've obviously been involved in a lot of cross border disputes. Why do you think that arbitrability has a particular significance in the Indian context when it actually across the world, generally, or at least in common law jurisdictions like the UK and Singapore, it doesn't seem to have the same significance. What do you think the reason for that is?

KANIKA GOENKA: So obviously the reason for that is the fact that and you touched upon that as well, if you look at the law in Singapore, you look at the law in UK, at a general level there is a more pro-arbitration approach to arbitrability. Courts generally tend to hold that disputes are arbitrable, except in very, very limited circumstances. So if you look at the UK and I will touch upon that in more detail in the next section, even though a Tribunal cannot award reliefs such as winding up, disputes in the nature of oppression and in the nature of oppression are arbitrable and even though the Tribunal might not have the power to award that relief. Now that isn't the position in India and that is very important from an enforcement perspective, because parties would spend years arbitrating the award, going through set aside proceedings and then come to India for me to realize that the arbitration is just a paper decree. They can't really do anything with it.

SHREYA AREN: Yeah. Thank you for that. Nidhi, so just from a user perspective do you find that clients are mindful of this question of arbitrability when you're considering whether to add an arbitration clause to your contracts?

NIDHI PAREKH: Good morning, everyone. First of all, I'd like to thank Shreya and MCIA for having all of us here at the panel. Thanks a lot for that. Arbitrability, the subject dispute is, of course a concern. But as we see, that is not the only reason why somebody considers to keep an arbitration clause. One of the main reasons why arbitration has been a global choice is because it's cost effective, time effective, parties from different jurisdictions can settle disputes or adjudicate disputes rather. Not, settle is not the right word. But just on the basis of the comfort that it's taken care of by rules which can be neutral and can be applicable to everybody. So from that perspective, I think arbitration is a very strong choice, regardless of the

arbitrability issues. I'll give you an example. In one of my... we have rigs which sail across the globe for our CBM blocks, or oil well reserve exploration works and the rig is of a different flag. It's owned by a company which is the whole Co is in a different country. The crew working on the rig, which is the base where they are, are of different countries, all of them the expats. So there was a time when we did not have arbitration clauses in our crew agreements, or any kind of agreement that we had the subcontracts, etc. They would drag us to any and every jurisdiction across the globe, just to sort out matters and that's when we said that this has to stop at one point and we need to go to arbitration. It's a different story that then they started having issues with the arbitration also. I think you need to go retrospective and correct what is wrong instead of just looking at the dispute clause. From that perspective, I think when you look at the arbitrability from... it's of course, important. And I would give it a consideration when I am taking a matter. But it ultimately also depends on the if the matter goes into arbitration by the time, if there's a development on that law, if there's a judgment supporting what my views are, etc. So I cannot sit today in 2023 and say I will not put an arbitration clause because I cannot foresee what might happen in 2027 in that agreement. And this particularly works very importantly for agreements which are longer in duration. So, yes, it's important but it's not the only factor.

SHREYA AREN: Understood. Thank you. So, Shaneen, then just to set the scene for what we'll be talking about today, could you provide a brief overview of the position on arbitrability of shareholder and corporate disputes in India? And obviously we touched on the fact that you have lots of experience with the NCLT, so we'd love to hear about that as well.

SHANEEN PARIKH: Thanks Shreya and good morning, everyone. So before I wade into shareholder disputes, the obvious oppression mismanagement kind of disputes which I think are a subset of that, I want to just step back a bit to the questions you asked. And I think it is apparent to everyone that while I think India has developed into a very pro-arbitration jurisdiction, our courts are very conscious of the fact that they should not.... they were seen to be interventionist, but they are no longer today. Your award will be upheld. It will not be set aside. Your foreign award will be enforced. I think our biggest problem today really is the delay in the court system. But coming back to arbitrability, we discussed that *in personam* rights in general are arbitrable. If they are *in rem*, they're not arbitrable. Kanika talked about subject matter arbitrability, which is where we come to. I think O&M crosses two thresholds in this regard. One is subject matter, which is the nature of the dispute. The other is also a special Tribunal setup under a special statute, which is the NCLT. Now when I'm talking about NCLT, some of you who have read ***Vidya Drolia*** and other judgments may also know that in terms of arbitrability we're not that pro-arbitration. The scope of disputes which are not arbitrable,

have widened in fact, over the last five years. So, for instance banks and financial institutions seeking to recover a debt are forced to go to the DRT, which, frankly does not have the wherewithal or the sophistication to decide several disputes. But why has this happened? It's really I think it's a question of public policy. Each state decides on arbitrability as part of its public policy. And when you look at that, you also look at the protection that it offers to the litigants to have a special Tribunal decide their issues. Now if you.... so coming therefore to oppression mismanagement disputes. Where did this protection arise from? It arose from the Companies Act in 1956 as also 2013. It is protection that is offered to a minority shareholder, which may not have the same bargaining position, which may not have the same deep pockets. Of course Arvind may be able to fund them. Which may not have the sophistication, right? So this arises out of minority protection and the government in it's considered decision felt that these are disputes that ought to then be decided by a special Tribunal set up for the purpose. Not just that, in the course of minority protection, the minority may need reliefs that a Tribunal, an arbitral Tribunal is simply not capable of granting. So what can the NCLT grant? It can remove directors. It can replace directors. It can have an administrator to take over the management of the company. In extremely egregious cases, it can direct winding up of the company. It can direct the majority to acquire the minority's shareholding. All of these are reliefs that cannot, whether they are *in personam* or *in rem*; many are *in rem* of, of course. But these are relief that no Arbitral Tribunal can grant. And therefore, and this is my assumption in its considered wisdom it felt that the NCLT will be the appropriate place to afford the most protection to such minority shareholders in oppression mismanagement cases. And touching upon arbitrability and shareholder disputes, I also want to therefore say that there is, however, a distinction between a pure contractual shareholder dispute that may arise out of an SHA, the shareholders agreement or any agreement between shareholders and something that actually takes the colour off clear oppression and mismanagement. So while in the past we have seen that several minority shareholders who wanted to avoid what they thought was an expensive arbitration or an arbitration that would decide against them, would run to the NCLT with an oppression mismanagement petition. Now courts have seen through that and therefore if the petition is "dressed up", parties will nevertheless be referred to arbitration because it is a pure contractual dispute. So, you have to distinguish, really the nuance of arbitrability in that respect. And just one more point I wanted to make in relation to shareholder disputes and arbitrability is also the question of fraud, which also comes up, particularly in the Indian conspectus. Indian lawyers love to pepper their pleadings with fraud and egregious, etc., etc. Courts initially said their allegations of fraud could not be arbitrated. Again there was rationale for that because they felt that it needs to be a detailed, intensive trial conducted by a civil court. But now if it is a mere peppering of an allegation without any real basis to it, that issue of fraud can also be arbitrated.

SHREYA AREN: Thanks Shaneen. So just picking up on that, and that's a great segue to the next question because then are there kind of strategic considerations about how you make a claim or how you kind of plead a claim and which forum you decide to go to? Can you kind of first decide, okay, this is a forum that will be favourable to our clients and then make the claim on that basis? So what are the kind of strategic considerations that go into deciding arbitration versus NCLT?

SHANEEN PARIKH: Okay. So where you want to go, which forum you want to go to? Which strategy you want to adopt, changes as any lawyer knows, it depends. Right? Are you say in a ***Anupam Mittal versus Westbridge*** situation and you will note that I unconsciously said ***Mittal versus Westbridge*** rather than ***Westbridge versus Mittal.*** Okay, so if I were Westbridge, it would be a no brainer that I'd go to arbitration to enforce an exit right. If I were Mittal, I have a choice. And I'm not weighing into whether the dispute really is oppression, mismanagement or it is a purely contractual dispute. But Mittal has the option right to consider do the Acts fall within the scope of oppression mismanagement. Would I be better served by going to the NCLT for one of several reasons. The first reason that I know that all of you have on your mind is that the NCLT will take forever to decide this issue. But apart from that, are there reliefs that I really need, that the NCLT can give me that arbitration cannot? So generally as a disputes lawyer, as an Indian disputes lawyer, my preference would be arbitration. If, and not if I... if a party wanted to avoid arbitration if a party wanted specific relief, if for any other strategic reason, a party wanted to bring the other party before the Indian courts, yes, that is your legal strategy. You may go to the NCLT and it has been done several times which is exactly why our courts have ruled that if your petition is dressed up to avoid arbitration, you will be referred to arbitration, and that has actually happened to us favourably I might add, in two cases. The counterparty we were asking for, an investor counterparty moved the NCLT, they were referred to arbitration. So I think that's the way you would actually look at it.

SHREYA AREN: So the question is basically from a client's perspective, how are you looking at NCLT versus arbitration? What kind of disputes would you bring to one or the other? What are your strategic considerations in that regard?

NIDHI PAREKH: So, as Shaneen correctly said, as every lawyer knows here, we would strategically decide which one should we go to. Having said that I think one of the best ways to resolve this issue once and for all, at least or not once and for all, I don't think is the right word to use, but probably to make things better, is to ensure there's uniformity in the master

agreement that is executed, and the arbitration clause which is executed. I appreciate that the Arbitration Agreement or Arbitration Clause is an agreement in its own but it's a part of a master agreement. And as we refer, if there is an absence of anything meant to be mentioned in the Arbitration Agreement, then going and saying that it's implied to refer to a pro arbitration jurisdiction will say, okay, fine. It comes under arbitration. I don't think that's the right way of doing it. Now that you can't again decide only independently. If we had issues on O&M et cetera well crystallized to be arbitrable or not in India this would not ***Anupam Mittal*** case would have been a little more... would have been a lot more easier to deal with. But it was a double whammy because again there was no clarity on the... there was an issue that the Arbitration Agreement does not have the governing law for the Arbitration Agreement, while it's a part of the whole Master Agreement, which is referring to India. So it is a no brainer that I would refer to the Master Agreement, but you will keep coming across such issues with pro arbitration jurisdictions where they'll say, okay, fine, no, this can be arbitrable. It's not written. All the more reason I'll imply that it's pro arbitration. Secondly, what is important is again once the arbitrability of the issues are crystallized and we have clarity on that that can go in sync and we can decide accordingly, which can be taken care of or not. So again, that is the strategy I would use as a user for deciding which matter I would refer to. And NCLT takes its own time, but I've seen 101 matters where they would just refer the matter for settlement or prefer that people settle it across themselves and instead of taking it into issues like that. So it's going to take time, even in arbitration and even in this. But then you have to weigh also which one is going to be more beneficial to you.

SHANEEN PARIKH: Can I just add one thing? One other consideration, again I'm thinking about the ***Westbridge*** case. Right? So we know that if Westbridge brought the award into India to enforce as it will likely have to, if the issue is found to be clear oppression mismanagement one of the grounds for refusing enforcement is that the subject matter is not arbitrable. Another consideration to keep in mind at the time of actually deciding what forum to invoke is where my award will be enforced. Now if Mittal is sitting pretty on assets in London or Singapore, Westbridge doesn't really bring the award to India at all, and the award is enforceable. So that's one other consideration that I would also have in mind. And likewise Mittal against Westbridge.

SIRAJ OMAR SC: Can I just make one point out of turn? I think it's also important. I agree with both of what Shaneen and Nidhi have said. But it is also important to keep the end in mind when you're drafting your arbitration clause. And I think often that's overlooked, because as you see in the ***Westbridge*** case, the wording of the clause was part of the problem and I will perhaps expand on that later. But it's important to not just grab any old arbitration

clause and dump in the agreement. There has to be some considered thought put in before you enter the agreement. Thank you.

SHREYA AREN: Thank you for that. So Kanika, then just shifting gears a little bit, and we've talked about arbitrability in India. What's your take on how that compares to the position for example, in the UK ?

KANIKA GOENKA: So, Shreya touched upon this a little bit earlier but unlike in India, a wide range of disputes are capable of arbitration in the UK. Now as with the Indian Arbitration Act, the English Arbitration Act does not specify what disputes are arbitrable and what aren't. So just like in India, the courts have to determine arbitrability on a case by case basis. In general the attitude has been that commercial disputes contractual and non-contractual will be arbitrable, so this will be distributes relating to fraud, IP rights, employment rights, in certain cases I understand even competition law issues. Specifically for shareholder disputes and things which touch upon operational mismanagement, I think the court that, the case that holds the field is the Court of Appeals case in the Fulham Football Club, where essentially just to give some background. Fulham was a football club that was a shareholder of the Premier League. They wanted to bring unfair prejudice which is the equivalent of you could say oppression against the company proceedings on the ground that the Chairman of the company had taken unauthorized steps that unfairly affected Fulham. Now, what Fulham did in this case was initiated court proceedings on the ground that the dispute wasn't arbitrable because the reliefs that they wanted could not have been granted by the Tribunal. What the court held over here was actually quite interesting and very important, even from the perspective of what we're going to discuss in ***Anupam Mittal,*** is that the court distinguished here between the subject matter of the disputes and the remedies that a Tribunal can grant and they said that it's true that the Tribunal can... only the Tribunal can grant certain remedies, like winding up or like Shaneen mentioned removal of Directors, etc. However, just because these remedies are unavailable to the Tribunal, it doesn't make the dispute non-arbitrable because of the subject matter is arbitrable The *inter se* disputes between the parties can always be decided by the Tribunal. And that is the general position in India and as I understand in the UK and in Singapore as well. And that is in contrast with India, where the approach seems to be not so much on the subject matter versus reliefs analysis, but purely looking at arbitrability from the perspective of who can grant the relief. So that's currently where we are.

SHREYA AREN: Thank you for that. Siraj, obviously, Singapore is going to be very important in this conversation given that we've talked about ***Anupam Mittal*** even before

we've asked you to tell us about that decision. So before we come to that, can you tell us a bit about the Singapore position in arbitrability and in particular, oppression mismanagement?

SIRAJ OMAR SC: Thank you. First can I just echo my thanks for the invitation to be part of this. It is always a pleasure to be in India and thank you for the excuse for coming. Although I feel I'm here to put under the microscope somewhat. So, the position on arbitrability in Singapore is quite simple and it's important when considering that question, to keep in mind the context. Singapore has always been pro arbitration and so it's always been a policy, of courts, of the wider industry to encourage arbitration and whole arbitration ecosystem. And so the law in Singapore is simple. Most issues are arbitrable unless there's a public policy reason to say otherwise. That's your basic position. So, examples of issues which are not arbitrable are issues which involve the status of the individual. So, for example, divorce, custody, and also issues which involve broader public policy issues. So insolvency is the example that comes to mind. But generally speaking, most matters are arbitrable unless there's a public policy reason for saying otherwise. Specifically on the question of minority oppression, there's a well-known Court of Appeal decision that dates back to 2015, which was directly on this point. And the answer that the Court of Appeal gave was that there's nothing inherent in the nature of minority oppression disputes to render them non-arbitrable. Again, you come back to the touchstone of public policy, is there anything in the nature of the dispute that is.... of the specific dispute that is put before the Court or Tribunal, that invokes the public policy against arbitrability. So generally nothing against arbitrability of minority oppression claims unless there's a specific element of public policy that is engaged.

SHREYA AREN: And so just staying with you for a second, can you then, from that perspective, give us an overview of what happened in ***Anupam Mittal versus Westbridge***? It sounds like everyone knows. Sounds like it's a decision some people have talked about before, but it'll be helpful to get an overview, especially the points you were making in the context of the language of the Arbitration Agreement, etc.

SIRAJ OMAR SC: Sure. So that case was a shareholders' dispute. They were both shareholders in the company that operates Shaadi.com, which everybody may have heard of. So just to go through the proceedings. Westbridge commenced proceedings in Singapore. Sorry. Mittal commenced proceedings in the NCLT claiming oppression. Westbridge then goes to Singapore to seek an injunction to say that this should be stayed in favour of arbitration. They got that *ex parte*. Mittal then commenced proceedings in the High Court here, seeking a declaration that the NCLT was the only competent forum to hear and decide the dispute. So what then happened was the anti-suit injunction was made permanent by the Singapore High

Court. Mittal then appealed to the Court of Appeal. So the Court of Appeal decision.... I think it's important bear in mind that the Court of Appeal released its decision before the suit came, the suit that Mittal had commenced in Bombay had come on for hearing. So that is the relative chronology. There were two contracts, both governed by Indian law, and both provided for arbitration with the Singapore seat. And my point earlier about the arbitration clause, both clauses were identical, and they referred to a dispute relating to the management of the company or relating to any of the matters set up in this agreement. And the phrase dispute relating to the management of the company will be critical, as I will try and show. So the court had to decide the question of arbitrability. Court of Appeal stated again that the essential criterion of non-arbitrability is whether or not the subject matter of the dispute was contrary to public policy as I said earlier. They held at Section 11, of the Singapore International Arbitration Act, which deals with this, that public policy referred to in that section was both the public policy of Singapore and the foreign jurisdiction. So you at look at both issues. And so in order to determine whether a particular issue was arbitrable, it had to be so under both Singapore Law and the Foreign Law. So this concept of double arbitrability. And so the court then turned to look at what was the... the law of the seat was very clear. The law of the seat was Singapore Law. And under Singapore Law, these issues were arbitrable. We then had to look at what was the law of the Arbitration Agreement, and the test it applied was a test that essentially was derived from Sulamerica. It's very well established. All of you would know about it. First limb of that is, has there been an express choice. The court looked at the clause and noted that the clause provided that and I just want to get this right. Provided that the contract and performance was governed by and construed in all respects in accordance with Indian law. But the court held that this was insufficient to amount an express choice of law for the Arbitration Agreement. And I think one of the reasons that influenced that was the way, to answer the second element of the test, which was whether there was an implied choice of law. And there ordinarily, you would look at the law of the arbitration – Sorry -- The law of the contract. And there would be an implication that, well, if you intend your contract to be governed by a certain law then every aspect of that contract could have to be governed by that law. And so you would imply that the law of the Arbitration Agreement would be the same as the law of the contract. But the court held that that implication didn't arise in this case because the Arbitration Agreements here and I go back to that phrase earlier included disputes relating to the management of the company, and the court found that the parties could not have impliedly chosen Indian law because Indian law under Indian law such disputes were not arbitrable. So they held that the second limb didn't apply. And then they looked at what was the law with the most real and substantial connection with the Arbitration Agreement held that was Singapore law and so applying the concept of dual arbitrability, did help that. Singapore law applied and the issue was arbitrable and therefore dismissed the appeal. Right?

So again, we're dealing with supposition and speculation here, but if the provision if the clause did not expressly say that the parties wanted disputes relating to the management of the company to be resolved, then I think there's a fair chance that the court may then have held that under the second limb of the test, Indian law was the applicable law to the Arbitration Agreement, in which case the double arbitrability concept would not be satisfied and it would not be arbitrable, in which case the appeal may have been allowed. But again, speculation. But it goes back to my point right at the start that it's important to get your contract or get your arbitration clause right, right from the beginning.

NIDHI PAREKH: Do you think the fact that O&M matters or the management related matters were not arbitrable and would have therefore been an NCLT in India, would have also been an acting ingredient for them to take a decision that it should be in arbitration?

SIRAJ OMAR SC: So, I don't know, I don't think the detailed nuances of Indian law was canvassed before the court. I think the court was aware that this was an issue that was not arbitrable under Indian law. But my sense from reading the judgment was, that was not the actual reason behind it.

SHREYA AREN: And just one more question on that Siraj. You said in the beginning that it was important that the decision came up before the Court of Appeal before it was heard in India. And obviously we are in the territory of hypothetical here so we're asking you to guess things now. But do you think if it had been heard in India before and there had been some kind of decision from the Indian courts, it would have gone differently in Singapore?

SIRAJ OMAR SC: This is where I have to [UNCLEAR] my air ticket. My own view is probably not looking at the way the Court reasoned it out. I think they looked at it quite dispassionately and I think they looked at the clause that they were presented with and made a decision based on that. But again, I don't speak for the courts. Pure speculation.

SHREYA AREN: No. And thank you. That's appreciated. Thank you for giving us your honest opinion on that. But importantly, the saga did not stop in the Singapore Courts and the Court of Appeal. So then, Shaneen, could you tell us more about what happened in the Indian courts in the Bombay High Court of the NCLT?

SHANEEN PARIKH: So, actually before I go into what happened in this case, I want to allude to what Siraj said in terms of I think I've jumped my question, but since I've started, I will continue. I could have answered this in another question. So Siraj referred to the

Arbitration Clause, which included the words relating to the management of the company and that was part of the rationale for the Singapore court ruling that therefore, Singapore law would apply to the Arbitration Agreement. And he also said that this may not be so in every case, and it really depends on the way your Arbitration Clause is worded. So we actually had an arbitration before SIAC where we were trying to enforce an investor's exit rights. It was Indian Law governed which was a Singapore seat. So, very similar. When we saw this ruling, we were absolutely petrified because for various reasons, we needed Indian law to govern the Arbitration Agreement. And we thought that we were stuck now, that the arbitrator would see this and would rule that Singapore law applied. But because of the wording of our Arbitration Clause, the arbitrator took the closest connection test, took the implied choice of the Arbitration Agreement to also be Indian law. So notwithstanding this very well-reasoned decision of the Court of Appeal, and I can also tell you that our arbitrator was one of the parties, one of the lawyers in this case, we got a ruling that Indian law applied. So really it boils down to what your Arbitration Clause says. Sorry. Now I'll move on. So really what did the Bombay High Court do? We all know that the Bombay High Court granted an anti-enforcement injunction. That is, it restrained Westbridge from enforcing the antisuit that had been granted by the Singapore courts. What the Bombay Court did was, it examined the three tests for grant of an injunction, which is your *prima facie* case, grave and irreparable, harm or injury and balance of convenience. And on each of these three, it came out in favour of Mittal. Why? Because of the crux of the issue being that oppression and mismanagement cases were not arbitrable, that the NCLT had exclusive jurisdiction. What was also argued before the High Court was the principle of committee of courts. But look, the Singapore Court of Appeal has already granted this anti suit injunction. The Committee of Court Principles demands that you request it. And I just wanted to read and what the court said is, 'if such an injunction of the foreign court is offensive to the domestic public policy, its enforcement can be resisted and the Principle of Committee of Courts cannot be used as a weapon to leave the litigant remediless' and that's where both the High Court and the NCLT landed up, that if you prevent Mittal from proceeding with the NCLT petition, which has been filed for oppression and mismanagement, which gives a minority shareholder specific statutory protection and remedies you will leave him remediless. And therefore the High Court granted the injunction. What is notable, though, is that the Court did not go into whether the NCLT petition was actually dressed up, not dressed up, was on a valid oppression mismanagement petition. And because the NCLT has exclusive jurisdiction to determine these issues, it left it open for the NCLT to decide. So, the High Court granted only an anti-enforcement injunction on the anti-suit. Then I think just a couple of days later the matter came up before the NCLT and was heard by the NCLT. If you're going to read any of the orders, I think it's the High Court order rather than the NCLT's you should read. But it agreed with everything that the High Court said. It went one step further

and it granted a stay of the arbitration hearing, which was going to take place on the 18 September. So I think 15th September it granted a stay of the arbitration proceedings, and it also noted that Westbridge they didn't go into whether the oppression mismanagement petition was genuine or not. And it also noted that Westbridge had the option to approach the NCLT to refer the parties to arbitration under Section 45 of the Act, which I think was fairly balanced. So it is open now to Westbridge to go to the NCLT to say that the petition is dressed up. Please refer me to arbitration, and you never know, it may well go there.

SIRAJ OMAR SC: Can I make one point? So this issue of certain reliefs arising from oppression only being open to the court. So for example, one of the reliefs for oppression is buyout or winding up. Obviously, winding up is not something an arbitrator can assume. But that was an issue that the Court of Appeal did consider. The Court of Appeal made very clear that, look, if you decide that the issue of liability is to be decided by a Tribunal, then we will uphold that contractual choice that you've made. Now, if you then want to use the findings of that Tribunal and then try and wind up the company, your recourse is to enforce the award or rather register the award and then seek relief from the court. So the fact that some of the relief that's available in oppression claims can only be granted by the court was not a factor on the issue of arbitrability.

SHREYA AREN: Yeah. And I think the UK courts would take that view as well. Similar position. So then we thought about Anupam Mittal decision that was great to hear from two different perspectives. And obviously the Indian courts and the Singapore courts came at it from different perspectives really. So it would be interesting to hear from all of you about what your view is of what happened and what do you think, who's right in a way? Obviously I can foresee that it will be a lot of it depends, but I'd still like to know what you guys think. And also does it worry you about enforcement of foreign awards in India, that parties go through this process of getting an Arbitral Award and then come back to India to try and enforce it and then it, does it create issues in that regard and do you think you'd be advising your clients to consider Indian seats in those cases in the future. Maybe I can start with you Kanika.

KANIKA GOENKA: So two things actually, one of which Shaneen touched upon. When we're discussing arbitration in India, the one thing that comes up very often is the culture of the Indian litigant. And precedents like these might set a bad precedent for a recalcitrant party. The fact that the Bombay High Court did not go into the fact that the petition was dressed up, and effectively said that doing so would kind of entrench into the NCLT's jurisdiction, might just give impetus to a person looking to avoid arbitration, to adopt similar strategies. Now, obviously, if your petition is completely frivolous, hopefully precedence will kick in. But it's

just from that perspective it's not a very happy scenario. Also there, another view is that for a non-court seats to injunct the arbitration in the middle, essentially because the dispute would not be enforced at a point in the future. It's exceptional because and also unnecessary because if the award were to counter your courts in the enforcement stage, you could exercise that remedy. To injunct the arbitration in the middle five days before the hearing and impose the notions of arbitrability when it's not the court's seat that's doing it, it is quite exceptional.

NIDHI PAREKH: Again, I'll take a little bit of detour from shareholder related disputes. I've actually dealt with myself 40 to 50 matters, where we've had an Arbitration Clause in the agreement. But just to ensure that there's immense pressure on the party, the corporate debtor, the matter has been referred to NCLT, of course, for liquidation. So again, this is a strategy that people will adapt and this will continue to happen till we have clarity. As a user for me, I appreciate every view, but I am spending my.... I'm completely talking as a business person here who is, of course, interested as a lawyer. I'm facilitating a business tomorrow, but my company's money is going into, the time is going, the execution of the agreements are getting stalled, etc. A lot of money is being parked into these contracts and the future contracts that they have out of that. Everything gets impacted just because of this multiplicity of proceedings, just because there's no clarity or, just because one party goes there, the other party comes here. And we've literally in few of them had had to sit down across the table and finish the matter before it goes into NCLT because while we were... the matter could have been adjudicated upon in its due course of time, we didn't want to waste the time. We didn't have the time to waste because there were lot at stake at that point in time. So again, I think if a composite approach can be adaptable in order, it completely depends once the arbitrable issues are crystallized and if hopefully there is a standardization that in event of no express, even in ***Anupam Mittal's*** case, if you see the language of management is specifically written because they are not interested in the day to day business or the functioning of what Shaadi.com company is doing. They are interested only in the shareholders work. That is the reason it was restricted only to the management disputes coming out of the contract, the agreement. Hence you may mention that, but I think there needs to be standardization again. As I said, crystallization, of the arbitrable issues and standardization that in case of no clause in the Arbitration Agreement for the governing law, it has to be implied to the Master Agreement.

SHANEEN PARIKH: So look really, I mean, I'm going back to the point of arbitrability going hand in hand almost with the public policy of a state. Now, if you ask me personally and actually this is something that just came to mind while everyone was speaking. If you ask me personally, I think India should narrow the scope of non-arbitrability rather than widening it

as it has been. Therefore, I do think oppression, mismanagement disputes should be arbitrable. Perhaps there should be an option for a litigant to go to the NCLT if reliefs are required which a Tribunal cannot grant, though also I take Siraj's point of how that could nevertheless work. But while I was thinking of saying this, I'm also speaking from a position of privilege right? I work in a large law firm. More often than not, my clients are the Westbridges. They are the foreign investors. They are the corporates with deep pockets. And given that we are such a large country, the UK, the Singapore, they're much smaller. There is a lot more parity. Does it make sense that public policy should or would want to also protect these smaller players? And therefore, you have to evaluate, I think a state's public policy. I'm thinking of the interest to all its citizens with a pro arbitration stand and therefore find a balance. And I think in our government's wisdom, given the number of courts, we have District Courts, Lower Courts, High Courts, they've come out in favour of the minority shareholder over here. And I think there is a logic to it. Therefore, I also think there is a logic to the High Court and the NCLT having granted these jurisdictions. But I think that is also because in my head and unconsciously I'm automatically as an arbitration lawyer veered towards the Westbridge position. And I don't think it's that straight an answer. And I don't think it's a no brainer to say yes, of course it must be arbitrable. Although, as I said, that's my preference. But I'm just wondering whether I have an unconscious privileged bias on that front.

SIRAJ OMAR SC: So the question of what should or should not be arbitrable in India is a matter for Indian public policy. I'm certainly not going to be presumptuous enough to state a view. I will say that that issue in Singapore is not really a concern for me because I go to court in arbitration so I don't really... that doesn't really matter. But I will make one general point, which is that if you are using arbitration and if you are in the arbitration game, then you need to know the lay of the land. You need to know that if you have a matter which relates to an Indian Company or Indian parties and your dispute may involve oppression or management claims, then you need to know that that is an issue that is clearly non-arbitrable under Indian law, as it stands is. It's not a secret. It's well-established. And then you need to form a view whether you tailor your governing law accordingly. You tailor your choice of seat accordingly. But again, it comes back to what I said earlier and it is a bit of a pet peeve for me. It is not a one size fits all solution. You need to tailor your clauses to the particular situation.

SHREYA AREN: Thank you. Interesting. We've got a range of views on that. And I think Shaneen, your point is well taken. But when you think about from an arbitration perspective, I think and the point that Nidhi made about certainty and kind of knowing what you're getting into really, when you sign up to arbitration, it can be quite difficult to square it up with

basically being dragged to court, even though you agreed to arbitrate certain matters. But I take the point on Indian public policy and how it doesn't just cater to one set of litigants, particularly. So then moving slightly to a different topic but connected, and that also was very prominent in the Singapore decisions and maybe... actually, the question is, can it solve the problem really of arbitrability, which is the law of the Arbitration Agreement? And we heard a bit about the Singapore position Siraj on this in the context of ***Anupam Mittal and Westbridge.*** But do you think this is the silver bullet? Do you think this solves the problem of arbitrability?

SIRAJ OMAR SC: In the sense that you pick your law accordingly? I suppose it could. It is one aspect of what you look at. You look at also the governing seat that you are picking. But if you were to use the facts scenario in ***Westbridge***, then clarity in terms of the applicable law governing the Arbitration Agreement would have addressed the issue at ***Westbridge***. Whether it's a silver bullet that fixes all evils, I don't know. But it is a tool that can be used.

SHREYA AREN: And I guess on this the question also under the Indian position and that we've been discussing is the enforcement question doesn't get solved by this right? Because the enforcement when you come to India is still determined as per the arbitrability under Indian law. So irrespective of what law governs the Arbitration Agreement, the enforcement question doesn't get solved. But Shaneen what is the Indian Court's position on this? How do you determine the law governing the Arbitration Agreement in India?

SHANEEN PARIKH: So, as we have seen in almost every arbitration related issue we have conflicting decisions. One bench of the Supreme Court will distinguish a judgment on the other. It ultimately does boil down to how your arbitration clause is worded. I think we generally follow the Sulamerica test where if the law of the Arbitration Agreement is not expressly specified in the first instance it will be the underlying law of the contract. It can, if there is no specified underlying law of the contract, or if the presumption is rebutted by anything else in the agreement for instance, relating to the management law as we saw in this case, then it will go to the law of the seat. So that's where we kind of end up as a general framework. But in each case, it really is very relevant to see what the clause says, what disputes it encompasses, and therefore, what the closest connection test would be to the Arbitration Agreement. And that's why I said the example I gave you earlier about my decision was actually in answer to this question. It was Indian Law, Singapore seat. The Tribunal held that Indian law govern the Arbitration Agreement, not Singapore law.

SHREYA AREN: And obviously the Sulamerica decision's come out of the UK a long time ago, and that's the test that's been established and kind of enforced by Enka v Chubb recently. But the Law Commission in the UK, which is currently considering this issue has come up with a different position. So Kanika could you tell us bit about that?

KANIKA GOENKA: That's right. So the Enka position is a default position is that if the contract doesn't provide for the law governing the Arbitration Agreement, but it does provide for the law governing the matrix contract that would unless that law would render the Arbitration Agreement ineffective, be the law that governs the Arbitration Agreement. Now what the Law Commission has suggested is an amendment to the Arbitration Act which basically says that absence and express choice of the parties, the Arbitration Agreement will be governed by the law of the seat, even when this differs from, even when the law of the seat differs from the law governing the matrix contract. So this is obviously abandoning the Sulamerica, Enka position and coming closer to what I think the courts, Singapore courts in ***Anupam Mittal*** had kind of...

SHREYA AREN: And I think it is targeted at getting that certainty, basically. I think it is not looking at first principles in a way because there's a debate to be had about first principles, but it's okay users are wanting that certainty. Let's give them that certainty by including a rule in the legislation. Would you agree with that?

KANIKA GOENKA: Correct, correct. And also aligning your law of the seat for the law of the Arbitration Agreement might take away some issues of the scope and arbitrability.

SHREYA AREN: And I got this frustration from Siraj, and I definitely share it which is that transactional lawyers basically consider the dispute resolution clause the midnight clause, right? It's the one you agree right before you're signing, you mail your arbitration colleagues and say, does this look okay, and then they tell you how much time you have. You tell them 20 minutes, and then they give you an advice which allows you to sign in that time, which you most often disregard. But I'm not frustrated at this point at all as well, but Nidhi, just coming to you on that. Adding this additional complication of law governing the Arbitration Agreement to the dispute resolution provision, do you think it's something that's sensible? Do you think workable, or are we just adding one more layer that people who do transactions don't really care that much about?

NIDHI PAREKH: No, we definitely care, but it's opening a Pandora's box. Now, today, if I say, I mean I was thinking while you were again talking about this right now, you have very

conveniently said that the implied choice is not Indian law because it is not there in that particular clause. Now I am going to go back to every provision, be it termination, be it confidentiality everything and then say that also has to be specifically mentioned in the Arbitration Agreement clause. Because then if you're only keeping the governing law part because of course, the scope of that is only that much then what about confidentiality? How are you, then keeping that separate? You're adding more and more levels to this. But India being a very business oriented country, we have... these developments are very important... midnight clauses. As a matter of fact now I always ensure that people in the spirit of ADR, that my every agreement or contract always has mediation first and failing which it goes to arbitration because... and this really helps the foreign entities to invest and gives them a lot of comfort also because their bigger concern in India when they are working with Indian entities is, the litigation, the judiciary. It's a long shot if you get into litigation and sometimes it's strategically used against them, sometimes it's not. But we of course contemplate on that and you may need to specify but I personally would again... I'm strongly of the opinion that in absence of the Arbitration Agreement, which is a part of the Master Agreement, it should be referred to the governing law clause of the Master Agreement. So I am very much in that favour altogether.

SHREYA AREN: Right. Thank you for that. So just getting final thoughts...Siraj do you want to say something on this?

SIRAJ OMAR SC: No, I was just going to say that this issue of the Midnight Clause is I think borne out of not ignorance, but a lack of appreciation of how badly things can go wrong. And in most big firms at least there are silos in terms of the transactional people do their own stuff and the disputes people do their own stuff there's very little cross interaction. And I think it's important that there is that cross interaction. That people on the transactional side understand what could go wrong. So that is a risk that they bear in mind when they're advising clients. So if I just put on my SIAC hat for a minute, one of the things that we try to do is engage with transactional lawyers to sort of give them a little primer on what are the issues, so that they're just alive to that. Then they can have that conversation with their disputes, colleagues.

NIDHI PAREKH: To add to that, what Siraj said, it's very important. And that's one of the reasons when I'm ever drafting an agreement, business team generally just comes and dumps an email and goes away. I'm like, sit down. Tell me exactly what it is that you want, because they might say a different language and respecting all different cultures and religions and languages people use. I mean, no offense to anyone here, sometimes what they want may not come clearly from what they are telling you. So it's very important that I sit down with them,

at least for a good brainstorming session. Understand exactly what is it that they want and what are the advantages or disadvantages of drafting the clause in a particular manner. Sometimes it can act in your favour. Sometimes it cannot. So you have to keep that in mind as well. And these discussions are important. We're never going to have amendments, we're never going to have any development or evolution of any law if it's not for these judgment, if it's not for these lacunas that we have. So yeah long live.

SHREYA AREN: Thank you. So moral of the story is, talk more to your colleagues. Right?

SIRAJ OMAR, SC: Although we might be talking ourselves out of a job as a dispute's lawyer.

SHREYA AREN: So just on.... just two final kind of questions and wrapping up what we've spoken about, because we covered a lot of ground here, about arbitrability, about arbitration clauses, about how, what we want it to look like. So, Shaneen and Siraj what is your view on this final word? Should India be moving closer to the position in other countries when it comes to arbitrability of oppression and mismanagement disputes, and on the law governing the Arbitration Agreement? And if it is to do so, then how should it do so?

SIRAJ OMAR SC: I will defer to Shaneen on this, because it really is not my place to comment.

SHANEEN PARIKH: You can give a wish list. Yes, I think it should. I think the NCLT for instance, to take oppression, mismanagement cases - The DRT. I think these Tribunals are overburdened. I think we should move.... I think we should move towards wider scope of arbitrability of disputes. I think we've actually been moving in the reverse direction. Today oppression mismanagement, DRT related disputes, trust disputes, IP unless they're clearly *in personam*, all of these... fraud, all of these are not arbitrable. I think most of these can be decided by arbitration. And if the parties have decided to put an arbitration clause into an agreement, I think that is party autonomy and I think that should be respected. So that's my view.

SHREYA AREN: Spoke like a true arbitration lawyer.

SIRAJ OMAR SC: I will give two cents.

SHREYA AREN: Okay.

SIRAJ OMAR SC: I think the question of whether you do or do not, impacts. It is an element of growing as an arbitration hub. If you want to be an arbitration hub, then logically, the more things that can be referred to arbitration the more vibrant and more appealing it's going to be. So that's you know, that's a general sort of logical perspective. Whether or not that is something that is in India's interest or in accordance with Indian public policy that's for all of you to decide.

SHREYA AREN: Thank you for that. I am glad we convinced you to offer a view. Nidhi and Kanika, what is your view on this? Do you think India should change the position in arbitrability? And particularly given that there are certain remedies that will always only be granted by courts?

KANIKA GOENKA: So the short answer, yes. I echo what Shaneen and Siraj said. We can talk about whether the anti-arbitration injunction was correctly granted. We can analyse the High Court judgment. But the point is that until Indian law and Indian courts actually catch up to the position in India and Singapore, India is never going to be the global hub, arbitration hub that we say we want to be. And in circumstances where and Shaneen said this, where parties have consciously have an arbitration clause in their dispute, that clause should be given, that has to be respected. And the solution that the Court, the English courts have adopted distinguishing subject matter from the remedies granted is a solution. And maybe Indian courts will step up in this very dispute and before the NCLAT and the Division Bench of the Bombay High Court. But the *inter se* disputes of the parties are arbitrable. Then the solution may well be that those aspects are arbitrated, and then you go back to the NCLT for remedies that the Tribunal might not want to grant. I'm not saying that that solution is without its problems. But it certainly will go a long way in improving the reputation of India as an arbitration hub.

NIDHI PAREKH: Arbitration was always introduced to reduce the work of the court. And we have seen only with amendments, not the actual act, which was the actual act, had too much pressure on the courts. Okay, you can't decide an arbitrator go under Section 11. You are having interim measure, go under Section 9. So keeping that in mind, I think as Shaneen correctly and Siraj, correctly said and of course, Kanika, that it's important we crystallize, what are the issues we want to... I also say that we need to widen the scope of arbitration, make it a little more, make it a lot more precise to avoid ambiguity. But you are here to reduce the pressures of the court. So keeping that in mind, I think it's important we work in that spirit and as much as possible have that covered under arbitration.

KANIKA GOENKA: Just add to one more thing. You know when shareholder disputes are being decided, whether there has been breach of a shareholder's agreement, whether or not there has been oppression. These are fact heavy inquiries. The Tribunal will conduct a cross examination of the parties, there will be witnessing. I actually haven't thought about this in depth myself, but I don't know that the NCLT is conducting the inquiry in that same level of detail. So it may well be that the arbitration Tribunal is actually a better forum to decide these disputes. And you go back to the NCLT for your remedy.

SHREYA AREN: Thank you so much for that. This has been a really interesting conversation. And I'm just wondering, we have a bit of time, maybe five minutes so I don't know whether anyone in the audience had any questions or thoughts on what we've discussed?

AUDIENCE 1: Okay I think I have a loud voice. In alignment with what has been already discussed and deliberated over here, given the [UNCLEAR] of arbitrability, in context of India, specifically arbitration and dispute resolution perspectives, I just want to know one thing. As appointed Counsels for the companies or independent law firms that have been hired by the companies, why is there an absence of a cautious deliberation or because it has been stressed today a lot why is there an absence, complete and utter absence of not making a solicitous perusal of choices that are there for seat for law governing the substance and the procedure and the arbitral institution, rather than considering that the law itself should be changed to widen or to shorten the scope? Because it is not more of a legislative consideration. It is more of a judicial contemplation when a matter is put before a court as to interpret. This law is basically centred around party autonomy and it is basically for the interest of the companies. It is flexible. It should suit the interests of the companies. So it is the burden. It almost feels like it is a pendulum between the legislation, the judiciary and the companies. And there's a constant cry about, the law should be amended time to time. Why should the law be amended, if you have a proper, well rounded arbitration clause with regards to a solicitous choice of the seat of the law which should govern the substance and the procedure or the arbitral institution? If that is in place, then the tactical advantage is very much with the company itself that is solicitors to succeed. Why the burden should always be on the law itself?

SIRAJ OMAR SC: I think that, I agree with you. I think there has to be more consideration given to the state of the law beforehand. But I also think that there are two separate issues. One is, given the state of the law now, what should I pick in order that is probably more in line with my interests and my risk profile. But there is a second question, which is sort of broader and not company specific, which is, should the law change not to cater to the company, but is

there either philosophical or public policy interest in broadening the scope of arbitration? So I see that as two different questions. But I agree with you.

AUDIENCE 1: Yes like I said which you say about public policy, the law is very clear. Simply Section 34 of the Arbitration and Conciliation Act 1996 states that there are certain matters which are not capable of being arbitrable. Subject to arbitration. Now it rests on the judicial contemplation of what falls within that category. So if you want to escape from that, because time and cost efficacy is the primordial concern, given the sophistication of the arbitral services that companies need to hire now, why can't the companies make a conscious deliberation into this new resolution strategy itself that they have?

SHREYA AREN: I think the question, though, is that the law has to determine what is arbitrable, and what we're deciding here is whether oppression and mismanagement, which in other jurisdictions is arbitrable, should also be considered to be so in India. So....

AUDIENCE 1: That again comes down to public policy.

SHREYA AREN: Yeah exactly. And that public policy and law are very closely intertwined. Right? So when you talk about public policy, you are necessarily talking about legislation in the law. And I think all of us are dispute resolution lawyers definitely agree that you need to think a lot about the Arbitration Agreement. But some points are points of public policy and law, which you can't really account for in contract. So I think as Siraj had two different points. Any other questions? We have a transactional colleague in the room, Harsh. So we'll definitely take a question from you, since we want to be talking more.

HARSH: Hi. I think one question specifically one point to consider specifically in the context of shareholder disputes is while of course whether these disputes should be arbitrable or not, and that's a policy decision on how the law should evolve in a certain way, I think this overlap between the NCLT jurisdiction and an Arbitral Tribunal's jurisdiction is going to continue. Even if let's say we solve this issue of arbitrability and go and say that okay, these disputes are to be arbitrable, there is another whole branch of law or in terms of whether shareholder's agreements need to be incorporated into the articles. And you have this odd practice in India, where the entire shareholder's agreement is incorporated into the articles, minus the arbitration clause. And it really confounds while doing transaction law is why is this practice in. Therefore my only comment here, it is not... is that in order to solve this issue, if I can term it as that, it's not just the question of arbitrability which needs to be addressed, but also on shareholder's agreements and whether they are required to be incorporated in articles to what

extent. And until that overlap point is also not decided by the courts or by legislation, this overlap between NCLT and Arbitration Tribunal will always be would be my comment. And I think I don't know if you have seen this in coming up in practice or in arbitration, but happy to hear your thoughts.

SHANEEN PARIKH: So Harsh, you're right. This is an issue, and it is an automatic incorporation of the entire SHA whether by way of kitchen syncing it into the articles or referring to it. But the rationale for that is that if the shareholder's agreement is not signed by the company, then how do you bind the company to it? And that's where all your judicial precedent has come from. And that is a basic principle of Contract Law. Right? And your articles are the constitutional documents that govern the functioning of the company. So unless there's a massive legislative change that allows these disputes to be decided or the terms to override the articles of the company. I think we are going to be stuck with that position for some time. There is a logic in it, and there is, whether you agree or you don't, there's a logic which the arbitrability position taken in India as well. Now just one has to see what makes more logic down the line than whether we need to move with the time which I think we all agree we do.

AUDIENCE 2: Earlier you guys had mentioned that the Bombay High Court decision had left it open for the NCLT to consider whether the claim was actually dressed up to be one that was brought in the NCLT. Now my question is should the Bombay High Court have done that or should it have been the foreign way decided that the dressing up was there, or it was not there, and therefore it's proper to go to the NCLT because now you have made ***Westbridge*** go through one round of proceedings in the Bombay High Court and have to take the question of... in fact it is a threshold question, which is now going to the NCLT to decide whether or not the claim was properly brought in the NCLT. So my question really is, is your Bombay High Court the proper forum to decide this?

AUDIENCE 3: Sorry, while the mic is near me, can I also just piggyback on that? Siraj is already rolling his eyes but can you exclude the jurisdiction of the NCLT by way of drafting the contract to say that you exclude its jurisdiction on issues of oppression, liability but confine it to merely the ordering of the remedies? Thanks.

SHANEEN PARIKH: Okay, let me answer the first question first. Look, our Companies Act confers the NCLT with exclusive jurisdiction and oppression mismanagement petition is exclusively within the jurisdiction of the NCLT. I think the High Court did deal with this question and then said the NCLT should decide it. And it also.... but it also said that just

looking at the allegations and it did look at the allegations. It wasn't possible on the face of it to make out. And you look at, was it.... Yesterday we looked at the words manifestly without merit, right. In terms of our a dispositive motion to dismiss. So unless it jumps off the page at you, I don't think the Bombay High Court could have gone into it. So I think it correctly didn't. And I think it is the NCLT that ultimately has to decide.

KANIKA GOENKA: But there are, I mean like you said, like we discussed, there are evident problems with that approach because then that would just I mean, that would be a strategy that, frankly, any old law firms will be employing if you want to avoid an arbitration. So that is a problem. No, I think Shaneen actually already answered it essentially that O&M disputes are exclusively within the forum or within the purview of the NCLT. So you can't really contract out of a mandatory forum requirement.

SHANEEN PARIKH: So you can't exclude NCLT's jurisdiction. I think they did try to do that by saying disputes relating to the management will fall within the scope of the arbitration clause. But that's different from saying the NCLT shall not and excluding that jurisdiction.

AUDIENCE 4: We are deliberating on the jurisdiction of NCLT. In a very recent judgment on 6 October in a petition filed under Section 241-242, NCLT has referred the parties to arbitration. Very recent judgment. NCLT concluded that the disputes arising out of SHA are arbitrable and referred the parties to arbitration. So I think their suggestions have been accepted by NCLT.

SHANEEN PARIKH: Well, you never know. ***Westbridges***, 45 applications, they may yet be referred to arbitration. That's still open.

SHREYA AREN: There is hope still. Well, thank you everyone, for joining us for what I hope you'll all agree was a really insightful discussion. And thank you so much for our panellists for coming and talking about this with such.... articulating the responses so well and talking us through all the intricate issues of this. And thank you very much to the MCIA for allowing us to host this panel. I know there's a very fascinating panel on arbitral appointments coming up next, so please do stick around for that. Thank you very much.

~~~END OF SESSION 2~~~