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2 **INDIA ADR WEEK DAY 4 – DELHI**

3
4 **SESSION 4**

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7 **2:00 PM To 4:00 PM**

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9 **Sanctions and International Dispute Resolution**

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11 **Speakers:**

12 Rishab Gupta, Advocate, Bombay High Court; Barrister, Twenty Essex

13 Baiju Vasani, Barrister, Twenty Essex

14 Rajat Rana, Partner, Selendy Gay Elsberg

15 Piyush Joshi, Partner, Clarus Law Associates

16 Samantha Rowe, Partner, Debevoise & Plimpton

17 Dipen Sabharwal KC, Partner, White & Case

18 Niyati Gandhi, Principal Associate, Shardul Amarchand Mangaldas

19
20
21 **NIYATI GANDHI:** Thank you, everyone. I am going to start this panel now. I'm Niyati, I'm
22 the moderator of this panel. I'm the least important person on this stage. But my job is to make
23 sure this remains interesting and people don't cross the timelines that have been set for them.
24 I think I'm going to skip introductions. Unless you would like actually, the introductions are
25 not, okay. They're there. You know who these guys are. It's on your screen. This panel is about
26 sanctions and international dispute resolution. It's a hot topic. We have a stellar panel of
27 speakers, but the question you might have is, why is it really relevant here today. We'll hear
28 from the speakers on how it's relevant, how it's relevant to Indian companies, how it's relevant
29 to legal professionals, and how it is playing out in the dispute resolution space. I'm not going
30 to take any more time. Over to you Rishab, if you can tell us a little bit about how sanctions
31 apply to Indian companies.

32
33 **RISHAB GUPTA:** Hi, everyone. Thanks, Niyati. So what Niyati asked me to do, just because
34 I'm the first speaker on this panel is to sort of situate this entire topic and because a large
35 majority of the audience is here from India. To just say a few things about why sanctions are,
36 in particular, sanctions that have been imposed against Russian entities could be relevant to
37 Indian companies. Now the reality is that unlike the UK sanctions or the EU sanctions or the



1 US sanctions, which you're going to hear a lot more about from the other speakers, India
2 doesn't have an autonomous sanctions regime of a similar sort. Nor, are there any specific
3 sanctions that the Indian Government has imposed against Russian entities as such. What
4 India, of course, has, is the Foreign Trade Act, which pursuant to which the foreign trade policy
5 has been introduced, and that has certain restrictions imposed upon trade in goods and
6 services with entities in certain jurisdictions like North Korea, Iran, Iraq, et cetera. You also
7 have legislations which then give effect to and power to the Central Government to impose
8 sanctions on those entities which have been identified in the UN sanctions list. I think Piyush
9 is going to talk more broadly about that. But none of that is particularly relevant to the Russian
10 context. And therefore, of course, Indian companies and to that extent Indian lawyers may
11 also then think that Russian sanctions, sanctions that have been imposed by other
12 jurisdictions are largely irrelevant to Indian companies. In my experience, at least that isn't
13 true. The sanctions that have been imposed by jurisdiction, such as the UK, US, EU,
14 et. cetera. are so broad in their scope, the consequences of reaching them are so dire that they
15 do end up affecting Indian companies in lots of different ways. And the starting point there, of
16 course, is to identify whether or not there is any jurisdictional nexus that the Indian company
17 has with those jurisdictions that have imposed sanctions such that those sanctions regime may
18 become applicable to the operations of the Indian companies. Now, those jurisdictional
19 nexuses tend to arise in very very strange and very often unusual ways. The most common way
20 in which I have seen it arise in the Indian context is that you would have on your Board or on
21 your management, nationals of jurisdictions which have then imposed sanctions. So it's not
22 very uncommon in the Indian context that you'll have a Board which comprises of, let's say, at
23 least one or two US nationals, EU nationals, UK nationals, and so on and so forth. Those guys,
24 of course, continue to be bound by the sanctions regime that has been introduced by their
25 respective jurisdictions. Now, how do you cater to that situation? Do you have them resign
26 from the Board? Do you create a special recusal policy for them, when that company is taking
27 certain steps which may otherwise be in [UNCLEAR] sanctions? That question often arises in
28 the Indian context. Another very common way in which it arises is that the Indian company is
29 trading with another company, which is then on the sanctions list of one of these countries. It
30 may not be always the case that your counterparty is on the sanctions list, but the counterparty,
31 in fact may be owned by someone who is then on the sanctions list. How do you deal with that
32 situation? What kind of safeguards you build in your contracts in that scenario? Another
33 situation which I have seen arise a few times in my practice is that an Indian company is trying
34 to buy the Indian assets of another Indian company but the assets are encumbered or charged
35 to a Russian bank. As we all know, Russian banks and in particular, the VTB bank had been
36 very prolific in the Indian context, giving out loans to lots of Indian companies and then taking
37 mortgages on lots of Indian assets. If you're buying one of those assets, how do sanctions



1 impact you? That becomes a very relevant question and in fact has arisen in multiple on
2 multiple occasions in the past. What about the currency in which you're doing your
3 transaction? If it's US dollars, technically, the jurisdictional nexus of the US sanctions regime
4 gets implicated. How do you address that? So there are lots of different ways in which the
5 sanctioned regimes that you're going to hear about may become relevant to the Indian
6 companies, even though India by itself has no specific sanctions regime in the present context.
7 The other thing that I thought I'll briefly mention, because I know my fellow candidates are
8 going to address that is that because India doesn't have a specific sanction regime, specifically,
9 in the Russian context, some of the things that, for example, Baiju, would be speaking about,
10 such as anti-arbitration injunctions, anti-suit injunctions, none of that jurisprudence has
11 really arisen in the Indian context. But because the audience obviously comprises of many
12 lawyers as well the things that you might hear are relevant because of course they might
13 become relevant to your international arbitration. And lastly, though, of course, this would
14 come up later in the context of what mitigating strategies you might consider. As you hear
15 from the panellists, you may also want to think about things like governing law, seat of the
16 arbitration, the law of the arbitration agreement, because all those things, of course, in the
17 Indian context, there's a lot of jurisprudence about. None of that jurisprudence is specifically
18 in the context of sanctions. But the remedies that you'll hear, the mitigating steps that you
19 would hear could be put in the context of what we know, the relevant law on those items are,
20 as far as Indian jurisprudence is concerned. I think I'll just stop there and then I can just come
21 back.

22
23 **NIYATI GANDHI:** Thanks, Rishab. This is very helpful. I think now that we know how
24 sanctions might apply to Indian companies, transactions Indian companies might be involved
25 in, it's also important to look at what are the sanctions regimes at play? So I'll
26 request Piyush, to please talk to us about the interplay of various sanctions regimes and how
27 they might apply here.

28
29 **PIYUSH JOSHI:** Thank you. So right at the basics is the fact that there are two broad
30 sanctioned regimes. One is, of course, from the United Nations. And if that Security Council
31 resolution has imposed a sanction, it becomes part of international law, it becomes part of
32 public policy across UN chartered countries and consequently if we are dealing with the
33 country or a transaction that is getting hit with a United Nations sanction, it's a very different
34 ball game, a very different option. But luckily what has happened or unfortunately, UN
35 sanctions are pretty much dead in the water now, and there's no possibility of us in our practice
36 areas now ever facing a UN sanction. So what we are left with are these individual sanctions
37 which create this grey zone, where it is not a public policy of a country other than the country



1 which has imposed the specific sanction. So you are not able to get out of a contract
2 immediately, at least on the basis of public policy or the fact that the contract has become
3 unenforceable. The issues that arise from this is very fact specific. So I would just like to take
4 a few minutes from my own experience, so the first sanction transaction impact that we faced
5 or I faced was in 1998 when the Pokhran blast was done by India. So at that point of time we
6 were structuring the, the reason I keep saying “we” is from my Indian practice only, and at that
7 time I was in the Unified [UNCLEAR] so it was in that sense we also. So we were structuring
8 two infrastructure projects which were Greenfield projects which were for the first time being
9 done in India, one was the Greenfield road project, another was a Greenfield water project.
10 And we had structured it specifically for multilateral investment and it had gone through two
11 and half years of actual structuring with the World Bank and the Asian Development bank. So
12 what happens is overnight, after the blasts, US imposes sanctions and it’s not a United Nations
13 sanction, it is a US specific sanction which is the first time we came across the fact that a
14 country can impose a sanction and it was a very huge event because the World Bank dried up,
15 because the consequence of the US sanction extended to multi- lateral assistance given by
16 United States. All assistance vanished for the project that was structured for the particular...
17 and we did not have any dispute, obviously access. Consequently although the documentation
18 was structured, we were able to use that to obtain the required funding and implementation
19 and although the project cost rose, we were still able to structure the project and implement
20 both the projects. However as the second [UNCLEAR] therefore what this experience taught
21 us was that there is a need, at least for India to have made some sort of legal framework, not
22 for imposing sanctions but for taking some defensive measures in respect of sanctions that it
23 gets hit by, but obviously that has still not happened. The second experience I had with this is
24 when I was with British Gas, which was now a British Company, and it was actually
25 implementing a project in Iran. And we had spent again a year trying to develop
26 documentation, investing and creating the capital structure to implement the project in Iran.
27 And then, of course, as everyone knows, 2004, the US sanctions were imposed on Iran. Now
28 it was an interesting difference, because British Gas was at that, now it's merged with Shell.
29 But British Gas at that time was obviously a company under the UK jurisdiction. But UK
30 followed the US sanctions. Consequently, we had this overnight meeting in which we had to
31 analyse the effect of a US sanction possibility of inspection. What are the impacts if we
32 continue and the decision was obviously taken to take the hit of the investments already made
33 and exit the project completely. However the counteract action that we got from Iran was
34 interesting, which I think is something India should look at also was that they just said they
35 were not saying, okay, so US sanctions, goodbye. But they actually sent some sort of dispute
36 to this, which created a bit of a flutter. But in those days, obviously it got settled or buried
37 under the thing. The third experience we had was, we were advising an Indian company, which



1 was actually operating in Yemen. And then the civil war starts in Yemen, and obviously
2 sanctions follow the massacres. So, the issue came up that the Indian company had actually
3 given \$14 million worth of bank guarantees from a German bank and they were exposed to
4 the Yemeni Government encashing it immediately. And the German banks would have, of
5 course, enforced the thing because it was not a German sanction at that point of time, it was
6 still a US sanction that had come across.

7

8 But effectively what we had to do was because it was back-ended by Indian bank guarantee,
9 given we had to run to the Indian jurisdiction Courts, try and make a case of frustration
10 on bank guarantees. And Indian law which is again I cannot stress the need for India to at least
11 come up with some law relating to sanction because what happens in bank guarantee law, as
12 we all know, you have to only claim fraud or the misrepresentation type level to get out of
13 a bank guarantee. Therefore, we had to actually start an arbitration then file a Section-9, and
14 at the same time seek a, some sort of stay on counter action on the Indian bank not to release
15 the money and at the same time start the arbitration. And luckily for us the venue and
16 jurisdiction was German. So we could at least have a jurisdiction that was not bound
17 specifically, and we could raise the issue of *force majeure*, and eventually we won that
18 arbitration. But it was a very edgy experience because the company would have definitely gone
19 under had the Yemeni Government simply encashed the bank guarantee. So I think that
20 experience effectively shows that we should at least Government of India should look at some
21 clarity on the law governing sanctions. Particularly as we become more dominant in the world
22 stage and we will be faced with both actions and counteractions. Thank you.

23

24 **NIYATI GANDHI:** All very interesting experiences. But I think the last story that you told
25 gives us a good segue, because I wanted to ask Dipen, that what are the forums that are
26 thinking about sanctions issues? What are the Courts or Tribunals thinking about it? How are
27 they thinking about it? Who decides who is the right person to decide what a sanctions law
28 really means?

29

30 **DIPEN SABHARWAL KC:** Thank you, Niyati, I think Piyush took us back to the 1990s,
31 right? Because there is a temptation that because we have the Russian sanctions in front of us
32 we focus what is immediate, but we actually forget the lessons and experiences from the past.
33 And so a bit of a flashback going back to the 1990s, those who are in the room, old enough to
34 remember there was something called the First Gulf War in 1991 - 1992, when the Americans
35 went in against Saddam Hussein after the invasion of Kuwait. And there were a bunch of
36 sanctions. And as Piyush said in those days, the UN Security Council was not that divided. So
37 there were UN sanctions, which imposed very heavy prohibitions against activities involving



1 Iraq. And there were a series of cases that played themselves around the world on the question
2 as to contracts with Iraqi parties, which had arbitration clauses. Were those commercial
3 contracts arbitrable or did they UN sanctions regime, which had been incorporated in the
4 domestic legislation of many countries meant that these disputes were non arbitrable and
5 belonged to the jurisdiction of Courts? And it all kicked off in Italy first. There was an Italian
6 defence contractor called Fincantieri that was in the business of supplying arms
7 to Saddam Hussein. Sanctions came in, they stopped supplying arms, the Iraqi Government
8 said, where are the helicopters that we paid for, Fincantieri shrugged and said, sorry, no can
9 do, United Nations says, we can't do that. And an arbitration was launched. And Fincantieri
10 went to the Italian Courts and said, this matter is non arbitrable. These contractual rights have
11 now been subsumed by subsequent statutory action, and the Italian Courts, perhaps
12 unsurprisingly, agreed with the Italian contractor and said this is non arbitrable. This is a
13 matter for Italian Courts because it leads to mandatory rules of Italian [UNCLEAR]. So while
14 this was happening, the arbitration actually was seated in Paris, and the Iraqis went to the
15 Paris Courts and said no, actually, this arbitration should go ahead. And the Paris Court, the
16 Paris Court of Appeal actually ruled in favour of the Iraqi state saying that whether or not the
17 contractual rights have been frustrated or performance has been rendered impossible all of
18 these are legitimate questions, but it does not render the dispute in-arbitrable. That is, these
19 are questions that the Tribunal can decide for themselves. And so the Parisian Court said the
20 arbitration can go ahead. And in parallel, there were other arbitrations that have been
21 commenced in Switzerland, and the Swiss Court, faced with the same question, came to the
22 same conclusion as the French Court and said, yes, these disputes are arbitrable. So at least
23 those line of authorities what they seem to suggest. And there were subsequent authorities in
24 Canada and America. And I won't bore you with that. But at least on the question as to whether
25 the imposition of sanctions has a fundamental impact on the arbitrability of the SEO, I think
26 there's good authority to say that actually Tribunals can determine it for themselves. It's not a
27 matter solely for the preserve of Courts. And that's fine. But there is a related question Niyati,
28 which is when it comes up in the context of Courts versus the Tribunals is at the enforcement
29 stage, because oftentimes what happens is you can enforce it. You get an award against a party
30 and the losing party then resists enforcement by saying that actually, I would love to comply
31 with this award. I would love to make this payment in dollars to this bank account. But sorry,
32 I can't do that because doing that would mean that I'm in breach of sanctions. So performance
33 of the award is somehow frustrated by the operation of sanctions. And there is very good
34 authority on this point in the US, coming out of 2011, where the US had imposed sanctions on
35 Libya. And again, a US contractor was supplying arms to Mr. Gaddafi, Colonel Gaddafi, as he
36 then was, before sanctions. And they had an award. And they said, oh, sorry we can't actually
37 make these payments to Libya because making these payments would mean that we're in



1 breach of American sanctions, we can't do that. And the American Court said, well, bank
2 accounts are frozen, so there is nothing preventing you from taking, applying for a license from
3 the US OFAC paying money into this frozen bank account, the funds will stay in the frozen
4 bank account and if and when those accounts are frozen then the Libyan Government can do
5 what they wish to do with it, but simply the existence of sanctions cannot be a get out of jail
6 free card, which allows parties to get away from performing. Now, this is all a blast in the past
7 but Courts are now dealing with the aftermath of the Russian sanctions, but I know that Sam
8 is going to be addressing that.

9
10 **NIYATI GANDHI:** [INAUDIBLE]

11
12 **SAMANTHA ROWE:** Yeah, so. thank you. Yeah, I'm actually 103. So excellent skincare. So
13 there's the impact that sanctions is sort of having on international business and international
14 contracts is really creating a burgeoning battle between the Russian Courts and the Courts in
15 other jurisdictions. And I know that Rishab really issued a call to make this as relevant as
16 possible for Indian companies and Indian parties. Well, what I'm going to talk about for
17 reasons that I'll come on to is really relevant to anybody who has a contract with an arbitration
18 agreement with a Russian party, no matter where that arbitration is purportedly seated, and
19 no matter what governing law you have elected for your contract. So in 2020, so actually,
20 before this latest round of sanctions, Russia amended its Commercial Procedure Code in
21 response to sort of growing waves of sanctions that had followed its annexation of Crimea and
22 those Amendments really did three things. So first they granted the Russian Court's exclusive
23 jurisdiction over disputes involving sanctioned entities or disputes arising from sanctions
24 imposed on Russian entities and individuals, including where there is a valid agreement to
25 arbitrate or litigate outside of Russia. But it becomes impossible as a result of sanctions
26 because the sanctions create obstacles to the Russian party's access to justice. In those cases,
27 the Russian Courts were also granted the power to issue anti-suit injunctions previously
28 completely alien concept to the Russian legal system to restrain the foreign Court or
29 arbitration proceedings. And then third, the sanctioned party was entitled to seek
30 compensation from the Russian Courts if the other party failed to comply with the injunction.
31 So, the Russian Courts in the first cases where they were faced with this new procedural rule,
32 the *Uraltransmash* case. In those early cases, the Russian Court said, look, what you need
33 to be able to show is that access to justice, your participation in the foreign arbitration is
34 actually impossible. And they said in that particular case, the party had been able to fully
35 participate in an SEC arbitration, appointed a respected Arbitrator, expert witnesses,
36 reputable, lawyers, and the Supreme Court basically said, look, not impossible, not a bar to
37 access to justice, we're not going to assume jurisdiction under these new rules. This



1 unfortunately was quite short lived. In 2021 the Deputy Chairman of the Supreme Court
2 referred the *Uraltransmash* case a consideration by the judicial panel of the Supreme
3 Court, which concluded that Russian Courts will have exclusive jurisdiction to hear disputes
4 involving a sanctioned entity merely when that entity is subject to sanctions. The fact that it is
5 subject to sanctions is sufficient to infer that its ability to access justice has been restricted,
6 and the Russian Courts will have exclusive jurisdiction as a result. And the Russian Courts
7 really followed sue and in a series of decisions involving very high- profile Western parties
8 assumed exclusive jurisdiction over those disputes notwithstanding the fact that arbitration
9 and litigation was continuing in other fora. Most recently in a dispute that has really spawned
10 a host of litigations across the world between Linde, a German entity and RusChem Alliance.
11 The Russian Courts took things one step further. So in that case, the underlying contract
12 provided for arbitration in Hong Kong which currently sort of, the sort of mainstream view is
13 that Hong Kong is neutral when it comes to sanctions, it hasn't issued any sanctions of its own.
14 It's actually become very popular among Russian parties, looking for a third country in which
15 to seat its arbitration. In this case, however, Linde filed for arbitration with the HKIAC and
16 RusChem alliance went to the Russian Courts to say that Hong Kong and the HKIAC actually
17 are not sanctions mutual, a fair trial cannot be guaranteed and the Court agreed. The Russian
18 Court agreed and interestingly and again very relevantly for India, the Court found that while
19 Hong Kong is a Chinese SAR, it's subject to Chinese jurisdiction, it's legal system is largely
20 based on that of England and Wales, and there are British and European Judges who sit on
21 Hong Kong Courts and obviously will also sit as HKIAC Arbitrators. Stockholm also was the
22 seat of arbitration there, which the Court found was a sort of additional factor in its inability
23 to access judgment analysis. Linde, meanwhile, had gone to the Hong Kong Court to seek its
24 own anti-suit injunction to prevent the Russian Court proceedings from going ahead which it
25 obtained and Mimmie Chan, Justice Mimmie Chan, the Judge presiding over the case, issued
26 a pretty searing decision, in which she said the access to justice concerns were highly fanciful,
27 grossly exaggerated, totally based on false premises and unsubstantiated, and issued her own
28 anti-suit injunction which frankly was probably called comfort by Linde, because meanwhile,
29 its assets are subject to a freeze by the Russian Courts because it is still in jurisdiction. So the
30 last thing I'll cover because I know I've taken up quite a lot of time already. The finance, yes
31 the banks that were financing this project had their own contracts with RusChem Alliance,
32 which provided for Paris seated arbitration. French Courts, French law, anti-suit injunctions,
33 not available. They're just not part of the procedural toolkit that French Courts have. So the
34 banks went to the English Courts to seek anti-suit injunctions from the English Courts to
35 restrain the Russian litigation. And what we have as a result, for the time being, it was reported
36 in [UNCLEAR] yesterday, and I am very grateful to them for producing a really excellent
37 synopsis and I'll refer you to it. But what we basically have is three banks, three sets of English



1 litigation proceedings. In one we had the High Court, saying Justice Bright, he was
2 unconvinced that it was appropriate to grant an injunction in this case because injunctions
3 and anti-suit injunction is not available under French law. The Court of Appeal has overturned
4 this decision, and they've essentially said, like, look, it's not part of their toolkit, but it's not
5 antithetical to French laws. So, this being the case we will go ahead and we will issue an anti-
6 suit injunction to restrain the Russian litigation. There is another High Court decision from
7 Justice Knowles, also issuing an anti-suit injunction. And then in the third case we had, I've
8 got too many Judges' names in front of me right now, but essentially the last word was
9 with Justice Tier, who has refused to issue an anti-suit injunction in that case again, because
10 it's not available to the French Court. So it's 2-1. And we'll sort of see where the English Courts
11 take this. But a fascinating, as I said, battle between a number of different jurisdictions.

12

13 **NIYATI GANDHI:** Thank you, Sam. That was very interesting. I actually want to take some,
14 I mean take inspiration from some things you said that sometimes, as lawyers, we know
15 oftentimes what becomes relevant is procedural toolkits, practices, legal traditions, all of this
16 becomes really important. And that's why I want to go to Dipen, and I want to ask him, what
17 are these practices what are the unexpected restrictions we are seeing in commercial
18 arbitration?

19

20 **DIPEN SABHARWAL KC:** I'm going to sort of veer away a little bit, right, because the
21 sanctions regime, obviously is causing unpredictability for everyone around. Nobody actually
22 enters into contracts thinking that there will subsequently be sanctions of multiple entities
23 that are going to preclude that. And obviously commercial parties are struggling with that. But
24 the one set of bodies who are actually trying to step up to the plate and try to help out at the
25 arbitral institutions because ultimately they see their role as administering justice and
26 providing access for justice. But also very bluntly between these walls, arbitral institutions and
27 the business of administering cases and making money and if they can't administer cases they
28 can't make any money. And so just in terms of trying to provide predictability, right, let me
29 just give you examples. I come from London, the London Court Of International Arbitration
30 LCIA, profoundly impacted by sanctions because Russian parties used to use London as a
31 favoured seat, and the LCIA as a favourite institution. And the sanctions that started post
32 annexation of Crimea in 2014, followed by sanctions against Russian entities after the Russian
33 invasion of Ukraine, has had a profound impact on the business of arbitration in London. So
34 how has the LCIA reacted to that, to try to get predictability, right? So they've done two things.
35 The first is they have actually gone and taken a license from the UK Government saying, please
36 allow us to administer arbitrations involving sanctioned entities because there is a rule of law
37 and access to justice [UNCLEAR]. So they've actually got the license such that it is a legally



1 permissible activity, it's not a prohibited act. That's the first thing. The second thing that they
2 have done is, when they commence an LCIA Arbitration, you always get a note to parties. And
3 in that note to parties that are sent right at the outset, they actually ask the parties that if you
4 as a party or one of the beneficial owners or the ultimate beneficial owners are impacted by
5 sanctions, please speak up now, so we can actually work with you to see how banking
6 arrangements and transfer of funds and fees would be allowed. I mean, to give you one
7 example, for example, the ICC and I'm digressing from the LCIA for a second, the ICC does all
8 of its business in US dollars in terms of calculating arbitration costs and Tribunal fees,
9 the ICC now for entities that are impacted by sanctions, will compute numbers in other
10 currencies to actually facilitate the administration of arbitrations. So, I think institutions have
11 a big role to provide certainty and comfort. And I think they are stepping up to the plate.
12 However, they are just one cog in the machine. And I think while they can mitigate the
13 uncertainty, I don't think they can eliminate it.

14

15 **NIYATI GANDHI:** [UNCLEAR] it will also be interesting to know how lawyers are being
16 impacted, how our legal professionals are being impacted [UNCLEAR]

17

18 **BAIJU VASANI:** Thank you. As you can tell by the grey hairs in my beard and the stress
19 etched across my face. I have three young children. So I'm going to use a playground analogy
20 for sanctions, if I may? This is how sanctions are meant to work. A, B, and C are friends. A
21 does something naughty and B and C say to A, I am going to shun you until you change your
22 behaviour and A says to B and C, yes, you're right. I'm very sorry. I don't want you to shun me.
23 I will change my behaviour. That is how sanctions are meant to work. In reality, the way
24 sanctions actually work. A does the bad behaviour, B and C shun A and now A does not change
25 its behaviour. Instead, it goes to D and E and says, We've been acquaintances. Can we now be
26 real good friends? And D and A look at B and C and say, Well, those are the popular kids.
27 They're always trying to bully everyone and think, they're so cool. Yes, A, I will now be your
28 best friend. And now A, D and E are good friends. So what sanctions actually does is not
29 change the conduct of A.

30

31 What it does is realign the geopolitics of this world. And so for A, you read Russia, for D and E,
32 read India and China for B and C, United States and Europe. And that's essentially how the
33 world changes because of sanctions. Now it actually means something for those of us in this
34 room. And it's as follows. For at least 20 years and Dipen, alluded to this, London has feasted
35 on Russian work. Okay. There are people who have made their careers just doing Russian
36 work. For whatever reason, the Russians loved litigating and arbitrating in London. They
37 thought it's all about fair play, rule of law, cricket, right? It is the place to be. In 2014, you saw



1 the first sanctions in relation to Crimea. Now I spent three years in Moscow, practicing in
2 Moscow before the war. And I already saw then a shift in Russian corporate work, where
3 London, LCIA and English Courts were no longer favoured after those 2014 sanctions. Instead
4 everyone was told, use SIAC. Right? So what started to happen was you started to see contracts
5 signed around the world with SIAC arbitration. Of course, it wasn't immediate because
6 disputes happened five years, three, five years down the track. But now you're seeing an
7 increase in SIAC Russian arbitrations and a decrease in LCIA arbitrations, not just because of
8 sanctions on the war. But that subtle shift has coincided with this seismic shift, where now you
9 have these massive sanctions by the Western World for want of a better phrase. Now it is still
10 possible for those of us who hold passports of those western worlds with the sanctions to
11 undertake that work. But we have to get a license. And the license process is horrific. The
12 licenses themselves are strict. But beyond that and again, Dipen alluded to this, the
13 reputational risk that some, particularly law firms feel in undertaking this work mean that they
14 are washing their hands of not just sanctioned Russian work, but any Russian work or
15 anything that might seem to their other clients to be taking a position in relation to the Russia-
16 Ukraine crisis. Now, what has that meant for dispute resolution in relation to Russia? Which
17 is a big jurisdiction for disputes. What that has meant is a shift in dispute resolution in relation
18 to Russia from west to east. And in particular, what we've seen, our Russian lawyers have
19 moved out of Moscow. They have situated themselves in Dubai. Some of them have left for
20 personal reasons, others to avoid conscription, frankly. And specifically, the Russian again are
21 being told that now the best seats are Hong Kong as Sam described, although now it seems
22 that maybe not even Hong Kong is safe or Dubai. Singapore is now 50-50 because they do have
23 sanctions, although in truth those sanctions are weak. Now, as I said, sometimes barristers
24 and lawyers, smaller law firms are doing Russia work with Russian Counsel under a license.
25 But what I thought what was very interesting for this audience is what exactly those Russian
26 law firms require when they do this work? They are excellent lawyers. The Russian lawyers are
27 absolutely fantastic. But the two things that they need are, one, English law expertise. And I
28 know a lot of people in this room are English solicitors and barristers. And the second is
29 English advocacy. So they feel they need someone who can speak and write English in a native
30 way. And it struck me as I was preparing for this that, in fact, Indian lawyers are very suitably
31 paced to do Russia work, in the sense that there are no sanctions preventing Indian lawyers
32 from doing Russia work. You are native English speakers. It's an official language of the
33 country. And as I said, a lot of you have English law qualifications, or at the very least, Indian
34 law and English law are based on the same common law system. So what I see is a real
35 opportunity, a vacuum if you like, where Indian lawyers can step up and work with Russian
36 law firms to fill the vacuum that is left by some of us on this podium. At the same time, you've
37 got India who was D in my example, saying to B and C, I used to do what you wanted me to



1 do, and now I'm not going to, very good. I like that. And I'm going to do my own thing. And in
2 fact, I'm going to deepen my relationship with A. And as Rishab spoke about, deepen my
3 investment. And there is another opportunity where your existing clients may be interested in
4 pharmaceutical and technology and other areas to have new relationships and investment in
5 Russia, because there is a vacuum there as the Europeans and the Americans pull out. The
6 Chinese, the Indians and others will go in and the question is, what are the dispute resolution
7 clauses your corporate colleagues are going to put into those contracts? MCIAs should be one
8 of the choices. And really, there's an opportunity, I think over the next five years, as those
9 contracts feed in for there to be disputes where Indian lawyers are front and centre. So what is
10 our loss is your gain. Two words of caution. And this again goes back to what Rishab said. One
11 is where law firms have lawyers who have British passports, US passports. There is a
12 possibility when you do sanctioned work as a law firm, you are subjecting your partners in
13 particular, potentially not associates, but potentially so, to sanctions liability as a result of the
14 way law firms work. I would say that's one. Second for your clients. And this is what Rishab
15 talked about. The notion of secondary sanctions. Secondary sanctions are an
16 invidious, horrific, I think long arm reach, which is that, even if the sanctions don't apply to
17 your nationals, the United States Government, in particular will block you from any US work,
18 any US dollar transaction and say it's them or us. You can't choose. And the third thing I think
19 is one that I know they're working on, and that's payment, right? I know they're trying to work
20 on a Rupee-Rouble corridor, but that's all to say on my playground example, I think we are in
21 the process of A and D and E becoming closer friends, B and C shunning, and I think it's an
22 opportunity for everyone in this room to take advantage of that.

23

24 **NIYATI GANDHI:** Yes, absolutely that was the intention of this panel. But I just wanted to
25 say that as of today, as you said, the Vostro accounts are empty and things are going to change.
26 Just moving on very quickly. We know we're all lawyers. We know we come up with creative
27 solutions. We'll get the dispute through till the end. But again, as Indian lawyers, we knew, we
28 know that getting a judgment is only half the battle won. We need to execute the judgment.
29 We need to get our money back and I wanted Rajat, to talk about his experience trying to
30 enforce judgments against sanctioned entities.

31

32 **RAJAT RANA:** Thank you. So I have this monumental task to talk about something that I've
33 obviously in my last panellist towards end of the panel and also to summarize what I lived
34 through last six years of my life trying to enforce several arbitration awards against Venezuela,
35 which, as you know is a sanctioned country in the United States and some jurisdictions. So, I
36 love hypotheticals, so just imagine that you go through your arbitration, you hire top legal
37 minds and you spend several years and you have arbitration award and you win millions and



1 in some cases billions of dollars. You pop up, open the bottle of champagne, you go to bed and
2 you say, okay, now let's go collect money. You have a private investigator who tells you that
3 there are assets in the United States. You try to attach those assets and, next week sanctions
4 are imposed. And I'll give you this, obviously, as I said, I lived through this in 2018 we
5 arbitrated several arbitrations against Venezuela because in 2011 Hugo Chavez sat down in his
6 office and just expropriated several projects in Venezuela. And in 2018, because of the
7 elections in Venezuela, US Government decided to impose sanctions and through private
8 investigators, several judgment creditors who the last time I counted have \$48 billion in
9 judgments against Venezuela, identified that Venezuela owns this oil 100% shares in this entity
10 in Delaware. So there was a mad rush to go to Delaware, because the rule in Delaware is first
11 in time, first in line. And as Dipen used this word which really struck me it was 'lack of
12 predictability' and I think that's the world we lived in because your clients keep calling
13 you, when the hell am I going to keep getting, when am I going to see the money in my bank
14 account? I've paid you enough in arbitration, when will I see the money? You have no answers
15 because there is no law in the country. And the crazy part, I think it's also a lot of politics is in
16 2018, when this decision was announced to sanction Venezuela, you have these proceedings
17 going on in US Courts, and at the same time, United States Government announced that
18 they're going to recognize Guaido Government, which was the Government that United States
19 was supporting. So you have two Governments and you're enforcing an award in Court and
20 the Court, the Judge is like, what the hell am I supposed to do here? And then there's a briefing
21 schedule. And there's a delay. And then the Government and the Courts line that they're going
22 to accept the Guaido government. But the point is and there's good news towards the end that
23 I'll share that. Now it's been since 2018, you are enforcing these arbitration awards, and you're
24 trying to attach the shares of this entity that's owned by Venezuela. There is no Case Law, as
25 we said there's about sanctions, we don't know which Government to recognize and there's no
26 regime to sell the shares. We don't know how to auction shares in the United States to enforce
27 arbitration awards. And their bondholders, their arbitration award holders and then the issue
28 in each of those cases that became was you're trying to enforce these awards. Sometimes you
29 have an arbitration against Venezuelan Government itself. Sometimes you have arbitration
30 against state owned entities. So Venezuelan oil companies, Venezuelan Ministry of Defence.
31 So how do you say that you can enforce these awards. And so we got into this huge battle of
32 piercing the corporate veil, which is a nightmare in the United States, especially in Delaware
33 because you really have to show that the state controlled the day to day activity of the
34 Government. And that went all the way to the Supreme Court and now it's back. But the key
35 issue that the Court struggled in the United States was all right. If we have this arbitration
36 award and there's a sanctions regime. And as you may have heard a lot of this today about to
37 get licensed. At least the Courts decided that license is not going to stop you from proceeding



1 with enforcement and execution of the award. It's only when you're about to collect from the
2 escrow account you have to show that you have license and OFAC is a disaster in US like you
3 send them letters and there's no response. And in the meantime every litigant, so there are
4 several of them had to show that at the time so the big question for the Court was do you really
5 have to Pierce the corporate veil to attach Venezuelan assets at the time the wrongful conduct
6 took place, so let's say in this case 2011, or at the time the award was given, which was different
7 in different cases. So the Court forced all, at least six litigants to go to trial on all those different
8 dates. So say our clients, they had three different dates of award, and ultimately, we won on
9 that. And we did, the Third Circuit recently affirmed that. And obviously as politics has its way,
10 the United States Government overnight decided that they are going to ease the sanctions. And
11 recently, as I promised, the good news is that the United States decided that they will ease the
12 sanctions and some of the judgment creditors who are unable to collect on their awards can
13 actually start operating in Venezuela. So a lot of oil and gas companies whose assets were
14 expropriated in Venezuela are now actually going back to Venezuela so they can collect oil and
15 sell oil and actually set it off against the arbitral awards. And second, the best news I think that
16 came this year for a lot of our clients was that the Government said you don't
17 need OFAC license anymore. So I think it was good news for us and the bad news for Delaware
18 law clerks and Judges because there's a massive influx now in Delaware Courts to basically
19 start attaching those assets. But the good news I told you actually, next week, October 23rd is
20 the day when all the shares are going to be auctioned. All the judgment creditors bondholders
21 who have been trying to chase these assets for now over a decade are finally going to be part
22 of that auction. First in time, first in line. But there are few takeaways right like you don't have
23 to wait till the sanctions regime passes its time and start enforcement. You have to with this
24 rule, as I said, first in time first in line, you have to get in the line, you have to still start with
25 the enforcement proceedings or execution proceedings. But a lot of times people ask, what's
26 the takeaway? And I'm obviously going to put this question to the whole panel, what takeaways
27 do we have from the execution stage? And obviously it's unpredictability, what would I advise
28 my clients if they come to me and say, hey, we have this arbitration award, and there's a
29 sanctions regime and so it is my experience what we did was we really made great friends with
30 private investigators and they started tracing assets around the world and a lot of creditors,
31 actually and we did, too. We went to the country I never heard of, in Curacao in the Caribbean.
32 So what Venezuela was doing was trying to avoid sanctions. They started entering into this oil
33 for cash deals. They entered those oil for cash deals with China, then they enter a lot of those
34 deals with Indian companies. So we moved in Curacao of course, to seize those oil barrels. So
35 as soon as those barrels are taken off the ship, so sometimes to seize those ships. And you'll be
36 fascinated with the work that some private investigators do to actually track on live basis where
37 the ships are moving and you can see in front of your screen where the ships are moving so



1 you can attach those ships the same day. So, I think that was my experience just trying to figure
2 out the best way to avoid this as opposed to be stuck in one jurisdiction. And I think recently
3 if I recall [UNCLEAR] enforce in Asia, I don't know if in Malaysia or something. They found
4 some Venezuelan assets there oil assets but that's just my take on that.

5

6 **NIYATI GANDHI:** Wow, I'm not sure if I should call it a nightmare but you had some
7 success. Okay. So my takeaway from this entire thing has been that global politics are
8 impacting global business in ways that global business does not accept. So I wanted to go
9 to Baiju and I wanted to ask him if investors are using investor state dispute settlement to
10 challenge sanctions measures, or in any other creative way.

11

12 **BAIJU VASANI:** Yeah. Thank you. So as you can probably tell, I'm not a big fan of sanctions
13 because I don't think they work. I also don't like the way that we as lawyers treat sanctions like
14 inviable edicts from above, that we for some reason don't question. I think the first thing we
15 have to think about is where sanctions come from and Piyush put it very rightly is that
16 sanctions come from the United Nations Charter and that's where they stay. The notion of
17 unilateral sanctions by a nation don't actually sit very neatly in the framework of international
18 law. You won't find within international law, a power potentially through countermeasures,
19 but other than that there's not really a sound basis for unilateral sanctions. The nation and it
20 won't be any surprise and I can say this as a citizen of that country, it's the United States that
21 has pushed the notion of unilateral sanctions. When it started it's Cuba, Iran, Libya, and
22 various African nation sanctioned over the course of the last several decades. What you see
23 now, though, is an unprecedented number of nations imposing unilateral sanctions
24 collectively or regional sanctions in case of the EU on Russia. But as I said, I don't think they
25 are effective. They just create a headache, a labyrinth, a system that's overworked for licensing
26 and all you get is realignment of geopolitics of the type that I have described.

27

28 But more than that, I think one has to look at how sanctions actually come into being in any
29 particular nation. And if you look at it, there's no uniformity in how sanctions are applied.
30 Often the Legislature just says the President has the power to impose sanctions on anyone they
31 want. And then this President just says, you, you, you and sometimes you can look at that
32 information and it's really like snippets from public [UNCLEAR]. This person was seen with
33 Putin in a in a dinner or something like that. And it's questionable as to how these sanctions
34 are actually applied. And then you think, okay, but that's fine. Let's say you can be broad, how
35 you apply sanctions. But then how do you get out of sanctions is really difficult. There is no set
36 uniform due process methodology for saying, hey, you put sanctions on me or on my company,
37 but I think that's wrong. I would like to come out of it. It's very difficult in many jurisdictions



1 to even come out and fight sanctions. Then the effect of sanctions. Believe me, I don't feel sorry
2 for these billionaire oligarchs, right? But when people can't pay their children's fees, they can't
3 go to shop for their groceries, it is on not just those individuals, but so many sort of trickle-
4 down individuals associated with them. It really becomes an imposition of massive scale. I
5 mean, the whole world is essentially shut down overnight. So then you ask me about the
6 question of foreign investment. And this is interesting because it's a new frontier and there are
7 going to be cases testing the proposition, which is, where you have sanctioned individuals or
8 companies that are foreign investors, and those sanctions have been applied by the host state,
9 where the investment is made. And the sanctions have been applied in the circumstances that
10 I've described may be somewhat arbitrarily. The due process of coming out of the sanctions is
11 very difficult and yet because of the sanctions, you've had freezing of assets and not only
12 freezing of assets, but there is this notion that they are going to take a fund of assets and they're
13 going to give it to you to compensate Ukraine. Now Ukraine is a victim in this, it needs to have
14 compensation. The question is whether those frozen funds of private investors, individuals
15 who have a very tangential relationship with the Russian Government is the fund by which one
16 should take to make that compensation to Ukraine. And again, there is no venue to test this.
17 But there is one, and that's investment treaties. Now, I think it's going to be very interesting
18 to see how an Arbitral Tribunal when faced with this question is going to say, okay you are a
19 foreign investor, but you are sanctioned. Your assets have been confiscated with this idea.
20 We're going to freeze them to then use them to give to Ukraine. Is that a breach of the
21 treaty? Now, I can guarantee you that if they find it is a breach of the treaty the anti ISDS
22 movement is going to go ballistic, right? The idea that you can do that against sanctioned, but
23 honestly, I think there is a case to be made that these sanctions that come out of certain
24 Governments, the way they're approved. And if it wasn't sanctions, if it wasn't labelled
25 sanctions, it was just Presidential edict by a Dictator, we wouldn't have the same reaction. But
26 it's almost the same thing. I hereby decree you are a bad person and therefore, I'm going to
27 take your stuff. Just because we label it sanctions doesn't give it some sort of immunity. So I
28 think this is a very interesting topic. Watch this space and vice versa, because Russia is of
29 course doing the same thing. It is confiscating and there'll be cases against Russia. But I think
30 this is the latest frontier. And let's see if how sanctions will be affected by ISDS.

31

32 **NIYATI GANDHI:** At least that pre-dispute notice won't go ignored like your fact letters.
33 Okay, so I think we've covered at least most of the substantive ground. And I want to start
34 revisiting the panellists to ask them for strategies to how to solve these problems.
35 And Rishab, I thought I would start with you. I wanted to understand what can we, I mean,
36 what can an Indian company do to avoid these disputes that sound like a nightmare? We don't
37 want to be engaged in sanctions related disputes to be.



1

2 **RISHAB GUPTA:** Just before I answer that, I was jotting notes as each one of you was
3 speaking and I started off my bit by saying that there is no jurisprudence in the Indian context
4 on all these issues that you'll hear. But actually the beauty of Common Law of course is that
5 most of the things that we do on a day to day basis can then be stretched to exactly account for
6 the issues that we discussed. When Piyush for example mentioned bank guarantees, we all
7 know that one of the defences to bank guarantees is egregious fraud. But the lesser known
8 defence is special equities. And special equities arose in the Indian context for the first time in
9 the transcribed case from the Bombay High Court where there was civil unrest in Yemen,
10 sorry, I was referring to the special equities defence to the invocation of bank guarantees under
11 Indian law. No I don't see it as being that difficult for an Indian Court to stretch special equities
12 to a sanction scenario because if they could do it for civil unrest in Yemen and effectively what
13 the guarantor has to show in those circumstances is that the situation on the ground is such
14 that if it were to even be successful in the underlying dispute it would never be able to recover
15 that money. So if you could do it for civil unrest, I suspect an Indian Court could stretch it for
16 sanctions as well. Dipen talked about arbitrability. Now that frankly, in the Indian arbitration
17 context, that's one area of flaw which is hugely in flux. You've got the *Anupam Mittal* case
18 recently in the context of shareholder disputes. I've spent a good part of yesterday and today
19 in the [UNCLEAR] global case which again is all about arbitrability. And I see no reason why
20 Indian Courts, when encountered with similar issues, would deal with sanctions as well in
21 much the same way as some of the foreign Courts have, Enforcement, I thought is another
22 interesting one. As you were speaking I was reminded of a case which is currently before the
23 Bombay High Court called [UNCLEAR] and there the defence that [UNCLEAR] an Indian
24 company has taken is to effectively say that they can't comply with the ICC arbitration award
25 because payment of the monies would not be allowed by the RBI because RBI has imposed
26 certain, which, I think, factually maybe incorrect that there are certain sanctions which
27 effectively prevent it from even paying the arbitration award.

28

29 **RISHAB GUPTA:** So almost like an Indian public policy kind of a defence. And then of
30 course, what Baiju was saying about LCI, VCR coming, that's very well known to us in the
31 Indian context. I mean, we all began in the Indian context by having lots of LCIA clauses. But
32 we all know that today SIAC is a default choice. Now that has nothing to do with sanctions.
33 But again, it's a very sort of similar movement. That I now hear Russian clients have taken
34 which is the same what has happened in the Indian context. Just coming to what you were
35 saying Niyati, the reality is that at least in my limited experience of dealing with these things
36 that, as Niyati said, no one wants to get embroiled in this, and Indian companies, usually
37 when they do get embroiled, are really cross about it for reasons that Baiju was saying that,



1 look, India has no sanctions. India has no real position on all of this. Yes from a geopolitical
2 standpoint, from an economic standpoint, it's benefiting from it. But the Indian companies by
3 themselves get really cross about the idea that in circumstances where they're primarily
4 governed by Indian law, when they themselves have no real position on this issue, why should
5 they be worried about sanctions that have been introduced by foreign jurisdictions? Now,
6 unfortunately, if you're operating outside of India, if you have exposure to these jurisdictions,
7 you've got to take them seriously. And frankly, and unfortunately, the only real way to deal
8 with it is to try and get rid of the jurisdictional nexus. Because if you try and get rid of it after
9 having established the jurisdiction nexus and you still want to go ahead with a transaction
10 which is otherwise prohibited, you're really just looking at balancing what the penalties against
11 you would be from, as opposed to the benefits of it. And how do you do that? Of course there
12 are lots of concerns over circumvention there. And circumvention itself is a big problem. But
13 the ways that I've seen it happen and I mentioned this briefly, is that many Indian companies
14 have had foreign nationals sitting on their Boards resign. Many of them have had them recuse
15 from resolutions which would otherwise impinge upon sanctions. There are instances where
16 Indian companies have actually changed the nationality of the counterparty with whom they're
17 entering into a contract just to avoid the sanctions. There are lots of clauses that you put in
18 contracts, so you take proper representations as to whether or not the counterparty itself is
19 compliant with sanctions. You would have usually a clause which would say that to the extent
20 payment is being made by the Indian company, it's not being made to a bank account, which
21 is either owned by a company that is sanctioned or encumbered to a bank which is sanctioned.
22 You would also do a lot of due diligence, usually to find out who the ultimate beneficial owners
23 are. But I think as many of the others were saying, that it's really at that point of time shooting
24 in the dark because how you may end up reaching sanctions is just really hard to figure.
25 I mean, I read in the news. I'm not personally involved in any of it that seven Indian companies
26 were recently sanctioned because they were selling some US technology to companies which
27 were ultimately sanctioned. And I'm pretty sure none of them actually realized that they were,
28 in fact, reaching sanctions by doing that. So the way it might hurt you is sort of beyond
29 imagination in lots of different ways. The things that I've mentioned are at least ways in which
30 I have seen Indian companies address it, but I'm sure there are other ways to do it as well, and
31 probably people in the audience would have to [UNCLEAR]

32

33 **NIYATI GANDHI:** That's all very helpful. And that again gives me a good segue to go back
34 to Piyush. What can a transactional lawyer do to pre-empt the issues that you have seen? What
35 could a transactional lawyer do to react appropriately to the issues you're seeing? We would
36 really appreciate your thoughts.

37



1 **PIYUSH JOSHI:** So quite frankly, at least in infrastructure projects it is foreseeable in terms
2 of financing and project financing that there is a future that since the whole project runs for
3 20 years, some event may impact part of it, and some events may not. So, the flexibility
4 provided within the structure is maintained. So for example, in the projects that were
5 restructured due to the Pokhran sanctions, we ended up with an implementable framework.
6 We got the financing implemented, but unfortunately the cost of implementing that
7 restructuring was exponential, which resulted in the project cost being staggered and to a point
8 that the Government counterparty reneged from it after a certain point of time.

9
10 So which is what the issue is that as a transaction lawyer there are obviously devices, you can
11 foresee and structure it around known, sanctioned countries, known counterparties who are
12 there. But the project cost that comes out of that restructuring, it may not serve the project at
13 all. So for example, the road project that we did, it ended up with a high tolling fee, which went
14 to the High Court. And although the transaction survived a nuclear bomb, it could not survive
15 the single Judge. We ended up with a situation where we are stuck in limbo, although we
16 managed to restructure it.

17
18 **NIYATI GANDHI:** I think that was the funniest part of this panel.

19
20 **DIPEN SABHARWAL KC:** I just want to say something right? I think on this subject about
21 what can parties do to avoid sanctions or navigate their way around sanctions and what plans
22 and strategies we can come up with. And we're all clever lawyers and we can all come up with
23 strategies. But it's a bit like what Mike Tyson said, right? Everyone's got a plan till they get
24 punched in the face. And then all plans go out and you can have all the plans in the world, but
25 sanctions are passed by foreign countries, by foreign Legislatures, driven by their foreign
26 policy considerations, and what the United States is going to do tomorrow or day after is
27 completely unpredictable. Their geo- political strategists, who will give you predictions, but
28 nobody knows anything, right? And I think the thing that what we can do is we started today's
29 discussion, right with Niyati saying, why is it that a bunch of Indian lawyers sitting in this
30 room in Delhi, why should you care about sanctions? And hopefully what you've heard in last
31 hour and a half is that even though your clients may think that sanctions are not really
32 something that is relevant to them it's probably going to be in some way that they don't know
33 about. And actually the best thing that we, as lawyers can do is to educate ourselves and
34 spot those issues. And we can counsel our clients when they're navigating. And Rishab gave
35 some excellent ideas and say, you got to think two steps ahead, can't eliminate risk, but you
36 can certainly mitigate it. And I think that educational piece where people are actually
37 identifying that, I mean, in my firm, we have at least a dozen lawyers sitting in New York,



1 London, and Brussels who do nothing. 365 days a year they just counsel clients on sanctions
2 and I mean, I never used to think about sanctions, but now I talk to them on a weekly basis
3 because there's some element of some work that I'm doing that I think is being touched by
4 sanctions. And I think that, unfortunately, is going to become a reality. It has become a reality
5 for those who practice in the US and London. And it's a bit like a forthcoming attraction you
6 see in a movie of trailers, like coming near to a cinema close to you. I think this is probably
7 coming to a case or a transaction close to you.

8

9 **RISHAB GUPTA:** Can I just add one thing. Just to add to what Dipen is saying. That of
10 course there's unpredictability, there may still be a little bit greater predictability if you are a
11 local company of those jurisdictions, because ultimately their interest perhaps is still being
12 taken into account. There is some lobbying effort going on at their end, but no one is thinking
13 about the Indian companies when they're doing it, right? So the level of unpredictability for
14 an Indian company is just being taken as an example, but I just mean anyone who's not outside
15 of those jurisdictions because to you it would always strike as something which, a, you've never
16 heard of, perhaps never even encountered, and you would encounter it for the first time when
17 actually someone asks you that question. And at least in my experience, that question very
18 often gets asked when you're doing a large transaction. So either you're entering into a contract
19 and a vendor asks you, are you fully sanctions compliant? Have you looked into X? Have you
20 looked into Y? I saw that one of your shareholders is a Russian entity. How does that impact
21 me? Or you're buying an asset and your counterparty asks that question, or you want some
22 loans, and the bank asks you that question, and you suddenly start thinking, Well, I never
23 thought that those things were relevant to me at all. But because a counterparty, a vendor, a
24 bank asks that question you start doing that due diligence and perhaps at that point of time,
25 it's a little too late.

26

27 **RAJAT RANA:** Yeah. Just one point for me. I was just thinking about the solutions, and I
28 think it's important to consider just going back to the enforcement. And I think oftentimes we
29 tell our clients that you can actually consider selling your arbitration award. And sometimes
30 clients don't think about it. But there are a lot of hedge funds, private equity funds around the
31 world who will actually buy your arbitration award. And maybe for 30 cents, a dollar, maybe
32 higher. And they engage law firms where we actually do really detailed analysis. So how would
33 a US Supreme Court come down on this issue? Do you really think the US Government is going
34 to change this issue after elections, and you engage like lobbying firm in DC. And you come
35 back and say, okay, I think this is your analysis. And you go to a hedge fund and say, you said
36 20 cents, but I think it's 60 cents. It gets a little crazy. But there are ways out of it. So, if the



1 movie really comes near your, arbitration or your litigation, I think there are ways out of this
2 and you can be creative about it.

3

4 **NIYATI GANDHI:** Sam, some comments from you? My question to you was going to be on
5 dispute resolution for dispute resolution clauses, how we should be thinking about drafting
6 them in India, but you can just skip it if you want to?

7

8 **SAMANTHA ROWE:** I couldn't agree more with what everybody has said. There are just no
9 magic bullets here. It seems to me that the easiest thing that you can do and really that anybody
10 should be doing unless you absolutely do not care about the United States of America and have
11 absolutely nothing to do with it, which is rare for larger companies, it is thinking about at least
12 contractual allocation of risk. So the substantive point, which, frankly, is the easiest point to
13 deal with. And we always already have doctrines to deal with that, we have applicable law
14 clauses, we have *force majeure*, we have illegality. We are increasingly seeing specific
15 sanctions clauses being inserted into contracts. So all of that should be part of what you're
16 thinking about as a transactional lawyer. The disputes, lawyers, it's really hard, and I honestly
17 actually don't have very many good answers for us because you can't control for who is and
18 who isn't going to be a neutral jurisdiction in the future. You can't control for what is going to
19 be a governing law that will contain sanctions and that won't contain sanctions, regulations.
20 Ultimately, I think this is what Baiju was getting at, it's, okay great, you can get to the point of
21 having an arbitration award, but you need to enforce. Where are the assets? What's going to
22 be the legal regime in the country where your counterparty's assets are held? All of that just
23 can't be controlled for and so I think it's right that this is about flexibility and creativity at the
24 end game.

25

26 **NIYATI GANDHI:** Or if you want to be in arbitration, you choose Paris. They'll always pick
27 arbitration. Okay. I think there are no more questions from me, but I'll open the floor up for
28 some questions. Anyone? Vikas.

29

30 **AUDIENCE 1:** Hi Baiju, I think my question is to you actually on secondary sanctions. And I
31 think it's a little bit to do with what Samantha was talking as well, about how distant you need
32 to be from a country to not really worry about sanctions. As a lawyer, for instance and you are
33 doing some Russia related work, do you really think it has an impact in terms of other clients
34 that you might have in other jurisdictions and if there are certain countries where that's a
35 problem which is a higher risk than others I'd love to hear that. But is that really a problem for
36 people like lawyers or is that more for businesses that are doing business in multiple
37 countries?



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BAIJU VASANI: Well, now that I am gladly no longer with a big law firm, I'm going to skip that question to Sam and Dipen. But in terms of businesses, I think it's very critical. The way the US looks at it is the big gorilla in the room. Right? And it is. So it has economic power. And it can bully others to abide by its sanctions, even if those nations don't have their own sanctions. And the way it does that is primarily through the United States dollar, which is the currency that everyone uses for their transactions. So if you do anything in the United States dollar, you have jurisdiction, regardless of anything else. So that's one because every United States Dollar transaction has to go through clearing in New York. So the first thing you do is you don't use US dollars. Which I think is going to backfire on the United States as the BRICS start using a different currency and petroleum stops being denominated by dollars and different things start happening, which pushes everyone away from the United States. The second is simply a choice. Right? The United States is almost, like Rishab says, you decide to yourself, is it worth it for me to do transactions here, if it means that I'm pretty much excluded from the United States because if I'm doing both, I'm going to get a penalty. Or you take the penalty, but it's still worth it, which I don't think is a good idea anyway, because reputationally and it's not just a penalty then the US are asked to you and it's messy. So for me, it's really becomes an economic choice. And again, it goes back to my point that sanctions don't do what they're meant to do, which is to correct the behaviour. What they do is realign the world. And I don't think they're realigned the world in a good way for what the sanctioning country wants it to. I guess it's about reputation and dollars, right?

DIPEN SABHARWAL KC: Absolutely. I mean, I think it is increasingly hard. I mean, firm like White & Case, we operate in 31 countries and very I mean so so, it's extremely hard to work around sanctions. We obviously have lots of US nationals who are partners, therefore, very hard to escape OFAC and the licensing requirements. And finally, reputational issues, right? And I think all of that and I think this is the bit that we've obviously correctly focused on the legal impact of sanctions because we are lawyers but sanctions have their own soft value. And the idea of for a business, even for lawyers to be actually walking a fine line, even if you're on the right side, perception matters. And I think it's going to matter to clients, and it's going to matter to lawyers.

AUDIENCE 1: So taking my question from where you left. Under Indian law, especially under Advocates Act out here. If a client, if a Russian client does come to you for advice and for representing him, under Indian Law, you cannot probably, even if a Pakistani comes and it's a declared war, maybe you would not be able to not appear for him or not represent him. So, a, whether this holds true for US as well? That's question number one.



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BAIJU VASANI: I can say very quickly so we have Cab rank rule as barristers. But when the sanction question came out, everyone looks very closely again at the Cab rank rule and actually only applies to Court litigation. It does not apply to foreign proceedings. So you can, if you so choose, as a barrister, say no, to a foreign proceeding simply on the basis that the client is sanctioned. If it's a Court case, that's a very different matter. And Cab rank would apply. But I think law firms, it's absolutely business, right?

DIPEN SABHARWAL KC: Yeah. I think ultimately for example, right now, let's say there's a sanctioned individual who shows up at a firm and wants representation. Effectively for our firm to represent him or her, we will actually need to go take a license, right? So essentially, it is a prohibited activity to act for a sanctioned individual or enterprise without seeking permission and the process, that's essentially the discretionary exercise and you have no legal obligation to seek that permission. That is very much a choice that you have.

BAIJU VASANI: Can I just say you raise a really important point, which is access to justice. And there was a recent decision. I want to say it was [UNCLEAR] I can't remember the case. But where, oh, yeah. It was the banking case. The *Mints* case, yeah. Where the Court I think it was, the Court of Appeals said that it's very important, maybe it was another case, but it's very important that even sanctioned individuals have a right to access to justice and not just for defence, but also to prosecute rights. Right? What then happens to the proceeds is a different question. But access to justice is very important. And for that reason, I think you're absolutely right to raise the question of turning people away on the basis of sanctions when there's an access to justice issue, I think it's a very dangerous line that lawyers are walking. But I think it applies more to the barrister group than it does maybe to law firms, particularly global law firms.

AUDIENCE 1: So that brings me to the next related question, whether such sanctions in India, to a country like India, where US sanctions are there, would it be a change of law? Can possibly as an arguing Counsel, or can I say that, yes, there's a change of law under Indian context, and therefore maybe Advocacy. Advocate Act will be second fiddle to it and there'll be a change of law, a, in me accepting to represent or denying to refusing to represent? That is a, and b, even under the contract while defending non- performance because of sanctions, would the change of law concept be made applicable to countries like India, which are probably I don't know whether it's under direct sanction or indirect sanction, however you would want to put it? And you can answer both of them.



1 **RISHAB GUPTA:** The first part has already been answered. The Indian Advocates Act point.
2 Though I just wanted to say that on the barrister part as well, the Indian position is actually
3 very similar that theoretically there is that responsibility that we have as advocates under the
4 Indian Advocates Act. But there are exceptions built to it. And what the most recent judgment,
5 the *Mints* judgment, also does, is very clearly identify those exceptions. On the second point,
6 I suspect that's a question of the governing law of the contract, right? So if the governing law
7 of the contract is Indian law, then you ask the question as to whether or not the imposition of
8 sanctions would constitute, a, change of law. Now, change of law is not a defence to non-
9 performance under the Indian Contract Act, not under common law generally, it is usually a
10 clause in the contract, and then you have to meet that test, except frustration. Frustration is
11 recognized as a concept as a defence to non- performance. So it would if and I mean, obviously,
12 this panel is not about trying to identify what precisely are the elements of frustration. And
13 those would differ from jurisdiction to jurisdiction. But I think generally speaking,
14 the answer unfortunately, to your question would be a, which law governs the contract, and b,
15 whether or not that specific issue, change in law has been identified as a defence to non-
16 performance in the contract itself. But I don't know if others have...

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18 **SAMANTHA ROWE:** Unless maybe you could argue that sanctions is somehow a
19 mandatory rule that applies, place of performance, something you could try to bring it in that
20 way.

21

22 **RISHAB GUPTA:** But again, unless the contract actually provides for it, then you have to
23 say that either the Common Law, if it's a Common Law jurisdiction or in Indian context, for
24 example, the Common Law, then has been codified into the Indian contract. Then you have to
25 look at the Contract Act to find the answer .

26

27 **RAJAT RANA:** So just quickly going back to the question about under US law. So I think you
28 have to distinguish between if it's a criminal case or a civil case. And in a criminal cases,
29 defendants have right to legal Counsel and the Court, if you can afford someone or Court will
30 always find you. And there's a huge constitutional jurisprudence in US Courts, that you do
31 have a right. In civil cases, you can absolutely say no to any case. There is no obligation on me
32 to accept client and represent him. I think on the second point that you just said about
33 contracts, I have at least two instances where contracts, especially had the language under
34 the political risk section where sanctions was one of the exceptions to perform under the
35 contract and in some cases were considered as a breach of contract because if you have a
36 contract with the Government and the Government just unilaterally used a sanction as an



1 excuse to basically avoid performing under the contract that was considered as a default. And
2 you can bring a claim. So it all depends on, I think, case by case basis.

3

4 **NIYATI GANDHI:** Okay. I can take two more questions and only short answers, please to
5 the panel. Yes, your follow up question is already disqualified.

6

7 **AUDIENCE 1:** So I'll take the second question. How have Tribunals reacted to disputes where
8 sanctions issues have come up? Have they laid their hands off and suspended the proceedings
9 or gone ahead with the proceedings? Because they really would have to determine whether the
10 party is sanctioned or not in some form?

11

12 **SAMANTHA ROWE:** I'll go first. I'm sure others have views as well, but I think it depends
13 what the impact is. If the impact is on the sort of substantive questions of performance of the
14 contract breach, default, et cetera they've gone ahead and decided the disputes. There's no
15 magic source about sanctions that makes it well, except your non arbitrability example. But
16 assuming that it is all about sort of contractual breach and defence, et cetera. then they go
17 ahead. The more complicated point is sort of the points that Baiju was getting into, which is
18 where the Arbitrator is a US National, or you have an issue with being able to make payment
19 to the arbitral institution, those issues around payment of Arbitrators and Counsel and
20 institutions, that is where we've really seen the kind of block being put on the proceedings.
21 And I think when the LCIA applied for its license, there were dozens of arbitrations that were
22 frozen because they just couldn't work their way through the payment issue.

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24 **NIYATI GANDHI:** Okay, last question. Niyati, is already here. I should tell you.

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26 **AUDIENCE 2:** [UNCLEAR]

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28 **DIPEN SABHARWAL KC:** I think not in the sanctions context. But you obviously look at
29 the defendant's financial position, right? So if they're an SPV located in Mauritius, with zero
30 assets and then you say, well, we can do this, but it's going to cost you X, and there is only a
31 20% chance you're going to recover this, as a responsible lawyer, you have to counsel them,
32 right? And I think most sophisticated lawyers would take account of the prospects of
33 enforcement, sanctions being one element, but not necessarily the only element.

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35 **SAMANTHA ROWE:** Yeah. I completely agree with that. I think another dimension to think
36 about is if it's a listed company, do you owe obligations to your shareholder? What is that
37 obligation to your shareholders. Should you pursue something, even if it looks like immediate



1 enforcement is impossible because things will change, right? That's the one definite that we
2 can all walk away with today, things will change at some point, and at that point the potential
3 to enforce, you can sell the award. So I think just looking at it being like, oh, sanctions, let's
4 not bother, is a bit short sighted and it requires [UNCLEAR].

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6 **NIYATI GANDHI:** Thank you, everyone for joining us. 04:00 PM is a virtual panel, so the
7 screen is going to change now. Thank you, thank you, everyone.

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~~~**END OF SESSION 4**~~~

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