TERES

INDIA ADR WEEKDAY 4: DELHI

SESSION 1

Anti-Suit & Anti-Arbitral Injunctions - The Achilles Heel of International Arbitration?

08:30 AM To 10:00 AM IST

Moderator:

Sheila Ahuja, Partner A&O Shearman and Co Head of India Group

Speakers:

Justice (Retd.) Mr. S. Ravindra Bhat, Former Judge, Supreme Court of India

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ANURADHA DUTT: Foreign seated arbitration is because of principle of competence-competence. Here I have to also say that unlike UK, when we are deciding anti-arbitration injunctions, we are examining the arbitration, the scope of the arbitration clause, we take a *prima facie* view, unlike UK, which takes a full merits view. We are following what Singapore also takes, a *prima facie* view. So, to my mind this is important because that's what even ***Vodafone*** decided. But what concerns me in this country, I apologize for saying it, but I have to be candid is the delay in court system. Now, I'll give you a recent example of which I saw in many of the articles that are being written is of ***Bina Modi Case, Lalit Modi Case.*** I'm handling that case, but from the arbitration perspective, it's over. But what I want to tell you was that there was an arbitration clause in the family arrangement. Arbitration of ICC at Singapore. So Lalit Modi had invoked the Singapore. Bina Modi and those who were supporting her, they filed an injunction, a suit in Delhi High Court, asking for an injunction against the Singapore arbitration that had been commenced on the ground. Now, this is important because this has some consequence to Anupam Mittal -- saying that this is a trust matter, and trust matters are not arbitrable in India.

Now yes. Now the defence raised was competence-competence and also that the trust had come to an end because of certain factual parameters in that case. So the single judge on the first day itself, following ***Kevina and NALCO*** judgments of hands off and Section 5, which we have, which is notwithstanding any other law, you can't injunct arbitrations, dismissed their suit. But when it went to an in appeal to the division bench, the division bench remanded the matter and said no, file a Section 8 or a 45, file your written statement, and it should be examined in detail. The matter doesn't rest here. It's taken an appeal to Supreme Court on the question whether an anti-arbitration injunction can be granted in view of Section 5. Four years, almost four years, this matter languished. The court didn't have time. It was mentioned about 10 times but the court, I mean, I understand the court's predicament. They said we have criminal matters. Those take priority. I understand that. But the problem is that 4 years we were languishing. No decision, no hearing. So ultimately, we had to withdraw the arbitration and file a suit in India, where the hearing was faster. So, delay is something which I think the parameters are well established now in many judgments, but delay is something which, not just arbitration in all, all aspects is something which touches, delay in pronouncements and hearings is touching all of us in every aspect, including anti-arbitration injunctions.

SHEILA AHUJA: And let's just pick up on that theme and in particular Ms. Dutt when you said comity versus competence-competence, that's sort of what we're looking at if one thinks about the parameters of this discussion. And then let's come to our favourite topic, which is

Anupam Mittal. I'm just going to, in just a couple of lines, just remind everyone of the sort of setup. So there was a shareholders' agreement, the law governing it was India law, right? So that's clear. The law governing the arbitration agreement is not expressly specified, so this is one of the features to Ms. Dutt's point about delay, that delays matters as to where should one even be and what's the scope of framework or governing law that should dictate. And yes, there may be a bespoke problem of delay in certain jurisdictions, like here. But even just not specifying it creates that jurisdictional hurdle which one has to navigate in any court system. Singapore was the seat. The outcome was that there's an anti-suit injunction in Singapore against the prosecuting court in the NCLT proceedings in Mumbai on grounds of breach of the agreement to arbitrate. So, and the arbitrability, of course, of the subject matter under Singapore law. Now, Anupam Mittal, of course, then approached the Bombay High Court and got an anti-enforcement injunction against the anti-suit by the Singapore court. And then the Bombay High Court granted that. Ms. Dutt, you referred to that earlier and we'll come back to this. And then the NCLT Mumbai after that issued the anti-arbitration injunction. So, lots of kind of groundbreaking developments there as between India and Singapore, kind of headlines for most of us who follow these two jurisdictions very closely. The orders were primarily based on this point about non-arbitrability of the subject matter, right? So, I'm going to ask a series of questions. The one question that has been debated, but we have the benefit of Justice Bhat sitting here, so I'm going to ask you quite candidly. Do you think the Indian courts were right in granting the anti-enforcement injunction against the anti-suit? And also the anti-arbitration injunction on grounds of non-arbitrability?

JUSTICE S. RAVINDRA BHAT: I think you can look at it from... depends on which premise you start with. You start with the premise that this is a Singapore seated arbitration, that's very clear. Then the law applicable, the curial court is Singapore. So, and there is an arbitration clause. So, if we follow the law as it existed when the dispute hit the courts, the law is clear that you should not touch the arbitration. But I would rather frame this from another angle, that supposing the issue, supposing the arbitration had proceeded, then it would be an issue of enforcement here, rather than an enforcement of the anti-suit, anti-arbitration injunction itself. Now, is it, would it fit in the 45 category? I don't know whether we have examined it from that angle. We have kind of pre-empted that inquiry by just getting into the enforcement of the interim injunction. So I think these questions need to be, these are larger questions which need to be addressed, and hopefully they will in the Supreme Court because the appeal is pending. But going forward, again, there's an underlying issue of the substantive law. Is it as clear that O&M disputes have to be adjudicated by the Tribunals. That too is an issue which, whether there is an exclusion at all, because there is no exclusion in Singapore, as I understand. If there is no exclusion in Singapore, is our law as clear. If you go to ***Booz***

Allen, which is Justice Ravindran's judgment, it's not as clear. He says, winding up proceedings are non-arbitrable. So there is an exclusion of winding up proceedings. There is a judgment of the Delhi High Court, which seems to suggest that O&M disputes are not arbitrable. On the other hand, you have Gujarat and Bombay which say that they are. So there is a clearly a difference of opinion. And ***Vidya Drolia*** is, let's say, more of a general. There is no clear cut yes or no on this issue. Whereas when we come to other areas, and this is where I draw upon my experience, when you take, for instance... don't get into Company law, don't get into IBC, because I think even IBC is very clear. But you get into, say patents or intellectual properties, it's very clear that when it comes to infringement of patterns you cannot arbitrate. Whereas when it comes to licensing or, you know, things like that, or even infringement of trademarks, they are arbitrable, and in fact, I have received a couple of them. So the point is what is and what is not in. Now, I think there is more clarity, not in the arbitration, but in the mediation segment because there is a negative list, so to say, as to what should not be arbitrated, I mean mediated. And the government has the power to notify what should be there in that. Like, for instance, environmental complaints. These are not per se, arbitrable. So I don't want to expand on that. The point was, I think there could be could have been a different result if we had seen this from a different perspective, because the real lens is 45 and that has been somehow missed.

SHEILA AHUJA: And sir, I really like, first of all, we always do these things and you get an idea for the next topic or two, and a lot of what's been said here, I sort of wrote down as, hey, we can talk about this next, particularly your point about mediation and when you compare to arbitrability. But I like the way you started that answer. You said, it depends on which premise you start with. So what I'm going to do is just change or tweak the premise a little bit. So Mr. Sen, what if there was an express choice of law governing the arbitration agreement, and it was Indian law? Do you think that would change the answer?

PRASHANTO CHANDRA SEN: Yes, I think that would change the answer, because then Singapore and in fact, that kind of I want to make a segue here. Important thing to note about the Singapore jurisdiction is that it has a separate law which is dealing with International Commercial Arbitration. And in that it defines foreign policy quite widely. It takes into account foreign policy of other jurisdictions also. Public policy, sorry, Public policy of other jurisdictions also. And in fact, the reasoning given in the judgment is that had the arbitration law been governed by sorry, law governing the arbitration agreement been Indian law and Indian law says that it can't be...and if that was the argument that it can't be, it's not arbitrable, then the Singapore law would have respected that. Now, this nuanced approach to comity and to an international flavour which is there is because Singapore has a separate international

commercial law dealing with international commercial arbitrations. And I think this nuanced approach is commendable for India also, and which is one of the reasons why I feel India must have a separate law. Because what they have done is they've taken the UNCITRAL Model and covered both domestic and foreign commercial law. And as a result, what happens is many times pronouncements on domestic arbitration issues can create ripples in the international commercial world, thinking that's how the courts are thinking, which may or may not be the case.

One very important example which I gave, a very recent one is the curative one. Now, the curative one kind of sent shockwaves all over that how the court intervening, et cetera. But the point to be noted is it was with respect to a domestic arbitration award. And even Indian practitioners in one of the conferences I went abroad, seemed a bit muddled about it and seemed to indicate it could extend to our international arbitrations also. So, I think coming back to the question that, if it was Indian law which was governing the Arbitration Agreement, Singapore would have given way, and I think that's a far more sophisticated approach because of the structure which is there, which may not be in India.

One quick, sorry, one quick point I want to raise about the experience. You see, interestingly, ***BALCO*** put in the seat concept, which is an international law concept into domestic law. And initially I was a bit taken aback by it, but I think overall it has worked quite okay, because India is a large country with a large number of states with different High Courts, which are there. So, coming to this experience of anti-suit injunction, if you talk about forum non-convenience, it is there in Section 24 and 25 of the Civil Procedure Code. That principle finds mention there because courts can transfer. Supreme Court can transfer matters from one jurisdiction to another. High Courts and District Courts can transfer. So that is very much in our DNA in that sense, if we were to speak. Comity is in our DNA. Other high court jurisdictions when they have seized with matters, how do you deal with it? So I think that it is endemic in us in many ways because of the size of our country.

JUSTICE S. RAVINDRA BHAT: I just want to make you comment on this, comity issue. See, we are all saved in the silo of commercial law and arbitration. What if the issue were custody? And that also is tied to your question about why don't we have jurisprudence? If you make an inquiry into that, it may not be anti-suit, it may be anti-enforcement. Not articulated as such, because then the courts look at a larger principle beyond law. They look at the constitution, because we don't go by comity and we are not a signatory to the Hague Convention. We have not been part of it. Therefore, the courts, except, I think in one exception have not gone by comity. They have gone by what is called as the best welfare of the child. And

there is really an issue internationally because a lot of provincial courts in Canada and US and state courts in US are very sore about the fact that Indian courts do not give respect or honour to this principle of comity. So, I feel that when you talk of anti-suit really, we have to look into anti-enforcement issue of whether the foreign seated courts' injunctions are honoured here or enforced. And then one of the earliest judgments is from India on anti-suit, which is a tractor export, which is 1969 and then we didn't... No, it is not 1940, it is the foreign awards '61. We didn't have the UNCITRAL. So, then lines were not as clear cut. Therefore, I think that's one aspect which we should keep in mind. And then about Volume II, I have a slightly different perspective. In support of what Anuradha says that well, Supreme Court seems to have delivered some 14 or dealt with 14, but actually, I think there are eight... or seven or eight judgments. The Delhi High Court has dealt with this issue in 77 cases or mentioned it and Bombay in 34. If you look deep, drill deep, I'm sure you will find more judgments. And you look into the segment of enforcement, you might just... there might be a different world. So it depends on the subject matter.

SHEILA AHUJA: Can I also just say I'm really impressed at just the amount of, I guess, thinking and work and this is partly why also, we chose you as panellists for this topic because we knew that you'd come kind of with these points, like, how many cases have there been? What has the individual judgment said? I find that really I find that really interesting. And as I say...

JUSTICE S. RAVINDRA BHAT: One more. Sorry, I'm hijacking. No two minutes on this investment treaty. I'm not making any comment. I think to my recollection, India has derogated from the idea or rather not been ratified the New York Convention bit, which talks about whether this is an ICSID kind of award is a commercial award. And that makes, I mean, that's, even the Supreme Court to my knowledge, has not dealt with it, although the occasion did arise. And interestingly, my own High Court seems to have even both the High Courts seems to have all overlooked this point. And the second point which I wish to make is not either in favour or against, but the point is, the agreement between the... is between the states. So, then were.. and secondly, it is a treaty, most importantly. And these treaties have not been enacted into law. So, then the jurisdiction that the state or the Tribunal derives is because the private entities enabled to approach the State with a dispute and make a claim. Now, this is outside of the arbitration mechanism, unless we have a codified Investment Treaty Law in India, which we don't.

SHEILA AHUJA: That is another topic, actually in itself, just that last comment you made, sir. But can I just ask, maybe Charanya. I'm going to change another facet of this judgment.

What if the Shareholders' Agreement, and how would an Indian court view it if the Shareholders' Agreement was governed by foreign law. So say, for instance, governed by English law or Singapore law, not in Indian law.

CHARANYA LAKSHMIKUMARAN: Right. So, thereby saying that it would have been arbitrable in that sense. But the question is you still have the threshold of 48 in India. So, the enforcement is happening here. Then I think, it'll still be a question that in India, could this be arbitrable? And therefore, I think you would come to the same conclusion. That is my view.

SHEILA AHUJA: And Ms. Dutt, if I may ask you, and I know you said earlier you're going to tell us your views about this. I'm going to put a premise and then I'm going to let you, of course, tell us how you really feel about it. But do you think there would have been a difference in who was approached? So, if, for instance, it was the Singapore seated Tribunal as opposed to the Singapore Court that was approached, would that have changed the current?

ANURADHA DUTT: So, I'll answer this at the end of my analysis.

SHEILA AHUJA: Yes, please.

ANURADHA DUTT: So, when Singapore Court of Appeal, as it's called, decided this Arun Mittal matter, what they did was they said there's a distinction between pre-award stage and post award stage. And then in the pre-award stage they said that they will examine the Arbitration Agreement and which law governs the Arbitration Agreement. On their analysis, they found that the Arbitration Agreement, even though the disputes were to be settled by Indian law under the contract, but because there was nothing said regarding Arbitration Agreement, they came to a finding that it will be governed by Singapore law. And in Singapore law, they examined various provisions, including 11, Section 11, which talks about public policy and if there is a bar. And they say that this would not be a bar, operation mismanagement petition would not be a bar under the Singapore Public Policy. And then they come to a finding, they do examine the complaints made in the petition in the NCLT by Arun Mittal and say that all these are encompassed in the Shareholders Agreement because the clause said disputes regarding management also to be referred. So, they say, they come to a finding that all these disputes emanate from the Shareholders Agreement. And therefore, the petitioner there, Westbridge, is entitled to an injunction against the NCLT proceedings. But they also say, they are also cognizant that Bombay High Court is seized of this issue. So, what they say is, we will not wait. Let the arbitration go on. At least Parties will know what is the strength of their case.

I think that's a little weak argument, that you say that, I'll wait, but let it go on, because there are expenses involved. So, if you have decided to give an injunction, give an injunction.

Now, my problem is when I see the Bombay High Court judgment. They have refused to enforce the anti-injunction given by the Singapore Court of Appeal on the ground that ultimately, when this award comes, and if it's presumption is, it's against Anupam Mittal, if it comes for enforcement, then, under Section 48, if an issue is not arbitrable in India, then you can't enforce it. So, why have an injunction? Now I heard what Justice Bhat said. There is a Section 430 which says wherever there is jurisdiction of NCLT, which includes oppression mismanagement, you can't have either a suit or any proceedings, which will obviously include an arbitration. Now the distinction made in Singapore judgment is that pre-award and post-award are seen separately. As I said, when I started reading the material you suggested that ***Tomolugen*** case, please see para 72 of that case. I actually got that judgment only because we don't read it every day, so I'm not sure if I... I don't want to misquote it.

SHEILA AHUJA: You might ask me what it says.

ANURADHA DUTT: So, para 72 actually says, there is no difference between pre-award and post-award. And if something comes for enforcement and it is not arbitrable, which ***Tomolugen*** puts in null and void of the Section 45 principle, which they also have, it says there is no difference between pre-award and post-award. And if in post-award it cannot be enforced, you cannot injunct. Now, Justice Menon is party to both the judgments. Now the same para does talk about what is the law that is applicable to the Arbitration Agreement. But to my mind that's a separate point that is being considered. Now, if I go by ***Tomolugen*** ratio, of course, in that case it was a domestic proceedings, and they hold that there is no bar to oppression and mismanagement, and therefore they grant injunction.

But if this reasoning is correct that there is no difference between pre-award and post-award jurisprudence, then Bombay High Court is correct, presuming that 430 is right. Because from ***Haryana Telecom*** onwards, there have been several judgments, but I must also point out a distinction which one of the judgments in NCLT has picked up. Section 41(b) of Specific Relief Act says that a court can grant an antisuit injunction only vis-à-vis, a case that is below, in a forum below it. Now, the NCLT has said that this means that NCLT has no jurisdiction to grant a stay of an arbitration, a foreign seated arbitration, because that's not a forum below the NCLT. Now coming to the problem that I am facing is the NCLT judgment, where, in ***Arun Mittal*** case, where there is a stay given of the foreign arbitration, because the Bombay High Court only refused to enforce. The actual stay has been granted by the NCLT where Anupam

Mittal approached for a stay. That judgment has recognized this McQuery judgment of NCLAT but does not deal with it. And most importantly, I think where the Singapore Court made a mistake, which maybe a Tribunal would have examined. There was an argument that please see that this petition filed in NCLT is dressed up. That is, actually its shareholders' dispute. You are only dressing it up as operation mismanagement. Now, this was a point raised before the Singapore Court, but they did not. They examined it and said it's within the arbitration clause, but they don't give a finding. I think if it had gone to a Tribunal, it may have given a finding on that. Now the NCLT in India does not examine, whereas there are judgments of ***Rakesh Malhotra***, et cetera of Bombay High Court which say that you should examine whether this is a dressed-up petition, a genuine petition, even if it's a *prima facie* look, but do examine that. Yes, but the Tribunal in ***Arun Mittal*** case is so influenced by the Bombay High Court judgment that they either do not see 41(b) and the argument that NCLAT, which is binding on it, had examined and said, you don't have power, nor did they examine whether this is really a dressed-up issue. So, I find fault in the NCLT judgment, in my analysis, not the Bombay High Court, because as I said, if you agree with para 72 of ***Tomolugen*** then pre-award and post-award, there is no difference. Then I may say that there is some rationale in that judgment, although I don't agree that they have put it on two basis. One is 48, you can't enforce. Second is he'll be remediless, which he will not be because there is an arbitration .

SHEILA AHUJA: And the Court of Appeal in Singapore tries to deal with ***Tomolugen***. But as you rightly say they don't actually reconcile.

ANURADHA DUTT: Yes. They just say it's within the clause. They don't examine the petition, whether it's dressed-up or not. If that finding was there, I think then it may have been easier for courts in India to deal with it.

SHEILA AHUJA: And actually. Ms. Dutt, your view on the NCLT decision. I mean, we know that everything's being appealed right now.

ANURADHA DUTT: It's an appeal, I believe the NCLT.

SHEILA AHUJA: And I think the Bombay High Court order as well. Can I ask you, sir, do you think, that the last outcome will be different to where we are now? Maybe just crystal ball gazing for a moment.

JUSTICE S. RAVINDRA BHAT: I really can't speculate.

ANURADHA DUTT: Astrologer.

JUSTICE S. RAVINDRA BHAT: The only thing which actually astounds me is that so much of energy and time is spent on the issue of jurisdiction, and nobody 's really got onto the... And Anuradha mentioned about expense. I think there's no dearth of expense here. Any amount of money is being poured in, and it's essentially a private dispute. So, the point I am making is I'm again going back to her comment about courts not fine enough time to deal with cases. Now, if we are stuck with these and you have let's say ten of them, and these are I mean, time stands still in these cases in India. And then an average judge, and the best of courts, I don't know what the workload is. I think now it's 80 cases a day. So, we have talked about a lot of reforms changing the Arbitration Act, Commercial Courts Act. But unless we increase the capacity, double it or triple it, I don't think we'll see any significant change. Why it happened because of that, and we simply just have not learned the lessons there.

ANURADHA DUTT: Maybe I can only think for arbitration because we are talking about arbitration. I think there needs to be a separate arbitration bar, because what's happening which even the international arbitrators who come here say that people say, oh, after court. Please have it at 04:00 or 4:30. Oh, I was stuck in traffic jam. So we need to get out of this and there should be dedicated benches also in High Courts and Supreme Court so that these issues can be dealt with. And I somehow feel that this is as important as anything else because of international trade and commerce and the fact that India needs investment, and as she said, certainty. So to my mind, for arbitration there should be a separate bar and there should be a separate dedicated benches who hear this, maybe one step ahead.

SHEILA AHUJA: And just to the points about cost versus delay, giving credit where credit's due to the Indian courts as well. They were aware, right, that the parties had flown to start the arbitration hearing, and it was the night before the hearing was meant to commence. And, of course, expenses had been spent by lawyers. Not me, but by lawyers to prepare for this arbitration, only to be met with this injunction. So it really brings in all the issues of yes, the court....

ANURADHA DUTT: Actually, I was hearing podcast the other day and one of the cases in India, 45 adjournments on a bail case. So that's a kind of delay we are talking about.

PRASHANTO CHANDRA SEN: Speaking about delay, one interesting point made in the Bombay High Court judgment is, they say that it should have been brought to the notice of Singapore that this application with Singapore said if it's likely to take more than twelve

months, and which is why they gave this interim order. It should have been brought that within twelve months normally, this application at least would have been decided. And that's the observation which the Bombay High Court makes, which was not brought to the notice of Singapore, apparently.

SHEILA AHUJA: And actually, there is a question there.

ANURADHA DUTT: It was brought.

PRASHANTO CHANDRA SEN: But not within twelve months. The Singapore court judgement says within twelve months, it's not likely to be decided. And that weighed with the Singapore court.

ANURADHA DUTT: Which is correct. Therefore they say, let the arbitration go on, and at least each party will know the strength of its case. That I found a little peculiar.

SHEILA AHUJA: And actually this brings me to maybe the final sort of set of questions. I'm going to put it to the entire panel, in fact. But is it exactly this point about, I wouldn't call it criticisms, but just observations and where do we go from here. So Mr. Sen, you asked me at the beginning this Achilles Heel and why did we choose this topic. And I think it's a good question, right? I mean, first of all, of course, the team and I, sort of thought about this topic and what do we call it? How do we lure this panel to come here and talk about it the way you have, well, preparedly as well. Achilles Heel is a weakness, despite overall strength, which can lead to downfall. That's what it stands for. Okay? A weakness despite overall strength. So we're sitting at the premise of the system works as good as any system can. Of course it's got problems, but does this problem in particular lead to downfall is the question that we are met with. So that's why I didn't answer it at the beginning because what I wanted to do here. So thank you for pre-empting that, actually, and setting the scene for me is to ask the panel, do you think, and we've heard quite a few things about arbitrability, delay as a very, very big point, which, of course does kind of lead to the justice of it all, the comity versus competence-competence and then of course, does it matter which court you go to first and then is the obligation on the parties to then update the respective jurisdictions as to what's going on. Let's take all of that, put it against international arbitration as a system that works as the premise. Do we think that this idea of anti-suiting or anti-arbitrating, is it going to lead to ultimately, the downfall and the reversion back to courts? And I ask that question in this jurisdiction because of the comment made earlier that there are initiatives either way coming from the top, that perhaps, in some cases, courts are better than arbitration. Do we think that this is actually

one of the reasons that people will start to think, it's really tiring to fight jurisdiction? Anti-suit, anti-arbitration, spend lots of money on people like us before you even start to argue the dispute. Is that going to lead to an ultimate downfall of the system? I put that question and unlike my usual directional way, I'm actually going to just say whoever wishes to speak first. Please do. But I'm going to make sure each of you do, if you don't mind.

JUSTICE S. RAVINDRA BHAT: Well, there's a disadvantage. The framing of the question, Achilles was brought down in the sense that that was his fatal. That was the only weak kink in his armour, because his mother had dipped him into the river of immortality. But well, I don't think this is our Achilles Heel. We have shown remarkable capacity to self-correct over the last so many years. I think ***White*** was one red signal for us. And then we had ***BALCO***. And there has been a fairly good, let's say robust development of jurisprudence. What is needed is needed is, yes, capacity building, sensitization. And I think what we need to do is strengthen some good institutions and not just the courts. We have to look away from the courts and Anuradha's point is absolutely right, that we have to have a robust arbitration bar and not a part time arbitration bar, which is what is happening. The attempt in our report, seven years ago, was to create a body which would be a kind of market driven body, which would be industry dominated, or let's say, staffed, that is, arbitration, promotion counsel, which would evolve standards and accredit institutions. But unfortunately, it's taken a completely different direction and it's not taken off. But going forward, I think it's not just the state unless the industry shows interest and the Bar also equally takes that initiative to not just talk of an arbitration bar, but actually do it. And there we have to look, plan ahead. You have to have more scholars. We have to invest more in endowment scholarships and make sure that people go abroad and bring back this culture and live it. So, unless you foster that kind of thing, it can't happen magically overnight. But yes, I am always an optimist, and I do believe that things will settle down. Maybe ***Anupam Mittal*** could be a new threshold, and a wakeup call, because well, I'm not optimistic about the fact that there would be more judges or more arbitration benches. For that matter, Charanya knows how it is on the tax side. So the more we talk of having more specialized people, which is badly needed, at the same time we have to develop that capacity, both in terms of personnel and it's not just enough to have courts and staff them with anyone. You have to have people who are sensitive to that class of litigation, which will take some time. I don't think, I will speak more.

SHEILA AHUJA: That is a really excellent summary.

CHARANYA LAKSHMIKUMARAN: I absolutely agree with sir. I had very few occasions to disagree with sir, though he disagreed with me, I think, in court. But I think, I don't think it

is an Achille's Heel, because as we've just seen, the resistance and the resilience that our system shows it's always been there. As sir said, self-correction, I think there is a resilience in our system. Having said that Achilles Heel, I don't think it is anti-arbitration suits, which really will be an Achilles Heel. There are other systemic issues which will actually, I won't say lead to the downfall, but prevent the kind of robust environment we are looking for in India for arbitration. And I agree with sir, even when it comes to capacity building, I think that is really the need of the hour, right from the Bar to also when we have technical arbitrators. Are we equipping them with judicial background. Right? When we have judicial arbitrators, are we equipping them with technical know-how because there is very complicated infrastructure, technology arbitrations, they're all very complicated. And as we are going forward, each of those disputes is getting more nuanced, more complicated. They are not money decrees anymore. So those are issues. And similarly, the problem we face with technical arbitrators is natural justice. How do they take evidence? Are they ready to take this? Are they ready to hear? Many of these things, they come with a preconceived notion that lawyers will always try to delay. They will always try. So there are some of those notions. It is going to take a while, but it has to be an all industry effort.

SHEILA AHUJA: Thank you, Charanya.

PRASHANTO CHANDRA SEN: I often kind of wonder whether one should take a linear view of things and saying there's a progress in future which will happen. It's always a mixed bag. Going back to BALCO, when I was involved, we took a study. Of course, that was many years ago, and I was in a different avatar. Now I'm very pro arbitration, et cetera. But at that time, we moved a Section 34 in a very remote district of Korba, which was, which meant that the whole machinery of KATSI had to come down to that District Court which didn't understand English, and that was, of course, a strategic move. But you know, on the first day when I went there, the judge, kind of before issuing notice, pointed out to me. He said, you'll have to deal with this, this and this judgment. There were all the latest up to date he was on what were the judgments which were involved. I was quite taken aback. Fortunately, he was transferred by the time the next matter hearing came up and it went up a long way. So there is within the system a lot of resilience. Number two, as far as arbitration bar is concerned, taking from what Anuradha said you see, now, because of Section 29A arbitrators are very conscious that it should be done within time. I mean, of course you can get extension, but a good arbitrator wouldn't like to go into a situation where extensions are required. In fact, strangely enough, I'm in an arbitration, and this happened yesterday technologies, which is creating the problem because this counsel on the opposite side was arguing, and he said, I've got an extremely important call. I'm very sorry. I have to break off. So he went off on the call. We

thought it was a personal call, but it appears, he went for a quick hearing on the screen and then came back again for the arbitration. So I think those... but those will smoothen out. But I think that will set in the arbitration bar and stricter timings on that.

SHEILA AHUJA: Ms. Dutt, just before I call on you, so there's a really well known Hong Kong decision. Actually, the judge is a dedicated arbitration judge, and she comes from legacy, Allen and Overy. So I say this with a great degree of pride, who decided that an award should be set aside and the proceedings were on the ground in the mainland. The arbitrator was shopping around in a mall and hearing the matter at the same time. So that every time the parties were making submissions, he had his phone and was kind of looking around at things and then sort of going, yeah, yeah, I follow. And she said, well, that is not a reasonable opportunity to be heard, I'm afraid. So, we sit here about India and its progress. India sees so much jurisprudence and gets it right so often that when you do take a very kind of macro comparison, we could sit here literally all day and talk about judgments that are so interesting. Ms. Dutt, I'm sorry. I wanted to hear you.

ANURADHA DUTT: So, to my mind, as long as India requires investment, any businessman who's coming from outside India will insist on arbitration because our delays in our judicial system are pretty well-known. So I don't think India's public policy can wean away from international arbitration because of the compulsions that we have for our economy. And as long as that remains, I don't think this system will break. And as I said to you, quality, I do find. Quantity may be less than Singapore. But look at Singapore. Nobody used to go earlier to Singapore for arbitration. That country made it a public policy to ensure that this becomes a destination, and see where they are now. So if India makes that concerted effort, we can also become a destination. But with all due apologies, judges should not take two steps forward and one step backward or three step backward. That certainty should come, because... I'm saying, because of what happened in the Stamp Duty case, I mean, that was really shocking.

SHEILA AHUJA: I've got another couple of topics that I've picked up for next time, so do watch this space on what else we might...

JUSTICE S. RAVINDRA BHAT: I just want to have a last not because of what Anuradha said, which is right. She's absolutely right there.

SHEILA AHUJA: She opened can of worms out.

JUSTICE S. RAVINDRA BHAT: No, I think there's issues. Right. Because when we do tweak, we believe it's a very small tweak, but then it turns out to be a tsunami. But more importantly, it's like a regime. When you make changes in a regime, transition is the most painful and we experience it most often in India, and it's not good. But I do want to make an additional point and it's not about ADR or arbitration being only to attract investment. I think we are looking at internal investment, and from the citizens' point of view easy access to swift justice. So therefore I think there's a wider audience there. Whether you look at the history of arbitration, whether it's England it started, whether or ICC -- ICC, of course not. But England is the best example. An old institution like the LCIA dealt only with domestic arbitration. And then you had admiralty, I mean, shipping arbitrations, et cetera. So, the entire basis is domestic arbitration and then, of course, the entire edifice of international arbitration is built upon it. So, we need to inculcate that culture and rather not leave it at the international commercial arbitration. We have to work it up from ground up, and not just the larger metropolitan cities, but also some of the tier, as they call it, tier two cities, which are really the investment centres. And we are not talking of investment abroad. We are talking of internal investment. There's a lot of that happening, and I think we should not ignore that in this whole movement and segment it in this manner. That's the only extra comment I wish to make.

SHEILA AHUJA: I'm going to wrap up. Thank you so much sir, and everybody. I'm going to wrap up with four very short points. The first one is, I'm pleased to say that I think the consensus is that the anti-pseudo, anti-arbitral injunction won't be the Achilles Heel of international arbitration, although there appears to be some suggestion that there might be other Achilles Heel, that it won't be this. That's great. Second is, how do we change it? And I think the idea of I'm going to call it capacity building, take that phrase as the umbrella phrase for I think, what was very consistent feedback on where we need to go from here and how we need to change things in this landscape, such that this topic completely changes. Right? I mean, talking about downfall. We're talking about sort of carrying on. That's the second point, is capacity building and how we should focus on that. The third is the steps in the right direction. I like that point about as you build capacity and focus on the goal, you've got to keep taking the steps in the right direction without turning backwards or away in the direction of a tsunami or anything of the sort. I like that because as you're building the capacity, you got to build it for the right paths. Right? Otherwise, what's the point? And finally, and I'm going to end with saying, a very, very big and completely wholehearted thank you to this panel, not just as thought leaders sharing these points, which I have to say I've been to a lot of talks on ***Anupam Mittal***. Some of them I've actually been a part of, and those were, yeah... I mean, and a lot of them I've listened to. Some of the stuff that was discussed here today, I actually haven't heard, so I'm quite sort of taking notes. I'm going to go back and....

ANURADHA DUTT: Para 72 says that...

SHEILA AHUJA: I do have, I'm going to follow you out on ***Tomolugen*** names. But really interesting, I think, debate on what are seriously contemporary issues, and as sir said, maybe they'll come to fruition in this long awaited appeal of ***Anupam Mittal***. Maybe they won't. Who knows? Maybe we're sitting back here in another twelve months debating a slightly different Achilles Heel. But the point is. I'm grateful for this panel to take this time and also the hard work behind it. I also saw up here, the amount of writing and notes that went behind it. I usually get put by the team to do some hard work before I earn my spot up here. And I feel like we've put this panel through the same and everybody's done so much justice to this. I'm very grateful for that. I'm very grateful for the audience. And before we finally wrap up and allow everyone a bit of a drink and a breather, are there any questions from this room? I don't know, I suppose there's a hundred going on in my head, leaving aside future topics, but if there's any burning questions we have about three or four minutes. Otherwise, we can meet outside for coffee and continue the debate.

ANURADHA DUTT: So they agree with all the points?

SHEILA AHUJA: Yes, please.

KABIR BHALLA: Hello. Thank you. I am Kabir Bhalla from King and Spaulding in London. I wanted to say a few words about the English experience, and we've had in the past two month,. I think about six or seven different anti-suits awarded, all involving the Lugovoy Law, almost all involving the Lugovoy or Article 248 and Russian parties. But I also wanted to dispel the notion that English law is any more sophisticated or advanced in terms of this area. Last month, the English court ordered only its third ever anti-enforcement injunction, which was a post judgment and anti-enforcement injunction, i.e., the foreign judgment sought to be, the enforcement of which was sought to be restrained, had already been obtained and the English court is injuncting its enforcement in a separate jurisdiction. And if one looks at the two or three examples where this has been done, it's very difficult to actually identify the juridical basis for such an anti-enforcement injunction. There are these loose assertions that comity justifies it. But often it's a sort of vague concept of sufficient interest and sufficient connection to the jurisdiction of England, often by way of an English jurisdiction clause.

SHEILA AHUJA: Or a French seat?

KABIR BHALLA: Or a French seat, indeed. So, I think there are these uncertainties and perhaps, perhaps it's really anti-enforcement injunctions. that might be the Achilles Heel because they are actually quite difficult to explain from a legal perspective.

SHEILA AHUJA: Thank you. That's interesting insight. And I think if one looks at the reforms that are proposed, that also kind of brings together just how little England, I think, had in terms of clarity of what they want.

JUSTICE S. RAVINDRA BHAT: I would only react to this, that we have our own moment of epiphany, the inter-digital end. But seriously I think extreme responses do evoke this kind of reaction, let's say. So, Wuhan, the Wuhan court, entire suit, injunction,

ANURADHA DUTT: Xiaomi case.

JUSTICE S. RAVINDRA BHAT: Xiaomi. We came out with... we call it an anti-suit, but it's really an anti- enforcement.

ANURADHA DUTT: Yes, there of course, the court held that the two subject matters were different. This was a patent issue, infringement issue, and that was a pricing fixation issue, so there was no commonality. And also they said that it was obtained secretly because it was never served.

JUSTICE S. RAVINDRA BHAT: Because the SCP dialogue requires notice. Rush to the court without issuing notice to the...

ANURADHA DUTT: I just have one little difference on comity of courts, that it's not important in India. I absolutely agree that say custody or marriage cases, we do not. But in commercial cases we do, because all judgments say that you must have jurisdiction over the person. And if that jurisdiction over the person is not there, no injunction can be granted. So comity of courts is recognized in this manner?

JUSTICE S. RAVINDRA BHAT: Absolutely.

ANURADHA DUTT: *In personam*, jurisdiction is necessary.

SHEILA AHUJA: An entire new topic comes around. Non-parties to the contractual framework, right, which I could get you to sit back, talk about for another hour.

ANURADHA DUTT: Yes.

SHEILA AHUJA: But thank you so much on that note. And as I say, I feel like this has been a really sort of wholehearted discussion, and I'm very grateful to you for participating and to the audience for listening. Thank you very much.

ANURADHA DUTT: Thank you for calling us.

JUSTICE S. RAVINDRA BHAT: Thank you for calling us. Thank you.

PRASHANTO CHANDRA SEN: And thank you also, actually also to juniors also, who helped us, at least me in the back in some of the research.

ANURADHA DUTT: Well, my colleague gave me an interesting judgement. So, I'm not sure I'm thankful. But for that I would not have been knowledgeable about anything.

SHEILA AHUJA: If we can pick up para 72 after this. Thank you very much. Thank you. Thanks.

~~~END OF SESSION 1~~~