TERES

INDIA ADR WEEKDAY 4: DELHI

SESSION 2

Arbitration spells innovation with an E: emergency, expedited, early dismissal, and enforcement procedures - tales and war stories?

10:00 AM To 12:00 PM IST

Moderator:

Vijayendra Pratap Singh, Senior Partner & Head – Dispute Resolution, AZB & Partners, New Delhi

Speakers:

Hon'ble Justice (Retd.) Mrs. Hima Kohli, Former Judge of the Supreme Court of India

Mark Mangan, Founding Partner, Lindsay Francis & Mangan (LFM)

Emiko Singh, Partner, White & Case LLP

Chaitanya Arora, Managing Director, Secretariat, Singapore

Mudita Roy, Associate General Counsel, Akasa Air

HOST: Good morning, everyone. Thank you for rejoining us after the short break. If I may request the panellists for the next session to kindly come up on stage. And maybe the moderator, Mr. VP Singh, can take responsibility of introducing the panellists as well. Of course. Mr. VP Singh himself needs no introduction as all of you know who he is, but over to you, VP.

VIJAYENDRA PRATAP SINGH: Good morning, everyone. I know breakfast is a big attraction, and I can see that we'll fill up as people's bellies fill up. But while we do wait for people to join in, I have the brilliant task of introducing a fabulous and a fantastic panel. The best thing about life is, if you want to look good, always surround yourself with intelligent people. I have all intelligent people on my left. It's in this context that I can give you paeans of praise and pages of it. But given the fact that we are on a timer and we are going to take questions hopefully at the end of the session, we would like to ideally keep these short. So, let me start with Justice Hima Kohli. Justice Kohli is a former judge of the Supreme Court of India, a name that, of course, needs very little by way of introduction, because she's been a path blazer and a trailblazer for us. She was the first woman Chief Justice of the Telangana High Court. In addition to performing various judicial duties, she has taken an active interest in two things which will make a change and help us survive. One is Alternate Dispute Resolution. I call it one, because this seminar is on that. And the other is an environment, and she's known for speaking off the pages and in court on both rather articulately. In addition to that, she's also SIMC accredited mediator, possibly the only judge who completed the accreditation while sitting as a judge. That shows you her commitment towards the arbitration and the mediation movement. And the movement is not complete with just one stroke. You need to go full circle. In addition to that, she's spoken on various issues around the area and has presented papers in national and international symposium and conferences on these subjects. Thank you, Ma'am, for coming here and gracing us with your presence.

To her left, I have Mark Mangan. Mark is the person who I keep telling my team is bring me Mark, which is in any international arbitration if you do want to find out what a position under the SIAC rules is, Mark is the person to go to. Because Mark has written the definitive tomb with respect to international arbitration, and especially the SIAC rules. If you don't have it, please do buy it. It's the publication by the Oxford University Press. Insights into the rules, his experience as Counsel and Mediator shine through in that book. It also shines through because of the fact that he's possibly had the best access from the SIAC because the Singaporeans for once allowed someone to take a look at the internal working as closely as he did. In addition to doing this, he's also written a book which he had the misfortune of reading my chapter on, on International State Dispute Resolution and Investor State Dispute Resolution. And I must

confess, despite my chapter, it's a really good book. It's published by the GAR and you should take a look in because it's curated content from the best in the world. Mark has been listed in various directories, including the who's who. In his case, it's actually the Who's Who Legal, unlike in my case, where when you mention my name everyone says who. So, you do have someone who is well known in the area, and thank you, Mark, for coming on. He is in his latest avatar, the Founding Partner of Lindsay Francis and Mangan, which has started only this year and has already won accolades in its short but impressive life.

Thereafter I have Emiko. Emiko is a dual qualified Partner with White & Case's dispute resolution practice based out of London. She is also someone who focuses on international arbitration, and has a wide range of disputes that she has been a part of both in the context of cross border work as well as institutional arbitration representing states, companies and individuals on high value disputes. She has represented clients in the energy, construction, financial services and regulatory sector on matters ranging from shareholder and financial service disputes in investor state disputes. She also has substantial experience with advising and representing corporate and financial services clients before the English courts, particularly in relation to the challenge and enforcement of arbitral awards arising out of investor, state and commercial disputes. She's also known as, "Show me the money" because she gets it out. She also has one more thing here, which is a proud set of parents who are going to watch her speak. I couldn't help that. Sorry.

Next we have Chaitanya Arora. Chaitanya is a friend and you can find out he's a friend because he was parachuted in here into this panel last evening. He was promised kebabs. He wasn't told that he was going to be Barra himself. Chaitanya has over 20 years of experience in advising on all aspects of business valuation, damages quantifications, mergers and acquisitions and project finance related matters. He's the Managing Director at Secretariat, Singapore. He has advised private and public companies, private equity funds and sovereign wealth funds. He has acted as a party-appointed independent expert on matters involving various expert issues across industries. He's opined on damages, loss of profit valuation, accounting treatment and of transactions and application of joint accounting standards. The nature of disputes he's been involved with arises from supply contracts, joint ventures, mergers, acquisition related matters, and expropriation. In addition to being my friend, which is something that he will never agree to in public, he's also my go-to guy for my arbitrations. He has, and was closely involved with the ***Amazon*** arbitration, something that he's going to speak on as an innovation, I hope.

CHAITANYA ARORA: If you say so.

VIJAYENDRA PRATAP SINGH: And to his left we have Mudita Roy. Mudita is actually a woman of the skies. She is the Associate General Counsel for Akasa Air, based in Delhi and has numerous years of experience in aviation. She has, prior to her present role, worked with Indigo and in this role, before this, she was working with a tier-one firm in India and has done work around the PE and the aviation space. So, we are going to find out what happens when you are effectively only a flag carrier in a world where you continue to do business across, and how arbitration works. So, her perspectives in this regard would be greatly welcome. With this, I thank my co-panellists for all being here at short notice, some at shorter notice than the others. And thank you for stepping in.

To start off things, let's start at the very beginning. One of the most prominent inventions or innovations that has drawn India into the arbitration roadmap has been the Emergency Arbitrator in innovation, which has come into institutional arbitration. As a statistics SIAC has since 2010, received 152 applications for EA. It has accepted all 152 applications and has appointed EAs and that's where its role came to an end. The EAs thereafter, have on the basis of the case before them, granted 50% reliefs. Offered relief, in 50% of the cases. Now, to that extent, it's work which would have gone to the courts being effectively diverted. So, my first question goes to Justice Kohli. Judge, do you think that the EA can work as an effective docket management tool as it can be used to meet the need for interim relief and divert cases from court?

JUSTICE HIMA KOHLI: The gentlemen are being so courteous. Now, I have two mics. Thank you. Just to say that yes, the answer would be a prompt yes. The concept of EA holds tremendous potential as an effective docket management tool, particularly in the light of the growing relevance of this particular tool in the case of ***Amazon v Future***, where, let us not forget, EA allows parties to obtain urgent, interim relief even before the Constitution of a formal Arbitral Tribunal. And that alone can divert cases from courts that are overburdened and address urgent needs as efficiently as can be. So, looking ahead, emergency arbitration will be a valuable docket management tool. It will reduce the number of cases that flood into the court looking for urgent relief. And just as businesses are increasing and they're adopting these clauses with EA provisions, more disputes are likely to be resolved at the pre-litigation stage and alleviate the burden of the courts. For EA to realize its full potential, maybe the Legislature at a later stage might give more clarity, because the clarity has come from the judgment, really not because there is a silence in the act on that aspect, to expressly include Emergency Arbitration within the scope of the Arbitration and Conciliation Act. So, wider acceptance of EA within the Indian business community and the legal practitioners, coupled

with the judicial consistency in enforcing emergency awards, to my mind, will be the key to its success.

VIJAYENDRA PRATAP SINGH: Thank you. Crisp and clear. That's the message as well as a speech. That takes me to Emiko. As a practitioner, Emiko, what makes you recommend the EA route over a court route to your clients? Would your view change from jurisdiction to jurisdiction?

EMIKO SINGH: So, this is one of those questions where I'll have to answer with an "It depends." And that's mainly for two reasons. So, on the one hand, I think institutions and national courts have recognized that where parties have chosen of their will to have arbitration as their dispute resolution process, they would want to have an interim relief or an urgent relief system incorporated within that. And in response to that, institutions increasingly began to offer Emergency Arbitration as part of their rules. Ten years ago, very few of them did it. Now, almost all of them did it. So, that has been a positive development and welcomed. But like any other arbitral mechanism, ultimately, whether or not we would recommend it or whether or not clients want to take it up, depends on two things. One is, how it will be treated by the courts in terms of its recognition, which is what I'm going to talk about a little bit about, right now. And then another thing, which is something we'll come to later, which is how it will be enforced. Because ultimately, what matters to Parties is whether the dispute resolution forum that they have used to get that interim relief is actually going to help them, then get that interim relief. So, in my experience I've actually had a good experience with the Emergency Arbitrator mechanism. We were actually able to get effective relief almost within three weeks, all told, of submitting our request for appointment of an Emergency Arbitrator, and it was a good result. It was a London-seated arbitration, where we would have had to enforce the Emergency Arbitrator's Order in India. But as it came about, as soon as the Order was issued we didn't even have to enforce it. The other Party withdrew the proceedings that the order was issued against. So, in a three-week period, we were able to get very effective relief. That's not always the case. And also, one of the key issues that we're seeing in the UK over the last few years is uncertainty around how an Emergency Arbitrator's award or Order will be treated. Because on the one hand this is, at the end of the day, a provisional measure and it's a provisional measure that courts and Parties recognize is subject to being looked at once again by the Arbitral Tribunal. The other question is, how are both going to treat it in a situation where you do have the rules on the one hand of various institutions, saying that court interim relief should still be available to Parties, but courts are then comparing that against their own legislation. And a key development in this respect has been a case that many of you will have heard about, called ***Gerald Metals v Timis***, which actually prompted the LCIA to tweak

their roles a little bit. So, in 2016, just by way of background, there was this case where Gerald Metals tried to enforce a guarantee in relation to an offtake agreement against an iron ore company called Timis. When they approached the institution to appoint an Emergency Arbitrator to give them urgent relief against dissipation of assets, the institution declined to do so on the basis that Timis then provided certain undertakings about what they would not do about their assets. And the institution was also of the view that urgent relief was not needed and that they could wait for a Tribunal to be constituted. Gerald Metals then went to the English Court for interim relief. In this instance, the English Court declined to grant the interim relief on the basis that Emergency Arbitration was available to the Parties and they would only intervene if urgent relief was not obtainable from the Tribunal. So this, in some ways, this decision, even though it was very specific to the facts, created a situation where a lot of Parties who had London-seated arbitration were excluding the Emergency Arbitrator provisions from the rules that they were applying in their contracts, which was obviously an unintended consequence. More recently, the Law Commission actually analysed whether the English Arbitration Act needed to be amended to make clear that that court interim relief was available, so that Parties would not stop using Emergency Arbitration. Eventually, they concluded they didn't need to, because this case was very specific on its facts. But there has definitely been some reluctance amongst Parties in using the Emergency Arbitrator mechanism where they felt that actually they might be precluding themselves from court relief as a result. So, I think that's the key factor that we look at when deciding whether to advise clients or not. And hopefully as there's more clarity in national Legislation, this will get better and better.

VIJAYENDRA PRATAP SINGH: That's why Emiko is called "Show me the money" because right on our money on this one. See what you want, that's what you will get. That brings me to what I would call on Mark for, which is, what are the factors you keep in mind while you're deciding an EA application, given your extensive experience as an EA, done 25 of those, or you've done a significant number of those in your arbitration. In your experience, how effective is an EA in going ahead and preserving status quo?

MARK MANGAN: So, thank you, VP and let me begin by thanking you and AZB for inviting me to speak here today. You mentioned the creation of my law firm some six months ago, Lindsay, Francis and Mangan. I must say, I took inspiration from AZB. And I hope over time, it'll become known as LFM. And those initials will resonate with people the way that AZB resonates with the legal community around the world. So, I might begin by just talking about the factors that an emergency arbitrator considers when deciding a request for emergency relief, and you said in your introduction that some 50% of EA decisions or applications are

successful under the SIAC rules. I was not aware of that statistic, but that accords with my experience that it is probably roughly half of the applications that succeed. And if time permits, VP, I'll talk a little bit about what I think can be done to try to help those applications succeed. But in terms from an Emergency Arbitrator's perspective, what are the things that they can consider when considering these applications? The first thing, of course, they have to consider is what is the relevant criteria to be applied for determining requests for interim relief? And in order to determine that criteria, first you have to decide what is the applicable law. So that first needs to be canvassed by the Claimant. Generally speaking the criteria for granting interim relief is broadly the same in my experience around the world. It's described in different ways, but essentially there are two main factors that you have to establish. The first is that you have a *prima facie* case on the merits or some jurisdictions referred to it as a serious issue to be tried. The second broad category relates to establishing that the balance of convenience lies in favour of the granting of relief. And you can see various descriptions of that same principle, whether it's balance of hardships, proportionality, a risk of serious or irreparable harm, all of those formulations effectively go to the same thing, which is, what would be most fair in the circumstances of that particular case. And then thirdly, what I would refer to as atmospheric factors, can also have an impact on these applications. So, if there's any evidence that the Respondent has been acting unreasonably, that it has been ignoring decisions from, handed down by previous Tribunals or courts, whether there's evidence of the dissipation of assets, evidence of an attempt to frustrate the process, those sorts of factors I think can have a big impact on an Emergency Arbitrator's approach to one of these applications. The last thing, I'll say broadly in terms of criteria is that often in my experience, Claimants fail to realize that there are specific rules for certain categories of case.

So, I've just described the broad approach, looking at proportionality and the *prima facie* case on the merits that individual circumstances have specific rules. And I'll give you three examples. The first is performance bonds. I think it is misconceived when applicants and emergency arbitrators apply those standard rules that I just mentioned to a Performance Bond because it is, by definition different to other forms of relief. The purpose of a Performance Bond essentially the bargain between the Parties is that relief can be obtained immediately on demand. Effectively, it's received the relief immediately and then argued later. That is the essence of what the Performance Bond is. So, in my experience, sometimes that is forgotten and that criteria that I just mentioned is applied somewhat artificially to a Performance Bond, when by essence, it is something that should be automatically enforceable, subject to certain exceptions.

Similarly, restraints of trade if ever one is seeking an injunction on an interim basis against an employee for instance, which may happen in a private equity sphere, restraints of trade have their own rules in relation to interim relief. And in particular as a matter of Singapore law, you need to show that it's in the public interest that the restraint of trade is enforced, which is a much higher burden than would ordinarily be the case for request for interim relief. And the last example I will give relates to a case I had recently, which is for sporting athletes. Whether it's at the Court of Arbitration for Sports or at SIAC or at or at other Arbitral Institutions, in my experience, athletes deserve different considerations than what would normally apply in the commercial sphere. In particular, there is a presumption that an athlete should be allowed to compete, given the shortness of their careers, even if there's evidence that they're breaching a contract when doing so. So, the default position is allow the, similar to a Performance Bond, you allow something to continue and then argue later. Allow the athlete to compete, whether it's in the Olympics or something else and then the course of action can then be fully ventilated after the event has concluded.

VIJAYENDRA PRATAP SINGH: So, you have it there, ladies and gentlemen. One size does not fit all. Figure out what is unique to your case, and that's how an EA will do it. The Trinity test and conduct alone does not hack it always. Mudita, just coming to you. How do you think the EA works in the aviation sector?

MUDITA ROY: [INAUDIBLE]... but I think emergency arbitration is [INAUDIBLE] just because of the way it caters to business exigency which is funded in very well [INAUDIBLE]. So the fact that it is speedy resolution, and that it caters to the confidentiality of maybe a business secret or something that is very high stakes that you would like to safeguard, that you wouldn't want to [INAUDIBLE], it's certainly something that is innovative. It is giving you an option that you didn't have before. You don't have to wait for the minimum 30 days' period before the Tribunal is constituted. You can have someone appointed in 48 hours. And, of course the huge cost [INAUDIBLE].... Spread over 7-8 days. Senior Counsel and [INAUDIBLE] the same. So, I think that adaptability is very crucial for addressing something like a fast paced nature or something like aviation where operations are critical. And of course [INAUDIBLE], there were several [INAUDIBLE]... and of course, we have, like, [INAUDIBLE]. So, the fact that they can go for any emergency arbitration and have a point get an arbitrator appointed and get some kind of opinion, at least it gives me the [INAUDIBLE].... as issues, there were specific tools and circumstances of a particular party involved. Perhaps [INAUDIBLE]. So, I think it's been something that is very [INAUDIBLE]. Of course, in the context of the other contracts in the industry, which sometimes you can have a single company with multiple contracts related to the same thing, which has different choices for

[INAUDIBLE] to resolve disputes. For example, you could have energy, you could [INAUDIBLE] manufacturers that [INAUDIBLE] arbitration in New York. And then we would have a [INAUDIBLE] .... At the same time, related to the same part and then working with the person in [INAUDIBLE]. So, I [INAUDIBLE]. And so I think for several reasons, [INAUDIBLE] keep up with the agility required in arbitration. I think that a lot of the large contracts with origin [INAUDIBLE] industry, today, not really resolve through the normal process. They end up happening throughout the court settlements through [INAUDIBLE] and a lot of them opt for settlements [INAUDIBLE]...

VIJAYENDRA PRATAP SINGH: Thank you. Thank you. In fact, we get back to you on that one. I'm going to hold you to it. Mark, you had alluded to the fact that you had some tips on how do you sell an EA, so that you bank it?

MARK MANGAN: I'll just make one broad point in that regard, which is, I think applicants need to be conscious of the pressures on Emergency Arbitrators. They only have 14 days to dispose of the application. And people should also be realistic about the financial motivations on Emergency Arbitrators. They're paid a limited fee, which is significant in itself, but it is limited and significantly less than what they would get for a case that went to conclusion on the merits. So, applicants need to be conscious of the temptation of an Emergency Arbitrator to look for an easy off ramp, to look for an easy basis to either dismiss the claim quickly or to accept it. So, simplicity is very important for the applicant and conversely, for the Respondent, you want to try to complicate things as much as possible so that the EA gets concerned that it's overwhelming in the detail and the complexity that they can't determine the issues even on an interim basis. So, I think the key recommendation for applicants and their Counsel is to be very wary of providing easy off ramps. The key example of that would be seeking Interim Relief that is misconceived. So, for instance, I gave some examples before about Performance Bonds. There is the default position for Performance Bonds would normally be that they would be enforceable. So, Claimants need to be wary of that. And Respondents, the last point I would make in relation to Respondents to EA applications, I've already said that they could try to complicate things. The second thing that they could consider doing is looking to provide alternatives, alternative forms of relief. And I'm not suggesting that by way of settlement, but actually, in their submissions. They could be identifying alternative options that they're prepared to do in order to help maintain the status quo that is less burdensome for them and effectively trying to see some of the initiative through the process, rather than being beholden to the particular relief that the Claimant, seeks.

VIJAYENDRA PRATAP SINGH: Thank you. That's really helpful because it tells you that you may have this spice rack. But always remember, it's a protein that makes the dish. So, that brings us over to the next part, because the EA was just getting a determination. The next is enforcing it. And that takes me to Justice Kohli on have you ever encountered a situation where enforcement proceedings become a de facto appeal of the arbitral award?

JUSTICE HIMA KOHLI: I will start with a caveat on this question, which is that my answer will be in the context of domestic arbitration. So, personally, no, I've not encountered a situation where enforcement proceedings became a *de facto* appeal of an arbitral award, perhaps for the reason that I didn't permit Parties to go that way, which is also an important role of an enforcement court. Let the question that is being posed touches upon that nuanced and a critical issue in arbitration law, particularly in India, where there is a growing emphasis on respecting the finality and the sanctity of the arbitral award. And at the same time ensuring that the standards of justice and fairness are met. So, let us not forget that a decree once, an award once made, is to be treated like a decree to be enforced, like any decree in a civil court. And the emphasis of the Arbitration and Conciliation Act and the amendments that have taken place in it from in 2015 and 2019 itself reflects very strongly the legislative intent is, to minimize judicial interference at the enforcement stage. So, there has to be a fine line drawn between judicial review of an arbitral award and an enforcement of an award that has attained finality. In other words, all the processes are through from Section 34's appeal to the 37 appeal in a pyramid fashion, and it is done and dusted with. So there should be no scope of a judicial review at the stage of enforcement. Again, the courts, there have been a plethora of cases in our country that have decoded this stand on public policy, many times giving a wider interpretation of public policy. But that is in the context of 34, not in the context of enforcement, that any enforcement that is to take place must be done strictly within the parameters of the award. And again, the line between enforcement and appeal is to be drawn by emphasizing the principle that the enforcement court is not expected to delve into the merits of the dispute. That is imperative. The judicial approach is, in such matters to be more circumspect, ensure enforcement does not morph into an appellate review. The line drawn is clear, that where public policy concerns are real and serious, the courts in 34 would have examined it, whether it is on the aspect of fraud, corruption, so on, so forth, fundamental policies. But that should not be a pretext that you'd come in an enforcement court and reargue the entire case on merits. It should not be permitted. So, that fine line between enforcement and an appeal in India, is maintained by strictly adhering to the limited grounds that are available for judicial interference and arbitral awards at 34, and virtual non-interference when it comes to enforcement. I think that should answer that.

VIJAYENDRA PRATAP SINGH: Thank you, Ma'am. Therefore, you have it. It's not Oliver Twist's "May I have some more." It is, once you've had it, you can't start it again.

JUSTICE HIMA KOHLI: Right.

VIJAYENDRA PRATAP SINGH: That brings me to Mark. Mark, has there been any case where you've had to get creative with asset tracing for enforcement?

MARK MANGAN: Thank you, VP. The first thing I'd note is that the premise of your question is that asset tracing would happen at the point of enforcement. But what's happening increasingly today is that asset tracing is happening at the very beginning of a process leading potentially to arbitration. In particular, if you are seeking funding from a third party funder, one of the first things they will be considering beyond the merits of the claim is whether or not there are assets that are identifiable against which any favourable award could be enforced against. So, asset tracing is starting at the beginning of the process, and there are now specialists in that field, both in terms of external consultancies as well as within the third-party funders themselves. They have dedicated people who focus on trying to find assets around the world. So, I think that is a key change in recent times. Moving beyond that in terms of actual asset tracing, I think the traditional approach has been to try to identify specific assets against which you could target and seek to enforce your decision. Another strategy, one that I've seen succeed, is what might be described as a "scorched earth policy." If you have a client that has a sufficiently large enough legal budget and a determination to obtain relief as soon as possible, then opening up potential proceedings against a Respondent in multiple fora can reap dividends very quickly. You can reduce them to their knees, which is effectively the objective when you are trying to enforce a decision. Sometimes more quickly if you are doing it on multiple fronts. But you do need a significant legal budget to do that, which is not always available. But sometimes, if the amount in dispute warrants that strategy, it can be extremely effective. And one of the more famous examples of that was when the so-called vulture fund, Elliot, in New York enforced judgment debts that have been rendered against the State of Argentina. This was a ten-year enforcement effort that spanned the globe in which I had some visibility on. And one of the more famous examples of that asset tracing was, Elliot instructed the law firm that I was previously with, effectively to identify the jurisdictions in the world where the Argentinian Navy had ports of call, and to analyse their roles in relation to sovereign immunity and to identify those jurisdictions where it was most likely that the courts would allow a Claimant to seize an Argentinian Naval ship. And the jurisdiction that we were able to locate that actually had the most favourable rules in that regard was the State of Ghana. And famously, the Argentinian ship Libertad in October 2012 was seized in a port in Ghana with

200 Argentinian student sailors on board and held in the port for a few months, it became a bit of a scandal within the Argentinian Government that these poor Argentinian sailors were being deprived of returning home for Christmas. And that was an effective tool in itself to apply pressure on the state. That in itself didn't ultimately succeed because the seizure was lifted after a decision was rendered by ITLOS, the United Nations body on the law of the sea. But it did apply pressure, ultimately. How Elliot succeeded, was they convinced the courts in the United States to freeze Argentina out of the US capital markets effectively for as long as they remained in default. The courts ruled that they were not able to raise any further funds in New York. That then led to Argentina reaching a settlement with Elliot, which was a multibillion dollar success, all brought about by the enforcement strategy that was adopted in that case.

VIJAYENDRA PRATAP SINGH: Very interesting. So, matters mundane and Naval, can all happen in the course of an enforcement action. Emiko, you've told us about how do you get to the money and how quickly can you get there. What has been your experience with respect to non-monetary awards and their enforcement?

EMIKO SINGH: Thanks, VP. So, actually, I'll use that to circle back to what I promised I would talk about, which is enforcement of emergency arbitrator awards and urgent interim relief, which a Tribunal is granting, and what happens when you take that to a court. So as I'd mentioned earlier, I actually had a good experience with what I call soft enforcement, where we obtained an Emergency Arbitrator's order and we never even had to go to court because the other side effectively withdrew the action that we've got the Order against, on the basis of that Order. That's not always the case. And ultimately, we find increasingly that what it comes down to when you're trying to enforce these non-monetary urgent relief awards is basically how the national courts are going to approach it. Increasingly, we are seeing that more countries around the world, the courts are trying to give more and more deference to these Emergency Arbitrator awards and Orders, but there's still a lot to be done. We've seen, for example, the Indian Supreme Court in a case that's already been mentioned, went ahead and supported an Emergency Arbitrator's award, but we're also seeing that in many jurisdictions, there is confusion when you approach the court about how to treat this award, because in most national legislations, Arbitrator's awards are meant to be given effect to, as final and binding and disposing of certain issues. The problem with Emergency Arbitrator's Orders or awards is that they are subject to review in many instances by the Tribunal that's eventually constituted. And so many courts don't view these Orders and awards as being final and binding or dispositive of a particular issue. Or even if they're not sure, they err on the side of treating them as somehow a sort of, provisional or a temporary Order, and then it gets treated in that way. We are seeing that there's been a movement in jurisdictions to try and address this in

their Legislation. So, for example, again, the example I'll give you is of the UK, because I'm most familiar with that. But the recent changes that have been proposed for the Arbitration Act and which will likely go through, effectively legislate that once an Emergency Arbitrator has issued their Order or award, and if it's not complied with, they can issue what's called a Peremptory Order where they order compliance within a certain time frame. The English courts are empowered to enforce the Peremptory Order of an Emergency Arbitrator or a Tribunal. So, that's how they're proposing to get around it, where they're empowering the Emergency Arbitrator to effectively issue a follow up Order ordering compliance, and the English courts will then give effect to that as if it was an order of an English court, which would be a very interesting initiative if it comes to pass.

VIJAYENDRA PRATAP SINGH: It's an idea whose time has come. We did that in our act and that allowed in the ***Amazon*** matter for us to go to court. Immediately, as if the order of the EA was in fact the order of court and it was enforceable as such. So, it's a very powerful tool. It adds to your repertoire of options, and we should never rule it out, because you can effectively get to market with an Order faster without a validation required. So therefore, the two stage may be still more time taken. That brings me to my next question. And this goes to Justice Kohli. Ma'am, can an award, once approved by the seat of arbitration, be subject to any reopening or reconsideration in a non-seat jurisdiction?

JUSTICE HIMA KOHLI: So, inherent in this question is the fact that we are dealing with an international award. So, generally speaking international public policy, there's no such international public policy that exists. Of course, we have the New York Convention or the Convention on the recognition of enforcement of foreign arbitral awards that laid out conditions where the execution of the award can be refused if it goes against public policy of the country of either of the Parties. Execution of international awards is a difficult area on grounds of violation of public policy, because an award can be ordered to be executed in one country, whereas in another it may be treated as a violation of some public policy that would be applicable in that jurisdiction. Once approved, we all know that an arbitral award may still therefore, be subject to when it comes to the second jurisdiction, of being reopened, of being reconsidered, and depending on the legal framework, depending on the standards of jurisdiction. So, arbitration, while it is designed to ensure finality and efficiency in dispute resolution, when it comes to enforceability, when it comes, there is a potential challenge played to the arbitral award, it would vary from country to country, each of which may have its own grounds for reviewing, or for reviewing or refusing enforcement. So, this highlights, as a matter of fact, the interplay between national sovereignty and the global principles of

arbitration. Different countries have different standards, the extent of scrutiny and the public exception being a variable.

Let us take the, for example, in the Convention, we are referring to the New York Convention on recognition and enforcement of foreign arbitral awards. About 170 countries, including India, has ratified it. The Convention allows Parties to seek enforcement of awards across borders, but also provides grounds for refusing enforcement under Article 5. So, this would include, if the award is in violation of public policy of the country where the enforcement is sought, if the Parties were not given proper notice, or were otherwise they were unable to present their case, if the award deals with matters beyond the scope of the Arbitration Agreement. And if the composition of the Tribunal or the procedure adopted was not in accordance with the agreement between the Parties or the law in respect of the seat of arbitration. These provisions go to show that while an arbitral award may have been confirmed by the seat of arbitration, it can still face stiff challenges when enforcement is sought in different jurisdictions, particularly on the public policy ground or the due process ground. The public policy exception is again, very subjective, with each country interpreting it based on its own legal and moral standards. For instance, in India, in the earlier decisions, the Supreme Court had interpreted public policy very expansively, but you would have noticed that more recent rulings have sought to limit that scope by clarifying that public policy grounds should be applied narrowly, should be constricted to preserve the integrity of the arbitral award. The general emphasis of the Indian courts has been that award should not be interfered with lightly, unless they contradict the country's fundamental policy of interest of such a nature that goes to the root of the matter. Other countries have taken a more expansive approach, as, for example, France, Switzerland and United States. They have, all along tended to adopt a pro-enforcement stand, often upholding the sanctity of the arbitral award and limiting the judicial intervention. So, the question is whether and award can be reopened or reconsidered in another jurisdiction. The answer would be, it would depend on the law and the judicial philosophy of that country, of that jurisdiction. So, while the seat of an arbitration might confirm the finality of an award, it does not immunize the award from scrutiny, when enforcement is sought elsewhere. As a result, when arbitration is intended to offer finality, the global enforcement still depends on the national legal interpretations and the standards. And the awards still may be reopened or there may be a refusal for enforcement in particular cases.

VIJAYENDRA PRATAP SINGH: Thank you, Ma'am.

JUSTICE HIMA KOHLI: Thank you.

VIJAYENDRA PRATAP SINGH: And that builds us into what is actually what Gary Born's also mentioned. Gary Born defined national public policy and arbitrability as a two escape walls of arbitration under the New York Convention. So, they give you some kind of a national escape route. My question is to Mark. Do you think it's time for rules to prescribe a transnational standard without any national escape holes?

MARK MANGAN: The short answer is yes, and no, in terms of whether or not there's a need for a transnational standard on the concept of arbitrability. I think it's important to distinguish between the approaches that should be taken at the seat of arbitration as compared to the place of enforcement. And please forgive me, but this discussion is a little bit theoretical. But nonetheless, I think it is an important issue. In terms of the seat of arbitration, one first has to begin with recognizing that in the words of Mr. Justice Kerr in the early 1980s, in a case of Bank Mellat and [UNCLEAR], he famously said that arbitration does not exist in the transnational firmament. It doesn't exist in space. It doesn't exist above any national borders. It has to be anchored within the jurisdiction that it's seated. That view of arbitration, of it needing to be anchored to a seat has taken hold in the common law world, including here in India. A so-called delocalized view of arbitration has gained some acceptance in some parts of the world, in particular in France. But in the common law world, it's accepted that arbitration has to be anchored to a place in which it is seated. And effectively therefore, for arbitration to proceed, you need two forms of consent. You need the consent of the Parties and you need the consent of the state in which the arbitration is being conducted. And that states, when it's giving that consent, it has the power, it has the sovereign right to determine the extent to which it will allow arbitration to take place within its borders. So, I take a little bit issue with Gary, because Gary talks about escape valves from arbitration. But in reality, what we're talking about is escape valves from the court system where Justice Kohli has come from, that every state has the right to determine, to what extent it is going to allow exceptions to the normal rule that disputes should be resolved within its judicial system. So, the real escape valve is that which allows arbitration to continue in the first place, because it's not delocalized. It is tied to a particular jurisdiction. And so, from that perspective, it's natural, I think, for states to regulate the extent to which they will allow arbitration to take place and to define what is considered arbitrable. And it's also natural for them to have certain exceptions when doing that. So, for instance, excluding the ability to arbitrate disputes in relation to family matters, criminal matters, taxation issues, matters of property or insolvency. Those are the sorts of issues that I think it's understandable that a state would not want to give an escape valve from its judicial system. But there's one area in which I think in India where, I think there's a divergence has developed in terms of arbitrability, which is whether or not minority oppression claims in the corporate context should be arbitrated. And I think the view here is

that they are not arbitrable. In other jurisdictions, including in Singapore, probably the majority of common law of jurisdictions as an acceptance that minority oppression, shareholder claims should be arbitrated. And perhaps that is something that could be considered going forward here in India.

But broadly speaking, I think it's in the interests of each state to have a broad conception of arbitrability, because of what I might describe as three goods in terms of arbitration. Arbitration is good for the court system. Justice Kohli, you talked about earlier that the Indian court system is overburdened, and I've seen some of statistics on that. And arbitration generally has been considered a good release valve of pressure from the court system. And if people have regard to the first decision of the English House of Lords embracing arbitration, that was the Scott and Avery decision of 1855. The reason the House of Lords accepted arbitration in that case was because of the famous book by Charles Dickens, who you quoted earlier, Bleak House, which had been sterilized by the Times of London in 1853, which described the horrors of the delays within the court of Chancery in London, in the case of ***Jarndyce and Jarndyce***, which took real life examples. There was one case in the States being... sorry, I'm on a tangent here, but there was one case before the Court of Chancery in the 1850s that had been going for over 70 years and that's what inspired Charles Dickens to write Bleak House. That, in turn, inspired the House of Lords to recognize that arbitration was good for the public because it was an escape valve from an overburdened judicial system. Secondly, it's good for the Parties. We all know that the traditional reasons why we consider arbitration to be good for the Parties in terms of speed, neutrality, efficiency and expertise. But it's also good for business generally. Arbitration has become a multibillion dollar industry, in terms of the ecosystem that has developed, in terms of law firms consultancies, clients, venues, hearing facilities and so forth. It is a multibillion dollar business that I think countries around the world are recognizing. They want to support to get a part of that business. So, it's in every state's interests, I think to have a broad conception of arbitrability, to have only narrow exceptions to that escape valve from the courts. I think in the interest of time, I'll stop there.

VIJAYENDRA PRATAP SINGH: So, there you have it. Charles Dickens got it right. And that gave us the Scott versus Avery Clause. Now, we talked about, Mark talked about a billion dollar industry. The man who deals with billions is the man sitting right at the end, which is Chaitanya. Chaitanya, as an expert... expert usage in international arbitration is an idea which has come to stay. But experts as an innovation to bring about efficiency, economy and effectiveness, keeping with my E-theme is the way of the world. Where do you see the new frontiers, which is expert 2.0 and how do you see it playing out in the near future?

CHAITANYA ARORA: Thank you, VP. It's quite common in arbitral proceedings for experts to go on the last day. So, this seems quite home ground. To address the topic, look, the use of experts in arbitral proceedings in India and internationally, it's not new. The '96 Act has provisions to incorporate expert evidence. And while there has been slight reluctance among Parties and counsels in India, particularly domestic-seated arbitrations to incorporate the use of experts, there is a compelling reason with the increasing complexity of transactions cross-border trade and the evolution of technology, that compels the inclusion of expert evidence in any proceedings that are being conducted during arbitration. Primarily because, for instance what we are being asked to get involved in is technologies like cryptocurrency. And that's a novel subject that has very limited expertise, if I may, to offer assistance to Tribunals and courts, where the liability question often turns on the technical aspects of these novel technologies.

Now coming back to the question of innovation, I mean, over the years, and I think I have a slight benefit of having entered the fray of experts who were being sort of considered in India 10, 15 years ago, there has been a distinct evolution of a familiarity with the role that expert plays. I no longer have to talk in conferences where we're discussing what is an expert and what is the role of an expert. I think that horse has been flogged sufficiently. I think now it's a question of the timing at which point do you think about engaging an expert. And Mark mentioned the use of funding. That has also created a new approach towards considering the appointment of an expert, particularly an expert on damages or valuation, because at the end of day, as much as the Parties are fighting about the law, the critical question is, what do I get as compensation or damages? Or is this even worth fighting for? So, the engagement of an expert has started to happen much earlier in the process and in that context, another new trend that seems to have been observed, particularly involving Indian Parties, is the use of what is colloquially mentioned as a "dirty expert." Now as unclean as that word sounds it's an expert who is working alongside Counsel in the Party without being independent, and it's being often used to assist in the assessment of legal strategy, perhaps testing out different theories and assisting and sometimes identifying who that independent expert could be for a particular case. And that's not always easy. We're currently working on a situation that involves construction of highly complex fusion-related technology, nuclear power plants around the world, and there are only 27 people who can claim expertise in this space, and 17 of them work for the Claimant, and 7 of them work for the Respondent and the remaining work for the competitors. So, it's very, very difficult to find such expertise available to assist Tribunals who are, I think in desperate need for perhaps shedding more light on these rather

technical and difficult concepts, which often form the crux of trying to resolve a matter through an arbitral proceeding.

Now, I think the big question often comes up, is expert evidence even necessary? Right? I mean, Parties, especially in India, have often asked this question when approached with the option, why am I having to pay for someone when my internal team can do this work and what's the value that the expert brings? And I think the starting point for considering the effectiveness and efficiency of the use of expert evidence is to stop and analyse if expert evidence is critical to the outcome of a particular dispute. I mean, if you refer to the ICC Commission Report on techniques for controlling time and costs in arbitration, it states that the presumption should be that expert evidence is not required, which should be departed only if expert evidence is necessary to inform the Tribunal on key issues in dispute. And despite this recommendation, Party-appointed experts are very frequently appointed, often as a matter of course in arbitration proceedings without close consideration as to their scope of work and whether the evidence is really required in order to determine the outcome of the dispute. I mean, the LCIA's note on experts in international arbitration, for example, states that most, if not all, of the LCIA's registered cases involve the use of experts, and I think that goes to the point I made earlier. The Tribunal are often comprised of in individuals who are extremely trained and experienced in law. But they are trying to decide issues that are highly technical and complex, some of which are even difficult for industry players to find expertise in. Therefore, the adoption of expert evidence and perhaps that being considered innovation is inevitable. And I think we will see more of that as we embrace the technology on the horizon, which everybody talks about, AI, and how will that impact the involvement of experts and the use of expert evidence is something which everybody is waiting and watching.

VIJAYENDRA PRATAP SINGH: So, there you have it. He's doing it for free. He's not sending me a bill for this one. But you do need an expert because the other three Es flow from it - economy, efficiency and effectiveness. That brings me to the next E, which is "Early Dismissal", and I'm going to go to Emiko on this one. It's difficult to balance out a strike-out action like an early dismissal with the right to a full say in a proceeding. How do you, a), balance that, and how do you ensure that the EDA process is not misused in terms of how parties recourse it, not just to derail the arbitration?

EMIKO SINGH: So, the Early Dismissal process is something which I think causes a lot of tension and controversy amongst clients because, some of them are in favour, obviously there are different institutions who have come up with procedures that you can follow to obtain early dismissal of claims. But I think clients are very conscious of the fact that ultimately it comes

down to what Justice Kohli was talking about earlier, which is enforcement. And a lot of jurisdictions are very nervous about enforcing awards, which have been issued without actually a full hearing, on the merits of the case, which is what Early Dismissal effectively is. So, I think the one sort of instance, and again, this is something that you will hear lawyers say I've only been through this once or twice before Tribunals. I mean, I'd be interested to hear if, I'm sure Mark has seen more examples, but it's very rare that you will actually see clients go for this option. The one instance where I have seen it is, I think it was a very clear-cut case. There were very narrow issues, and it was clear that the other side's claim was without merit. And so, for us to go in and argue that their specific claims should be dismissed with without a full hearing, it was a relatively sort of easy argument to make, because they were clearly not able to, in their response, even refer to evidence which would support their case. That's not always the case. Sometimes you see Tribunals distinguish, especially Tribunals seated in London, they will distinguish between the concepts of Strikeout and Early Dismissal. So, Early Dismissal will be ordered in the event that it really is clear that there is no evidence to support a specific claim, and sometimes there will be a short hearing to determine that, although not a full oral hearing on the evidence. Strikeout, on the other hand, is just something that's done with respect to sections of the pleadings. So, where a party has pleaded a claim or Respondent has pleaded a counterclaim, which clearly has not been particularized by them enough despite being ordered by the Tribunal to do so, in those instances, Tribunals are more comfortable with ordering them to strike out that claim, which effectively means they no longer have the opportunity to plead that claim, given that they can't support it. Strikeout is probably something that is less impeachable and therefore, more of a soft target for parties to go for if they're concerned about something like this. I think Early Dismissal is something that we still advise with a lot of caution. You can, of course, as I said, try and address it by making sure that the criteria that you're suggesting to the Tribunal is really of a very, very narrow scope. Again, borrowing from English Law, where, if a court has to grant summary judgment, you really have to show that the other side has no real prospect of success and the burden of proof is on you, as the applicant to show that. All of which shows to the enforcing court that certain steps were followed and the Tribunal was left with the very clear result that this was the only conclusion they could come to. So, if you are going to go for that, that's what I would advise clients.

VIJAYENDRA PRATAP SINGH: So, surgical, certain and only if it's worth it. That's clear advice there. Before we go into my next piece, I would say that the next idea is an idea where, fortunately, no one's doubting its efficacy. In fact, it's the new kid on the block, but has been around from time immemorial. And that is the idea of Med-Arb or Arb-Med-Arb, which is the idea where you're using mediation as an effective tool to resolution, because resolution is the

essential aspect of our Dispute Resolution solution. My question here goes down to Justice Kohli. And it is, what is the legal sanctity of a mediation settlement in the course of arbitration?

JUSTICE HIMA KOHLI: In a single word, the answer would be, that there is a legal sanctity or for mediation settlement in the course of arbitration. So, how does that work? In India, the mediation settlement can take place and everywhere else also, wherever it's applicable, where it's integrated in the course of arbitration, which is commonly known as Arb-Med-Arb. It offers a flexible and efficient resolution mechanism. It is a natural outgrowth of this trend, as it provides that mediation should be a window available at any stage of arbitration, allowing the same neutral, if possible, to be the mediator, and not necessarily so, depending on the extent of breach of confidentiality that may occur as a consequence of the same person wearing the two hats. So, in mediation, especially under a law centre model, the mediator can leverage expertise to guide a settlement and strategies based on legal norms and industry practices. What is the purpose? It enhances the persuasive power. The mediators can evaluate potential trial outcomes and with reference to similar cases. But unlike arbitration, where the neutral decisions are based on only the facts presented, mediation often involves sharing confidential information which remains within the four walls of the process of mediation. So, in our Act of Arbitration and Conciliation was at Section 30, all-encompassing and encourages mediation at any stage to permit Parties to settle a dispute, and if a settlement is arrived at through an Arbitrator who acts as the mediator, it can be recorded as an arbitral award on agreed terms, which is again enforceable in law and binding in the courts. The source of arbitration stops at... of mediation in Arbitration and Conciliation Act would stop at Section 13. But when we come to the new Mediation and Conciliation Mediation Act 2023, it works in tandem with the Arbitration and Conciliation Act. So, this act adds a further structure of regulating the broader principles of mediation, ensuring that the settlements are enforceable and by and large, promoting ADR. The impact of a Med-Arb or Arb-Med-Arb, therefore, must be viewed from the prism of both the Arbitration and Conciliation Act and the Mediation Act combined together. Both the processes, whether it is Med-Arb or Arb-Med-Arb, have received greater legal support and wherever there are mediated settlements, whether reached through these standalone mediation or within an arbitration process, they are recognized as binding and effective. So, overall, it reinforces the sanctity of these settlements.

Another aspect which I must touch upon when we talk of this is, the fact that there are institutions that recognize it with and enforce these processes, too, whether it is ICC which encourages the use of mediation during arbitration or it is in the Indian flavour also, the Mumbai Arbitration Centre, whether it is SIAC or SIMC. Of course, in the case of SIAC and SIMC, the Arbitrator is appointed independently through one channel of SIAC, whereas the

mediator through the SIMC route, unless parties otherwise agree that the Arbitrator can itself wear the mantle of the mediator. Then comes an aspect which engages India as a Commercial Courts Act, which is also mandates a pre-litigation mediation and lays much emphasis on Parties going through that process. That emphasis has, if I may share with you, translated into a disposal of 99,000 cases plus, during April 2023 to March 2024. And this is what demonstrates the efficacy of a dispute resolution mechanism. Picking a leaf from this, perhaps the Government of India decided that there should be a further fillip to mediation. And therefore, came this June of 2024 Notification that the Government came out with which provides a certain parameters for referring matters to mediation and certain volumes of matters, as in financially, which ones are the heavier ones which need not go into mediation. Those below a particular level would, for example, as a result of this Notification, Parties to the contract could be private and public partnerships that are increasingly opting for mediation, commercial agreements below sum of Rs. 10 crores, construction and infrastructure contracts, Government tenders and procurement tenders. So, the base has expanded.

Earlier, there was resistance to mediation when it came to Government agencies. It was somehow felt that they would compromise their stand or they would dilute their stand if they came out candid in mediation. So, that perhaps is one reason the Government has come out with this Notification, to break that resistance and break that barrier and offer more flexibility in the process of mediation, besides, of course the confidentiality aspect and the faster resolution aspect. End of the day, it is a non-adversarial nature of mediation as a tool that helps businesses keep their relations going, to take it to the next level. And when it comes, like, to sectors like construction, real estate and long term business partnerships, they mean a lot. You are not cutting off ties in mediation. You are building on a relationship further to continue with it. So, it's the maximization of profits when it's commercially sophisticated Parties who opt for mediation, maintaining efficient business operations and often seeking to avoid disputes through prolonged mitigation, making it what? Cost efficient, as at the same time, dispute resolution friendly. That would probably answer the question, by and large.

VIJAYENDRA PRATAP SINGH: Thank you, Ma'am. That brings me to Mudita. Mudita, you spoke about the fact that the OEMs usually use litigation or arbitration as a method, but not a solution. How often are Parties open to mediation as that solution?

MUDITA ROY: Well, so you know why the contracts with the OEM, at least from an aviation industry perspective, are most significant is because they are very high value. So, for example, if you have, if you see any of the largest contracts with OEMs, whether they are for purchase

of engines or maintenance contracts, and when I say high value, they run into billions of dollars. While they will have detailed provisions for arbitration, I've rarely ever seen any provisions for mediation. But having said that, it doesn't mean that Parties are going down the route of arbitration. Often, more often than not, they are actually resolving disputes, and these would be very critical disputes through settlements and these are actually... Parties are being compensated purely on the basis of their relationships, and these are business relationship over a period of time. I mean, it sounds like an oversimplified answer, but that's actually what is happening on the ground because the entire ecosystem is interdependent. So, you can have an aircraft manufacturer, but you also need the engine manufacturer, you also need the MRO, which is the maintenance provider, and you're all interdependent because that's how the industry is functioning. So, if you cut any one of them off, like you have a long term of the business to cater to. Of course, I'm sure there are scenarios where you have to go down the path of a dispute, but mostly mediation is not something that I would have seen often.

VIJAYENDRA PRATAP SINGH: So, that tells you, symbiotic coexistence ensures everything gets settled. Last question to Mark, which is the last E, but definitely not the last in all times to come, for the time ahead - the environment. What can arbitration do to reduce, remove recycle for a better environment?

MARK MANGAN: Thank you, VP. I think the point of departure for this issue is for us as a community, the arbitration community, to recognize that we need to align ourselves with the users of arbitration as represented on this panel and in this room. Many of the users of arbitration are currently on a journey to net-zero. And many of those users of arbitration have aligned the compensation packages for their senior executives to their performance on the environment. Some very well-known companies, for instance, link 10% to 20% of the entire compensation package for senior executives to the company's ability to hit environmental targets. So, that has inspired the thought in my mind, which is, why don't we, as a community also seek to try to incentivise ourselves to reach certain environmental targets? Why don't we link some of the compensation that's available to Counsel to Arbitrators to institutions, to our environmental performance? And perhaps this is a good, provocative thought to be leaving the audience with. And I'll answer that in a little while, what I think as to how we could potentially do that. So, the main causes of carbon emissions in the practice of arbitration, of course, is the transport of people and paper across borders. But even emails generate a carbon footprint. I don't know how many within the room know what is the carbon emission for the sending of a simple email that says, "Thank you"? You might be surprised to learn that that generates 4 grams of carbon just through the sending and the storage of that email. And so, if you multiply

that by the millions of emails that we send, that in itself generates a significant carbon footprint.

Some people have sought to measure the total footprint of a typical arbitration. In 2019, a study conducted by some people at the International Chamber of Commerce calculated that a typical middle to large size arbitration generated 418,000 kg of carbon emissions. I did a study a couple of years ago, adopting different assumptions post-COVID, where we are traveling less and we're becoming more environmentally conscious. Even with different assumptions we calculated that a typical middle to large size arbitration generates 162,000 kg of carbon emissions. And to offset that in the atmosphere, we would need to grow more than 7000 trees for one year, or allow 2000 saplings to grow to full height over a ten-year period. That is how much trees that we would need to remove the carbon from the atmosphere generated by a typical arbitration. And if you multiply that across all the arbitrations that we're doing globally, you can see that we, as a community, do have a carbon footprint. I'm not suggesting we are one of the main sources of global warming or carbon emissions, but we do contribute to that phenomena.

So, I think it's important that we think about how can we track, record and reduce carbon emissions in the practice of arbitration. And the starting point for that is also to consider what we're doing today, which is attending a conference. That in itself generates carbon emissions. But you'll be pleased to know that I'm not suggesting that we should ban travel, including for these conferences. On the contrary, I think we can all recognize that travel, including by plane, is important for our community. The sorts of transnational standards that you've been asking us about today, VP, concepts of public policy and arbitrability, key instruments in our profession, such as the New York Convention's UNCITRAL Model Law all of those have been generated through travel by people coming together and discussing different legal and cultural traditions, and that has to continue in order for those standards to continue to be applicable across the community. So, we can't ban travel. We can be conscious how we do that travel. And some members on the panel have told me that they're flying Economy Class, in part, to reduce their carbon footprint. And I noticed PwC recently has announced that all staff have to fly Economy Class going forward in order to reduce carbon emissions.

But I think in terms of conferences, a provocative thought, and it's not really for me to say, so I am being deliberately provocative, but India ADR week is, of course, held in three different states within the one week - Bengaluru, Mumbai and Delhi. Maybe one of those states, one of those cities should host the entire week on a rotational basis, or is there a middle ground

between, is there a middle city between all three where we could meet, that would reduce the carbon emissions, VP.

VIJAYENDRA PRATAP SINGH: It's definitely Delhi.

MARK MANGAN: So, perhaps the thought could be given to reducing the carbon emissions related to conferences, including allowing hybrid sessions. And it's good that today's session is being uploaded to YouTube. And I've heard people from around the region talking about wanting to dial in and see what's happening at India ADR Week without traveling here. In terms of the conduct of arbitrations themselves, we can also do that in a more sustainable way. And I think every stage of the process in an arbitration we can have regard to the environmental impact of what we're doing. Whether it's thinking about the length of our submissions, the number of witnesses, the number of experts, whether we have hearings virtually or physically, I think at every juncture when making procedural choices, we should also be thinking about the environmental impact. I'm not suggesting that we don't continue to fight. And of course, the name of the game is still to win, but at every juncture we should be thinking about the environmental impact.

And I'll conclude with what is my most radical suggestion, which is that Arbitral Tribunals be empowered to take into account Party's environmental performance when it comes to allocating costs. So, there are ways in which you can, as I mentioned, track and record the emissions that you incurred during an arbitration. Parties can tabulate what the total carbon emission is and submit that to the Tribunal. Similar to what we currently do with cost submissions. And we've developed some of the formulas that you can use in order to work out your carbon footprint. We could empower Tribunals to consider both Parties' monetary costs and their environmental costs, and ask them to weigh that up when determining the final allocation of costs between the Parties. Similar to our clients, we could potentially allocate a factor of 10% to 20% to the environment on the issue of cost allocation. And we don't need to... and I might say that some institutions are now starting to pick up this idea, so that Hong Kong International Arbitration Centre and its rules released in July just a couple of months ago. They have expressly said the Tribunals can take into account the environment when allocating costs.

And I'll conclude by saying that I don't suggest just Parties' Counsel be subjected to these environmental market forces. But experts, arbitrators, arbitral institutions, the entire community, could start to record and calculate and transparently report what is their environmental footprint in order to apply pressure on all of us to do the right thing.

VIJAYENDRA PRATAP SINGH: That's definitely food for thought. Thank you to my panellists. It's a great discussion. And for the room, let's take a pledge that we'll calculate, conserve and continue with our journey towards a better environment. Thank you.

JUSTICE HIMA KOHLI: On behalf of all five of us, we must thank VP for taking us through this flow absolutely effortlessly, seamlessly. And that's how the answers have come out so promptly. There was a lot of back room that happened before we were here before you, which we weren't sharing. Thank you.

~~~END OF SESSION 2~~~