TERES

INDIA ADR WEEKDAY 4: DELHI

SESSION 3

Emergency Arbitration 101: Latest Trends and Developments

12:00 AM To 1:30 PM IST

Opening Remarks:

Manini Brar, Independent Practitioner/Arbitrator, Arbridge Chambers

Moderator:

Varuna Bhanrale, Partner, Trilegal

Speakers:

Tine Abraham, Partner, Trilegal

Rebecca James, Partner, Linklaters, Singapore

Mukul Shastry, General Counsel, Cube Highways

Mehak Oberoi, Legal Head-Hydro Power APAC, GE Vernova

Avnit Arora, Director (Arbitration & Conciliation), Department of Legal Affairs, Ministry of Law & Justice

HOST: The next session is hosted by Trilegal, Linklaters and Arbitral Women on Emergency Arbitration 101 Latest Trends and Developments. I would like to invite on stage the panellists for this session. We have Ms. Varuna Bhanrale, Partner at Trilegal who will be moderating the session. Ms. Tine Abraham, Partner at Trilegal. Ms. Rebecca James, Partners at Linklaters in Singapore. Ms. Mehak Oberoi, Legal Head-Hydro Power APAC GE Vernova and Mr. Avnit Arora, Director of Arbitration and Conciliation, Department of Legal Affairs, Ministry of Law & Justice.

VARUNA BHANRALE: Hi. Good afternoon, everyone. Thank you so much for joining us today to discuss this very crucial topic, an interesting topic of Emergency Arbitration, where we see a lot of traction, especially in India with the latest legal developments and our effort, my effort, along with panellists over here would be to try and take a deep dive into various issues that we are seeing right now, including is emergency arbitration even required. And what is the way ahead if we have to continue evolving the process of dispute resolution in arbitration through emergency arbitration. So without any further ado, I'm just going to straightaway dive in. And my first question is to Rebecca and to Tine, is that do you think that emergency arbitration is even required. It's been around for a very long time, 30 years odd, gained traction in the last decade or so. But we also have courts which provide for interim relief. So is emergency arbitration even required when you have other avenues for getting urgent interim reliefs? Rebecca I'd request your thoughts first of course.

REBECCA JAMES: Thank you so much, and it's a pleasure to be here to discuss this interesting topic today. Now, reasonable views may differ on this topic, but personally, I do think that Emergency Arbitration is a very useful tool or mechanism that has real additional advantages. But my respectful view is that it is badly overused, and it is the use of the mechanism that is creating the problem. So just to touch on, I suppose some of the benefits that I perceive in emergency arbitration as an additional mechanism which is not necessarily replacing interim relief from national courts, but as an additional tool. Frankly, when you are looking for urgent relief, which is by its very nature what Emergency Arbitration was introduced to address, you want it to be done quickly. And actually, usually Emergency Arbitration you can get an Emergency Arbitrator appointed sometimes within a day, a couple of days and you can actually even get a decision within a few days or at the outer limits within a couple of weeks. And it really depends which jurisdictions you're dealing with, whether you could possibly get relief anywhere near that quickly in the national courts. But there are certainly various countries where you would not be able to. So noting that often there is quite

a high degree of compliance with these awards once issued or orders, it can actually be very helpful to have that speed.

The second key area where Parties can perceive advantages is frankly linked to the reasons why they picked... they picked arbitration rather than the national courts to start with. And one factor here is actually whether the Parties trust or have confidence in those national courts. They want independence, then they may well want their interim relief prior to constitution of the Tribunal to arise from that same sort of neutral forum rather than the State courts where one party is likely to be based. You of course, also have the ability to end up with an arbitrator, Emergency Arbitrator who is well adapted to the circumstances of that dispute. And often in an Emergency Arbitration context, at least in an institutional context, that choice would be made by the institution. You can get variable quality in the courts. I would say probably at least you can get excellent decisions. But you can also end up sometimes with judges who are not very well suited to determining these sorts of these matters in conjunction with arbitration needing to do so. The final point, I suppose, is confidentiality, again linked to that factor of why does the Parties actually pick arbitration to start with? And this is not uniformly the case, but in many national or state courts, in order to seek interim measures in that forum, you wouldn't be able to preserve the confidentiality of the arbitration cleanly, certainly not without taking steps to actually put additional confidentiality measures in place, which, if done, might take so long, it would, in fact, obviate seeking the relief to start with. So I might pause there and let Tine chip in with further thoughts. There are lots of other points to raise as well.

TINE ABRAHAM: Hello, everyone, good afternoon. So I think to answer the question, I would simply echo everything that Rebecca has said and maybe add a few additional points. When you're looking at an arbitration or a dispute resolution in general, interim relief is most often very critical to how the dispute spans over the course of next 18 months, 24 months till you have an award and how the award gets executed. So interim relief in that sense, as a concept is extremely critical. And more the avenues to get that interim relief, the better it is, is the way I would put it. The question is that how do you use those avenues. And that's an aspect where there can be difference in opinion. But as a principle, more the forums, the better it is. The primary advantage of that is that it gives the party who's seeking that interim relief, the option to choose from multiple forums. You have the national courts to go through. You have the option of Emergency Arbitration or wait until a Tribunal is fully constituted and then get an order from the Tribunal. So all these three becomes options available.

Now then, it's a question or an option which is available with the party, depending on various issues, like what is the timeline within which you need that order. How do you want to enforce

that order? Say, do you need a court assistance to enforce that order, or you expect the counterparty to comply with the order, once the order is there? What is the ambit of that order that you're looking for? Are you looking it to be limited by territory or looking at an order which will have global implications covering assets across jurisdictions? So all of these factors actually go into a party deciding which forum or which option for interim relief they need to pick. So at the end of the day, when you're looking at arbitration, it's something which is governed by party autonomy. And having an Emergency Arbitration is also only taking that principle forward, which is that you have the autonomy to decide where and how you get the relief. And obviously the benefits of time is in your favour. Sometimes National courts can give you the order in five days' time. Sometimes it would take five months as well. You might get a protective order which was in operation from one date to the next date, but you still need to go through a five month process to get that interim order from the national court. So there the timeline advantage is significant in terms of going into an Emergency Arbitration.

Similarly, confidentiality is, again, an aspect which you can't protect if you're before a national court getting these interim orders. So there are these advantages. It's always to be weighed in and seen what works the best for a particular situation. There is no one size fits all solution. Some cases, even if you have the benefit of emergency arbitration, it makes sense for the parties to go to the national courts. But in several other situations, Emergency Arbitration works as a better option. So I think the answer boils down to the point that, yes, it is important, and it needs to be used wisely, depending on where you are and what you're wanting.

REBECCA JAMES: Well, we're in heated agreement here. Unsurprisingly I completely agree with everything that's just been said. I just want to add a few additional remarks on, I suppose, the limitations of Emergency Arbitration or where actually, it might not be very helpful. And enforcement is a really important issue to analyse carefully, as we've just touched on briefly. And in my experience, this can be a really important issue in deciding whether it's worth pursuing Emergency Arbitration to start with. And it's really critical almost to start by thinking ahead to the end which party are you dealing with, when are you in need to actually enforce the order or award if it's not complied with? And what actually is the legal regime in the relevant country with respect to enforcement of emergency awards or orders. And that's really important because there are quite widely different approaches to enforcement of this sort of relief between countries. There are actually really not that many that expressly address the position with respect to enforcement in their statutes or legislation, and so you can end up at the very least, territory of what we'll come back to some exceptions to that, but what might the national courts do here, and that can be quite a difficult place to be. I think another key point is what is the nature of the relief that you're seeking and in particular when you're looking for

example, the question of asset preservation, dissipation of assets and you may actually need orders that would be binding on a third party that has not agreed to the arbitration process. Then, frankly, there are pretty clear jurisdictional limits on the ability of the arbitrators to give relief that is effective. And at the very least, if you did get relief, you would still need to end up before a national court in order to enforce it. So if actually emergency arbitration is just a necessary prerequisite to going to the courts anyway, you may actually just want to go there. So that's all I want to add.

VARUNA BHANRALE: Thank you so much.

TINE ABRAHAM: Sorry, if you allow me?

VARUNA BHANRALE: Discussions are free flowing, so by all means,

TINE ABRAHAM: Yes the point of enforcement, right? Because for instance, and I'm taking India as a context with all of us sitting here in Delhi, if you have an emergency arbitration award which was in an arbitration which was seated in India, you have some sanctity to go ahead and get orders in case of non-compliance. However, if it is an arbitration which is seated in Singapore, you don't have those same privileges. So which was the reason why it makes sense to have this remedy available to you. But then you decide, okay, am I looking at assets, say, which are located in India, or whether the party is an Indian party as against assets in other jurisdictions. You might be better off getting an emergency arbitration award, which can then get recognized, depending on which all jurisdictions are involved. So, ultimately, while this option has all these benefits attached to it, it's a question of how best it can be used in a particular circumstance, and that's where the weighing and a balance of various options come in. And if you ultimately have to go back to a national court, then there's no point incurring the cost and time to Emergency Arbitration, only to use it as a paper to tell the national court that, hey, I've got this another paper. Please therefore, help me here.

VARUNA BHANRALE: Thanks so much, Tine, for adding that bit. And I take it, Rebecca, Tine, that vis-à-vis court processes there are certainly certain advantages and perhaps some aspects which we need to consider before opting for Emergency Arbitration. I take that point fully, but given the kind of limitations we see at times in Emergency Arbitrations relating to enforcement, et cetera, the question that pops up in my mind is that. Would it then not be better to opt for, say, an expedited formation of the Tribunal and an expedited sort of procedure for arbitration? Would either of you want to weigh in on that?

TINE ABRAHAM: So, see expedited process for appointment of a Tribunal would ultimately, at the end of the day, yes while there are timelines given and you can try for an expedited appointment of a Tribunal, ultimately, it will require your counterparties' cooperation as well to a certain extent because they have to nominate their nominee arbitrator, because before you can get a fully constituted Tribunal. That's the first point. The second aspect is that then again, you are asking for interim reliefs there. It depends on your Tribunal whether they want to have the pleadings on the main issue completed before you have an hearing on the interim application. That's another aspect which can come in, in terms of timeline. Cost, again, because you're looking at a situation where the institution, for instance, may ask for certain payments given that the arbitration is fully constituted. And the last point, and this is something which goes back to what we discussed earlier, which is the enforceability aspect, which is that, even if a Tribunal is constituted in an expedited manner, at the end of the day what comes as interim protection is not in the nature of an award where there's a final determination of issues. So, it doesn't become something which was enforceable as an award in many situations. If that is the case, then the same problems of enforcement of emergency arbitration award could as well come up in the context of interim order that comes from an expeditiously constituted Tribunal. So I think enforceability becomes a key issue whichever way you go.

REBECCA JAMES: And just to, I suppose to add on that a couple of extra observations. I suppose the first is that, they're not actually mutually exclusive. And actually, when you look at a lot of the institutional rules, there will be a mechanism for Emergency Arbitration, the purposes which is to get really relief, which is so urgent it just cannot wait constitution of a Tribunal. And then there's separate provision that is made for forming the Tribunal faster in the circumstances of the case. So they can go hand in hand. And in my practical experience they actually often do, because if a matter is urgent enough that you want emergency relief, then you will also want the Tribunal formed very quickly. But the second point there is, well, do you need emergency arbitration if you've got expedited formation. The real issue here is how fast and expedited is expedited. And I think the practical issue is often that it will still take longer to get the Tribunal in place, particularly if you're dealing with a three person tribunal then, frankly, time permits if you need emergency relief. And this is, I think, actually linked to the nature of what emergency relief should be, and personally one of the reasons I think it's overused. Are you actually likely to get emergency relief or should you be able to get it? Now, the threshold really needs to be that it's so urgent that it cannot wait constitution of the Tribunal, and that's actually a very high bar. But of course, in the circumstances of any given case, our clients counterparties will often feel, rightly or wrongly, that it is very urgent. But

even if it is, actually most of the time, if you can wait for the Tribunal, by definition, you don't need emergency relief.

VARUNA BHANRALE: Thank you Rebecca and Tine. Tine, I'll come back on the issue of enforceability at some point in time later in this discussion. But I think an interesting point that Rebecca raised is that the kind of objectives that various parties want to achieve when they are choosing Emergency Arbitration and are they always choosing Emergency Arbitration when it's actually an emergency? And on that front, I'd like Mehak, to address the issue of that from a commercial perspective, from a client's perspective, when arbitrating parties are looking at what to do next, how to get urgent reliefs, how is it that businesses or companies weigh in on should I go for Emergency Arbitration? Should I go to courts for interim relief, or should I just do an expedited procedure of the arbitration? So I'd love to hear your thoughts on that.

MEHAK OBEROI: So I think a lot of the points are very similar. We're definitely looking at enforcement related issues. So first of all, as far as India is concerned, we've only now recently started incorporating institutional rules in our clauses. So, before that we were all about ad hoc, and so the concept of Emergency Arbitration did not pop up at that time. But when we're now looking at, if I was to say there's a foreign seated arbitration, and I need to enforce it in India because of the fact that it's not automatic, then yes, I need to consider it. However, if there are two Indian parties, then like Rebecca said, it's the same thing. If it's a bank guarantee injunction, I'd rather go to court because the bank may not adhere to the order given by the Emergency Arbitrator, so I have an issue over there. Though an Emergency Arbitrator may be faster, so I'd love for RBI to change their rules, but as of now, that's not an option.

Then of course considering Emergency Arbitration is extremely fast tracked, I apprehend the quality of the arbitrator in that case. Especially in my industry where there are very, very complex matters, and sometimes you really need to get up to speed with what we're trying to explain, they may not be able to appreciate it also because there's a pressure of wrapping it up and giving an order in time. Then of course there is the probability of needing an *ex parte* relief. That's another aspect. Then there's one more which probably I don't see people saying very often. It's not that it cannot be resolved, but there is a grey zone to it. So what typically happens in our contracts is that we have a multi-tier dispute resolution. Right? So you'll have, say, about 30 days for settlement or mediation, and then you move on to Arbitration. Now there's a completely grey zone as to whether I can go file for a request for Emergency Arbitration during that 30 day period, or I wait to exhaust that 30 day period. Now if I practically speaking, I should be able to go whilst the settlement is on because that's the

purpose of Emergency Arbitration. But then I have to file for constitution of my Tribunal concurrently, as per the SIAC Rules, and I think ICC says 10 days but SIAC says concurrently. Even I think our rules probably IAMC also says concurrently. So there's a bit of a grey zone there, which probably causes us to add another layer to the process because we haven't really figured out how to do it unless people start incorporating Emergency Arbitration related clarity in their clauses itself. So I think that's about it. I think I've covered my points.

VARUNA BHANRALE: On that front, do you see more companies actually asking for lawyers to integrate Emergency Arbitration clauses because I think that's very fresh idea that at least I've heard but I haven't seen too many clients as of now, asking for it so that they have clarity from the grey zone

MEHAK OBEROI: I think, yes. That is something that we've been contemplating. But like I said with dispute resolution, typically everyone has a very narrow mindset. They have this fixed template that they want in their contract, and they don't want to think anything beyond that. So usually in contracts so long, to be very honest, when you're dealing with, you have other evils to fight. So sometimes you just give in and say, okay, let's just go with the standard as long as you're giving me the institutional rules and the governing law that I want, we'll figure the rest out. But yes it definitely would be a welcome change that parties are willing to accept in clauses.

VARUNA BHANRALE: Thank you so much for that. And now coming back to the issue of enforceability, because I see that while commercially party is taken into consideration a lot of things, including whether to see their arbitrations in India or outside before deciding whether they're going for Emergency Arbitration or not, but I've been wondering what could be the answer to this conundrum. We know for a fact that pursuant to ***Amazon vs Future,*** we have clarity now on what happens when you have an Emergency Arbitration Awards in an arbitration seated in India. But, Rebecca, would you have any thoughts on how we could borrow in perhaps from other jurisdictions. And how are other jurisdictions tackling the issue of fore foreign seated arbitrations or Emergency Arbitral Awards.

REBECCA JAMES: Sure. And I think it's a really interesting issue just because there is such wide variation between countries as you've noted, I think since the ***Amazon*** decision at least we have very welcome clarity that Emergency Arbitration Awards issued in arbitration seated in India will be enforceable or can be enforced under the Arbitration Act. But you're left with I suppose just that uncertainty with respect to foreign seated arbitration. So for now, one option, which you do see in some other countries is that you don't have any legislative or

statutory proviso clarifying the position, and it's just determined on a case by case basis. So certainly at the moment, the status quo would be that you would need to make an independent application for interim relief under Section 9. But if you had already obtained an Emergency Arbitration award or order, then there are cases that suggest that would be a persuasive additional factor and in that context, for instance, some of the authorities suggest that a judge would take into account that the parties had participated in the proceeding before the Emergency Arbitrator. They'd agreed to be bound by the orders. If the orders had not been interfered with or set aside at the time and so long as there was natural justice and no objections from the parties, then it's more likely to assist in getting interim relief from a court, but you would still need to make that separate application. Now, whether that is normatively a good thing that you would need to go through two applications or effectively go straight to court because the emergency relief would have no independent meaning in and of itself. I probably can't answer that question and everyone has a different view, but that is one approach in terms of how it can be done. Another approach is to actually clarify the position to a greater extent in the arbitration laws. So the legislative framework in statutes and I know, actually, this is an option that was previously considered in India. I know others will come back to that in more detail, and it was not in fact, adopted, but whether that will remain the case is perhaps an interesting question for others. Just to contrast that with the approach in other jurisdictions, certainly in Singapore and Hong Kong, the actual arbitration legislation has been clarified to make clear that actually an Emergency Arbitrator would be included. Sorry for Singapore, the legislation clarifies that an Emergency Arbitration... Emergency Arbitrator is included in the definition of Arbitral Tribunal. So it removes that doubt in terms of enforceability and there's also been a subsequent High Court decision which specifically confirms the enforceability of a foreign emergency, foreign seated Emergency Arbitral Award. But subject to the proviso, of course, that the Emergency Arbitration process did comply with natural justice, and that can be an issue. This is to how these processes play out sometimes.

Hong Kong takes a similar approach, but through slightly different means. So unlike in Singapore, where they've dealt with it by way of definition of what a Tribunal is they have sort of left that alone, but actually have a separate section which they've introduced, which expressly and exclusively deals with enforcement of emergency relief. And as far as another jurisdiction by way of contrast, certainly at the moment in England, the Arbitration Act does not expressly address the position with respect to Emergency Arbitral Relief, but this may well change. Actually and there has been an Arbitration Bill which has been kicking around over the last couple of years. And was then put on hiatus at around the time of the last election, which now actually has been re-tabled. And certainly one of the proposals for reform is actually that this will be addressed and will be aligned more closely, actually with some variations, but

broadly speaking, aligned more closely with the position in Singapore. But there are also other countries where that's not the case, and you're left to judicial interpretation. So I hope that's helpful by way of just broad context.

VARUNA BHANRALE: Thank you so much, Rebecca, and that's indeed a lot of food for thought in terms of what other jurisdictions are doing and how we could also facilitate the mechanism of Emergency Arbitration. And with that I'm going to take the liberty of putting Avnit in a bit of his thoughts, because we've had the 246 Law Commission Report and we've had the Shri Krishna Committee Report, both of whom suggested that Emergency Arbitrations should be recognized or given a place in the Arbitration and Conciliation Act, and the Emergency Arbitrator should be considered an Arbitral Tribunal. Now that we see that different jurisdictions have either formulated that idea or are towing with the idea, how do you think this issue can be resolved in the Indian legislative context such that parties are encouraged to actually resort to Emergency Arbitration where required, instead of perhaps going to courts, or at least give more sanctity to the whole process?

AVNIT ARORA: Thank you. So an interesting point that Rebecca started with that in international jurisdictions her view is that emergency arbitration is being overused. We are on the other side of the horizon where Emergency Arbitration is yet to pick up in our jurisdiction. As far as the Law Commission's recommendations and subsequently the Shri Krishna Report also highlighted the relevance of Emergency Arbitration in the Indian context as well. So I think principally, we all agree that the time for Emergency Arbitration has come. There is no dispute. ***Amazon versus Future*** says so. Predominantly the major institutional rules in our country starting from DIAC, IIAC, MCIA, and even the LCIA have included clauses or rules relating to Emergency Arbitration in their respective rules. So there's no dispute that we all agree that possibly the option of exploring Emergency Arbitration should be there, with the parties, party autonomy being the bedrock of arbitration, which has also been highlighted by all of you.

As far as legislative intervention is concerned, possibly the slight distinction, which we'll have to keep in mind is that, India predominantly has been doing ad hoc arbitration. And an Emergency Arbitration is predominantly an offshoot of institutional mechanism. So assuming for a second, if we have it in the legislation, do we have enough institutions who can take up these kind of matters in a very time bound manner. Because if we see all the rules. We take Rule 14 of DIAC, we take Rule 14 of the MCIA rules, the Rule 18 of IIAC, everywhere the maximum time period from the appointment of the Emergency Arbitrator to the conclusion of the proceedings is 15 days so the wherewithal of the institution to appoint an arbitrator,

decide a challenge within two days, and then the arbitrator to render an award within 15 days is also some practical consideration which will have to be kept in mind. ***Amazon Future*** very clearly says it is enforceable under 17(1). No dispute where it is a domestic seated arbitration. As far as foreign seated arbitration is concerned, as we heard from Rebecca, there are examples in Singapore, Hong Kong and possibly UK is also coming up with something where they want to legislatively enable recognition of a foreign seated Emergency Arbitration. So, I mean there is no dispute that we are deliberating on the fact whether there should be something which is legislatively required to be done. Foreign seated arbitration is, I mean, still some way away. I think to begin with, we'll have to see how we go ahead and do it for our domestic arbitrations, whether our institutions are ready for this. And I think we have a lot of stakeholders here who will be able to, I mean, share with us whether Emergency Arbitration proceedings have been used within the rules in our country till now and in how many matters. So that is also one analysis we'll have to take up to see whether it helps just to have it recognized in the legislation. But yes, predominantly, I think we all agree that the option of either exploring to go to an Emergency Arbitrator, or go to national courts under Section 9 or after, obviously, the constitution of the Tribunal, we have the option of going under 17, so all these options predominantly should be available in all those stations.

VARUNA BHANRALE: Thank you, Avnit. I think you raise a very interesting question, which is that of course, we want to give parity to international institutions and Indian institutions and ensure that everyone's able to grow and thrive and cater to all kinds of parties and all kinds of disputes that need to be decided through arbitration. But I just wonder that, is this going to be a case of putting the cart before the horse. Should it not be the case that the legislation actually has something more concrete which enables Emergency Arbitrations and also infuses enough confidence, perhaps in fraternity to be able to take up more Emergency Arbitrations. That's point number one. And second, is that would you think that to give impetus to Emergency Arbitrations, it would help if courts proactively take up the role and say that, hey, listen, you've signed up for an institutional arbitration, which provides for or rules which provide for Emergency Arbitration. Why don't you go first and resolve your issue there, especially where these are domestic seated arbitrations?

AVNIT ARORA: I completely agree with you. I think that must have been the idea behind both the reports. The Law Commission Report and the Sri Krishna Committee's Report has been highlighting why there is a requirement of at least recognizing Emergency Arbitration legislatively. So there is no dispute to that account. So possibly the amendments of 2019 were also intended to enable institutional arbitration to be taken up in a more focused manner in our jurisdiction, which I think is a transition which is happening over a period of time. I think

over the last three, four years, possibly there is more insight, even among the in house counsels, that why institutional arbitration is more relevant and important than doing it in an ad hoc manner. So I completely agree that the nudge that you get by possibly even referring to Emergency Arbitration legislatively could also help in giving thrust to the concept per se. There is no doubt about that. And I mean, that is also, which is something which is being deliberated, and it's there for everybody to see that it has been referred and recommended earlier, but possibly a conscious decision was taken early not to include it because of the reasons that I highlighted that the lack of more institutions. So if both of these things can go together, I think there is no difficulty in recognizing Emergency Arbitration in our jurisdiction.

The second question that you put up is whether, assuming if the institutional rules provide for emergency arbitrations, should the courts say that I will not entertain a Section 9? So I think that is something which is, which will have to be deliberated further because assuming, if we want to oust the jurisdiction of the court, so there are two ways of doing it. One is the court using a discretion to say I will not do it and the other being that I am mandated to not do it. So the mandate part may not happen without the legislative backing. But as far as the discretion is concerned, I think assuming if the parties are able to show in a Section 9 that I have attempted to go to an Emergency Arbitrator, and I did not get what I wanted and what was my initial thought, I think there could always be a possibility of courts being able to use that discretion.

TINE ABRAHAM: Just add to the points that Avnit made on whether the courts should hold their hand. I mean, one thing that we see is that particularly in the context of ad hoc arbitrations, you have courts in India, who have taken that initiative to say that, okay, this is an interim really, which can wait for three days or five days. Let the Tribunal be constituted. Let the Tribunal take up this question. And this is particularly where there is a consent between the Parties to have a sole arbitrator, so that you are cutting down the time for constitution of a Tribunal. Now, the other point of... so that is one side of it which was that you're referring it to a Tribunal and the Tribunal looks at it. The second is that you don't have the constitution of a Tribunal but directing the Parties to go to the institution, get an emergency arbitrator appointed. I would say that most often the life cycle of a dispute is that it's not necessary that the dispute happens two years or one year after the contract being there. Many a times, even now, we are looking at disputes arising under contracts entered into in late '90s and early 2000s. So the contracts are written very differently. Emergency Arbitration or even institutional arbitration is largely not recognized under those contracts. So I think the impetus can come from court depending on the facts and circumstances which are before the court. So I think it may be a little difficult to come up with a straight jacket formula that, if there's an

institutional arbitration, let the courts take that initiative to refer the parties or nudge the parties to go to an Emergency Arbitration. And the other thing is that irrespective of there being an Emergency Arbitration provision there, it's at the end of the day, the option of a party to choose between multiple avenues available. And as Rebecca had mentioned earlier, there's sometimes an advantage to going before a national court, and you don't want to take away that advantage of going before a national court by prescribing something without having explored all the issues surrounding it. I think Rebecca wants to add something.

REBECCA JAMES: It's just building on what you just said on the point of choice, and I completely, as usual, agree with everything you've just said. It was just to add one point from the English Law perspective about that interplay between Emergency Arbitration and what an Emergency Arbitrator can do and when the courts will be prepared to weigh in. So certainly at the moment, the position under the English legislation is that it says that the courts can provide interim relief in support of arbitration where a Tribunal or an Emergency Arbitrator is unable to act effectively or unable to provide relief, and that has given rise to quite a lot of controversy and jurisprudence as to what unable to act effectively means. But what has come out of that is quite clearly, is that, actually, if the nature of the relief you're seeking, as we discussed earlier, perhaps involve third parties, or actually just an Emergency Arbitrator could provide an award or order, but ultimately, it wouldn't get you what you're looking for, that would usually pass the test of unable to act effectively. But there can be that grey zone actually, if parties have signed up for institutional rules, whether they are entitled always to go to the court or if they need to actually seek emergency arbitration first, because that's what they've signed up for.

MEHAK OBEROI: May I?

VARUNA BHANRALE: Of course. In fact, I was going to come to you for the same.

MEHAK OBEROI: So I think I have a slightly different view here. I want certainty of process. I want my budget under control. I need to be able to decide that in 2025, I'm going to spend X amount of money on the arbitration, and I want to spend that only. I don't want these permutations and combinations where okay, now, this has happened. Now, we may be able to do A, but we can also do B, but C is an even better option than A and B. I don't know how it works otherwise, but internally at least for us, we're constantly evaluating options which are on a cost benefit basis. So forum shopping doesn't work at all. And if I've agreed to institutional arbitration, there's a reason that I want a streamlined process. I do not want to go ad hoc. So I'm willing to bear the consequences of it, even if the Emergency Arbitrator does not rule in

my favour, but at least I want to know what my process is going forward. And also, like, Avnit was just saying that we need to understand the practical considerations in terms of whether we have so many institutions right now to pander to our needs. I think in the similar way, as far as the courts are concerned also, I think about 36 years ago, the Law Commission had recommended that we need at least 50 judges per million population in India, we're still at 21 and US is at 107, Germany is at 240, and UK is at 50. So there is a lot of backlog. We'll take 342 years, I think, as per the Niti Aayog report, to clear the backlog. So I think we can pump up the institutions faster, then we can recruit more judges, because that hasn't happened in 36 years.

VARUNA BHANRALE: I think that as a consumer of the arbitration process, you would be more in favour of having clarity towards being able to do Emergency Arbitrations than be bogged down by having to decide which forum you're supposed to go to and that might give more clarity. I believe so that might also give more confidence to parties when they are negotiating like you mentioned. So if there is more impetus, which is coming from the legislature and the judiciary on Emergency Arbitrations, I believe that there would be more of a case for negotiating parties to insist that you please put down a clause on Emergency Arbitration and wanting to resort to that unless, of course, you need to go to courts for those very nuanced things that courts are there for including where you have, say, a third party involved or where you have BG issues for instance, that you'd mentioned. And with this very hot topic that we've just discussed, I do not want to be taking up another question. I'd much rather hear from the audience as to any other questions that are going on in your minds or you'd like the panellists to address. You could raise your hands and we can have the mics passed around.

AVNIT ARORA: Nobody else has a question. I will myself pose a question for possibly Rebecca. So we all agree that possibly Emergency Arbitration needs to be recognized. So the next question is, how. You were referring to possibly Hong Kong and UK and Singapore, where an Emergency Arbitrator has been included within the definition of an Arbitral Tribunal. So it is to some extent distinctive from what Amazon does. What Amazon does is it says that it is an order of the Arbitral Tribunal enforceable under Section 17 of the Act. So if it becomes an Arbitral Tribunal then it could be an argument that the order becomes akin to an award. If it becomes akin to an award it is amenable to challenge under 34. So it will be interesting to assuming if, I mean, you are aware that, how is this taken care of, whether an order, or so to say, an award passed by an Emergency Arbitrator, is it akin to an order of the Tribunal which is enforceable under a separate section for example, like in Hong Kong, or does it become akin to an award which is generally passed under the act per se. So that's a very important

distinction that needs to be drawn to understand the enforcement angle and the challenge angle. So, for example, if we see MCIA has recently put up their draft rules for consultation. So what they do is, they have used both the terms. They say an order or an award which is distinctive from what the other institutions do. The other institutions take up ***Amazon*** and say it's an order. So it'll be great to understand how internationally Emergency Arbitration decisions are seen, whether it's an award or an order.

REBECCA JAMES: Thanks very much. It's a great question. So I think, again, just to sort of try to zoom out almost to aeroplane view globally, briefly. I don't think there's a consistent approach on this in national legislation or in jurisprudence. So in some countries this is actually one of the key issues on enforceability of Emergency Arbitral Relief. Some countries would only recognize emergency relief in the form of an award, and that would flow from, for example, the New York Convention and the usual concept of enforcement of award. Certain lack of clarity, depending on national law in some jurisdictions, as to whether interim relief has the requisite finality to actually be enforced. And so, as you've noted, there is a divergence between different sets of institutional rules as to how this is addressed. So you've mentioned the MCIA position. The SIAC position is actually the same. So it allows a Tribunal or an Emergency Arbitrator to provide relief in the form of an award or an order. The ICC is in a different category, and it refers to an order. So this sort of takes you back to the point I made it start, which is if you're looking at an international dispute really think about where might you need to enforce this relief. Because if you might have an order, and you're dealing with a country where that wouldn't be recognized, then actually, you have a very obvious disconnect from the start and it's not worthwhile. So this is often one of the very first points that a party would be thinking through.

Now as to, I think, the second layer of your question, which as well, how does one address that in national law and legislation. I think it's ultimately, to some extent, a matter of policy. And then just how that's implemented in the drafting. So, just to clarify, when I mentioned the definition of Arbitral Tribunal, the way that it's been dealt with in that mechanism, for instance, Singapore is effectively just to make clear that when you then get to provisions, the existing provisions relating to enforcement, that's not only talking about final dispositive awards because you've defined Tribunal in such a way that it does include an Emergency Arbitrator. So it sort of hooks in the emergency provisions in that way. Now in terms of how it's designed or executed, Hong Kong is different because they haven't touched the definition. They've sort of specifically dealt with Emergency Relief. There are some countries in Southeast Asia I've been dealing with recently, which you just would not be able to enforce Emergency Relief in any way, shape or form, be that an award or an order. So I know that might actually

add more uncertainty than clarity, but that I think is my answer on the question. And on exactly how you would change or tweak, sort of the Indian legislation, there are probably a number of different proposals, and I think, obviously, the one that's been most widely discussed is not dissimilar to Singapore, which is well, should we amend some definitions to at least make clear that this sort of relief could be capable of enforcement. And then a question of whether the discretion to enforce exercise is a different question. That is true even in the countries I've discussed where there is a clearer statutory framework. It's not saying that these awards or orders must and are always enforced. It's just that they can be. And the courts will sometimes need to reassure themselves that actually they think there's been at least a base level of due process.

Would anyone else like to contribute? Sorry, Manini. Of course. Please.

SUSHIL SHANKAR: Yeah, hi. Sushil Shankar here. As Avnit rightly pointed out in the Indian context it's mostly ad hoc arbitration and not institutional arbitration. And so to that extent this Emergency Arbitration, although it might be a useful tool, is available to a very limited number of parties. And this situation I don't think is going to change in the near future. Ad hoc is going to continue for some time, although we would like to see it otherwise. So would it be possible to have something like a workaround to make emergency arbitration also available to ad hoc arbitration, say something like having another ad hoc arbitrator who passes the interim award and then gets out of the way before the other one is appointed?

TINE ABRAHAM: So, that would require a large amount of overhauling our Arbitration Act. Because essentially, who will appoint that Emergency Arbitrator in an ad hoc context? I mean, that has to be provided for there's no basis for that under the Arbitration Act. I mean, we have a situation which is that parties have to agree on.... Parties have to nominate their respective arbitrators and then presiding gets appointed, if it's a three member Tribunal or Parties agree on a sole. Now let's assume a situation where you want to bring in a concept akin to an Emergency Arbitration dehors the institutional rules, the fundamental question is that how will that appointment process work? If you have to go to either the parties agree on it, but then when you're looking for emergency relief, you don't want to spend two months, one month, even a week, deciding and discussing on appointment of that one person as the Emergency Arbitrator. That's point number one. If we were to give that power to appoint an Emergency Arbitrator to our courts, then again you are here before the courts for a few hearings to get that Emergency Arbitrator appointed. So I think the "Catch-22" situation here is the fact that how do you get an Emergency Arbitrator appointed in the absence of an institution facilitating the process. And if we have to come up with a formula for that, that in itself will provide for

additional time and either consensus between the parties or additional time through a court process. If that's the case, then might as well go get the relief itself from the court or try your luck before the court. So I think that's the situation. That's where the problem is. So unless until we have a serious overhaul to our entire legislation, it becomes difficult to tweak this bit into the current framework for ad hoc.

MEHAK OBEROI: And I think the courts cannot be given that power. I've been stuck with a Section 11 for two years. Yes, COVID played a part in it, but even with COVID, it should have been lesser. So courts getting the power to appoint ad hoc arbitrator, no, no, no sir. You should veto that thought from your mind.

SUSHIL SHANKAR: See, actually this question came from an actual pain point, where we are waiting for a Section 9 to be resolved before the courts while the Section 11 is pending for years. So if there is some kind of a workaround, not necessarily the way I suggested it, but...

TINE ABRAHAM: Yes, so I mean like, the solution always lies in having a quicker constitution of the Tribunal. Unfortunately, in your situation there's no institution which will facilitate that process. And therefore given the lack of consensus between the parties there is that lack of constitution of the Tribunal. But ultimately, the solution to the problem is fast-tracking the appointment process. And futuristic, but at least the way the act is structured and how it is looking and having an appointment process where you don't always need the court's involvement that will be the solution to the problem. But unfortunately, what is already in court. We have to deal with that as it is.

VARUNA BHANRALE: So I have a bit of a disagreement with Tine and Mehak on this, because I feel that there is certainly a case for putting in place a mechanism for Emergency Arbitration in the legislation. Of course, it will need a legislative amendment, but I feel like you are looking at basically a bank of arbitrators, and there could be a body appointed to be able to appoint Emergency Arbitrators at a quick notice. So the way you have a Section 11, of course a similar process would not work out. That I think all of us are aware of. It is time consuming, and it sort of defeats the purpose. But I do feel that when we are being futuristic, when we are wanting to be more proactive with arbitration, then shunning the idea that we can have something on those lines in ad hoc arbitrations, I feel is disservice to the neutral dispute resolution mechanism that has evolved over time, which is arbitration. So I feel there's definitely a case. It may need nuances, it may need some time to work on it to make it functional, but it's possible.

SUSHIL SHANKAR: And it would be a very novel thing, right? India would lead the way in this.

TINE ABRAHAM: That is true. If we were to bring in emergency arbitration to ad hoc in arbitration, then there will be novelty to it. I think all of us agree on one point, it's not a bad idea. But how do we implement it? And how do we construct it within the framework of our Arbitration Act.

SUSHIL SHANKAR: So if this idea ever sees the light of day, don't forget who suggested it.

TINE ABRAHAM: We have Avnit here to make note of that.

VARUNA BHANRALE: I was just going to say that let's hand over to Avnit, because now I really want to hear what we have to say.

AVNIT ARORA: It's an interesting suggestion, no dispute. But we'll also have to understand, see, ultimately Emergency Arbitrator does what? He's a very important stakeholder in doing something when the Tribunal is yet to be constituted. So it's a judicial function that he's in a way giving in. So, I mean, Section 9 is an option where the constitution is yet to happen. So in an ad hoc arbitration idea, no dispute is more relevant for how we are placed today in our country. but because of the nitty-gritties of the quick, what we are referring to the quick appointment, the quick decision on the challenge, and, for example, a 15 day period within which most of the institutional rules envisage, the final conclusion of the emergency Arbitration proceedings, it becomes a food for thought, how do we do it on ground? So the answer may not lie legislatively, because in an ad hoc arbitration it is ultimately party autonomy which will prevail. So the idea, although may seem to be very noble and great to have an institution only to appoint Emergency Arbitrators, considering how large a country we are, if a Section 9 in our jurisdiction is taking so much of time, having a new framework where across districts we have people who are appointing Emergency Arbitrators may not seem practical. Possibly a middle ground could be where assuming for the case, there is an ad hoc mechanism which has been agreed to. But only for the purpose of Emergency Arbitrator, possibly the parties could agree to go to an institution which has that mechanism in the rules. So that is which is something which is more market driven and possible, rather than doing something legislatively for something which is yet to take off in our country. So a stop gap arrangement possibly could be again, be not easy because the parties have to agree. So if there is a clause which goes back to being done in an ad hoc manner, parties will have to agree only for the purpose of possibly Emergency Arbitration. Let us go to this institution, which has

those in its rules, and get it sorted in 15 days. So that is one possible solution that comes to mind, rather than the larger legislative intervention which seems to be different.

TINE ABRAHAM: And I'll add to Avnit's point, which is that even now, courts even where there are no institutional arbitrations provided, courts have relegated the function of appointing the arbitrator to institutions. I mean, obviously it requires some amount of consent from the parties. But even the Supreme Court has directed, say, for instance, even an MCIA to appoint an arbitrator when the party will approach the court for appointment of arbitrator. So a via media, which would essentially mean that parties are in an institutional framework and then can have the benefit of an Emergency Arbitration or a quicker decision on the interim aspects as well. But that requires participation of the judiciary, participation and consent of the parties as well, to a large extent.

REBECCA JAMES: I wonder if actually, I may ask a quick question of my co-panellists. So, just given all of these complications we've discussed and the possibilities that would require perhaps legislative reform that would not be straightforward, do you think there might be more scope for wider uptake of institutional arbitration? And either way, why? I mean, what is holding parties back when they could choose that and they are not doing so?

TINE ABRAHAM: Yes, there's definitely a wider uptake of institutional arbitrations. I mean, if you compare 20 years ago, you would find five disputes in a year going to institutional arbitration and right now, it has changed completely. I mean, India, still, India is currently the largest consumer of most of the arbitral institutions. I mean, we have representatives from most of the institutions here, and they can give us the accurate numbers, but we are, as a jurisdiction, a large consumer of these institutions. So, the number of contracts where you have institutional arbitrations have significantly gone up. But it's also a large country with a large number of disputes.

VARUNA BHANRALE: Also if I can add to that, India as a market, irrespective of what field we're looking. Into or what product to service we are thinking of consuming is a) a price sensitive market. So a question that we feel very often from some of the parties that are newer to arbitration of clients who are newer to arbitration is but institutional, does that mean that it's a whole lot more cost? So that's another consideration that they have. So I think what's also required is, despite there being enough and more information about arbitration, I think there's still a whole lot more to be done to further the cause of institutional arbitration. So that's that. And I see one hand raised there. I think I'll take that last question, and then we'll move on to closing. Yes, please?

SUMER SETH: Hi, my name is Sumer Seth. So, I have a question for everyone on the panel, actually. So as we know, the ***Amazon vs Future*** judgment of the Supreme Court was in relation to an India seated arbitration. Now, my question is that, in relation to a foreign seated arbitration where an emergency award is passed does that also become enforceable in India automatically if an enforcement is filed, or will a party have to file a separate Section 9 and get an award on that basis? Should the court in such a case automatically enforce the emergency award in a Section 9 or go into the merits of the case all over again and then come to a conclusion?

TINE ABRAHAM: So I think, I'll quickly answer this, and other panellists will also add in. So the answer to the first part of the question is that, as you rightly said, ***Amazon Future's*** in the context of India seated arbitration, and the way the court read in that enforceability is to say that it's akin to an order passed under Section 17 of the Arbitration and Conciliation Act, which is essentially applicable only to an arbitration which is seated in India. And that benefit does not extend to an arbitration which is seated outside India, and that's the reason for this lack of clarity as far as foreign seated arbitrations are concerned. In practice what you see is therefore, that once you have an Emergency Arbitration Award, and you anticipate that it needs more teeth to be complied with, you have the ability to then come to Indian courts and file a Section 9 seeking identical reliefs. And this has been done in multiple instances now, you have decisions from multiple High Courts, essentially on this point. Largely what the courts have done is that they have, in fact, passed an order similar to what has been passed by the Emergency Arbitrator. But it's also difficult for a court just to automatically be enforcing it in the absence of any kind of legislative mandate allowing them to do so. There will be that application of mine that comes in. But there is some document which is extremely persuasive because that application of mind has happened once over in the Emergency Arbitration. So to a large extent, if there is already an order, the courts tend to give effect to that. You also have the other situation where you haven't received orders from the Emergency Arbitration and you've come to the Indian courts asking for orders. There again there's a reconsideration which needs to happen. So there's no automatic extension, but it will require the intervention by the court.

REBECCA JAMES: I don't actually have anything to add to my earlier response on this issue for a change. Any further comments?

AVNIT ARORA: Possibly, I can add is what Rebecca said, for example, there is some judgment of the Singapore High Court which deals with this issue. I think you were referring

to some judgment. We'd have to possibly see that, because we all agree that it's a foreign seated arbitration Part 1 will not apply. So 17 is no doubt out of question. If it goes under the subsequent part, then it has to be akin to an award. So what Rebecca was also referring to assuming if there is a possibility where the Emergency Arbitral Award has been passed without hearing the parties in that jurisdiction, that could be one objection which will have to be seen. Today, as of now, the legislative framework is such that it will have to go under 48 and that is what Tine was also referring to so legislatively. There possibly, there possibly is a scope for interpretation as far as the foreign seated arbitration is concerned in the context of Emergency Arbitration.

VARUNA BHANRALE: Now, without further ado, not wanting to stand between all of us in the lunch, I would request Ms. Manini Brar to come up for the closing remarks

MANINI BRAR: Thank you. So the onus is on me. Now, I'm the person standing between you and lunch. I will make this quick. I remember it's been about ten years since different rules have adopted, Emergency Arbitration procedures. And about up to five years ago, when there were panels discussing this issue, we were really discussing issues around consent, whether in a domestic context, in an ad hoc context, in an investor state context. And it goes to show how quickly the arbitration community has adopted the idea that Emergency Arbitration is here to stay, and it is a strategic tool that is to be used in international commercial arbitration that now we are past that discussion. Today as a panel, very surprisingly, we're at a stage where we are talking about what are the procedures judicially legislatively that we can adopt to support this process and to make it more available, whether in an ad hoc context or an institutional one. So, I think already that is indicative of how far we have come as a jurisdiction that is adapting to international arbitration procedures and standards. And of course, the thought provoking discussion here is that how does it interplay with the court and what is your best strategy? And it fell from someone on the panel that it's important to have clarity, whichever way you do it, whether you have it in court or whether you have it before an arbitrator. You have a budget you need to stick to that. But of course, partly out of interest of my own survival, as an advocate, I will disagree with that and simply say that every dispute is so varied and the kind of advice that you provide depends so much on the circumstances in that particular dispute. You can have an ad hoc arbitration where consent is a really important consideration because they have not really expressly agreed to any Emergency Arbitration procedure. You can have an arbitration where the place of enforcement is clear and it might be a jurisdiction where an Emergency Arbitration may not be recognized as a procedure. So you have to go to the national court. You can have an international commercial arbitration where there are more than one places of enforcement and therefore you don't want to be running pillar to post

between different national courts, and you actually want some kind of interim recognition that you have rights in your favour. And in that context, especially international commercial arbitrations with multiple places of enforcement emergency arbitration is a very, very effective tool. So I think the sum of it really is that we're happy it's here, and we are happy it's being considered very seriously. And if there was anybody in this room who was really to sort of take it forward within the legal fraternity, it would certainly have the five panellists who are with us today. So I must really thank you all for your time and the audience for such a patient hearing.

Before I close, I must give my thanks to the MCIA for organizing this panel, of course. And Linklaters and Trilegal in particular for sponsoring it because it involves arbitral women and the initiative around enhancing the diversity of women in arbitration in India. And as a representative of Arbitral Women on the Global Steering committee of YAW, I would just like to say a heartfelt thank you to the corporates and to the individuals who are giving so willingly of their time and resources to enhance the cause of diversity in arbitration. For those of you who don't know, Arbitral Women is an International Non-Governmental Organization, which has been dedicated to promoting the cause of women and diversity in International Dispute Resolution since 1993. Today we have 1000 plus strong membership that spans the globe in more than 40 countries and our purpose, as is evident, is to promote and unite women in International Dispute Resolution. YAW, which is the young arm of arbitral women looks after our younger members who are under the age of 40. We run a range of initiatives. You can find them on our website and I would urge you to consider membership as well, which also involves hosting and supporting events like these and promoting our memberships our members in professional achievements, speaking engagements, and maintaining a very public, very searchable directory of our members on our website to assist parties, counsels and institutions in identifying female arbitrators, counsels and experts offering professional mentorship, hosting regular parental discussions for parents and would be parents in the workplace, reporting on diversity initiatives in the workplace and beyond, and also educating the international community about unconscious bias and the ways to overcome it. So please do give our website a look over. I am here if there are questions, and if you want to find out how to engage with Arbitral Women more, please do reach out to me. And once again, thank you very much to our esteemed panellists and to the audience. Thank you.

~~~END OF SESSION 3~~~