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INDIA ADR WEEKDAY 5: DELHI

SESSION 5

Competence-competence or Incompetence-incompetence? Court intervention in tribunal jurisdiction

5:00 PM To 6:00 PM IST

Moderator:

Justice (Retd) AK Sikri, Former Judge, Supreme Court of India

Speakers:

Birendra Saraf, Senior Advocate & Advocate General, State of Maharashtra

Niraj Modha, Barrister, 39 Essex Chambers

Sidharth Sethi, Partner, JSA Advocates & Solicitors

Tejal Patil, General Counsel, Wipro

Zameer Nathani, Group General Counsel, CarDekho Group

HOST: Can I request everyone to please take the seats? We'll be starting the session by MCIA soon.

This session by MCIA is on Competence-competence or Incompetence-incompetence? Court intervention in Tribunal jurisdiction. I would like to invite on stage the panellists for this, for this session, Justice AK Sikri, former judge, Supreme Court of India who will be moderating the session. Birendra Saraf, Senior Advocate & Advocate General, State of Maharashtra. Niraj Modha, Barrister, 39 Essex Chambers. Sidharth Sethi, Partner, JSA Advocates & Solicitors. Ms. Tejal Patil, General Counsel, Wipro and Mr. Zameer Nathani, Group General Counsel, CarDekho Group.

JUSTICE A.K. SIKRI: Good evening, everybody. I know this must be the last session and you must be very tired yesterday and today. And must be awaiting evening cocktail and thereafter dinner. But let us have this discussion as well. We'll try to make it interesting and I have full confidence and faith and trust in the panellists, who are all very well-known people in their respective fields. And I need not introduce you to each and every panellist. Names and their designations are there at the back, and I think we'll be able to save this time and have some discussion on the topic.

I just would like to make few comments as far as this topic for discussion is concerned in this session. It's Competence-competence or Incompetence-incompetence? Court intervention in Tribunal jurisdiction. So though the principle of doctrine is known as competence-competence, which is very well known all over the world but then the implicit message behind the theme of the session is that the way the court has intervened in the Tribunal's jurisdiction leading to as if the Tribunals are incompetent. So instead of competence-competence, it is becoming incompetence-incompetence. How far that is correct that may be wrong, that may be right, that may be partially wrong, partially right, so that is what we have to discuss.

So just first as far as competence-competence is concerned as I've said, that is now very well known in public international law and is followed almost in all jurisdictions and in international arbitrations as well. And what it signifies is, that once the parties have decided to go for arbitration in a particular case, and adopt that method of resolution of disputes which is based on the principle of, as we know, Party autonomy. Then the court's interference should not be there. Whatever are the subject matter, different facets of the dispute, which may raise many issues, but because issues in an arbitration, as of all of us know, are not related to what are the claims and confined to those claims or what may be the counterclaims of the other sides. Many incidental issues are also raised, which may relate to the scope of the arbitration

clause. What is included in this arbitration, what is not included? Even the jurisdiction, even the existence of a particular arbitration, or validity of the arbitration agreement that on various grounds, as we have seen in recent past in India, the issue which involved stamping, so whether such an instrument, which was without any stamping, was valid or not. So such issues do arise, then there are what is the jurisdiction which is assigned to the arbitral Tribunal under that particular arbitration agreement between the parties and some disputes which are raised, whether they fall within the scope of that particular provision or not which we call jurisdictional issues, et cetera. So those issues also arise. The question that is these principles of competence or doctrine of competence-competence which ensures that normally all such issues are to be decided and are supposed to be decided by the Arbitral Tribunal in the first instance, including about its jurisdiction. And we know, even under Indian law when it comes to challenging the jurisdiction of a Tribunal, I'm not talking about the arbitral Tribunal say quasi-judicial Tribunal or some Tribunal created under the act and there are umpteen number of judgments in general law also of Indian Supreme Court, that if you are raising the issue about the jurisdiction of the Tribunal let that jurisdiction issue should be decided by the arbitral Tribunal itself. Or that Tribunal itself, statutory Tribunal or whatever which applies to arbitral Tribunal in the form of competence-competence principle. So, based on party autonomy, Section 16 categorically incorporates this principle of the Indian Arbitration and Conciliation Act, Section 5 again gives an indication to this effect, which says that when the arbitration proceedings are on, the court's interference should be minimal.

So, having said that, this may be a good lesson for a student in a law class and once we tell the students about what this doctrine means and how this doctrine operates. But lawyers, litigants or the members of the arbitral Tribunals, the arbitrators, et cetera they very well know that it is not as smooth as it appears to be. Because in actual practice, how it has been followed, that raises many issues or many related controversies, et cetera, around it. In Indian context as we have seen court has again emphasized this principle of competence- competence number of times. And as we mentioned in that Stamp Act case the constitution bench reinforced that, at the same time there have been some judgments wherein it has been said that, look, under certain circumstances, about the jurisdiction it may not be left to the Arbitral Tribunal to decide. Because in India, as we know unlike many other countries, we still are a jurisdiction where most of the domestic arbitrations, particularly are ad hoc arbitration. I think 60, 70, 80% arbitrations are still ad hoc arbitrations which is not a good thing. Let us hope that in near future we have institutional arbitration. More and more institutional arbitrations and institutions like MCIA, et cetera thrive thereby. But then, in those cases, naturally application in the Section 11 is filed before the court by one party. If the parties are not able to decide about who should be the arbitrators and how it is to be constituted. Suppose single arbitrator and

parties are not able to decide, naturally they go to court but the other side may object to the constitution of the Arbitral Tribunal on various points, and one of some of these which I have said.

So there the issue has arisen many times whether if the arbitration agreement is there and prima facie, it appears to be valid. All other issues should be left to the Arbitral Tribunal to decide with the opposite party is raising or at threshold the court has to decide itself. And here we are in choppy waters, if I may say. So there are some cases where like in ***Chloro*** also ***Chloro Control*** case. After discussing positive and negative aspects of this principle of competence- competence which should be applied. The court ultimately said that it is for the referral code to assess the ingredients of the arbitration agreement at the threshold. Issues have arisen. We have seen in ***Booz Allen*** case as well, that the courts have said that certain kinds of disputes are not meant for arbitration. They are excluded. Four or five categories of cases. So, therefore, that should be decided by the court or it has to be left to the Arbitral Tribunal. So these are some of the issues which arise when we end. The question that ultimately, at the end that we'll come to that. It's a balancing between respecting Tribunals. Autonomy on the one hand, and on the other hand, preventing potential injustices may be a dispute which is raised, say *ex facie* time bar raise after 40 years and if it has to go to the Tribunal, and Tribunal has to decide and ultimately comes back only at the stage of 34 or some jurisdictional issue, which may be valid jurisdictional issue but we leave it to the Tribunal to decide. And even if the Tribunal decides and hold it, as a jurisdiction. But the other side can challenge it only after the final award is given and at the stage of Section 34. So therefore, there's on the one hand respecting Tribunal autonomy, which is ingrained in this particular doctrine and on the other end, preventing potential injustices.

So these are some of the aspects and on which how to strike a balance and what we should do. That is what we are going to discuss in this panel. Of course, I may say at the outset itself, which we have agreed upon, I may be asking the question to one of the panellists, but then the others can always add on and even controvert what one has said, because then it enters a lively debate also. If anybody has here also difference of opinion, it should openly come.

So going by that may I ask the first question to you, as I've said, in the context of Indian Arbitration act and the decision of I'm referring to the decision of ***SBI General Insurance versus Krish Spinning***. You know it. Very well. Where the courts have discouraged from intervening in complex factual disputes at the restless stage. How do you view the balance between the Tribunals autonomy under Section 18, and 16 and the limited role of the courts at the referral stage under Section 8 and 11, which I have paraphrased. So how you can say that

this balance can be struck and whether there's any risk of the parties exploiting this to delay the proceedings.

SIDHARTH SETHI: Thank you, sir. Respected Justice Sikri, esteemed panellists ladies and gentlemen, Namaste and a very good evening to all of you. It is my proud privilege to be speaking and to be a part of this esteemed panel and to be speaking in front of such accomplished professionals. Now the provisions which are Sections 8, 11, 16 and the scope and interplay has been the subject matter of various judicial precedents. Section 11 in particular, which deals with appointment of arbitrators, has seen an evolution of sorts. And over the years both the legislature by introducing various amendments to this provision and the courts by their judgments have given due importance to Tribunals autonomy, that said, the balance between Tribunals' autonomy under Section 16 on the one hand and the limited role of codes at the referral stage under Sections 8 and 11 is fragile as I see it and this fragile balance is apparent from the various judgments on the scope and ambit of Section 11 and the never ending saga of judicial interpretations from Konkan railway, where the exercise of Par under Section 11 was held to be an administrative function to SBP and Patel Engineering, where it was held to be a judicial function, and then later in ***National Insurance versus Boghara Polyfab*** where the scope was further enhanced to the amendments, which were brought about in 2015 by inserting Section 11(6)(a) and then the judgments on the scope of that 11(6)(a) ***Mayavati Trading and Duro Fuelgura***. Section 11, I would say, has come full circle. But despite all the conundrums Section 11 has been the life support to the field of arbitration in India to maintain this balance. When we look at the Arbitration and Conciliation act, the provisions try and maintain that equilibrium and balance. Section 16 gives the Arbitral Tribunal the power to rule on its own jurisdiction, including any aspect concerning the invalidity or existence of the arbitration agreement. Section 5 mandates that no judicial authority shall intervene except and unless as provided under the statute. Section 8 is another example, which mandates that a judicial authority before which an action is brought in a matter which is governed by an arbitration agreement. The judicial authority is required to refer that dispute to arbitration and the scope of the Arbitral Tribunal scope of the judicial authority in such a situation is to see the existence of a prima facie existence of an arbitration agreement. Section 11(6)(a) is yet another example where the scope is only to see existence of an arbitration agreement. Courts on their part have also played a proactive role in trying to ensure that the balance is maintained. The equilibrium is maintained.

The judgment with Justice Sikri referred to ***SBI General Insurance versus Krish Spinning*** throws light on how courts have tried to maintain that balance. And what it lays down is certain principles which are very informative it provides that at the stage of deciding

a Section 11 application, the courts should not conduct an intricate evidentiary inquiry as to whether the claims are time barred. And this is something which should be left to be determined by the arbitral Tribunal. That said, in the same judgment, relying on ***Vidya Drolia***, which is another landmark judgment, the court held that in exceptional cases and circumstances, however, if the claim is *ex facie* time barred or it is deadwood is the expression. They use, the court can exercise jurisdiction not to refer the parties to arbitration. The court further held that tests such as eye of the needle test or an *ex facie* meritless claim, et cetera though provide and ensure that courts interference is restrained. However applying these tests itself requires some sort of an examination of evidence, et cetera and these tests the court held in ***SBI Insurance*** that are not in conformity with the principles of modern arbitration, which places Tribunal autonomy and judicial non-interference at a very high pedestal. So broadly the position which emerges from ***SBI Insurance*** is that a court will only look at the existence of the arbitration agreement and will only refuse interference in cases where, let's say, a claim is not arbitrable at all, or is *ex facie* meritless. In this this particular case, the issue involved was whether a situation of accord and satisfaction should be referred to Tribunal or it should be decided by a court. And the court said, this is a mixed question of facts and law and should be within the exclusive domain of the Tribunal. Another judgment with Justice Sikri mentioned in his opening address, the interplay between arbitration agreements under the Arbitration Reconciliation Act and the Indian Stamp Act. That judgment also provides that at the referral stage. A court should not conduct a laborious test or a contested inquiry. So these are broadly some of the issues which have emerged from the judgment and which assist us in trying to see if a balance can be maintained.

The second aspect of your question, sir, was that is there a risk whether the parties can exploit a situation and the answer to that, according to me, is yes. And this can happen both at the pre-referral stage and also before the Tribunal. In my view, at the pre-referral stage despite all the judgments and the tests which are laid down. Therein they still exist certain elasticity and a litigant can take use of that by taking pleas to defeat the arbitration. Conversely if there is an *ex facie* time barred claim and the court wants to adopt a hands-off, approach, a litigant may nonetheless be sent to arbitration when that should not be the case. Before the Tribunal a party can again misuse the provisions and can file a bogus Section 16 application, which is also done in some cases to drag the feed and delay the proceedings, but that is still, according to me, not a big concern because of the timelines which are prescribed in the statute where the arbitration has to be concluded in a certain time frame.

So to conclude, sir, I would say that I am cautiously optimistic because of all the recent developments. And these recent developments are steps in the right direction and help in maintaining an equilibrium between judicial non-interference and Tribunal autonomy.

JUSTICE A.K. SIKRI: Yeah. Mr. Saraf, since you are the most accomplished person in this panel, an advocate general for the state of Maharashtra and as a senior counsel who has done so much work, would you like to add to what Mr. Sethi has said and particularly on this maintaining of this balance, et cetera and on misuse of Section 11 or Section 16?

BIRENDRA SARAF: So, firstly, if you read the act as it stands, the language is very clear. The role of the court at a Section 11 stage is to help constitute a Tribunal where parties cannot agree on the identity of an arbitrator. So the role of the court contemplated at the stage of Section 11 was simple, the statute read very simple. But the difficulty very often is that the courts cannot give up their sense of justice when matters come up before them. So, very often, this is what the problem has been right from the beginning, that the courts have thought that we also need to contribute to make sure that arbitration becomes a more effective means of dispute resolution and it is not abused. And very often and time has shown that over last two decades and more that this desire of the court to do justice or to contribute to arbitration has added more problems than found solutions to arbitrations as an effective means of dispute resolution because one after the other judgments came led to a situation of almost many trials at the stage of Section 11, almost every point was being argued at the same age of Section 11. Section 11 petitions were being pending for before courts for one year, two years, three years, maybe more. And was that the purpose of a Section 11 proceeding at all? The idea is a Section 11 proceeding was to ensure that a parties cannot agree upon the identity of an arbitrator. Then the court should assist and identify a person who will be able to decide the dispute neutrally, impartially and far from that, the court transgressed its role and took over a role of an adjudicator at initial stage, they started deciding whether this dispute is arbitrable. Whether this dispute is within limitation, whether their document is stamped? If each of these issues are to be considered by the court at the Section 11 stage itself. Then there is only the final merit, which are to be decided by the arbitrator. Then we could have had a stage of jurisdictional decision at the stage of appointment in the act itself. But that was not so.

And if you look at it, arbitration is ultimately a forum decided by the party. Let's take it instead of arbitration, there is some other Tribunal constituted under some law. All these objections are raised before the Tribunal. A person goes and files a claim, the other side raises its defence, and in the defence are the defence of jurisdiction are the defence of is the defence of limitation, is the defence of any other kind these are objections which are in the nature of a defence being

raised by a person faced with a claim and that should be left to the Tribunal to decide. And therefore particularly at the Section 11 stage, the whole endeavour should be to constitute the Tribunal as early as possible and thereafter relegate the parties to the Tribunal to go and decide everything. In the limited point on which the court could possibly see is whether there is actually an arbitration agreement or not, whether there exists an arbitration agreement or not. And after a long journey of 20 years we are narrowing it down to that point now by judgments. I hope those judgments stand for some time before something else comes in and widens the net again. So sir, I think that recent judgments we say that Section 11 should see the existence of the agreement alone and nothing else are in accord with the scheme of the act and the legislation, and I think that is a step in the right direction.

JUSTICE A.K. SIKRI: Yeah. Thank you, Mr. Saraf. You see the two points which emerge from this discussion is, yes, the courts are now favouring, tilting towards party autonomy mode least interference. Only when as Mr. Sethi mentioned, a particular case *ex facie* barred by jurisdiction, et cetera, barred by limitation or there's no jurisdiction, the face of it, to deal with particular matter. Suppose like going by this ***Booz Allen*** matters and issue which is raised is on the operation and mismanagement, which has to be decided by NCLT under the Company's Act. So therefore, such a dispute is non-arbitrable. The court can see under Section 11 before making a reference.

Having said that, Mr. Sethi you have also said the two things which are to be kept in mind, as we said that is a risk of parties exploiting this to delay the proceedings. And you accepted that, Yes. Under Section 16 also that can be done even before the Tribunal, even when the matter is before the Tribunal. Section 16 application can be fil filed and it can be delayed may not be to much extent because of Section 29(a), where the Tribunal has to decide within the time limit. And the mandate of the Tribunal is for one year, one and a half years within which it has to decide. But what happens is ultimately, even when such issues are decided by the Tribunal, when Section 34 application is filed, it's not that the issue decided by the Tribunal on jurisdiction particularly limitation, et cetera, which is all jurisdictional issue are the issues which can be raised under 34 also. We cannot go into the merits of the decision taken by on the merits, but a question about the jurisdiction can very well be raised and that is very well recognized principle for challenging an arbitral award. So therefore if an issue, suppose about the jurisdiction or the ambit of Section 30. Sorry, arbitration agreement where a particular dispute is arbitrable or not, and we are saying that it should be left to the arbitral Tribunal to avoid delay, but then matters comes back and the court has to again do it and the court has the supervisory power. This is what Mr. Niraj here I'm coming to you that in ***Dallah's*** real estate case a few years ago UK Supreme Court had also decided that whatever on such issues,

the Tribunal decides that is subject to judicial review if it is ultimately has to be subject to judicial review, whether it is decided at the threshold or it is decided at the end. It is going to make any difference then, and why we should curtail the powers of the court and the process, how this duality weakens the doctrine of effectiveness? And in the context of your UK, there may be other cases which may have come after ***Dallah's*** Judgment. And you can throw some light on that.

NIRAJ MODHA: Thank you, Justice Sikri. And hopefully, it's perhaps comforting to hear that we have similar struggles with these issues. The competence-competence doctrine and the supervisory or supportive powers of the courts in England and Wales, we have much the same debate. I think there is a good reason for that because we would all understand that Tribunals gain their legitimacy and their authority from the autonomy of the parties and the consent of the parties but an award gains its power, its legal effect from the courts at which in the jurisdiction in which the orders ought to be enforced or recognized. So there is this necessary tension between the competence of Tribunal on its jurisdiction, but the ability of a court to be able to supervise where it's, for example, a case of Tribunal that have no jurisdiction has found that it has jurisdiction and any award is another t. So this really strikes at the heart of the relationship between the courts and the Tribunals. I do think it's possible to reconcile this duality, and I don't think it needs to be a weakness. Hopefully there'll be time to come onto some of the reforms to the English Arbitration Act, which are in the pipeline and which seek to take down some of the hurdles that are in the way of a party that is seeking to enforce an award or is seeking to avoid challenges to jurisdiction that may be frivolous or maybe raised with the sole purpose of defeating an award at the stage of enforcement.

Dallah is an interesting case. It's 14 years old now, and one of the reforms that I mentioned a few minutes ago to the English Arbitration act seeks to overturn some aspects of ***Dallah***. I won't go into the facts of ***Dallah***, but in essence, one way of looking at it without hoping to be too controversial is that it was a bit of a power play between the English courts on the one hand and the French courts on the other hand. In respect of an award. An ICC award that was the product of an arbitration seated in Paris. The question that arose in the Supreme Court was at the stage of recognition when the Governor of Pakistan wished to challenge the award. What is the approach of the English courts to a jurisdictional challenge, particularly in circumstances where a party has not participated in an award, has not sought to challenge jurisdiction before the Tribunal, so the facts of ***Dallah*** were quite limited in that respect. But the dictate, the consequences of ***Dallah*** and the judgments of ***Dallah*** and Lord Mance is that essentially the court that is being asked to consider whether or not to recognize an award does not need to look at, it can consider a Tribunal's award on jurisdiction, but doesn't actually need

to bother to do that. Because the court rehears the matter afresh. Here's evidence, experts evidence as well on foreign law essentially has a retrial of the question of jurisdiction, which seems on the face of it to be a total pointless waste of resources because you've already had one bite of the cherry if you're seeking to oppose or challenge jurisdiction, or you've had the opportunity in this case, the governance of Pakistan didn't participate, but it could have done and it would have had the same effect. It would have been able to have a rehearing before the English courts but hopefully come on to the reforms or touch on the reforms to the arbitration act a little later, but I think we do need to go back to the English Arbitration Act and consider that actually, whilst it's based on the model law, as is the Indian arbitration, Consolidation act. There are some subtle differences Section 30 of the English Arbitration act codifies or enshrines the principle of competence-competence and it is still subject to the court supervisory powers in Section 1, which have to be exercised in accordance with the arbitration, English Arbitration Act. English courts the act doesn't say this, but the English courts have over time formed a settled view that a Tribunal really should have the first say on jurisdiction. So whilst that isn't codified in the English Act. That is the position in case law. There is a presumption almost, that the Tribunal should have the first say. However, as I say, it's not in the act, so you will often find questions of jurisdiction raised at a much earlier stage. You'll have perhaps not even an arbitration or arbitration would just be getting going and somebody will issue court proceedings, and there'll be an application for a stay of those court proceedings. And this is when it begins to get very complex, because, again, unfortunately, my view, the way the English courts have interpreted stay applications or the hurdle that a party must amount on a stay application is regrettably not in line with the Arbitration act. The Arbitration Act allows a given discretion to a court to stay judicial proceedings where there is a, there appears to be a valid and binding arbitration agreement. Now, the way the English courts have interpreted that provision is that the court must be virtually certain that there is a valid and binding arbitration agreement. And this contrast with the Indian Act, where there must be a *prima facie* or *prima facie* determination of the bindingness of an arbitration agreement. So again, this is a gloss on the arbitration act in Section 9. The Law Commission has considered potential reforms to the Section 9, which is the section relevant to applications for a stay and has decided not to reform Section 9. So there is a real problem at the point of very early on in proceedings when you have a claim being issued and a party wishes to enforce an arbitration agreement. You have a mini trial or a trial, effectively, of the question of whether there is a valid and binding arbitration agreement. And that is classic situation, which I think, the court should take a hand off approach to use the phrase used by the panellists, co-panellists that the court shouldn't be involved at that stage. The court should allow a Tribunal to rule on its own jurisdiction.

The other potential reform, which is, I said, going through the pipelines is a reform to Section 67 of the English Arbitration Act, which is the provision that allows a party to appeal or to set aside an award based on the absence of jurisdiction or in excess of jurisdiction. Again, the classic approach of the English courts which doesn't appear to be mandated by the English Arbitration Act, but has been interpreted by the courts in this way is to allow a party a second bite of the cherry. So you fight on jurisdiction, you lose on jurisdiction, you have the ability again to challenge jurisdiction afresh under Section 67. Clause 11 of the arbitration bill that is going through parliament at the moment will make it very clear that the court, when dealing with a challenge under Section 67, will not be rehearing arguments, will not be rehearing new evidence on jurisdiction and I think that's a very welcome reform. Again, that deals with one of the problems in ***Dallah***, which was that the courts that is being asked to review is actually rehearing arguments on jurisdiction that's to be no more once the arbitration bill is enacted. So I think it's important that ***Dallah*** is an important case, but I think we have to look ahead and look to the future of where arbitration law is going in England. And it does appear that with some time that the courts will take an approach that does return jurisdiction back to Tribunals' dealing with jurisdiction, which is the way it should be that there must be a supervisory power, that is essential to give legal effect to awards. But it should be exercised at the right time. I think we're still far from the French position, which is to not entertain, the courts do not entertain jurisdictional challenges to the jurisdiction of Tribunal until after an award has been promulgated. So we are going, I think there is a balance to be struck. And I think we're on the right path, but there is still some element of working out of the new law, particularly after the arbitration bill becomes new law later this year or next.

JUSTICE A.K. SIKRI: So Niraj, I think your comments raise some very important and interesting issues. One is that it gives us some comfort that Indian courts are not that interfering as UK court has become, particularly in the light of the supervisory power. Now, yes, this is good thing. Which English approach is there? That first bite on the cherry by the at the stage of Tribunal. Let the Tribunal decide. But having said so, when it comes back then having a trial all over again and including the evidence, et cetera on these jurisdictional aspect, this is, I think, going a little far and I don't know whether at least enforceability of the award would get delayed because of all these reasons. Please.

BIRENDRA SARAF: Sir, the judgment which you referred to was in a very peculiar fact situation. Ther, the state of Pakistan. Yes. Dallah. Yes. The state of Pakistan was not a party to the arbitration agreement at all it was not a party to the arbitration agreement, but it was sought to be drawn into the arbitration. It had raised the issue of jurisdiction and thereafter refused to participate in the proceeding at all altogether. Now, when the award was passed,

that was not challenged at the seat of the arbitration, that is France. And when the other party came to enforce the arbitration award. It is at that stage that the state of Pakistan objected to the awards enforcement in England, and so this was decided in a particular fact situation. And if you see the judgment in its entirety also, it does make a reference to these situations, though it does say that, yes, the arbitrator's views deserve difference, but not a entirety of binding nature on the court. So, of course, they have gone on a slightly higher requirement of tests. I just want to add one thing that your question was that when, after the arbitrator decides it is in any case going to be tested in a court of law. Then this duality defeats competence-competence. Sir, let's take it, what is so unique about an arbitration, otherwise you would go to a court, which will be a trial court, and file your claim statement. Instead, the parties have agreed to an independent forum where they believe that this person will be able to better adjudicate the disputes and a procedure is agreed upon by them for deciding the disputes. So as in a trial court, instead of a trial court, it is a forum of the party's choice, which is deciding all issues. After that in a regular proceeding there is a full-fledged first appeal given. Here there is no full-fledged first appeal, given there is a limited ground of challenge. So effectively this is only a supervisory role of generally seeing that the award is not contrary to the limited g rounds available. So that supervisory power does not in any manner run counter to the principle of competence-competence. Competence-competence really means that allow the arbitrators a full flow so that uninterrupted that you can decide early and decide in a meritorious manner. So thereafter, of course, to make sure that arbitration awards or the arbitration proceedings are not abused, a limited supervisory rule is given.

JUSTICE A.K. SIKRI: You are right to that extent, that in that limited role as far as issues of jurisdiction are concerned. These are well recognized all over.

BIRENDRA SARAF: Therefore, I don't think that supervision by the court after the passing of the award in any manner runs counter.

JUSTICE A.K. SIKRI: It doesn't run counter to competence-competence. My comment was only to that aspect where neither said trial again, all over again to decide that issue that was the only limited comment. Let us take some nuanced approach to all that topic, which we are discussing about this now. As I said in ***Booz Allen***, the court has decided that there are certain matters which are not arbitrable. Now, one of them is, if there is a serious allegations of fraud and illegality of the arbitration agreements, et cetera. In ***Chloro Controls***, the court recognize both positive and negative aspects of the competence-competence and on the other hand the courts are faced with the allegations of fraud and illegality of arbitration agreement when Section 11 application is filed. So how you view that and in this particular scenario, how

it can be balanced. So I'll ask both Tejal also and Zameer also to say. First let us ask Tejal what you would like to say and you can combine it with while giving this answer to also the situation where these issues are there and competence-competence is followed very strictly, and this is left to the Tribunal. Then, after long and expensive arbitration, when it comes to enforcement of the award, then we are again struck. So how you view such a situation?

TEJAL PATIL: First of all, I think, thank you for adding me on the panel, because I would like to sort of use it to give a little bit of a client perspective to this very academic discussion, where we are kind of, in a little way, splitting hairs on jurisdiction. So let me just start with what was the basis of this policy was that it respects the mutual intention of the parties who have chosen arbitration as a forum for resolving disputes. The fact that one of the parties is challenging jurisdiction in the first place is that the mutual intention of the party is now gone, because that mutual intention did not exist anymore because they are challenging the fact that the arbitral Tribunal itself has jurisdiction in the matter. So I think for me, that is the first thing that we've got to bear in mind. The second thing is it took about six to eight years, I made one of my juniors check, how long did it take to decide jurisdictional issues prior to the amendment. It was about six to eight years. Post the amendment it still takes two years. So the fact is that it is taking us that long to decide on jurisdiction in a matter of whether the person has the jurisdiction in the first place to run the matter. I think this defeats the entire purpose of the arbitration. Why did we choose arbitration as an alternate dispute resolution? One was confidentiality. The minute it is a mixed question of law and fact, and it goes to court, the confidentiality is out of the window because all facts are discussed at that stage. Then you go to the second aspect of time when it takes two years to just decide that. We have the second problem.

And the third, of course, is cost. I don't think it has substantially reduced cost given this piece. In some sense, though I would say that given the maturity of the, and I know I have many arbitration practitioners here and the fact that, sir, you said that 60% to 70% are ad hoc arbitrations. The arbitrator in many cases is not chosen by the parties and therefore the trust element in the arbitrator is low. So what happens then is you challenge everything that the arbitrator is deciding first and foremost jurisdiction. So to the point of whether the arbitration agreement was fraudulent, whether the agreement itself was an agreement between the party it goes to the very root of what we're trying to achieve.

And to your point on, if the arbitrator decides jurisdiction and we cannot challenge it till the point of the entire award is done. That is further cost, further time and I'm not sure of how it achieves that purpose. Jurisdiction should be a preliminary discussion, a preliminary

judgment, which has to be accepted before it goes forward because you also mentioned that Section 34 is very limited scope of appeal. And once the party agrees to jurisdiction and the arbitrator assumes jurisdiction, the party then cannot take themselves out of it. So there is no hope, there is no appeal. There is only one appeal, which is under 34.

JUSTICE A.K. SIKRI: Thank you. Zameer, what would you like to add?

ZAMEER NATHANI: So my perspective will be of the client she referred to because I am from the corporate. Now, in the corporate from last 20 years, what we see is the three things when the law came out, the three factors always figured hindered in our mind, saying that this is the decent making point at a corporate level. One is the competence of the arbitrator. Second is the timing, time it takes to resolve the dispute under arbitration. And third is the cost. So these were the primary factors we used to define. The point of Justice Sikri where you speak about a fraud or a conflict of interest ***Booz Allen***, judgment, et cetera, I think the preliminary step which was overcome. In 2006, 2008 we would see all matters lined up in the courts of law saying that it's a challenge to the arbitration. It takes about four or five years to resolve it. 2012, 2014 onwards, the court took a stand saying that all right, come to us on need basis only. And then gradually, the Supreme Court and all other courts started taking view. It's very selective. We don't want to become one plus one. The process is one and we can be .25 if there is anything required.

I always felt for us fundamentally in the corporate is the timing of judicial review and the extent of judicial review really mattered to us in the arbitration process. So in the ***Chloro*** judgment, when it was tested whether the arbitration agreement has been arrived between the parties. I always felt that this is the fundamental, what we agreed in the New York Convention saying that the courts will still have a purview of the arbitration agreement, arriving at a conclusion whether it is null and void, inoperative, or incapable of being performed. Is the primary stage which the credit we should give it to the courts of law in case the process also has to have one amount of supervisory.

So for me, if there is a fraud or a conflict of interest in an arbitration, these fundamental principles of intervention, timing of intervention, and the extent of intervention was very critical. In fact what I also did before coming here is research on what's the confidence level of the world in the arbitration process because we thought that arbitration today would have taken a very front seat. I myself thought that 70%, 80% of us will have a view saying that we have a total confidence in the process, so I took a global survey from a reputed organization which says, how confident are you in finding right services for litigation or arbitration support?

Fully confident the number was zero. Very confident 7%. Moderately confident, was 50% neutral was 19%, slightly confident 17%, low confidence was 6%. So that's the number. So what we feel from a corporate perspective, we divide this, we look every litigation as part of the strategy also whether we should litigate or whether we should compromise and close the litigation. So for us, if there is a fraud or a conflict of interest which is involved in an arbitration, a preliminary purview of the court of law in a reasonable time period is always what we look out for then going for an appeal after a period of certain point of time when lot of money and a lot of efforts, time has been also spent. So that's my preliminary view from the New York Convention. And what's the alignment with the courts of law.

JUSTICE A.K. SIKRI: Okay you'd like to add?

NIRAJ MODHA: Sorry following on, I think from both what Zameer and Tejal have said it seems like there is market demand for some kind of preliminary determination. And funnily enough, the English Arbitration act does provide for this in Section 32, and there isn't a similar provision in the Model Law or the Indian Act. That section, Section 32 is headed determination of a preliminary point of jurisdiction. And that's being reformed as well in the arbitration bill. Just to clarify that you can go to the court, but not if the Tribunal has already ruled on jurisdiction. So under Section 32, you can apply to the court either with the agreement to the parties. Well, you're not going to have the agreement to the parties at this point. Or with the consent of permission of the Tribunal and if you can show to the court that this will result in a cost saving so that the act actually says one of the options is to make the application with the permission of the Tribunal, and the court has to be satisfied. A, the determination, the question is likely to produce substantial savings in costs. B, the application was made without delay, so you got to be quick and C, there is a good reason why the matter should be decided by the court so the court can take jurisdiction on this question of jurisdiction, and that seems to me to be an option it does, I think jar with competence-competence.

JUSTICE A.K. SIKRI: But triple tests, which you have said and only when these conditions are satisfied, court should decide first of its own, rather than relegating it to the Tribunal. I think, what I feel. Yeah. Please.

SIDHARTH SETHI: Sir, just to give the Indian context, because we heard the English context and we heard what the corporates feel and the most important stakeholders being clients what they feel. So the positive and negative effects of competence-competence are recognized, as you rightly said, in ***Chloro Control***. There also recognized in ***SBI General Insurance*** and the seven judge bench ***Interplay*** the stamping judgment. And in all these

judgments, the Supreme Court has said that the positive effect is that it enables the arbitrators to rule on their own jurisdiction. And the negative effect is that it deprives the courts from exercising their jurisdiction. However, what they also say is that the arbitrators are to be the first judge and not the sole judge and that's important. And in this background, if one were to see the role of courts when they are faced with allegations of illegality or fraud. In my view, the approach has to be balanced and cautious. And why I say balanced and cautious? Because not in every situation you can follow the same principle, and this has been a vexed issue in itself and has seen its own share of various divergent judgments. But I just want to give some hope to the stakeholders here, because what we saw and what position we have now, that should give you some comfort. So when I say this has seen its own share of divergent views. So it started with ***N Radha Krishna and Maestro Engineers*** where the Supreme Court said that the issue of fraud is not arbitrable at all. then came the judgment in ***Ayyasami*** where Supreme Court introduced the seriousness of fraud test and here. The court held that the allegation of fraud is of such a nature that it amounts to a criminal offense then such cases are not arbitrary, non-arbitrable, and courts will exercise jurisdiction not to refer.

JUSTICE A.K. SIKRI: My judgment.

SIDHARTH SETHI: That's right however, you also said that mere relegation of fraud with the Justice ..... That's right. But you also said that mere allegation of fraud, simpliciter is arbitrable, then. Later, sir in Rashid Raza and [UNCLEAR] Studios, the Supreme Court introduced the test of public flavour. The public flavour test. And as to what constitutes a serious allegation of fraud, certain tests were laid down. And what the Supreme Court said there was that if the plea of fraud permeates the entire contract and above all, the arbitration agreement rendering it void, then those cases will not be arbitrable. However, if the plea of fraud merely touches upon the internal affairs of the parties, then those cases, can be referred to arbitration.

Later in ***Vidya Drolia***, which is a landmark judgment, it has been held that the allegations of fraud can be referred to arbitration, especially when they relate to civil disputes and the exception to this rule is that if the fraud has the effect of rendering the arbitration clause itself null, and void. And ***Vidya Drolia*** has been affirmed in . Yeah, that's it. Has been affirmed in NN Global the law commission, also in its 246 report, has proposed addition of section subsection six in section 16 to provide that arbitrary Tribunals can rule on aspects of fraud, et cetera. So with this expanding body of jurisprudence. In my humble view, the courts should follow a balanced approach, a cautious approach and a principles based approach and we can't have a one size fits all.

JUSTICE A.K. SIKRI: So I'll ask one question here, and anybody of you is free to answer. It's a very interesting situation, which comes when it comes to the, in international arbitrations, particularly, I'm saying, and when it comes to the arbitrability of the dispute. Suppose it's an international arbitration, London seated or SIAC Singapore and the seat of the arbitration would apply. Now, there as far as fraud is concerned, it is arbitrable, clearly arbitrable. But the issue is raised by one of the parties in Indian party. And they say that it is opposed to Indian public policy. And in India, there is a clear law that if it is fraud, then it is not arbitrable, of course, subject to, I'm making this statement very simple. And now the Tribunal is supposed to decide as per English law, as per Singapore law, and can decide. Yes. It is not... it is arbitrable, and we'll go ahead. But when it will come to enforcement, ultimately objection would be taken in India that it is opposed to Indian public policy because the Tribunal decided something which is not arbitrable in India. So in such a situation where you take this principle of competence-competence and how it should be decided. Anybody can answer.

ZAMEER NATHANI: A better example on the international arbitration part. I think this is one of the larger issue we face on refusal of recognition and enforcement of the awards by the courts of the country where international arbitration has come for enforcement. One of the finest example is that SIAC is engaged. Arbitration happens on our shareholders agreement, there's a provision of clawback, of shares. There's a provision which maintains about certain nitty-gritties which are not well known in the jurisdiction, but the jurisdiction is very well known from the business perspective and the courts termed that as an unfair and probably, if I may give one example of Middle East, for example, from a Sharia Law perspective, et cetera. So I think those are one of the issues we are facing on a country jurisdiction perspective, where you have an international arbitration, and even there are set of judgments which were evaluated before signing this Agreement, whether partly paid shares can be issued, whether clawback can be done in case of a breach by the other party and the courts of those countries are also specified that if it's a contractual agreement between the parties, the court of the jurisdiction will still recognize. But when you go for the enforcement of that award in that jurisdiction, I think the enforceability came into question was one of the serious question marks on the arbitration process itself. Because it could internationally, this judgment would have been recognized in multiple jurisdictions which have adapted to the arbitration process and one of the very well recognized arbitration forum was there. But when you faced it in a jurisdiction from an enforcement perspective then the question comes down to when you have faith in the competence-competence, where do you go from here?

JUSTICE A.K. SIKRI: Yeah, I think these are the issues which we'll have to grapple with and what I feel is, on that basis alone, that at the time of enforcement, it may become little difficult that can't deter the Tribunal for deciding by applying the law which is applicable. Say, example which I gave. If it is Singapore law applicable or English law, where it is arbitrable, they can't say that look what happens. And they are concerned with the enforcement of award at the stage of making that decision, and we have less than four and a half minutes. I had one question which I wanted to, but we can stop that if there are some questions which the audience would like to ask. Anybody has any question for any of us? Then can I ask this question now because nobody is saying anything about it. You see do you feel and particularly the two general counsels also who are sitting here giving the client's perspective, et cetera. That most of these issues arise because of the poor drafting of the arbitration agreements. And where to go, and what is the remedy for all this? Because Tribunals, or even, for that matter, courts are grappling with how to interpret a particular arbitration agreement. What it sought to cover, what it sought to exclude, et cetera, because it's ultimately arbitral Tribunal has jurisdiction from that arbitration agreement. Which is because it's not that why jurisdiction like a civil court, which has and plenary jurisdiction kind. So it is that limited jurisdiction. So therefore, many times it is observed and it has happened because of the poor drafting we know which right from those, particularly that Reliance Union of India. Three times the cases went. I was also part of that. Twice I was part of that bench. We decided these cases and the main problem was imperfect arbitration agreement. What is your take on them?

ZAMEER NATHANI: So I think in my case, so yesterday's experience with some other CEOs of a company. He was signing an international term sheet, and he was trying to understand what's the meaning of venue, place and seat mentioned in the arbitration clause. I think from a corporate perspective, where we have seen this for last 20 years, I think we really ensure that the arbitration clause and because we have been seeing this for last 20 years with close eye, we can also drop the clause in the middle of the night. But what I also keep doing from my side is that we keep on seeing the judgments. Like, for example, the Middle East example I had given, before getting into the arbitration zone itself or agreeing to that particular clause on clawback, and partly paid shares. We'd also done a research whether there is a precedent of the courts of law in that jurisdiction, whether this will be acceptable or not acceptable. So I think in my experience, we have seen drafting of good arbitration agreements between the parties. What tectonic shift I have also seen in the approach between two corporates is that we have stopped strategizing for how do we increase the time and where we get opportunity to delay the process. I think that has been cut down largely by the courts of law as well as the arbitrators. I have seen arbitrations in last five years going down to about also three to six months. So I feel the clauses which are drafted in my career, which I've seen, they've been drafted well. We are

cautious about things. We give a limited time for the mediation, so that the mediation process is upheld in its own sensitivity and ethics. And then if the parties don't agree, so defects in the arbitration clause. I don't recall at all. So according to me, I think corporates were adopted already a good clause so that because they know and they now appreciate a fact that we want to first go for arbitration. That acceptance has come at a broader leadership level, also, with the CEOs and managing directors.

JUSTICE A.K. SIKRI: Maybe Zameer, what you say and what I mean. If I may say so, first that many of these cases have because of poor arbitration agreements. Maybe these cases are old ones. And with so many judgments coming in between people are becoming wiser. And that too, when it happens when very good legal brains they put their heads together and draft such an arbitration clause and dispute starts from there.

TEJAL PATIL: Let me give you two practical issues here. So one is this question of one arbitrator versus three arbitrators. In all cases, it is not possible to have three arbitrators, so why default? Unless you are going for institutional arbitration, you are going for a single arbitrator. So by default, you are in court because the other party will never agree to whatever name you put it could be the best name in the country, but they will not agree.

JUSTICE A.K. SIKRI: Yes, it happens.

TEJAL PATIL: So I think by default, you will go in if you go for a single arbitrator, and we cannot. Afford three arbitrators at all points in time. Even corporates cannot.

JUSTICE A.K. SIKRI: Yes.

TEJAL PATIL: So I think we've got to look at that aspect. The second thing is, for example, if I compare it to the arbitrations we do in the United States or with the United States parties. It's all institutional. So what happens is you have a standard institution clause, the institution appoints the arbitrator and that is generally that method that is followed here. Here the concern goes

JUSTICE A.K. SIKRI: Tejal, that is only for the appointment of arbitrator.

TEJAL PATIL: Correct.

JUSTICE A.K. SIKRI: But ultimately, when the Arbitral Tribunal is constituted. It has to go by that arbitration clause again.

TEJAL PATIL: No. So that is one part of it. And then that's why the arbitration clauses, which were older, were not drafted that well, because it was only seen as parties will go for arbitration. They'll appoint one arbitrator as an alternative, not understanding, sort of where that will lead.

ZAMEER NATHANI: But just from my side to you also in the courts one of the arbitration, which I remember is the Singhania family. Arbitration between father and son where I think the major issue came up on the interpretation of the arbitration in a way where whether the family has to first sit down in a mediation process and then go for arbitration was one and second was, of course, the stamp duties always the challenge part of it. I think those are the two defects we have been seeing for many years on the interpretation part of it, but I think up the hill, we have now figured out that if it's a straightforward arbitration, is the right way of doing it.

JUSTICE A.K. SIKRI: Thank you very much. And I may sum up by saying that, look, I think the best approach would be coming back to competence-competence principle. I mean the meat of the matter fulcrum of the discussion that we have to respect party autonomy. And in the first instance the court should lean in favour of party autonomy and this principle and asking the Tribunal to decide that thereafter limited supervisory jurisdiction is allowed under the law and to what extent but still to maintain balance and to ensure that deadwood, which is deadwood, doesn't come in the arbitrations team, and those cases are not unnecessary. Three triple test which Niraj mentioned. If the courts in India also apply that and on that basically they say whether we should in this case go into any jurisdiction issue in the first instance before referring to the court not may provide a good solution. Thank you very much. Thank you, everybody. Thank you.

~~~END OF SESSION 5~~~