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INDIA ADR WEEKDAY 1: BANGALORE

KEYNOTE ADDRESS

07:00 PM To 07:30 PM IST

Hon'ble Mr. Justice Vibhu Bakhru, Chief Justice, Karnataka High Court

HOST: I request everyone to kindly be seated. We'll be expecting the Chief Justice here any moment. I would like to request Mr. Harish Narasappa to come on stage to introduce Chief Justice Vibhu Bakhru. Thank you.

HARISH NARASAPPA: Thank you. It's a pleasure to introduce our Chief Justice, Justice Vibhu Bhakru. Justice Bakhru has been with us in Karnataka for less than two months, but all of us who are practicing in the High Court have already felt the difference in Court Hall 1. Now, those of us who practice in the Commercial Arbitration and Tax matters are all very familiar with Justice's Bakhru. We may not have appeared in this Court, but we have read all his judgments. We rely on it regularly. Most of his judgments, which are substantive in nature reflect a deep expertise in the areas that I mentioned. It helps us enlighten ourselves on the area of law that he's written about and helps us in our own matters.

Now because I didn't want to go to the High Court website and read out his CV, I asked a few friends who practice in Delhi and who have appeared before him when he was a judge there and also when he was practicing to give me some nuggets of information that I could share here. The one response that I got, which sort of struck me, one of my friends who has appeared before Justice Bakhru said he is one of the best commercial lawyers that India has produced. And I think in the last two months that we have appeared before him in Court Hall- 1, I think those of us who have had the pleasure of appearing before him will attest to that. The most important question comes very quickly, probably in the first few minutes after you have started arguing. And to answer the question, you not only need to know the law in detail, but you should have also balanced out all the considerations between the Parties, because the question, though innocuous, has thought through all these issues before it's posed. So, all of us in the arbitration community look forward to learning from his experience and knowledge while he is in Karnataka. I'm sure we are in for a treat on the topic that he's speaking today. Welcome, sir.

JUSTICE VIBHU BAKHRU: Well, thank you. I'm not sure all of it is true, but I'll lap it up. Well, to all of you, a very, very warm good evening. I know you've had a long day and I'll keep it, try and keep it really short. At the outset, let me just compliment everyone, organizers for organizing this ADR Week. Nowadays you have large number of events like these, but one of the facts is that it has an osmotic effect on the thoughts and the ideas that flow. And you only realize it much later when in a different area, you recall something that you'd heard in one of these events. So, my compliments to the organizers for doing it. And I wish it all the success going forward, considering this is the first day of the ADR Week.

So, the topic that I really would address is institutional area. India is a country rich with a population of 1.4 billion. Ensuring access to justice and efficient redressal is a purpose in perpetuity. The judicial infrastructure, though extensive, it comprises of 39 High Court complexes, 3642 Districts and Taluk court complexes and 16 specialized Tribunals. They continue to grapple with an enormous pendency of over 54 million cases. Now, these statistics do not include the Tribunals and the Supreme Court. Against this backdrop, the past decade has seen a growing recognition of the need for augment Alternative Dispute Resolution Mechanisms, particularly in a rapidly globalizing economy and the digital age, where efficiency, adaptability, and cross-border compatibility are vital. As commerce becomes increasingly global and interconnected, India has also emerged as a significant player in the international ADR. The participation of Indian party is an institutional arbitration abroad illustrates this shift. For example, the Singapore International Arbitration Centre, SIAC 2023 Annual Report ranks India as the third largest foreign user, with approximately 160 cases involving Indian Parties. Far from declining, these numbers suggest a steady and possibly expanding reliance on institutional ADR by Indian businesses and individuals, underscoring both the demand and the opportunity for India to strengthen its own ADR institutions.

The legislative framework has also evolved in recognition of this necessity. Key enactments such as the Med Act, the Commercial Courts Act, the Mediation Act, and the proposed draft Arbitration and Conciliation Amendment Bill 2024 collectively signal a strong policy commitment to institutionalizing ADR. While several Indian ADR institutions exist, they remain at a nascent stage compared to their global counterparts. There is therefore, a pressing need to strengthen them so they can handle the diverse and complex disputes that arise both domestically and internationally. Now, what does it take to build a robust institutional ADR system? And this is the subject that I will focus on today. We must recognize that the institution's longevity and legitimacy depend on the trust and the confidence of those who use it. For ADR institutions, this trust is earned by ensuring processes that are accessible. They are fair, transparent and efficient. Institutional credibility cannot be assumed. It must be continuously built and reinforced.

So, the first point, accessibility. Accessibility in particular, is a critical factor. For a country as vast and diverse as India, infrastructure is the key, both in physical forms that is adequate facilities and spaces, and in technological terms, that is state of the art, digital platforms capable of supporting high volume of users. The challenge of accessibility is not unique to India, but its sheer scale magnifies the urgency of adopting innovative solutions. I'll give you an example of Delhi International Arbitration Centre, one that's been very close to my heart. I was at the helm for it for three years. Over three and a half years. We started with 8 rooms three years ago. We now have 19 courtrooms. They're all choc-a-bloc full. And the next dates

I'm told are now in November. So, there is no infrastructure, even in these three years from 8 rooms to 19 rooms. Now, there are two ways to access this infrastructure problem. One is, of course, to expand it, build more, but the other is to use it more efficiently. And this is where we have to use technology. It can facilitate remote participation and mitigate the burden on physical spaces. Now Artificial Intelligence is here to stay as well. We have just begun to discover the manner in which AI can be used in dispute resolution. The possibilities here are ever expanding. We know that it can be used effectively in assimilating precedents, crystallizing issues and enhancing case management capabilities. Some of the High Courts have already commenced projects for use of AI in administrating scrutiny and case flow management. Now, indisputably, AI can be a force multiplier. An increase in the capacity would inevitably result in higher accessibility. Globally, many jurisdictions have also embraced Online Dispute Resolution, ODR as a means to provide quick cost effective and geographically neutral access to justice. A number of the ODR institutions have come up in India as well, however, yet to gain traction and wider acceptability. ODR fundamentally transforms dispute resolution by eliminating the need for physical presence in a single location. Unlike traditional court linked e-platforms that support judicial decision making, ODR processes are fully virtual, allowing Parties, Arbitrators, Mediators, even institutions to operate seamlessly across jurisdictions. Indian legislation has begun to reflect this shift. The proposed amendments to the Section 2(1)(a) and 2(1)(a) of the Arbitration Reconciliation Act under the 2024 Bill, as well as Section 30 of the Mediation Act 2023 formally recognized ADR proceedings conducted entirely online.

Another hurdle to accessibility is cost. Cost remains a significant hurdle. While ODR can reduce certain expenses, institutional ADR often involves institutional fees in addition to costs for representation and arbitral/mediators. For many, this creates a barrier of entry. For larger claims between large commercial enterprises, the cost may not be a deterrent, but for relatively small and medium Enterprises, cost poses significant hurdle. Clearly the quality of arbitration cannot be compromised. Thus, if accomplished professionals with domain knowledge are appointed, they will require to be adequately remunerated. This would bring us to the need for capacity building, which I will touch on a little later. But apart from mitigation of costs, we must explore the possibility of cross funding arbitration proceedings. Now, this hasn't been tried earlier, but we can ensure that some part of the costs that were collected by institutions are used to subsidise arbitrations initiated by small and medium enterprises. In Delhi International Arbitration Centre, we have split the fee structure. It's very akin to the 4th Schedule when it comes to the first three bands, but when it comes to the last two bands, it is twice as much as the 4th Schedule. So, therefore, this is an oblique way of ensuring that there is some cross funding of arbitrations. There's another aspect, that is the third-party funding.

Now, this is litigation finance as we know it. This has now emerged as a global trend. Now third-party funding allows Claimants or in some cases, Respondents to secure funding to pursue disputes in exchange for a share of the award, if successful. The allocation of liability in a case of an unfavourable outcome depends on the terms of the third-party funding Agreement. By mitigating financial risk, third-party funding can open doors of institutional ADR to a much wider pool of litigants. The evolution of third-party funding in Common Law jurisdiction illustrates a changing character. Once viewed through the lens of doctrines such as maintenance and champerty, third-party funding is now increasingly seen as a tool for access to justice. Enabling Parties with meritorious claims to pursue them without being deterred by prohibitive costs. In the United Kingdom, for instance, it allows third-party Funders to operate under framework of self-regulation. The Association of Litigation Funders, ALF oversees the conduct of Funders through a voluntary code of conduct while a statutory recognition awaits under the pending Litigation Funding Agreements, enforceability Bill in the House of Lords. Hong Kong, meanwhile, has taken legislative steps with the Arbitration and Mediation Legislation. Third-party funding Amendment Ordinance 2017. This clarifies that the third-party funding is not barred by traditional doctrines of maintenance and champerty and sets out safeguards to ensure transparency, disclosure and fairness. A similar step has been taken by Singapore by enacting the Civil Law Amendment Act 2017. In India, there is no central legislation on third party funding, though some states, which is including Maharashtra, Gujarat, Madhya Pradesh and Uttar Pradesh have amended Order 25, the Code of Civil Procedure to account for third-party funding in specific cases. Importantly, Indian law does not prohibit third-party funding *per se* provided that the funder is not a practicing lawyer funding on behalf of his Client. Yet the absence of a comprehensive framework leaves gaps regarding funder obligations, party protections, and enforcement awards in funded ADR proceedings.

Now, this brings us to the next one, which is fairness. Arbitral awards are final. Thus, for litigant is always a leap of faith. For any arbitral institution to have any credibility, it is essential that first, the Constitution of the Arbitral Tribunal is such that it is independent and impartial. There can be no room for any justifiable doubts as to the independence and impartiality of an Arbitral Tribunal. The principles that justice should not only be done, but should be seen to be done remains the fundamental guiding principle while constituting the Arbitral Tribunal.

And the second part is the Arbitral awards should be fair, just the awards are based on proper evaluation of facts and founded on sound principles of law. The challenge here for an institution is appointment of arbitrators, mediators with or mediators with requisite qualification and expertise. Institutions worldwide maintain diverse panel of arbitrators, mediators and conciliators across jurisdiction and subject matters, allowing the Parties to choose the adjudicators or conciliators best suited for their disputes. Importantly, in international disputes, institutions frequently ensure that these neutral persons are of different nationality than the disputing Parties, thereby enhancing impartiality. For instance, in the 2023 Report of the London Court of International Arbitration Records, 187 non-British arbitrators on their panel for Parties for the LCIA court to choose from. Singapore International Mediation Centre maintains a panel of over 70 international mediators. The Delhi International Arbitration Centre also has a panel of Arbitrators. I'm not sure of the number. I think it's about 23.

Now the third-party funding, which also raises a normal issue with a... novel issue regarding the independence and impartiality which is at the heart of ADR. If funders are undisclosed relationships that exert undue influence, it can erode the confidence in neutrality of the process. Thereby, transparency and disclosure become non-negotiable in elements in safeguarding fairness. In the context of arbitrations, IBA guidelines, which have been largely adopted in the 5th and the 7th Schedule of the Arbitration and Conciliation Act continue to serve as a guide for courts globally. Similar provisions exist in legislations governing mediation in different jurisdictions. In India, Mediation Act 2023 mandates under Section 10, a disclosure from the mediator of any grounds that may give rise to justifiable doubts as to the independence and impartiality. These provisions are guidelines and they mandate disclosure by mediators and arbitrators and the Parties involved. Now again with the third-party funding, the disclosures would have to change a bit, because now the Party must disclose his relationship with a third-party funder or the third-party funder who's not readily discernible from the record, whether the such a funder exists and otherwise, what are his relationships with the Party or the arbitration. The Arbitral institutions also have an internal and a robust mechanism to challenge, to ensure that challenges on the ground of independence of Arbitrators proactively dealt with. Now, I just read a case two days ago, which was delivered by a Single Judge of the Delhi High Court. It was an anti-arbitration injunction that was granted. I think, I'm not recollecting the full name, but ***Engineers' India Limited*** was the first Party. It was an interesting issue for, the matter is live, I'm not commenting on whether the injunction should have been granted or not granted to the merits of the case, but the facts are a little interesting because they're the Arbitrator had said there's nothing to disclose. There was a partial award, and in the course, we discovered that the Arbitrator had a previous involvement with the managing, in a dispute with the Managing Director, it was then the Defendant that would be the Claimant in the Arbitrator proceedings, and the challenge came to be raised before ICC. It was an ICC administered arbitration. And ICC dealt with it by saying its disclosure was not made, it's regrettable, but there are no justifiable doubts as to independence and impartiality of that Arbitrator. So now there are two challenges which are pending. The first challenge is to the award, which is now being enforced, partial award that is being enforced. And the second, of course, is an anti-suit, an anti-arbitration injunction that has come in that a Party has filed now, apart from everything else that was said in the judgment. One thing that really caught my attention was one of the reasonings by saying that if that disclosure had been made at the appropriate time, then perhaps there could have been a challenge to the Arbitrator and perhaps the institution may not have appointed it. Now, this course, this particular case will take its course, but from a standpoint of a litigant, I think instances like this does erode a certain amount of confidence that a litigant may have with the Arbitral institutions. And this, I think, needs to be checked and this can be done by a very, very robust mechanism for challenge. ICC has one. A lot of arbitration institutions also have one, but I think these needs to be strengthened further. The Arbitral awards that are given are absolutely final, so therefore, there is no recourse available to it, really. So, the only way that one can ensure that some amount of impartiality is there is this form of disclosure.

Of course, the second now, most important thing is competency. That's a challenge as well. Now we need to have sufficient number of arbitral professionals who are competent and have the domain knowledge. Arbitration, they say now say, is a very incestuous world and particularly in investor state arbitrations, there are relatively small number of professionals and that constitutes an elite club. There are double hatters, that's an issue, which is now being debated. They act as Arbitrators and Counsels. If Arbitral institutions have to maintain credibility, then these issues are required to be addressed.

Then it comes to building capacity. And it's necessary that we now encourage Arbitral professionals. It would be necessary to engage for the institutions, to engage with educational institutions so that sufficient number of arbitral professionals are trained. One of the initiatives that I would like to talk about is of the Delhi International Arbitration Centre. We partnered with... The institution partnered with National Law University, Delhi, and for an 80 hours course on arbitration. And as DIAC went, we only promised them content and that the judges would be available to take lectures if they're so required. We had no other role to play. But I believe that course, which ran for 80 hours, did well and looking at the next edition as far as that course is concerned. And some of those candidates undertaken that course were empanelled with, as young professionals with DIAC.

There's another very un-emphasised aspect of institutional ADR is the internal scrutiny process that reviews draft awards before they are finalized. The purpose of this review is to enhance award quality by identifying potential errors, gaps, or lack of clarity in the reasoning, ultimately facilitating the enforcement and reducing the risk of challenges to the award. This unique feature adopted by international ADR bodies such as the International Chamber of Commerce and the Madrid International Arbitration Centre, amongst others, strengthens enforceability and minimizes challenges and enforces Party confidence in ADR outcomes.

The last point is, of course, efficiency. Now, the key aspect and I think all of you know are timelines. We now have legislations that come about periodically reducing the timelines, fixing the timelines, and those timelines almost never adhere to. And the reason is, obviously, is the bandwidth with which one has to, with a limited bandwidth that one has. But time lines an important part as far as ADR institutions are concerned. I'll not read out the sections that are now being proposed for timelines in the Mediation Act as well as the Arbitration Bill.

Finally, to conclude, I would say that there is a need for continued engagement with global developments in ADR and more, and this is more pressing than ever. The rise of technology has introduced novel issues across jurisdictions. Some legal systems are grappling with disputes involving choice of law and disputes relating to crypto assets such as cryptocurrencies and non-fungible tokens, while other jurisdictions are dealing with issues arising out of a smart legal contract. Smart Contracts have posed significant challenge in many jurisdictions. These Contracts can broadly be defined as a binding Contract in which some or all of the contractual obligations are defined in or performed automatically by a computer program. An Arbitration Agreement or a MedArb Agreement in a coded part of a smart legal contract give rise to more complex issues. A Natural Language Arbitration Agreement could be embedded into the code of a smart legal Contract or included in notes to the code. This advancement has raised fundamental questions whether there exists an Arbitration Agreement, what would be the choice of law and whether it would even be an arbitrable dispute. These questions illustrate the profound impact of technological innovation on the practice of ADR. In the light of these challenges, it is imperative for India to adopt an outward looking approach, engaging with global best practices and adapting its institutional frameworks to meet the demands of an evolving legal and technological landscape. Only through such engagements can the Indian ADR system remain credible, resilient, and responsive to the contemporary disputes. With that, I conclude. Thank you very much.

HOST: Thank you very much, Honourable Chief Justice Vibhu Bakhru. I would like to call upon Mr. Karan Joseph, Young MCIA Steering Committee member to deliver the vote of thanks and the concluding remarks. Thank you.

KARAN JOSEPH: Thank you, Chief Justice Bakhru, for those incredible insights. I'm happy to inform the room that the latest edition of the MCIA Rules incorporate a lot of the suggestions, including scrutiny of an award. Perhaps that's why they've got 100% hit rate of none of their awards being set aside so far. Touchwood and, well, everything else that people believe in. A very warm welcome to Justice D.K. Singh, who, apart from being a very erudite judge is also president of our own Arbitration and Conciliation Centre. Thank you, sir, for joining us. Ladies and gentlemen, what a fantastic day. I've been associated with the MCIA since 2016 and from the very beginning it's had one very clear ambition, and that is to put India firmly on the Global ADR map. And the India ADR Week is living proof of that vision. This entire week will see 700 lawyers across 16 jurisdictions participating in the events. Three cities, one united theme. And today Bangalore has shown why it is such a priority for the MCIA. Sessions from 10:00 a.m. to 07:00 p.m., double the participation in comparison to last year. To me, that just isn't growth, it's momentum. It also tells us that the ADR community in this city is not just alive, but thriving. What impresses me the most about the MCIA is its professionalism and foresight. Dates for the India ADR Week are fixed a year in advance, because that's the kind of certainty as lawyers would like when it comes to dates. But what impresses me the most is the inclusivity of the India ADR Week. It's evolved in such a manner that other institutions post their own events in the same week. They plan events, they plan their calendars, not just around the India ADR Week, but also in such a way that they're part of the ADR Week. Far from being competition, it shows that the India ADR Week by the MCIA has become a festival of arbitration and a celebration that belongs to the larger community. Thanks to the host committee for the Bengaluru event, Ms. Poornima Hatti, Mr. C.K Nandakumar, Mr. Pramod Nair, Mr. Shraeyas Jayasimha and of course my very dear friend Lomesh. Thank you to the MCIA and its leadership, my dear friends Neeti and Madhukeshwar, and, of course, all of you participants and speakers. Let's hope the conversations that we've had don't really end in this room. The India ADR Week, in association with its knowledge management partner Nishith Desai & Associates has a survey, and there's going to be a QR Code that's going to be on screen. I encourage all of you to scan the QR Code and participate so that that helps us well, perhaps mould next year's programming in addition to the questions that there are. On behalf of the MCIA, I thank you all for your time, your energy and your ideas. The future of ADR in India and Bangalore is bright and I'm quite sure that going by today's events, Bengaluru will be at the heart of it. Thank you and see you at the next edition.

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