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INDIA ADR WEEKDAY 1: BANGALORE

SESSION 4

The Founder's Dilemma: Should All Disputes be Fought or Forgotten?

05:00 PM To 06:00 PM IST

MODERATOR:

Mr. Mohit Abraham, Chief Legal Officer, Peak XV Partners

PARTICIPANTS:

Mr. C K Nandakumar, Senior Advocate, High Court of Karnataka

Mr. Dhyan Chinnappa, Senior Advocate, High Court of Karnataka

Mr. Nishanth Kadur, Leader, Nishith Desai Associates

Ms. Poornima Hatti, Partner, Samvad Partners

Ms. Shilpa Shah, Senior Partner, Singhania & Partners LLP

HOST: The next session is hosted by MCIA. The topic of the session will be " The Founder's Dilemma: Should All Startup Disputes be Fought or Forgotten?" The session is moderated by Mohit Abraham. The speakers include Dhyan Chinnappa, Nandakumar, Nishanth Kadur, Poornima Hatti and Shilpa Shah. I kindly request the speakers to please come on stage. Thank you.

MOHIT ABRAHAM: Should we get going? Good evening, everyone, and thank you to the organizers for having all of us here. We're looking forward to a, what we'll hopefully be an interesting session on the Founders' dilemma. When to sue, when not to sue. Those kind of issues. We have an amazing panel of some of the leading Disputes Arbitration Experts in the country. So much so that one of our panellists is actually still in court, but is on the way; so, that really shows the jobs that we have. So, we are very excited about this session. Just to lay out a bit of context. So, I've worked closely with startups and Founders for the last ten years or so. In my experience, it's one of the hardest professional journeys one could undertake. About 25% of startups only will end up even returning capital to the Investors. So, that's astonishing. Think about it. 75% of startups are not even going to return capital to the Investors, or for the Founders for that matter. Only about 1% of startups are actually going to be Unicorns, that is billion dollar companies. It's a super, super-hard job, professional journey to actually set up a successful startup. I would say you have to actually be a little crazy to even undertake that journey; but when they do it, it's obviously very fulfilling. There are a lot of constraints that Founders have. Money, obviously is a big one. Reputations are still being built; so, they are very fragile. Allocation of just resources and the single most important resource is actually one of time. So when you think of all these things, Founders really have to make critical decisions every day. How much money can I spend on this product or this Engineer or this particular issue? And in that steps in legal issues and disputes. So, whether to sue, whether to settle, whether to send a legal notice, whether to go for mediation or arbitration becomes a very, very challenging topic for startups. So, that's the context. We are going to leverage on the expertise of the panel, discuss a few different topics and themes. And I thought we can start with Dhyan. So, Dhyan again, Founders have to make money, go the longest way. You are a Senior Counsel. No panellist here is going to be cheap. Their legal advice is going to be very expensive. Of course, I'm sure they do *pro bono* work and so. But it is a huge decision point for Founders to decide, should I sue, should I not sue? At a very high level, if you had to think of a framework on when to approach court, or when to really pull that trigger in terms of activating a dispute or different layers in terms of settling, making a legal threat, any one of those concepts, just at a framework thinking level, how would you advise young startups and Founders to think of that?

DHYAN CHINNAPPA: Thank you, Mohit. It's a pleasure to be here. Like the Warren Buffet's two rules for his CEOs, I have two rules for promoters. Rule No. 1, do not litigate. Rule No. 2, do not forget Rule No. 1. That, of course, sounds a little distressing for a litigating lawyer to say, but the point really is this money is scarce. Time, resources, all of which are early startup Founders are hard pressed for. So, when you decide to litigate, you need to choose your cases, you need to choose when you must fight. I think, long back, I had this Client who was a scientist. They were developing transgenic technology in cotton. And there are a lot of disputes, but they've never fight. They were very nice people. But the only time they really fought was when their technology was challenged, because that was the most critical part of their business. And when they fought, that fight was a scenario where the Founders were involved completely. It was like their business. So, you must choose your litigation or your disputes when it really threatens your very business. So, in a way, if you ask me, if you need to fight, you must fight. But if you have to fight, you must always keep a window of settlement open at all points in time. Litigation is not going to take startups and the Founders anywhere, if they decide to fight for the sake of fighting.

MOHIT ABRAHAM: What about leveraging litigation? So, in our country, Interim Orders become extremely critical. There is a threat of litigation and then there's actually initiating litigation towards the strategy of settling, or whatever it may be. How do you see that used? And especially as somebody who's in the arena, how would you recommend that that particular aspect should be considered?

DHYAN CHINNAPPA: Litigation, as a measure of strategy works very well sometimes. Litigation is a threat, works better when you're suing a startup, because a startup doesn't want to spend money and there could be a scenario where an Investor is suing a startup, and the cost of fighting the Investor may be just too much. But I think in any litigation strategy for litigation in a startup must be to find a way to settle. And therefore, if at all you're leveraging litigation for a purpose, then you must be clear about that purpose and how far you're willing to go with it. I think many a times as startups grow to a certain level, the egos take over and that's when startup finds its way down. And therefore, it's critical. And therefore, since we now have Nanda, I think we can focus on him.

MOHIT ABRAHAM: Welcome to Nanda as well. As I said, we have hardcore litigators. This is actually, he was actually busy in some cases, so, ... So, we got going, Nanda and we were just discussing frameworks and how to think of when to go to court. Are there situations, Nanda, let me turn to you, where we have different modes of dispute resolution? We'll think of arbitration, mediation, litigation. But sometimes, we may want to go directly to court and court itself as a leverage strategy for a Founder or for a startup, how would you think of that kind of an approach?

C. K. NANDAKUMAR: First of all, I am sorry about the delay. He was right in saying that I was, in fact, in court and whatever time it takes between the High Court and here, that's the amount of time I took. Very quickly, there are several reasons why not just startups, but any company might choose to go to court instead of adopting another dispute resolution mechanism. The first of these is posturing and positioning. You might want to go to court so that you get an Interim Order or any order or even the fact that you filed a suit or a proceeding, might demonstrate the seriousness that you have. Getting an Interim Order, as Dhyan often does, is something that not often for startups; he appears only for the big MNCs; I appear for the startups, is something that will help you in posturing if you have to get into a negotiation. So, very often Parties do feel that they're better off with an order in hand with a certain sort of advantage while going into a negotiation. Obviously, the other side would want that vacated before you go into the negotiations. So, that's one other reason. The other reason that I can think of is that very many of these startups will have arbitration clauses in their agreements. And the first port of call before you initiate Arbitration is very often a Section 9 proceeding where you go to court, because your Tribunal is not constituted, at least under the domestic situation. Of course, if you have a SIAC clause or whatever, and if you're second stage, third stage funded, you might have a SIAC clause where there's an Emergency Arbitration clause or an ICC clause or whatever else but plain vanilla startups very many times, you do not have any of these, and you don't have an institutional arbitration mechanism; you have a simple Arbitration clause, which means that, again, for the same reasons that I mentioned, you might want to go to court, try and in some ways, get ahead of the game, get ahead of the position, and then see how it plays out.

MOHIT ABRAHAM: Got it. So, just a follow on from there. When startups are thinking of their Contracts and like, what is the Dispute Resolution Clause that I should be including there, what should be in that clause. Again my MCIA friends will be very interested in what you're going to say now. Depending on who the counterparty is, many big Investors may say that "Hey I want a SIAC Arbitration clause", but how should Founders think about whether it should be MCIA, should it be SIAC? What are these factors? How should they think of the seat of arbitration? How should they think of the governing law? Because oftentimes, startup Founders really, they don't know the law. They are very good at one thing, which may be building a product or operating in a particular area. They oftentimes are not even looking at these things. They just want the deal. So, what would your advice be to startups and lawyers who are advising startups?

C. K. NANDAKUMAR: Right. Because I came late, just trying to score back some brownie points, I'm going to say use the MCIA clause but jokes aside, on a very serious note, for a reason, Dispute Resolution clauses are called Sunset clauses. Because very often at the end of a long negotiation, these just inserted as boilerplate clauses. So, that's something to be wary of. Having said that, I would say that typically, let's just turn it on its head and look at what are the typical disputes that startups face. First, set of disputes are among shareholders or amongst the promoters themselves. That's a very, very common regime of disputes. The second set of disputes are between Investors or one set of Investors and the company/ promoters. The third typical ones are between ex-employees who started something similar, the Investor wants to, is making a noise about IP; so, you just go and file a bunch of proceedings and say how they are violating your IP, took away your source code, blah, blah, blah. The fourth set is typically with vendors or whatever, but those are, I think less frequent, and they are not unique to the startup world in that sense. My sense is that, at least as far as startups are concerned, definitely you need to have a strong pre-litigation mediation clause, which will facilitate your being able to go and try and resolve this with the least level of pain. The point that you made about startup Founders not being very sophisticated with their legal understanding, I think it's equally true that they simply don't have as large a professional set up under their command that they can say, "All right. I'm going to ask my legal head to go and negotiate, I'm going to ask somebody else to go and negotiate", because effectively, it comes down to the startups running the whole show themselves. So in many ways it's important that you realize that the time that you spend as a startup Founder, as a promoter, as it were, is quite huge. And in order to save that time, I definitely think it's advisable for you to, as a startup, for somebody advising a startup to try and keep them out of court, out of arbitration, out of disputes, to the extent that you can. So, mediation or pre-dispute negotiations/mediation are great techniques, and we found them effective in many, many cases, especially with Investors. So, that's certainly something that you should look at. Otherwise, I think you'd certainly need to look at, again, institutional arbitration mechanisms which are today probably far more robust than they were a few years ago in India. And therefore, that's something that, again, startups should certainly look at.

MOHIT ABRAHAM: Maybe there's something in it for law firms to think of in terms of catering to startups; a manual or something of the sort. A playbook in terms of how to think of these concepts. I think it'll be very useful for a lot of Founders as a startup. But to shift gears a little and Nishanth, maybe I can come to you. As I said, cost is a big thing. About a year, year and a half back, a Founder approached me in relation to an IP matter. And I strongly urged him to go very aggressive on a litigation. And he said, no, it's not a priority, so on and so forth. A year later, they lost the case at the ITC in the US, International Trade Commission there, and a 450 million funding round got scuppered. And then he came and told me, Mohit, you were right. But the reason he didn't go ahead at that point of time was costs. So, on that point, Nishanth, this is obviously a big factor. What are some of the kind of solutions available for startup Founders? So, one is litigation financing. There are a few firms that are providing that. Is that a thing, especially in India? Could Founders think of that? The other is just some of the insurance policies. DNO, cybersecurity insurance, even litigation insurance, pieces, if that is something that Founders could consider? And finally the US, I am aware of law firms. Of course, in India it's not permitted, but law firms are able to take equity in companies in exchange of legal advice. Should, I mean, the Bar Council, I know it's very far-fetched, but just as it's an interesting thought exercise. Is that something that those kind of solutions should be considered?

NISHANTH KADUR: Yeah. Thanks, Mohit. Look, disputes are expensive. They're becoming more and more expensive as days go by. And for a startup like Mohit mentioned, each and every dollar, they need to see to it that it goes the full mile, and they're getting the best benefit out of each and every dollar they spend. So, obviously, depending on the nature of the dispute, especially like Mr. Nandakumar mentioned, if it's, say, a dispute with one of their Investors, or some big people like Mohit or it's with some Investor with deep pockets, and you feel you're in the right as a startup Founder, but you're also at the same time, struggling to ensure that you get the full representation that you should be getting in court or before an Arbitral Tribunal, litigation financing is definitely a good thing to consider. But just to ensure that litigation financing doesn't seem as, doesn't seem like the one solution for all problems kind of a thing, there are some inherent problems and the biggest problem, or rather, the biggest factor that will come into play is where is your dispute? Right? Because I've had conversations with several litigation funders who are very aggressively looking to invest, but the moment I tell them it's likely to be before Indian courts, then they take a step back and say, "Look, I need to do a full due diligence." Because ultimately, for a litigation funder, what matters is, how quickly can I recover this money, the money that I am promised at the end of this litigation? And unfortunately, we have seen that even after a successful domestic arbitration, we end up seeing extensive challenges before a Section 34 court, and then you take it all the way to 37, you go to Supreme Court for an SLP. I thought it would stop there. But now two more players have recently been added as well, which is review and curative. So, litigation funders are a little apprehensive coming to India. Now, say you have a foreign-seated arbitration and you have a good case. Again, some considerations are whether you're the Claimant or whether you're defending it, right? If you're a Claimant and a funder feels that you have a good case, then there is a good chance that you will be able to convince them for a good litigation funding arrangement. But if you're defending a case, which more often than not, startup Founders do, then it may not really auger that well for you. Now that is litigation financing.

Coming to insurance, like Mohit mentioned, right? D&O Insurance- Directors and Officers Liability Insurance. I have personally seen it work and it work really well. Typically, we see D&O Insurance being taken either an Investor tells... Investor has nominee Directors on the Board and tells the portfolio company to ensure they have D&O Insurance. Or at an Investor level, they get D&O Insurance and they try and cover all their key officers and nominee directors across the board. But just a few things to consider for a startup. If you're taking D&O Insurance, as we all know, insurance are based on utmost good faith, *uberrima fide*. And the regulatory setup in India is such that you may have received a notice three years ago and nothing has moved forward. And then today you're going and taking D&O Insurance, and you don't disclose that notice. And ultimately, when it's time to claim, you end up facing some sort of disputes with the Insurer. Right? So, there are several key considerations to keep in mind. One is what I just mentioned. The other is, generally, anytime you receive a claim or you are thinking that somebody may sue for whatever reason, or a regulatory authority may sue for whatever reason, it is a good idea to first assess whether what your position is insofar as the insurance is concerned. Look the third thing, I think, Mohit, sorry, it's a long question, so I'm taking some time.

MOHIT ABRAHAM: It’s okay.

NISHANTH KADUR: The third thing Mohit mentioned is taking fees in the form of equity. So, while I think it's definitely a good idea to start a conversation around it, I think it ultimately it boils down to, especially in litigation, I think it ultimately boils down to whether, ultimately a litigating lawyer's first duty is to court. And the moment you're seen as having a part or being one of the owners of your Client that may end up raising certain conflict considerations, but insofar as non-litigation work is concerned, all for it. I think startups deserve to pay through equity if they think that is the best way to go forward and get legal representation for them. I think I'll stop there, Mohit.

MOHIT ABRAHAM: Yeah, I mean, we could go on and on.

NISHANTH KADUR: Yeah.

MOHIT ABRAHAM: In the US, for example, startups can be much more aggressive because they have these things. It actually fosters the growth. But we, of course, have many other hurdles to surmount before that. But changing gears a bit and Dhyan again, I want to bring back the concept of Dispute Resolution modes, and I wanted to speak a bit about mediation.

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There was in the middle, like few years back, a lot of talk about that. Now the focus has again gone back to just arbitrations and how effective do you think has that been more from commercial disputes perspective. Of course, on the family side, you will have a lot of those things working very well. But from a commercial perspective, how do you think of that? And should startups actually be thinking of putting those clauses, or is it just not worth the time?

DHYAN CHINNAPPA: Mediation, I think, is a great way to resolve if both Parties are willing to do. The problem, of course, lies the fact that when you get into a dispute scenario, given the fact that courts in India take their own sweet time, everyone believes that delaying dispute resolution has a lot of meaning for a Party who has a bad case. And therefore, mediation almost falters at that level. But I think what is, and possibly an interesting drafting technique which could be used is to introduce a Mediation Clause and nominate a Mediator in that clause, because I've seen good Mediators are still able to settle disputes, notwithstanding the initial resistance of one of the Parties. Therefore, by putting in a good institution or a good Mediator as a named Mediator, you're actually able to bridge that requirement of having to find the Mediator after the dispute is started. That is one way of doing it. The other is to say that, if any Party does not put in good faith effort to try and mediate, then there must be a liability of costs on litigation or arbitration once it has started. So, these are of course, contractual mechanisms which Parties can think of, and I think law firms can introduce, because for startups that may actually prove to be extremely fruitful in trying to resolve or nip disputes at its bud. So, I believe that that could be one way of doing it. But if you ask me quite honestly, if a Party doesn't want to settle, there's nothing much you can do about right.

POORNIMA HATTI: Sorry, Mohit, if I can come in on that. I just wanted to reiterate what Dhyan is saying. And I think I don't agree with you when you said mediation, where we talked about it and we're not talking about it anymore. We're still talking about it. And we've seen 'n' number of commercial disputes resolved through mediation. I think what has happened is that law firms and lawyers have matured. When I started off, people would say, we are not going to be the first people who're going to talk about mediation. I think now we do. At least a lot of good lawyers I know do. So, that conversation helps move things along. And if you can't name the Mediator, there are plenty of good Mediators available and mediation at best, I mean, mediation has a success of 80% around the world. We now have the Singapore Convention for Commercial Disputes. So, we have, and India has a legislation; we have moved miles. So, startups should definitely look at mediation. If you can't name your Mediator, there'll be ways and means around it. And mediation, at best, will take you 48 hours. And you may succeed in those 48 hours, as opposed to the long hours of litigation. So, I think it's definitely worth a try and people should, and hopefully the startup community will tap in on that.

MOHIT ABRAHAM: I think it's a great point. Maybe we'll invite you, Poornima, to take a course with our startups on how to think of this and putting those clauses. Yes, Shilpa, the next question was for you only, but please go ahead. Yes please put the mic. Hold it up. No, just hold it to your mouth.

SHILPA SHAH: Mediation is the best way out, but like the in practicality what we are observing and experiencing that we had, like, in a few cases, because now in commercial court, before the commercial, this disputes initiated like now you have to go for mediation. But every time we tried and I'm very much on settlement and mediation and amicable settlement, other Party is not turning up interested. They are just not interested.

MOHIT ABRAHAM: Which is why I think Dhyan's suggestion of getting this into the Contract. And putting this into the Contract itself is something that can certainly should be thought of, I think, and startups should leverage that because it'll actually be the cheapest form of dispute resolution for them. Shilpa, I wanted to ask you a question. A lot of the Founders and startups, their products, especially if they are consumer-facing products, they will have standard form of Contracts. And typically, there's a lot of friction at the consumer level. Consumers are disgruntled and there will be Consumer commission cases, so on and so forth. So, how should they think of dispute resolution in that context? Because the volume of these things can add up very quickly and can be a huge friction point for a startup or for a Founder. So, when they are thinking of dispute resolution in that context, what are some of the key things that you would like to see, which are being included in those Contracts?

SHILPA SHAH: Yeah, as all of us discussed that startups are always in financial crunch, and that's why they have to depend upon the standard form Contracts. So, templates, what we call. So, generally, they depend upon that, but you can't have the standard Contract for all the requirement. But majority, like Vendor's Contract, Employment Contract, some amount of IP Contract, it can be done. And as you ask for clause. So, I would suggest, because now Consumer Forums and Consumer Commissions, they are also taking like years together. When they started come up with law, they thought it won't take much time, and in short duration they will be able to... lawyers not require. Various things are there. But each and every, those Consumer Forum case or Consumer Commission case, they have the lawyer and it goes on for years. So, I would suggest, like, in a conciliation maybe the first one and so that should work well. And that also they should go for one conciliation. Now it is there. In the framework, Arbitration And Conciliation Act, et cetera. They have nicely, like, incorporated the provisions.

MOHIT ABRAHAM: Right.

SHILPA SHAH: So, I think conciliation should be the...

MOHIT ABRAHAM: Right. Okay. So Poornima, I'm going to turn to you now. Actually, I want to ask a little different construct. A lot of startups that are especially having software products; large companies like a Facebook or an Uber or any one of these large tech companies will have product legal teams that are studying the product; is it complying with privacy? Have the appropriate disclosures been made? Am I taking user consent? So on and so forth. How much time do you think a startup should actually invest, keeping in mind their resource constraints in terms of this product review piece itself? And is that something for which they need to engage lawyers? But before they launch their product, basically, how much of due diligence should they be doing? Is it sector specific? Would you factor in that, "Oh, there's a regulator here" or "There's a privacy issue here." How should they think of this broad point?

POORNIMA HATTI: Thanks, Mohit. There are different kinds of startups and different kinds of Founders. You do actually have many mature Founders and most startups. If you're looking to go into a niche area, should talk to lawyers. I mean many law firms in the room are talking about the recent ban on real money gaming, right? Nobody expected it. And we're getting calls from people saying we can't pay your bills overnight.

MOHIT ABRAHAM: But to that point, all of those companies would have taken legal advice, and they're all shut. I can...

POORNIMA HATTI: So, but how many of them are challenging that, right? Only a few. I mean, we have some cases pending before the Karnataka Court. Now, but how many of them would actually think of challenging this legislation. Are you thinking about going forth and reviewing that and is that something that's going to happen or not happen or where are you looking to do that? So, those conversations, many of them, I'm sure are not looking at, right? So, I'm saying, how are you going to approach a problem? So, one is, what you're saying is here's a niche product or a niche issue or a niche breakthrough, let's say that's going to happen. And do you need protection? Of course, you need protection. Maybe regulatory protection. It may be IP protection and you must get it. And I think most startup Founders are conscious of that. Because I think everybody believes that they have the next big idea. So that protection and conversation should be taken care in whatever way you want to do it, whether it's *inter se* between Founders, whether it's with Investors and Founders, whether it's sort of a public law in remedy, and I think most people will do it. So there are different kinds of protection for each of this, and also regulatory review. And where will that stand? So, all of these different verticals will have to be addressed and done. Otherwise, they will have to step back and that will not be addressed. So, we must encourage people to do it. And I think there are also niche associations.

I mean, the gaming association also has the NASCOM helps people. So, depending on where you fall, you have that protection and that engagement and startup Founders are leveraging that.

MOHIT ABRAHAM: All right. Yeah, please.

C. K. NANDAKUMAR: I think the heart of this is the fact that most startups don't take compliance very seriously. Legal compliance, regulatory compliance and therefore, in disputes *inter se* amongst Founders and in disputes relating to regulatory issues like the ones that say Poornima was referring to, they run into a lot of hot water. A lot of disputes can easily be avoided if there is a greater focus on compliance. For example, they won't have their Memorandum Articles of Association in great shape. They won't have Minutes of Meetings, they won't have... a lot of things that you take for granted, they simply don't have.

MOHIT ABRAHAM: But Nanda, sorry to interject. The problem is, a lot of these Founders and startups, they are just trying to get their product out. It's a question of survival.

C. K. NANDAKUMAR: You're right.

MOHIT ABRAHAM: Compliance becomes a luxury. So, what are some of the ways in which they can think of?

C. K. NANDAKUMAR: I was just coming to that. I think very many times startups start thinking seriously about compliance, only when they're looking at funding.

MOHIT ABRAHAM: Good point.

C. K. NANDAKUMAR: It is true.

MOHIT ABRAHAM: Because as Investors, we will also...

C. K. NANDAKUMAR: So, Investors want to make sure that everything's in Apple pie order, or they think it's an apple pie order, won't get into what you're thinking. I think, therefore, this is something to pay attention to. I also think that you can actually be compliant at a very low cost. I mean, there are today techniques. There are people who do it. There are businesses that do it for you, which could be a Company Secretary. It could be a small law firm who'll help you with a lot of these things at a very, very nominal cost, and I think you have to accept that as a part of your costing in whatever product you're building or service that you're offering. And if you don't do that, it's like taking insurance in some way, and if you don't do that the potential cost, you mentioned a $450 million deal that went to begging. I mean, that's the sort of price that you'll pay. So, my sense is that as a startup, you shouldn't wait till the point in time that an Investor thrusts compliance down upon you, and you must sort of have tried to done it proactively from get go. And that very often avoids *inter se* disputes amongst Promoters and Founders. And I mean, very, very typical. You'll have three friends four friends get together, start something, and then *dost dost na raha* and usual stories. So, that can be avoided.

POORNIMA HATTI: Sorry, I was just going to say,

MOHIT ABRAHAM: Yes, Poornima.

POORNIMA HATTI: Not so much arbitration, litigation, but the number of startups who said we don't have the money to set up a sexual harassment policy at the workplace.

MOHIT ABRAHAM: That's not a...

POORNIMA HATTI: But people do say a we don't have women. We have two women. We don't have a senior woman; not anybody's point to say, why don't you have enough senior women? We don't have the money to give you for a posh policy. And how many of them have had reputational risks, governance issues, all because you just didn't set up a Committee. That is compliance. And yes, there are so many young lawyers who could have put it together for you. And that's the culture that you start building of compliance at various levels. I just wanted to make that point.

MOHIT ABRAHAM: I think there's a really great case here for a playbook which can be a plug and play, at least a low friction one, for these kinds of companies. But Poornima... Yes, sure, sure.

SHILPA SHAH: We had one Client and he just sent me one mail and said that, Shilpa, just look at this. We are planning to sign this. There was a Share Subscription Agreement. 55-page Agreement, he said, just glance through, please. We are planning to sign it. When I looked at it and then sent the red line version, he called me. What is this, Shilpa? He's my friend. Like my Investor, he's my friend, he's saying we were in same wing. I said yes, but you are now in different wing. So, it's a totally like a different Party, but trust factor generally like the Founders are, most of the time they are friends or ex-colleagues. And similarly, when Investor is also friend, then you feel that it's a cakewalk, but...

MOHIT ABRAHAM: True. Some people say that a Contract is ultimately, you may write whatever the intent also matters of the Parties, but quickly, how much time do we have? I'm not sure when we started. Does somebody... 10 minutes after 05:00. Okay, fine. Poornima, turning to the relationships of the startup with its employees. What are some of the mistakes you're seeing. Firstly, in creating this culture of compliance with lawyers, you advise a lot of startups and companies on this, what are some of the mistakes you're seeing startups that are making and how can they handle this? Including in their Employment Contracts. How should they be thinking of this? Because a lot of disputes bear out with your employees and a lot of disputes are because of employees who may have gone rogue. So, what's your experience on this, and can you share some thoughts on this piece?

POORNIMA HATTI: So, I'm going to come to this in a different way. I think a lot of startups have told us that they're high-stress environments. And my experience is that if any organization is under extreme stress, there are going to be disputes, right? Look at startups or companies that are going through re-organisation, retrenchment, whatever else, huge amount of employment related disputes, huge amount of discontent. So, you have to plan for that. So, in a startup situation, you're looking at people and culture, you'll have to look at work, growth and compensation. So, if you look at all of this commonsensically and say either between Founders, whether they're two, three, five, who's going to do what? How are you going to be compensated for that? And are you looking at how these people are going to exit and what happens if you don't do what you said you would do and put this in some even very commonsensical Contract, that's going to be great. If you don't do that, then that's where the issue starts. And we've seen many. And often people will settle simply because there's an Investor, they don't want the organization to suffer, many reasons. But if you don't have that, the time and energy going and building the organization will now be going in sort of resolving this one way or the other. It's also important to talk about IP in your Contracts. You are creating it for the organization. It's not your IP. What happens to the IP in the context of an Investor? Who's going to sit on the Board? How are decisions going to be made? And when an Investor comes in, what about exit rights? How is that all going to work out? So, I think these are what are called transfer restrictions if any, are also important aspects to consider. We do have non-compete. I think they've been tailored a little bit more for Promoters or Founders to say, these are the people who founded it, they know more about it, so they can't walk away easily and just replicate the whole system somewhere else. But they're difficult insofar as the regular employee is concerned, but you do still find them in terms of Employment Contracts, but difficult to enforce.

MOHIT ABRAHAM: Got it. Dhyan, I wanted to now move on to certain specific kinds of disputes. I mean, we can go on and on about this topic, but *inter se* shareholder disputes is obviously a big category, and I know you have personally handled many of them, including very high profile ones. I mean, my firm may be an Investor in some of those. So, in relation to these disputes. When the company is doing great, everything is wonderful. Investors are encouraging the Founder. No questions are really asked. Founders are going ahead and doing what they want. They're given because there's a high degree of trust. But the minute things start going wrong, problems creep in. That's when people start looking at the Contract for the first time, which may not even have been looked at even once. So, given this, in your experience, what are some of the most obvious pitfalls you see, which you think that, My God, I keep seeing this pattern. If they'd only address this in the beginning or they're taking certain steps in terms of information sharing, whatever it might be, it may not have led to this. Can you share some of your experiences on this and learnings on this piece?

DHYAN CHINNAPPA: Mohit, as you rightly said, there are two types of Founder's fight. One, if the startup is doing exceedingly well, then it's a fight for control. If the startup is doing badly, then it's a fight to exit, and how best to get out? And of course, one wonders, why would the Founder fight with the Investor? Because, after all, the Investors are one who funded the entire exercise. But then, still there are fights with Investors, or Investor is fighting them. And I've seen on many occasions, Investors want to take over the company, and the best way to take over is to fight the Founder, so that the Founder then exits. So, you see, some of these are strategic. We are nobody to judge why they do it, but I think there are two things. One is of course, a good Contract. A good, fair Contract is the mechanism by which you can avoid a dispute. But the problem is, Founders, when they start, never enter into a Contract because they're doing it on good faith. They're good friends who've gotten together. They want to develop something. They want to build something big. And therefore, the first time they ever look at a Contract is when there's the first round of funding. And that's when an Investor comes in, and they must hope that the Investor is good and who want to stay with them for the long tenure and not look at someone who's going to want to exit at some point. As you rightly said, valuations are very important. And sometimes, and in some large startups, you saw that as valuations went up, the Investors valued it even much higher. And then when it dropped, then everyone wanted to fight, and then it became a fight for really control. But I think, quite honestly, Contracts are not an answer to this. No matter what you may put in a Contract, the fight can still go on. And you'll see lawyers come and argue in operation mismanagement proceedings that Contracts of this kind must not be enforced, or you must take away certain rights which are granted to certain Investors because they are misusing it.

MOHIT ABRAHAM: Right.

DHYAN CHINNAPPA: Like Nanda would certainly agree with me in many of the arguments that we've advanced against each other, sometimes he does, sometimes I do. And you have arguments in operation mismanagement because the Contract can still not be binding on the Tribunal. An argument is possible to say that this was given in certain circumstances which we never thought would exist today. And today you're misusing it for a certain benefit, and therefore your conduct is oppressive. So, if you really ask me, the most important thing in all of this is the ability of the Investor and the Promoter to talk and to be transparent about what you're doing. I think most of the time transparency is sufficient to give enough confidence to the Investor to stay invested and enough for the Promoter to know that at least he's being open about it. The problem is when you hide. The problem is when you don't disclose. And those problems are problems which are much, much larger and no Contract can ever solve.

MOHIT ABRAHAM: Yeah, I think you hit the nail with that. There's so much more practical experiences we could talk about, but unfortunately, we can't. But I think that's absolutely right. Transparency is critical, and being frank and forthright is extremely important.

POORNIMA HATTI: What do you think of this, Mohit? Putting it back on you because...

MOHIT ABRAHAM: I wasn't accepting any question.

POORNIMA HATTI: No.

MOHIT ABRAHAM: But of course, we are Investors in companies.

C. K. NANDAKUMAR: There are five lawyers on the panel. We really can't get away with it, can you?

MOHIT ABRAHAM: Well, I actually agree with what Dhyan just said. Transparency, information sharing, being candid is the most important. And speaking the truth, even as Investors, when you're seeing pitfalls, just because a Founder is doing well doesn't mean you don't talk about it. And having that trust is actually the most key thing. It may even be, result in an investment coming to zero. That's fine. But being truthful is extremely important. The big two kinds of fraud we see. One is the easy fraud, which is, someone is stealing money. That's the bad intent. These are not complex cases, you know, you have to sue. The tricky one is when Founders get under pressure and they start cooking up the numbers in terms of showing good numbers, because they may be feeling pressure from somewhere else that they need to show it and we'll make it up in the next quarter. That's when the problems kind of start sliding and it becomes ugly.

C. K. NANDAKUMAR: Can I just take a minute on that. It's not often that Dhyan and I get to say this to one another, but I completely agree with Dhyan here.

MOHIT ABRAHAM: You can take the same side once in a while.

C. K. NANDAKUMAR: Jokes aside but I think Dhyan hit the nail on the head really. And it's something I wanted to say it the other thing that I think in addition to transparency. And I'm just going to tie in what Mohit said. Whenever there is some problem. There's somebody who's hot under the collar. The best thing is to have a discussion. I mean you try and ventilate whatever grievance it is, thrash it out, try and talk it out and be done with it. It'll really save a lot of heartbreak and heartburn and a lot of lawyers' fees in time to come.

The other thing that I wanted to say was that very often, and Mohit actually made a very nice point. There are obviously some cases where there is siphoning of funds, bad faith. I mean, clearly there's something that's not within the fort and fence of the law. There are very many cases where this sort of hiding of information with the fond hope that I will today solve the problem and next month I hope the results will be better, leads to a situation where, though you never intended to, you'll get labelled as a fraud at a later point in time, which is actually avoidable. And the minute you get labelled as a fraud, you want to fight back and say, no, no, I wasn't and then you want to clear your name, and it just gets into a bit of an unnecessary tug of war and completely avoidable. So therefore, transparency and fairness and really trying to de-escalate and dispute avoidance are, to me, the most key factors.

MOHIT ABRAHAM: Yeah. Nishanth, I wanted to ask you, a very common mistake I see startups making is in relation to the management of data and corporate records and so on and so forth. When it comes to a dispute, they know they have been wronged. But when it comes to actually showing the evidence, they're very, very sloppy. So, what are some of the pitfalls you see? The other point actually, any one of you could chime on that is Attorney-Client privilege. These are concepts they don't really grasp. These days, ChatGPT phenomenal, by the way. You put in legal questions, you're getting very good answers. It's like a third-year law firm associate who is in my computer, but what and startup Founders will naturally use this. But what is happening is that confidentiality is not being maintained and they are compromising themselves on privilege by asking it as if it's their own lawyer. So, these are some of the challenges. How do you think startups and Founders should think of these aspects and how critical is it actually?

NISHANTH KADUR: Yeah, a lot of third-year Associates are not very happy with you right now.

MOHIT ABRAHAM: It is the truth though. Better to get ready.

NISHANTH KADUR: On a lighter note, of course. So, a lot of things were mentioned during this discussion itself, right? Mr. Nandakumar talked about maintaining Minutes of Meetings and I have an example to give there. I was advising a Promoter who seemed to be on the bright side of things, at least from the outset, and he's saying, no, this is what we had agreed on. This is what we had decided. But each time the Minutes were circulated by the Company Secretary as a matter of course, the Investors nominee directors always had some few subtle comments to make on those Minutes of Meetings, and the Founder was like, you know what, it's my Company Secretary. It's my company; so, I'm not going to really look at this. He never made any comments. And later, many years later, when all these, several of these things came to be questioned or these became points of disputes, then, okay, I'm telling the Promoter, look, I agree with you, but this is what was recorded in the Minutes, and the Minutes do not reflect your position. And that's just one example, right? So Minutes of Meetings is one thing. And generally, I mean, look, there can be no quarrel about the fact that you have to maintain proper records, in the event of a future dispute. But usually what ends up happening, especially in the context of a startup is, there are, like, two top guys or two top people or three top people who are managing everything; who are looking at getting Investors, who are looking at the business side, who are looking at the technical side and a lot of other things and the more structured sort of setups are not there to ensure you end up maintaining, you end up maintaining records the way you'd ideally like to. That obviously will have to change. And with modern technology, with a lot of these apps now coming in, that don't cost the startups too much, I think it's critical. But I just want to address one other point that doesn't usually come up and which is people leaving, right? And you have three top people. One person decides to leave or is planning to move out of the organization, but you also have an active arbitration ongoing where you need that person as the Witness. That is also the best evidence you can give off the dispute, of the transactions that took place prior to the dispute. So, how do you deal with that? Startups should really think about when a key person is exiting, having some clauses in their exit formalities that allow them to be, or bind them to come and depose on behalf of the startup or something like that. Because we see a lot of churn generally in startups, and this is something that doesn't usually get discussed. So, yeah, those are my points.

MOHIT ABRAHAM: Got it. Poornima, I had a question. Nanda had touched upon a bit in terms of compliance culture, but on corporate governance. Again, governance can be a luxury at an early stage. You don't have the time or the resources or the advisors to advise you. What we have done at our firm is we are trying to convince Founders to have a tiered structure of governance. If you're at this much revenue, you should have so and so committee in place. At 100 people or whatever, 100 crores of revenue, I'm just making it up, have a CFO, an Audit Committee, something like that. So, those checks and balances are there. Is that something which you would think is how startups should think of corporate governance? Or they should go whole hog from Day-1 when it's a survival issue? What are some of your thoughts on corporate governance for startups?

POORNIMA HATTI: Yeah, I think wherever the law is clear, you have to comply, right? I mean, I can say, when many Founders tell us that this is a luxury, but there's a huge reputational risk. And once you're seen as a non-compliant startup or a non-compliant Founder, there's also reputational tag that comes with it. Also, in the larger context of this discussion, if you're going to be a litigious Founder, or a litigious person that's going to come with you. People don't want to see that I mean, you're in the same ecosystem, you're going to speak to the same Founders, the same Investors. So, I think if it's a law, you've got to comply with it. So, there's no two ways around it. You can't hope not to get caught, or you can't hope that things will not fall and play. You have to comply. There's no other choice in that matter. But of course, the corporate governance aspects depend on the industry. Are you greenwashing? Are you environmentally compliant? What's your carbon footprint? Those kind of things, they're nice to have, are, I think, individualistic. You also have young startups who are very green and want things to be done in a certain way and will comply. So, it depends on which industry you are, what you're doing and where you're going. But if it's the black letter of the law, you have to comply. I don't think there's no two doubts about it, right? Corporate governance, which is, do you want more women on the Board? Well, yes, I would like that, but maybe some people don't think it's necessary, and they would rather have somebody else and they won't look that farther away. So, maybe that'll come with culture or maybe it won't come. And that's something that nobody can really push people to do.

MOHIT ABRAHAM: Yeah, we can always see red flags coming up. There is a company making like we have deposits on time, even if you check some common filings, you can see those things. Like we now have begun to see a pattern which we can spot early, and we get Investors to then talk to the Founders. But on this theme, and I want to leave some time for questions as well. Shilpa, I'll leave you with the last word on this. From your experience, can you share a practice, a ritual, a quarterly picture or something which you have seen companies at early stage can follow, which would prevent disputes, because I think, including the Senior Counsels, everyone has agreed that you're better off not fighting. I think that's a fairly obvious conclusion. So, I thought we could end with that, at least from the panel.

SHILPA SHAH: I mean, for ritual, you can just only do for quarterly ritual. So, only can do for regulatory compliance like not to see that house is in place. And there are no issue but so far as other things like as and when required, they have to, like, take help of legal mind, we generally found us like, I mean, startup, they avoid and then they fall in the difficulty. But they should like take help of legal minds. So, to avoid those dispute and all the Contracts should be with clarity and in unambiguous manner.

MOHIT ABRAHAM: Okay. All right. Big thank you to everyone. But before we wrap up, we can open it up for a few questions. Neeti, I think I was on time. We were on time rather, but okay. There's a question. Can someone hand over a mic?

AUDIENCE: I think Poornima touched on it briefly when she mentioned one of the reasons that Founders may be adverse to litigate is because they don't want to be seen as a litigious Founder. Right? So, I just wanted to know your opinion, Mohit, and also the rest of the panel. Mohit's opinion, of course, being on one of the big Investors and the rest of the panel on both sides of the forum. But do you really see perception or the risk of being seen as litigious Founder or a trigger-happy Investor, do you see that as an effective deterrent from taking up disputes, whether it's in court or even mediation and arbitration?

MOHIT ABRAHAM: Yeah, I think the best Founders would actually not care about the optics so much. I'm just telling you, I'm not saying this is my view. I'm telling you what I see from Founders. The best Founders will just do what is right for their company. And if that means that they have to litigate, they will litigate. I worked with the Founder of Uber for the longest time; he had a tenacious reputation. Everyone knows he's going to fight. No matter what, he will fight every Government. And that was a reputation. With it, comes certain costs because they will think you are brash, they will think you're aggressive, but ultimately, that was the approach that worked for the Company and made it a very successful Company. There are other Founders who will be very averse to litigation and they will just not want to fight. So, it will also depend on the industry. If you take a company in the FinTech space, they should be more conservative, they should be more measured in their approach. They should be very forthcoming with regulators, engage proactively with regulators. But on the other hand, you may have a company that's operating in a new segment, like, I mean, online gaming. Of course, ironically, a lot of them are not taking up the challenge, but they should expect that they will have to litigate at some point of time because they're going to face a lot of... Or Uber, where you were up against the transport regulators everywhere who are banning you. You don't have a choice but to litigate. So, it will depend on the industry, but it will also depend a lot on the personality of the Founder and most Founders will do what is right for their company. And that's what I see amongst the best Founders. They won't care about the optics. They will do what is right for their business. I don't know if there are any other thoughts on this.

C. K. NANDAKUMAR: Wanted to very quickly add that invariably, I mean, whether you're a Founder or not, invariably, there are typically two or three reasons why somebody goes into

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litigation. One is that you have a certain goal. Second is that you very, very firmly believe in, that this is the right thing to do and matter of principle and so on and so forth. But ultimately, what it comes down to is that everybody does a cost-benefit analysis. And it's only after that that you either start the litigation or get into the settlement or continue with the litigation. Very often, what starts as a point of principal, you run out of, and then you realize your legal costs are going up quite significantly. Then you're not too sure that you want to... the principal is as important as it seemed like a year ago. So, these are questions also that possibly a startup Founder has to look at more closely in addition to what, of course, Mohit pointed out.

MOHIT ABRAHAM: Yeah, I think there's one more question here and there was one there as well. We'll get to you. I've seen your hand raised.

AUDIENCE: Hi, so, we have spoken about disputes between Investors and Founders and all of it. But there's a very big component that is defamation and publicity, negative publicity. So, what is your view on that? Because there are multiple online magazines and platforms which have said in the past, and there are multiple litigations which are going on for years, especially for startup Founders with respect to whether it's about counterfeiting or on those lines. So, what is your view on that?

MOHIT ABRAHAM: I will let Dhyan take that.

DHYAN CHINNAPPA: Well, if it's the truth, better to keep quiet. But if it is...

MOHIT ABRAHAM: Truth is a defence. It's a defence as well.

DHYAN CHINNAPPA: So, it's better to keep quiet, but. If it isn't, then of course you must fight. There's no question. And in a fight of that kind. There is, I think, very difficult to really settle. You take it the whole hog. You make it appear to everyone that you are the one who's standing for what is right. And I think if you don't do it, it also indicates to everyone else that possibly there's some truth behind what is written online. So, I personally always advise people if you find something defamatory and you're certain that it's not, the truth, then you must necessarily fight.

MOHIT ABRAHAM: But, Dhyan what about? So, there's something called the Streisand effect. ***Barbara Streisand versus Hollywood personality***. And there was some article written about her, about some construction she was doing for her personal home and nobody knew about it. But she filed a defamation lawsuit, and now suddenly everybody knew about it. So, this lawsuit itself resulted in more people knowing about it. So, sometimes it may be untrue, but if it's a small publication, would you still think it's worth?

DHYAN CHINNAPPA: See if it's something. You're absolutely right. What happens is, once you raise it, everything opens up. And if someone calls you a fraud and you want to fight it, when you do go into trial of a dispute of that kind, they can raise anything under the sun to show you're a fraud and therefore of course, there's no question it opens up a huge Pandora's box which, as I said earlier, it's really like choosing your battles. If it's something which is very elementary, very fundamental to your existence, then you must fight it. If it's someone who's irrelevant. Suppose it comes up in the front page of Times of India and it's false, then you must fight. Yes, but if it comes in a classified somewhere, you might as well ignore it. There's no point in fighting.

AUDIENCE: Just a follow up question, sorry. It's to you, Mohit. As an Investor, what would be your take to, say, one of your Founders having a piece written on them, which is bad for business. As Investor, would you encourage them to fight, even knowing that it would might open a Pandora's box?

MOHIT ABRAHAM: That's what Dhyan said. It depends. You'll have to make an assessment. If it's true, obviously keep quiet, move on. If it's not, and if it's only your reputation, if somebody's calling you. If somebody's saying you're not performing well, I would say ignore it, but if somebody's making a point to your integrity, I think that is irreparable, you must fight it. So if somebody's calling you a fraud and it's not true. Or somebody saying you stole something, it's not true. Somebody's saying you hid information, it's not true. You should. But if somebody is saying, you're a hopeless Founder. Your product is terrible, I mean, defamation may not lie, but I think those ones you should just ignore, because barking dogs, so on and so forth.

NISHANTH KADUR: Yeah, just one small point to add there. I think it also depends a lot on where you are from an Investor's perspective or the investment's perspective, say you are preparing for an IPO or there is some round that is coming, especially an IPO. Right? And there are these two, three, four articles that you're curating your profile, and then these articles are coming in about how you did this or how you're not a good Founder, maybe that could also be one of the considerations, but, yeah, fully agree with Mohit.

MOHIT ABRAHAM: We will take one last question, I think and then we'll be on time, I mean, at time, sorry.

AUDIENCE: Thank you. Good afternoon, panel. So, my question was regarding the initial part of the discussion where Mohit had asked Nishanth regarding the fundings of how startups and Founders are funding the litigation or the dispute resolution process. But in my readings of what I have seen with this issue, there is a simple solution that is the third-Party funding where third-party funds the litigation process and keeps a share of the compensation that then comes. So, question number one, in the panel's experience how does a third-Party funding actually unfold in real life? And number two, why has this concept or ideology not developed in India because in Maharashtra, in the Bombay high Court and the Madhya Pradesh High Court, we've clearly seen judgments in favour of third-Party fundings. And this clearly is a solution for the issue. So, why has this not developed in India?

MOHIT ABRAHAM: So, we addressed this when we spoke of litigation financing. You're calling third- Party funding it's the same concept, but...

NISHANTH KADUR: Yeah, I think I briefly alluded to it earlier as well. While third-Party funding is allowed in India there's nobody stopping you from doing it. The funders themselves are a little apprehensive, if it's a court litigation in India, or if it's an arbitration seated in India because they're ultimately looking at what returns they're going to get and most importantly, when are they going to get that returns? And because of certain pendency issues and legacy issues, in India, that is a problem. But nobody's stopping. If a third-Party funder is willing to fund a startup, I would say totally go for it.

MOHIT ABRAHAM: I think you're going to see it more in arbitrations rather than full-fledged court disputes to start off. Because of the uncertainty and timing. Arbitrations are more kind of certain and faster. And I think I would say, watch this space; there are going to be companies that are coming up which will offer these solutions, and I think that's good for the entire ecosystem.

POORNIMA HATTI: But I just want to add that it hasn't moved as fast as we thought it would, simply because it's a business for them, right? So, if they go to put in $100,000 they want to know by when can I get my 100,000 plus interest or whatever the cost of that, back? Now, if there's no clarity on that horizon, or people are going to say it's going to take 20 years, that same 100,000 can be put somewhere else, in Singapore or Dubai, and you're going to get your returns. Right? So, it's just a business decision as far as they are concerned. They're not going to be really pushing some Founder or some litigation because of the joy or the integrity of that Founder. It's purely a business decision. There's a better business opportunity somewhere else rather than the Indian courts right now.

MOHIT ABRAHAM: Right. So, I think we are right on time.

AUDIENCE: Just one more question.

MOHIT ABRAHAM: Can we take one more question? Well I have been told. Okay, so, a very big thank you to all my panellists. Thank you very much. This was a fun session, at least for us, and happy to carry on the discussion outside.

~~~END OF SESSION 4~~~