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INDIA ADR WEEK DAY 2: MUMBAI

ESG Considerations in Commercial Arbitration

10:30 AM To 12:00 PM IST

MODERATOR
Mr. Murtaza Kachwalla, Partner, CMS INDUSLAW

Co-Moderator

Ms. Amrita Tonk, Partner, CMS INDUSLAW

Mr. Abeezar Faizullabhoy, Senior Partner, CMS INDUSLAW

Mr. Fredun DeVitre, Senior Counsel, Bombay High Court

Mr. Saurabh Mohindru, Chief Legal Officer, Godrej Properties Limited

Mr. Vineet Bose, Head-Legal & SVP, Adani Cements

HOST: The next session is hosted by CMS INDUSLAW. The topic of the session is, "ESG Considerations in Commercial Arbitration". The session will be moderated by Murtaza Kachwalla and Amrita Tonk. The speakers include Abeezar Faizullabhoy, Mr. DeVitre, Mr. Saurabh Mohindru and Mr. Vineet Bose. I request all the speakers to kindly take the stage. Thank you.

MURTAZA KACHWALLA: Good morning everyone. I am Murtaza Kachwalla, Partner at CMS INDUSLAW. I am joined by my colleague Amrita Tonk and we are delighted to be moderating this panel on ESG Considerations in Commercial Arbitration. ESG. ESG refers to Environment, Social and Governance. It provides... ESG is basically standards which determine whether company or any organization operates in a socially conscious manner. There are three criteria. You have the environment criteria. It basically is how the company performs, takes steps to protect the environment. You have the social criteria, how the company manages its relations with its employees, suppliers, customers, and the communities in which it operates. You have the governance criteria, which basically deals with, how the company deals with its leadership, shareholders rights, antibribery policies. Why really are we discussing ESG today? It has gained significant importance, and it is one of the most important factors which the companies... It really determines how the company operates and how investments are made. Earlier ESG was... ESG principles were merely voluntary. They were nice to have matter on the company mandates, however these are now binding on companies. They are mandated and they are now becoming legally enforceable. It is on top of the agenda of many of our Clients. As you are aware, arbitration is one of the preferred modes of resolving commercial disputes internationally, and we are seeing ESG disputes frequently being referred to arbitration. ESG has gained prominence and has a significant importance in company matters. It affects their reputation, their values, and the relationship with communities. In today's discussion, we will explore how ESG considerations are influencing commercial arbitration from the kinds of disputes which are being referred to procedural innovations, Arbitrator's responsibilities and expectations from the parties and institutions.

To discuss this topic, I am privileged to be joined by an outstanding panel of experts. We have Mr. Fredun DeVitre, who's a Senior Advocate practicing in the Bombay High Court. He has over 48 years of experience essentially in civil litigations and commercial arbitrations. He has regularly been appointed as an Arbitrator by the courts. He has represented many Clients in International Commercial Arbitrations. Interestingly, he was a radio and television cricket commentator for Test matches. Won the internationals and national level championships, and he has conducted a popular program called 'sports roundup' on TV for several years. He has also presented programs at the Asian Games. He has edited books on cricket. He was also deputed by the International Commission of Jurist Geneva as an observer at the trial of Xanana Gusmão at Delhi East M. O. We are really thankful to have you here, sir. We also have with us Mr. Vineet Bose. He is the Head - Legal and Senior Vice President at Adani Cements. He looks after highly sensitive sectors like mining and cement. He has handled complex regulatory matters like environmental and forest clearances. His insights will be widely in understanding the on ground operational challenges of ESG.

AMRITA TONK: Hi. Good morning, everyone. I am Amrita Tonk, your co-moderator for this session. I will be introducing the remaining members on our panel. We have with us Mr. Saurabh Mohindru, who's the Chief Legal and Risk Officer at Godrej Properties Limited, a law graduate from Maharishi Dayanand University. He brings over 18 years of experience in litigation, real estate transactions, corporate advisory and risk management. Since joining Godrej in 2014, he has held various leadership roles and currently heads the legal secretarial and risk functions guiding the company's leg legal strategy, governance and risk assurance. We are delighted to have you on the panel, Saurabh. Thank you for taking out the time.

We also have with us Mr. Abeezar Faizullabhoy, who's a Senior Partner at CMS INDUSLAW, dispute resolution practice and is based out of the Mumbai office. He brings over 35 years of experience spanning dispute resolution, arbitration and corporate commercial transaction, as well as advisory. His dispute practice includes representing both a domestic and International Clients across sectors such as manufacturing, technology services and retail before the Supreme Court, various High Courts and Tribunals in the country and in both domestic and international arbitration. He has also handled numerous matters under the Insolvency and Bankruptcy Court and regularly advises an enforcement of decrees and Arbitral Awards in India. In his corporate commercial practice, Abeezar has advised on joint ventures, angel and private equity investments, shareholders share purchase agreements, tech transfers and issues under FDI Regulations and Companies Act, FEMA, as well as other commercial laws. Thank you for joining us today, Abeezar.

We are joined today by a distinguished panel of experts who bring with them deep insights from law, policy and practice perspectives. So, without further ado, let's dive into this intersection of sustainability and dispute resolution and unpack what it means for the future of commercial arbitration in India. My first question will be to Mr. Saurabh Mohindru. It is widely known that Godrej Properties Limited has made sustainability, a core part of its identity, integrating environmental and social responsibility across its real estate projects, all across the country. Saurabh, my question to you is what, in your opinion, are ESG considerations? How and why is it important? And how is it suddenly that it's emerging rapidly? What in your view, is so critical about ESG that it impacts the reputation of an organization?

SAURABH MOHINDRU: Thanks, Amrita to choose me for the first question. See, as Real Estate industry and as a developer, there are a lot of considerations that we incorporate in our projects with which I'll come to later, but I would first want to touch upon how Murtaza has introduced this concept. It's a very nascent concept at the stage, which is picking up very rapidly globally, I would say not just in India, but globally. And India has taken few very important steps making it enforceable in a manner. See for example, like he explained that it comprises of environment, social and governance. Right? See, Corporate responsibilities is nothing new as a concept, corporates has been accountable and responsible for longest period of the time. Historically, these things were in the nature of financial clarity, transparency, legal compliances and shareholder rights protection and all that. But lately, what we have observed is that it is becoming very rapidly towards these consideration integration of environment, social and governance considerations are getting involved in business.

Now, why is it important? To me, as a corporate, I would say it is important because ultimately, this is the planet that we are at, right? Environment is the biggest consideration that we must have. Coupled with that, of course, how people incorporate in your business. How do you treat them? It's widespread when it comes to everyone contributing towards their business. There are huge amount of labourers involved in our industry, where any project that comes up. It's a five year cycle, bare minimum to deliver a project, every stage human intervention is involved. And governance, of course, is something which is a pillar of a transparency for any business that needs to proceed today. Why it is becoming so rapidly growing these days? Because there are a few things which are very important. Social awareness is one thing, where your customers, your investors, your end users have become very aware that how you are doing you are business and ultimately delivering a product. What is it costing to the nation, to the planet? That is where awareness has played a big role for it to become a concept which is becoming so prevalent.

Now, when we talk about we, as a business, of course, we've taken few steps which we believe are very important for future of the company or maybe Real Estate as an industry. See, for example, now we have decided that any project that we do will be Green Certified Project, bare minimum with a silver rating. None of our projects which are coming up from past two, three years are not green rated. We are shifting to renewable energy. We are buying green energy. We are coming up with projects which are zero waste discharge, recycling of any discharge, any waste that comes out of our project that is getting segregated. We have specific vendors who are doing it for us and there is a complete audit process, first internal and then external, that we follow to ensure that at least what we are doing is meaningful and culminating into a reality.

MURTAZA KACHWALLA: So Vineet, My next question would be to you. Since ESG is pretty much at a nascent stage, are there any rules, regulations governing ESG in India?

VINEET BOSE: So being in the, I think some of the highly regulated industries I had worked almost 20, 25 years of my career rising from chemicals to what you call resource driven industry, energy sector. First of all, I would like to say that ESG, environment or social or governance. All these things, laws were very well there. It's not nothing something new. You have an environmental impact assessment, right, from 2006. You have lot of Labour Laws which are very specific from the perspective of labour development, human development and all those aspects, safety and all that from so many years. These are there. But what has changed basically? What has changed is the way we see those enactments. The way we see the business. We see a business not now, only a set of financial metrics we see it more as something which can impact my brand, something which can impact my reputation. These aspects becomes typical. And I would like to just give one or two examples, very small examples to explain how the approach and the accountability towards those laws or the dynamics have changed. If you see Labour Laws, there are provisions related to certain small non-compliances and all that. And of course, at my GC level, those issues didn't come. But the changing dynamics, how it changes is the way, if there is a non-compliance or if there is a small thing in the past, what used to happen, you go and get it compounded. It's a very small process. If there is a compounding is there, you go to the magistrate and occupiers whomsoever is the occupier, being a director and all that. They really, say *theek hai*, it's a routine practice. Small law there. But now it's not the case. You have your LODR disclosures. You have your BRSR, Business Responsibility and Sustainability Report, where this thing comes as a disclosure. And now the thing is that the accountability changes. It changes, varies, actually, drastically. Now the GC has to see why this has happened. You go and check why this has happened. Occupier would be monitoring the things, because it's a sizable reputation impact, even if it is small blip but it creates a challenge.

I will give another small examples. I don't want to bother this forum with too many heavy things, small example. Land acquisition. Of course, it impacts community. Prior to 2013 Act, companies used to acquire land. It was not need based. It was more from a financial *aaj* acquisition process as simple, get and acquire it. *Kal ko,* it will be required later. *Abhi to,* let's go ahead and acquire the land. Because the process was simple. You have to go to the Collector. You have to get one notification of Section 4, Section 6 and all that. And it's very procedural part, and those things are easily happening. Coming 2013, the way the land acquisition happened. Now, you have a lot of responsibility when you go and acquire a land acquisition. You have to get the community buy in. The compensation is almost four times. How the compensation is determined is also drastically changed, it's not the discretion of the Collector. Now you have to see, when there is a land acquisition proposal, it goes into so much of scrutiny. Do we need that land? What are the alternatives, how you look into that? So all these aspects have changed. Another example of Cement sector where I am working. Cement sector last 20 years there is a lot of innovation to have happened. Because it's a highly carbon emission and all that. Those considerations are there. And industry... So how the two industries, one is the power sector in cement. Power sector generates fly ash and Cement sector uses the fly ash. And how the dynamics have changed? Cement sector has introduced new ways to come up with composite cement, fly ash cement, other kind of cement where you mix almost 30% to 40% slag. So what happened? Power projects, environment clearance will not happen unless and until they provide the utilization thing. So both has to work together in a kind of a circular economy or waste and all.

So I think what I'm trying to say is *ki* laws were very well there, but the disclosure, the importance which has come up from a brand and reputation standpoint, the things have changed. So you have a Sustainability Report. You have, of course, a BRSR and all that. All those things are there. Of course, it's coming for top companies. Sustainability Report is more from Dow Jones Index. All those indexes are there where all these parameters, standards we have to evaluate, whether we meet those standards. So, it has lot of sensitization has generated across the business community on the ESG. So that's why now it is ESG we are seeing otherwise laws were very well there. Only some kind of a right tweaking has happened to make it more linked with your strategic objectives. That what I say it is.

AMRITA TONK: Thank you so much for that Vineet, some very thought provoking insights. With SEBI's reporting frameworks in place, ESG disclosures, or the lag thereof will definitely have an impact on commercial arbitration, and it'll be interesting to see how governance failures like ESG misreporting will really pan out during arbitration. Abeezar, my next question is to you. To what extent can arbitrary tribunals legitimately consider ESG principles, particularly environmental and human rights obligations or labour rights, especially when the party's contract does not expressly incorporate them?

ABEEZAR FAIZULLABHOY: Thank you. So, basically as we all know, arbitration is written Contract. It arises from written Contract. Now, in case the Contract does not have any specific clauses with regard to any breaches of any ESG obligations then the Tribunal will find very difficult to actually look into those principles and impute them into the year going to the awards ultimately. And given the fact that the Arbitration Tribunal is ultimately bound by the mandate that it has to decide a dispute which arises from the Contract. My belief is that if that is not part of the Contract, then it is not going to be possible for the arbitrary Tribunal to actually impute any principles of ESG into what they decide, what they ultimately award. Having said that, what is happening whether consciously or not, the Tribunal now, the arbitrations, now that we are appearing before, basically in some essence already following the ESG principles. For example, now when you have virtual hearings. What the impact and effect of that really is, is that you are now not spending time or not using as e-briefs, for example, you don't use paper. You don't travel for arbitrations, which basically means that you're going to be saving on the emissions of the jet planes actually emit. You are going to therefore indirectly and I know we are, consciously or not, do comply with these ESG principles, so to speak in that sense. But actually a question pointedly if it is not part of the Contract, then the Arbitrator will not be able to impute those principles and actually make them part of their hearings or their award. Thank you.

MURTAZA KACHWALLA: As Abeezar, said that it's only a contractual dispute which can be arbitrated. But sir, my next question to you, Mr. De Vitre. We have seen internationally and globally a lot of ESG issues being arbitrated. However, this little progress in India. So what, according to you could be the reason for this? Is this because ESG disputes often involve diverse and unrepresented interest thus is the risk of privatization of justice in matters affecting public good, especially or considering the fact that ESG issues largely have a character of rights in realm?

FREDUN DE VITRE: There may be many reasons why ESG in commercial arbitrations, and we are only focused on commercial arbitrations. Because ESG considerations can arise from various sources, from statute, from conventions from investor treaties, et cetera. We are focused only on contractual commercial arbitrations for the purpose here. Now, as Vineet rightly said, in India, we've had a regulatory framework for many years in regard to matters concerning commercial matters. I'm not saying commercial arbitration arbitrations but in the matter of commercial... We've also importantly had specialized Tribunals dealing with these matters. Like you have your NGT, the National Green Tribunal, which deals with one part of what is ESG. Environment. You have your social, your labour matters, your criminal courts, in a sense you have the NCLT, which deals with intra company disputes, shareholder disputes, et cetera. So these specialized Tribunals are one way in which you can have these disputes resolved.

Now in India, under the overarching constitutional guarantee, under Article 21, we have always had the right to life with dignity, with pollution free atmosphere, environment, et cetera, et cetera. But the difficulty has been, from the arbitration point of view, that all this is

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in public law. All this is essentially against state action or state inaction. I think the challenge in India is to now transcend and to cross the bridge from a public law features of ESG to a private arbitration, contractual dispute resolution. And to my mind, one of the reasons why it perhaps has not caught on in India as much as it should have, perhaps is what I regard as the slightly uncertain situation, legal situation which relates to the arbitrability of such claims. As Abeezar said, an arbitral Tribunal has to act within the four corners of the statute. I don't quite entirely agree with his hypothesis that ESG principles and arbitral Tribunal cannot apply. But when you consider what are the, let us say, matters which have been held to be non-arbitrable in relation to ESG, in relation to commercial matters? There is a long list and I tried to sort of prepare the list because now, after the judgment of the Supreme Court and ***Avitel*** and in ***Vidya Drolia,*** which is not this aspect not been dealt with in the stamp matter. What are the exclusions? Indian courts have tried to broaden arbitrability claims even within the exclusions. For example, insolvency, you can't have an arbitration in relation to insolvency matters covered under the IBC, but in ***Kotak Bank and Indus Bio*** the Supreme Court said that, no, you can have that, to the limited extent that matters *in rem* are not normally arbitrable, as Murtaza said. But matters which are subordinate, two matters *in rem* and arise in personnel can go to arbitration. So what the Supreme Court said in ***Karnataka Bank***, for example, is that a financial creditor can file a section seven application on a financial debt, the *in rem* part of that will come in only once the claim is admitted. Prior to admission, if the NCLT, for example, which is the specialized Tribunal, comes to a conclusion that there is no default, it can refer the Parties to arbitration under Section 8, if there's in Section 8. I happen to be in the losing party in ***Karnataka Bank.*** But the Supreme Court has extended this principle now to say that all *in rem*, all disputes before the Insolvency Court are not *in rem*. The *in rem* proceeding commences only once the dispute is admitted, and then you are bound by the *in rem* principle. Until then, an arbitration is permissible. So the Supreme Court has tried to carve out sections or carve out portions from the overarching non-arbitrability of *in rem* proceedings. Take criminal matters for example. Settle law. Criminal matters can never go to arbitration. What did Justice Nariman say in ***Avitel***. He said that, yes, criminal matters cannot go to arbitration, but the same breach may give rise to a criminal cause of action and to a civil cause of action, the civil cause of action arising from that breach, even if it involves a coordinate criminal action nevertheless can go to arbitration. Again, it's a carve out. Because you remember the days of the judgment in ***Radhakrishnan*** which said that fraud can never go to arbitration. Serious questions of fraud can never go. Supreme Court has now said no, that's not correct. ***Radhakrishnan*** has now been overruled. And the idea is to make it broader, arbitrability broader. But even within that broader framework, I feel that in India the state of the law is a little uncertain. And remember that these disputes are to be referred at the Section 8 stage and Section 11 stage now, on a *prima facie* consideration by the court as to whether it should go or not to an Arbitrator. And the Arbitrator, you have the second step after an Arbitrator decides under Section 16 or if he has to come back to court.

So, when a company or a corporate body starts an arbitration claim, it does so with a certain element of uncertainty as to whether that claim would be regarded as a claim which is incapable of being settled by arbitration in India. Remember that the Arbitration Act on the 34(2) and under 48(2) also for a foreign arbitration, enforcement of foreign awards, all awards have to be passed through the gateway of this test, is this subject matter capable of being settled in arbitrations. And matters *in rem*, criminal matters, et cetera. Take, for example, child labour, which is one of the aspects of the social element of ESG. It may arise in criminal matters, but it may also arise from a contractual dispute where the investor says that you will not engage in any labour in any practice prohibited by law, and there is a breach. There may be reputational damage, et cetera, which we deal with separately. But it is possible that if you go to an arbitration, the Arbitrator may come to a conclusion. Yes, I have jurisdiction. Because very few Arbitrators like to say they don't have jurisdiction. But when you come to court, a court may well find that this is hit by Section 34(2) because this was a subject matter which was incapable of being decided in arbitration. So these two, my mind are the kind of barriers which were coming. Take Greenwashing claims. Greenwashing is where there is a fraudulent misrepresentation. Now that fraudulent as to whether that disclosures have been made, compliance has been effective by companies under what was referred to as the BRSR, the steady regulations, now the LODR regulations, et cetera. Now, these Greenwashing claims, to my mind, can go to arbitration because they are now different from a fraudulent misrepresentation in other Contracts. And now, of course, the Supreme Court has said that the fraudulent misrepresentation must, if you are not to go to arbitration, it must relate to or affect the existence of the Contract, namely, at the time of entering into the Contract. The fraudulent claims which arise in the course of performance of the Contract are always arbitrable now, again, a refinement of the earlier law with no fraudulent claims. Sorry, that was not intended for. So I feel that the uncertainty of the law in what is referrable to arbitration or not is a major hiccup when it comes to whether you can go, because these are all commercial disputes. But you have to bridge the gap between the public law and the private law aspects of that.

AMRITA TONK: Thank you so much, sir. It will certainly be interesting to see how the jurisprudence evolves. The principles of ESG, which were once seen as peripheral, are now central to how businesses operate, invest and also resolve disputes. And it's a lens through which investors, regulators evaluate long term value of businesses and also their ethical conduct. My next question is to you, Saurabh, from a Counsel, corporate Counsel perspectives. Do you feel ESG Obligations are influencing contract drafting as well as negotiations?

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SAURABH MOHINDRU: Thanks for the question, Amrita. Yes, see now as sir has explained that how the interplay is that all issues which are *in rem* might not be arbitrable, but a subset of it is. Now see, ESG has now become something which is a mandate from CB standpoint, right? Before that before even CSR came into 2013 Act, which was mandated. It was voluntary. How have Contracts evolved from pre that era to today? If you see general example, if I give you a Construction Contract, if I give it to a Contractor where I tell them that you please construct a building, maybe 60 floors, deliver it to me three or four years period, five years period. There are a lot of insertion of new provisions, we are also doing, we are evolving day by day where we obligate the Contractors to ensure certain standards of environmental impact that they create, certain standard of social impact that they create. How they will deal with labourers, how they will be stationed, where they will be living, the conditions, their food. Everything that we are now incorporating in our contracts. Whereby we are making them obligated to take care of certain things which should be bare minimum as an ESG standpoint. Now, of course, Contracts have evolved a lot. This is one aspect, which I told you, which is a Construction Contract. Now if I buy a land today there are a lot of provisions which are being incorporated as antibribery, anticorruption, PMLA. All these are government standpoint where we do take those representations, which maybe long back we were not.

Now, from these standpoints, contracts have evolved. They are further evolving and with the rapid change in this scope. We will, of course, change a lot of incoming time. Like, sir, explain how arbitration helps, I would also want to add to one example, sir in it. That environment impact when you create the concept is polluter pays. Action will happen against you. Now assume there is a contractor who's in place. I have given him a job to do. There are obligations in my contract which he has breached and not done, and hence the agencies are after you to affix the accountability. But there is a contract now where there was obligation, which is breached, right? Now, there is the arbitration, which is possible, and now how this subset will work from *in rem* to...

MURTAZA KACHWALLA: In person.

SAURABH MOHINDRU: Yes.

MURTAZA KACHWALLA: And thanks Saurabh for that. Vineet, I'll ask you the next question. How are companies building contractual clauses with ESG aspects?

VINEET BOSE: In focus, I'll start with an example. Let's put it this way so again, of course you agree partially with the concept of *in rem*, and all that. That's very straightforward. In fact, in my career, I've also handled bilateral investment, treaty related arbitrations in international jurisdictions, et cetera, because of investor versus state cancelling certain rights and against going that. See, first of all I would like to say that one form of arbitration, so, just take an example. You enter into a Share-Purchase Agreement which obviously will have an Arbitration Clause. You execute the agreement on the date of execution, and now there is a time period in which all the condition precedent has to be met, and there is a closing. Under this Share Purchase Agreement, there are two clauses. One is specific indemnity. Another clause is material adverse event. Now, how the dynamics change? On the date of execution, you have gone with an understanding that of course, the company, whichever you are investing it has a mineral resource and there are certain licenses issues which are there. 2018, Supreme Court in a common cause of matter has come up that all the mining leases has to have an environment clearance under 2006 EIA. What does this mean? 2006 has introduced a public hearing concept. So if you don't have it, then you have to revalidate it. Plus, in case you have done certain non-compliances, Ministry of Environment came up with a circular saying that we will evaluate and we will put some environmental compensation. So you enter into this SPA with an understanding that there may be an indemnity which may come in future, and you put a good clause on specific indemnity and you have a material in adverse event clauses. Now, by the date you final closing happened there is one ***Shakti*** judgment which came which said that Ministry has no power to condone. And all that, or impose penalty. So no Environment Clearance can be post facto. So that means what? It has transformed into a material adverse event. And now the question would be that the dynamics of the dispute would be whether it is a change in law or it is because, of course, there was earlier judgment and.. . So this kind of a dynamics is going to happen, I think law is evolving again.

Another example, I say, maybe not under the Arbitration Act, but in the Labour Law, there is a kind of a mediation cum arbitration kind of a procedure. All your concept of Industrial settlement under Section 12(3) of the Industrial Dispute Act. What is this? This is a kind of an area where you do kind of a settlement. First you go for a settlement. If the settlement doesn't happen, you go to a consolation. And if the consolation doesn't happen, then a reference has been made to an industrial time. So this is basically one form of a Dispute Resolution mechanism. Another way of course I just started with this two couple of examples. I have been in the oil and gas industry. So again, under the production sharing of Contracts, there is a clause of good international in the petroleum industry practice. And that clause in the agreement, all the agreement. Even though you directly, you cannot go and enforce that particular clause. But when you go for your claims, your cost recovery, your damages, this clause plays an important role. Again, how the companies are now changing in the dynamics is ESG Clauses used to be there, clauses were there. But again, now the dynamics is that now, when you select a vendor you have those parameters, you see whether he meets those parameters. So that becomes an important way.

The second thing is the scoring. Because when you impose your liquidated damages, your other... ESG scoring also now matters a lot. In big projects because it's a matter of all reputation, because ultimately, if a Contractor doesn't pay Sub-contractor, in turn a Sub-contractor doesn't pay its labour. The impact with... What will come in the newspaper? Newspaper, it will come to an XYZ Company has not paid its vendor. It won't come that a Contractor, small time contractor, has not paid. So that responsibility metrics that governance system mechanisms, et cetera, has come up. Of course, data privacy, all other aspects are there. Again one of the arbitrations which is in the Cement sector, which has an element of ESG, as I mentioned, the fly ash and a slag lifting Contracts which are there where there is a symbiotic relationship between power plant and the grinding unit of a Cement company. So they promise that you allot me, give me land, I will give you the fly ash and you have to evacuate fly ash. So now the question which comes is there is a clause relate to penalty. If you don't lift it, you have to pay this much penalty. Now the way that now we are seeing the arbitration dynamics is that this clause is whether it's an LD clause, genuine, what you call predetermined loss and all that, or is in the breach of penalty. And the way the Tribunals are now interpreting this clause is a strict liability. Kind of strict enforcement. So sometimes we say, oh, just because I have not lifted fly ash, I'll be imposed such a heavy penalty and all that. And the Tribunals are upholding that because they are seeing the whole dynamics that you have promised certain investment and they have given you an evacuation right. And if you don't evacuate, ultimately this fly ash has to be dumped, which will have a societal impact and all that. So those enforcement mechanisms are coming up, are there, but it's evolving stage in the Indian arbitration jurisprudence.

But I see maybe two years, three years down the line, once these investors or the management maybe may have to face arbitrations when these sustainability reports if the disclosure doesn't meet and all that, the accountability, enforceability of BRSR or Sustainability Reports. Maybe investors may take arbitration route and all that if the companies do not meet those targets and all that. That could be a situation which may come up. But the bigger problem is how you need expert Tribunal to look into that, you need evidence, the evidence is very different level of evidence is required. It's a very technical subject. And of course, how you quantify the intangible damages. So all those aspects are there, but yes, clauses are evolving in the context.

MURTAZA KACHWALLA: Thank you Vineet. So, interesting discussion. So, Fredun sir, I'll ask you the next one. As he rightly said there are few challenges. So you would like to know what challenges are likely to be faced while dealing with arbitrations relating to ESG disputes?

For example, if you have an environment dispute or some dispute. How would the Arbitrator really quantify damages? Is there a standard for quantifying these damages?

FREDUN DE VITRE: It's a difficult question to answer because essentially, you're asking, how do you quantify what may be intangible damage or intangible loss. Now, I think the answer to that really depends on what kind of damages you claim. Because ESG breaches can give rise to a variety of claims, including performance, et cetera. But at the moment, we are on damages. Now, what are the kinds of damages that can arise in the case of an ESG breach? As Vineet rightly said, one is a reputational damage where you are looked upon by the world as having associated yourself with a person or a company which has not adhered strictly to the law and which he was required to adhere to by reason of the contract between you apart from the law. I mean, the law is mandatory, but also, he entered into a contract with you saying he will not do XYZ, which is prohibited, and he does it down the supply chain. The upper down the supply chain. Now, you may be tinted with the same brush as an investor or financing that project. Reputational damage, I think, can be assessed because you must realize that damages may be monetary, have to be monetary, but there may be non-monetary reliefs also possible in ESG breaches. Now, as far as monetary breaches are concerned, reputation and damage, if you want to assess it, I would, as a lawyer, as assume that these same principles that would apply generally to, say, defamation, would generally apply to reputational loss, because eventually, what is reputational loss? You are standing in society as a corporate. Of course, it may affect your profits, which is a separate head of claim. But reputational loss may be decided or quantified on the same principles as you would have defamation losses.

Generally speaking, I would say that the principles underlying are Section 73 of the Contract Act, which has withstood the test of time for so long. Generally, I don't see why those principles can't underlie also the quantification of damages in ESR breaches. And take, for example, what are the likely other breaches that can arise in the case of I just tried to tape it out so that we can proceed with this quicker. One would be, as I said, reputational. Greenwashing claims, as I mentioned. What are Greenwashing claims which arise in ESR? As I said, fraudulent misrepresentation. Now, fraudulent misrepresentation is not specific only to ESR Contracts. Fraudulent misrepresentation, you have had cases in commercial matters broadly. So you have had processes by which you can quantify these misrepresentation claims for Greenwashing. There are many Greenwashing claims which come up where a party at the time of entering into the contract represents that he is compliant with XYZ law, and then you find that that disclosure was fraudulently misrepresented or the extent of the compliance was not properly done. So even Greenwashing claims, to my mind, can be quantified on the application of general principles of damages.

Remediation claims may arise. Remediation in the sense that as Vineet mentioned, somebody in down the supply chain has agreed with you that he will, or a builder. The example that Saurabh gave. A builder agrees with you in a project that he will give you five acres of forest land. Why? For the benefit of the purchaser as well as for the benefit of the community. He doesn't do it. What do you do? Either remedial or restitution. Now remedial would mean, he didn't do it. So you are forced to do it because you have to comply with the law. Again those costs are quantifiable in India. We have had a very vibrant judicial intervention of many interventions, in forest matters, in cleaning up of river matters, in water source prevention matters. But all those have been, as I said, in the public law sphere. Here we are talking of damages claimed in person and reality by the individual concerned who has suffered that damage. So under all these heads, to my mind, there is no reason why you can't... Valuation may be a problem, what to have. But there are now International Valuation Standards, which are common for ESR cases, which the market approach or the income approach or whatever the normal accountancy, and I'm sure those will come into India also, effectively. So to my mind, these are matters which... there is a very interesting case, for example, where a group of Indian farmers sued the IFC, the International Finance Corporation, because they financed a coal based project in Gujarat, which then in the functioning of the project, it started contaminating the fields around then polluting etc, etc. So this would brought a class action in America, and there, of course, they claimed sovereign immunity as a state, and the American Supreme Court said no. So the trial is probably ongoing. But in such a case, it will be difficult, I assume. But an Arbitrator who is dealing with commercial matters, ultimately, the Rupees, *Anna's* and *Pies* can always be computed. And one interesting thing where perhaps, what Abeezar also touched upon, an Arbitration Tribunal, to my mind is entitled to apply, for example, the Polluter Pays Principle, because even in impersonal damages. So far, Polluter Plays Principles have been applied, but the community has been damaged, whether has been damaged to public property, etc. But I see no reason why that principle can be applied when you have environmental damage in an ESG, commercial arbitration.

AMRITA TONK: Thank you, sir. With ESG clauses now increasingly being embedded in commercial contracts, shareholder agreements and investment treaties, arbitration is indeed emerging as a vital forum for resolving these complex multidimensional disputes. As Vineet also pointed out, it is interesting to see what evidentiary challenges would arise when Parties allege environmental harm, and it would be interesting to see cases where in scientific data itself is contested. My question to you Abeezar, is should arbitrators possess specific knowledge or expertise in ESG matters? And if so, then how would arbitral institutions address this in the entire appointment process? Also, do you see eventually there being specialized arbitration rules for ESG arbitrations and maybe even a dedicated Arbitral Tribunal?

ABEEZAR FAIZULLABHOY: So, I think there can be no dispute with the fact that specialized knowledge is very important, and ESG, in fact, is a specialized niche field, and therefore, anybody adjudicating on that having that knowledge would definitely help in having the resolving the dispute, basically. Having said that, what as my co-panellists have all mentioned, the laws which uphold the principles of ESG are not new. And for example, for environment, we have the NGT, we have, for example for labour we have a specialized labour courts. And on the G, the governance side of it, we have the Companies Act. Disputes arising under that go to the NCLT. Now, therefore, to carve out these disputes to go for arbitration will be a challenge. So I think the call will have to be taken at some point of time that are we going to have a Tribunal setup to deal with the ESG disputes, or are we then going to allow them to go for arbitration? And if they go for arbitration then those disputes which already are going through these specialized Tribunals, what happens to them then? So I think the challenge, I think to answer your question, yes, definitely. If we are doing the arbitration mode, we will have to have or we should have specialist Arbitrators who are specialized in the ESG principles and concepts. Because our specialists can always, I think the better judgments or awards, as the case may be on the subject and being a specialist in this particular subject.

Now, in terms of the way forward, if the decision ultimately is to go to an arbitration as being the forum to resolve these disputes, then you have to start educating those specialized Arbitrators who volunteer to, of course, be in this particular field. And I think having sessions with them, educating them on the principles would always be, always be a good idea. So the way forward, I think the major decision really is that when we have these disputes, whether they go to arbitration sessions or go to a specialized Tribunal. And if arbitration is the preferred option ultimately then educating arbitrators, giving them special classes, so to understand this law or this process even better, is definitely a preferred option .

MURTAZA KACHWALLA: Just speaking of challenges that are being faced in arbitrations, Fredun sir, I will just ask you this question. Do ESG related forums cited awards post special challenges for enforcement in India?

FREDUN DE VITRE: So you're asking me. I think it would depend on the nature of the foreign award. If it is a monetary award, although arising from an ESG breach or involving ESG, issues of ESG and considering considerations of ESG. If it is a monetary award, then it would not face any more difficult challenge than any other monetary award under the foreign award. The problem may arise in cases where foreign awards deal with non-monetary aspects of ESG. In such cases, to my mind, that award, which deals with these non-monetary aspects and whether environmental, social, operation mismanagement, shareholders, share transfers, etc., those awards will necessarily have to comply or be shown to comply with Indian Law on the subject. And if they don't, because remember there are at least three provisions in the Arbitration Act which, as I'm sorry to repeat it, but which make it very clear that the subject matter of the arbitration, of the subject matter must be susceptible to arbitration, must be capable of being resolved in arbitration. And in non-monetary awards, very often the subject matter will be general environment concerns, Carbon credits or emissions, etc. So, those would then necessarily have to comply, I think, with Indian Laws. And in that context, it may be interesting to see that, for example, in the case of shareholder disputes where Party A has agreed to sell to Party B. Maybe under an investment, maybe under whatever. And there is a foreign award saying, now you have to come here, have your award held to be enforceable under 48. But as the Privy Council has often said, in India, problems arise at the execution stage because Privy Council said it many, many years ago. It's like starting a new litigation when you want to execute something. And the Supreme Court in ***Cheran Properties*** took the view that in such a case, if the company does not register and you have to then go and get relief for execution. You can directly then apply to the NCLT because the NCLT is the body having exclusive jurisdiction in these matters. So foreign award maybe have to be executed through the agencies of these specialized tribunals, whether it's NGT, whether it's NCLT. And as Abeezar said, these are all special bodies. So one of the disincentives for arbitration may well be, that look there is supposed to be an expert, a specialist domain expert on these specialized bodies like the NGT or the NCLT. You are paying much less. So why can't you regard this as some form of Government institutionalized arbitration and give up your right to party autonomy in the question of appointing Arbitrators? It may be a sort of rival to a private arbitrations, because most of these, for example, the Supreme Court has said debt recovery claims cannot go to arbitration in ***Drolia***. So also, as I said, insolvency, etc. So, maybe in India people will wear to the specialized Tribunals which have been formed. And therefore, if, for example, the award involves foreign exchange, it may be possible that after the court is held it to be a final award. That's the preliminary state you can't avoid 48(2). But after the court has held it to be enforceable, it may be possible that you have to go to RBI, for example for sanctions, for permissions, etc. And it's a question which a jury is out in that sense. Can a regulatory authority in India frustrate a foreign award? To my mind, the answer is, no. But I know ***Docomo*** dealt with it in a certain way. But it's interesting because when you come to enforce a foreign award in India, these are considerations that may arise in ESR proceedings in the case specific to ESR proceedings. I think foreign awards can in regard to ESG matters. It was summarized, can be enforced like any other award, subject to this one overriding consideration, which I say, and which I repeat that the foreign award the subject matter must be capable of settlement in accordance with the law in India because that is the requirement of 48(2). So, whether the law in London does it or in the UK does it or allows it. If the law in

India prohibits something then I do not think that foreign awards in ESG matters are enforceable in India.

MURTAZA KACHWALLA: Thank you so much. I think we're running out of time. We'll open the... We'll ask the audience if they have any questions to our esteemed panellists? Yeah. Let him ask.

ABEEZAR FAIZULLABHOY: Who has the mic? Mic?

AUDIENCE 1: Good afternoon to all the panellists. My main question is that pertaining to valuations or determining the quantum of damages when it comes to ESG considerations, if any legislative framework that can come up or any rules that can be prescribed by the government, what should be developed and how it should be developed so that it becomes easier for the Arbitrators to determine the quantum of damages pertaining to specific type of ESG claims?

FREDUN DE VITRE: Whom is it ? I presume I'm not being presumptuous in understanding that the question is addressed to the person who dealt with the valuation points. But unfortunately, we don't have a chartered accountant on this panel, because that question may well be answered best by a person in more acquainted with chartered accountancy principles for valuation purposes, etc., or a Valuer. But broadly, as I said, there are now emerging international standards of valuation, and those, when you examine those really those valuation standards are, in a sense, no different from how you would value claims arising from breach of Contracts for refusal to transfer shares or some such claims like that. So, I assume that the Indian Institute of Chartered Accountants will come up with some Indian standards or valuation that should be done. It will be a useful guide, but at the highest, it will remain guidelines. Ultimately, these standards will be a sort of evolution of the existing standards which are applied in cases of valuation to non-ESG matters. So, I mean, there will be separate standards for ESG, but they will be built upon and will be based upon existing standards for, I don't see any major deviation from those standards. Would anybody, Vineet or...?

VINEET BOSE: Just want to add here. For example, environment compensation there is, in fact what you call, Central Pollution Control Board. They have come up with a very formula for determination. It has certain factors and all that. That formula. And that formula is uniformly being applied. Similarly, as sir has said, that there are international IFRS Sustainability standards are there, but Indian standards are not there in this regard. So, of course, in fact, it will take its own time to develop. I think it's specific regulatory bodies are coming up with standards of computation and all that, those things are there. Even if you go for, let's say, it's not exactly a damage your entire rehabilitation when you acquire a land. Entire rehabilitation policy. R&R policy, which we call. That has certain standards, actually based upon, compensation has to be determined. So, those certain things have been standardized. But of course, day to day damages and all that in the arbitration, those standards are not... Thank you.

MURTAZA KACHWALLA: Thank you so much. This gentleman.

CHAND: Good morning to all the panellists and the moderators. It was very enlightening and very good to discuss on the ESG considerations in commercial arbitration. My name is... I'm Chand. I'm coming from Andhra Pradesh from Visakhapatnam. So, my rather, question or my observation on the ESG front considerations are that, hope that in order to see that these arbitrations and all. Are we really having something called as ESG audit, like that of the financial audits of the Chartered Accountants, where you can really see that whatever you are saying, whether that has been effectively coming out or not, instead of giving lot of things, we should consider ESG and all that, whether the audits with respect to the environment, with respect to the social, with respect to the governance; that is the most important thing where... in that angle, if I have to add, the human rights, the morals, the ethics. These are the things when they are being effectively brought in the minds of the society, in the minds of the people, then really these kind of arbitration cases of mediation, or Alternative Dispute Resolutions, whether they are, year after year, what is the responsibility of the legal system or the ADR system to reduce those things, whether it is reducing or if they are increasing, that means, is it effectively what all is said is happening or not? Because any industry, when we are checking its performance, we have this Corporate Social Responsibility. All these things in order to increase social cause. Similarly, in the system of law the audit, where year after year, it seems that in India we have plenty of disputes, plenty of conflicts. They are increasing, year after growing you can say it as year over year they are increasing. That means they say that because of the cases pending, because of the economic growth of the country, because the industries are growing so there are more and more number of disputes and all. But then, on the contrary, what I want to ask is that if at all, we are really bothered about this ESG or the settings right of the human rights and other things... Whether these things are disputes are coming down, whether they are stagnant, at least if not going up? But my observation is going like anything they are multiplying. And then the cases which are pending, if I'm not mistaken, more than five crore cases of pending. All these things are detrimental towards the growth in the moral growth the kind of things which are talking about the good governance and societal for the environment. This is the main concern. Today in this forum of discussions where we're more interested in this commercial arbitration where people are, I'm sorry to make this kind of a statement, but the more the number of cases, the more the sustenance of every one of us,

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though we call it as noble profession on the other contrary, on the other hand we are seeing that they are growing... what we are trying to do. But really, is it happening, is my question. Thank you very much. Sorry for a lengthy question.

VINEET BOSE: Just want to add. You are absolutely right. Audits are important. Sectoral wise. Sectoral wise, this is very evolving,. Let's say, giving energy audits, particularly in certain sectors. Just three days back, there are environmental audit rules have been notified. In fact, I would say, let's say Power sector. The RPO compliance, Renewal Power Obligation Compliance that initially it was litigated. Industry says why it is required this, that and all that. But the Courts have remained firm, actually, even up to Supreme Court and all that. And those areas certain sectorial areas, the things are improving, actually and litigations are coming down. So you won't find much litigation. Now on the RPO obligation, despite the fact that the Government is every three years, Government is increasing your RPO, basically your Renewal Power Purchase Obligation as compared to your thermal energy and all that, that obligation. So that initially people were litigating, now, it's not. Similarly, when it comes to the green Bench related matters and all those things all those areas related to eco sensitive zones and all that. Supreme Court has come up with certain principles and all. That now the litigations have come down, actually. Of course, those persons whose industry had got impacted and all that they will go and fight it out. But the fact of the matter, things are changing. But there are lot of sectors where it has to still to catch up. I would just try to add.

FREDUN DE VITRE: Just as a preliminary observation before answering the... What I believe was the question you wanted to ask. I think you have made out a very good case with due respect, for inclusion as a panel member at the next conference. I'm only saying that in the lighter vein. But one interesting thing strikes me of course, there are energy audits and all these audits, but your question will raise one important aspect. Maybe it's time we had arbitration audits. And maybe the MCIA who is represented here by, maybe and others. Maybe the MCIA can initiate it. Let's find out how arbitrations, how green are arbitrations in India. Abeezar touched upon it in some way. But an arbitration audit, apart from a business audit or an industry wise or a segment wise audit might throw up very interesting answers to what extent, for example, are we dispensing with paper. And I remember doing an arbitration in Delhi, an International arbitration in Delhi, where we had two Indian Arbitrators and the Chairman was an Arbitrator from London, Ian Black. And believe me, we were at the Oberoi, in Delhi, hall about the size of this room every conceivable wall was covered with records and paper records where we had huge tons. All of us had sort of volumes and volumes and volumes. And what did the Chairman have? He used to come to the arbitration with one Surface Pro. That was all. The entire record was in that one Surface Pro. It was one of the most let me call him the Greenest Chairman that I have seen. But that kind of an audit and maybe in arbitrations in India can now tend towards dispensing and going online as Abeezar said or using methods which would make arbitrations greener in India. Your question may take us into that new avenue. It's for the MCIA and other institutional arbitration forums to really take the initiative on that aspect.

CHAND: Thank you, sir. Just to add one last point is that, because of these more number of cases of arbitration, because of more companies involving into these kind of conflicts and disputes indirectly, in fact, directly, I can say the cost of the products, the cost of the services, definitely increase because Arbitrators are not coming free or cheap. They are very expensive. At the same time, the companies which are getting into those conflicts are very much expensive because of these conflicts and all millions of dollars are getting into it. And this is ultimately going on whom, going on the country. That means on the people. So my worry is that it should be reduced as much... They have to have a scale. They should have an audit where these things are coming down or not. Otherwise, all our efforts is not going to come to the rescue of the nation. Sorry. Thank you very much, sir.

AMRITA TONK: Some very interesting perspectives shared today. Thank you, everyone. Thank you to all our panellists for their rich perspectives and also a gracious audience for engagement and participation. From this discussion, it is clear that ESG is now no longer a copyright buzzword or just a compliance checkbox. Rather, it is a catalyst for ensuring that we draft our Contracts, manage risks, and resolve disputes, keeping in mind all of these considerations. As India continues to attract global investment and also asserts its position in the international arbitration team, integrating ESG considerations is no longer just prudent, it is imperative. The future of commercial arbitration in India will be shaped not only by legal innovation, but also by a collective commitment to sustainability and justice. Thank you once again. And I will only request that let's keep the dialogue going on beyond this room. Thank you so much.

HOST: Thank you very much for an insightful session. We'll be starting our next session at 12:15. So I'll see you all at 12:15. Additionally, there is going to be a fire drill at 12:00 at Oberoi Hotel, so I request you no one to panic. It's just a drill and we can continue with our conversations outside. Thank you.

~~~END OF SESSION 2~~~

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