

INDIA ADR WEEK DAY 2: MUMBAI

OPENING ADDRESS

08:30 AM To 09:00 AM IST

Hon'ble Mr. Justice Somasekhar Sundaresan, Judge, Bombay High Court

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1 **HOST:** Good morning and a very warm welcome to the India ADR Week. We will be starting
2 with our first day with an opening address by Honourable Justice Somasekhar. I would request
3 Mr. Farid Karachiwala to come on stage to introduce the judge. Thank you.

4 **FARID KARACHIWALA:** Can we have everybody settle down, please? Good morning,
5 everyone. It's my absolute honour and privilege to introduce Justice Somasekhar Sundaresan.
6 After having spent 25 years in practice, being a part of two law firms, he actively went into
7 counsel practice and became a Judge of the Bombay High Court. His expertise, when he was a
8 counsel, ranged to a variety of matters, securities law, financial law, commercial law. When he
9 exited the law firm that he was last in is J Sagar Associates, which then inducted me as a
10 Partner. So absolute honour and privilege. And may I request Justice Somasekhar to please
11 address the audience?

12 [APPLAUSE]

13 **JUSTICE SOMASEKHAR SUNDARESAN:** Good morning, everyone. When there was a
14 discussion to do this session, I was wondering who would show up at this unearthly hour in
15 the middle of a week, but thank you for coming in and listening in. I will very briefly touch
16 upon some of the experience that I've had in the context of the theme of what you're going to
17 discuss over the next two days. Arbitration and its landscape has been a very satisfying
18 experience for me, sitting as a roster Judge in the High Court. A role where the interference
19 and the involvement of Courts by law is meant to be, at a minimum. But when I look at the
20 landscape and look at things that... the trends that are emerging in arbitration, I thought I'll
21 share some perspectives in that light and see whether we are geared to live up to the
22 expectations of this legislation because it's a very important policy intent we handle legislation.

23 I believe every legislation has a policy perspective. There's no legislation without an underlying
24 societal objective and Arbitration Act, the Arbitration Conciliation Act is no different. What I
25 do want to talk about is, are we fashioning ourselves in the conduct of Arbitration in the
26 manner that is expected to be of value addition to the stakeholder, which to my mind is
27 primarily the litigator. The litigant who seeks to have disputes resolved and comes in to...
28 agrees to arbitrate, reposes faith in the arbitration system upfront by Contract, and then the
29 law says party autonomy trumps everything else. What it essentially recognizes is that it is the
30 litigant who has made a conscious choice, and that choice to go in for arbitration needs to be
31 respected, and he gets returns from that choice to the best extent that the system can throw at
32 it.

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1 So, are we as a Bar or are we as an arbitration community, able to live up to that expectation
 2 is something I would like all of you to reflect upon as an abiding theme. I did go over the topics
 3 that you're going to deliberate upon over the next 48 hours. Mediation is something you are
 4 going to discuss. And I found, to my pleasant surprise, that whenever we sent disputes to
 5 mediation as a precursor to arbitration, almost in six out of ten cases, I mean, it's, again,
 6 anecdotal and not really empirical, but a significant component would come back to settle, and
 7 they would say that, look, we are thankful to you for referring us to mediation, and we've
 8 settled. So, which led me to another approach to essentially say that when people are
 9 struggling to even have an Arbitrator appointed, some of the Section 11 proceedings would be
 10 pending for years on end, and one has had to think about means to devise speed with disposal
 11 of leavens. But what innovation I felt was appropriate would be to say that we'll appoint the
 12 Arbitrator, but give a deferred effect of four to six weeks, depending on the nature of what is
 13 being presented by the Parties to say that we'll give you, here's the Arbitrator. The Arbitrator
 14 will start proceedings. But we'll give you four to six more weeks to try and resolve. If you don't
 15 resolve the arbitration will start. There too, I'm happy to report that a number of cases, Parties
 16 would settle or come back in the fourth week or the third week and say, look, thank you for
 17 that deferred effect. We just need two more weeks to allow us to defer the arbitration further
 18 by two weeks which, again, indicates that mediation as a means of resolution, is something
 19 that really works.

20 But how does one make this work professionally? How does one make this work in a manner
 21 that's consistent with the Act? How does one look at mediation and conciliation in a formal
 22 process or manner to work effectively is something I hope all of you would reflect upon in the
 23 session that you have on mediation. While on mediation, I must touch upon the MSME Act. I
 24 mean the MSME Act is meant to be a special legislation, which is got protective features for
 25 medium, micro, small and medium enterprises, and this would be the future conglomerates of
 26 India hopefully, if the market economics choice that we made as a policy works. And they get
 27 certain specific special treatment in terms of a better interest rates in recovery, etc., which is
 28 meant to be a disincentive, likewise a 75% deposit, which is meant to be a disincentive to
 29 challenge those awards lightly. But again, the society reacts. Like whenever there is affirmative
 30 action in favour of a certain component of society, the embedded assumption is to say, all right,
 31 why the special treatment? Why this appeasement? We must adjust for it. So, the 75% gets
 32 computed as 75% of the principal amount awarded and not of the interest awarded. You take
 33 any other legislation in the societal sector, special laws for protection of women or children,
 34 the system adjusts to do justice because it feels the law is not just and we should try and adjust
 35 for it. I'd again, encourage all of you as the Bar to reflect on it and see whether this is something
 36 that would, in the long run erode the arbitration field.

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1 Of course, there's no perfection, but with judgments come improvements. And the MSME
2 Council may not be adequately trained and they may not be delivering the best of awards, but
3 with case law, with reviews that take place, it would evolve even further. So I'd again request
4 the Arbitration Bar to reflect on how we handle MSME awards. Can we participate in those
5 councils more? Is there something that law firms could do to engage with facilitation Councils?
6 Do capacity building sessions with them and try and see that you raise the bar in the quality of
7 the awards that come from there, rather than just see how do we hit and ground? So essentially
8 the protectee of that legislation should not get those protections eroded without eroding the
9 principles of fairness and justice, is a thought I want to leave behind.

10 Then I see that you're going to debate India's evolving Bilateral Investment Treaty Regime.
11 Again, a very, very important, controversial subject in my days as a lawyer. I've been an Expert
12 Witness in one of these treaties, sitting at the, I don't know what room that was, a palace room
13 or a Japanese room or whatever. And this is, again, an area which needs a lot of study. There's
14 no syllabus that covers it. The philosophy behind Bilateral Investment Treaties and whether a
15 private Arbitral Tribunal can resolve disputes between constituents of two republics are the
16 larger philosophical questions that may be debated. But when a treaty has been signed, a Party
17 has the power to invoke that treaty and that arbitration does get underway. What is the
18 capacity? What is the bandwidth that we, as Arbitrators, bring to bear or we, as Arbitration
19 Bar bring together is something that I'd like all of you to think about. I know I still use the "we"
20 for the Bar, but I do think that lawyers and Judges are part of the same ecosystem. A Judge is
21 a lawyer who's chosen to be a Judge.

22 So, when you look at the Arbitrators in these BIT treaties, I don't see many Indians on the
23 panel. What can we do to get onto those panels? How do we build capacity to ensure that there
24 are Indian Arbitrators in these Tribunals looking at disputes between two large far western
25 republics is something we should think about. The quality of cross examination, the quality of
26 Witness Evidence that is led in these arbitrations is something, maybe forums like MCIA
27 should run special workshops on or do case studies and examine how it's done. But the other
28 element I want to leave behind is, you have to just see how some of these arbitrations are
29 conducted to see the time value of money in litigation. If each Party is given a time allocation,
30 that Party decides how to allocate, use the allocated time and the clock stops, the guillotine
31 stops.

32 I've tried to make a very small start with time allocation in my roster with reasonably good
33 success, though I do realize that it leads to a bottleneck at my end because as more and more
34 matters get done, and then the onus is on me to then convert that into a judgment. But again,
35 we have to raise the bar here. If there is a case management hearing and there's an estimation

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1 of time, the expectation would be to have a realistic feedback of the time. Estimation should
2 be based on real issues that you intend to articulate. You come back and say, these are the five
3 issues that we need to discuss. This is the kind of time we need per issue. That's what a case
4 management hearing is about. I find that it's quickly getting into, all right, this guy likes to
5 hear 45 minutes or 30 minutes. We'll say 45 minutes, 30 minutes. How is he going to stop us
6 beyond a point if he can see that it needs more time? So again, I'd encourage you to, before
7 you come in for a case management hearing like with these international forums, think
8 through the issues, the key issues, the sub-issues, the time needed for each of these and then
9 come with a realistic estimation of time so that the case management can meet international
10 standards from the BIT. At the least what we can learn is the professional standards that get
11 deployed in the course of really high stakes arbitrations that take place.

12 Then you have an interesting theme called, "Are You Interviewing Your Arbitrator? Changing
13 the Mindset in the Indian Landscape." There was a time when lawyers being interviewed for
14 being recruited was considered ridiculous. I mean, it's a noble profession, after all. How can
15 the client expect the lawyer to do a beauty parade? What kind of profession is this? Are we a
16 profession that's intellectual and going to give service, or are we here to show-off and burnish
17 our credentials and polish them and present them in a marketing of our resources? But the
18 truth, as in all cases, lies somewhere in between. You don't need to market, you don't need to
19 promote, you don't need to self-promote, which, of course, you just have to log into LinkedIn
20 and you see how many lawyers express emotional satisfaction at having won at matter or
21 having closed the Contract. So lawyers are out there, burnishing their credentials and
22 polishing it and showing it to the world. But the flip side is, are we delivering value? And how
23 do we examine that the Client is satisfied that the person he recruits is someone who can
24 deliver value?

25 Now shift this to the Arbitrator scenario. Party autonomy is what underlines choice of
26 Arbitrator. How much two Parties get to appreciate the qualities and the capacities of the
27 Arbitrator who would decide matters that are being referred to arbitration? This is an
28 important question. To the extent possible, as a Judge holding the Section 11 roster, I try and
29 apply my mind to the nature of the dispute, to the value involved in the dispute. It's very easy
30 to dispose of these applications appointing an Arbitrator, but if the cost benefit ratio doesn't
31 work, arbitration would fail because people would say that it doesn't work. The Arbitrator
32 would be frustrated beyond a point where fees are not paid and he would resign, and then you
33 would substitute, and all this is happening at the expense of the litigant. And therefore, I'd
34 encourage you all to encourage your Clients to think about to the extent possible upfront, agree
35 upon the identity of an Arbitrator or agree upon the identity of the process by which you choose
36 the Arbitrator.

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1 The process for choice also has specific sections in the Act. But I suspect nobody ever reads
 2 those provisions and applies their mind while negotiating a Contract as to what is the
 3 procedure for appointment, what is the procedure for conduct of the arbitration. Most
 4 arbitration agreements are wholesomely silent on these facets of the matter in which case you
 5 then depend upon institutional arbitration, forums like MCIA or even the algorithm based
 6 service providers who are now adding value, particularly in low stakes matters, high volume
 7 matters.

8 What is the nature of the choice that a Client gets to exercise while appointing an Arbitrator is
 9 something that lawyers need to apply their mind to. Not every person is equipped to handle a
 10 sophisticated trial. Because remember, when you choose an Arbitrator, you're not choosing an
 11 ultimate Appeal Court. A retired Supreme Court judge may be excellent in disposing off the
 12 matters that come to the Supreme Court. Because by the time things come to the Supreme
 13 Court, two or three layers of judicial review have taken place. Issues that come up at that level
 14 are finely distilled, and therefore dealing with that distilled issue is one skill set. But dealing
 15 with a whole, full blown trial is a completely different skill set. So you may have the dichotomy
 16 of a Bar which has never conducted trial because the Bar is practicing in the High Court, not
 17 in the District Courts, not in the trial courts. The original side of the High Courts may be so
 18 overloaded that actual trial on a day-to-day basis does not take place enough for bandwidth
 19 for the buyer to develop. That bar becomes the bench, and that bench goes higher, and then
 20 they suddenly become Arbitrators, having to conduct trial of a complicated dispute. This is
 21 something that we need to introspect on.

22 How do we build bandwidth? Do institutions like MCIA go to the district level and identify
 23 talent? I mean in one of my discussions with the MCIA team, I wanted to understand how they
 24 look at the catchment area? How do they look at having the best panel possible? Where do
 25 they go and scout for new talent? And I'd encourage all of you to think in these terms. If you
 26 know of great trial judges, trial lawyers, bring them into the arbitration ecosystem. That's very
 27 important for the wider good of the arbitration landscape. And, of course, as Counsels, as
 28 Advocates who argue, you may be able to argue, but at least the forum that you argue before if
 29 it doesn't have hardcore trial experience, you could end up having a reasonably complicated
 30 outcome in an arbitration, and that award may be set aside five or seven years later, in which
 31 case you're like a snake and ladders' game, back to square one, which again takes you to the
 32 other subject about modification. The last word has been spoken as of today on modification
 33 by a much larger Bench of the Supreme Court, and therefore, this is something that you need
 34 to think about whether at the very genesis of the arbitration when we select the Arbitrator, is
 35 the Arbitral Tribunal a relevant horse for that course. And will it be able to run the process in
 36 a manner that gives best value for the Client?

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1 Most of what I've said also touches upon the focus on the Client theme that one of your sessions
 2 intends to talk about. I just want to leave this thought behind; ultimately in every ecosystem
 3 the stakeholders' experience is what matters. The stakeholder decides whether the ecosystem
 4 is working for him. If the ecosystem doesn't work for him or her as a stakeholder, the
 5 stakeholder moves to a different ecosystem, which works. In the darker side, the stakeholder
 6 would move to settling matters by taking the law in his own hands if the justice delivery system
 7 doesn't work. On the brighter side, in the economic sphere, the stakeholder would choose a
 8 market which prices that asset better. This is what is called arbitrage in economics and the
 9 stakeholder would move markets. So, you would have stakeholders going away to other cities
 10 within this country or going away to other jurisdictions outside this country enforcing Indian
 11 law. So it's not for nothing that Singapore has positioned itself as a forum, regardless of the
 12 proper law of Contract, so people can go there. Dubai is trying to do the same. So we need to
 13 think long term on the stakeholder satisfaction facet. If the stakeholders are dissatisfied, we
 14 wouldn't have a market left to deliberate upon and discuss. So I just want to leave that thought
 15 behind. Thank you very much for listening to me. And again I'm sorry for this unearthly timing
 16 of this session. It's really 08:38 or 8:45, is really early in the morning on a weekday. Thank
 17 you for having me.

18 **HOST:** Thank you, Honourable Justice Somasekhar. We truly appreciate your valuable
 19 insights. I would like to request Mr. Vyapak Desai, MCIA Co-Chair to come on stage to deliver
 20 the vote of thanks. Thank you.

21 **VYAPAK DESAI:** Good morning, everyone, and thank you for coming. As we ended, Justice
 22 Somasekhar saying it's an unearthly hour to come for this session. So looking at this session
 23 fully booked and fully full, I think definitely things have changed. When I started the practice,
 24 and I used to talk to a lot of senior people, they used to say, change the way you look at things
 25 and things you look at change, right? I think that's what ADR Week is all about. That's how we
 26 set up MCIA to see that if institutional arbitration, can we see arbitration differently and can
 27 arbitration change in itself. I think we have come a long way. And thank you, Justice
 28 Somasekhar to give such an inspirational speech. And like he does his case management
 29 hearing, he asked me how much time I should take in. I said 15 minutes, and he actually
 30 covered the full topic, full ADR Week in that time. So it's possible if we do a case management
 31 hearing, it's possible to cover most of the topics, and it was truly inspirational.

32 In fact while ADR Week and MCIA has started more than seven, eight years now, but since his
 33 roster, I think it has given a complete new sense of confidence and perspective that
 34 arbitrations, particularly because of Bombay High Court and the support he has given, we can
 35 look at a very different level, very different perspective. And without too much of interference,

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1 he has given the kind of support that MCIA possibly needed for a very long time. So thank you
2 for everything, Justice Somasekhar. And without much ado maybe we can straightaway go into
3 the session. Thank you again. Can we give a very, very big round of applause to the Justice
4 Somasekhar?

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~~~END OF SESSION~~~

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