

INDIA ADR WEEK DAY 2: MUMBAI

Mediation in the Realm of ADR

09:00 AM To 10:00 AM IST

MODERATOR

Mr. Farid Karachiwala, Partner, JSA Advocates & Solicitors

Mr. Justice Akil Kureshi, Rtd. Chief Justice of High Court of Rajasthan and Tripura

Mr. Janak Dwarkadas, Senior Advocate, Bombay High Court

Mr. Shrivardhan Deshpande, Legal Head Mumbai International Airport Ltd.

Ms. Shwetha Bidhuri, Director and Head (South Asia) Singapore International Arbitration Centre

TERES

1 **HOST:** Thank you, Vyapak. Our first session will be hosted by JSA on the topic of “Mediation
2 in the Realm of ADR”. The session will be moderated by Mr. Farid Karachiwala, and the
3 speakers include Honourable Justice Akil Kureshi, Mr. Janak Dwarkadas, Mr. Shrivardhan
4 Deshpande, Ms. Shwetha Bidhuri, and I would request the speakers to kindly take the stage.
5 Thank you.

6 **FARID KARACHIWALA:** Once again, good morning. Just a minute to introduce my
7 panellists and myself. My name is Farid Karachiwala. I am the Co-Chair and Partner in the
8 Disputes Practice of JSS based out of Mumbai. To my left is Justice Kureshi. Justice Kureshi,
9 after having practiced at the Bar, became a Judge of the Gujarat High Court, and then retired
10 in March '22 as the Chief Justice of the Rajasthan High Court. He was also the Chief Justice of
11 the Tripura High Court. To his left is Janak Dwarkadas. I don't think anybody in the audience
12 needs to know as to who Janak Bhai is. Janak started his practice in October 1997. Sorry, 1977.
13 Became a Senior Advocate in July 1997. As somebody who does litigation, I would like to say
14 that there's just nobody who wouldn't think of Janak to be involved in a matter which he wants
15 to litigate in the High Court. To his left is Shrivardhan Deshpande. Shrivardhan Deshpande is
16 the Legal Head of the Mumbai Airport. After having practiced in a few law firms, he went into
17 the corporate side of being involved, and he's right now the Legal Head. He's been the Legal
18 Head of the Bombay Airport since the last two years. To his left is Shweta. Shweta is the
19 Director and the Head of SIAC. Now of course, the topic is mediation, but I thought that she
20 could give us a perspective about how an arbitration institute views mediation and whether
21 they are threatened by mediation to that extent. So, she's going to give us that perspective from
22 the institutional point.

23 Let me start off the question so that we have enough to speak about, and then we would
24 probably take a few questions from the audience. I'll start with Justice Kureshi actually. Sir, in
25 your experience as a mediator, how effective is mediation as a form of ADR?

26 **JUSTICE AKIL KURESHI:** Thank you Farid for having me here. I would say mediation is
27 extremely effective. You cannot go by percentage in how much of success you have received.
28 Out of ten matters, how many are you settling. But one settlement stops several litigations.
29 And particularly I've seen three flavours or kinds of disputes which come for mediation. One
30 is purely, purely commercial where there are no emotions involved. Two parties who are on
31 commercial terms have a dispute, they go for mediation. Other is purely family disputes, where
32 there are highest levels of emotions, husband wife disputes and such like. But in between come
33 the most difficult part, where the family has done business together. So, the family emotions
34 are involved and the business stakes are also involved.

TERES

1 In one of the matters which I could resolve, there were twelve pending proceedings between
2 husband and wife. All kinds, the worst kinds and at least five more in pipeline. So, also in
3 commercial matters, we know one matter is not just a single proceeding. There are several
4 disputes, and then there are litigations, there are appeals, there are revisions, there are
5 executions. So don't go by the numbers. Even if we settle one-fourth of the go to matters which
6 come before us, it's an outstanding result because that stops a lot of litigation in future, also
7 coming before the courts. So I believe it's very effective. Still, we need to do better. We need to
8 have more and more people coming from mediation. And the key to success of mediation Farid
9 is, to select the matter which is possible of settlement. Okay? That's where the lawyers and the
10 courts can play a very positive role. Find the matter, which has a potential of getting settled.
11 Thank you.

12 **FARID KARACHIWALA:** So just curtailing from the thought, what according to you are
13 the causes or the prime causes for failure in mediation. Because, like you said you need to
14 actually go in for a matter or go for mediation where a matter could be possibly settled. But of
15 course, Justice Somasekhar said that out of ten matters that he refers to mediation, or the
16 High Court refers to mediation, six get settled. But what, according to you, in your experience,
17 as a mediator are the prime causes of failure of mediation? Is it the mindset of the Parties who
18 are just not interested in going into mediation or participating fully into mediation? Or what
19 according to you would be the prime causes where instead of, say, six matter out of the ten, we
20 could have a higher number?

21 **JUSTICE AKIL KURESHI:** Three prime reasons, according to me. One, involvement of too
22 much of emotions, you know, ego. I do not want to give in. I do not want to give up without a
23 fight. Sometimes it goes to the extent of 'I'll destroy him, even if I get destroyed in the process'.
24 So if we can eliminate the ego or the hurt feeling, sometimes even in commercial matters, we
25 are very emotional people, the Indians are. And therefore, one aspect is if there is a lot of
26 emotions involved, then there is a lesser chance of success. Two, the highest chance of success
27 of mediation is where, because of the pendency of prolongation of the litigation, both sides are
28 going to lose something. If you are proceeding there, I lose nothing and you lose everything by
29 that because of the tendency, there is very little chance of it getting successful. If I owe you
30 some money, if the matter goes through Civil Court, I'll say, I'll see after ten years. Why should
31 I settle? Why should I mediate? And the third aspect is frankly, too much faith in the Indian
32 legal system. People say if I don't succeed here, I'll go to the Court and get the order, not
33 realizing that how difficult it is in sheer time consumption. And effectively therefore, if they
34 don't mediate now, if they don't settle now, they come back after ten years, completely tired,
35 drained off their resources and ultimately settled. So all the times I say if you don't settle now,

TERES

1 you come back after ten years and you'll anyway settle. These are the three main causes,
2 according to me, are the reasons for failure.

3 **FARID KARACHIWALA:** Thank you, sir. Janak, I'd like to get you involved in the next
4 thought that I have on this discussion that Justice Kureshi mentioned are the prime causes of
5 failure. Do you think that they should be... And I know that you participated as a mediator in
6 a couple of mediations which you told me earlier that they were not successful, but do you
7 think that there should be consequences where a party does not participate in the session or
8 in the process, when this could be an effective way of resolving disputes?

9 **JANAK DWARKADAS:** Thank you, Farid. Thank you MCIA for inviting me for this ADR
10 Week, and thank all of you for being here early in the morning participating in this seminar.
11 To answer Farid's question, I had told Farid when he asked me this question: "How successful
12 have you been in settling disputes in mediation?" I said my record is rather dismal. I was
13 appointed mediator in two disputes, both of which I had to put in a failure report. So I would
14 not be the role model or poster boy of mediation. But to add to the two was yesterday when in
15 Court again, there was a dispute. Not dispute, as Justice Kureshi mentioned, several disputes
16 involved in the litigation, more than ten, if I may, if I think correctly, and I was asked to
17 mediate by the Court. And unfortunately, for a very, very small and marginal difference and
18 probably for the reasons which Justice Kureshi just outlined, probably all four of them. I mean,
19 I noted them all of them very carefully. Ego, emotional attachment, litigation, delays and faith
20 in the legal system. I think probably all four played a role, if I may put it that way. Why, even
21 though the difference was hardly anything, and I can tell you the difference was so small that
22 one day's cost to the Parties, one day's cost, there were 40 lawyers engaged on the two sides,
23 including at least five or six Senior Counsel on each side. I think the average cost of a day's
24 hearing was about 2 crores, and the difference for which the mediation failed was not even 4
25 crores. I mean, it is insane, let me put it that way.

26 As luck would have it, a connected matter out of the ten went to the Supreme Court and
27 reached in the evening... yesterday afternoon. And Justice Pardiwala said nothing of the kind.
28 And they told the court that there was an attempt to mediate the dispute in Bombay, and it
29 failed for a very small difference. He said nothing doing. You'll go to Justice Oak. I'm referring
30 all the disputes to him and get it mediated. So, to answer Farid's question, it's a very important
31 question he has raised. Do you think if there are consequences would it help? Now, according
32 to me, there are two ways in which you can look at it. In some jurisdictions, you have a
33 consequence where if a Party does not make what is called reasonable efforts to mediate, there
34 can be some consequences visited on that party in the ultimate outcome, if the matter goes to
35 court. So that is one kind of a deterrent on the Party trying to scuttle mediation or avoid

TERES

1 mediation, because, as you know, under the act a Party, the other Party can just refuse to
 2 participate or participate in a half day half-hearted manner, knowing that at the end of the
 3 day, if I am a Defendant and I have to pay up, I would rather take advantage of the delays in
 4 litigation than try to resolve it because I know that the Plaintiff has to wait for 15 or 20 years
 5 to get the reward. So, that is one way of looking at it that you penalize a Party for not making
 6 reasonable efforts in trying to resolve the dispute through mediation. But according to me, and
 7 this has been my belief for a long time, the more important deterrent or the more important
 8 consequence which we ought to seriously undertake, considering the fact that litigation today
 9 sometimes is more than a luxury, much more than a luxury. And it only favours the Defendant
 10 at the end of the day, or the Defendant or the dishonest Defendant, if I may put it that way,
 11 who does not want to honour the contractual commitment or whatever obligations he may
 12 have undertaken.

13 I feel that the only way in which things like mediation or any kind of ADR would succeed, is
 14 the losing party having to pay the actual cost of the Party winning the litigation. Until and
 15 unless we adopt this model and I'm sorry to say, sometimes when Courts do impose costs as a
 16 penalty for recalcitrance or for adjournments, which are unnecessary or for dragging on a
 17 proceeding without just cause and say a figure of... I'll give you a recent example. I won't take
 18 any names. The cost of 15 lakhs were imposed on a litigant who took some two and a half years
 19 to file some affidavit or the other. It became a talk of the whole library in the High Court, and
 20 there was so much hullabaloo. What does this judge mean? 15 lakhs? I mean, what the... I
 21 mean, frankly I thought it should be much more. You know, you can't take the courts for
 22 granted. The litigants who are waiting for years together, you take your own sweet time, come
 23 after two and a half years and ask for an adjournment to file some reply there. Should there be
 24 costs? Why should there not be a cost following the event?

25 So I think if you're asking about consequences, yes, one could be as I said not participating can
 26 result in consequences. The other is all right, you go through litigation, avoid the mediation
 27 route, end up paying not only your lawyers, your solicitors, and the time that you have wasted,
 28 but even paying the costs of the lawyers and solicitors of the other side at actuals, and see how
 29 mediation becomes suddenly very effective. Thank you.

30 **FARID KARACHIWALA:** Thank you, Janak. Just to take this thought further, our
 31 Mediation Act, which came out in September 2023, we had two years from the time that the
 32 new Act came, this actually kind of required a voluntary participation in mediation. When we
 33 look at the earlier Bill of 2021, it kind of mandated that a party needs to go through compulsory
 34 mediation before it can initiate a process in Court; very similar to what we have in the
 35 Commercial Courts Act. But finally, what was enacted by Parliament was not making it

TERES

1 mandatory, but making it voluntary. Do you think that the approach of the Parliament of
 2 making it not mandatory, but the making it voluntary, kind of puts a shadow back in terms of
 3 how disputes could be resolved, especially when we have so many Courts in our country,
 4 including the Bombay High Court, which is facing the largest backlog of cases, which are to be
 5 heard? Do you think that we've taken the right step of not making it mandatory before
 6 initiating? Or do you think that the approach of the Parliament, of making it voluntary
 7 mediation is the way it should be?

8 **JANAK DWARKADAS:** Thank you, Farid. Again, a very important point raised by you. I
 9 mean, look, if you look at the objects and reasons as to why Parliament thought it fit to bring
 10 in mediation as a mandatory pre-institutional requirement, it says in so many words that it is
 11 to take the burden off the Courts. That is one. And the second is that commercial litigation
 12 deserves a priority in the sense of it deserves, commercial disputes required to be resolved in
 13 that sense, faster, because commercial disputes cannot afford to wait for 10 years or 15 years
 14 or whatever it takes. But I don't see any logic in saying that commercial disputes, you make it
 15 mandatory, pre-institutional mediation and keep all the rest on the back burner. There
 16 appears to be absolutely no rationale and no sensible reason to make non-commercial disputes
 17 pre-institution mediation non-mandatory. I think the Parliament ought to have accorded the
 18 same sentiments and required the same, given the same importance to mediation. Because if
 19 you really wish to promote ADR, you really wish to lessen the burden on the Courts, then it
 20 doesn't make any sense to say that pre-institution mediation, in respect to commercial matters
 21 will lessen the burden, but the other litigants can wait for whatever time it takes. I think this
 22 requires a rethink.

23 And I may just tell you, I was looking at some of the provisions in other jurisdictions of the
 24 world. I found Italy, since 2010 has made it mandatory in certain categories. Brazil, in 2015
 25 has amended its Civil Procedure Code mandating pre-institutional conciliation or mediation.
 26 Singapore has done the same. The EU framework has done it since 2008. And UK and US does
 27 not have a mandatory universal mandate, but the Courts compel the Parties as far as possible
 28 to undertake mediation before taking up trials. But again, I must emphasize once again that
 29 don't forget, in these jurisdictions ultimately, the courts do impose costs on the losing party at
 30 actuals. So when they talk of mediation or they talk of pre-institutional mediation, the party
 31 knows beforehand that if it does not take this chance and bring about a settlement through
 32 mediation or conciliation, there is a price to be paid at the end of the day.

33 And also, look at it this way. The statistics, say in UK, I don't know about other countries, I
 34 have not studied it, but I'm told that because of the consequence of the losing party having to
 35 pay the cost and actuals of the winning side, it is not even 4%, if I'm not mistaken. Probably

TERES

1 the statistic is even lower today. But at one time, not even 4% of the cases filed ultimately went
2 to trial. So, you can just see if 96% of the cases which are filed are resolved through an ADR
3 mechanism, can you imagine the burden that would be lessened on our Courts?

4 **FARID KARACHIWALA:** So Janak, I think the point is well taken that in order to make it
5 successful there should be not only a full ecosystem where the legislation, the judiciary and
6 everybody participating, including Advocates and Litigants, understand the consequences of
7 not participating in the process fully. I think the other point that I would like to take on our
8 Act is, although India is a signatory to the Singapore Convention on International Settlement
9 Agreements to recognize mediation, but that again has not been imbibed into our Legislation
10 and to that extent international agreements which are reached between parties are not
11 recognizing enforcement in India. Do you think that also is something which is lacking in our
12 Act in order not to provide for international agreements, especially when India, the
13 Government is one of the biggest litigants in the world? We are looking at so many disputes in
14 every part of the world and the act that we have enacted is not having this recognition. Do you
15 think that we felt or we have fallen a little short of expectations from the global community
16 and being a signatory to the Singapore Convention, we have not taken those effective steps in
17 our Act?

18 **JANAK DWARKADAS:** Frankly, again, there are so many areas where we are lacking in our
19 approach and attitude towards ADR. I think we seem to be always moving in the direction of
20 one step forward and two steps backward. I mean, recently, what the Government of India has
21 done by issuing the circular with regard to arbitrations and its approach and telling
22 Government and Government institutions that, why should you go in for arbitration at all? I
23 mean I can't even imagine what could have prompted the Government to give the stepmotherly
24 treatment to ADR in the first place. Now, if that is the mindset, and that is a thinking, is it
25 surprising that we have made more Mediated Settlement Agreements mandatory under the
26 Act, but restricted it only to domestic agreements of this nature? Why should it not be
27 bilateral? We are signatories to the Singapore Convention. Why have we not affirmed that part
28 of the Convention and made it part of our law? Of course it should be done. It will encourage
29 parties who have entered into these settlement agreements on a bilateral basis to have ADR
30 taken up and mechanism adopted. What is happening is, we are, as I have said in some other
31 seminars, India is not only in that sense lagging behind in pursuing ADR, but what is more
32 important is, India is exporting arbitrations. Our biggest export today is arbitration. I think
33 Trump should put some tariff on that also, according to me. You see how many countries are
34 benefiting by the fact that our arbitration mechanism itself has become so slow with the
35 interference by courts that people are opting to take the disputes outside the country, and this
36 is happening regularly.

TERES

1 **FARID KARACHIWALA:** Janak, your point can be confirmed by Shweta.

2 **JANAK DWARKADAS:** She's one of the beneficiaries.

3 **FARID KARACHIWALA:** Singapore International Arbitration Centre, is I think, India is
 4 the biggest client. And in terms of disputes that SIAC handles, isn't India the biggest market
 5 so far as arbitrations are concerned? I want to talk a little bit more on mediation and how you
 6 view it, but from the perspective of Singapore, I did a little bit of reading while preparing for
 7 this. Singapore set up its Mediation Centre in 2014. It also set up its Mediation Institute in
 8 2014. In 2017, they came out with their law on mediation. In 2019, the United Nations had
 9 this agreement on International Settlement, recognizing Mediation Settlement, which was
 10 found in Singapore, which is why it's popularly known as the Singapore Convention. But
 11 Shweta, again, is India not your biggest market, one? Two, how do you look at mediation as a
 12 threat to your institution as arbitration? Now, while I have read a lot about mediation and
 13 arbitration actually going hand-in-hand so far as Singapore International Arbitration Centre
 14 and Mediation Centre is concerned, but from your perspective, and I know 85% to 90% of the
 15 matters which actually go to Singapore Mediation Centre gets settled. How do you respond to
 16 these two questions about, one, what Janak said that India is the largest exporter of arbitration
 17 and two, as an institute and an arbitration institute, how do you look at the Mediation Centre
 18 to be a threat to your institute?

19 **SHWETA BIDHURI:** I think both very important questions and thank you for having me
 20 here. I'll start with your first question which I think Janak put in the spotlight. India is one of
 21 the top foreign users for SIAC. But I think we hear this quite often in the recent times about
 22 cases from India going to Singapore or the word of exporting cases which could have ideally
 23 been adjudicated in India. But look at that large number of what are those cases. These are
 24 international disputes, which means one of the parties is a foreign party where, in their dispute
 25 resolution they would require a neutral mechanism or a neutral seat. Right? So if you have a
 26 foreign party and an Indian Party, and when they're negotiating their Contracts, the Indian
 27 party would probably say, we want India as the seat and the foreign party would say we would
 28 want a third country. For example, if it's a Japanese party on the other side, and they would
 29 put maybe Tokyo as a seat. Indian party would probably put Mumbai as its seat. And then
 30 comes the option of what is the second neutral seat for both of these countries would probably
 31 be amongst the top foreign seats in the world and Singapore being, having that proximity with
 32 India becomes a natural choice. So I think Singapore has served in terms of where there was a
 33 need, particularly for international contracts. And I think even when India continues to
 34 develop as a strong hub and a seat for international arbitration in disputes relating whether
 35 it's a foreign party, an Indian party involved, there will always be a need for a neutral seat. And

TERES

1 then there's the question, which is that neutral seat is going to be. Is Singapore serving that
2 need or not. To my response, it very much is. I think rather than looking at exporting, could
3 those cases be done out of India? Would the foreign counterparty be comfortable to have them
4 seated in India? Not because India is not mature enough, but because of the mindset to feel
5 it's completely neutral in that sense. So, I think it's a little bit misconceived to say it's being
6 just exported out. It's being given out.

7 And there is also a trend that I've been very closely following about Indian Parties, choosing
8 India as a seat with SIAC as the administering institution, which is a growing number as well.
9 In fact, about 18% to 18% to 20% last year were seated in India. So those are you need an
10 institution of international gold standard. So you get that institution to administer those cases,
11 but those are very much seated in India. So Indian parties, two Indian parties, or even where
12 Indian parties have a stronger negotiating power can choose India as a seat, take SIAC as the
13 institution. So I think there are different layers to even understanding this, including the
14 concept of whether, how many arbitrators are being appointed, right? Who would you appoint
15 as an Arbitrator in cases with a foreign party? Can you appoint an Indian as an Arbitrator in
16 those cases? You need a neutral third nationality, and therefore we've become sort of victim to
17 our own success in that sense, because you've got so many Indian cases with Indian party
18 involved, you need to have a third national appointed on those cases, and therefore the
19 statistics reflect a story that it does. So I think we need to understand it in a more nuanced way
20 than to just put statistics side by side and say, oh, what is happening? Indian party is
21 arbitrating in Singapore, which is not the case. It is there to support what the Indian trade
22 needs.

23 And I think that follows into your second question to whether mediation is a competition or a
24 threat to arbitration. Why do we have these different mechanisms? It is to serve the needs, the
25 commercial needs. Right? It's not to make arbitration popular. That's not the underlying
26 objective. Which is why Justice Somasekhar talked about the societal need, and I think at the
27 heart of any enterprise is what is the value, what is the need that it is catering to and both
28 arbitration and mediation are serving to that commercial need to resolve disputes efficiently.
29 Can mediation bring in its net all kinds of dispute and resolve everything efficiently? The
30 answer is no, because there are so many different factors, there are emotions, we talked about
31 egos, where all of that. There are also types of disputes. Types of disputes, parties objectives,
32 their own mandates that drive their choices of dispute resolution.

33 So mediation cannot bring within its net, even though that may seem like the more ideal way
34 because the Party's relationships are preserved. It makes more sense because it's less
35 contentious in the societal norms, it feels like the better thing to do but the reality is not so

TERES

1 uniform. Right? It is this mix set of disputes, mixed set of commercial realities and then are
 2 these arbitrations. So, I think while mediation will continue to grow and internationally we are
 3 seeing, with the Mediation Convention coming in, we had about, I think, 58 signatories and 19
 4 those that have ratified, which includes major countries like Japan, who were ratified. In fact,
 5 in Japan, mediation is quite popular. When we go and meet Japanese parties, they're very
 6 serious about mediation. For them, it's not like just the step that they need to follow. For them,
 7 like when they choose processes like Arb/Med-Arb, they put it in their process to make it
 8 mandatory that the Parties would be referred to mediation after arbitration or before
 9 arbitration mediation. It's very much part of their clause. It's not just a compliance, so to speak.
 10 But that's also the mindset in certain countries where they look at it more seriously.

11 I think India is gearing up with the Mediation Act. There's lot more, I think we've warmed to
 12 mediation than before. There's a lot more seriousness. Even when I go and speak to
 13 companies, they're more serious about mediation now. We've got this Arb/Med-Arb protocol
 14 with SIMC, which means that the parties, when they commence the arbitration, they refer to
 15 mediation. They try and settle the dispute. If they do, it's converted into an award, which
 16 means it becomes enforceable. And that's the gap, right? Till you have as many countries who
 17 are signatories to New York Conventions sign up to the Mediation Convention or ratify
 18 Mediation Convention, you need something that will be able to enforce it, like the way you
 19 enforce an award. Till you give teeth to that award, that settlement, it's still in vacuum. We still
 20 talk in theory, not in practical terms, so I don't think they are competitors. I think they're
 21 complementary. They serve the larger need of the businesses and that's the way we need to
 22 look at it. And I think SIAC is very much working with the Parties to understand where it sits.
 23 In fact you would have seen the revisions and the rules. The SIAC revised its new rules. While
 24 in practice, that's not something that needs to be codified, but we have codified in the rules
 25 that once the case comes to the table in the first case management conference, the Tribunal
 26 will nudge the parties to go and mediate. And it is recognized as the powers of the Tribunal if
 27 they want to particularly adopt the protocol as well.

28 So, these are the changes at an international level that the institutions are making to integrate
 29 mediation within the system to help parties that where they are serious about preserving
 30 relationships, continuing businesses, that mediation is something they can very much adopt
 31 within the same ecosystem and also give an effective, enforceable award at the end of the day.

32 **FARID KARACHIWALA:** Shweta, you mentioned Arb/Med-Arb. Do you see any other
 33 form of ADR, which is actually practiced abroad, which, of course, in India we may not be
 34 following, but which could also result in an effective way of settlement? I mean, there are
 35 concepts which are called as Settlement Conferences. There are concepts which are called as

TERES

1 neutral evaluation or early neutral evaluation. Now, these are not concepts that we see. In fact,
 2 when I was looking up and doing some research on early neutral evaluation, I came across one
 3 case, and that case actually related to a masala company. **Baba Masala** company. The Delhi
 4 High Court in 2007, Justice Sanjay Kishan Kaul actually referred that IPR dispute for an early
 5 neutral evaluation. And I don't know the result of that, but there has been some movement
 6 forward, but somehow it's not taken off after that. Now, these are other modes of ADR which
 7 are actually practiced in other jurisdictions, and in some of them, they are mandatory. Like
 8 the US, they have it in the ADR Rules. The UK have it in their CPR Rules. Now we don't have
 9 it anywhere. Do you think... Of course we have a Mediation Act now, which is lacking in some
 10 form. But do you think that there are these other forms of ADR, and I'm putting this question
 11 to you from an international institute perspective, that could really be the way forward to
 12 resolving disputes which could be, of course an alternative to litigation, and, of course, even
 13 mediation to that extent?

14 **SHWETA BIDHURI:** Yes. I mean with my limited understanding on these other forms
 15 besides arbitration, mediation, you know I think they are very structured, expert driven. Also
 16 depend on the specific industries and kinds of disputes where they work well. So, you do see it
 17 in international suite of dispute resolution mechanism. But if you were to match it against
 18 arbitration or other more popular, it is still fewer and more I think technical sort of disputes
 19 where they work well, or very high value, complex sort of disputes where they work well. In
 20 some cases they could be used as a part of the multiple suite of options in the tiered
 21 mechanism, or to hive off a part of the dispute. In fact, when you'd asked, when you'd put this
 22 question, there's a very interesting example which SICC has done with SMC, Singapore
 23 Mediation Centre. It's called INTEGRAF where they have integrated multiple dispute
 24 resolution mechanism, including neutral evaluation and interim adjudication. Where they
 25 allow in fact there's this neutral profession called signal person who helps to identify which
 26 part of the dispute should go to which mechanism. So it adds to the toolkit for sure. And if
 27 India were to adopt it more actively, it would certainly help. But I think just one word of
 28 caution and a caveat would be, it needs specialized training. And that I add to even the
 29 conversation of mediation. Mediation is great, but you need specialized, trained mediators.
 30 Not everybody can be a mediator, right? Not everybody can be an arbitrator. So that really is
 31 very, very essential. So if we think of adding this, another mechanism to the toolkit, it cannot
 32 be without the training of the mindset, of the skill set and sensitizing people, the parties who
 33 are really beneficiaries of these dispute resolution mechanisms.

34 **FARID KARACHIWALA:** I think we need to take baby steps in this area because while we
 35 are grappling with mediation, with the law that we have, I think going into other forms of ADR
 36 like early neutral evaluation, or early evaluation is where you go to a retired judge or an expert

TERES

1 and just make submissions who will give you an evaluation on the merits of your case. And
 2 what are going to be the estimate of costs. Now, this is without evidence, without any trial.
 3 Just the Parties are being made to realize that if you take this dispute to litigation, this is the
 4 expectation of the likely outcome and the cost that you'll incur. Now, we don't see that too
 5 much in our part of the world. But these are things which are practiced abroad and to some
 6 extent, successful.

7 Now, since Shrivardhan has not been... and I would like to hear from the industry perspective,
 8 because the Bombay Airport, and I can say that as a matter of fact, since I have been
 9 representing the Bombay Airport since the privatization, and for last 20 years, Janak has been
 10 my counsel in most of my matters where the Bombay Airport was involved. And the kind of
 11 issues that we face in the Bombay Airport and for those who have travelled from outside the
 12 city and for those who are living in the city, of course know, that when you actually land in the
 13 airport you see, this whole encroachment of 300 acres of slum. That's one part of it. The second
 14 part is the high rises, which are surrounding the airport. That's the second part of it. The
 15 commercial contracts and the issues relating to right of ways. Every aspect of how
 16 development needs to happen in the city since our airport, which was created in the 1940s and
 17 50s where Santa Cruz and Andheri were considered outside the city limits, has now become
 18 the centre of the city. Now that's why I wanted Shrivardhan on this panel because as a party
 19 who's facing so many litigations, and litigations on all fronts, how do you view mediation as a
 20 way of resolving your disputes? And do you see any success or is it that you have to initiate the
 21 litigation process or the other party initiates a litigation process? What happens in your
 22 disputes and how do you look at mediation as a form of ADR?

23 **SHRIVARDHAN DESHPANDE:** Thank you Farid and thanks everyone for coming. Thank
 24 you MCIA for inviting me. So when I joined the airport side, I was not very familiar with what
 25 happens behind the airport and I won't generalise, but I'm sure a lot of us wouldn't probably
 26 get a clear view of how airports function behind the scenes, and especially from the legal and
 27 litigation side. And Farid, of course, has a lot of experience acting for me also, he laid out the
 28 pointers very nicely. From a perspective of airport and generally as an organization who's
 29 obviously not just operating airport as a business for profit, but clearly it is an infrastructure
 30 project. It's a PPP Project, and it is necessarily for the society and for the public, and at the
 31 same time, also a business, so to speak. So I think the onus on such infrastructure projects in
 32 companies like ours, especially where we have a stake of the Airport Authority of India a
 33 Government entity in the SPV, becomes very important how we handle our litigations and our
 34 disputes. So from that perspective, if I see mediation or any form of ADR is critical because
 35 frankly, nobody wants to spend money on litigation. We always say as lawyers that we advise

TERES

1 our clients you're spending good money behind bad money but we end up becoming
2 beneficiary of that good money as practicing lawyers or other law firms, etc.

3 But the point is, I think, in an airport, there are so many stakeholders precisely talking about
4 this organization. It's an ecosystem, right? And mediation or any form of ADR can only be
5 successful if all the stakeholders who are involved in the airport come together and adapt or
6 adopt a system like that. So, it's not purely an ecosystem where two commercial entities are
7 involved. Of course, we have our concessionaires and retailers, who are at the airport and are
8 running a business for profit. But we have Airports Authority of India as one of our biggest
9 stakeholders, and we have ongoing disputes for the last several years and still disputes
10 simmering with the AI, which are large stake disputes. They may be involving land, involving
11 revenue, which is under a Concession Agreement. We have disputes with employees, with
12 people who are encroaching over airport premises. So, just taking a cue from the point Janak
13 Bhai made, that if we limit something like mediation especially a formal mediation only to
14 commercial disputes, then we will not be able to widen the scope to other disputes per se. Of
15 course, there is a reference to community mediation in the Mediation Act but it is more like a
16 better form of probably a Local Panchayat or societal disputes being evaluated and adjudicated
17 in a society. So that really doesn't cater to these kind of scenarios.

18 So, I think, in an ecosystem like airports, I can tell you personally from experience, the airport
19 operator or the concessionaire or any stakeholder doesn't want to litigate because it is an
20 infrastructure project which can only run if everybody works together. Nobody is there for as
21 a fly-in/fly-out operator. So it is very important that areas like mediation and a formal
22 mediation is adopted by the stakeholders in an ecosystem like airports because it is a bit like
23 two family members living under the same roof, can't see eye to eye, but have to sit on the table
24 and eat their meal together but still bitching about each other at the back. It's a bit like that.
25 So, it doesn't serve our purpose or a stakeholder's purpose if we are fighting in a court or in
26 arbitration, but at the same time, we have to work together, right? Unless, of course, it's an
27 extreme situation where one party is completely on the wrong side. So it is an important tool,
28 and I think as MIAL and as a group, generally I can say we have some examples where as a
29 group also we have encouraged mediation even with international parties and have had
30 success recently in one of the mediations where a US mediator was involved, and it was an
31 intense mediation of two or three days, and it was resolved successfully.

32 But just coming back to your point again, Farid, just to conclude, I think it's important that
33 every stakeholder in an airport ecosystem and any infra project, including government
34 entities, view this seriously. In fact, Airport Authority of India has their own roles for
35 mediation that they have something called AI Mediation Rules. But frankly, in my last two

TERES

1 years, I've not seen AI using that to their benefit or just to resolve issues very frequently. And
 2 there are fairly decent rules, to be honest. But I feel if entities like an organization like Adani
 3 or any other large corporate or Government on the other side, if these kind of institutions and
 4 conglomerates encourage mediation, it does give a boost to smaller parties, relatively smaller
 5 parties, and generally to the public and to the stakeholders to say that, yes, if Government is
 6 entering into areas like mediation and taking it seriously, and abiding by it, of course
 7 compliance is probably more important than the process, I would say, then it could take all of
 8 us a long way in this format.

9 **FARID KARACHIWALA:** So Shrivardhan, since you've mentioned mediation both
 10 domestically and internationally, do you incorporate these clauses in your Contracts on
 11 referring the dispute to mediation as a precursor to any other dispute resolution, or do you
 12 voluntary try and approach the party to participate in a mediation process? Because under the
 13 Mediation Act, you need to have a written agreement. So how do you kind of get involved in
 14 the process as an industry player. Do you have it in your contracts or do you reach out to
 15 somebody before the dispute arises? How do you go through this process?

16 **SHRIVARDHAN DESHPANDE:** So just on that point, and I was listening to what Janak
 17 bhai said, and Shweta said on exporting arbitration I think I can... I'm pleased to say that we
 18 are more vocal for local at the airport and at MIAL we don't have SIAC or foreign arbitration
 19 clauses in our Contract. But that's also because as you said, most of our contesting parties on
 20 the opposite side are Indian parties. But on a serious note on what Farid asked, so, we don't
 21 necessarily have a mandatory mediation clause under the Mediation Act. But yes, as most of
 22 the Agreements have, we also do have a pre-arbitration, negotiation or conciliation clause. But
 23 I just feel practicing for so many years and then now in-house and we spoke about other forms
 24 of ADR, my view is that what nomenclature you give to the ADR mechanism or what process
 25 do you follow as an ADR becomes immaterial beyond a point if both parties have the right
 26 intent to resolve the dispute, right? Because Mediation Act has only come in three years ago.
 27 What were we doing before that? And most of us have been practicing I'm sure for more than
 28 15-20 years. So it's not like Parties were not resolving disputes before this. So a lot of clauses,
 29 including our agreements with the Government entities, don't have a formal Mediation Clause
 30 as such, but what is important is whether the pre-arbitration, pre-litigation provisions are
 31 being adhered to and are taken seriously.

32 The way Courts are now pushing and under the Act or otherwise for the Parties to go and
 33 resolve their disputes, there has been jurisprudence earlier in our Courts on the pre-
 34 arbitration Clauses, whether they are mandatory or voluntary, and the Courts have taken
 35 different view on whether they are mandatory or not, and I personally feel they should be

TERES

1 mandatory otherwise. What's the point of having those clauses? The conciliation may fail. So
 2 whether we call it conciliation or negotiation or mediation or INTERGRAF or any of that
 3 thought, I think it's important that the parties adhere to it. And yes, our agreements do have
 4 those clauses. We do follow that mechanism. But sometimes formalizing a mechanism like
 5 mediation becomes important because then the Parties, I suppose, take it more seriously as
 6 opposed to an informal negotiation and with an expert or an appointed arbitrator or mediator,
 7 it just becomes all the more process driven and formalized in that sense and ends up into an
 8 agreement. So that's something that we will be looking into in our future contracts.

9 **FARID KARACHIWALA:** Thank you, Shrivardhan. I just want to ask both Janak as well as
 10 Justice Kureshi because both of them, and I know Justice Kureshi has done far more
 11 mediations than in the room that we are in. But I'd like to ask both of them because what
 12 positive role can lawyers play in this process to make it successful? I mean, as a part of the
 13 ecosystem, I think lawyers have a very crucial role, but as mediators, and I know Janak has
 14 not had too much success being a mediator but, in his experience, and I'll first ask Justice
 15 Kureshi and Janak can take up that question that what is the role or a positive role that a
 16 lawyer should have in mediation?

17 **JUSTICE AKIL KURESHI:** Lawyer's role starts even before the mediation starts. As I said,
 18 find the correct matters to go for mediation. Sending all and sundry matters really does not
 19 help. As I said, immediately the lawyers can see through it that here is a chance of settlement.
 20 So first, selecting a correct matter for sending for mediation. That's where the lawyers have
 21 the best are in the best position to say. Throughout the mediation, the lawyers can guide their
 22 clients correctly. That's another extremely important role. Because very often even the
 23 industry people, when they come for mediation there is some sort of apprehension. Slight
 24 hesitation what this process is. And those who are not fun industry, those who are not so
 25 experienced come with lot of trepidation. Who is this Retired Chief Justice. Is he going to
 26 decide something? Are my rights going to be foreclosed? Do I say something, will it be held
 27 against me? So lawyers can constantly guide them, put them at ease and also say that every
 28 stage, whatever you say before the final decision is taken, you will be guided as to what you are
 29 doing is correct or incorrect. Should we go ahead with this, or should we change our strategy?
 30 So that's constantly guiding the client all throughout the mediation process is an extremely
 31 important role. Sorry to say, sometimes I've come across cases where the lawyers do not want
 32 the mediation to succeed. Not many cases; maybe it's less than 20%. Most difficult part for me
 33 is, how do I tell the client that don't go blindly by the advice of your lawyer. But that's a very
 34 small element, so I don't really worry much about it.

TERES

1 And last is how to prepare the settlement terms. In one of the cases, Janak Bhai, everything
 2 was settled. Only how to write down the settlement it failed. Parties could not decide. They've
 3 decided how to settle it, but they could not decide how to write it down. And it failed. It was
 4 tragic. So lawyers can guide them. And what I tell the clients is that, look, international
 5 contracts are prepared with input and expertise of battery of lawyers. But if somebody wants
 6 to sabotage it, it is possible. So don't go by writing everything. You cannot protect your contract
 7 by writing down everything. The intention to carry it through should be there. So, it to my
 8 mind three important stages. Pre-mediation, find out correct matters. Two, all throughout,
 9 guide the client correctly. At the end, be positive and cooperative in writing down the
 10 settlement terms so that it doesn't go into unnecessary complications. Thank you.

11 **FARID KARACHIWALA:** Janak?

12 **JANAK DWARKADAS:** I would totally agree with Justice Kureshi. He couldn't have put it
 13 better. I think lawyers are really the people who can inspire the confidence required from the
 14 side of the litigant to undertake a mediation process. And holding the hand of the client
 15 through the process is extremely important because it may be something the clients are not
 16 used to. They may not be aware of. They do not know how it works. They don't know the
 17 process. They don't know the outcome, and they don't know how unforeseeable or otherwise
 18 the final outcome may be. So, I think the guidance which the lawyer can give and the
 19 confidence the lawyer can inspire in the client is extremely important.

20 Of course, that happens, by and large, when the lawyer himself is not insecure. And I mean
 21 insecure in that way where he doesn't think that by giving, by going through the process of
 22 pushing the process of mediation and settlement, he is likely to lose out on a lucrative brief.
 23 So, I think that, unfortunately, Justice Kureshi said happens, but happens probably in lesser
 24 number of cases than the number of cases which do really get settled. But it is important
 25 because, and that's where, according to me, how savvy the client is also plays a huge role.
 26 Because the client should be smart enough to know whether his interests are really being
 27 protected or is he being encouraged to do something which may not be in his own interest.

28 The third, of course, is where the lawyer tries his level best to encourage the client to go down
 29 the right path. But the client as Justice Kureshi earlier outlined, for one of these four or all four
 30 reasons would not want to go through the mediation process. There again, I mean, short of
 31 holding a threat like I did yesterday, and I told my clients that, look, if you're not going to give
 32 me authority to settle and mediate, then I don't mind giving up the brief and walking out. It's
 33 enough is enough, I think you're being really stupid in trying to prolong this dispute. So
 34 sometimes you have to use those methods. And very often the language I speak, many of my

TERES

1 juniors will vouch for it, and many clients too, where I tell them that you may think that you're
 2 contributing to the welfare of the legal profession by coming to people like us, but I can tell
 3 you there is a queue of people waiting outside the door who look after my welfare. You don't
 4 need to worry about it. I am telling you, this is not a dispute you should be fighting and
 5 litigating about is in your interest to settle or bring about a resolution. So, yes, according to
 6 me, lawyers do play a very important role.

7 **FARID KARACHIWALA:** I think we have just this much time. Do we have time for a
 8 question or two? Neeti? So, we'll just take... let's not take any questions. People can just reach
 9 out to any of us outside. Justice Kureshi and Janak have to also get on with their professional
 10 engagements. So thank you very much, everybody. And it was delightful to speak in front of
 11 all of you. Thank you.

12 **SHRIVARDHAN DESHPANDE:** Just before that, just one point. Sorry, just a last point. I
 13 think in addition to the three points that Justice Kureshi mentioned, the first step starts with
 14 in-house Counsel, I believe on a mediation mechanism because we, as in-house Counsel, have
 15 to advise our business stakeholders that you start with negotiations and then reach out to us,
 16 and then we reach out to the external lawyer. So I think that is equally important, and that's
 17 where the first step starts.

18 **FARID KARACHIWALA:** Thank you. Thank you so much. Thank you, everyone.

19

20

21

~~~END OF SESSION 1~~~

22

23