

INDIA ADR WEEK DAY 3: MUMBAI

Navigating Supply Chain Disputes in Post-Pandemic Markets: Causes and Best Practices

02:30 PM To 04:00 PM IST

MODERATOR

Mr. Raj R. Panchmatia - Partner, Khaitan & Co.

SPEAKERS

Mr. Arjun Doshi – Head Litigation, Adani Ports

Mr. Chakrapani Misra – Partner, Khaitan & Co.

Mr. Sandeep Chowdhury – Group General Counsel, Suzlon Energy Ltd.

Ms. Seema Manku – Division Counsel TE & Head of Legal, Corporate Legal Services

Ms. Lucy Reed – President, SIAC Court

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1 **HOST:** Good afternoon, everyone. We will now begin with our next session. The next session
2 is being hosted by Khaitan. The topic for the session is "Navigating Supply Chain Disputes in
3 Post-Pandemic Markets: Causes and Best Practices". The moderator for the session is Mr. Raj
4 Panchmatia. The speakers for the sessions are Mr. Arjun Doshi, Mr. Chakrapani Misra, Ms.
5 Lucy Reed, Mr. Sandeep Chowdhury and Ms. Seema Manku. I request the panellists to kindly
6 come on stage. Thank you.

7 **RAJ. R. PANCHMATIA:** Thank you for joining us this afternoon for the session. Post-lunch
8 session. We know that we are post, post-lunch is difficult to keep everyone await, but we've got
9 a very interesting panel today with us, and we're talking on a very interesting topic which is
10 "Navigating Supply Chain Disputes in The Post-Pandemic Markets: Causes and Best
11 Practices". Before I start, I must say thank you to Arjun, who agreed to join this panel in just
12 five minutes because we had one of our panellists drop out because of work experiences. But
13 thank you again for agreeing to do it in such a short notice. He's an expert on supply chain. So
14 I thought, that is, who better than him can help us from this panel. So, let me start by
15 introducing the panel. We have Arjun Doshi, who heads the litigation at Adani ports. We have
16 a partner, Chakrapani Misra from Khaitan & Co. We have Lucy Reed, SIAC Court President
17 and of course the global name in arbitration, and we are thankful for her to have taken up this
18 session and give us her insights on how institutions look at this kind of issues. We have
19 Sandeep Chowdhury, the General Counsel for Suzlon Energy again, a big energy conglomerate
20 in India. And we have Seema Manku. She is divisional Counsel and Head of Legal, Asia for
21 Archroma. Thank you, all of you, for joining me this afternoon for this session. We live in a
22 times where this disruption in supply chain on a regular basis that we are seeing in today's
23 time, be it geopolitical issue, be it tariffs, be it sanctions. We've seen it all. Pandemic, in fact
24 still there and still wavering more, so we thought that it'd be a good idea to discuss what are
25 the kind of issues that people face and what they see in the day-to-day operations of the
26 companies and we try to get the industry perspective and the lead as a perspective on the
27 criticisms that are being faced in the supply chain regime. So, my first question is going to be
28 to Seema, Sandeep and Arjun. What have been the most significant causes of supply chain
29 disruption in your sector since the pandemic? Whether geopolitical tension, pandemic
30 aftershocks, or regulatory challenges? Seema, you want to go first?

31 **SEEMA MANKU:** Hi, everybody. Thanks, Raj, for having us here. And thank you, audience.
32 I know it's after lunch session. I hope as a panel, we won't be too boring and we give good
33 takeaways as a part of our discussion. Okay, so, Raj, back to your question, just a bit of
34 introduction about who I represent. Archroma is a speciality chemicals and dye company. And
35 we manufacture chemicals which go into your, and of course, the dyes of course. And plus we
36 also help Zomatos and Swiggys of the world by lining their containers and food containers. So,

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1 it also goes in paper packaging. So, basically we serve packaging technology. And as we are
 2 discussing supply chain here, I am, as in Archroma is the supply chain of people see a brand,
 3 for example a Mango or a Zara or a Lululemon. I seek for mine as too, but of course, S&CG
 4 companies, etc. like an HUL or P&G. We supply chemicals to them as, so we are the supply
 5 chain in that sense. And to your question, Raj, what have we been affected by, definitely tariffs
 6 right? Definitely the disruptions caused due to internal unrest, like, for example, what
 7 happened in Indonesia. We were affected there. We were affected by pandemic, of course, like
 8 everybody else. We are affected by sanctions, which seems to shift every now and there. We
 9 are affected by trade compliances, which again, ESG requirements or the constant shift in
 10 regulation and, of course, cyber security. I'll stop here and let others give their inputs as well.

11 **RAJ. R. PANCHMATIA:** Sandeep, your thoughts?

12 **SANDEEP CHOWDHURY:** Thanks. Before I start, again, like Seema, a little bit
 13 introduction about my organization. So, I'm the group general Counsel for Suzlon Energy
 14 Limited. We are by far the largest clean energy company. We have around 35% plus market
 15 share. We predominantly on the renewable energy space we focus on wind and we work with,
 16 so we are OEMs. So we work with all the developers and top multination and the PACs in India.
 17 Before answering the question, Raj, it is my individual view again, which has got nothing to do
 18 with the organization per se.

19 Two most important challenges, other than the tariff that Seema had spoken of, that we face
 20 at this point of time is one is shortage and second is the rising price, correct? Given our
 21 industry, we are heavily dependent on steel and aluminium because all the towers and all,
 22 there's a lot of steel towers, fringes and towers, a lot of steel and aluminium goes into it. And
 23 then if I speak up the blades, the larger blades of windmill, then we are dependent on resins
 24 and fibre glass. Now there's been a complete shoot on the pricing that had happened in the
 25 last couple of years, which is a matter of concern, because every upward movement, you just
 26 cannot pass in on as a pass through to your potential customers. And coupled with this, you
 27 also have the shortages like in India today. One is definitely, there's a bottleneck on the
 28 transportation or the supply chain path, be it because of the trade sanctions, because of the
 29 unavailability of vessels or even in ports you have at times. There's a condition in port. That's
 30 a point of concern for us. Then you have the geopolitical situation, like we are dependent, we
 31 used to be dependent a lot. Now the dependency has reduced, but still there's an element of
 32 dependency on China, on certain components of ours. Then the third one is definitely on the
 33 regional protectionism. So, there are regions like EU, US and India which moving more
 34 towards localization, of the moment you move towards localization of the product and all,
 35 there is a disruption that you are doing in the global supply chain. So, that is also coming and

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1 hitting us at some point of time, but not the least, is definitely the manpower or the skilled
 2 manpower, availability post-pandemic we had seen, there's a reduction out there, people are
 3 more interested in working from home. People are more interested, we have seen situations
 4 where people are changing the entire, going to a different industry per se, so that is affecting
 5 both the manufacturing hub as well as on the logistics part and all. So, these are the things, I
 6 think, which we look out for, is a matter of concern for us. I don't think there's any
 7 management meeting we conclude without discussing a couple of pointers from these issues.

8 **RAJ. R. PANCHMATIA:** Arjun, any thoughts?

9 **ARJUN DOSHI:** Sure, Raj. So, Port sector is something that I represent here and we are a
 10 Ports and Logistics Company, so we are the facilitators of the supply chain ecosystem and what
 11 we have realized, at least post-COVID are two large issues. And of course, I tend to agree with
 12 what Seema mentioned. As far as sanctions are concerned, and I'll touch upon that at a later
 13 stage, but most importantly, what we have realized is the delay in construction of ports,
 14 because the way we operate is on a build on operate-transfer basis, and the obligation is, of
 15 course, on us to construct the port or a terminal in a certain time frame, and if I am unable to
 16 construct that in a certain time frame, barring the *force majeure* issues, then there is a
 17 likelihood of my Concession Agreement getting terminated for event of default. And if there is
 18 a delay in construction that has a direct impact on termination and subsequently, on my future
 19 participation in tenders that are issued across India as well as globally. And why do I say that
 20 there would be delay in construction post-COVID is because typically, under the Concession
 21 Agreements, we would have what is known as a change in law provision and because of COVID,
 22 there were multiple notifications that the Government of India, at the central level and at the
 23 state level. Wherever our ports are located, they would come out with those notifications,
 24 which would have a direct impact on supply of materials to construct the port. The manpower
 25 that is deployed at the port, you could only have at one point, ten people working at the port,
 26 and it's such a capital-intensive industry that you can't operate at such minimalistic tense. So,
 27 in that sense, what we have realized is that COVID did have an impact on us in terms of
 28 constructing ports across the Concession Agreements that we had and we took refuge under
 29 the *force majeure* provisions. And of course, the port authorities were also sympathetic
 30 towards that and somehow we were able to navigate. In fact, we weren't able to complete the
 31 projects at some places in time, but that was because of how we were able to, how we were
 32 impacted because of COVID, and then eventually, because of our conciliation meetings with
 33 the port authorities and other sectors, we were able to come out with a well-intended plan in
 34 place to complete the project, but, yeah. So, that's the aspect that I wanted to touch upon,
 35 which is how we were impacted in the construction space, because of the COVID impacts.

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1 **RAJ. R. PANCHMATIA:** Thank you. Thank you, Arjun. This was very helpful as a starting
 2 point maybe Sandeep, I'll come to you with a question more specific on the energy sector
 3 however, the events like Russia and Ukraine war impacted the supplying on facts, especially
 4 around whether there have been a *force majeure* issues or the risk allocation issues that you
 5 see in your sector?

6 **SANDEEP CHOWDHURY:** So, definitely it's impacted because of this war and all. There's
 7 been a lot of disruption on the supply chain front. There's been delay in getting the raw
 8 materials, which *inter alia* results in us delivering the project within a particular timeline.
 9 Now, if you really look into the *force majeure* clause before the Russia-Ukraine war or before
 10 even the pandemic and all. It was pretty boilerplate. So, we used to have *force majeure*. The
 11 trigger point of *force majeure* was war or the management action or any other causes. But
 12 now, post-pandemic and post this Russia-Ukraine thing. So, what we are doing is we are also
 13 bringing the element of supply chain destruction in *force majeure*. So, if there is a condition
 14 in the port or if there's a shipping line shortage, there's sanctions and all. So, we are sort of
 15 negotiating with the customer and bringing it within the ambit of *force majeure*. So, we are
 16 not leaving it on a futuristic commercial risk which will be decided at any given point of time.
 17 Second is, all this delay on the supply chain front. This has also sort of resulted into a list which
 18 at this point of time, or at a given point of time, we are not in a position to put any dollar value
 19 to that risk, right? So, what we are doing is that we are keeping certain pointers open in the
 20 agreement, in the risk part when we are negotiating with our prospective customer and there
 21 are two ways of dealing into it. Either if it's an uncontrollable risk, then we are putting it in
 22 FM; if it's a controllable risk and all, then we are laying down what is the proper risk mitigation
 23 plan that we have in place before triggering the FM clause. Now, when I speak of risk and all,
 24 definitely the pricing risk is something which has really hit us. As I stated, steel and
 25 aluminium, the prices had really gone up. Previously, any increment in price was to be taken
 26 care of by the Doer and also we are the service provider, so it would be taken care of by us. But
 27 now, we are slowly and steadily shifting towards pass through of the cost to the end customer.
 28 Now, have we sort of gone 100 percentile in shifting the entire pass through? We've not. But I
 29 can see there is a change. And the customers are also willing to accept that pass through.

30 The second one is definitely on the risk on account of supply chains. As I stated, on sanctions,
 31 on the availability of ports, shipping lines and all. So, these are also what we are doing is there
 32 are certain uncontrollable things out here, which we are putting it under FM, which could *inter*
 33 *alia* trigger FM and shipping controllable cost and all. Again, we are passing on to the customer
 34 for them to observe, which again I can see the shift in the needle over the period of time. So,
 35 typically, if you look at the contracts, the way we are drafting in today's scenario. Previously,
 36 the FM clause used to be pretty narrow; so, now there's a lot of back and forth discussion and

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1 negotiation that happens with a customer, with regard to the FM clause. Now, basically, we've
 2 sort of extended the clause to include the geopolitical events, the supply chain disruptions,
 3 emissions and all. Secondly, you also have, one is this. Secondly, also on the labour front, right?
 4 On the labour front, also, what we are seeing is previously, the FM used to cover strikes and
 5 lockouts. So, now it's not only strikes and lockouts. So, post-pandemic, there has been
 6 complete shift in getting the availability of the labour, which is also something that we are
 7 putting under the FM clause and trying to negotiate with a customer to absolve. Now, our
 8 business is such at some point of time, we are the supplier or the Contractor. In certain other
 9 times, it is the Contractor who's catering to us, correct? So, we have to take care of both the
 10 situations and then come up with a perfect agreement but in a nutshell, to answer your
 11 question now, I think we are moving more towards a hybrid clause and we are more moving
 12 towards bringing certain elements of risk under the definition of *force majeure*.

13 **RAJ. R. PANCHMATIA:** Thank you, Sandeep. Arjun, coming to you, especially on the port
 14 sector. Keep in mind what the geopolitical issues are, sanctions issues that are going on. How
 15 do you see the continued traffic movements or the supply chain related issues impacting the
 16 port sector?

17 **ARJUN DOSHI:** The issue with sanctions, especially from a port operator perspective is that
 18 while I would know in certain cases, when I'm handling cargo, what is the nature of the cargo.
 19 In certain cases, like containers, I would never know the nature of the cargo within the
 20 container. And the only thing, and of course, that is from the Customs' perspective, that they
 21 would X-ray the cargo and then find out what is there within the container. But from a port
 22 operator's perspective, I will never know the nature of the cargo which is being shipped
 23 through the container at my port. Now, with this background, everybody knows that sanctions
 24 are an evolving regime, right? And it changes every day. And with the US sanctions, those
 25 sanctions apply not only to just the vessel owners, but the beneficial owners of the vessel which
 26 is being handled at my port. It also applies to the cargo on board, and it also applies to the
 27 truck services that I give to the vessel for them to berth at my port. Now, in all of these issues,
 28 it becomes almost impossible as a port operator to know whether the cargo that is going to
 29 come at my port, is it a sanctioned cargo or not? Or does that cargo belong to a sanctioned
 30 entity or not? Such that I am impeded in dealing with that cargo or handling that cargo, and
 31 therefore, it becomes, and of course, I may know about it just by looking at the papers, but the
 32 sanctions regime also extends to beneficial ownership. And when it extends to beneficial
 33 ownership, I will never know who is the ultimate beneficiary of either the cargo or the vessel,
 34 and whether that beneficial owner is a sanctioned entity or not. Because of this issue, what
 35 happens is that if I handle a cargo, which at the time when I handled, I wouldn't know that it
 36 belonged to a sanctioned entity. If I handle I and then later it comes out that it was belonging

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1 to a sanctioned entity, then it has an implication on the bonds that I subscribe in the US market
 2 because eventually what I will have to do is I will fall foul of my obligations under those
 3 Contracts where I would have said that I will comply with the sanctions regime, and eventually
 4 what I will get in return for that, for violating it, is not just penalty which is monetary in nature,
 5 but also I will have ruined my relationship with the external investors in this case. So it's a very
 6 difficult market to navigate, especially in circumstances where sanctions keep changing on a
 7 day-to-day basis. The SDN list, which affect maintains right now it's changing, and I wouldn't
 8 even know unless there's a person designated in the organization who keeps a check on who is
 9 included in the list, who is not included in the list, and therefore to handle my cargo at the
 10 port, it becomes difficult. And secondly, just a practical perspective, you have to understand
 11 that anybody who sits at the port, they are all operators. They take the cargo on the basis of
 12 the Bill of Lading that comes through. They don't go into these nuanced issues of whether the
 13 cargo is sanctioned or not. So, there is a high level of communication that has to go from the
 14 headquarters sitting in Ahmedabad across many, many kilometres, where you have to interact
 15 with them and tell them that these are the issues that you need to keep in mind before you
 16 accept a vessel to be birthed at the port. So, yeah, these are a couple of issues that we face
 17 because of the sanctions regime currently in play.

18 **RAJ. R. PANCHMATIA:** Thank you. It's very interesting, and not many people would kind
 19 of foresee the kind of problems and issues that a court sector can fail because of the sanctions
 20 or legibility issues that may come in. But Seema, just taking you to on your specialty chemical
 21 related issue, couldn't reflect on the post pandemic disruption draggers you've seen in the
 22 specialty industry. And what are the top points that you see?

23 **SEEMA MANKU:** The very fact that I changed my industry was a disruption for me, right? I
 24 was in Pharma, which was almost immune from sanctions to speciality chemicals, which, of
 25 course, comes within the sanction purview. So, that aside, I just wanted to kind of make that
 26 statement. But, yeah, sanctions, of course, because that has led to reduction in the market that
 27 I can sell, that affects my revenue, of course. And I have got no exceptions, if it's a food
 28 company or a Pharma company, then they are to a large extent, if course, there are ifs and but,
 29 it's fair to say, to a large extent, they're exempted, but this directly affects us. So, that's one.
 30 And then, obviously these wars, Red Sea blockages, that has led to increase in my cost of
 31 operation. Why? Because I sell chemicals and I sell dyes in big drums. I necessarily need to
 32 use only Ocean mode of transport. Of course, locally there is always road. But of course,
 33 because I am spread over globally, I need to use the Ocean transport. That's one of the
 34 disruptions that I have seen. I was talking to my supply chain guy. And mind you, in
 35 preparation of this meeting, I was talking to the supply chain guy early this morning, like, "Oh,
 36 tell me, what's the difference between your Ocean trade five years ago?" And now he's like,

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1 "Oh, no, Seema there is an AC-BC type of division. After 2020, I don't do a five-year contract,
 2 I just do three months, and now I feel I need to come down to a one-month Contract." So, that
 3 is the level of disruption in our field, right? That is another thing. And tariff, of course, less
 4 said the better. So, I'm not going to kind of dwell on those topics and others are policies
 5 because I deal with chemicals, there are a lot of issues relating to ESG right, while I myself am
 6 a supply chain. As I said earlier, brands buy or mill buy from me make the cloth and sell it to
 7 the consumers. I also buy stuff, so my supply chain, I need to be very careful, mind you. I am
 8 almost, hopefully, 2 billion, the reason I'm not giving an exact figure is because I'm privately
 9 held, but I'm a big company, mind you. Right? By Indian standards. But I deal with many other
 10 companies who are not so big and I need to satisfy a Mango or Lululemon and people like that.
 11 Hey, listen, people who, while I am good, I have a code of conduct, I'm one of the pioneers in
 12 sustainable chemistry, right? But I do have suppliers who may not. So I need to find suppliers
 13 who are sustainable and even the product that I sell to the mill, is ESG-compliant, right? And,
 14 of course as somebody pointed out labour issues or Human Rights, for that matter. Again, that
 15 is another thing which affects me because I've got large operations in China. I have suppliers
 16 who belong to, I hope I'm pronouncing this right VIGO region, right? And therefore I need to
 17 do an additional layer of due diligence where we see. Oh, apart from the FCPA. Now that was
 18 some years back, I know in all the legal seminar, we used to speak about FCP a lot, but I think
 19 that's gone now of course it's still there. But that's not the talk of the town. The talk of the town
 20 is ESG. So in all aspect, that is something which really drives us crazy.

21 **RAJ. R. PANCHMATIA:** Thank you, Seema. I think this is very helpful. Lucy, I will come to
 22 you now, I've kept you waiting for too long. I wanted to get the industry perspective first to
 23 then come to you and say, how do you see these kind of disputes. Do you see these multiparty,
 24 multi contract disputes? What are the kinds of things that you see at SIAC? And I think what
 25 Seema said, that the contracts are coming down from five years to one month, that means
 26 more Arbitration clauses, so that's the good news for all the institutions. But any thoughts?

27 **LUCY REED:** Thank you. Thank you all I think probably, unfortunately for the experienced
 28 business people surrounding me, SIAC has a great deal of and a growing deal of experience in
 29 supply chain disputes. And I want to thank in advance my colleagues who are here are India
 30 reps, Shwetha Bidhuri and Steffi, our tenures, for briefing me on this because, as President of
 31 SIAC, I appoint Arbitrators, I decide consolidation if I'm not conflicted, of course, and deal
 32 with emergency and expedited arbitrations. But I don't follow the content of the cases through,
 33 so I needed to get some research done. I start with a caveat to say that from the viewpoint of
 34 an arbitration institution, supply chain disputes usually are part of a much bigger set of
 35 disputes, Contract disputes, payment disputes, it's part and parcel and we see them in trade
 36 disputes, commodities disputes, especially Energy, Pharma disputes, and as a result, of the

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Russian sanctions and the Myanmar sanctions as well and the COVID after effect. But I can't say that there's a clear pattern that I can give about how the cases fall out. We haven't seen, really tariff disputes as yet, but the statistics are interesting. We have a notable increase in, as Raj said, multi-Party and multi-Contract supply chain disputes. In 2022, SIAC administered approximately 80 cases related to either multi-Party or multi-Contract supply chain disputes, which is 21% of the overall caseload. But then, in 2023, there were 320 such cases, accounting for almost 50% of the caseload with supply chain, in some way coming into play last year. In 2024, it went back down to about 185 cases, which was 30% of the caseload, which it's hard to tell. It may be the post-COVID blowbacks or improvements, you should say, from a procedural standpoint the main point for SIAC and other arbitration institutions would be consolidation and the importance of consolidating sometimes two, sometimes up to ten, sometimes many more Subcontractor-Contractor disputes where the supply chain. The first supply chain disruption leads to five more and ten more and 20 more as the goods get dispersed. I thought I'll give you just one example rather than talk all generalities. In one case, involving a shipment, just a plain old shipment of crude oil to be delivered by a Russian seller to two Chinese buyers. The Chinese were the Respondents. The Russian was the Claimant. The Seller, Chinese Parties claimed that a significant portion of the contract price remained unpaid. The buyers had many defences, including the delay, the disruption in the supply chain, in delivery and *force majeure*. The details aren't important. There was a Sale and Purchase Agreement and an undertaking, which is why there were two Respondents. Now, the Respondents argued that the delayed delivery of crude oil disrupted their distribution chains down the line and caused commercial losses. And when the Tribunal looked at the dispute. They looked at the CIF income terms and they found the Tribunal found that the risk in the title passed to the Buyer at the loading port and the Seller wasn't responsible for the delays after loading. Also noting the Buyer hadn't objected quickly enough and at the end of the day, the Tribunal found that the disruption in the supply chain including termination of Contracts, did not relieve the Buyer of its payment obligations.

Then again, in another recent case involving an Italian Contractor Respondent selling to a Russian Claimant, where the Respondent said that the sanctions caused the performance, made the performance illegal. The Tribunal put all the risk of the supply chain disruption on the Seller, not the Buyer and said the only remedy would be suspension of the contract. So, as I say, there's no pattern. Once the cases get into our chain of arbitration, the outcomes will be case specific.

RAJ. R. PANCHMATIA: That's very interesting to know the institution, how the records show and what the numbers show. Chakrapani, coming to you, what trends you see on the

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1 types of supply chain disputes that are coming before the Indian courts or say, using them
2 before the arbitrations in India?

3 **CHAKRAPANI MISRA:** Well, thank you for the question, and good afternoon, everyone. I
4 got so engrossed in the discussion that I was listening to that. For a moment, I took a backseat
5 and I was thinking, there are so many issues in supply chain that we as lawyers view from one
6 side whereas there is so much inside a story to it, from so many practical issues that the clients
7 face on a daily basis. So well, thank you for keeping me on this panel, and I am grateful to the
8 organisers and each one of you for sharing this. And Lucy, thank you for that very interesting
9 statistics and everything. Coming to the question, I put it this way. The pre-pandemic
10 disposition of cases or when it came to court system, it was more of a routine contractual
11 dispute in a supply chain, delayed supply cost and so on. Pandemic brought a philosophical
12 change to the approach that the court or arbitral Tribunals will take to deciding a dispute. For
13 example, when we talk about *force majeure*. Now, that clause existed in some form or the other
14 end. Almost all agreements. It was the first time that courts were taking the magnet pine glass
15 out and saying, well, you have put a clause, but it does not cover this or this aspect is not
16 defined well. Likewise, when the people talked about impossibility to perform the Contract,
17 courts came up with that nuanced reading of it, that mere difficulty is not impossibility. An
18 impossibility has to be impossibility in itself.

19 So, in a nutshell, if I have to put it, the courts' approach became more [UNCLEAR] and being
20 force of equity in India, courts try to balance the two sides because they have seen that
21 somewhere equity is balanced. But the approach was always related to the... when it comes to
22 the wording of the Contract, what the intention of the Parties was, and so on. So, that was the
23 first thing, that was COVID. This disruption because of sanctions and because of the disruption
24 in supply chain due to trade routes changing, again that has been more on severe disputes
25 where dispute, in a sense, is small. The implication on the trade is huge. So, again, courts have
26 tried to balance that, and there is a subtle difference.

27 I don't know whether others will agree, but approach of courts and approach of neutral
28 Tribunals have been slightly different. So, in terms of courts, when you are talking about
29 enforceability, when you are talking about renegotiating a fixed price Contract, the courts have
30 been very strict in that sense, whereas arbitral Tribunal in certain cases and I have handled a
31 few of them, they have been less involved, lenient and looking at the issue at least. So these
32 few trends, these should, philosophical shifts are few trends. That I could articulate here, but
33 that's what it is for me.

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1 **RAJ. R. PANCHMATIA:** Thank you, Chakrapani. I think it's very important to know as to
 2 how the courts are now looking at it and what is the court's views on these kind of disputes.
 3 Seema coming back to you, just wanted to get your views on the work that you do across Asia,
 4 what are the different differences, do you notice in dispute resolution approaches, legal
 5 systems, cultural differences, or the enforcement issues when you come across them in various
 6 settings?

7 **SEEMA MANKU:** So, we have plans in Indonesia, Thailand and Vietnam. We have business,
 8 we have sub in Vietnam and we'll open R&D labs there, right? And of course that I say we have
 9 fully listed entity in Pakistan. Of course, India is there, then Bangladesh, right? For us, one,
 10 there is a different types legal system. Let me put in this way. There are differences in the legal
 11 system in India, Bangladesh or even Pakistan. It's based on English law whereas say a
 12 Philippines is more influenced by Mexico and Portuguese, we have, Singapore again is based
 13 on English law. And of course, there are language differences. We being a Swiss entity, we then
 14 look to having more of arbitration as a dispute resolution mechanism and if the Contracts are
 15 cross-border, then it's Singapore. We use Singapore institutional arbitration. If it is local
 16 Contract, we still go for arbitration, in as much as possible, because obviously, for us, as a
 17 Swiss entity, we would like to have comfort of quicker and a dispute resolution mechanism
 18 which can be carried out in English. So, those are the drivers for us in negotiating the
 19 Contracts. Of course, there will always be exceptions, but these are the general drivers for us
 20 in negotiating Contracts in Asia, at least.

21 **RAJ. R. PANCHMATIA:** Thank you, Seema. Coming to you, Sandeep, some projects facing
 22 delays due to logistic and bottleneck issues. How should a Liquidated Damage be structured
 23 to strike the right balance, in your view?

24 **SANDEEP CHOWDHURY:** So, we've seen there's a lot of delays which are happening
 25 because of the unfolding situation that we've all spoken of now. And there's a lot of focus that
 26 is going in today's scenario in negotiating the Liquidated Damages clause with our prospective
 27 customer. Now if I word the clause too harshly, then again, there is a risk of, to some extent,
 28 overpricing the Contract. And then also number of litigations panning out of that. And if I do
 29 it too leniently, then the customer is going to take the heat or the burden. So, there has to be a
 30 perfect balance in terms of when you're drafting the LD clause. Couple approaches that we've
 31 taken and we try to follow at this point of time are, one is definitely you're putting a cap on LD
 32 right, so you're putting either, just for example, 10% of your Contract value. So, if there's a
 33 delay, instead of just going and hitting on that 10% we are breaking it into slab based. So what
 34 we are doing it for the initial four weeks so it is 0.03, 0.3 or 0.5% of the LD that you've sort of

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1 negotiated with your customer and then if the delay is beyond that, then that increases. So,
2 one is definitely a slab-based LD.

3 Second is we are also year marking LDs depending upon the nature of delay. Now, if the delay
4 is on account of my fault, say there is some manufacturing delay or there is some financing
5 delay at my end, then there is a full cap on LD that applies. But if the delay is on account of the
6 logistics and all, where my control is lesser, then we are negotiating for a lesser LD cap. What
7 we are also doing is, we are preparing a carve-outs. Carve-out on account of the uncontrollable
8 logistic risk or the delays. So, what we've seen over a period of time that the port congestion,
9 availability of shipping lines, the sanctions and all. All +this, we are trying to bucketize it into
10 an FM clause, and then when it falls within FM, there is a time extension and no LDs or
11 compensable delay, what we call it. So, if it's falling within the bucket of compensable delay,
12 then again there is time extension and instead of LD, we are also negotiating with the customer
13 in order to sort of share with us the incremental cost that we had to bear for that supply chain.
14 Then there is also a concept that we have introduced, which is a hybrid concept, where we are
15 moving LD or we are focusing on LD in terms of delay, but when there is a performance issue,
16 we are tagging it with damages, right? So, that way what happens is, suppose there is a delay,
17 in. Suppose there's a logistics delay and you don't get the product within the timeline, because
18 of which you are unable to complete the project within the stipulated timeline that you were
19 supposed to do, but you have done that. You have overshoot at the time and the project is up
20 and running. So, the windmill that we commission, that is perfectly up and running, and its
21 generating revenue for our customers. So, in that case, I am not burdening myself because of
22 the logistics delay. So, there is some sort of damages that I'm paying to the customer, but that
23 intact LD cap and all that, I am sort of removing myself. And by doing all these things, what
24 happens is, from the customer standpoint, there is some sort of visibility in terms of project
25 completion near to a perfect visibility that we can provide and from our end also. We are not
26 burdened with those uncontrollable risks of supply chain and that way, to a large extent, it's a
27 win-win situation for both the Parties. And that's how we are sort of negotiating. So, we've just
28 created our entire template of the supply chain related contracts and the clause library which
29 is attached to it. Now we've taken three or four different situations and we have plugged in the
30 LD related clauses, depending upon each of the situation. But by and large, what my team is
31 doing is they are taking this as a bible and then negotiating with the customer.

32 **RAJ. R. PANCHMATIA:** Thank you Sandeep. I think this was very helpful for all of us. Lucy,
33 in this present geopolitical issues that are going on, the tariffs issues on the one hand, the
34 sanctions issues on the other hand, what are the best practices do you recommend when
35 drafting arbitration clauses for complex cross-border supply chain contracts and what things

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1 you need to keep in mind while doing this, because the situation is so fluid. We don't know
2 what's happening on a daily basis. So what do you keep? What are your thoughts?

3 **LUCY REED:** Can you just give up two sentence answer to that, which is, despite the fluidity
4 and the uncertainties that we're all living with use a model or a template that has worked
5 before without trying to anticipate things that might happen, specific things that might happen
6 for field that you will leave out the specific thing that does happen.

7 **RAJ. R. PANCHMATIA:** Do you see the impact? Because of sanctions and because of which
8 certain seats of arbitrations become a problem, things like that?

9 **LUCY REED:** I think sanctions pose a lot of problems. They pose problems for nationals of
10 the countries that have issued the sanctions for seat of arbitration and for example, in
11 Singapore SIAC has cleared that it has jurisdiction. It can maintain jurisdiction of Russian
12 disputes and pay Arbitrators who sit on Russian disputes. I can have nothing to do with those
13 as an American national also, by the way, affirmatively sanctioned by the Russians, but that's
14 a different story. The fluidity is important, but certain arbitral institutions have blanket
15 permission to proceed despite sanctions because of the importance of dispute resolution, even
16 when there are sanctions. And by the way, thinking of something Seema said, I should have
17 mentioned about human issues. We have cases at SIAC involving disruptions in supply chain
18 of vaccine components, which are highly important to resolve.

19 **RAJ. R. PANCHMATIA:** Well, that's interesting. Seema, we've heard about various kinds
20 of disruptions. What about the cybersecurity disruptions in supply chain? And how would they
21 impact the supply chain issues?

22 **SEEMA MANKU:** So, here is the thing, right? Cybersecurity, because we all are moving
23 towards adopting technology or have adopted technology and adopting more technology, AI,
24 all of these, one way or the other, provide avenues... Okay, let me put it this way. Earlier, what
25 used to be in hard paper scattered all over your respective offices, is just available to the
26 hackers, to the, illegal elements at one place, right? Most of the time, the target of the cyber-
27 attacks are not, the ultimate targets, I mean, are not the small players, but they are the large
28 players, right? Your supply chain components, they are attacked so that the cyber attackers
29 can get information about you, the brand, the ultimate, the big fish. That is where I think as a
30 consumer or the customer, one should ensure that your own supply chain, of course, nobody
31 can be cyber-proof in that sense, but at least they have means and measures which are in place
32 and they are not vulnerable. So, of course, you cannot do for every other supply chain player,
33 but you could do for your key supply chain actors, say, for example, it could be your key raw

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1 material supplier or your key contract manufacturer. Those are somebody you should have
2 them close to you, in all respects. That is where I come from, because we've seen, in the Pharma
3 world, and this is especially there in the Pharma world, where a lot of IP which is being shared
4 between a smaller player, the larger player is lost in the cyber-attacks. And, of course, the big
5 players like banks and personal information. Of course, all those are, they are also quite
6 vulnerable. But that's given. But in the sense, like, from an IP perspective, I just wanted to
7 bring that out as well.

8 **RAJ. R. PANCHMATIA:** Thank you. It's very important because recently we had a matter
9 where a major oil gas player, there was a security breach, cybersecurity breach, and they
10 hacked the servers and rerouted the entire supply. That caused complete chaos for the
11 company because rerouting the entire supply is that we're supposed to go to a particular
12 jurisdiction went to another jurisdiction. Had to be quickly reworked, so these kind of issues
13 do happen. Arjun, just coming to you, are there any novel dispute resolution mechanisms that
14 are adopted in Port sector? These are generally you see arbitration litigation. What are the
15 novel piece in which you work around the disputes that you see in the Port sector?

16 **ARJUN DOSHI:** Sure. Of course, the Concession Agreements provide for a classic dispute
17 resolution mechanism of going into an arbitration. Mostly what we have seen is an *ad hoc*
18 arbitration, a three-member Tribunal, both Parties getting the opportunity to appoint their
19 Arbitrators, and then the two nominated Arbitrators would appoint the Presiding Arbitrator.
20 That's typically what you see in almost all Concession Agreements. But there was an outcry
21 about how this process has become so lengthy, so ineffective, that it has almost made the
22 Concessionaires out of remedy. And with that in line the Ministry of Ports, Shipping and
23 Waterways came out with certain set of guidelines which are known as the Conciliation and
24 Settlement Committee Guidelines. And what it does is that outside of the arbitration
25 mechanism you would have the Secretary of the Ministry of Ports, Shipping and Waterways
26 along with all the leaders in the shipping industry come together and then the Parties to an
27 issue, and I wouldn't say dispute, but to an issue under the Concession Agreement could sit
28 together and nominate three members from this committee, or it could be an odd member
29 committee as well. So it could be three, five, but you could choose three members from this
30 Committee, not undergo the full-fledged dispute resolution mechanism, sit across and come
31 out with solutions that are pin points for both the Parties. And we have been a prime example
32 of that. Because this is in public, I can share it. We had a long-drawn dispute with a port
33 authority. It went into a three and a half year of arbitration and then there were seven offshoot
34 litigations after the award was passed, spending almost six years into dispute space, first into
35 arbitration and then into court litigation, of course, not to mention the amount of money we
36 spent on lawyers, Arbitrators and otherwise. But what eventually happened is that when these

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1 Guidelines came out, both Parties sat down, said, okay, why don't we appoint the Conciliation
 2 Committee because they are people of repute, they would come out with practical solutions to
 3 the problem that we have had. And in less than a year and a half, both Parties walked away
 4 with amicable solution, both being extremely happy and both to the benefit of the Concession
 5 Agreement. And what it did, it did two things. One, you understand that the Concession
 6 Agreements are long Concession Agreements. They are 30 years, 45 years, further extendable
 7 by 15, 20 years with the consent of the Parties. You don't want to fight with the port authority
 8 when you are going to be sitting at that very port, operate the very terminal for the next 50
 9 years. Right? So, you want to sit with them. You want to come out with a solution which is
 10 practical, which is amicable, and which is beneficial for both of them. And what this
 11 Conciliation and Settlement Committee members do is to facilitate that conversation and
 12 discussion because they are from the industry. They would come out with solutions which are
 13 beneficial to both Parties.

14 Second, what it did was, and quite specific to our case, it gave us solutions which no Tribunal
 15 or no court would have been able to give us. Right? And because this is in the form of a
 16 mediated settlement between the Parties, I would call it that term, where they would sit across
 17 and tell you that this is the solution best for the Parties and none of the Parties to the
 18 arbitration mechanism had even asked for that relief. Right? And the Tribunal and the courts
 19 would be bound by what you ask them, but this Conciliation and Settlement Committee can
 20 suggest ways in which you could resolve disputes, which could not have been possible in a
 21 dispute resolution mechanism, which is in the arbitration or a litigation. So, I would say, from
 22 a port industry perspective, this is a great initiative taken by the Ministry having highlighted
 23 the fact that there is an issue, it takes awfully long period of time to resolve disputes between
 24 a Concessionaire and a concessioning authority. The fact that it has a long drawn Concession
 25 Agreement, period. It is in the best interest that both Parties sit across and amicably resolve
 26 the issue. So, what took us eight years to resolve, or not even resolve to come with first level of
 27 adjudication, it took us eight years, and with this mediated settlement by the CSC members,
 28 we were able to close that dispute in less than a year and a half and not to mention all the
 29 litigations withdrawn from the court. So, yeah.

30 **RAJ. R. PANCHMATIA:** That's commendable. Better resolution that quickly.

31 **SANDEEP CHOWDHURY:** I think I have one comment to make. If this is a move that we
 32 are seeing from the different government authorities, then I think the number of arbitrations,
 33 litigations which reduced by a large extent, and I'll give you my example, my previous
 34 organization, I was in the construction and infra space, right? All our clients were B2B clients.
 35 and in all the agreements on 100 percentile basis, we had a mediation, and then you resort to

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1 arbitration, and then the normal jing-bang of this score court will happen. 100% of the
2 disputes and all, we went for mediation and it was like 'my way or highway'. The price that was
3 quoted was, you just cannot even imagine that someone's quoting that price for mediation. So,
4 you'll have to resort to arbitration, although you have a timeline of 18 months. Again, the
5 discretion of the court, the Arbitrators, we've also had situation where two Arbitrators died
6 during the process of arbitration. Again, starting from scratch. And then, inevitably, if it's more
7 than 50 crores, the file would go to Ministry of Law. Ministry of Law without seeing the merit
8 would sign and say that it's a fit case for 34. And then you go to 34. 37. SLP getting converted
9 to civil appeals. A civil appeal, good seven to eight years.

10 **RAJ. R. PANCHMATIA:** That's what you..

11 **SANDEEP CHOWDHURY:** I mean that's the reality. So, that's what I'm saying if this is
12 something that's been followed by the government in all the sort of verticals, it's a very, very
13 welcome.

14 **ARJUN DOSHI:** And I think just to add to one bit to that, is that these settlements are
15 facilitated by people of repute within the government. Right? So, what generally happens is
16 that when both Parties are stuck to their own ground. There's somebody who's going to come
17 and tell you that you need to be slightly more reasonable about it, and that is a closed-door
18 conversation, not in front of the counterparty. And when it comes from them, the good sense
19 prevails, and that's when you come to a midway to be able to settle this dispute.

20 **SANDEEP CHOWDHURY:** It has to be a win-win situation for both, right? Otherwise, you
21 would always resort to litigation or arbitration.

22 **ARJUN DOSHI:** Yeah.

23 **SANDEEP CHOWDHURY:** I mean, just think of a situation in the construction space,
24 sometimes back, we also have the VVS Scheme, right? Typically, in all the arbitrations, the pre
25 and post award interest that you get is anywhere between 12 to 14%. And depending upon the
26 tenure of the litigation, in every four to five years, your principal multiplies, it doubles. So, the
27 VVS scheme came up with pre and a post-award interest of somewhere between 8 to 9%. So,
28 if I am having a litigation, which is going for seven years and typically, most of the
29 infrastructure company, they also withdraw money by paying by giving the BG, 75% and all
30 the withdraw. So, we've done a calculation. In most of the situation, it was us who were to give
31 money to the government rather than getting something out of it in the VVS scheme.

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1 **RAJ. R. PANCHMATIA:** This typically happens. Chakrapani, maybe just one quick
2 question, what are the clauses that you think are critical in detecting these supply chain related
3 issues that you will see and how Parties can mitigate this by bringing the right clauses?

4 **CHAKRAPANI MISRA:** Sure. So, my co panellist, Lucy, said very simple thing when it
5 comes to dispute resolution, clauses stick to the standard and you are sorted. I'm going to say
6 the other way around for the rest of the clauses. No, I'm not saying it for arbitration clauses,
7 she's absolutely right. I would second that when it comes to Arbitration clauses choose the
8 standard clause because lot of thought has been put in it, so no need to reinvent the wheels.
9 Coming to the question, I'll quickly run through it is, basically there is no magic clause that I
10 can provide here, which can be put in an agreement and it will sort the problems out. What
11 my experience tells me, and which I want to share with all of you, is that there is no option to
12 reviewing every word in certain clauses and coming up with your unique situations and
13 covering that. For example, *force majeure*. We have seen enough litigation in last six years to
14 see various courts across India as well as across the world. How it has been interpreted, how
15 it has worked for some, how it has not worked for some. So, you need to incorporate your
16 unique situation, what you feel will be a *force majeure* at those specific tasks. Notice. Do you
17 want to give notice? What kind of notice you want to give? What is unique to your business?
18 Or what is unique to your continuity of your supply chain? Envisage that, put the provisions.
19 Similarly, dispute resolution. There is no need to again jump the gun. You can have proper
20 escalation mechanisms, like we heard about mediation or dispute the amicable set. There are
21 settlements. Keep that. If supply chain is important to you, why not? Have the waterfall
22 mechanism where you have various aspects covered out. So, in a nutshell, I know. We are
23 running out of time.

24 **RAJ. R. PANCHMATIA:** No, no. I'm listening. I still have one question for all of you. The
25 last question.

26 **CHAKRAPANI MISRA:** So, in a nutshell, what I am trying to say is that clauses like *force*
27 *majeure* clauses for notice, clauses for Liquidated Damages, clauses for termination of
28 contract. All these need to be thought through from a unique industry perspective. There's no
29 one size fits all or a boilerplate. Think. Spend time with your advisors. Take days before you
30 come up with that clause, but cover the possible situation. That's all that I'm going to say.
31 Thank you.

32 **RAJ. R. PANCHMATIA:** Neeti is already giving me a stare. But I have just one question for
33 all of you. In less than 30 seconds, each one of you, two things that you would recommend to

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1 the Parties that they should keep in mind while dealing with disputes, supply chain related
2 issues. Starting with you, Seema. Two things. 30 seconds.

3 **SEEMA MANKU:** So, in the *force majeure* clause, please don't add like things which are
4 already happening right? Because you can contemplate it. So, that's, for example, if you put
5 right now, if you were to execute a Contract or negotiate a Contract, don't put tariffs in the
6 *force majeure* clause, because it's already happening. You can see it revolving, right? That's
7 one. And wherever possible, do your due diligence for your supply chain. Invest in tools and
8 technologies where you'll be able to see it can raise red flags. I think there are many more. But
9 then I'll, just two things. I'll stop here.

10 **RAJ. R. PANCHMATIA:** Thank you. Sandeep? So you want to go, Sandeep?

11 **SANDEEP CHOWDHURY:** I think the two important things for me, one that Seema has
12 rightly pointed out. *Force majeure*. I think there you have to gradually use your risk,
13 government risk or geopolitical sanctions or logistics risk. Just ask simple questions. What
14 happens? Who bears the cost? Who bears the pain? And then you can link into FM. The second
15 one is definitely you need to have a multi-bagging of your suppliers. Don't just depend on a
16 couple of suppliers, especially when they're supplying critical component of your final product,
17 because we've seen the entire geopolitical scenario, and we've sort of burnt our hand in terms
18 of relying too much on one supplier. there's a lot of push that is going towards localization. So,
19 in the entire scheme, of event, what we had seen is we had really strengthened our internal
20 localization channel, which is really helping us out. I mean, just to share with all of you, I think
21 a couple of days back, we've signed one of the largest Renewable Energy Contract with Tata
22 Renewables. That's an 838 Megawatt. And all the turbines with all the components will be
23 manufactured in India.

24 **LUCY REED:** I have only one thing to say, but I need 45 seconds, which is, there's a lot to be
25 said for all the major arbitration institutions, but there's no institution better at emergency
26 relief than SIAC. We're the pioneer. And in only one instance over a decade, has an application
27 for emergency relief been held back. And here, for those of you thinking about urgent needs
28 with supply chain problems in a recent emergency arbitration where the Claimant said, I've
29 delivered the coal, but it hasn't been paid for, but the Claimant didn't know where the goods
30 were. The Emergency Arbitrator granted the relief requested and ordered the Respondent
31 Buyer to inform the Claimant in writing where the goods were, whether they had been sold on.
32 If so, where and how and for how much money and prohibited the Respondent Buyer from
33 dealing with the goods, in any way that damaged the Seller. So that was an uber supply chain
34 problem where no one knew where the supply was.

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1 **CHAKRAPANI MISRA:** I will go after you. I will take 25 seconds.

2 **ARJUN DOSHI:** Sanctions regime is here to stay. And I think it's very important that
3 whenever there is an issue that arises out of that regime, it would have vast reaching
4 consequences. So, when in doubt, it is best advisable to take the right guidance, even at the
5 corporate level as well. And secondly, and this is not specific to supply chain, but generally is
6 that try and avoid going into a full-fledged dispute, considering that there is a business
7 relationship that you need to maintain. So, if there's a way out, please deal with that in the
8 most amicable way.

9 **CHAKRAPANI MISRA:** All right. So, everything is covered. So two things from me based
10 on experience. One is that, please ensure your documentation is meticulous. It will help us. It
11 will help you in your case. Second thing is, which I have done umpteen number of complex
12 cases; is your insurance. Please think and choose carefully on insurance clause and cover the
13 situations. So, these are the two things coming. Thank you.

14 **RAJ. R. PANCHMATIA:** Thank you. Thank you, all of you. And thank you to the audience
15 as well. We really had an exciting time discussing the supply chain and disruptions, and we've
16 disrupted Neeti's schedule as well. So, we're going to get some eyes very soon to say, get out,
17 but thank you. Thank you for having us here on this session today. Thank you, all of you. For
18 joining us and thank you.

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~~~END OF SESSION 4~~~

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