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CORPORATE GOVERNANCE IN CONFLICT: ARBITRABILITY OF INVESTOR RIGHTS

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ALISHA SHARMA: Ladies and gentlemen, a very good afternoon to all of you. Today marks the opening day of India ADR Week 2026, and it gives me immense pleasure to welcome you all to the Bengaluru leg of India ADR Week as MCIA completes ten years since its establishment. Before we begin with our second session for the day, please note that these are the following sessions for the day. We will have a special address by Honourable Justice Tara Vitasta Ganju followed by further panel discussion which is hosted by JSA and Rajah & Tann Asia and then we will move to have our IAW Bengaluru debate organized by MCIA. We will also have a special address by Honourable Justice D.K. Singh, after which we will formally close the day with an interactive Fireside Chat with Honourable Chief Justice Vibhu Bakhru, our guest and Dr. Aditya Sondhi. The evening will end with dinner and drinks from 7:30 p.m. onwards.

As our second session for the day is now hosted by Touchstone Partners on the topic: Corporate Governance in Conflict: Arbitrability of Investor Rights; a subject that sits on the intersection of corporate law, shareholder protection and the expanding scope of what can be resolved through arbitration. The session will be moderated by Mr. Sandeep Das. The panel will be will constitute Mr. Abhishek Goyal, Ms. Mamta Sundara, Mr. Navneet Hrishikesan, Mr. Ramanand Mundkur and Mr. Yashasvi Mohanram. Please, I request you all to please join us on this stage. Before we begin with the session, please note that this session is being transcribed by our transcription partner TERES. Thank you so much.

YASHASVI MOHANRAM: Okay, am I audible to everyone? Okay, great. So, welcome, everyone post-lunch session. I hope all of you have had a good lunch. I think this is an eminent gathering and an even more eminent panel that we have here, I mean, there are lawyers, Counsels, seniors and otherwise. There are also judges who will be making their way in. So in many ways I feel a bit like a fish out of water here because I'm still taking my introductory steps into the disputes world but hopefully the panel will more than make up for it. Just a couple of recent developments that I want to go over before Sandeep and the panel gets started.

One is, I suppose and people in the know of things will know that this is probably the conference circuit time of the year. I think last week was the ADR Week hosted by the Gujarat High Court, where I think one of the introductory sessions or introductory speeches was by Justice Rohinton Nariman. And I would highly recommend everyone to listen to his speech because I mean one, because he's just so good and doesn't miss a beat, spoke for 45 minutes covering the span from 1850 all the way to now all the latest decisions which have come out, some which he agreed with and some which he vehemently disagreed with. But what was more interesting was a couple of recommendations that he made towards the end of his speech. One was to do that with the fact that he said that the time has come where arbitration in India needs to stop just delivering a rough justice sort of a system where it is quick, it is effective but not necessarily correct. So, his view was that maybe the time has come for arbitral awards to be subject to appeal both on law and on fact, and not just on the basis of patent illegality to the High Court. And his recommendation, of course, was that rather than go to a single judge of the High Court goes to a Division Bench. But I think it's important to at least bear that in mind because as the arbitral discourse develops, one will need to keep in mind that there will be a body of precedent which will be created by the arbitral award themselves rather than just by court decisions.

And the other development that struck me was there was on one of the groups that I'm a part of, there was an arbitration expert who had put out that in his conversations with General Counsels. He sees that contrary to some of the feedback that come out at conferences like these, that arbitration may not be the most preferred form of dispute resolution for General Counsels and the survey wanted to know and better understand why that is the case; various reasons of course, whether it is speed, whether it is uncertainty, unpredictability, costs, time, institutional mechanisms, so on and so forth. So, it'll just be useful to understand from our panel members whether some of it could be true to the extent that they can be truthful about it.

Just to introduce our panellists, Sandeep Das is a Partner of mine at Touchstone Partners. There's Abhishek Goyal who is the Co-Founder, Vice Chairman and Executive Director of Tracxn, which is a market intelligence platform providing data on private companies, which he co-founded in 2013. Incidentally, Tracxn got listed in 2022. So, he's the Founder, I think a Promoter of a listed company. So that's Abhishek. Then there's Mamta, she's the Chief Executive Officer of Daksh, India's leading think tank and research organization focused on law and justice system reforms and access to justice. Prior to Daksh she used to be and we worked together for several years, she used to be at Diageo both in India and in the UK, and she used to be a Board Member on Diageo India's board here. So, her insights on some of the corporate governance aspects, especially some of the contentious matters that she's been involved with, will be particularly useful.

Then there is Navneet Hrishikesan, who's Senior Director, Legal AP JSP and General Counsel, India and South Asia at Cisco Systems. He has over two decades of legal experience. And he's a member of the Mumbai Centre for International Arbitration Users Counsel, so welcome Navneet. And finally, Ramanand Mundkur, who we've, also had the pleasure of having worked with on several matters over the years and continue to do so. He's an independent director on the Board of Federal Bank, one of India's leading listed private sector banks where he chairs the stakeholder relationship committee and he's a member on the audit and NRC committees. He's also the co-founder and Managing Partner of Law Partners, which is a boutique law firm which he founded several years back in Bangalore. So with that, I think I'll hand it over to Sandeep and I hope to have a very, very engaging and insightful discussion, thank you.

SANDEEP DAS: Thank you Yash. I'm extremely happy today that the shoe's on the other foot. As an External Counsel, I get questions from all of them over here, but today it's my privilege to be asking them the questions and get their views on the tricky things that we face day in and day out in courts.

MAMTA SUNDARA: I'm feeling like we should have been warned about this before.

SANDEEP DAS: Yeah, she didn't want them. So, the topic we have is of course corporate governance in conflict and arbitrability of investor rights. As Yash mentioned, there's been a slew of developments of late regarding arbitrations, corporate governance, etc. To my mind at least, you know, in India, corporate governance or good corporate governance is a bit like a mythical creature. We read about it every day in newspapers. It's in vogue, be it HDFC, be it Tata's, maybe six-seven years back it was Satyam. So, the way the law has developed in corporate governance and the way the law has developed in arbitration, we today find ourselves at an intersection of the two. And it's really a vexed question under Indian law whether corporate governance can be arbitrated. And I'm very glad we have this eclectic panel who can, I'm hoping, bring in their diverse experience. Abhishek, of course, from the startup world, entrepreneur who's also been an investor. Mamta, as Yash mentioned her UK experience and as a Director on Board in an Indian listed company, Navneet, of course, from his experience at an American conglomerate or I mean multinational from the US and Ramanand, who's of course sitting at an Indian bank. I'm hoping that all of these experiences are going to inform the discussion today, and hopefully it'll be useful for all of you as well.

But let me start with the lady on the panel, Mamta. So, in your experience, what are the kind of corporate governance or the good corporate governance disputes like, let's put it like that or issues that you've come across which you think are a bit knotty to unravel?

MAMTA SUNDARA: I'm not sure I would call them good disputes firstly, I'm not sure any dispute is a good one. Maybe just to take a step back and to say the experience of a listed company with the kind of disputes that you see from a corporate governance perspective would be quite different, I think, compared to even a bank or a private company or a startup that may just be prior to listing. But you know, just getting itself sorted. So, I would say take the experience with a pinch of salt, it is specific only to the context in which I was operating. I think a large part of our time and effort in the beginning at least when I joined Diageo here in India was taken up by specific listing related issues on related party transactions and they seem to be... this the regime had just started did I say. Is that correct?

YASHASVI MOHANRAM: Yes.

MAMTA SUNDARA: Yes, yeah, the regime had just been announced and implemented and we found ourselves at the threshold of multiple questions for which they were not a straightforward answers. And so a lot of the conversations that we had with our External Counsel, including, you know, Touchstone and Yash, was very much in the space of what's the right thing from a corporate governance perspective because that should inform how you would try and interpret the law. So, I would say the related party transaction piece was large. We had some Board Membership related issues about exiting directors, getting new directors on board, etc. And in one very famous or maybe infamous case, we had a subsidiary that we had set up actually in Diageo, as a Joint Venture with another third party and we were... Both parties had decided it was to launch a new product, which didn't really do well in the market. Both Parties decided that they were going to withdraw but over a period of time, the number of meetings from a governance perspective were not held, there was a whole lot of procedural lacuna, which resulted in a weird situation where we couldn't even take a step to close the company. So, I say these few examples to just give a representative feeling for the types of issues that you can be faced with.

And the last but not the least always for a listed company is what do I disclose under the LODR, the SEBI LODR rules, right? And so, while there are some specific or recommendatory sort of guidelines, there is always a need I suppose to take an interpretation based on what would people want to know and would it harm the company if you were to inform. And to constantly make weighted judgment calls on those.

SANDEEP DAS: Let me bring Abhishek in. Abhishek, because your experience as Mamta herself says might be diametrically opposite coming from the startup world and being an entrepreneur and an investor. Now are these the concerns you also share when it comes to corporate governance with startups or in that world?

ABHISHEK GOYAL: So, over years, so I was an investor between 2008 to 2010. And then I've been an individual investor in a lot of startups. I have backed over 100 companies by now. In a lot of cases, I think at least I have seen that India is largely dominated by like US or international investors where the bar of corporate governance and the entrance is very high.

So, if there is even a slight inkling that this person will have a lot of regular related party transaction, they would typically back out. And in many cases, I think we have seen overall maybe around ten cases where founders have taken out cash from the company and gotten caught later. There has been very few instances where it began with a corporate governance issue. In most cases there was a dispute first and then they looked into the books and found a governance issue which was used to get the founders out. I have only heard of one or two cases where they caught the theft first, and then they decided to let the promoter go from the company. But in most cases that I know of, it has been an afterthought and it has been used as a tool to sort of... So, in most cases when there is a dispute, they don't want the founder to keep the equity because they can create a lot of operational trouble later. So, maybe 70-80 percent of cases it was used as a tool to get them to sell their equity at a very throwaway price and settle it and instead of following it in the spirit.

But again, our industry is very tech heavy, which basically means that unless you're doing something exceptionally new and world changing, you will not get a... you will not get a funding. So typically, people are on forefront of technology will eventually get in and they are likely chances that they're more geekish in nature than a businessman. So, for example, I've seen Agnikul's journey, they are building a 3D printed rocket which is a single piece rocket engine these people are more technical in nature. So, there is lesser chances that it's an adverse selection in some cases that they don't have wherewithal to do all these things. So our sample set is very sort of one percentile of the Techkish or Geekish people who are starting these companies.

SANDEEP DAS: Very interesting. And that actually we will deal with this maybe down the road during the discussion about, you know, call options and put options and arbitrability and how investors are now leveraging these and their rights under SHAs. But Ramanand...

RAMANAND MUNDKUR: Actually, before you ask me the question, can I just...

SANDEEP DAS: Absolutely.

RAMANAND MUNDKUR: Pry a little more on something Abhishek just said, which is that where they find the fraud, they don't dispute it. And more often you're seeing disputes arise first and then looking for frauds to build the dispute. And I was wondering why that happens? Is it because at least in the VC and VE Space, if you frown the fraud, you probably written off the investment and don't want to spend any more money on it. And you see that there's very low chances of recoverability or is it some other reason and in the other cases where they start the dispute and look for fraud, what then happens to the whole issue of recovery and return on investment in those situations.

ABHISHEK GOYAL: So, there are cases... in most cases people don't discover these frauds early on. It's not very easy to figure them out because these are all small scale frauds, these are not like large amounts of money being taken out. In most cases the dispute happens because there is a performance concern. The company is doing good and one founder is getting left behind and they're not ready to leave. So, that is when most of our disputes that has happened in our ecosystem has happened there is probably one company which is consumer retail chain. And I think I really like what they are doing. In that case, they found the fraud first, and then it very quickly I think in a month or two everybody was settled because they knew that there's no chance of surviving. So, they came out very quickly. There are very few cases where they discover it and not act on it. So, that is usually in most cases they will not sit on it, that is what I have seen.

SANDEEP DAS: Thanks. And Ramanand, corporate governance at a bank or lack thereof?

RAMANAND MUNDKUR: You know, if you read the papers you start to wonder. The thing is that I mean corporate governance ultimately is about solving the agency problem in its various manifestations across various stakeholders. At banks, in my experience, the number of stakeholders and the issues that you're dealing with get a little more attenuated for two reasons; one is that ultimately, banking is about trust and the agency problem therefore, is more acute when you're dealing with relationships that are founded inherently on trust.

And the second reason, I think is that virtually all banks are listed. I think all banks are required to be listed, at least in the private and public sector banks. And the RBI also sits as a key regulator and is one of the few regulators that I'm aware of in this country that actually goes in and does a supervisory review of every regulated entity every single year. So, you don't just have Shareholder's Board and management as the stakeholders that you're solving for. You have depositors whose money is, you're effectively using for classic intermediation and you've got regulators, both the RBI and SEBI, looking very closely over your shoulders on a regular basis. And again, my experience at the Board is it still becomes very personality driven in terms of how corporate governance plays out. Some Boards take firm decisions and in other Boards, I think there was a speech just last week by Mr. Murthy, who's the whole time member at SEBI, right next to at the Taj, where he was talking about corporate governance and he said that having wise men in the room is not enough. He talked about Dhritarashtra's court, okay, where you had all these brilliant people but no one spoke up. And you could have a similar situation in a boardroom where you have all these brilliant people and no one's willing to speak for fear of upsetting the apple cart or saying something that's unpleasant to hear. And corporate governance often is about knowing when to speak and when not to speak when it matters and that then plays out in disputes.

But bringing it back to Arbitrability because it's all about these multiple stakeholders. With some stakeholders you have contractual privity and with other stakeholders the issue is more public facing. It's much larger and how you then resolve disputes that arise in that context really depend on what is the relationship between the two sets of Parties that you're talking about and I think that applies, it certainly applies in banks. But I think that applies across the board in other corporate entities as well.

YASHASVI MOHANRAM: Sorry, Ramanand, one fundamental difference between banks and maybe other corporates and particularly other listed entities is that because of the RBI rules, I suspect there's no concentration of shareholding, whereas in most other industries you will find that especially in India, I mean it's different of course in say the UK or the US, where you've got dispersed shareholding, whereas in India you tend to see promoters having 50% plus stakes and going all the way up to 75%. So, I suppose with...

RAMANAND MUNDKUR: I agree and I disagree. I agree that there is no concentration of shareholding because of the RBI Rules, but I disagree with the effect of that. You have a concentration of personalities. And if you've read any of the news articles about banks. A lot of bank related issues have been personality driven and this is not unique to India.

MAMTA SUNDARA: No, but just to go back to what you were saying about REITs, *inter se* versus REITs generally, I guess, the point I was trying to lead towards is whether there is concentration of shareholding. It may be somewhat easier to make an argument that the REITs are *inter se,* whether they are or not is different, right? It can gain the character of a *inter se* dispute much easier than when there is no concentration, there's really the world at large.

RAMANAND MUNDKUR: So, here's where it gets interesting because you've now recently in the last year had a number of banks that saw private equity investment in fairly significant, very, very large deals. So although, there's no concentration because of the RBI Rules. Well in some cases, they've actually acquired the bank and then been told that they can only vote 25%. Okay, so, you've got a mismatch between shareholding and voting rights. In other cases there's this cap of 10% of shareholding that the RBI itself imposes. But I wouldn't be surprised if even at those levels of shareholding because you do have Shareholders Agreements with those investors that you could still have disputes.

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MAMTA SUNDARA: 100%.

RAMANAND MUNDKUR: And there are arbitration clauses in there as well. Yeah, yeah so yes, it's diversified but that doesn't preclude...

MAMTA SUNDARA: Agree, yeah.

RAMANAND MUNDKUR: ...the rights issue coming up absolutely as well.

SANDEEP DAS: Yeah, thanks. Ramanand. Taking a cue from what you said about Dhritarashtra's Court, Navneet, coming from your background at Cisco, you know, I have generally seen all these large American companies now have an ethics office which sits outside of the GC's office maybe sometimes, doesn't answer to anyone apparently and is a beast of its own. You think that's something that can work in the Indian context as well? Again, I mean coming from Mahabharat, Dhritrashtra, should we should we provide for that in India as well?

NAVNEET HRISHIKESAN: Well, I think you need to look at the broader context, At least from a corporate governance standpoint, right? So, when you look at the ethics office the role is not limited only to corporate governance issues. Could be, you know, and living in India, we are a country that likes to sometimes manufacture grievances, right? So, you will find 100 emails every day coming in saying, oh, you know, this employee did that or this person did that and the like. So, the office really spends a lot of time reviewing that aspect of it, right? Which is was there any wrongdoing, were the employees behaving badly or were our partners behaving badly or whatever.

When you look at the corporate governance structure itself, I think the US tends to be a little more, I would say if you compare it to the UK as an example, right? The structuring is much more adversarial, right? So, it's very much a 'us versus them mentality' in some form and I think you can probably look at the history behind it and say it's because you know, US securities law really came out of two big events, right? One was the stock market crash of the late 1920s, which kind of drove the first set of securities laws. And the second was one that people have still not completely figured out, I think in their own heads, Enron, right? The way it came down and the impact it had on the businesses and the and the way it affected the markets. I think that if you look at it from that lens, what you really see is, you know, Sarbanes-Oxley and the rest of it that came out of it, extremely technical, extremely, I would say the penalties are fairly significant. So, it becomes very expensive for you to really survive. And similar to the to the India situation with the RBI and other people jumping in, you know, the US is not one law, right? So, there is the federal law, then it's the state where you go and register it now if you even if you take Delaware, which is probably 50% of all companies in the US register in Delaware because it's an easy jurisdiction to go and register.

The laws are always conflicting. There are different parts of it then if you go and list in the NYSE and the NYSE is set of laws. You go and list in NASDAQ, they have a set of requirements.

So, if you look at it from that perspective I would say that it has always been adversarial. The companies are trying, it's an arms race, right? The companies are trying to do something which is different than the regulator tries to step in and block it, right? That has had an impact on the way some of the functions are set up. So, you expect similar issues in India. The additional problem we have in India is the reason we get. So much scrutiny is India is pretty high on the corruption list. Now, you know, as an Indian, I can argue both sides of it to my face and I say that, you know, if you look at the FCPA violations around the world, there is not a single Indian company there, it's all European or American. But the reality is we are still very high up from a perception standpoint. So those parts become, I think from an India perspective as a India part of an MNC, it's... those are probably a bigger issue than if you look at it from as a listed company in India.

MAMTA SUNDARA: Or I guess even in the UK, it's very different. Experience of corporate governance and what it's what's expected is very different. It's very much a compliant... here's a bunch of rules and there is actually a corporate governance code, which I think is useful if everything is in one place because it helps to inform some interpretations as well. Because then a conversation about a board composition is not just about board composition, you understand why you are having that conversation, it's about governance, it's about building trust with your stakeholders. Yeah. So, you can take a principle based approach which I think is useful and they have a bit of a comply or explain approach which is nice. So you're expected to comply and if you don't comply, you're expected to explain. So your stakeholders and the regulator understands why. So, you know eventually, in reality, it is always circumstance based. It's not that I will choose as a UK company to not comply with five of these regulations. So, the optionality and the dropping of things doesn't really happen as you would be afraid of, but I think that's because they operate in an environment that is not needlessly legislating, not overly regulated. I don't think an approach like that would work in India because just from my own perspective, practically speaking, if I had an option to comply or explain, I would find many things I could explain, you know. It's easier because there is just so much compliance and the burden of regulating or rather complying with regulation is really very hard, higher up here. So, it's a very different approach I think, in how you think about it also and how therefore, you're set up and how your functions operate.

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NAVNEET HRISHIKESAN: I think that's a great point. I think if you look at it from a cultural standpoint, right? And I should not be I was in two minds whether I should speak about this or not, but there is one big difference between US companies and UK companies. In the UK companies usually the Chair or the Chairperson is different than the CEO, that is not the case in the US. Now you can discuss, you know, this can be a law school class, right? You can have a discussion about conflict of interest here because the board also decides the compensation paid to the management. But that I think, you know, a large portion of that really doesn't come out of any codified, you know, the US doesn't really say you can't... it says you can have both in the same person, but they're supposed to behave in a certain way. But I think, you see, so this is kind of the arms race that I was talking about. So, every time there is something that the statute forces you to do, people try and find different ways of getting around it. And you can argue whether, you know, there is a large body of opinion which suggests that corporate governance, the methodology used in the UK is much, much better than the one in the US, right? Now again, it depends on your where you're looking at it from.

SANDEEP DAS: Right, thanks. Yash, as a transactions lawyer, let's look at the brass tacks when you are drafting up your SHAs, when you're drafting up your documents, how do you ensure you know corporate governance standards will be met by investee companies or if you're on the opposite side as an investee company lawyer? How do you ensure that corporate governance, as Abhishek said, doesn't become is not really the tail wagging the dog, right? It shouldn't be the other way around.

YASHASVI MOHANRAM: Yeah, I mean one thing I want to say on a lighter note is that whenever our documents come up before the courts, we regularly see the... judges and maybe even some of the Counsels take a pot shot at us to say that, oh, these are all just copy paste documents. But I think we do a little more than that. But anyway, but I think when we when it comes to drafting, it's really a function of how serious the investor is about ensuring corporate governance and of course, it differs from a listed context to an unlisted context. Because in a listed context the investor is not just keen on ensuring that or the controlling shareholder, if you like, or the joint venture partners are not interested only in ensuring that their rights are protected. But also, they have a public shareholder; as Ramanand said, you're almost acting as their agent or as their representative to protect their interests so that you're not... you're ensuring that the company functions in a certain way. Whereas when it comes to an unlisted context, I would say that you've got pretty much an open book within the contours of course, what the what the Companies Act says and all of that. But otherwise you've got pretty much of a blank cheque as to what you want to have. But it is there that we see more of what you are

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saying in terms of the investor wanting more, whereas the company and the founder wanting to ensure that it doesn't come in the way of the them doing the business in the normal course. And especially, with private equity investors, this is a conversation that we often end up having as to how much do you want. I mean, you're not running the company, you just want to protect your own interests, so stop trying to meddle in what we call as ordinary course of business.

SANDEEP DAS: Very, very interesting. And Abhishek, you have a view on this as being again on both sides of the table when it comes to private companies?

ABHISHEK GOYAL: So, I think...

SANDEEP DAS: Sorry, just before you start, I mean where I'm going with this is, I think a lot of the disputes now that we see in arbitrations are emanating from, you know, unlisted companies, be it public or private? You know, the disputes on tag, drag, Put call reserved items, which we would typically say an investor would put in to punish bad behaviour and which I would think an investee would look at as some sort of leverage that the investor has in ensuring that the investee falls in line while doing the business.

ABHISHEK GOYAL: I've done my fair share of SHA work during my 3-4 years. So, I think all the points are put in with the right intent because there were bad behaviours in the past which get caught by these sections. But eventually, in all our cases, if you reach a point when there is a dispute, largely the battle is over. In a sense, that in most of our industries, actually as an India ecosystem, if you look at it, if you fund 1000 companies in a year, five companies come out eventually, which makes the entire journey worth it. All the money is just returned by these five companies. And if you look at an industry in most of our industries, you can start with hundreds of companies, but at the end it all consolidates between 2 to 3 players. This has happened in all kinds of industries and as tech has become more and more integral part of our ecosystem. It is likely to happen. So theoretically in a world if you figure out that after 10 years there will only be five legal firms in India, unless you run very hard and you actually win, there is no point of doing that business. And in one of the firms that you have invested in, if there is a dispute or an issue, largely you will not make it into top five. That is how our worlds have sort of worked. So, as an investor I would continue to put all my corner cases into SHAs. But if you ever reach a point where there's a serious dispute. it is a very high chance that it will be beyond recovery. And it is because in our industries largely like industry consolidates very, very rapidly and in our... like last 20 years, telecom has gone through this. There is now only two players. Airlines have gone through this, there's only 1 or 2 players. So largely, you can keep writing SHAs as such, but as soon as it reaches a point where there's a dispute, I think you're not in top five of that cohort and the battle is largely done. So it sort of weeds out anyways the bad players.

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MAMTA SUNDARA: And it's about mitigating loss, is it rather than making...?

ABHISHEK GOYAL: It's not mitigating. It's just eventually at that stage you are... there will be some assets which will still recover out of it I think I know that is two companies in our ecosystem that eventually recovered and did well. But largely the bar to survive is so high and crazy that unless you are perfect in all the cases there's no point of keep fighting the battle. So, at least in our industry, if there is a SHA ever opened that companies will eventually not make it to a point where the journey was worth it.

SANDEEP DAS: Very interesting, very interesting. So, the cost benefit analysis actually is maybe not I think not to get into it.

ABHISHEK GOYAL: Just to get the least amount of friction and close the company that is what our industry is. And if you look at it, I think it will continue to happen with more industries now that globally only few handful of the companies will survive. If you can't build a Toyota, why not don't even start bothering a car company. That is the bar that we are setting up at least in our tech industries and I think more industries will go there.

So, we have to learn to make sure that we preserve the rock stars and then let everybody else perish along with least fixtures. That is how SHA is being viewed by investors and that's why they don't litigate every time because we are fighting for those five companies that will come out of India that year. 2013 is when Swiggy started. From that point there are four companies that have made money and we probably funded few hundred companies that year.

SANDEEP DAS: Navneet from your perspective, you know, Yash mentioned rough justice as Justice Nariman mentioned recently and what Abhishek is now saying. You think arbitration therefore is the go to option for a GC to ensure that the companies which are worth saving are saved, get that rough justice at least going so that...?

NAVNEET HRISHIKESAN: Yeah, I think, well, I think any litigation strategy and I would put arbitration in that mix really comes out of what you want. So, there could be situations where you the *status quo* suits you, in which case a rough and ready quick justice is probably not what you want. Second, is there could be other factors involved in that jurisdiction, right? So, you know, India is one of those countries where generally speaking, there is no question about the credibility of the judiciary. It's about the speed, the time it takes to come, you know, it might be sometimes be a little bit about the technical capabilities of that particular court or the judge. But generally speaking, it's not... the bias is not in question, it's not as if I come in

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here and I'm not from Bangalore, the Bangalore court will be anti-me. That is not necessarily the case across the world right so if you go to many countries in even in our region right in South-east Asia, you will find just because you're not from that country, you will the courts will not look at you very pleasantly. So, you decide... So, first you decide which what do you want out of it, right. The litigation or dispute resolution of any sort should not be based on you know, this guy did wrong to me, so I should get back to them. That's not the intent here what is it that you want out of this whole thing. Once you decide on that then you decide on the mode. So, as a company when we deal with large deals, you know, we have built some of the largest telecom networks in India itself, the contracts have arbitration. And the reason you have it in there is because you know that by the time you get to that phase to jumping off, what Abhishek is saying, by the time the thing lands up somewhere in front of a judge or an arbitrator, you've already lost the battle, right? You've already lost the war, I mean still fighting the battle but the war is gone. You will probably have tried to settle it before. But if it does reach that stage, and I do want to take this fellow to the cleaners, I want something that's fast and quick and I want something where I can trust certainty out of the whole process.

Now I think one piece that in India creates a little bit of confusion on the certainty part is the fact that the courts keep, I would say changing the mind on what can be arbitrated, what can't be arbitrated, shareholder disputes is.

MAMTA SUNDARA: And for what reasons can you...

ABHISHEK GOYAL: And for what reasons can you appeal, right? So that creates a bit of a problem there, in terms of the whether that's a... is that a public piece or is that a private piece, you know, the courts have kind of said that you cannot arbitrate the public parts of it or the *in rem* parts of it and only the *in personam* and *in rem* can be. And that definition of what is *in rem* and *in personam* seems to keep changing, right? Let's be clear, every country has that requirement well more or less, every country more or less has the thing which says that sovereign functions cannot be arbitrated because this is largely a commercial dispute resolution mechanism. But if you keep changing the definition of what is sovereign and what is not sovereign, it leads to a lack of certainty from a business standpoint. So, I think if you ask me, that is probably the biggest issue, you know, Yash, I think you mentioned about the survey, I don't know if I took part in the survey or not, but the reality is that is what is creating the confusion here. It's not... the it's not the institutional arbitration or the fact that that's actually in many respects the best approach to try and solve disputes in this country, right?

SANDEEP DAS: So, this is what I call the ***Vidya Drolia*** conundrum being the judgment of the Supreme Court, which sort of fortified the law. But let me bring Ramanand in here because original judgment of, you know, *in personam, in rem* starts with ****SBI versus Booz Hamilton***, another bank. Ramanand from your perspective and I know that you know, you are you are deeply involved in a lot of shareholder disputes.

NAVNEET HRISHIKESAN: Not a lot, Not for the not for the firms he's a Director.

SANDEEP DAS: So, I think quality over quantity is what I meant but qualitative shareholder disputes. But from your perspective NCLT versus arbitration in a shareholder dispute or you know go for oppression mismanagement? Again, I'm not asking as a Counsel within the dispute, but you know, someone who's on a board, someone who's a commercial call on this, would you would you rather prefer to litigate in the NCLT or arbitrate in, let's say MCIA? So, Mumbai...

RAMANAND MUNDKUR: I think there's one area where India is an outlier. And this goes into this, sort of uses this as a platform of the statement that Navneet starts from, which is when you go into a dispute, that call is taken by the Parties figuring out what they ultimately want and that's the big motivator of the dispute. Tying that into the statement of where India is an outlier is on how we approach the solution to this *in rem* versus *in personam* issue. In pretty much every other country in the world what they've said is the fact that an Arbitral Tribunal cannot give you certain reliefs, whether it is, you know, winding up or any other "*in rem*" reliefs does not go to the issue of whether or not the dispute is arbitrable. If there is a contract that is being arbitrated and there are certain reliefs that the Tribunal can give you, the entire dispute doesn't have to be taken out, taken away because there are also other issues that are not Arbitrable, say fraud. And if we took that more flexible, less binary approach to what is arbitrable and what is not arbitrable, I think it would do a couple of things. It would provide far more certainty as far as investors are concerned, because the way investors behave when they see uncertainty is that they... look the market is just too large, the opportunities are just too large. They don't run away from the market just because there's uncertainty. But they do price in that uncertainty. And their investment decision is therefore, based on that price. So, it would make India more attractive investment decision from that perspective and I'm not just talking about investment decision for foreign investors but for domestic investors as well.

The second thing it would do is that it would give folks like Navneet, a real choice on pursuing that portion of the dispute that is relevant to them, because very few businesses want to dispute on points of principle. It's just too expensive. Businesses don't have the luxury of disputing

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principles. Unfortunately, I mean, that's a very cynical thing to say, but it is a reality. And so I think if we aligned a little bit more with what major markets are doing and I know Delaware is thrown in as you know, the Delaware General Corporate law doesn't allow arbitration. I think that's a mischaracterization of the issue. It's very limited in what it doesn't allow. It's specific to the charter and bylaws of Delaware Corporations. It is not it does not cover Shareholder Agreements, for instance, it doesn't cover securities law disputes which are covered under a whole different set of rules. But pretty much every other country, whether you're looking at the UK, Singapore or even Malaysia, which has a very closely aligned oppression and mismanagement regime, same history, very similar sets of... even they landed up with a different conclusion on what is arbitrable and what is not. And so, the *in rem, in personam* really needs to be sliced and diced a little further it's not whether the facts in issue are *in rem or in personam*, but whether the remedy sought are *in rem* remedies. If those are *in rem* remedies then fine, that's not something for an arbitrable Arbitral Tribunal, but if the remedy is sought are remedies *in personam* and then even though there might be issues that are more public facing, it should still be an arbitrable dispute.

YASHASVI MOHANRAM: At one point there are, I suppose this leads to the other point about whether you need to provide for party autonomy or whether you can pull in connected Parties into an arbitral award even though they're not specifically covered there because there could be certain remedies which are rights *in personam* as far as those parties are concerned. But it could be affecting the interests of a wider group of stakeholders in which case, while the Parties themselves may feel that it's fine to arbitrate on that I think...

RAMANAND MUNDKUR: Where the Indian courts have headed? What is it ***Chloro Controls*** and...?

SANDEEP DAS: Yes.

RAMANAND MUNDKUR: Which basically looked at some kind of nexus an umbrella that sort of brings these parties together. It still doesn't become *in rem*.

SANDEEP DAS: Yeah.

RAMANAND MUNDKUR: It's not... it's not *erga omnes,* it's not to the world at large, which was the original ***Booz Allen*** formulation, it wasn't just *in rem,* with remedies *erga omnes* right? Sorry for the Latin but for the non-lawyers.

MAMTA SUNDARA: Literally... changed that.

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NAVNEET HRISHIKESAN: Well it sounds Latin.

RAMANAND MUNDKUR: Yeah.

YASHASVI MOHANRAM: But for the latest test is that you claim prove somebody, right?

RAMANAND MUNDKUR: And I think the best test is that it's a whole series of documents that were done together. So there's something that ties these people together and it's still *in personam* and we're just missing a few it's akin to the necessary and proper parties for joinder in civil litigation, right?

MAMTA SUNDARA: Abhishek had an interesting perspective on this when we were discussing in the prep session, right, about how the power imbalance effectively. Could you share that I think, it'll be interesting for the people?

ABHISHEK GOYAL: No, I think we were sort of on brainstorming on Saturday and flow of the session, and I...

MAMTA SUNDARA: Also gave you the opportunity so, you know, you would know we were working very hard on the weekend on this.

ABHISHEK GOYAL: One of the points on the debate was that why shouldn't we have a much wider scope of arbitration? And at least, whatever little I have seen in our world, at least when there are investors and founders fighting on a dispute at an early stage, I think arbitration should be optional. SHA says, that you have to arbitrate before you go to court. But if there is a weaker party in the negotiation, they should have an option of not honouring that and just going directly to court instead of going for arbitration because in most cases I have seen that the party doesn't have as much money to go through arbitration and then go to the court. So, it adds as a deterrent for the party who is first the contracts are signed by an investor or designed by them for their benefit, not everything is debatable at the time of signing. And then if arbitration comes at first and it's a reasonably expensive affair for many of these people. So, I think if even if we scope increase the scope of arbitration, I think Parties should have an option of not honouring that and directly going to court, if they don't have resources to do that.

SANDEEP DAS: So two points to that. Sorry go on.

NAVNEET HRISHIKESAN: I was going to say but it's the question one of resources in terms is understandable or is it one of equitable fairness principles?

ABHISHEK GOYAL: So, it is also because when the SHA is drafted, companies don't really have any negotiating power.

NAVNEET HRISHIKESAN: Right.

ABHISHEK GOYAL: And I'll give you an example of a founder which has eventually created a unicorn. In first two months, when they were raising capital, they actually travelled by train to Chandigarh because somebody said that they will invest 10 lakhs into their company. And at that stage, if you ask them to sign SHA and say it's not a properly negotiated SHA. So, courts usually take that into consideration. But if you purely do a commercial negotiation then contract supersedes all of that. So you have to be mindful of that.

MAMTA SUNDARA: So, actually, this led to quite a bit of discussion in the group because there were two clear, I guess paths of discussion coming up. One being no matter what the imbalance of power, every contract has Parties where power is imbalanced. So, I mean the fact that two Parties who are perfectly in their senses and have had the ability to do whatever due diligence have then signed up to a contract, they should be expected then to adhere to what they have agreed. And the flip side of it being maybe the courts are looking at this public policy element to interpret more and more things in the *in rem* box rather than the *in personam* box and therefore curtailing the ability to arbitrate a little more.

SANDEEP DAS: That's very, very interesting because...

RAMANAND MUNDKUR: Just add to that, particularly in the corporate governance context. So, I we have a provision in the Arbitration Act that allows us to draft our arbitration clauses and to enable the Tribunal to act *ex bono*. I'm sorry, I'm using a lot of and I hate doing that, but basically, it allows the Tribunal to go beyond the letter of the contract, right, which Arbitral Tribunals tend to stick to because that's their that's their mandate, that's their brief. I know whenever I've drafted a Shareholders Agreement with that thrown in, it's been thrown out by the other side because they don't want issues discussed in equity and good conscience. But in the context of corporate governance, we talked a little while ago about how corporate governance could be glorified you comply or explain and all of this. In fact, corporate governance goes beyond and in the boardroom corporate governance goes beyond what you're told you have to do and it necessarily should...

MAMTA SUNDARA: Yes, should.

RAMANAND MUNDKUR: Because corporate governance is actually about what processes and controls do we have to deliver value to all stakeholders fairly and I underline the word ‘fairly’. And so particularly in the context of corporate governance disputes. And this is a question, I'm just throwing out there, is it more appropriate that when you're looking at issues that are based on hortatory principles, on ethics, that there is provision for the Tribunal to go beyond just the letter of the contract? And look at the spirit of it, look at the equities, look at the fairness involved.

ABHISHEK GOYAL: So, I have a counter question. So, there is this whole transaction within Amazon, Biyani’s, and then they had Reliance name under non-compete you can't sell the company to. So would you expect arbitration from to be honouring that or would you say give a public good, so many jobs will be lost, so we should allow that transaction? So, either....

SANDEEP DAS: If I can just comment on that.

ABHISHEK GOYAL: Yeah.

SANDEEP DAS: Just I mean just for everyone's benefit, of course I know the view Justice Vibhu Bakhru takes, which is which is and he was sitting on he's the Chief Guest for today and he was sitting on the arbitration roster in the Delhi High Court at that time, which was at an Arbitral Tribunal can do everything that a civil court can do and may again be a bit of a outlier view now that we are seeing Westbridge and Anupam Mittal and you know, it's again becoming a vexed question, but that was in the context...

RAMANAND MUNDKUR: ***Gayatry Balaswamy.***

SANDEEP DAS: Correct the...

RAMANAND MUNDKUR: Justice Nariman talked about...

MAMTA SUNDARA: His favourite.

SANDEEP DAS: That was in the context of whether an arbitrator can adjudicate fraud in an arbitration which requires, you know, detailed adjudication, looking at evidence, but do you think that, that is a view that should actually prevail that in the context of what Abhishek has asked?

RAMANAND MUNDKUR: No, I think that takes, that pushes the needle a little too far. The point I'm making is that the statute already and the legislature already contemplates that even in contractual disputes, there is a need to look at the fairness aspects of the contract or of the principles underlying the contract.

MAMTA SUNDARA: But the specific issue...

RAMANAND MUNDKUR: But if you're bringing in issues of fraud, there is I mean, by definition a fraud is supposed to be something that's against the state, right? So, I wouldn't go that far. But where you're talking about issues of multiple stakeholders, Byju's I think was an interesting example. Because it wasn't just Shareholder's dispute. One of the things that was hanging around the margins on that Shareholder dispute and or a creditor dispute was what happened to the people who signed up for those courses and how were they dealt with, which is which is a much. I don't believe that side of it should be arbitrable which is not to say that the shareholder portion or the creditor portion could not be.

SANDEEP DAS: So, that's very interesting. You're you are saying that different. So, same set of facts give rise to different causes of action and different remedies.

RAMANAND MUNDKUR: Yes.

SANDEEP DAS: But then what happens to the often criticized yet celebrated judgment of ***Sukanya Holdings?*** You can't spread cause of actions and therefore and I would I would like to come in here right? Sorry...

MAMTA SUNDARA: How then do you get certainty because you...

SANDEEP DAS: Correct.

MAMTA SUNDARA: ...can have an award, but you know that you could have a... already do have and...

SANDEEP DAS: And from your experience multiplicity of litigation from a public policy perspective, does that not give rise to multiplicity of disputes, multiplicity of litigations

MAMTA SUNDARA: Absolutely does.

RAMANAND MUNDKUR: It does. It would... and it would be a problem in a world where the public sector has not frozen out the private sector from approaching the courts. But if you look at the reality of what you have today in terms of litigation overall and dispute settlement overall, you've really literally got a situation where the even the limited recourse that the private sector has to arbitration is now being shut down because of ***Sukanya Holdings.*** So, you can't even go and arbitrate the limited remedy and the limited cause of action that you have on contract because there are ancillary issues involved in that.

ABHISHEK GOYAL: Blocks you completely.

RAMANAND MUNDKUR: Yeah.

SANDEEP DAS: Right. Yes, I would like to bring you in now at this stage as again as a as a lawyer who negotiates these documents day in and day out in a listed company context in private companies, in startups with, you know, private equity funds, all option or a put option, when an NCLT injunction at right and that's what's happened in in ***Westbridge, Anupam Mittal.*** We've seen a few other cases like that where two and as Abhishek mentioned. A founder may not want to arbitrate in Singapore, the cost may be too high, whatever be the reasons. I mean, I don't think Anupam Mittal would have that problem, but whatever be the reasons, how do you sort of view it and advise your clients on the next set of documents that you're doing, when knowing fully well that a precedent can basically, you know, injunct exercise of their put or their call as and be characterized or mischaracterized as oppression mismanagement?

YASHASVI MOHANRAM: So, two points there. One, is going back to what Abhishek said about whether an arbitration could be too costly from the perspective of say, the founder or the company and I think there are invariably the investor, so to say, or the controlling shareholder will get their way in to say that, look, a dispute resolution mechanism is meant to be a deterrent. So we don't want either side to be launching into a dispute without thinking through the implications of that. But as far as the regulatory interplay is concerned and we're always conscious of this, and particularly when it comes to foreign investors who are investing, it's always a question: are you entitled to a assured return? Because what does an investor want, especially if you're a private equity investor, you will want return on your equity, and unfortunately, you can't do that in India for equity instruments or even quasi-equity instruments which are fully convertible. So, we are constantly having to keep track of where the law is on enforcement of either whether it is damages or whether it's enforcement of put options, what is considered to be punitive, what is not considered to be punitive and we try to draft around it. But it is always an overhanging risk from an investor perspective and clients, as Ramanand say, said they almost walk into it with their open eyes. But they almost pricing this risk to say that if there were to be a default event and if your nuclear option is that you have an option to sell back to an Indian party. You know that it may not be fully enforceable. For various reasons, it may not be enforceable upfront, it may not be the arbitral award which you get overseas may not be enforceable in India. And there are ways to structure around it by saying that let the Indian promoter whatever identify, a foreign counterparty who will be the who will honour the put option, so on and so forth. But it's constantly we are trying to, you know, draft around it and build in as much of alternatives as possible and I think the latest decision of the Delhi High Court, which I think it was taken to the Supreme Court in ***Nine Rivers*** and where the SLP was not was not....

SANDEEP DAS: It's still pending.

YASHASVI MOHANRAM: ...No, no, no, the Supreme Court disposed of the SLP.

SANDEEP DAS: Oh really?

YASHASVI MOHANRAM: Basically the Delhi High Court judgment is still standing. I think it's helpful in that at least that they say that any of these issues should be raised before the arbitral Tribunal rather than at the stage of enforcement. So, at least you know for a fact that when you once you are done with the arbitral proceedings, if you have emerged successful there that this is not going to be a roadblock in trying to enforce the arbitral award in India.

SANDEEP DAS: So, your you mentioning about ***Nine Rivers*** actually takes me back to 1984 ***LIC versus Escorts*** Lord Swaraj Paul and how under the regime he was struggling to become a Director on board. But from your perspective. Again Abhishek, I mean question for all of you since you've also, you know, dealt with cross border issues. You think FEMA, Foreign Exchange Management Act arbitration and now of course we have the ***Tata Docomo*** judgment of the Delhi High Court, do you think that has also always been an uncertain position thrown you know always that door is left ajar for a domestic party to challenge enforcement on FEMA? And how does that play out when you think of, you know, arbitrating or going to a court?

RAMANAND MUNDKUR: It's a tough question to answer. I think the bulk of FEMA compliance issues the courts have seen as a process and not a substantive in bar to enforcement of an award or enforcement of a contract. But there are complications that continue to confirm, for example, if I'm not mistaken in the ***NTT Docomo*** case. They said that the put option of the call option or whatever it was damages and not an assured return on investment. And an award for damages is a current account transaction which is freely permissible under FEMA. But what if that's coupled with a sale of shares and a sale of shares is clearly a capital account transaction, then how do you enforce the award? And you know, you bring in all these uncertainties because of regulatory restrictions that are there in FEMA. So, I honestly I don't know the answer to your question. Lawyers will stay in business for a long time.

MAMTA SUNDARA: In India generally, so I wonder Yash, from your experience just as a transactional lawyer, then are you thinking when you are thinking about these remedies and all the potential alternatives in your clauses are becoming pages long because you're trying to think about every eventuality, are you also thinking about what the foreign exchange implications are taking any of this money out?

YASHASVI MOHANRAM: Absolutely. And what we try and build in is to make it as self-help as possible so that you avoid having to get into an enforcement situation where you go to a court, you go to an Arbitral Tribunal and you're then stuck with these issues. Because you never know once the ball is in the court of is in the court of a court or in the court of a regulator, you never know what your answer could be.

MAMTA SUNDARA: Yeah.

RAMANAND MUNDKUR: And I can tell you what's happening on some deals that at least three deals that I'm working on right now, which were both which are both US-India deals. So, the there's a US entity, there's an India entity, investor coming in or buyer coming in and the way these deals have all been drafted is that the India piece is purely a valuation piece because you want to make sure that you don't have you know, you don't have tax proceedings. So, you do a fair market value as per income tax law to show that whatever consideration you're paying for India is justified, and all the recourse, the remedies, the reps and warranties, insurance, everything is in the US and only in the US.

SANDEEP DAS: Right, Abhishek, anything you would like to add to?

ABHISHEK GOYAL: So, I think...

SANDEEP DAS: I know you've tried to raise money outside India as well in the US, dealt with funds outside of India.

ABHISHEK GOYAL: So, I feel that we are trying to build a parallel system primarily because the speed is a concern, yeah shouldn't we put all our mindshare and actually solving that why not create a specialized branch like contractual kind of whatever system you create, it will take 50 years to solve it because there are thousands of corner cases and you want to like what Namnetes had touched a chord with me in... we trust the court's judgment, we don't go inside thinking that the judge will get it wrong. You usually go thinking that largely if I've not done wrong, nothing will happen. We should preserve that spirit and the courts have solved that.

YASHASVI MOHANRAM: Well, as it happens, the NCLT and the O&M remedies are summary remedies and they are meant to do that, but that's all bandwidth they're like that, but the point is we know that it does not operate the same way in practice. I mean.

MAMTA SUNDARA: there's a new National Tribunals Commission that's come up to look at tribunals, unfortunately NCLT is out of their jurisdiction.

ABHISHEK GOYAL: But we should design a system.

MAMTA SUNDARA: I agree with you.

ABHISHEK GOYAL: Like a system, I want my kids to be able to have a system where you can trust the court as much as we do it today, but work it for companies and make it faster

MAMTA SUNDARA: And see it in your lifetime.

ABHISHEK GOYAL: Yeah, I think that happens. That would be the ideal answer that I think.

NAVNEET HRISHIKESAN: You know, keeping the Shareholder part of it and Shareholder dispute part of it, I think the... and I think I feel morally obligated to say this since we're sitting at MCIA event. I mean, I think the arbitration tries to cover scenarios which are not generally available in the country, so let's say there's a technical issue that you are facing or a new type of commercial model. I think it's too much to expect the courts which are also handling property disputes and everything else to get you create...

ABHISHEK GOYAL: Absolutely. That's why a specialised...

NAVNEET HRISHIKESAN: ...You create a specialized group. That's what arbitration is trying to solve. Now the challenge I think to a certain extent is full certainty only comes, I think it's the point that you made, right? Full certainty only comes once you have had the meeting with the regulator. Unfortunately for us, the reality...

RAMANAND MUNDKUR: This used to be like that. Now even after that meeting you still are...

NAVNEET HRISHIKESAN: Unfortunately then that's the reality, right? So, you don't know what the hell is going to hit you tomorrow until it actually hits you, right? So the one way to work around that was if you and I are agreeable, then we will do it by arbitration, which is a person we kind of generally we choose or somebody knowledgeable will choose who will know something about it, right? So, that was kind of the thought process here. Now unfortunately, and I'm presuming our next guest has not entered yet, the problem is the courts keep changing the mind. So, they would rather allow the arbitrators and the ADR to take on the workload, absolutely, but you know, still have a say it's a bit like the like .

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MAMTA SUNDARA: You still have a say.

NAVNEET HRISHIKESAN: I just I was joking with that... left my kid in college recently, right? So one level you are happy he's out of the house. Second level, you are scared you are worried how much you are spending with the credit card he has taken from you. So, you want to control it. So that's unfortunately the situation we are in.

MAMTA SUNDARA: So, I think in... I mean in fairness, there is an element of not necessarily only control, I think a public policy view that a judiciary can hold, which an arbitrator, I do not think will consider. It is not within their remit to consider and they are right in not considering it. But some disputes will have that element. So, it is the reason we are having this discussion today. I feel is because it is a complicated problem, it is not straightforward and there is not an easy answer and that is why there is so much back and forth even within the judiciary with judges taking different views because the way to approach it is not straightforward. I do think there is value though, in someone sitting down and maybe doing a real analysis of all the jurisprudence to say here is what we've seen in India, here is what we see in other countries. For example, say in Singapore where or London where there are also arbitration centres, how do things work there and here is a recommendation. And maybe we could do something with that to help resolve the uncertainty a little bit. As is, I think we will keep flip flopping like this depending on which judge is looking at an issue, isn't it?

ABHISHEK GOYAL: I'll extend Navneet's statement look, so the day you feel that your kids are making as great wise decisions as you are on your credit card spend, I think you'll stop looking at it and that's how I think arbitration should work.

NAVNEET HRISHIKESAN: I don't think that they will work

ABHISHEK GOYAL: So, but so, I'll give my example. My son is like now five years old. He does all his shopping himself. Go to the mall. He is able to pick and he has better success rate on items for himself than me. So, I think arbitration has to deliver that kind of trust, so that's when you will feel that this whole entire effort of making it faster is worth it, otherwise it will control will keep going back to the court.

SANDEEP DAS: So, very quick last word, I think we are all out of time now. You know, we've seen a lot, a whole host of these corporate governance disputes, Zee, Sony, Indigo, TATA Mistry, et cetera et cetera. Just very quickly, do you think arbitration and all of these did not actually go to arbitration, but do you think arbitration would have been more efficient, would have delivered more certain outcomes. I know that Tata Mistry is still alive, the buyout has not happened. So would there be like more certainty if these governance disputes had actually been arbitrated?

YASHASVI MOHANRAM: Okay. Just a one line answer, given that we're running out of time, is that if absent fraud or absent a regulatory interface, I think they would, they could be and if there was an underlying agreement they could be, but as Abhishek was saying in invariably in all of these cases either fraud is pleaded first or the fraud comes in later.

SANDEEP DAS: Ramanand?

RAMANAND MUNDKUR: I don't know. I think and this goes to Abhishek's point as well about arbitration creating that trust. It might create the trust as far as the general public is concerned, in terms of being an option that is used. But as far as the Parties to the arbitration themselves are concerned, very often we have this habit in India of just not giving up and continuing to appeal the unappealable.

MAMTA SUNDARA: Absolutely.

RAMANAND MUNDKUR: And so, that finality of the award never seems to establish itself sufficiently strongly enough and if there were a focus on that side of it, then I think arbitration would become a far more powerful tool in India. And honestly, the courts can deliver that. They can become stricter on saying and there has been in fairness, there has been an attempt by the Indian courts to do that. But it's a bit of three steps forward, one step back.

MAMTA SUNDARA: So, let's not forget we are talking about a narrow issue on investor rights arbitrability. There is a larger universe of commercial disputes that are getting arbitrated and are not coming to court every day. So let's not let's not forget that actually it is effective, it may not be perfect.

NAVNEET HRISHIKESAN: I think, I'm going to ignore the question in the true form of, you know, the how you handle...

MAMTA SUNDARA: For General Counsel.

NAVNEET HRISHIKESAN: I'm going to say that I must say that Ramanand has proven why he got seven gold medals in law school.

MAMTA SUNDARA: I agree.

NAVNEET HRISHIKESAN: You had to bring that in somewhere and Yash was even though he refused to say it so I just want to say that that was the case.

RAMANAND MUNDKUR: That's right.

SANDEEP DAS: Mamta, Abhishek?

MAMTA SUNDARA: I don't actually know enough about the specific facts to make a statement so I think I will refrain.

SANDEEP DAS: Likewise okay. I mean now I know we are all out of time, but if there are any questions I think the panellists would be very happy to take them. No?

NAVNEET HRISHIKESAN: Unlike Sandeep, I can see her standing there. I'm getting as nervous as she is .

SANDEEP DAS: Thank you very much to all our panellists, thank you. That's been our time for today.

NAVNEET HRISHIKESAN: Thank you very much.

ALISHA SHARMA: Thank you so much to Touchstone Partners for truly enriching session, and thank you to all the Panellists and Moderator. The arbitrability of investor rights is a frontier that will shape corporate dispute resolution in India for years to come, and we are grateful for their insights. Now, I would request the panellists to come ahead and get a group picture. We will begin the next session shortly.
