

CONSTRUCTION LAW: PECULIAR CONTRACTS, PECULIAR DISPUTES

SESSION-1

SPEAKERS:

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ALISHA SHARMA: Ladies and gentlemen, we now begin with the first session of the day hosted jointly by Asian International Arbitration Centre, Khaitan & Co and Society of Construction Law. Construction contracts occupy a distinct place in the world of commercial dispute resolution. They are typically long term multi-Party arrangements involving complex risk allocation, technical specifications, delay claims and valuation disputes; features that set them apart from more conventional commercial agreements. These peculiarities often translate into disputes that call for a specialized understanding of both, contractual framework and the underlying engineering and project realities. Our first session takes up precisely this theme aptly titled "Construction Law: Peculiar Contracts, Peculiar Disputes." This session will be moderated by Gaurav Juneja, and he will be joined by Mr. Animesh Bordoloi, Ms. Mehak Oberoi, Mr. Ratan K. Singh and Robert Whitehead. I would now like to welcome the panellists on the stage. Thank you.

GAURAV JUNEJA: Good morning, everyone. I hope I'm audible. So, thank you very much for showing up in such a large number. It makes me feel that all of you are Construction law enthusiasts. I mean, we were informed that we would be starting our session at 8:45 AM and the session is starting at around 9:20 AM And the most common cause of delay in any construction project is a delay in handing over of the site. This is our site. So, I mean, I would want to ask a couple of questions from the audience before we begin. Do you think that we are eligible for extension of time? Please answer by show of hands. Very few of you. Do you think, all those who agree that we are eligible for extension of time, do you also think that we are entitled to prolongation cost? Please show by... Great, you are my friends. One round of beer from me after the session gets over, and provided we get the prolongation cost.

So I'm also a construction law enthusiast, I'm a lawyer, construction lawyer, and when my friends asked me about my I mean, the lawyer friends who are working in different practice areas, when they asked me about my practice, I tell them it's a very complex practice; construction disputes are very complex. And they smile at me and say, that these are just contractual disputes with some fancy words. So why do you think it's so complex? And I always tell them I wish it was that easy. I mean, that would have saved us a lot of sleepless nights. In construction projects, two experts who are equally perfectly competent, can reconstruct two different histories on the same project. Expressions like delay with disruption, delay without disruption, disruption without delay, these are not tongue twisters; these are actual claims. So I mean, I again ask one more question. Do you also think that standard principles of Contract Law are sufficient to resolve construction disputes? Please by show of hands. Only one. "You too, Brutus?" So, I mean I agree I mean the construction disputes are basically a contractual dispute but construction contracts they work in a very different manner, and that is the reason why this topic which is a very apt topic, which is construction disputes or Construction Law:

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Peculiar contracts, peculiar disputes. And to discuss this further, I have with me Mr. Robert Whitehead, who is a partner and head of dispute resolution practice of a law firm leading law firm in Dubai that is HAS Hamdan Al Shamsi. Robert, over to you. Thank you so much.

ROBERT WHITEHEAD: Thank you. Well, good morning everybody. It's a real pleasure to be here and thank you to the organizers for the opportunity to speak about the subject, which, in my experience, has a remarkable ability to bring lawyers, engineers, quantity surveyors, project managers and occasionally bankers in the same room, usually because something has gone terribly wrong. But let me start with a proposition. So imagine if I asked to sign a contract to buy a car that hasn't yet been designed. So one way you'd pay for over three years, and whose engine was swapped halfway through, and where the mechanic building it also gets to decide whether they've been overcharged. Most people would be upset and walk out the room, and yet more or less, this is what we face when we see a construction contract. We fix the price, we sign before the work is truly known and the project runs for years, and it succeeds only if many Parties keep cooperating throughout. So a construction contract is simply not an ordinary commercial contract, a construction contract is the exact opposite. It's not a snapshot, it is a long term relationship with a legal document attached. So, what we're here to talk about today is peculiarity, and I'm going to describe an almost every peculiar dispute that I've ever seen or been instructed on flows from one simple feature, that the contract is unfinished at the moment of signing, and every everybody knows it will move, the goalposts will shift. So the scope will move, the time will move and the price will move. So, peculiar contracts inevitably then lead to peculiar disputes. And peculiar disputes then lead to arbitration, which we're here to talk about today. So get the contract wrong and then we inherit the dispute.

So there are three links in the chain, and I think the starting point what we'd like to talk about today is the FIDIC. Obviously, the contract within the contract. So we all know FIDIC is a default template for major construction projects and is routinely followed both in the UAE and across the wider Gulf area, but standard in FIDIC is often misleading. FIDIC often comes in two halves as we all know the familiar general conditions and then the particular conditions. So, when someone tells me and when we're instructed on claims this is a FIDIC contract, my first question is always which FIDIC contract? And then the second question is to show me the particular conditions. So first practical tip is always don't begin with the clauses you know by heart; instead begin with a particular condition that you don't know.

So, we then come to two things which I think are very important in any construction dispute - time and money, and here the peculiarities really begin to bite. So if we take liquidated damages, for example, so often called 'delay penalties', in practice, whether they apply or not and whether they are properly triggered and whether the contract is actually entitled to more

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time, can actually become an arbitration in and of itself. So we've also got prolongation disruption. Obviously, we know prolongation is the cost of the project taking longer, site staff still being on the payroll, the tower crane still standing, the site office still lit... we all know the particular issues. And then disruption which is slightly more subtle, which is the lost productivity; the same people getting less work done because work out of sequence or constantly being moved around. So, then there's problem which keeps obviously us construction lawyers up at night is concurrent delay.

Picture a project delayed by two independent causes at the same time. Say unusually severe weather which the employers risk, and a late delivery of steel which is a contractor's fault. So both delay completion and both are running at once So who pays is the question? Does the contractor get more time because the weather would have delayed him anyway, or does he get more money when his own late steel would have delayed him regardless? So we're seeing, in the UAE, some service and supply issues, obviously given what's happened with the conflict, but it's handled it extremely well, we would say. So the other factor obviously, with concurrent delays, one of the hardest questions in the whole field is peculiar is precisely how long and overlapping and many handed work. So, another factor as well in terms of a peculiarity is structural. So, an ordinary contract has two Parties, a construction project is a whole chain of them. So to hold that chain together, the industry has developed some devices back-to-back terms as we all know collateral warranties, innovation all these kind of things. But ultimately the key factor is cash flow, which is the lifeblood of the contract. So in terms of the financial architecture, we've got advance bonds, performance bonds, and interim payments. So these are some of the key factors.

What briefly I'd like to talk about before I pass on to my panellists, is the UAE. Obviously I'm from a lawyer based in Dubai, a UK solicitor. I've been there for approximately nine years now. And the key change in Dubai has been the New Civil Code and it's created a further wrinkle, because it replaced the Civil Code with the federal decree, which is 25 of 2025, and it means for decades of familiar law which has been replaced in us, practitioners on the ground in Dubai have now had to interpret these new provisions. So essentially a UAE construction contract, some of the most important terms are the ones which are never negotiated and which spent months' negotiation every clause and ultimately, decides the fate of the contract. So the other factor which is very important is the steps we cannot skip, which are the multi-tier clauses. So that's a trap that often catches people not being allowed to start the arbitration yet. Construction contracts, especially FIDIC, often make a climb staircase first and the engineer. So only then do you get to the arbitration. So these again are very polite suggestions. They can be condition precedence and each step of opening a door. So, for me the closing key takeaway from my end is obviously having travelled some time here, is that construction contracts are

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peculiar because they bring together technical complexity and years of performance, multiple Parties and mandatory legal obligations, all in one project. So, it can be peculiar for the same reason. It isn't enough to know the law instead you need to understand delay programming quantum FIDIC and above all what actually happened on the project, because that is the key the contract tells you the rules, the notices, the deadlines, procedures and legal framework. The project tells you the story that lives aside, lives on the site. So, not only the contracts and you're arguing against the abstract, not only the projects and nowhere to put the story, so thank you very much and I'll pass it back on to the panel.

GAURAV JUNEJA: Thank you. Thank you Robert, just one question on what you mentioned. So, a lot of Indian entities or contractors are now investing heavily in UAE, and you talked about a new UAE Civil Code. Does it materially change the risk allocation for contractors and engineers, when will Parties now need to rethink on how to draft construction contracts in UAE?

ROBERT WHITEHEAD: Yeah, I think that's important. Obviously, there's certain mandatory rules which are written into construction contracts, whether the Parties negotiated them or not. And you've got the, you know, the most striking is the decennial liability factor. So for 10 years after handover, the contractor and the supervising engineer can be jointly liable for a building's collapse or a defect which threatens its structural stability. So I think the UAE, the new code has solidified a lot of those provisions and made them more transparent than before. And I think the key point here with this decennial liability point is the 10 years' joint liability, strict liability and no contracting out of that... So it's a clause which limits or excludes, and it is void. So yeah, I think the law obviously overrides the contract there, which I think is very important for us practitioners.

GAURAV JUNEJA: Interesting.

RATAN K. SINGH SA: On the liability, this is something very unknown concept for Indian construction industry. In fact, three years back I had occasion to speak on this; the decennial liability in South Africa in a conference. The decennial liability is a concept where the Developer is held responsible to take care of the structural stability in the facade ETC of any structure made and this is very common in many other jurisdictions, and including in civil law jurisdictions, in UK, in other places, and you have a statutes governing this. So far as India is concerned, only where you can see the decennial liability concept, DDA as a Delhi Development Authority (DDA) has a provision, it has it has back off Institute. So DDA says that a plot size exceeding around 650 square yard, if there is any construction on such a plot size and that there is any structural defects and so on and so forth, in that case the developer

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can be held responsible, otherwise you don't see anywhere else in India about this the decennial liability.

GAURAV JUNEJA: In fact, in most of the cases, what we have seen that there is a defect liability period clause in the contract, and once that period is over, I mean the contractor is free from any kind of claims; only in the cases of latent defects. But in most of the cases where we have seen that after the completion of defect liability period, the owner struggles to claim any damages from the contractor.

RATAN K. SINGH SA: Actually, Defect Liability clause is restricted to a year or two.

GAURAV JUNEJA: Correct.

RATAN K. SINGH SA: That's it. It doesn't go beyond that. In fact, in UK, you have multiple statutory provisions, under which even the occupier who buys the flats from, you know, even the first allottee, they get such a protection from any such defects. We need to look at it, yeah.

GAURAV JUNEJA: Thank you, sir. Thank you very much. We now move on to our next subtopic. All of us have been hearing a lot about use of AI in construction projects. There's a lot of discussion about it that it's going to resolve the issues or would be able to spot the problem earlier. So before I move on to my next panellist, again, I have one more question for the audience. How many of you think that the AI would be able to spot a problem on the project sooner than humans can? Please raise your hands. Wonderful. I see a lot of a lot of less... I mean very less hands who think that AI would be able to spot the problem earlier. I mean, to discuss this aspect further, we have Mehak Oberoi with us. She's a construction lawyer herself, and she's India's first certified woman construction mediator. She's also the founder of ConstructHER, Legal Network. Mahek over to you.

MEHAK OBEROI: Thanks, Gaurav. Okay, so I think the topic that we've beaten down to death is the fact that how AI makes our efficiency better or summarizes contracts or may take away the junior roles, etc. That's why I chose to concentrate on this specific segment today, which is that can AI identify a dispute before a lawyer can even call it a dispute? Now, I think all my panellists will agree to me that, agree with me that on a construction project, the claims arrive much later, but they've germinated much before on the site. At the time when there is a site issue like Gaurav had said, or there is an interface issue or there is a supply procurement issue. And at that time, we see it only as a project management issue. One year later, we are scrambling to collate the documentation to get a claim together, and two years later, we're trying to reconstruct the story to put it in front of an Arbitrator.

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1 So, let me put some facts or stats in front of you. In 2025, HKA did a study of 2,200 distressed
2 projects across 114 countries, and the combined value of the projects was around \$2.43 trillion,
3 and the claims that amounted to about \$95 billion. So, it was crossing the mark of about 33%
4 of the contractual budgets. That is the kind of colossal impact that we are looking at in
5 infrastructure and construction projects. And that's exactly why we need AI tools to be able to
6 identify live project events and correlate them to contractual consequence. So, imagine a
7 scenario where you have an EPC contract. The drawing is delayed by the employer, the
8 contractor writes to the employer to accelerate the approval, it doesn't come through. He
9 records it in the meeting of minutes that they have on the site, the program is slipping up.
10 Now, all of this can get identified in a tool with live data, it can be connected to a contractual
11 consequence if the tool has been fed with all the bidding documents. I'm not only talking about
12 your GCC or your SCC, I'm talking about 1,000 pages worth of contracts which have your
13 technical submissions, they have definitions and amendments and the bidding conditions;
14 there's just so much to it. There are... one clause is qualifying another clause in the contract.
15 So, if all of that put together can give you a contractual knowledge graph and you have a live
16 project event, you will be able to detect issues much sooner.

17 Now, the thing is that one would look at this even as a documentary exercise, but it's not. You
18 can look at... you can go further ahead and look at image generation recognition through AI,
19 you can feed that in your BIMs, and then you can use that data and again compare it to the
20 program and see where the inconsistencies lie. So, now you can imagine you have a program,
21 you have live events on site, you have a contractual record and you have a contractual
22 knowledge graph, and they're finally speaking to one another, and that's what we really want.
23 But the problem is that we understand the potential of it, and we want to adopt AI, but we
24 haven't actually gone down to implementing it in a manner that suits the needs of the
25 construction industry.

26 RICS conducted a survey last year again of about 2200 professionals and they said 45% have
27 not yet even started using AI and 34% were still at the pilot stage. That's the kind of gap we're
28 looking at after been harping on AI for the last two years now, almost. And I want to leave you
29 with another thought. I think with all of this that we are discussing, we will also be... have to
30 be mindful about the downsides of it because I think it's also going to change the way we
31 interpret knowledge *per se* you know, borrowing a line from I think Spider-Man's father, he
32 said that "With great power comes great responsibility." So with great knowledge also comes
33 great responsibility and accountability. I'll give you an example to kind of connect the dots.
34 We have the FIDIC contracts, they require a claim notification period of 28 days which is
35 supposed to start from the day the claiming Party becomes aware or ought to have become

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1 aware. So, I want to leave you with that thought that what will ought to have become aware
2 mean in that world that we are going to step into now. Thank you.

3 **GAURAV JUNEJA:** Mehak, just one question on this aspect. I mean, the efficiency or
4 accuracy of AI depends on the data which is given to it or data provided, information provided.
5 In large complex construction projects, what we have seen that most of the times, the data is
6 not accurate or the data is incomplete or the data takes a lot of time to reach to the system. In
7 such cases, how do you think that AI would be able to spot the problem, or would be able to
8 assist the project management in managing or in spotting the issues with the construction
9 project?

10 **MEHAK OBEROI:** So, I agree with you. I think it's a typical case of garbage-in, garbage-out.
11 And I think construction disputes are very vulnerable to these kind of issues because we're
12 looking at information not only coming from multiple Parties, but also from multiple people
13 within those multiple Parties that you have. But how I see it as is, that AI will be able to detect
14 the inconsistencies. So, for example, if you have... if you have a program and you have site data
15 and you have a daily progress report which are not in sync, AI is going to detect that
16 inconsistency. So, you don't have to rely on poor data, it's going to help you detect that poor
17 data faster. And of course, at the end of it, there's a physical human being who's going to have
18 to take a call as to how to act on it and physically respond on site, but we need to rely on it in
19 this manner.

20 **GAURAV JUNEJA:** Interesting. We now move...

21 **RATAN K. SINGH SA:** Gaurav, I'll tell you one thing on AI. AAA (American Arbitration
22 Association) and ICDR...

23 **MEHAK OBEROI:** AI Arbitrator.

24 **RATAN K. SINGH SA:** Yeah, so they have started AI arbitration. So, up to a particular limit
25 of a particular category of arbitrations are resolved through AI. However, they have something
26 called Reviewer. So you have a human element attached to it to see what AI has done, it really
27 meets the expectations or not? So this is something very interesting development. So watch
28 for it, yeah.

29 **GAURAV JUNEJA:** I think, in fact, in India also we are contemplating to get the issues with
30 respect to Negotiable Instrument Act resolved by AI. I mean, it's in the initial stage, but I'm
31 not sure what the level of development is insofar as those matters are concerned.

32 **RATAN K. SINGH SA:** Actually, Gaurav, there is another development under Ministry of
33 Home Affairs, very interesting development Government of India and has come out with an

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1 arbitration centre called India Digital Dispute Resolution Centre. Though it is not adjudicating
2 or arbitrating digital dispute *per se* but it has been named like IDDRC because it will assist the
3 whole arbitration process digitally. And I'm on the board of governors of this IDDRC. And
4 there, we are looking for more and more role of AI, how and when it pans out... I don't know
5 as of now, but this is something AI is looking at us, staring at us, and we have to, I would say,
6 learn to live together with AI now. Yeah.

7 **GAURAV JUNEJA:** In fact, I was last year in UAE and I was talking to one of my lawyer
8 friends, and they were telling me that the UAE government is planning to have a AI court and
9 also AI lawyers, and I mean, that sounded really scary.

10 **ROBERT WHITEHEAD:** Yeah, I did a course in Oxford for the CIR, and we've got a lot of
11 UAE lawyers who are on that course. And one of them, Dr. Mohammed, was a specialist in the
12 AI subject. And he said... he was mentioning the China has got its own AI court at the moment
13 as well. But you're quite right, the UAE are developing one, as far as I'm aware, yeah, yeah.

14 **GAURAV JUNEJA:** See I mean from my perspective I'm fine with the court but I'm not fine
15 with AI lawyers.

16 **ROBERT WHITEHEAD:** Yeah, yeah, right.

17 **GAURAV JUNEJA:** Thank you. We now move on to our next subtopic, which is whether the
18 arbitral process should be designed differently for construction cases. Now let me go back to
19 the audience again. How many of you think that construction arbitrations should be handled
20 differently from ordinary commercial arbitrations? Again, very few hands. Very surprising.
21 That takes us directly to the role of arbitral institutions. To discuss this in greater detail, we
22 have Animesh, who is a senior international case Counsel at the Asian International
23 Arbitration Centre in Kuala Lumpur. Animesh, thank you. Over to you, please.

24 **ANIMESH BORDOLOI:** Thank you, Gaurav. I just like to add to the AI a bit. I was speaking
25 to some institutions from China, and they were telling me how now China's arbitral
26 institutions have come up with AI technology where they keep a record of arbitral awards. And
27 then any Arbitrator who's appointed for a certain amount of dispute, get access to it and they
28 can take the substantial part of those similar awards, and then they can integrate those. So, I
29 think as a civil law system, China is really spearheading within its community, the use of AI,
30 so it's very interesting what is happening with AI there. But again, for institutions, I think the
31 question is how do you use AI and ethically? I think that's a question that we'll all have to
32 grapple at one point of time.

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1 But thank you for the question on the institution. I think at AIAC we are quite proud to say
 2 that we were dual heads; we are not just the appointing... default appointing authority for
 3 arbitration in Malaysia, but we also have a unique statutory provision called Adjudication, the
 4 Construction Industry Adjudication Act, where we are the sole appointing authority for
 5 adjudication. And I think Robert, in his opening remarks, he mentioned the importance of
 6 cash flows in adjudications. And the intent of CIPA, the Construction Industry Payment Act,
 7 is that what we try to do is anytime within the construction industry, when there is a dispute,
 8 we try to resolve those disputes within 90 days. The statutory period is 90 days if the 90 days
 9 period lapses, then the entire proceedings will lapse. So, the intent is very simple: that the cash
 10 flow has to be maintained. And what it has taught us is that in like... like many of you
 11 mentioned in the beginning of it that the construction disputes are firstly complicated, they're
 12 very time-sensitive, and within the construction projects, there are multiple issues that would
 13 pop up. Something as simple as, let's say providing raw materials to one Party, and if the
 14 payment has not been done, that Party who's you know, way down the pecking order might
 15 have a dispute with another Party who's involved in the project. So that's how CIPA works for
 16 us. But through our years of experience in CIPA, we have also realized that CIPA is a temporary
 17 or interim measure because it is only helping the cash flow element, but there are also
 18 substantial elements in a dispute which can only be resolved through mechanisms like
 19 arbitration or mediation, which is where I think our role as a arbitral institution comes in.

20 To answer that question of whether we need specific different, you know, we need to
 21 differentiate construction dispute. In AIAC, almost 60% of arbitrations that we receive are
 22 actually construction disputes and it ranges from a different... I mean, the range is enormous,
 23 we do construction disputes in oil and gas projects, platform projects, tunnelling projects. And
 24 also, of course, building side projects because there's a lot of construction because of the Asian
 25 corridor, Asean corridor, there's a lot of investment that takes place around that region I think
 26 the success of our arbitrations in construction is sort of reflected by the fact that over the last
 27 one year we see that we've been getting a lot of appointment requests for not just AIAC Rules
 28 or for default mechanisms, but also for FIDIC related contracts or for DAD related contracts.
 29 Now to the question of how do we try to maintain the, you know, because we are construction
 30 heavy arbitration centre, what do we try to do that's different so one thing that we are very
 31 specific about is our panel of Arbitrators we do not only have we of course, have a lot of lawyers
 32 who have construction backgrounds. But at the same time we also have a lot of experts, there
 33 are people, there are quantity surveyors, there are project managers who have at certain and
 34 many of them are dual qualified and as Parties or as counsels who want to go for an arbitration
 35 they like options. So, for instance, if it's a very complicated dispute, I as a Counsel sometimes
 36 have preferences of Parties where they say, you know, we want to appoint a sole you to appoint
 37 a sole Arbitrator, but at the same time, one of the requirements we might ask you is if you have

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somebody who has certain technical knowledge considering the type of dispute that we are handling. So, many times we end up appointing an Arbitrator who is a lawyer but at the same time has had few years of experience. So, I think that is one way how we provide or try to provide a better service when it comes to construction disputes so, having a diverse pool of Arbitrators. Another thing we try to do is of course the procedural aspect of it. Today, we have come up with a new set of rules in 2026 and I would like to I mean, I can confirm that having read all the rules while we were drafting it, that we are at par today with all the, you know, international standards of rules. And many times we see that Parties prefer, you know, procedural flexibility when they are coming for a construction arbitration. Many times we see that there can be related projects where they want consolidation or they want the matter to be heard together by the same Parties, related projects, but they might want a same Arbitrator to hear the issue. Of course, there is subject to determination by the President and the court of AIAC. But those are issues that we see that pop up for us and as an institution, a lot of times we have to take that into consideration. We see that Parties, especially in a lot of again, issues which demand a lot of urgency they want to take the fast track route or the Emergency Arbitrator route where they want a dispute to be resolved very, very quickly. So, those are two... and so that's firstly, is the diverse panel.

Secondly, I think is the fact that we allow that procedural flexibility. The third point for an institution and it's a general again, an institutional point. I think when it comes to construction disputes, we have seen that a lot of even bigger companies tend to because they have a lot of projects because there are a lot of disputes they might end up becoming, you know, going into insolvency proceedings, which poses a sort of, you know, problem. Yes, for the Respondent or for the other related Parties, but also to the arbitral Tribunal who may not have the guarantee of being paid after the... And I think that will also be of great interest for the Arbitrator. So, I think institutions are also very, very useful in that way because we collect deposits at the earliest date. So, even if I have had arbitrations where, you know, Parties were involved either want to terminate proceedings or they want to settle up because there's an insolvency proceeding happening somewhere so in those cases, if even if the termination order is given by the Arbitrator, if they are not paid, they cannot really come up with the order. So, those are challenges I think procedurally that we receive and having deposits collected at an earlier stage sort of helps us with that. I think those are a few things.

The last thing that I think also when Mahek touched upon the fact that there's AI coming up and that there's a need for standardization through our experiences, we have come up with something called a standard form of building contracts, which is sort of AI, you know, a guide for Parties who want to get into construction and want to draft contracts. This has been there for some time, we update it every year what that allows is that it's a dispute avoidance sort of

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a situation where Parties can look at that contract before they draft such a contract and of course, when there's a dispute, they can come to us or any other institution to resolve that.

GAURAV JUNEJA: Great, thank you, Animesh. I've just one question on this point. In construction projects we have seen that the Parties have given bank guarantees, performance guarantees to the owners and a lot of times we have seen that there's an invocation of bank guarantee. And the Parties are required to get immediate urgent relief. So, insofar as your institute is concerned, what is the Emergency Arbitration framework in dealing with these kind of issues and is there any specific procedure for getting that kind of a relief?

ANIMESH BORDOLOI: Well, I mean Emergency Arbitrations, I think it's a sleepless night for the Counsel because our timelines are quite strict. If there's an emergency arbitration request, the President has to look into the request. And now that we have a court with the consultation of the court, they have to respond to that request within one day, whether they want to allow the Emergency Arbitration or not. And we had one very, very recently just before I travelled here and within two work two days, not even working days, even if it's a Saturday, Sunda, we have to appoint an Emergency Arbitrator and the Emergency Arbitrator then after is... So, that takes away three days at max, and then the Emergency Arbitrator within three days has to give his or her first Procedural Order and then has of course, 14 days in total to give the award. So, speaking about the bank guarantees and bond situation. I think when I was thinking about it one key element also is the jurisdiction element of it because a lot of jurisdictions identify only certain circumstances in which you can invoke an injunction in such situation. I think Malaysia along with Singapore is if I stand to be corrected, if at all, but Malaysia I know for sure is one jurisdiction where in addition to elements like fraud, you know, unconscionability is a condition where they allow such kind of remedies to be there. So, we do have certain matters where we have had emergency arbitrations relating to such bank guarantees.

RATAN K. SINGH SA: Gaurav, I'll add to what he said. It is not only sleepless night for the institutions when it comes to call on bonds, and it is also for the Arbitrators. Recently, I was the Sole Arbitrator. Obviously, it has to be in an Emergency Arbitration on call on bond where one Party had invoked the Performance Bank Guarantee. It was institutional International Arbitration. I was appointed as Sole Arbitrator, one was Korean Party and I had first the hearing went on till 9:45 PM evening and finally, so, I had to give some interim protection, whatever it was, and I had occasion to give the comparative analysis on law, on injunction on performance or advance Bank Guarantees or any other form of Bank Guarantees. The Singapore law which you talked about and the Malaysian law, they are little different from

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Indian law because in India unconscionability is not a ground to injunct the call on bond and Performance Bank Guarantees or Bank Guarantees. Yeah, thank you.

GAURAV JUNEJA: I mean, talking about sleepless nights, I think, I mean when the invocation of Bank Guarantee takes place it becomes a sleepless night for the lawyers as well. We now move on to our next sub-topic, which is interplay between arbitration and mediation. And now before I turn to our final speaker, I have one final question for the audience. How many of you think that mediation should be considered before a construction arbitration reaches the final hearing? Sir, the house is with you to discuss this further, we have Mr. Ratan Singh, who is a Senior Advocate with extensive experience in construction disputes in India and abroad. He is also the Chairman of Society of Construction Law, India. Sir, we are seeing in foreign jurisdictions is that arbitration is increasingly becoming a part of wider Dispute Resolution process rather than a process that ends into an award. Do you see this as a real change in the way arbitration is being approached, and what can India learn from this?

RATAN K. SINGH SA: So, you basically started with going for voting in the audience. And there was one such voting by Queen Mary and White & Case and Pound conference. There, the question asked was: whether Arbitrators should have role in facilitating settlement or not? And what are the expectations of the Parties and the GCs from all across the globe who are the Respondents apart from others? And 78.3% of them said they see arbitration and the Arbitrators as Facilitator of the settlement. Question to start with, as we say, it is always tricky to define fundamental concepts. So, question is, how do we look at arbitration and how do we define arbitration. Do we define arbitration as a Dispute Resolution Mechanism where Arbitrator renders a binding decision or adjudicatory role of the Arbitrator or we see Arbitrator as a dispute resolver? These are two different concepts; one, if we look at Arbitrator as a decision maker adjudicator rather than dispute resolver, then we have two different concepts. But if we look at the Arbitrators as somebody who is there to resolve the disputes, to see that disputes are resolved or one who does facilitate the settlement. Now, so therefore, the first thing is what is the true purpose of arbitration? It is to deliver an award or to resolve a dispute that is the starting point. Traditionally, well, how we look at arbitration is that you will have an Arbitrator who will resolve the dispute, who will adjudicate the dispute as a decision maker. Now however, particularly during the last two decades, now this is no longer a debate that arbitration and settlement co-exist. Now, we had fears about due process violation or violation of principle of natural justice or issue regarding some kind of bias in the mind of the Arbitrator if he tries to facilitate settlement. So, traditional thinking has been that Arbitrators should wear only one hat as that of a decision maker and he or she should not go beyond that in order to see that there is any mediated settlement or otherwise. But that had changed now. Now, if you see the development amongst all arbitral institutions, they have recognized the role of

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Arbitrator as facilitator of settlement. In fact, there is a fantastic report of ICC, Paris on this issue. There is a report of a task force which was constituted by the ICC, Paris. This report tells you how to do that in construction disputes or for that matter, any other dispute which goes to arbitration. The... In fact, there is I would say that nobody knows better than the Arbitrator what are the disputes between the Parties and how best it can be settled, how to go about it. Arbitrators should only take care of one thing that is that, I will not cross a boundary where there can be any due process challenge to my award or my appointment. Let's take an example, like you must be aware of there is something called 'Kaplan hearing', in fact I have been doing it for donkey's years. So, whenever I hear about Parties coming before me where I sit as Arbitrator, I said in 20 minutes you state your case just to give a fair idea about what you are up to. Though before Parties speak, I would be knowing what exactly the disputes are just for their satisfaction or for that matter, they may add something to what I have understood. I understand. So, if Arbitrator has the paper before him, he has gone through it, he understands the dispute and with his experience and domain knowledge, he would be able to understand where both sides stand. Then if an Arbitrator, without disclosing its mind on the final outcome tells the Party, I have understood your case, this is your position and this is the law on this aspect. So, Arbitrator gets a role of making the Parties aware and the lawyers aware where they stand without saying how Arbitrator is going to decide the dispute. So, how to go about it? In the first Procedural Order and in the first procedural meeting, if you ask the Parties to agree, that the Arbitrator's concern can take a role of Facilitator during the course of arbitration, then there will be no due processes. Or if institutional rule incorporates such a provision again, there is no due process issue. Even if none of the two happens, an Arbitrator... because what happens is see you can draw a parallel... If you have a judge in a court of law asking the Parties or he is trying to facilitate settlement, chances of settlement as higher than a typical mediation setup happening somewhere else, because they have this in mind that eventually, he is going to be the judge and adjudicator. Problem with the courts, courts do not have that much time to sit with the Parties through the whole journey of the litigation, unlike arbitration where same person is starting with the CMC and goes till the adjudication of this.

Second aspect can be if so required and this ICC report that the task force also recommends, you can also think of Mediation window. So, during the course of the arbitral proceeding, if Arbitrator thinks that there is possibility of settlement or if Parties want to really settle, you can let Parties go for mediation window and there they can settle and come back, if it has not happened before you as an Arbitrator. That is another way of doing it.

Another thing is the moment in construction dispute invariably you have big claims like Gaurav was talking about delay related claims. So, you have liability side of dispute and quantification side of disputes. If you go for bifurcation and you tell the Parties first, I'll decide

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the liability side. So, there are many ways in which you can do it. In fact, if you see Section 30 of Arbitration and Conciliation Act which you have in India it is, as we know, that Arbitration and Conciliation Act 1996 was in fact verbatim reproduction of UNCITRAL Model Law, but even then Section 30 of Arbitration Conciliation Act was much wider in scope than UNCITRAL Model Law. So, it allows and it says it is not incompatible to have settlement during arbitration. So, it gives complete authority to the Arbitrators to see that there is settlement and he can act as a facilitate settlement. But then question is why it is it happening in India? It is not happening in India for two reasons. We do not have no talked about mediation in arbitration or facilitated settlement in arbitration, we haven't talked about it so far. We do not have academic exercises and articles written on this. And another thing is the arbitral ecosystem in terms of remuneration and peace of Arbitrators is designed in such a manner that rather than incentivizing the Arbitrators to go to ensure that there is mediated and settlement, it goes other way round. So, no institution has so far encouraged settlement during arbitration through their fee structure rather it discourages them. In fact, DIAC can be seen which talks about one-third fee payable to the Arbitrator if it gets settled before commencement of evidence. In fact, that happened because of one arbitration where I was representing one of the Parties and one retired Supreme Court judge who is known for encouraging Parties for settlement, he was the Arbitrator and very first hearing, it went on till 09:00 or something and very first day Party settled and DIAC said, I am not going to pay you anything, to the Arbitrator. So thereafter, a lot of debate happened and eventually it comes to this and again Schedule 4. So, therefore two things are; nobody is better suited to facilitate settlement than Arbitrators that is one. Your Section 30 here encourages this. Two, it is just about the institutions have to invoke this sorry, incorporate in their rules and provisions for this. We should talk about more of this.

And last thing in every arbitration and this is you can go back for some thoughts where, let's say that big arbitrations, you have per hearing arbitral fees for the Arbitrator, or so, how do we take care of such an arbitration proceedings where Arbitrators are paid for hearing. Will they... will it be in their interest to facilitate settlement monetary? So there are certain areas in which we attend to, I'm sure mediation can be very, very good idea to bring in in the ecosystem of arbitration so that mediation and arbitration can run together, coexist and move forward. Thank you very much.

GAURAV JUNEJA: In fact, I mean, to add to what you mentioned. In fact, in the morning, Justice Mehta was also talking about one matter where he brought the Parties together to settle the matter. But that is very seldom seen in so far as arbitration is concerned. I mean, Section 30 only says that with the consent of the Parties, the Arbitrator can encourage settlement, but do you think Section 30 is enough? Do we need to have within the act itself some kind of rules

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or some kind of new provisions, let's say if we have to draft the Act *de novo* on this point, do we need to add something to it?

RATAN K. SINGH SA: See, I'll tell you, Act is basically very generally worded, widely worded. It allows Arbitrators to do what we just talked about. Now, how to do it, for that you may have rules where you can elaborate that how in the CMC or the first Procedural Order, what all should you write, take consent of the Parties so that there is no due process challenge and so on and so forth. How, should have mediation window? So that can be done through some rules. Or in fact, Arbitration bar of India has constituted a task force to prepare a protocol on construction arbitration under my co-chairmanship. I'm working on it and we are planning to have some window for that also in that protocol.

GAURAV JUNEJA: But how do you give the incentive to the Arbitrators to resolve the matter because I mean what you mentioned?

RATAN K. SINGH SA: This is the big challenge. So, how it should start is first of all, institutions should... I'm talking about arbitration institutions should incorporate provisions in the arbitration rules that if there is mediated or Arbitrator facilitated settlement during the course of arbitration, Arbitrators will get their fulfil that should be also put in the Schedule 4 and some kind of note on that on Schedule 4 as well. Problem is where we have per hearing fee, which is generally the case with Construction Arbitration because these are big disputes and high stakes. So, you have top line Arbitrators who will never agree for the Schedule 4. How to deal with that is a challenge for that? Maybe we can have one session where everybody can brainstorm

GAURAV JUNEJA: Sure, sir, thank you so much. Animesh, you wanted to add something?

ANIMESH BORDOLOI: I think I just wanted to add to sir and I mean and I quite understand his point as well because the AIAC now mostly it is rule 2026, we do have Med-Arb and Arb-Med provisions where Parties, if they want to settle, if they want to terminate proceedings, they can do so if they want a window for mediation while the arbitration is going on so those kind of concrete proceeding concurrent proceedings are some flexibilities that we are providing. But again like sir said that it boils down to the Arbitrator whether the Arbitrator is facilitating that discussion or not, but I take well as an institution, I think I take well of a note of your point where you say even when they are pushed for mediation, the Arbitrator should get their full fee. So I think that's one point, I take home.

RATAN K. SINGH SA: Actually, I'm going to speak in your ACIDR Week on 16th of October last seven months. I have been twice to KL to speak and I'm on the panel of AIAC and I'm following your rules Pugh appointment things came to me in my way, I don't know. See

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question is a starting point if you want to see mediated settlement or mediate Arbitrators' facilitated settlement, you need to have Arbitrators who have got expertise in that particular field and they are having domain knowledge. Unless you have an Arbitrator who has got domain knowledge, he will never be able to understand particularly construction dispute, nuances of it, what is the position of the Parties, what is the right answer. Unless you know you have domain expertise, you cannot make Parties... It is like a facilitative or an evaluative mediation kind of kind of thing. Mahek this is your subject. Okay, thank you.

GAURAV JUNEJA: Thank you very much. We have some time for questions from audience. I mean all this while I was requesting you to communicate by show of hands. Now I would request you to please ask questions, if any. Anyone?

RATAN K. SINGH SA: No question means either everybody understood and appreciated what was said or nobody understood and appreciated.

GAURAV JUNEJA: Great. I think there is no question. So, I mean we can end the session. Thank you very much, thank you everyone.

ALISHA SHARMA: A huge round of applause for our panellists. Thank you, Mr. Gaurav and thank you to all our panellists for that engaging session. The conversation has indeed offered valuable insight into just how distinct construction disputes are and what it takes to navigate them effectively. May I request... May I now request the panel to step ahead for a group picture for the audience. Kindly note that we will begin the next session shortly.

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