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INDIA ADR WEEK 2026 – 11 SEP 2026

SESSION 1

"PAY NOW, ARGUE LATER": INTERIM PAYMENTS AND INDIA'S CONSTRUCTION DISPUTE WAVE

SPEAKERS:

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ANUSHKA MANSHARAMANI: Good morning to one and all present here today, a very warm welcome to all of you as we begin Day-2 and the final day of the India ADR Week. We're delighted to have you back with us as we continue our conversations on the many facets shaping dispute resolution today. With our first session hosted by JSA and Rajah & Tann Asia. India's infrastructure and construction sector has seen a sharp rise in disputes in recent years with cash flow disruptions often at the very centre of the conflict. Interim payment mechanisms designed to keep projects moving while disputes are resolved have increasingly come under scrutiny. Hence raising the question of whether, "pay now argue later" truly holds in practice. It is the very question that our first session addresses - "Pay Now, Argue Later": Interim Payments and India's Construction Dispute Wave. The session will be moderated by Ananya Kumar. He will be joined by Avinash Pradhan, former Justice (Retd.) Hima Kohli, Dr. Mukul Shastry and Priyanka Kapoor. I would request the panel to kindly come up on stage. Thank you.

ANANYA KUMAR: Good morning everyone. Thank you so much for joining us, especially this early in the morning and I understand the BRICS traffic would have played havoc with people, but thank you for braving it and being here with us. Our topic today as you just heard from Anushka is, "Pay Now, Argue Later": Interim Payments and India's Construction Dispute Wave. So, what are we looking at really? Construction disputes have a peculiar feature. By the time legal disputes are resolved, the project may be completed, the contractor may have run out of cash, possibly, employer may have moved on, and sometimes the most valuable thing that either Party wanted from the legal system, and that is cash flow at the right time, has already been lost. So, the proposition before us today of "pay now argue later" is deceptively simple. Should a Party be required to make a payment today even though it maintains that the amount is not ultimately due? And this immediately raises some uncomfortable questions which I hope will get candid answers to. The primary of them being, is interim payment a form of commercial justice; keeping the project alive while merits are fought out or does it sometimes amount to giving one Party the economic benefit of what could be an award before the case has actually been decided? And perhaps most importantly in the Indian context, how do we strike a balance in a legal system where construction disputes can involve arbitration, courts, statutory contracts, public money, Bank Guarantees, securities and increasingly complex project structures?

We have an exceptionally experienced panel to explore these questions today. Justice Kohli, Avinash, Priyanka, Mukul, thank you so much for joining me today. And I'd like to begin with the most basic question and I'm going to ask each of you to answer this from a slightly different perspective. When we say "pay now, argue later", what exactly are we asking the law to prioritise? Cash flow, fairness, project completion or something else? Justice Kohli, let me start with you. In the context of construction contracts, would it be correct to argue that there is a principled justification for requiring payment before the merits are finally adjudicated? And where should the judicial system draw the line between protecting cash flow and effectively granting premature relief?

JUSTICE (RETD.) HIMA KOHLI: Very good morning to all of you. I surely think the organisers must give an early bird incentive to such of us who are within the hall at this early hours in the teeth of the kind of traffic that is expected to flow in, thanks to all the organising of BRICS. Keeping that apart and coming back to the question that Ananya has posed, certainly the features of "pay now, argue later" itself enhanced the fact that if there is a constriction in the cash flow in this industry of construction, and we all know that this principle basically is related to the construction-specific industry and not any other commercial contract. Reason being simple, that the cash flow is being generated by the contractor himself, largely. Contractor is the one who is expected to put in the money, is the one with whom there are other subcontractors who have a back-to-back contract and the whole chain goes down the line. So, any restriction or any such attempt to throttle that payment at the stage when the construction is ongoing, would virtually amount to killing the project and killing their lifelines and their timelines, which are so important because these are contracts which have huge impacts in the construction industry itself relating to projects which are large value projects that have lots at stake, both for the country and the private holdings, as also the public sector. So, to my mind, that interim cash flow, if that is withheld over a long time, the funding is choked off the contractor; his obligations don't stop. And if his obligations don't stop, then how does he generate the fund to pay? So, it's imperative that the flow keeps on. It could... then that's where "pay now, argue later" would apply.

So, "pay now, argue later" would not mean that if he's demanding a payment that it's good and finally adjudicated upon. It's a way of tiding over a situation where the contract itself can come to a grinding halt. And that is where, in our country, courts step in, and other countries like UK, like Hong Kong, like Singapore and Malaysia, the adjudicator steps in. And I think, though the question has not been asked by Ananya so far, I'm sure it's in the pipeline, it's imperative that the Indian bodies also think of coming up with a statute that addresses this issue, because the courts itself can only deal. Arbitrators can deal with an interim award; they can't give an interim relief of any sorts. Pending... before arbitration has commenced it's only the court that has its own threshold levels for entertaining such a request for "pay now, argue later", which is not the case if there is a statute. Then there are only that much of the aspects that need to be examined as an interim measure and payments issued subject to final adjudication. Now that "subject to final adjudication" is not happening in our statutory system, and that's where we need to address and focus ourselves, is what I would say.

ANANYA KUMAR: Thank you ma'am. Ma'am, you raised some interesting points because in construction, delayed payment isn't necessarily just a balance sheet issue; it can affect wages, contractors, subcontractors, procurement. So, on that basis, Avinash, let me bring the conversation to you. How significant is interim payment relief in keeping a distressed project alive, if you were to look at it from the contractor's perspective?

AVINASH PRADHAN: Thanks Ananya, for the question, and good morning everyone. I think from the discussion so far, you'll be able to tell that it is, in many instances, "the" thing that is able to keep the project alive. Justice Kohli has highlighted the problem of cash flow and the trickledown effect that delays in payment or refusals to make payment can have through the project. And the problem is that really once a project comes into a state of distress, it doesn't happen overnight. What happens is, there is a gradual build-up of stress and choke points across the project, and it's usually two or three different areas of inflection that are affecting the project, whether it's supply chokes or whether there are labour problems. And what tends to happen is, these can then coalesce into a particular situation where the contractor is placed under extreme stress. And from an employer's perspective, usually at that point of time, there is an even greater concern of putting in money, because the perception might well be that you're putting in good money into a project, that from the employer's perspective, seems to just be losing money. And that's a product I think, of the peculiarities of construction projects, in general.

But if one were to take a step back, usually the cost to the employer of having a project go from functioning to semi-functioning to truly in distress, the cost, once it is in distress, is far greater than the cost of keeping that going on a running basis through interim payments, basically. So, from that perspective, I would say that it is of critical importance.

ANANYA KUMAR: Thanks, Avinash. Priyanka, let me move the conversation to you, because while giving that answer, Avinash mentioned a concern that an employer may have about throwing good money after bad in certain situations, though he believes that the benefits outweigh the cost, so to say. But keeping that in mind, let me put the opposite proposition to you since we're having a discussion. Imagine you're advising an employer who genuinely believes that the contractor has been overpaid, perhaps because the work is defective, quantities are disputed or a claim has been made which has no contractual basis. Why should that employer have to write a cheque today and fight about entitlement two-three years later, whenever the matter goes up to arbitration or court? What is the strongest commercial objection you can see against a "pay now, argue later" approach?

PRIYANKA KAPOOR: It's a very good question, thanks. And morning to everybody here. I think if I switch this off, I might still be audible. Okay. So, before I kind of, answer the question, let me just paint a picture of the asymmetry that is very important, and I think Justice Kohli kind of touched upon it briefly. When it comes to the interim payment issue, under the England Wales law, it is a statutory right. When it comes to an international regime like FIDIC, it is a certification right where you are under a DAB mechanism or under any sort of certification. And in India it is a construct of the contract and you're in the hands of the Tribunal and then you delay... you have delay issues. And then you probably get to the same principle, but via the route of a constitutional challenge.

So, with that in mind, I think one thing which is quite clear, and there is an agreement on the panel, is that funds and cash flow is the oxygen of a project. And when it comes to who writes the cheque or whether the employer should write the cheque, I think the question is, you allocate the risk to the Party that is best placed to bear it. An employer has access to credit, an employer has project funded, committed project financing, and the difference between an employer and a contractor is, the employer can always raise the issue of recoverability later, but for a contractor it is the issue of survival, because the supply chain of a contractor is relatively short, irrespective of whether the contractor has been paid or not. And two months of payment missed, and the subcontractor walks off, the employer faces the loss in the... I would say in the disputed sums that you're looking to pay, which will be a fraction of the cost of the project that they have committed to. And therefore, it is the employer that should write the cheque; best placed to do so.

But there is always a caveat in it, and that is where the commercial pushback comes in. And that is, in my mind and from experience, the question of insolvency. It's a dreaded, dreaded poison for all contracts, because how good is your claim if your counterparty goes belly up and disappears? So, if the insolvency, and if you have the evidence for it, and it is not just an apprehension or not just a concern, if it is a real potential risk, then that is the time where the employer can put a pushback on interim payments.

You also have issues of ambush claims these days. You see that... you see the grab and run kind of strategies by some contractors, but those are far and few. But I think the biggest threat to an employer having to write that cheque, in my experience, is the contractor's insolvency.

ANANYA KUMAR: Thanks, Priyanka. So, I think I do agree with you that broadly, this panel does believe that interim payments are required. It's about how to structure it. But before we get to that, Mukul, would it be fair to say that we are seeing a broader shift towards preserving economic equilibrium of a construction project while legal rights are being determined? In other words, I mean, has the traditional idea that the winner is whoever ultimately wins the arbitration, become inadequate for long duration infra and construction projects?

DR. MUKUL SHASTRY: Yeah, thanks. First of all, good morning to all and thanks for having me here. Very true, Ananya. See, in infrastructure, the contracts generally are very large; they're long duration. You take at least six or seven years to build something up and then they are 25-30 years contracts. And in India generally even if you go by arbitration standards, which is the best dispute resolution that we have in the country as of now, you will take, from the day the dispute starts and the day you will see the colour of money, it will be easily seven to eight years; that is an average time it takes in India. So, now see 7-8 years if a person is struggling, and there's what even Priyanka said that if I need oxygen today, if I need food today, if I have been served best of the food after 10 years, it's of no purpose to me. If I need cash flow today, I need that money in in a shorter time, and that's why this economic equilibrium is very important.

Very rightly said that see if my contractor as an employer; so, we primarily are our employer most of the cases. If my contractor is not surviving, even if I have some disputed payment with this contractor, if he has done some work and I find that 10% to 15% of the work was defective and the payment should not be made for that thing, I will somehow ensure that I ring fence the disputed money and other money I pay. Why? Because if the contractor doesn't survive then, see, the problem for me will be, first of all go and find a new contractor, whatever this person has done, a new contractor will come has to start from there, there'll be a lot of issues for a new contractor to come in and do the work from again... from scratch, there are a lot of then this new contractor will put all the things on the past contractor. So, it will delay my own project; so, even I will suffer ultimately because my project will get delayed. So, the best thing is even if I think that legally I have a lot of rights that I can enforce, it is better that at times I take a practical call. And if I can ring fence part payments, at least pay them whatever is not disputed, and whatever is disputed, at least hold that much money or at least get some Bank Guarantee or some other stuff and thereby pay that money also to the contractor and dispute it later. That makes a lot of economic sense for infrastructure projects.

ANANYA KUMAR: Thanks, Mukul. Yeah, sure, Avinash, please.

AVINASH PRADHAN: Sorry, if I could just jump in, and I think perhaps before we get on to the later topics of discussion, just to contextualize it from two other perspectives. The first is, you know, we've been talking about it from the sense, to some degree of... I think you mentioned Priyanka about the "grab-and-run" approach and the concern that employers are overexposed through these mechanisms. But it's very important to bear in mind that the critical aspect of this, these mechanisms is that there is an interim adjudication. So, it is not

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as though a contractor just makes a claim and he's getting payment. The critical feature of these mechanisms is someone is adjudicating in a very real way on that entitlement; that's the first thing to remember.

The second thing to, I think bear in mind as we talk about this, is that the true utility of having an interim adjudicator is perhaps, I would say, in fact, less to do with cash flow and interim payment *per se*, as opposed to encouraging a much greater discipline in the project. What I mean is this. If anyone in the chain wants to make a claim under an interim payment mechanism, it has to put forward documentation in support of that claim. That documentation can't just come out of nowhere. That documentation must, in fact, be a reflection of the work that has been done. It must consist, for example, of timesheets or time expended records of the work done. What that does, is it forces the subcontractor, the sub-sub-contractor to keep much better records, which then has a flow through effect in terms of the discipline of the project. That same discipline then translates across into the person who's certified the project. It means the certifier, which I.. and I'm sure this is a common problem here as it is in all parts of Asia; the certifier, in many cases without these mechanisms simply says, no, or it gives the minimum possible entitlement that it can to any claim. These mechanisms means that the certifier can't take that approach. The certifier must pay attention to each claim, which means the certifier needs to be paying much greater attention to the project itself, ensuring that the project is tracking to program, that when there are deviations from the program that they are properly mapped into the program and to the rest of the project. And what I'm getting at is that, overall what this does is it creates far greater discipline in the project, and that in turn actually reduces the overall cost of the project in the long term. And from that perspective, actually it is not just the benefit of the contractor; it's to the benefit of the employer, it is to the benefit of the industry overall. And I think, bearing that in mind, when you think of what India's infrastructure plans are for the next 30 years. The bankability of India's projects in terms of getting foreign investment would be hugely improved by having these types of mechanisms in place. I just thought...

ANANYA KUMAR: I think that....

PRIYANKA KAPOOR: That point, sorry Ananya, is.. And it's basically, you know, the advice that you end up giving to the employers is that it is not just always the merits but the way the project has been administered.

ANANYA KUMAR: That's right.

PRIYANKA KAPOOR: The record keeping, the time of notices given to contractors, because what you don't want is part away with certain funds in the interest of the project only to then be, you know, caught or trumped when you're facing an arbitration. You don't want that situation to arise. And I think the biggest problem I have witnessed in terms of the disputes that come to my side, and when we are acting for the employers, it is the lack of administration that results in a lot of costs later on. So, don't try and marry administration and marry way too early; there is a time for it. And coming back to the point, hopefully, the development in the statute will take place. But it is the way the project is being administered, makes a lot of difference why interim payment is not just... you know, it's a manner in which you can continue the project and not allow it to become an unsecured debt.

JUSTICE (RETD.) HIMA KOHLI: So, can I ducktail, Ananya; we are taking the role of a Moderator to a large extent.

ANANYA KUMAR: Makes life easier for me.

JUSTICE (RETD.) HIMA KOHLI: Yeah, but talking of “grab and run” that Priyanka has highlighted and to support to add to what Mukul said. In the Indian jurisdiction we have ordinarily found that when are these large projects then there are those particular PSUs who, if a contractor would actually do what has been suggested, "grab-and-run", the first thing would be a blacklisting that would happen. And that is a real time death for any contractor. We realise it much more because there are so many matters that come to court and such like cases where they'll say, "Okay, this Party is blacklisted." It goes round to the entire set of PSUs because when they apply in a tender, one of the queries put to the Party is whether there is a blacklisting that has happened in an earlier project, and that itself can be killing. So, no contractor would stick its neck out to do something like that because that would mean commercial death. They'd make sure that if actually payments happened, they also kept by their end of the promise and continued working in the project to take it to a conclusion. It is an incentive to them to conclude early. And as Mukul said, if it's a long term relationship and there are that many specialist contractors in certain areas, certainly they would be the ones that the employer will also look at. He would not like to rule out a good contractor merely because there is an issue of payment. The effort should be to resolve. And that is why, it makes a lot of sense to talk of this principle of "pay now, and argue later".

ANANYA KUMAR: Thank you, ma'am, I think that's very helpful. And I think Avinash's question... Sorry, his comment about there being a certifier, actually leads us to the next part of our discussion. Let's move from the commercial rationale, which I think all of you are more or less *ad idem* on, to the legal architecture. As Priyanka rightly put it, you can either have a contractual mechanism, you can have a statutory mechanism or you can have an approach to courts. Now clearly in India we don't have a statutory mechanism today. Insofar as the contractual mechanism is concerned, I think from experience we can say that though you are supposed to have DABs and DRBs and DBs to do an interim certification, there are many times in India where that doesn't exist even though the contract provides for it. It's unfortunate, but it's true. So, we have to look at the court. Because since we don't have a statutory mechanism called interim payments, we have a Section 9 under the Arbitration Act, we have a Section 17. If we are not looking at arbitration we have the CPC.

So, keeping this in mind, Justice Kohli, let me come back to you. From the court's perspective, whether you are dealing with a challenge to a Section 17 order, whether you're looking at it in a Section 9 proceeding or you're looking at it as a suit, what is the conceptual distinction between protecting a Claimant's cash flow, which all of us believe is important, and effectively deciding the merits of the dispute at an interim stage? Where do we draw the line? And I'm just going to... I'm just going to combine a couple of questions here.

JUSTICE (RETD.) HIMA KOHLI: Yes.

ANANYA KUMAR: Is the traditional test of a *prima facie* case adequate in a high value construction dispute where the interim order may itself have enormous economic consequences?

JUSTICE (RETD.) HIMA KOHLI: When we talk of in the... in our context, Ananya, and when we are talking of a really speaking an Order 39, Rule 1 and 2 and an Order 38, Rule 5 CPC, we are looking at a very high threshold because we are looking at a *prima facie* case, a balance of convenience, irreparable loss and injury. We also know that there is an interim award that can happen only if there is an arbitration pending, and these are situations which are pre-arbitration in every which way. So, there is no arbitration happening is an assumption. It is only a work under progress when the dispute has arisen. So, the forum in our context would only be courts. When the courts look at it and they choose to pass an order, they're also mindful of the fact that it's going to have a long term impact on the ultimate disputes that will be adjudicated between the Parties before a different forum, and most likely an arbitration forum. So, what would they like to do? They would like to balance the equities in such a way that perhaps, would not kill the project, at the same time not really give the contractor so much that he would slow down.

So, one way is to balance both by saying, how do both Parties stand to gain or lose looking at the overall picture, and then coming to a conclusion. We would perhaps not say irreparable loss and injury, but again, as we said, ring it up in such a way that in the event the employer ultimately succeeds, is not left high and dry with money out of his pocket and nowhere to recover from. So, it's not going to be... it's not going to be an empty decree. Ultimately, the decision and the adjudication must be left by the court mindfully to a subsequent stage, only enough to keep in mind the factor that it's an ongoing project; it will actually stifle if the court decided not to pay, and if it's a genuine case and cause for a contractor to get payments, just to offer enough safeguards. And I do realise that many times courts and I myself have done it that. We would say Bank Guarantees be offered for the amount, that secure the employer to the extent possible, particularly when these are Public Sector Undertakings and public money is involved, that there is a fallback. Of course, we are aware also of the fact that these Bank Guarantees don't come for free, there is a huge charge involved, they have to continue paying a higher amount of interest to keep them alive, and many times those Bank Guarantees run for a long time, which itself is enough reason to bleed the contractor. So, there has to be a very, very even path carved out keeping both the matters in mind and keeping a balance is what courts, I would say, would need to look at, till we have a statutory regime that comes into play.

ANANYA KUMAR: Mukul, I'll just ask you to jump in here on... and this is from a non-judicial perspective. As an employer, like you mentioned, you like to ring fence. So, what is the basic consideration, I mean, even if I were to apply the concept of a *prima facie* test, is that something you would look at as well, or would it just be commercial reality and what is required to move the contract forward at that stage?

DR. MUKUL SHASTRY: So, mostly it is the commercial reality is at times, because infrastructure you have to balance a lot of things. But the *prima facie* convenience or the liberal harm, those principles of...

ANANYA KUMAR: I mean even if unconsciously...

DR. MUKUL SHASTRY: Obviously, there are, when you decide whether... You also see how the contractor has behaved and then the past also. If the contract has been really good and we have been working relationship, just one blip here and there would not just... because ultimately it is business we are not very friendly of course, ultimately we're going to dispute in court has its own cost and time. So, we have to be more practical in those things. So, yes, *prima facie* or the or the or laws or those kind of concepts are there, but then the commercial kind of judgments overtake while we deal with conflict.

ANANYA KUMAR: Fair enough. I think practicality should trump legality in this case. Priyanka, let me move to you then. What would be your view? Should an interim payment regime focus only on genuinely undisputed sums, or should a decision maker, a certifier, as Avinash put it, be prepared to make a provisional assessment of disputed sums as well?

PRIYANKA KAPOOR: See, disputes are not binary, okay? First and foremost. So, this notion of genuine dispute will collapse at first contact. So, there is, you know, there is no way for you to determine what a genuine dispute is. Because again, then you are getting into the area of merits prematurely. That's not what an interim payment is required to do. So, it is not the question of, you know, how much to pay; it is also a question of when to pay, and you know, it kind of marries the two points together.

So, to kind of summarise, there is no genuine disputed sum. You will have to take a practical view as to what is the... you know, how much is the contractor out of pocket and where does the presumption of false lie, in order to keep the contract... in order to keep the project alive. There is... The mechanism in itself has to be decided and it cannot be... you know, it can't be a template-driven situation; it has to be from each contract... each project to each project. As Mukul very rightly mentioned that there are certain contractors which are specialists in nature. There are not many of those around. So, the employer would not want to spoil their relationship with them. Here the treatment of, you know, whether there is a genuine dispute or what is the amount of provisional payment, is going to be very different from a contractor that has a history of defaults.

ANANYA KUMAR: Fair. Fair point. Let me just take forward from that. Avinash, if, in all this discussion, and I'm asking you this specifically because Singapore has the Security of Payments Act. There is a statutory mechanism for interim payments. What makes an interim payment mechanism actually work in practice? And what examples or learnings do you think India can take away from Singapore, particularly from the SOPA perspective, were we to, you know, come up with a statutory mechanism?

AVINASH PRADHAN: So, Singapore has had the Security for Payments regime for over a decade now, I think. And we've also had experience of it in Malaysia as well, and it has recently been introduced into Hong Kong as well. So, those are the three sort of jurisdictions where I'm most familiar with it. I also did a Security Of Payment Application in Ireland, actually the very first one randomly, but anyway that's a story for another day. They all have certain features in common. The first is that you need to have, through the statute and overlay, and sometimes, revision of contractual provisions. The statute needs to provide for substantive rights in the terms of recognising a right to be paid for construction work and a right as to the timing of that payment, the periodic timing of that payment. So, that needs to be overlaid. Usually, the statute will also invalidate pay-when-paid clauses. So, that delinks payment for that contract from the upstream contract which the supplier or the provider of services is not a Party. So, that's the first aspect of it.

The second aspect of it is, you do need someone to be looking at the merits and making a decision on an interim basis on the merits. And I want to be clear that in these systems, these adjudicators are expected to review the merits in a fair amount of detail. That is critical. Because as I mentioned earlier, the overall objective of these regimes is not just to support

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cash flow; it is actually to create these disciplines, because that is the thing that results in the public good. So, from those two perspectives, those are probably the most critical things.

The third though, which is also critical, is that the statute needs to provide for effective means of enforcing the adjudicator's decision. So, that can either be through the mechanisms of enforcement that you have with respect to judgments, but it can also be through provisions of permitting the Party in whose favour there is a payment award to stop work, for example. So, many statutes recognise rights of that nature; rights to stop work. Sometimes what the statutes also do is recognise a right to get payment from the Party above you in the contract chain. So, not the immediate Party to the contract, but to sidestep that Party and go above. So, say if you're the sub-sub-contractor, yeah, so, to go to the principal employer. So, those are the three, I would, say key buckets. The first - the modification of substantive rights, the second - the mechanism for actually reviewing the merits, and the third - enforceability.

ANANYA KUMAR: That's quite comprehensive. I mean, I think that that gives us a lot to think about if we were to have a statutory mechanism. But even otherwise, even if we wanted to put something in a contract, I think that would be a fair thing to draft if there is a step-by-step. So, let me just stop for a minute. Let's get into a few cases, for example, right, maybe which make the principle a little tougher to define. I'm going to ask all of you this; not a long answer. Suppose a contractor submits an interim bill for, let's say, $100 million or 100 crores, whatever currency you want to take. The employer says that out of that 40 crores, you know, refers to defective work, what he believes is defective work. The engineer certifies 100 crores as work having been performed, but there is a dispute as to the certification by the engineer. Should the employer be called upon to pay the entire 100 crores and argue about the 40 later, or do you think there should be a right to withhold? I'm just asking this as a practical question because we've done a lot of theory, but in this situation, what would your answers be? And in whichever order you want to take it. Mukul.

DR. MUKUL SHASTRY: If I have to face a situation where I have to pay 100 crores to the contractor and I feel that 40 crores is disputed, but whatever the Independent Engineer certified the full 100 crores, maybe in the interest of project, depending on what the project is and what the contractors past and present have been, what the reputation has been and the specialist nature of the contractor itself, depending on that we can even pay the 100 crores and rest 40 we can dispute later, and we can go on with that. At times, the problem is when the contractor somehow we feel this the entire thing is not disputed because of a right intent and it is... he's trying to play somehow to take some advantage of some technicalities here and there, at that time, sometimes we will take call that we'll not pay this 40 crores or we'll pay this subject to some Bank Guarantee or some protection that we have, otherwise we will not pay.

So, it all depends on... it's very subjective question depending on case-to-case basis. But most of the contractors because in in infrastructure they are all large contractors like L&T and stuff with whom we work, in such cases we generally pay and will distribute this 40 crores later in the interest of project and interest of relationship.

PRIYANKA KAPOOR: I agree with what Mukul has said, but there's always a question which is often raised and that is the independence of the certifier in the first place, where you arrive at that amount, because that in itself leads to Pandora's box as to what was the evidence before the certifier or the engineer before they said, yes, a 100 million payment is due and only... and then the employer can argue that an X amount of it is genuinely disputed or otherwise. So, it's a very subjective, you know, situation that you land yourself in. And you find, often, that the employers will take a call based on how much do they actually trust the certifier in the first place, and what stage of the project that we are at, that we need to then take a commercial decision.

ANANYA KUMAR: Avinash, anything?

AVINASH PRADHAN: I would just say that usually, in the situation that you've highlighted, to me the difference is that the engineer has certified.

PRIYANKA KAPOOR: Yeah

AVINASH PRADHAN: And usually, in a large scale infrastructure project, the engineer I mean it's supposed to be independent but rarely actually is correct. Because you know, the engineer is usually the consultant who's done the feasibility study who's then moved in to helping with the tender. So, the likelihood of the engineer at that stage being sort of biased towards the contractor, in the types of projects that I think we're sort of talking about, it tends to be quite low. We see it from time to time, but usually when we see it, actually then it is usually a case of something else happening, unfortunately. But to be fair, again, that is rare in the very large projects basically.

ANANYA KUMAR: Justice Kohli, again, if you were looking at it from the perspective of sitting on the bench and...

JUSTICE (RETD.) HIMA KOHLI: You see, the answers would be simpler. Under an international statutory regime and the FIDIC 2017 forms, it's very clear that the payment has to come up front and the employer must pay the fully certified amount. But then in India there is no such regime, and that vacuum is being filled up largely by courts. So, there is no adjudicator *per se,* there is no assessment done by a third-party adjudicator; it comes straight to the court. And to what extent the court will rely on certification by the independent... the specialist or a consultant, would also be an issue. One comes across cases where, and there are very many of them in our setup, where, as Avinash said, that Independent Consultant or an engineer is in invariably nominated by the employer. So, the swing-of is in favour of the employer. And I think if I were to adjudicate a matter where the consultant himself is certifying or herself is certifying an amount, goes to show that there is a quite a bit of merit in favour of the contractor. Otherwise, it's not too often that an employer... that a consultant would quantify an amount and certify it and expect that the employer who's engaged him, needs to pay to the same to the contractor. So, I would say it would fairly go in favour of a contractor on a certification.

ANANYA KUMAR: Ma'am, I'll just follow up on that, based on your answer. Would a "pay now, argue later" provision survive an allegation of fraud in that case? I'm guessing the answer to that, simply put, would be, no. But what level of evidence would a court require before that allegation changes this interim approach? Because like Avinash said, there are certain things that, you know, can take place. So, keeping that in mind, what...?

JUSTICE (RETD.) HIMA KOHLI: See, the very fact that somebody raises, and many times it's a bogey, the word 'fraud' and says a fraud has been played out by the other side doesn't make it a fraud. So, a simple statement or an assertion or an averment or even an affidavit saying it's a fraud without the supporting substantial documentation or some kind of evidence that would persuade the court to go that way to look at it, it has to go to the root of the matter. That is the kind of requirement that the court would expect as a threshold for entertaining an allegation of fraud. So, just saying so is not good enough, and that should not be a consideration for any court to adjudicate against a contractor on an allegation by an employer of fraud, unless really, it is something that absolutely brings to naught the whole process, and the court is convinced that there is something to be said about, would be my... So, it's a very high threshold.

ANANYA KUMAR: This conversation has, you know, at various points, used the word 'security' in the form of a Bank Guarantee or whatever, to secure interim payments. Keeping from there, taking from there, Priyanka, if I were to just ask you, do you believe that an order to pay at an interim stage should routinely be accompanied by a form of security? Should it be accompanied by a form of security for the disputed sum or not at all? Or would you know, just giving security undermine the very cash flow problem that interim payments are trying to solve?

PRIYANKA KAPOOR: So, this one hits home because I'm actually dealing with a case that addresses this issue. So, let me just again go back to my point of asymmetry here. In India "pay now, argue later" is backed by an On Demand Bank Guarantee often, right? So, the employer's liquidity is safeguarded and the contractor is generally out of pocket because Bank Guarantees don't come free. So, this is not a level playing field as far as the contractor is concerned. Security is an exemption. Security is a solution if there is a risk, there is a certain exposure of risk. It is not for you to be asking; it is evidence to be provided for a risk that the employer will face in terms of its lack of ability to recover later on when the claim of the 40 crores that Mukul mentioned in his example, comes to an arbitration. Unless and until that risk is completely evidenced, and it is a high threshold, it cannot be a norm, because you are trying to... you know, you defeat the point of interim payment, because you are imposing a financial obligation on the contractor on top of it. Most importantly, you are trying to arrest delay. And the security leads to a significant argument on the form and the substance that it will take - What is going to be the wording of it? Who is going to have the authority to execute it? And it becomes a never-ending question in many cases. So, ... And I think the most important point is, if there is money in the Escrow, if there is money in a ring-fenced account, it doesn't come to the contractor's help in if you look at it from the flip side of it. So, the security is not a preferable norm, but only to be used as an exemption, or in the case of a risk that cannot be, you know, met.

ANANYA KUMAR: Mukul, sorry, could you just also jump in on that, again from the employer's perspective?

DR. MUKUL SHASTRY: No, no, so, agree with what Priyanka said and totally echo what Justice Kohli also said. So, from an employer perspective that is right. But then see, unless you have some security we generally don't pay a contractor where in a dispute amount we think that that that disputed amount doesn't belongs to the contractor, because ultimately having whatever the Indian state of dispute resolution right now is, the trust on going to a court for a dispute is not that much in the play because it takes a lot of time. Obviously, ultimately the dispute is there it has to be settled through the dispute resolution, but the timing is where generally we are very much circumspect of. Therefore, in commercial sense, we try to handle things whatever commercially it is possible. So, if we feel that there is... So, as Justice Kohli rightly said, is there an Independent Engineer that has certified certain things and unless obviously fraud anybody can allege but unless there is a genuine semblance, there is some genuine reason to believe that there was some fraud played, if that is not the case, obviously we have to pay that money and then argue later. But if there are genuine reasons to believe that this amount is not due to the contractor, whatever reason it may be because of poor workmanship or poor whatever, whatever delays that the contractor has done, in that cases we generally pay only if we have some security, so that commercially we are safeguarded. So, that's how... And I totally believe that in this entire scenario of infrastructure contractor, employers, they have an upper hand over contractors because of multiple reasons. Like, if you are

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blacklisted by an employer, it's very difficult for you to get any other job that, as Justice Kohli rightly said, especially if you are a PSU blacklisted contractor, the contractor, it is very difficult for them, contractor to get any other job. So likewise, so, they have an upper hand, and most of the employers at times exploit that upper hand commercially, while they're dealing with the contractors. That is how we settle things.

ANANYA KUMAR: So, slightly different views on threshold but you agree with Priyanka on the asymmetry aspect?

DR. MUKUL SHASTRY: Yes.

PRIYANKA KAPOOR: That is... Sorry if I just wanted to add. If I was to compare the regime in England to what is there in India, in India security has become a part of the architecture, it's not an exception, and that kind of defeats the whole point of ensuring that the cash flow issue is addressed, because you're imposing one financial obligation over the other.

DR. MUKUL SHASTRY: No Priyanka, that cost is very less. So, suppose the Bank Guarantee is 100 crores, the cost will be a fraction just 2% or 3% of that so you will get 3 crores, will just pay 3 crores and just get...

ANANYA KUMAR: Okay. So, let's agree to disagree on because I notice you only let the...

DR. MUKUL SHASTRY: ... cost yeah.

ANANYA KUMAR: Sorry just, just...

PRIYANKA KAPOOR: To say we have the NITI Aayog in 2016. The NITI Aayog had come up with a proposal and that was introduced to the government that resulted in that Rule 227A of the General Financial Rules 27 being introduced. So, what does it do? It gives that window to Central Government and PSU where the it is recommended. But then I'm saying it's an aside because it's not ongoing project that we are talking about, but we are talking about a 34 that's happened and executions are pending, and the resistance from the government agencies to pay up despite there being an award. To overcome that, there is this rule which says about 75% can be released or put into an escrow account on a BG, which makes life easier. Though I admit this this mechanism would have its limitations, because we can't just say that, pick it up and apply it to a pending project. But it certainly operates, and it does operate after an award is made. But the fact is there is this window. And why is that so? Particularly we know in our context would be, any Public Sector Undertaking, any government official would not stick his neck out by saying pay up because we know that the award is really fairly against us. That would result in a series of consequences which could be financial, PMLA, and you name it, all of it. So, they would be wary. But when there is a mandate by the government backed by this kind of a rule, then there'll be less hesitation to coughing up the amount knowing there is a backup, there's a security, it's going into an escrow account. The flip side is that while Central Ministries and PSUs and other departments are bound by it, State Governments have an option to opt for it. So, it's for them to see whether it suits them to opt for this regime at all or not.

ANANYA KUMAR: I'm just following on from that, and this question is to both you and Avinash, in whichever order. Since you mentioned PSUs and since we know that PSUs are probably the largest player in the industry...

PRIYANKA KAPOOR: 75% almost.

ANANYA KUMAR: ... do you think that insofar as interim payments are concerned, thresholds should be different when, as they say, public money is involved? And Avinash, sure, you after Justice Kohli.

JUSTICE (RETD.) HIMA KOHLI: I'm going to throw a surprise at Ananya because there was some background discussion on this to keep the secret out. I did think initially that I mean it was just a thought, but I thought that perhaps we need to have a stricter regime for the PSUs, but fact of the matter is, and then the Supreme Court has ruled to, when these are commercial contracts, then you as a government is also expected under Article 14 to be fair, and that fairness in a commercial contract is equally important. So, if you are doing a commercial contract as a PSU, then play the rule by the game, which is pay up. If there is an adjudication, then you may as well, do that. End of the day, the aspect not to be forgotten in these pending contracts would be that if you don't pay up, then the whole thing has a trickle effect, as Avinash just pointed out. And that trickle effect can go down to the last man in the row, which is a vendor, a subcontractor, some petty vendor who doesn't have that kind of funds, isn't deep in the pocket. So, really, the rule should apply across the board. Now I've put you in a fix.

ANANYA KUMAR: No, you... I mean I'm not getting an argument that's the only fix I'm in. I'm hoping. Maybe. I don't know what Avinash is going to answer. Maybe he's flipping as well.

AVINASH PRADHAN: Is that a specific question? Do you want me to...?

ANANYA KUMAR: Yeah, on public funds. You want to answer differently?

AVINASH PRADHAN: No, I... No, I think you know, again, I my theme on this is really that when you have these mechanisms, it actually encourages greater project discipline, which tends to mean that in the longer term, the overall cost of the project is lesser. And when you're talking about public funds, actually that would tend to suggest that it's something that should be done, you should have these mechanisms in place. But I think it's also very important to understand that a hugely important part of this mechanism is that there needs to be some review on the merits. It's not... Without that, without improving the project discipline and that adjudication of the merits is critical to improving that project discipline, then in a sense, the broader public objective of these types of mechanisms, sort of, falls away. So, yeah.

ANANYA KUMAR: So, no argument then, sadly enough.

JUSTICE (RETD.) HIMA KOHLI: Sorry to disappoint you.

ANANYA KUMAR: It is what it is, ma'am. Okay, I noticed that the clock is ticking down; so, last questions to all of you. Avinash, I shall start with you. Do you think India needs a more formal adjudication model for construction payment disputes, something closer to the rapid payment models that we see in Singapore and Malaysia, in UK as well?

AVINASH PRADHAN: Yeah. So, just a perspective and, it's impressionistic to a degree. But I've seen a number of things to suggest that the infrastructure spend that is going to be required for India's plans in the next 30 years means that India will have to have to increasingly resort to PPP models for running projects. PPP is actually, in the longer term, potentially a huge cost to the public good. But... Well, not but, it's a cost and so, therefore there should be a lot of focus in trying to reduce the overall costs of these projects. Having these interim payment mechanisms tremendously improves the bankability of projects. And just to be clear by what I mean by 'bankability', what it means is that your cost of financing of these projects reduces. So, if you think about it, a bank is actually funding these projects, and for the bank in particular cash flow is key, right? So, when you have these interim payment mechanisms which impose these disciplines on the project, what it does is, it reduces the overall cost of the project and it increases the bankability of the projects, which means that it's easier and it costs less for the country to get in foreign investment or investment from private Parties for these projects. So, from that perspective, I think it's imperative actually that these mechanisms come in. They prove very helpful in countries like Malaysia, for example, in terms of making projects more attractive to investors and reducing costs.

I think just one other thing to add to that, is that, really, when you look, for example at the FIDIC form, and the FIDIC form has been used by development banks for many, many years as the model, right? It is no accident that in that form, as a standard, you have the an adjudication body that certifies interim payments, and it is precisely because having that improves the discipline of project, and therefore, improves the bankability of the project.

JUSTICE (RETD.) HIMA KOHLI: Agreed. So, my take would be, if you're going down the line, that keeping in mind that almost 70% or more of the Indian infrastructure projects involve government agencies, it is imperative that we have some kind of a statute. It simply gives that strength to the employer, in this case, a PSU could be NHAI, could be MoD, could be CPWD, you name it or a state PWD that the officers not taking a call and that officer is backed with a statute, because there's always a Sword of Damocles hanging on the shoulder or the head of an officer by way of the Prevention of Corruption Act and so many other provisions that kind of put them on the back foot. They're not willing to step forward and take that initiative. Their initiative would lie and rest in the statute. That would be the mandate of the statute. Would it make it easier? Yes, certainly it will make it easier for the inflow of cash to continue and to trickle in and keep the project going. Else, as we always say, FIDIC is the easy-in and easy-out. That easy-out won't happen if we are going to be wrangled in an arbitration that takes another decade to settle after the dispute has arisen, and in the meantime we don't know what the status of the project is, whether another contractor has entered into it, or the one who started with it has ended up in insolvency. So, my answer would be a big yes, the statute would help.

DR. MUKUL SHASTRY: I guess yes, the statute may help though being a private player it doesn't matter much to us. But as ma'am said and I totally, totally echo, most of the things are PSUs with whom we deal with also. So, if a statute is there it is always better. And as Avinash rightly said, FIDIC kind of provisions that we can really have a statute, similar statutes so people can draw from those clauses and can deal with it,

ANANYA KUMAR: Sorry, just I want you to add one more aspect to your answer. Whether you believe a statutory mechanism is relevant, and till that comes about, if sophisticated Parties know that payment disputes are inevitable, should the contract itself allocate risk more explicitly, including who carries the cost of paying disputed amounts?

PRIYANKA KAPOOR: So, those two kind of go hand in hand. I think India with the dollar value on its infrastructure bill, today and in the next few decades, has to be very conscious of one thing, that you need to attract, as a country, a lot of foreign investments. And those foreign investments are looking for certainty, transparency and recoverability. And that can happen on the back of a statute, rather than just simple drafting, because what a contract does not allow you to do is allocate risk. The contract tells you, where does the presumption of a breach or a Party being out of pocket lie, and what can be done to address it. The allocation of risk, you want that to be addressed in a more statutory form rather than having to knock the door of a court or be in front of a adjudicator or a Tribunal for every issue. That certainty is very important.

A contract will give you the trigger, the contract can also give you a mechanism, but most contracts fail in terms of important carve outs and also on the interest payments. The contracts that I have seen on my desk, most of them, don't even remotely address the issue of, what if you got it wrong, what is the cost of getting it wrong, where does the interest amount then lie? That regime is missing. So, contracts in itself are helpful only if there is a statute supporting it. And I think it will have a long term benefit to have a statute. Because what will happen, is you will develop an ecosystem of skilled professionals around it. And that will translate into an effective and efficient administration of these long term projects. So, the cost saving will therefore be inevitable. So, you can't kind of... you know, they all go hand in hand. But yes, to a statute, and yes to the development of ecosystem of, you know, skilled adjudicators, certifiers, engineers, it's very important. I think when it... when I was to compare India with England or Singapore or Malaysia, which is comparatively smaller jurisdictions, one of the reasons that they have succeeded is because of the skill ecosystem that they have.

ANANYA KUMAR: It's fair enough. I think certainty, transparency, recoverability, all of these things that you mentioned are very important, and a statute will possibly bring that in. I noticed that we're nearly running out of time; so, I'll open it up to questions on the closing thought that we need a statutory mechanism in India. Yeah, sure. Is there a mic that we can...?

AUDIENCE 1: Good morning. Very good panel discussion really, and this is very important topic in our country. But what I find in my 40 years' experience, that implementation is the problem. Statutes are there, whatever is there in the statute, that is also not being agreed to. FIDIC is a very good contract and all multilateral, bilateral agencies who are funding the project, they are always insisting for FIDIC. But still a project director is supposed to be independent person, but whatever he is deciding, again that is also not agreed to. FIDIC does say that you have to make running payment, interim payment within 7 days, within 28 days, but... and after that you have to pay interest, but implementation is the problem. So, yes, we may be needing... we may be requiring tweaking of the statute for that, but whatever is available that is also not being implemented and discipline is not there. There is a survey available that 70%-80% of our projects are getting delayed because sites are not just available. They are just writing, okay, sites will be handed over progressively, and I don't know what is the meaning of 'progressively', and then work suffers. And another very, very important issue is that contractors are quoting 10%, 15%, 20% below; so, how they will work? So, we have to have that mechanism also, so because there... you see 10% is the contractor profit and overhead and the quote is 20% below; so, how the hell work will be done? So, we need to tweak, we need to tweak there also. So, we worked with the Dr. Shridhar in DMRC, and he used to tell us okay, you go and take decision; all right decisions are mine and wrong decisions are yours, mind it. And then we put a clause in 80% payment will be paid in within 7 days and how work happened. So, according to me, the problem more problems towards implementation. Thank you.

ANANYA KUMAR: That's a very fair comment sir, and I think what Justice Kohli said, unless somebody else wants to address the comment itself. I think what Justice Kohli said about there being a statutory mechanism which gives... which empowers officers in PSUs to make payments, that will make life easier, because right now a contract doesn't give them teeth, a statute probably will. But thank you so much for that comment.

DR. MUKUL SHASTRY: Land thing is now kind of sorted because now, unless you have 90% land acquired, you don't give the contract for India's PPP road contracts. The land is only 90% has to be done before the project is implemented; so, that, they have made some amends. But even the 10% also at time gets stuck and there are a lot of long delays, yeah. Yes.

AVINASH PRADHAN: Can I just offer one perspective on that, on the specific topic of under... like cutting prices of the bid in order to win the bid. We found that in Singapore, having adjudication, a mechanism of adjudication, the discipline that that creates has, over the years, reduced that strategy on the part of contractors. So, actually now you see less of these situations where contractors are coming in, bidding at actually 10% below cost. So, when they do that, what they are doing is they will... they are banking on there being a variation in the project later on, in which they can basically, create profit for themselves. That's exactly...

DR. MUKUL SHASTRY: Now even contract department is a profit centre for a lot of contractors.

ANANYA KUMAR: Yeah.

DR. MUKUL SHASTRY: So, they will they will win and then they'll put off contracts.

AVINASH PRADHAN: Yeah. So it's interesting to see that with Singapore that, over the years... through... and I think there's a direct correlation with the adjudication mechanisms that that has been reduced. And it is I mean it's still there of course, but it is far less prevalent than it used to be.

ANANYA KUMAR: Thanks Avinash, and thank you Mukul. Anyone else? Okay, I've got a big "00:00" staring at me; so, I'll then assume that there are no further questions. Thank you so much Justice Kohli, Priyanka, Mukul and Avinash. I think that was a very insightful discussion. And I think we're all *ad idem* on the basics of what needs to be done. Modalities can be tweaked depending on which side of the table you sit, but thank you so much for all your different perspectives on the topic.

DR. MUKUL SHASTRY: Thank you for your moderation.

JUSTICE (RETD.) HIMA KOHLI: For all of us, thank you for moderating as well as you did. It was thoroughly researched, and it was very interesting to go into aspects which he had highlighted. It was a learning graph for us too.

ANANYA KUMAR: Thank you so much, ma'am. That's very kind of you.

ALISHA SHARMA: Thank you, Ananya and thank you to our panellists for that sharp and grounded discussion. It has indeed offered a timely reminder of how payment mechanisms can shape the course. May I request the panel to kindly step forward for a picture please? Audience, please note that the next session will begin at 10:30. Thank you.

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