

INDIA ADR WEEK 2026 – 08 SEP 2026**SESSION 6**

**THIS HOUSE BELIEVES THAT BILLION-DOLLAR INFRASTRUCTURE
DISPUTES SHOULD NOT BE ARBITRATED**

SPEAKERS:**JUDGES:**

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NUSRAT HASSAN, MANAGING PARTNER, DENTONS LINK LEGAL

MODERATOR: PRANAY LEKHI, ASSOCIATE, A&O SHEARMAN

FOR THE MOTION:

KIRTAN PRASAD, PARTNER, RPC

SANJNA PRAMOD, SENIOR ASSOCIATE, CLIFFORD CHANCE

AGAINST THE MOTION:

PATRICK TAYLOR, PARTNER, DEBEVOISE & PLIMPTON LLP

SHIVANI SANGHI, PARTNER, BRYAN CAVE LEIGHTON PAISNER LLP

ANUSHKA MANSHARAMANI: We request everyone to kindly take your seats. We will be beginning with the debate in the next two minutes. Ladies and gentlemen, we now arrive at one of the most eagerly anticipated traditions of the India ADR Week. The IAW Mumbai debate presented by RPC and MCIA. The motion before the House today is, "This House believes that Billion Dollar Infrastructure Disputes should not be Arbitrated." Speaking for the motion are Kirtan Prasad and Sanjna Pramod. Speaking against the motion are, Patrick Taylor and Shivani Sanghi the debate will be moderated by Pranay Lekhi. Presiding over the high stake exchange as our judges is Campbell Jackson and Nusrat Hassan. Over to you, Pranay. Thank you.

PRANAY LEKHI: Good evening, ladies and gentlemen. As was just noted, I think this is a much anticipated event and a highlight of the India ADR Week. But I can't help but start by noticing the elephant in the room. The motion reads that this House believes that billion dollar infrastructure disputes should not be arbitrated. We are, after all, here at India ADR week, a week that is supposed to celebrate Alternative Dispute Resolution and let's be honest, arbitration in particular. This is the sixth edition of the India ADR Week. It's organized by India's premier arbitral institution. A week, in short, dedicated to perhaps tell the audience that arbitration does more good than bad. But in the mix of this, we have the motion in front of us that appears a lot like having a debate on prohibition in a festival that's organised for wine tasting. But that aside, I think the motion does address something of significant importance that will resonate with many people in the room. And with that, let me begin by just setting the context for what this debate is going to explore.

First, I think it's important to note that infrastructure disputes are not typical commercial disputes. Underlying billion dollar infrastructure disputes are multibillion dollar infrastructure projects. The scale of these projects is immense and that creates certain pressures on any dispute resolution mechanism. Documents that relate to infrastructure disputes of this scale are not judged in lever arch files, but they are judged in terabytes. So, there is a large scope for pressure on any dispute resolution mechanism. And this pressure of course, accords to arbitration itself. Do the traditional advantages of arbitration; speed, cost effectiveness, efficiency, Party autonomy, do they act with equal force in the context of these really large infrastructure projects?

Second, and I think this is essential, infrastructure projects of this scale usually have an element of state involvement and by virtue of that, public interest. Which means that it is not necessarily only the Parties to the Arbitration Agreement that are relevant stakeholders in respect of these projects, but so are the ordinary citizens who aim to benefit from these

2 infrastructure projects as well. In that context, is arbitration well suited to address the public
3 interest in cases where arbitrations are held behind closed doors with relatively limited
4 accountability to the public? That is a question that we hope to explore today. And this has
5 particular relevance in the context of India because you would have seen, and it's all over the
6 news that you have government Ministries auguring caution against arbitrations use in the
7 context of large infrastructure projects. And this is what makes this motion more than a mere
8 provocation. What is the alternative to arbitration? Is it litigation? Are courts equipped? Or do
9 we need a neutral forum to adjudicate this dispute? And that, ladies and gentlemen, leads us
10 to our speakers for today, which I have the privilege of introducing.

11 I should say, of course, as the Moderator for this evening, I am completely neutral to this
12 motion. I left India six years ago to dedicate my career to international arbitration and that of
13 course means, I don't have a say in this motion, but we helpfully have individuals with diverse
14 and varied experience to speak on the topic. We've heard that on the side for the motion we
15 have Kirtan Prasad and Sanjna Pramod. Kirtan is a partner at RPC in London, specialising in
16 international arbitration and complex commercial and financial service disputes with all with
17 a cross-border dimension. Among her other fantastic achievements, Kirtan is ranked as a next
18 generation partner in Legal 500 UK. Sanjna is a Senior Associate at Clifford Chance in
19 Singapore, specializing in commercial and investor-state arbitration as well as the
20 enforcement of awards and judgments. She is a dual qualified lawyer admitted to practice in
21 India and Australia and has 12 years of experience practicing in multiple jurisdictions
22 including Hong Kong and Singapore.

23 Then their worthy opponents for today are Patrick Taylor and Shivani Sanghi. Patrick is a
24 Partner in the International Dispute Resolution Group at Debevoise and Plimpton, based in
25 the firm's London and Paris offices and is the co-Chair of the firm's Africa practice. Patrick has
26 over 20 years of experience representing clients and in 2024, he was appointed as a member
27 of the LCIA court as well as a member of the Council of the MCIA. Sanjana is a Partner in the
28 Business and Commercial Disputes team at BCLP in London. She also leads the firm's India
29 practice before joining BCLP, Shivani gained experience as... Sorry Shivani, my apologies.
30 Shivani gained experience across a variety of law firms including free Frank Covington and
31 Burling & Fieldfisher. Shivani is a dual qualified lawyer as a Solicitor Advocate in England and
32 Wales as well as an advocate in India besides having appeared in arbitrations across a variety
33 of arbitral rules. She has also appeared across the hierarchy of the courts in the UK, up to the
34 UK Supreme Court.

And the unenviable task of judging this debate falls to the two gentlemen to my left, Campbell Jackson and Nusrat Hassan. Campbell is the EY, Global Claims and Disputes leader based in London. He has over 25 years of experience of specialist forensic and disputes experience and leads EY's global practice advising everyone from corporations to governments to law firms on issues varying from international arbitration, commercial litigation, expert determination, forensic accounting and complex investigations. Campbell also regularly acts as an Independent Expert Witness providing testimony across a range of dispute resolution forums and is consistently ranked in the directories as a leading Expert Witness in arbitration and forensic accounting. Nusrat is the Managing Partner of Dentons Link Legal and has over three decades of experience in dispute resolution including international arbitration. He is a dual qualified lawyer admitted to practice in India and England & Wales and has advised and represented clients in sophisticated cross-border disputes across a variety of sectors and under all major arbitration rules. He currently serves as Chairman Emeritus of the Chartered Institute of Arbitrators in India and is also a Fellow of the Institute. He is also empanelled as an Arbitrator with a number of arbitration institutions and is regularly recognised in directories for his expertise in arbitration and Dispute Resolution.

And now for the format of the debate. This is going to be an Oxford-style debate where we have, first the two speakers for the motion who are going to be speaking for a total of 12 minutes, then we will have the two speakers against the motion also speaking for the same time. We will then, after the two main speeches are done, have rebuttals from the side "for the motion" and then surrebuttals from the side "against the motion". At the end we will have the judges provide their comments and the verdict. Now we will have... With that we let the debate begin. Could I please request the first speaker for the motion to start.

SANJNA PRAMOD: Thanks, Pranay, for making our case, but also showing us that we're going to be killing our arbitration careers within the hour with this topic. But jokes aside, and as Pranay mentioned, billion dollar infrastructure disputes are not your run-of-the-mill ordinary commercial disagreements. They typically involve a state or a state-owned entity, an asset that's publicly-owned, publicly listed or built under public concession, sums of money that are large enough to move national budgets and also impact price and availability of essential services to the public. So, this is true if the dispute concerns, say, an airport in Manila or water utility in Indonesia or a satellite program in India. As many of you know, in June 2024, the Ministry of Finance in India advised PSUs against routinely using arbitration clauses in their procurement contracts and mandated mediation as the primary mechanism. Earlier this year, the National Highway Authority of India also followed suit and removed arbitration

as the last resort in a process that already required mediation, Dispute Resolution Boards and Conciliation Committees beforehand. The stated rationale, arbitration has proven slow, awards are inconsistent and often larger than the claims involved, and high value awards are themselves routinely challenged in court anyway, making arbitration an added step rather than a real substitute for litigation.

So, this is the frame for today's debate. If even a state that once embraced arbitration is now trying to buy its way out of disputes rather than resolve them through the arbitral process, the House should ask whether arbitration was ever the right tool for billion dollar infrastructure disputes of this scale in the first place. Obviously, the opposition will come here and argue that arbitration offers neutral, expert, cross border, enforceable dispute resolution that domestic courts cannot match. But look at the pattern across jurisdictions. You have Philippine courts that have had to reassert control over airport terminal expropriation because arbitration simply could not absorb the public dimensions that brought to it. Tanzania's water concession dispute proceeded on a treaty technicalities that were completely divorced from citizens that were actually affected.

So, our contention is two-fold. First, billion dollar infrastructure disputes are not private bargains gone wrong. They are public trust questions wearing commercial contracts clothing and this House should not pretend that arbitration is built for them. Second, recent practical experience has shown that arbitration has failed to live up to its own promise of being a neutral and efficient dispute resolution mechanism. I'll address the first point and my co-speaker, Kirtan will address the next.

So, within the first topic itself, I have four main submissions. First arbitration's core features, confidentiality and Party-selected adjudicators are structurally wrong for disputes of this nature. Because billion dollar infrastructure disputes conducted behind closed doors with awards frequently unpublished even though the outcome directly affects tariffs, continuity of essential services or a state's fiscal exposure. So, if you take the example of **Biwater Gauff** in Tanzania, a private investor's dispute over the takeover of a water and sewage concession, a service millions of residents regularly depend on was resolved through a treaty arbitration turning on procedural technicalities such as six-month negotiation periods and most favoured nation clauses, far removed from the people whose water supply was actually at stake.

Second, precedent and public accountability. Naturally, a court judgment on \$1 billion infrastructure dispute becomes public record is appealable and builds a body of law that governs similar disputes in future disputes. A confidential arbitral award does none of this.

2 Third, duplication of process if disputes escalate past mediation and dispute boards sending
3 them to arbitration first and then on to court on a challenge, as happens routinely of
4 arbitrations in this nature simply adds an extra expensive confidential layer before courts get
5 involved anyway. So, removing that layer once Dispute Boards and mediations have already
6 failed, shortens the path to final appealable public resolution rather than lengthening it. So,
7 Kirtan and my case is not to simply remove alternative dispute resolution as a whole. We are
8 proposing Mediation and Dispute Boards which are well equipped to deal with infrastructure
9 disputes at a lower level. And if it does have to escalate, can escalate to court directly after that.
10 Arbitration, especially as we've seen in India, only lengthens this whole process and you may
11 as well get ahead in the game.

12 The fourth point is courts, not Arbitrators are equipped to weigh public interests. So, Dispute
13 Boards and Mediation, as I explained, are well suited for technical contractual day-to-day
14 disagreements and that those make up the bulk of infrastructure disputes like valuation delays,
15 scope defects, etc. But once a dispute becomes significant enough to move on to litigation, it is
16 likely to impact public interest, public money and third-Parties who never had a say in the
17 private arbitral process in the first place. So, courts are built to hear those interests and
18 Arbitral Tribunals selected by two Parties are simply not. So, even if you look at data centres
19 as an example, so, modern billion dollar data centre dispute has various issues that arise over
20 land allocation, discounted power tariffs, increasing data sovereignty and critical
21 infrastructure classifications. Where a data concession dispute turns on whether a state can
22 withdraw its once subsidized power or reclaim land for other public use, resolving that through
23 a confidential arbitration insulates the decision with a major public budget on energy security
24 concerns for the larger, larger public interests. And so, we are proposing that there's no need
25 for arbitration for billion dollar infrastructure disputes. And Kirtan will delve into these issues
26 in more detail.

27 **KIRTAN PRASAD:** Thank you, Sanjna, that was very eloquently put. Now, quite apart from
28 arbitration being structurally inappropriate to deal with public infrastructure projects and
29 questions of public interest. On its own terms, arbitration has failed to deliver on its promise
30 of... to deliver an expert, neutral, efficient and self-contained process. On the expertise issue,
31 as Sanjna has explained, there's no reason why Arbitrators are any better place than Dispute
32 Adjudication Board panels to decide a dispute which is highly technical in any event and
33 arguably technical experts are better placed to deal with some of these points than legally
34 qualified arbitration practitioners.

On efficiency and neutrality, addressing each of these in turn. On efficiency. Arbitration is no longer a final destination for Dispute Resolution on large infrastructure projects. It quite often does end up in court, which means it's simply an additional step in the decision-making process and an additional layer of expense rather than being the substitute for litigation as it has always held itself out to be. The sheer fact of the courts having to step in to manage the case, more often than not, undermines the promise of a self-contained private process. In this regard, there's another aspect to it. Take the roughly 1 billion San Antonio data centre dispute between Rogers O'Brien Construction and Microsoft. Although the Parties themselves elected to send the contract to arbitration and it was determined in arbitration, because of the public law element, a federal court had to administratively close the matter and the pending arbitration was abated and it ultimately, ended up in a dismissal by joint stipulation years later. A mechanism that cannot function without ongoing supervision and simply cannot close the matter because of the inherent public interest elements in it is not delivering the efficiency that it promises at its very outset.

And in that, we move on to the next point, which is neutrality, which has again been one of the great hallmarks of arbitration. Practice and recent outcomes from the arbitral process have shaken public confidence in the neutrality of arbitration as a mechanism to resolve disputes involving billions of dollars of public money and perhaps rightly so. The first is simply the size and the nature of liabilities against public infrastructure bodies. Data on Indian Highway Sector arbitration shows results in substantial uncapped liabilities with final payouts frequently exceeding the original claim amounts or indeed even the original contract value. A 2025 press report indicated that the total value of arbitration claims against the National Highways Authority of India was approximately 1 trillion. And take that figure in mind against what is the total liability of the National Highway Authority of India, 2.5 trillion. And this includes the money that the Highway Authority is intending to spend on future projects. In other words, nearly 40% of their budget and liabilities is now pending claims against the body. The sheer size of this liability, which often materialises directly into awards and its relative proportionality to the actual public good, causes the public to question the process through which these claims are rendered.

And then we move on to inconsistent awards and awards that are prone to challenge. And in that regard, I would like to cite just two examples which might make my case. The first is the 2024 Indian Supreme Court decision on the **Delhi Metro** case, which set aside a Rs. 0.5 billion award to cure miscarriage of justice on the basis that the Tribunal had ignored vital evidence in the form of the Safety Certificate issued and for rewriting the agreement. So, this

is what the award did. The award effectively rewrote the agreement to ignore the phrase effective steps for curing in the termination clause of the contract. Again, you know, the allegation often is well, it's the Indian courts, but not quite. Because there was the other well publicized decision from the Singapore Supreme Court, sorry, Singapore Court of Appeal, which set aside a very well publicized arbitral award emanating from the infrastructure space after determining that nearly half of it was directly copied and pasted from previous rulings relating to the same project. Again, you know, these are not great hallmarks of the arbitral process.

And on the third point, which is the elephant in the room, corruption. And in that regard there are two points. The first is query if arbitral Tribunals are really the best people to rule on corruption relating to the grant of is often raised as a defence in these proceedings. And the second is the P&ID case demonstrates that arbitration isn't even capable of spotting and rooting out corruption when it is raised in the process of the arbitration. I mean, you might say all of the four examples that I've cited are outliers, but the reality is that the public perception has been very deeply dented as a result of these cases coming to the fore. And at some level, perception is reality. If public confidence and the public who pay this money is ultimately shaken, then is arbitration really the neutral venue or can it claim to be the neutral venue that it holds itself out to be? Thank you.

PRANAY LEKHI: Thank you very much Kirtan and Sanjana for setting out that case so brilliantly. I think we'll now turn to Patrick and Shivani to make the case against the motion.

SHIVANI SANGHI: Thank you, Pranay. So, our side, Patrick and I will argue that billion dollar infrastructure disputes are precisely the type of claims for which arbitration is the most valuable dispute resolution forum. I would like to start by making three overarching points. One, our opposition has not said anything to say why billion dollar infrastructure disputes are fundamentally so different that they need to be excluded from arbitration. They have mentioned the use of public money, they have mentioned... they've made a lot of statements in favour of states. However, when you have an infrastructure projects, you have a contractor and you have the state. While public money is at stake, it is not a grant for jurisdictional nationalism. If the point is only about transparency, you could have publication of awards. So, that is not a good enough reason to change, to discard arbitration. So, that's number one. There's nothing fundamentally different about infrastructure disputes, especially billion dollar infrastructure disputes that they should not be arbitrated. In fact, given the amount, if there was to be an award or a judgment which is for \$1 billion, the Party which has that award likely needs to go to different jurisdictions to find the money to enforce that award. And that's why...

2 that's where the New York Convention and arbitration comes to help. A national court's
3 judgment is not likely to be as enforceable as an arbitration award. That's number one.

4 Number two, if there was a cross-border infrastructure investment claim, the other side should
5 not really be saying, or would not really be saying that investment treaty arbitration would not
6 be an appropriate forum. And if they hinted it might not be and if that was to be the case, how
7 will a country attract foreign investors if you cannot... if they cannot rely on the investment
8 treaty and the protection it offers? Thirdly, just in... just sorry, on that point, you can't have a
9 foreign investor go to national courts. That's something they're never going to agree to and
10 they will want the protection of an Investment Treaty Arbitration. So, if you can have
11 Investment Treaty Arbitrations when you have different states and a foreign investor involved,
12 why would you not do that when the investor and the state is of the same nationality?

13 The third point I would like to make is, the other side has not identified any perfect alternative
14 to arbitration. They mentioned mediation, they mention Dispute Adjudication Boards, but
15 both of them have issues. In terms of Dispute Adjudication Boards it is just a stage in the
16 dispute resolution. What happens if a Party serves a notice of dissatisfaction, which they can
17 do after 28 days of getting a... getting a ruling from the Dispute Adjudication Board. The
18 Parties will have to go to arbitration. So, Dispute Adjudication Board is not an answer. It's just
19 a first step. And it only works if the Parties choose to comply with the ruling of the Dispute
20 Adjudication Board.

21 Similarly, with mediation. It depends on the conduct of the Parties. If the Parties are able to
22 agree amongst themselves a solution that they both happy with, but when there are billion
23 dollars or so at stake, the Parties are very unlikely to do so. India has got the Mediation Act
24 2023 and recently the Mediation Council has also been set up. Forget the fact that the
25 Mediation Act is not fully notified. Even at the point when it is fully notified, Mediation doesn't
26 really provide a complete answer. A mediator can only facilitate a dispute between the Parties;
27 it cannot decide for them. So, ultimately, mediation fails because it depends on the Parties
28 being able to resolve the dispute between themselves. And like I said, when there are a billion
29 dollars at stake that is unlikely an outcome that's going to happen.

30 The other side did not mention litigation as an alternative, but they did say the problem with
31 arbitration is that it is slow. They mentioned neutrality and they mentioned that arbitration
32 fails because it is not self-contained. My response to all the three points is as follows. One, in
33 terms of speed, I think all of us in the room would agree that arbitration is much faster than
34 courts, especially, if it was to be Indian courts. We are all well aware of the backlog and the

2 delay that is before the Indian courts. In terms of it being self... arbitration not being self-
3 contained, now that is not really a problem with arbitration; that is a problem with Parties not
4 being happy with the decision they've got. So, you could have... you could go to litigation, but
5 there is nothing stopping the Parties from appealing. So, you can go from the single bench of
6 the Delhi High Court to the Division bench, then you can go to the Supreme Court, and if you're
7 allowed you could go in the curative petition. That is not a criticism of arbitration.

8 The third reason the other side said arbitration fails is neutrality. National courts are far from
9 neutral. So, that simply doesn't work. The other side also mentioned about fraud. Now fraud
10 is not an arbitration problem; fraud is a Party's conduct problem. There is no dispute
11 resolution mechanism that can be fraud proof. You could have fraud bribery in courts, you
12 could have fraud bribery before mediators, you could have fraud bribery before a Dispute
13 Adjudication Board. That... It is not an arbitration specific problem.

14 On the other hand, arbitration offers several advantages which are which are very conducive
15 and lend themselves to proper resolution of billion dollar infrastructure disputes. And I will
16 hand over to Patrick who will tell us about that.

17 **PATRICK TAYLOR:** Thank you. So, we heard from our opponents about potential
18 alternatives to arbitration. And I think if I heard correctly, it was that in order to get the
19 expertise you need, you could go to a DAB. In order to get the finality, you then need to go to
20 the courts. So, instead of arbitration, you've got a hybrid process. A hybrid process that would
21 be interminably long, extremely expensive and that's held up as the great alternative to
22 arbitration. The simple fact of the matter is, there is only one system that gives you everything
23 that you need to have for the arbitration of billion dollar infrastructure disputes, and it's easy
24 to hold up examples of arbitrations where things have gone wrong. But the fact that there are
25 so few examples to hold up demonstrates that in the main, it works.

26 And that highlights a fundamental problem with the arguments of our learned friends, which
27 is that the point at which you decide which Dispute Resolution mechanism to use is the point
28 at which you are agreeing the contract relating to the infrastructure project. And if you have
29 \$1 billion infrastructure project requiring expertise from overseas, requiring cross-border
30 involvement, there is only one way that you are going to be able to attract that. And that is by
31 agreeing to arbitration in a neutral venue that gives you finality, neutrality, expertise as well
32 as confidentiality and the ability to enforce your outcome. So, I just want to dwell with the
33 remaining time I have on some of those features.

2 Billion dollar infrastructure disputes are extremely complex. They can involve millions of
3 documents, literally. They can involve dozens of Witnesses and Experts. And you need the
4 flexibility of arbitration in order to be able to build a process that allows for all of those, all of
5 that evidence to be presented in a way that is proportionate to the rights of the Parties. In order
6 to get the expertise in arbitration, you have guarantees in place in the way that you appoint
7 your Tribunal. Guarantees that are not available to you in the courts. It's not to say that the
8 courts don't have, within their system, judges that do have that expertise, but you have no
9 means of guaranteeing that those judges will be available to you. And even if you did get them
10 for part of your dispute, you have no guarantees that they will be available to you for the whole
11 of your dispute. In arbitration, you get that expertise from the outset and available to you
12 throughout. And choosing the right panel and the right Arbitrators is key to resolving a lot of
13 the problems highlighted by our opponents today. If you get the right Tribunal in place, it can
14 give you the right process. And with the right process, you can control the time and the costs.
15 Parties have to take responsibility for that process. And if you have \$1 billion infrastructure
16 dispute, you can be guaranteed that Parties will be highly focused on ensuring that that process
17 and the agreement of the Tribunal to that process will ensure the best possible outcome.

18 Neutrality is also being presented, but without recognition of a really important fact.
19 Neutrality also depends on the seat if you have the seat in the country where the infrastructure
20 project is taking place, you may not get that neutrality and you may have the problems of the
21 supervising courts actually delving into the award in a way that takes a lot of time and money.
22 But you can choose. You have the freedom to choose your seat in arbitration. And choosing a
23 neutral venue in a jurisdiction that has an extremely good relationship between the courts and
24 the supervision of arbitral awards will ensure that you do get finality and that any challenge to
25 that award will be limited, on very strict grounds, and that you can have confidence that that
26 award will then be enforceable. And that's also key, as was mentioned earlier. Enforceability
27 under the New York Convention gives you the ability to enforce in over 160 countries
28 worldwide. And if you've got over \$1 billion of assets that you need to chase, the likelihood of
29 finding those all in one jurisdiction can be slim. And that can also be a significant concern for
30 the government Party that's involved. Because if you're chasing \$1 billion worth of assets
31 against a foreign contractor, the likelihood is that you're going to have to and want to do that
32 overseas.

33 Confidentiality. It's not a luxury in major infrastructure disputes; it's a necessity.
34 Confidentiality has always been one of the most attractive characteristics of arbitration. And
35 major infrastructure disputes often involve commercially sensitive technology, engineering

2 know-how, pricing, project data, etc., etc. As an example of how arbitration allows you to
3 balance that, Rule 46 of the MCIA Rules on confidentiality states that Parties and Tribunals
4 must treat the proceeding's evidence and award as confidential, but with defined exceptions
5 being possible.

6 Finally, as my last point, given the time, on cost and delay. Contemporary arbitration rules
7 have developed tools specifically to deal with cost and delay. It's a problem that has been
8 around for some time, but the new rules do work very effectively, with early dismissal,
9 expedited formation of Tribunals, consolidation, concurrent proceedings rules and joinder
10 rules. For example, the MCIA's 2025 Rules contain all of these mechanisms. With these new
11 mechanisms, arbitration is finally able to fulfil the promise of being a more time and cost
12 effective method of dispute resolution for major disputes. And I think that's probably our time
13 up; so, I will stop there.

14 **PRANAY LEKHI:** Thank you very much, Patrick and Shivani. Can we have a huge applause
15 for the opposition? And now we turn to the exciting part, rebuttals for the next three minutes.
16 We'll have the side for the motion giving their rebuttals to the arguments presented by the
17 team against the motion.

18 **KIRTAN PRASAD:** Thank you, Pranay. Given I only have three minutes, I'm going to limit
19 my points of rebuttal to three. The first criticism raised was that our proposal which is Dispute
20 Adjudication Boards followed by courts is expensive because arbitration is capable of being a
21 one-stop Dispute Resolution Centre. However, that is actually divorced a little from practical
22 reality on the ground because most of these large billion dollar infrastructure projects have
23 DABs built into them in any event. So, to have a DAB and then to go to arbitration and then
24 have the arbitral award, you know, heard again in court and set aside whether it's in the set
25 aside proceedings or otherwise, simply adds an additional layer of cost in the form of
26 arbitration. Our solution, which is DAB and then straight to court arguably removes that layer.

27 The second is expertise, which is that Tribunals are capable of more expert decisions than
28 court judges perhaps, but the reality is, there's nothing to stop national courts from coming up
29 with specialized benches as they have in IP and several other sectors. There is, for instance, a
30 commercial court in the UK with a technology-specific bench. The second is that, as I said,
31 DABs are part of the process in any event and can Arbitrators truly claim to be more expert
32 than the Dispute Adjudication body which is well embedded within a project and knows it in
33 and out. And second, arbitration comes at a cost, quite literally. The Arbitrators, unlike

publicly scrutinized and elected judges, do not come for free, and dare I say, they're not entirely cheap either.

The third point. If you will, is on enforcement. And this is arguably the strongest point that the opposition has raised today that it's easier to enforce under the New York Convention and therefore, arbitration is a good thing. However, if you were looking to enforce against a state entity, then your big stumbling block of sovereign immunity in terms of actually being able to enforce against asset comes up whether you're looking at court enforcement or enforcement under the New York Convention. The second is delay. I mean, just look at the Yukos and the Davos Awards. Ten years in, we're still babbling on about enforcement under each of those awards which were rendered.

And the third is that they have ignored entirely mechanisms that exist within the project finance structure which allow for easy enforcement, particularly if you are looking at enforcement against the contractor who is the private Party in the form of Performance Guarantees, On Demand Guarantees and other protections which don't even require you to go through the entire court process. So, with that, I think I have exhausted my three minutes and I'm going to pass it back to the opposition for surrebuttals.

PRANAY LEKHI: Thank you very much, Kirtan. Now, the side, against the motion, can we have your surrebuttal?

PATRICK TAYLOR: I think what we heard again there, with respect, was an attack on the instances where things go wrong, but when you agreeing your contract, you're not focused on things going wrong, you're not focused on the possibility of there being a fraud in the project later on, the possibility of disputes because one Party isn't complying with its obligations, the possibility of one Party refusing to comply with an outcome of a legitimate arbitration. And that's the issue. In order to try and fix the problems that might arise, you're throwing out the baby with the bathwater and proposing a process that is inherently less efficient, inherently longer, inherently less likely to lead to a final and enforceable outcome. And that's why when you are contracting, the only game in town is arbitration. Arbitration enhanced perhaps with mediation or DABs. But certainly not DABs with litigation.

As regards enforcement, yes, the issue of sovereign immunity exists. But of course, that exists in the courts as well. The only thing is instead of having only the issue of sovereign immunity to deal with, you're also having to deal with the enforcement of a court... of a judgment in a foreign court which as everyone knows, is a far more complex and difficult process than enforcing an arbitral award. And I think, really, to sum it all up, if you are trying to attract

foreign international contractors, highly specialised international contractors for major infrastructure projects within a particular jurisdiction, you are not going to be able to do that unless you are willing to have those disputes arbitrated in a neutral forum, offering the finality and confidentiality that only arbitration can offer.

PRANAY LEKHI: Thank you very much, Patrick. So, there you have it, ladies and gentlemen. Can we have a huge round of applause for Patrick, Shivani, Kirtan and Sanjna for their fantastic presentations. Now as a concluding part of this debate we've heard, on the one side we have arbitration buckling under the pressure of the complexities that billion dollar disputes may bring, and on the other side, we have the argument that for all its imperfections, arbitration remains, at least the least bad, if not a probably good solution for resolving such disputes. Helpfully for us... we have people to take our sides to my left. So, let me begin by asking Campbell to please present his comments in the first instance

CAMPBELL JACKSON: Sure, and congratulations to both sides. The level of experience and the superior advocacy is certainly noted in your submissions. I'm not a lawyer, I'm an accountant and a Forensics Expert. So, I feel a great privilege to be able to actually decide this debate here today. I was quite relaxed about it until my fellow partner Yogan reminded me about bribery and questioned my independence given I know some of the panel. So, I thought it would be remiss of me not to provide some reasoning for my decision, our award to the winner. On the for side, a very strong argument about arbitration being a fast track to court the discussion around neutrality and corruption, public accountability and confidence, I thought that was excellent tying into efficiency and the shared experience there. The loss of public confidence, I think is... is a good point that certainly resonated, but overall really well done. And thank you.

On the against side, we open very strongly doubling down on the absence of an alternative to arbitration. I don't care which forum it is as long as we have the dispute. That's a good thing for everyone. Mediation, a very strong point about the conduct of the Parties and the fact that a mediator can only facilitate can't adjudicate I thought was a fantastic point. Arbitration being much faster and with reference to the Indian courts, certainly my last two days vindicates that comment from what I've heard. Patrick led on to only one system, a very pertinent point. It was so quick to criticize arbitration with only so few examples. Every arbitration conference we go to we talk about the same issues but where are the positive examples; we only focus on the negative. Exception cross border expertise agreeing and upfront for forum and a guarantee as to what you're signing up to I think was very powerful. And then finally addressing the issue of costs and delay and the new rules to actually lean into some of the criticisms and limitations

there. So, overall well done. For me though, I thought the rebuttal was very strong. So, I'm going to have to award it to the to the against team for me, but thank you.

PRANAY LEKHI: Do we have a split verdict though. Can I now...

NUSRAT HASSAN: Yeah.

PRANAY LEKHI: Nusrat?

NUSRAT HASSAN: Yeah I'd like to do that. Yeah, so, of course, fantastic, both of you have made excellent points. I think especially when you look at India and you know if this was a topic which was being debated in some other country, it probably would be very straight and simple I guess. But in India there is in reality and which all of us who are in this room who are practitioners of arbitration have been, you know, what... using the words of the court in public policy as they say, their conscience was, you know, disturbed by the fact when the government made this systematic policy shift away from arbitration. I think this was not expected that the government would lose confidence in arbitration in India.

So, this topic, when you are especially debating here today, it's, you know, it's significant. And Kirtan and Sanjna, you made excellent points. You have almost convinced me that, you know, we should move away from arbitration. But I think one of the fundamental points which the team made against the motion is the fact that ultimately, you need to understand that these are billion dollar commercial contracts. This is ultimately between an employer and a contractor. The fact that the employer may be a state or it may be the government does not take away the fact that there are multiple commercial contracts involved. There is bankers involved, because there's a whole project finance, there are EPC contractors, they are actually in terms of, you know, dealing with many cross border issues, these are international contractors who are involved in these billion dollar projects. And therefore, the question comes down to when, you know, when the government shifts from its mindset that, yes, we should do, you know, believing that the courts would be faster, then I guess, you know, it's a... it takes a lot to make this paradigm shift.

And you know, the arguments which Shivani and Patrick have made are for the arbitration are quite obvious. I mean, you know, there are these are billion dollar contracts, they are confidential, there is neutrality, flexibility. And of course, at the end of the day, the question is you have the opportunity in a Tribunal to have experts. Now that makes a substantial difference, you know. Our courts, even in India have recognised over and over again that when you have an expert, we will appreciate that award, you know, directly in fact, saying that, you

2 know, we will appreciate the award, and we will not really sit in appeal against, or look again
3 into the... look again into the issues decided by a technical person. So, these are, quite clearly,
4 at the end of day, very critical points.

5 And of course, another aspect which is... which goes fundamentally to the issue in arbitration,
6 is neutrality. You know, we... the first thing when you study the subject matter when we start
7 as lawyers as dispute practitioners is about neutrality. And you understand, as practitioner,
8 how critical it is. If you are in a domestic court and as Kirtan and Sanjna mentioned is the fact
9 that ultimately, the Indian... or that's when you're talking about Indian courts are going to be
10 swayed by the fact that this may be, you know, public interest involved. Do we need to decide
11 on purely the contractual point or what is probably the right thing to do? And I guess when
12 you're talking about billion dollar contracts, it's not about fairness; it's about what you've
13 agreed in the contract. What you've agreed to perform and what you've agreed to pay. And
14 these become very critical points. And I think some of the points made on cost and delay and
15 how institutions have developed over the last five years or maybe slightly more, taking into
16 consideration the practitioners' issue and the... and I guess, my friends on the right side are
17 also practitioners of dispute resolution. So, they always had a difficult task. So, before I came
18 in I warned them you're in an ADR room; so, before you start.

19 So, quite clearly, the points were always in favour of my friends on my left. So, I'd also, like
20 Campbell, unfortunately, Pranay, I would love to be controversial but the arguments of Patrick
21 and Shivani definitely weigh heavily. And I guess it would be completely, I think I hope the
22 government revisits. In India you cannot... you can... I mean there are a lot of issues which
23 have been ironed out, are being ironed. I think the decision of the government is very, very
24 suspect in all aspects when they try to say that anything over ₹1 million... you know, ₹10
25 million have to go to the courts. I think it's disastrous to say the least. So, we will rule on your
26 side, against the motion. That's my view. Thank you.

27 **PRANAY LEKHI:** Thank you. Thank you very much, Nusrat, Campbell, for those comments.
28 I think given that we have 11 minutes, I just want to try to create some controversy. So, why
29 don't we go to the audience. For those who think that the motion falls, i.e. that this House
30 should not believe that billion dollar infrastructure disputes should not be arbitrated. So,
31 there's a double negative. If you support arbitration, can you raise your hand? So those against
32 the motion, can you raise your hand? And those for the motion, can you raise your hand? Okay,
33 my attempt has failed. So, the India ADR Week is still going strong. Thank you very much to
34 all the speakers and judges for that fantastic session, and I will now hand over to the MCIA.

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3 **ALISHA SHARMA:** Thank you to our judges, moderator and debators for what has been a
4 brilliantly sharp, witty and engaging debate. Whether you find yourself siding with the motion
5 or staunchly against it, it has certainly challenged assumptions about handling massive mega
6 project disputes. I would now request the panel to step forward for a group picture. I would
7 request everyone to be kindly seated as we begin our next session shortly.

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