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SESSION 2

FOCUS ON THE CLIENT: IN-HOUSE COUNSEL'S ROLE AND EXPECTATIONS FROM THE ARBITRAL PROCESS

SPEAKERS:

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ANUSHKA MANSHARAMANI: We request everyone to kindly take your seats. We will be beginning in the next minute. We now move to our next session hosted by Skadden. For all the attention arbitrations received from practitioners, Arbitrators and academics, it is ultimately the client and often the in-house Counsel whose expectations and experience should shape how the process evolves. So, today we ask, what do clients really want from arbitration and how well is the system currently listening. The session is titled "Focus on the Client: In-House Counsel's role and expectation from the arbitral process". Moderating the discussion, we have Sharmishtha. Joining her we have Friven, Naveen, Shalini and Vivek. I would now request... over to you Sharmishtha I would now request you to proceed, thank you.

SHARMISTHA CHAKRABARTI: Thanks very much Anushka. Good morning, everyone. Thank you so much for joining our session this morning before I get started let me introduce myself. I'm Sharmishtha Chakraborty, I'm a partner at Skadden's International Arbitration and Litigation Group, now based out of Singapore. And a huge thank you to MCIA, Neeti, to Madhukeshwar and everyone else out there for putting on this conference year on year and really allows us to come from across the world to India to Mumbai to discuss issues that are at our really at the centre of our business. So, the topic of discussion this morning is, "Focus on the client: In-house Counsel's roles and expectations during the arbitral process". Now given the topic, we thought it would be more than appropriate to bring on this stage some of the leading in-house Counsels in India today.

So, I have the great honour of being joined by Mr. Naveen Raju. Naveen, I'll take the liberty of using first names here. Naveen serves as the General Counsel and Executive Vice President at Mahindra and Mahindra. Naveen has more than two decades of experience leading Indian companies at Mahindra, Naveen has been instrumental in building the group's core internal competencies, integrating the legal function with group businesses and promoting the greater adoption of legal technology. Beyond his role at Mahindra, Naveen is also a member of the Association of Corporate Council, which is the world's largest in-house Counsel community and co-chairs, among others, the Corporate Governance and Corporate Laws Committee at the Federation of Indian Chamber of Commerce and Industry. So, Naveen brings today a perspective that spans law, business, governance, and that's exactly what today's discussion calls for. So, thank you, Naveen.

NAVEEN RAJU: Thank you.

SHARMISTHA CHAKRABARTI: Next to Naveen, we have Vivek Mittal. Vivek is the Executive Director of Legal and Corporate affairs at Hindustan Unilever Limited, which is

India's largest fast moving consumer goods company. He's also a member of the company's Management Committee. Before joining Hindustan Unilever, Vivek was Group General Counsel at Dr. Reddy's Laboratories. And so, he brings with him this unique cross-industry lens from pharmaceuticals to consumer goods, which will give us a really well-rounded perspective about the issues that we're seeing in play today in arbitrations. Thank you very much, Vivek.

And third, right next to Vivek, in that beautiful saree is Ms. Shalini Saxena. Shalini is Global General Counsel at Pine Labs. It's a tech company that needs no introduction. If you've used your credit card today, chances are you've used her technology. She brings more than two decades of experience in as Counsel, both in litigation and corporate law spanning industries such as consumer finance, fintech, crypto, power and renewables. Shalini is also Co-Founder of Cadre, which is an online dispute resolution forum, and the philosophy behind that, as Shalini tells me, is to make justice accessible and affordable for everyone. Shalini, we're excited to hear your thoughts today on online ADR as well as your in-house Counsel perspective.

SHALINI SAXENA: Thank you.

SHARMISTHA CHAKRABARTI: And at the very end, bookending these three general Counsels is my partner, Mr. Friven Yeoh. Friven is a leading commercial arbitration practitioner and he is the head of Skadden's International Arbitration and Litigation Group in Asia. Friven has extensive experience doing bet the company disputes some of the disputes I am honoured to co-counsel with him on and we look forward to your perspective on how we respond to questions from in-house Counsel during the lifecycle of a dispute.

So, without further ado, let's get to the topic. The first topic that I would like to talk about is really foundational. Even before we get to the lifecycle of a dispute, I'd like to understand from an in-house Counsel's perspective what prompts you to choose arbitration over litigation. And so, perhaps Naveen, I can invite you to lead on this.

NAVEEN RAJU: You know things have changed so much from the time that we started off being in-house Counsels. Earlier, there was this whole discussion about whether it is arbitration or whether it's litigation that we choose for our dispute resolution provisions. Nowadays, there is no such discussion. Arbitration is almost like, taken for granted if it's a commercial contract. Well, NDAs have their own standard. And I think maybe financial services contracts would have... Arbitration, it is. And I think the reasons for that is, one, the confidentiality that is attached to it, the ability to choose from panel and have some control over the process, in the sense that we can at least, even in the panel, you would have one

Arbitrator who you would have chosen who you think will bring the best skill sets to address the issues in dispute, and you would hope that, that person would have some influence in deciding who the third is, and so, you get a good set up to decide your issues. That's another reason. Well, we also expect that it would be efficient and time-bound, it would get a result within a fixed period of time, not that it always happens, but at least it's more certain than the times... time that is involved in a court process. And what else could be the reason as in...? Well, I think the these are about things that would go into preferring arbitration over litigation. Enforceability is something as well, you know. And if it's a cross-border, if it's going to be a multi-jurisdictional, we would rather have arbitration and have the benefit of the New York Convention.

SHARMISTHA CHAKRABARTI: Yeah. So, Vivek, moving on to you, if you could perhaps give your perspective on why you would choose arbitration or litigation, and it's not a foregone conclusion that you will choose arbitration; so, what's your perspective?

DR. VIVEK MITTAL: Hi, good morning. Can you guys hear me? Yes, I guess yes I share a different perspective than Naveen by the way.

NAVEEN RAJU: He always does have a different...

DR. VIVEK MITTAL: So the way at least I look at it as GC and I've lived through life where we were earlier providing quotes, then we then we moved to arbitration with our blind eyes, and then now we are in the space where we are now thinking which dispute resolution mechanism is better for us and I'll divide this into two pieces actually in one sense. So, I call these arbitration clauses as pre-dispute clauses or a dispute resolution clauses or pre-dispute clauses. And as a GC, there are, you know, tiers of contracts. So, let's say, low level contract; I want to be honest, I don't care what are we providing. Sometimes ODR, sometimes mediation, sometimes arbitration, sometimes courts. But then comes their mid-tier and high tier contracts, high tier certainly they are not no longer midnight clauses. And we really need to debate that which territory we are in globally. Whether courts are the right mechanism there or arbitration? The considerations are, as Naveen said, confidentiality, speedy process, cost certainly. Also as a strategy, we actually see that do we need to tire other side out. What are we seeking from dispute resolution? Are we posing it as a mechanism so that other party comes to the table to settle, or do we really need an outcome from arbitration? Is mediation the right option? Or we go to courts, that's the right option. And increasingly, I'm seeing that, you know, from the place where we were blindfoldedly providing arbitration, we are moving to a space where we are saying, okay, let's take a step back, let's still consider whether that's the viable option. Considering that arbitration, at least in India, has become far more complex and probably equally difficult as a court process. Sometimes you get immediate relief in court process much better versus arbitration. Cross border, I would tend to agree that many times the first choice arbitration, but then also depends that if you are in jurisdictions where you are present, other side is present, and you still think arbitration may not be a good process, I'm just throwing example, let's say Russia, you know. Do you think that courts in Russia could be a better option versus arbitration? Yes, it's a good consideration. So, what I'm saying is, it's a pure pre-dispute strategy and for high-tier or mid-tier contracts you really need to put your head around that what do you want from that particular dispute resolution process, and then you decide whether courts is a good option, and then you also decide which jurisdiction, then you also decide cost, then you also decide confidentiality, then you also decide your litigation strategy, etc., etc. There are multiple options there, and then you decide, oh, I think yes, arbitration could be a good process maybe.

SHARMISTHA CHAKRABARTI: I think what I'm hearing from both Naveen and yourself, Vivek is there is a menu available out there for in-house Counsel. Question is, how do you choose? Do you want a tasting menu, a little bit of everything, or do you want to go for the main course straight to arbitration? And we'll come on to that when we're talking about drafting the dispute resolution clauses. But before we do that, Shalini, from your perspective, you're in the fintech space, what do you go for, do you go for arbitration or do you go for litigation?

SHALINI SAXENA: I'm fortunate that both Naveen and Vivek have taken contradictory positions; so, I don't have to do that to start with. That being said, I'm going to come in from a different perspective we are talking about a situation where we control the narrative, but there is an audience out there that you're signing up to who needs to be convinced about your narrative. There are people that are coming with RFP that have arbitration or litigation or a different forum already pre-decided for you. I always put the hat on of saying, a life cycle of a dispute is sitting on top of a life cycle of a contract relationship. And as the relationship progresses, the gravity of the situation and the issues that are manifesting are also becoming different. Have I boxed myself in by saying I want arbitration because it's a fashionable thing to do, or do I want a foot in the door to say, look, tomorrow arbitration may not be the most viable position? I may want to go for litigation, and that may still remain an unsolved for area. I don't think we allow ourselves the, you know, the open space of rethinking and re-discovering what will work. There is no one brush. At least not for me. I end up signing to the government, I end up signing to the regulators. I need them to be convinced of following the same trends that we are discussing in this room, that you know, arbitration is a great way forward. So, if SEBI doesn't agree with it, fortunately SEBI agrees with it right, then I may love arbitration, but that's not what I'm going to get served tasting menu or main course. Yeah, that's where I am.

SHARMISTHA CHAKRABARTI: Right.

NAVEEN RAJU: But I had something here because you talked about government, you know, dealing with governments is totally different.

SHALINI SAXENA: Yeah.

NAVEEN RAJU: You may know that in '24 the Finance Ministry of India issued a notification, a directive to public sector undertakings requiring that if the value of disputes are above 10 crores of Indian Rupees, then it should necessarily go to litigation and it shouldn't be arbitration.

SHARMISTHA CHAKRABARTI: Yeah.

NAVEEN RAJU: And that's and the thinking behind that I have myself been involved in disputes with arbitration, both international and domestic, with government and government agencies where we have had lengthy arbitrations and awards which seem to, you know, to be in favour thumpingly of the private Parties involved but then have it rubbished by courts.

SHARMISTHA CHAKRABARTI: Yeah.

NAVEEN RAJU: And it has, I know that there's some of these disputes are playing out over 10, 15 year periods even today, so and these are like multi-billion dollar arbitrations which are being questioned in court. Why would you go through the pain and effort and cost of arbitrating something internationally if it's anyway going to get adjudicated in the courts? You might as well just be in the courts.

SHARMISTHA CHAKRABARTI: Right.

NAVEEN RAJU: So, that's a very important consideration I would think especially with natural resources and other heavily regulated industries.

SHARMISTHA CHAKRABARTI: Yeah, I think what I'm hearing from all three of you is it really depends on the counterparty that you're signing with and the nature of the contract, if it's a high value contract with an international counterparty that has assets outside of India, then arbitration might be the natural choice, but to sum it up, if you have the government on the other side sometimes by regulation you may be forced to put in into your contracts a court clause as opposed to arbitration. And strategically also you might have this discussion at the very beginning. And this is the kind of discussion that Friven and I like to have with our clients is, what makes sense at the end of the dispute resolution process? Where are you going to go to enforce that award when it comes out so it's not a hollow process? But before we get to the enforcement, which is the final piece of our discussion today, let's talk a little bit more about drafting that dispute resolution clause. And Shalini, you mentioned, you know, it could be a tasting menu. If it is a tasting menu, how do you choose? Like, what do you want to put into that dispute resolution clause when you're sitting in the room and you're thinking, do I want this dispute to be decided by arbitration or do I want it to be decided by court? What's... what do you look for when you're trying to draft that clause?

SHALINI SAXENA: I break up every relationship into an identifiable cohort to start with. And to the point that Naveen was making today, RBI, not today in fact, five years back, RBI came out with a circular which said that all customer disputes have to go to ODR. So, then that's a pre-decided cohort; I don't have to do anything about it. All I need to identify is what will I call as a customer dispute for that ODR category. I will then move to some of my service or vendor contracts, as an example, where I have the muscle power to make them agree to what works for me. I probably will put in a mediation and a Sole Arbitrator language there because that helps me keep confidentiality to the points that Vivek and Naveen both made, gives me speed, puts my money to good use and helps me get a quick award determining how I will enforce that award. That becomes very important for me. The big tickets are the international cross-border where I have not... I don't have much of a negotiation power. Then I'm going to be negotiating and I've widely seen in 90% cases, they come with the need for arbitration. Because confidentiality is most important, and expertise of the person who is going to be deciding your future is another very important thing. And that is definitely a given in arbitration. There we then debate as to where would we get the right seat, what works for us. There is a huge cost for running an arbitration. Even if it's a short window, there is a cost of flying your Arbitrators around or your Counsels around and getting everybody to be there. While we were discussing earlier in the day that we have these video ways of getting in and doing VCs, but well, you know, there is a touch and feel eventually that comes into the ground. So, that's how Sharmistha we tier it.

SHARMISTHA CHAKRABARTI: Yeah.

SHALINI SAXENA: We go for whatever is possible to do. And where we are negotiating, we've seen arbitration as the trend

SHARMISTHA CHAKRABARTI: Yeah. Vivek, what about you? What... what do you look for when you're trying to draft a clause in an agreement? And as you said, it's no longer a midnight clause and I agree with you. So, when you're sitting there hopefully well before midnight, probably at three in the afternoon, what's going through your head when you're thinking I need to have these points in my dispute resolution clause?

DR. VIVEK MITTAL: I just realized that we are... GCs are boxed-in.

SHALINI SAXENA: Yeah, yeah.

DR. VIVEK MITTAL: And we are forced to answer in a specific manner. I'm sorry, we won't give in. We can go to arbitration if you want to, by the way. So, as I said, I don't think arbitration is a midnight clause now; it's a pre-dispute strategy to when you think that if you go to dispute then what happens, right? But there are multiple considerations when you choose to write arbitration clauses. And, you know, I can just name a few but there could be some 10,000 more. And your kind of able lawyers, both the sides will actually complicate it more, which I completely understand. But just to give you an example, I was negotiating a contract with a Latin-American Party. And if I say come to SIAC, they said "What? Why would we fly? You are buying me out in Latin America, you have a dispute with me; you better come here rather than I come to Seattle", right? So, that's one consideration. Other consideration could be that while the guy is selling to me, is he parking his money in Bahamas, Bermudas, I don't know in which territory, and then you realize that despite you having an arbitration clause, let's say in London, where Skadden Head Office is. But you realize that that doesn't make sense. Then you also realise that, you know, probably the local law suggests that despite you doing arbitration, when you come to me for enforcement, enforcement doesn't make any sense. They are governed by Sharia law, they are run by, you know, some other law and you don't know what kind of laws come into picture. So, then you need to understand local law of the person against whom you are going after in relation to arbitration award. And then you realise that, okay, it all doesn't make sense, you better go to some other mechanism. So, I think, as I said, that the many considerations when you draft, sometimes it's a negotiation between Parties as well. And I have lived through that life where we, I, we actually decide that, oh, you're calling me to UK for arbitration, we understand that ICC or LCIA is very expensive; you better bear 75% of cost and I will bear only 25% of cost. That's the negotiation actually lawyers do bring to the table, which is a fair negotiation. I'm not debating. And I can also bring that to the table that you know. I won't bear cost if you bring me to London, which is very expensive or in Europe. So, when we draft, I think all those considerations now are being considered which earlier were not being considered.

SHARMISTHA CHAKRABARTI: Yeah.

DR. VIVEK MITTAL: And then you also decide that what will the arbitration panel, what will be the language, where will be the seat. You know, as I said, now the laundry list is going bigger and bigger when you consider. And as I said, it has become very complicated, and the only thing if you ask GC, is that we want outcome.

SHARMISTHA CHAKRABARTI: Yeah. So, Vivek, just to tell you not to complicate lives, but at Skadden we have a checklist that we go through to make sure that there are no complications and we will check and make sure you've asked your counterparty all of these points, but let me not answer that. You accused the two of us of bookending you. So, let me ask Friven to try and answer some of the points that you made. Friven what's your perspective when we are faced with a client like Vivek who has all of these complexities, how do we answer those questions?

FRIVEN YEOH: Just going back perhaps on the point about midnight clause and I think, I think we're seeing a lot less of that because I think people have learned that lesson the hard way, which is unfortunate because, you know, it's... it was true that, you know, at least when I started my career that, you know, five minutes before the deal is supposed to be signed and you realise that the clause doesn't work. And sometimes, you know, people don't want to hear that and they proceed with the... the signing and the execution nonetheless. But I think, kudos, I think, to a lot of our dispute resolution colleagues. I think these issues are front-ended a lot more these days and it's a very integral part of contractual negotiations, which is a good thing because the cost of getting it wrong is certainly very, very high. I mean, the worst is that you know, you really should be going for arbitration, but you've actually not had a clause, or a clause that is, you find out is problematic and cannot be enforced as a matter of law, and then you get yourself in a... in the wrong forum, or in other circumstances where the Party that you actually need to be... to enforce against is not a contractual Party, or in other circumstances where you have a very complex deals with a number of connected transactions and you have inconsistent clauses. And so, you know, you scratch your head as to how you try... you can try and consolidate some of these disputes. So, I think getting that right, I think that is certainly the first thing that we have been trying to talk to our clients and certainly the checklist that you've been talking about is something that we go through early on in, in the contractual negotiation phase.

DR. VIVEK MITTAL: Just one sorry, just one more thing at that in many M&A transactions, at least I have done is that before we decide on a commercial clause, I do actually ask that what's the what's the dispute resolution. Because then depending upon what's my dispute resolution muscle, I may decide to give some leeway on a commercial clause possible. And that I have done multiple times, that you know, let's first discuss what's the dispute resolution because then I'm seeing whether I'll get real value or not.

SHARMISTHA CHAKRABARTI: Yeah. Naveen?

NAVEEN RAJU: I think all that has to be said has been said, but to me there are four things an arbitration clause which gets. One is the seat, the venue, the governing law and the institution. And to me the most important ones are the seat and the institution. I really don't care about that.

SHARMISTHA CHAKRABARTI: Yeah.

NAVEEN RAJU: I'm not getting into why.

DR. VIVEK MITTAL: Sorry.

SHARMISTHA CHAKRABARTI: No, please.

DR. VIVEK MITTAL: One more thing I will add is that, what I realise is that the arbitration process and their rules. And I've lived through the life where I realised that I chose an institution, but I don't like their rules and their process. And then we were debating actually both parties were debating, oh, why did we choose this. And I don't want to name an institution. But I'm just saying that we were deciding, oh, why we could have gone to somewhere else, what means, you know, so what I've now started doing is that I've... I've been asking my lawyers that okay, let's see their rules, let's see their process, let's decide whether that process works for us or not and then choose proper arbitration institution.

SHARMISTHA CHAKRABARTI: Yeah. Shalini, did you want to react?

SHALINI SAXENA: I was just thinking, you know, Vivek, that's a good point you're making, but again it's the same story. By the time, God forbid, the dispute comes, life in that institution may have changed, how you thought would have changed, the circumstances would have changed and now you're stuck in that room. Whether you like it or not, there's there is going to be that one point where... too bad. Now you just have to write the whole course out.

SHARMISTHA CHAKRABARTI: Yeah.

SHALINI SAXENA: Yeah, yeah.

FRIVEN YEOH: That is actually an important point the distinction between institutions and that's something that a lot of clients don't necessarily appreciate and a lot of lawyers don't necessarily appreciate, because there's so much harmonization in the rules. When SIAC, you know, introduces a new set of provisions, another institution will follow, you know, and try and do that. But in fact, the way that each institution is structured may be very different. And the way that they conduct, and the whole philosophy in which they administer proceedings could be very different. Do you actually want scrutiny? Some institutions provide that and some less so. Maybe, it's a less formal form of scrutiny. I mean, you do want that level of... sort of scrutiny and making sure that, you know, there's consistency and that at certain minimum standards are met, but do you want to wait for that formal scrutiny process where it goes from Tribunal, to Secretariat to the court and then coming back down with, you know, perhaps several rounds of back and forth before you get your final award. So, that's something that I think, you know, we are also increasingly telling our clients, is this actually what you want, particularly in certain circumstances where we know that if there is going to be a dispute, the clients would be expecting and would need an award fairly quickly.

SHARMISTHA CHAKRABARTI: Yeah.

FRIVEN YEOH: Six months or you know, certainly less than a year is that going to be feasible with a particular institution without naming particular names and its efficiency, is sometimes quite varied.

SHARMISTHA CHAKRABARTI: Yeah. All that to say that the Counsel we have here are exactly, you know, the kind of sophisticated questions that we want asking because if you know the questions to ask, then we're speaking the same language, we're able to talk to you about the different choices that are out there and there are several choices. And another part of this, and Vivek, you mentioned this is the dispute starts during this process, starts during the M&A transaction. So, one thing that we do internally at Skadden is we really work closely with our M&A teams. And it's an education. It's an education for our M&A teams, it's also an education for the M&A in-house Counsel about what to think about. And ideally, just as you said, Vivek, we like to see in the Term Sheet the dispute resolution clause being a provision there with thought being... Naveen, to the points you mentioned about where is the seat going to be and what's going to be the governing law of the contract, also the governing law of the arbitration clause. I'm not going to go into that nuance here because that will open a whole other can of worms. And also, thoughts about how many Arbitrators do you want on the panel because many disputes may require three members. And Naveen, this goes back to one of the points you made is, you want the ability to nominate someone in the hopes that that someone, that

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wing has enough influence to nominate a Chair and then be able to influence the Chair. But in other cases maybe one Arbitrator like an NDA, one Arbitrator may be sufficient. So, that's the kind of checklist and the discussion that needs to happen not just among the dispute lawyers who, to your point, Shalini, when you've come to the dispute you're already there. This discussion needs to happen between the in-house Counsel, the M&A in-house Counsel as well as the dispute. So, it's a... it's a package that's built together at the very beginning of a transaction in the hopes that the dispute never arises, but if it does that we're in a good place.

DR. VIVEK MITTAL: So, two more points here. I have lived through the life where M&A lawyers were drafting the clauses and then we started asking M&A lawyers that have you run this clause past your dispute lawyers.

SHARMISTHA CHAKRABARTI: Yeah.

DR. VIVEK MITTAL: So, now increasingly of course, they also understand that's the client requirement and they do. One more point which I was thinking is that very critical and I was thinking that what kind of M&A transaction, what dispute is that, how sophisticated other side is to understand the arbitration process. And many times you realise that party on other side is not so sophisticated, they don't come from developed countries. We are also developing country by the way, but at the same time we do understand arbitration process far better than many countries out there. So, it becomes very difficult to actually run the process with the Party who would not know that when they agreed the arbitration process...

SHARMISTHA CHAKRABARTI: Yeah.

DR. VIVEK MITTAL: ... this is going to come. So, many times we do educate the other side as well that you are agreeing to this clause, do you even understand what does it entail, do you would your lawyers understand? And I'm talking about let's say countries from Latin America, countries in you know, maybe some other part of jurisdiction where, you know, they are not so sophisticated. And there are probably good within their jurisdiction, but not in London or Europe probably.

SHARMISTHA CHAKRABARTI: Yeah. Right, because when you have a counterparty like that, the instinct would be like, why not just go to our local court. And then to have that discussion when you're not familiar with the framework, it becomes a more challenging conversation.

DR. VIVEK MITTAL: Yeah.

SHARMISTHA CHAKRABARTI: But before we get to arbitration, sometimes when we're drafting this dispute resolution clause, you want to have in there, you mentioned earlier, you know, certain pre-dispute stages. Like for example, mediation or negotiation. And as disputes lawyers, sometimes, you know, our perspective is we want to understand from the client, like, where do you want to end up at the end of this process? Do you want this to be resolved or do you think there's a chance that this dispute arising out of this contract could actually be resolved by non-binding mediation? So, Naveen, perhaps I could ask you for your perspective. Do you often lobby to have mediation put into the clause as a pre-tier step?

NAVEEN RAJU: Yeah, yeah, Sharmistha. I'm a big advocate for mediation. We've seen the benefits of mediation in several of our disputes, but I think it needs to come from the culture of your company. The kind of... what kind of business model you follow. There are companies which are a lot more aggressive about chasing up on their disputes, but at least, the current company I work with follows a very different mindset. We'd rather do business and not engage in a dispute and avoid a dispute if we can. And so, mediation has been a really useful tool for us. In many of our disputes, we've, at various stages, found ourselves finding a resolution through mediation. The question is actually a little, you know, complex, about whether we need to mandate this in a provision itself because there's one view to see that it's a waste of time. If time is to the advantage of one of the Parties, then having a very detailed mediation process could just hurt you and you would be probably kicking yourself later down the road; why did I agree to such a complex mediation process not serving an end and I'm just being dragged on. But at the same time, you know, Parties, while the first round of mediation may not yield the result, what it does... Like for me, I'll give you the in-house Counsel perspective. It's a very difficult for me to tell my business people who are aggrieved by, you know, breakdown of a relationship that you have a bad case.

SHARMISTHA CHAKRABARTI: Yeah.

NAVEEN RAJU: You know, I can't say that, and it would seem like, you know, I don't have it in me. So, I would rather that we go to mediation and we have a, you know, a competent mediator telling us that these are the weaknesses of your case.

SHARMISTHA CHAKRABARTI: Right.

NAVEEN RAJU: And you know, these disputes arising, you know, and there are very strongly felt and these are individuals and egos and all that involved. And the way I've seen having spent the years that I have in the profession, I know these things ease over time.

SHARMISTHA CHAKRABARTI: Yeah.

NAVEEN RAJU: And people change, organizational memory is only so much, and suddenly it comes to hurt. So, the initial thinking is very different from things when it progresses a bit. So, more the opportunity to mediate bring a... a strong mediator in to help Parties to get around to a resolution, the more likely is a resolution. So, I'm very much in favour of mediation. And I... a lot of our significant contracts have mediation built in at multiple stages. But I know nowadays a lot of rules also does capture mediation.

SHARMISTHA CHAKRABARTI: Yeah, that's right. I mean just reacting to that and we can talk about some of the rules as well is, you know, one way to do it is to legislate it, bake it into your contract where you must have pre-arbitration mediation, and another way to look at it is even if you don't have it there, you're two consenting adults. You can agree to mediation at any point during the lifecycle of a dispute. And it sometimes helps to have mediation at the beginning like you said. And also, after initial pleadings have been filed because then you have a better sense of what the issues are. Somebody who's angry and offended by something might then actually be able to get a closer look on really where, which way are things being shaded. So, it's not as if it's like a once and done deal; you can have it, you can revisit it, you can choose not to have it in your contract, but if you have it at cooperating counterparty on the other side, you can decide to have it at any point in time during the process. So, I think it's a very helpful tool to flush out the weaknesses and lets sometimes your client, which is the business, really see which way we need to proceed. But enough about me. I want the in-house Counsel's perspective. So, Shalini, perhaps would you like to comment on this?

SHALINI SAXENA: I prefer mediation and I like to keep it fairly loose because I think that it's one really quick way of getting to solve the matter before it blows out of proportion. The minute this baby is out of the bathtub, it's gone. It's really. And if you can hold it back then you should. And as business Counsels, forget in-house Counsels, it's my duty to ensure that the business continuity at no point of time is tampered with just because the relationship soured at some stage. And I'm going to give you a live example, where we had this super important issue happening at the organisation and we decided that rather than going up and filing for litigation, let's start talking to the lawyers and the commercial leaders. But what we did, and I'm sure the other party did as well is, we got a back room with lawyers ready who started now helping us navigate by Minutes and Meeting records on how to navigate the situation towards either a pre-boxed dispute that eventually get externalised or it would be like, you know, churning the whole ocean. So, we started preparing for a potential litigation, but also solving the small fries as we went along. So, that's how we leverage mediation. It's very loose in our contracts. Just the fact that we are talking could pass off as mediation, but we like having it there and we prefer using that.

SHARMISTHA CHAKRABARTI: Yeah. The point you made Shalini, we'll come on to this is, you know, the dispute often starts even before the dispute has started in that you want to start building the record in your Minutes, in your board papers, in your correspondence before the first notice has gone out so that when the notice goes out you actually have something to hang your hat on, but before we move away to the to the adversary…

DR. VIVEK MITTAL: Quick one?

SHARMISTHA CHAKRABARTI: Yeah, please go ahead.

DR. VIVEK MITTAL: So, dispute starts when, you know, trust between parties go, and you start realising much before as you rightly said. So, you know what I have done in few contracts is that, and many times legal teams do take position and business heads do take position, but then we have said that two CEOs will talk and that kind of clause we have provided already in contract multiple times that whenever you're going to go to dispute, there'll be a meeting or call scheduled between two CEOs. When they decide let's go, let's go. So, that kind of mediation because that, you know, in that sense that's not a true mediation in one sense.

SHARMISTHA CHAKRABARTI: Yeah.

DR. VIVEK MITTAL: But then both parties have taken the position that, you know, it's a final position of ours. So, that's one process. Very interesting and lawyers in the room may not like it because the way I'm going now, in one or two of the contracts, what we provided is that, when two companies decide that they want to litigate, before that, the mediation could be by a third CEO of the similar kind of company. And we have reached out to that CEO and said, that we are providing your name are you comfortable or not? Reason of that is that you realise that more and more during the arbitration and mediation process, the expert is not the expert which you like. And you don't get the expert exactly from your own field, specifically, let's say in pharmaceutical, and that too generic pharmaceutical. A guy may not be able to appreciate the entire process of end-to-end of pharma. Let's say what happens in reverse engineering, R&D to bringing drug to the table, etc., etc. And then you realise that what do you do with the guy if you're stuck that, that person doesn't understand. So, we have done in few cases that third CEO will decide. And then it's your call, you want to still go ahead in the mediation process or not. One point which you raised is not so much overstated by Parties, but in few arbitration processes, Parties do decide after the written pleadings are complete that whether you want to go for mediation or not. That's very, very, very important for me.

SHARMISTHA CHAKRABARTI: Yeah.

DR. VIVEK MITTAL: And when I'm in arbitration process, I would always and always ask at that stage that now you have considered everything in writing on the table, you put everything in writing on the table; now do you want to still take the position? Because then we are here for the long haul, that's point number one; we will not leave you, and then you please consider and we will also consider our position. Very important point which people sometimes miss.

SHARMISTHA CHAKRABARTI: You raise a very important point and I'll leave it to everyone to detail maybe on this more, but right now and I are doing a very big pharma dispute. And the language sometimes in these pharma disputes are better understood by industry experts than by commercial lawyers. So, we regularly talk to industry experts to understand what's been going on so the solution you gave of having another industry expert somewhere during the stage come in and act as an informal arbiter of the dispute is very interesting one. Friven, would you like to comment?

FRIVEN YEOH: Yeah. And this I think goes back to your point that, you know, mediation is not just an... as part of an escalation process. It's not just something that's confined to pre-arbitration or pre litigation. It's something that can be useful to de-escalate in the course of a dispute.

SHARMISTHA CHAKRABARTI: Yeah.

FRIVEN YEOH: And I think in certain ways those are perhaps even more effective because the issues have already been crystallised. I think parties know exactly what their legal positions and where they each coming from. And that facilitates a slightly different mediation process. It tends to be more facilitated... more evaluative as opposed to facilitative. So, I think that is also useful in terms of pushing the parties towards a compromise. And in fact, this sort of, what we would often call as Arb-Med-Arb process is quite common in civil law traditions, you know. I deal a lot with East-Asian clients, for example. And that's something that's often been, you know, utilized. For example, in SIAC arbitrations where it's actually the Arbitrator who will during the course of an even a hearing ask the parties, do you want me now to mediate? Then he'll... he or she will take off the hat as an Arbitrator put on a mediator cap and gives his or her evaluation. I mean, you can have a debate about whether this is appropriate, but the stats will show you that this is actually a very effective way of settling and more than half of these cases then get settled. So, I mean, if you're not comfortable with that because you know, you may be maybe concerned about infecting the Arbitrator with *ex parte* bias, then another way is to go through an institutional set up Arb-Med-Arb procedure now they're very established procedure for example with the SIAC and SIMC, it’s a mediation protocol. So, there are a number of ways that you could do that and so I think it's important to remember that this is something that that Parties should continue to pursue as part of their dispute resolution process.

DR. VIVEK MITTAL: Yeah, one more point which I want to raise is that when you go through mediation and especially arbitration in India has become very complex because most of the Arbitrators establish Arbitrators are either ex-judges, or fairly senior counsel, they don't understand the subject matter expertise. And that we have seen that in pharma kind of dispute or in a technical dispute, they still see it from the lens of their own experience in past. And then the arbitration is or mediation is prolonged. So, I would rather find out a person from the industry who has lived through, whom we don't have to educate during the process.

SHARMISTHA CHAKRABARTI: Yeah.

DR. VIVEK MITTAL: And gives me quicker results, because that's my... What are my... what are my constraints and what are my considerations when I'm leading SGC, is that am I exceeding the cost, am I spending too much of cost on lawyers? And sorry to say that but am I getting a quick outcome as well in addition to spending whatever I'm spending, right? So, and I would put India arbitration versus international arbitration in different buckets because India arbitration has become far more complex than international arbitration, because of this process is being now run by, you know, people from the judiciary, rather than experts themselves.

SHARMISTHA CHAKRABARTI: Yeah. Points all well taken and good pointers to prevent Friven and myself I mean for example in in one of my cases the damages issue was so complex that not only did each side have to have their own quantum experts, but the Tribunal needed their own quantum expert. So, sometimes you wonder if it's a small enough dispute, you just want to go to an industry expert and have that industry expert give you the answer? That's not always the solution, but that's very indicative one. Well, this brings and you mentioned costs just a minute ago, I don't want to link my question to the question of costs. But when do you decide to bring in external Counsel and what do you look for when you're choosing in-house Counsel? And perhaps I'll start with Shalini for this question.

SHALINI SAXENA: Very recently, Sharmishtha, we started an activity within my team, we started educating our lawyers on what each of these institution offers. I think while you and I can debate the beauty of an arbitration-mediation clause, the rail track on which it runs is very important to understand. It helps me get comfortable with the institution that I'm going to take it. To answer Vivek's really good point it should also some... because I can't solve for world hunger sitting as a GC, right? I need the institutions to ramp up and also start telling or holding the pen of their Arbitrators saying, look if it's not your skill set, you may be a retired judge but please get the skill set. Educate yourself before you start opining on it. That's how I would think, right? It's something that was we did as we were growing up as GCs. We educated ourselves every day. Today I'm learning AI. Do I want to learn it? But I'm learning it. So, yeah, I mean it's what we all do. So, that's what I'm expecting my teams to do. So, to answer your question as to when are we getting the experts in first we are becoming aware of what we need to have as an expert and then like I told you in the example, we get experts in much earlier.

SHARMISTHA CHAKRABARTI: Yeah.

SHALINI SAXENA: Sometimes they are in our back rooms helping us make our responses sharper, our emails are more crystallised, our thought process, they become a bouncing board, or rather people we go back to saying, look, this is how X Party came up on the call. We, I, actually get them as observers on the call as well, because I want them to listen firsthand. I don't want to lose the messaging in translation to my back room. That's how we work with experts.

SHARMISTHA CHAKRABARTI: Yeah. And Naveen, what about you? When do you decide, okay, this matter is it seems like there's a dispute lurking, I should now think about bringing in external lawyers. When does that thought start percolating in your head?

NAVEEN RAJU: Yeah, like Shalini said very early, I think we see that there is a difference and it's likely to go to a dispute process, even if it's not likely to go to a dispute, but it just makes sense to set the record straight and prepare ourselves, then we would involve a dispute lawyer from a very early stage. You know, we also have the advantage of size; so, we have a large team and I have a set of lawyers who are dispute lawyers within the in-house team. So, there is a lot of guidance that the in-house team itself provides. But we would bring in in-house Counsel... sorry, external Counsel at the earliest, keeping in mind privilege and everything else that is.

SHARMISTHA CHAKRABARTI: A privilege is also a very interesting, especially in India given the status of General Counsel.

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NAVEEN RAJU: We go off on a tangent.

DR. VIVEK MITTAL: Yeah, yeah.

SHARMISTHA CHAKRABARTI: Yeah. But let me let me keep this contained. But on your point, I'd like just to give you an example of one, what I would call a victory for me this year is, a client came to us with a potential dispute. And we started with, you know, doing what we would do, which is building out making sure in their parent company Board Minutes, making sure that these points are being made so that later on, if it does go to a dispute, you have that foundational bedrock made. But what ended up happening though is instead of going to a dispute, they were able to reach commercial agreement with the other side. And so, that's when I took a back seat and our transactional folks came in, and Skadden really, we work very closely with our M&A teams, and they just helped restate the agreements because that was the commercial outcome and the better outcome instead of going for a 10 year, $500 million dispute seated in London, you know. The London IP team could sit there and restate the agreement negotiating with the other side. So, that's the value, you know. When you bring in a disputes lawyer, you might also be bringing it in M&A lawyers to consider restating the contracts. But I digress. Vivek, what do you look for when you decide to hire external Counsel and when do you start making that call that external Counsel should be involved?

DR. VIVEK MITTAL: So, few considerations again. And I would also see the position of other side. If they have brought in Counsel, then certainly I'll be forced to.

SHARMISTHA CHAKRABARTI: Yeah.

DR. VIVEK MITTAL: So, that's one point which I'm very clear that if they have engaged Counsel, as a protocol I would want to engage. Normally, as in-house, my first position will be that why don't we settle? And if you start bringing in external Counsel then you have already taken a position of dispute. And I'm not suggesting that, that doesn't help. Sometimes there's a positioning that helps that if you're bringing, let's say, a local Counsel, I would bring Skadden to scare them off. You know, that's also a strategy.

SHARMISTHA CHAKRABARTI: Have you seen my muscles?

DR. VIVEK MITTAL: You know, and that's what I'm saying I'll bring in muscle. Skadden muscle to scare them off that we are damn serious. We'll bleed you out and that's the business. Sometimes you give message through Counsel, indirect message, right? So, and then I would also probably, and have done few times that I bring in Counsels, not at forefront but at the back end just to put my house in order just to understand my own position.

SHARMISTHA CHAKRABARTI: Yeah.

DR. VIVEK MITTAL: I, you know, business guy may be saying something we have not done, you know, discovery process myself, I don't know what's on my email, if this goes in discovery process then what happens. I don't know what business guys have exchanged and I've lived through one arbitration where, you know, while documents said something else, but on WhatsApp there was something else. And we realized during the discovery process that, oh, what happened, why did this guy write that, right? So, then putting my house in order, I would then take a call depending upon the kind of dispute that when to bring in for my own house, keeping my own house in order.

SHARMISTHA CHAKRABARTI: Yeah.

DR. VIVEK MITTAL: So, various different disputes, different strategies, but considerations are... broad considerations are, as I said, is that depends upon nature of dispute depends upon various other things, when the... when do you bring them in. And what's the purpose you would want them to serve? You really want them to litigate? And they may also have had multiple strategies where I've linked Skadden plus local Counsel plus some other Counsel, you know, just to position myself well, I've also done that, you know. The back end work is done by local Counsels putting house in order, bringing international Counsel to actually guide us on a more strategic work. So, all those strategies.

SHARMISTHA CHAKRABARTI: Yeah.

DR. VIVEK MITTAL: As in-house you have to really be creative. Yeah.

SHARMISTHA CHAKRABARTI: Yeah. Very fascinating, and I want to pick you up on the muscle point later on again. But now let's... I'm cognizant of the time. Let's get to the end stage. So, I've skipped over the arbitration process. But let's say you have an award in your hand, and Naveen, as you pointed out, winning is sometimes only half the job. So, what steps do you take at the front end to ensure that at the back end, once the award is issued, you actually have something that's enforceable? What thoughts go through your mind at the pre-arbitration stage for that?

NAVEEN RAJU: So, I think the decision we spoke about on seat and institution would necessarily need to be guided by where are the assets located. If you are talking about a joint venture where there's little to know for example, we are an Indian company with a... entering into a joint venture in India with a foreign corporation, we would want to a dispute resolution process where we are able to easily enforce an award against the counterparty in the

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jurisdictions where they have their most significant assets. So, thinking about that at the time that you draft the arbitration clause is important.

SHARMISTHA CHAKRABARTI: Yeah.

NAVEEN RAJU: Well, things may change along the way, but that's something you can't factor in, but at least as things stand, where is the best enforceability should be the primary driver for a decision around that also I find that many times you charge into arbitration without really giving a thought, too much of a thought about enforceability, and we've been stuck with awards which look so great but are just not worth the paper it's written on. And that's when we get quite, and legal teams... in-house legal teams have really had to face the, you know, so odd for why we didn't advise that this whole process of three years would end up with nothing, you know, with more good money spent after bad. So, that's a very important consideration as well. You may have the best arbitration clause, you may have the best merits, but if your counterparty is bust, what's the point in commencing a very lengthy and costly arbitration? So, that's... that's something to think about even at the dispute stage.

SHARMISTHA CHAKRABARTI: Yeah. Before I get Shalini and Vivek's views, Friven, then what can we do to help people in Naveen's shoes, like for example, are there interim measures that we could go for, we could help the client out before they actually do the full four or five years' worth of arbitration?

FRIVEN YEOH: Yeah, I'll touch on interim measures, but I think also, you know, responding to or adding on to what Naveen had said, I think pre-contractual understanding of where assets lie certainly is critical. In a lot of the M&A deals that that we see actually the contract, the counterparty is actually an SPV. But you know that if a dispute happens, it's not going to be of any value, you know, with you're not going to be able to enforce anything against all these shell companies. So, I think even at that stage, I think it's important to strategize. I mean, at the back end you could rely on things like piercing the corporate veil or third-party beneficiaries, but you know that those thresholds are going to be very high. And so, you need to plan for that. And before contracts are even entered into, I think it's important to consider who the real people and who the real entities are that would have the deep pockets. And so, are there ways to try and bring them into the contractual framework? Are there ways to co-opt them into, you know, as a signatory to the Arbitration Agreement? Do we bring them in as guarantors or bring them or get them to provide them the relevant reps and warranties? So, those are the things that that, you know, we often consider with the clients. And to interim measures, it certainly is an increasingly used strategy to gain or to create leverage for our clients. And oftentimes, you get a sense, a heightened sense of tension with your counterparty, especially when questions start to arise on issues of performance. And you know, I think it's important at that point in time to start observing their behaviour. You know, do they stop responding orally? They only start to... they only communicate with written responses that seem to be very guarded and very brief. They might stop, you know, providing the same level of co-operation that they... that they usually, you know, provide. They become evasive or even obstructing to providing key documents such as financial information and management reports. And even key custodial documents, you know, are no longer accessible. And so, all these are indicative of the other side starting to plan for dispute, that they're in dispute planning phases. So, I think you start to look into whether there's any evidence of a removal of potential evidence or assets, and start to think about issues like emergency relief or preservation orders. Because I think ultimately, you know, these are important and could create important litigation leverage for any negotiations and that you might want to get into with your counterparty. And so, I think, going back a little, even before, you know, disputes start to happen, you want to think about, you know, when you draft your dispute resolution causes, to take a look at what interim measures or what interim relief, you can possibly get from your counterparty, whether by way of the arbitral rules or as a matter of the law of the seat. And these days, of course, with a lot of the institutional rules, Tribunals and Emergency Arbitrators, they do have the powers to grant interim relief. And curial courts as well have the powers to grant interim measures, particularly where orders against third-parties are needed. So, that's not always possible with an order from the Tribunal. So, you start to think about, you know, where these are possible.

You might also want to think about where interim measures will have to be enforced. This is not... this is often not an issue if the orders are to be enforced locally at the seat of the arbitration. But when enforcement is required in another jurisdiction outside the seat, this is where you would need the assistance of the court in the place of enforcement to assist with that process. And not all, you know, jurisdictions will provide that assistance. So, it's important to think about that. In Singapore, in Hong Kong, for example, the courts will grant interim measures in aid of a foreign arbitration. So, that's important to know whether there are assets to be enforced, you know, whether there are assets available to be enforced in those jurisdictions. In Hong Kong, Hong Kong goes one further by actually giving the courts the powers to enforce an interim measure, that's issued by a foreign Tribunal. So, those are things that I think you need to start to strategize when you think about, you know, availability of interim measures.

SHARMISTHA CHAKRABARTI: Shalini, Vivek, would you like to add anything on these points?

DR. VIVEK MITTAL: Yeah. So, I think enforcement, as I had also mentioned earlier, is a consideration when you draft actually, arbitration clause. Certainly. You know, but all becomes fluid when you realise you're dealing with a Party who's a standalone Party. And by the way, assumption during most of arbitration when you... when you talk to lawyers, they assume that counterparty sophisticated, and they're not running away. It's M&A between two large entities; you in some way find the assets. But I have lived through where the counterparties are standalone Party, exiting the business because of some reason, maybe family reason or maybe whatever reason. You're transferring $200, $300, $500 million to the person, and that when you talk to them during the process, you realise that, oh, he wants to buy a shack, he wants to buy a beach house and you know, then he wants to spend his life or her life there. You realise that this guy or this person doesn't want to create any assert; he wants to park the fund in some jurisdiction where you can't reach. All that then starts to come to your mind that whether you negotiate on price now or whether you, you know, still go through the process of providing arbitration clause and indemnities and then, you know, then you realise that indemnities are not worth.

SHARMISTHA CHAKRABARTI: Right.

DR. VIVEK MITTAL: The issue, biggest issue is while you covered it, the biggest issue is interim measure to have a freeze on this personal asset in the location where he's parked his fund rather than where he's the person is practically located. Right, the person would have parked fund and you know, you can park fund in Switzerland whether this person is in, let's say Chile, and Chilean court will pass an order which can freeze the asset or the funds lying in Switzerland, is that even possible? I think those are the considerations that you bring to the table when you realise that what are you seeking from arbitration clause or interim measures, etc., etc. So, very difficult, as I'm saying, it's very complex question of law and facts. It depends upon every case. But as I said, you need to think through all of those things, and probably ask them to create an Escrow in relation to your indemnities and reps and warranties and keep them for that period. Probably that's the best way rather than running after them after.

SHARMISTHA CHAKRABARTI: Yeah.

DR. VIVEK MITTAL: You know, dispute has arisen. So, very complex by the way, as I'm saying, but...

SHARMISTHA CHAKRABARTI: That's why you have the two of us sitting on your...

DR. VIVEK MITTAL: That's why you have...

SHARMISTHA CHAKRABARTI: Indeed.

DR. VIVEK MITTAL: Got it.

SHARMISTHA CHAKRABARTI: Shalini, any final thoughts on this?

SHALINI SAXENA: No, I think it's very well covered and valid point yeah dispute you need to get your clause in the contract before you get in there well.

SHARMISTHA CHAKRABARTI: Well, before I close and say thank you to all of you, I wanted to check whether there are any questions in the audience. All right, I see two hands. Let's start with you, Palash. Someone coming forward with the mic I think. Or, actually you'll go second Palash, let's have the question.

AUDIENCE: Myself Harshvardhan Melanta. I'm a Counsel in the chambers of Mr. Dharam Jumani, practicing in Bombay High Court my question is specifically to the GC's and especially to Vivek sir, you had given an example where a Mexican Party was you know, he said why should I come to Singapore right? Now, do you I mean yesterday there in the session one of the session gentleman from Malaysia said that there should be seat analysis, a cost analysis before deciding a seat so I... that was from the perspective of a legal practitioner; I wanted to understand from the GC's perspective whether GC's are brave enough, you know, I mean sorry, but you know, good experiment to venture out, you know, in locations apart from Singapore, Hong Kong, say Vietnam or yesterday one of the practitioner was suggesting Australia can be a location, so would GC's be comfortable to prefer seats which are say traditionally not an arbitration seat, but you know, it's pretty much rising.

DR. VIVEK MITTAL: Not denying. Possible. But as a GC and I can... Naveen can sympathise with me. And I'm also looking at Shalini to sympathize is that our considerations also are in-house pressures. Let's say if we go to Timbuktoo for litigation, and I don't get desirable result, later on, then my CEO will blame me that why did you go to that jurisdiction which was very unconventional because lawyers then will say, oh, Vivek decided that let's go to Timbuktoo for arbitration. So, I think sometimes consideration are not exactly as they look like, sometimes consideration are more. Would I be willing to consider, you know, different or unconventional jurisdiction? Yes, at the time of providing that arbitration clause, I would certainly discuss with Sharmishtha that Sharmishtha have you... have you gone there? Have you gone to

Timbuktoo and sat at the seat and, you know, done arbitration? If she says yes, then probably I'll consider if she says, yeah, I've heard we can, then probably not.

SHARMISTHA CHAKRABARTI: Yeah great. Palash, last question.

PALASH GUPTA: My question is addressed to... By way of introduction I'm Palash Gupta, Counsel with Ashurst ADT Law in Singapore my question is directed at any of the GCs but Vivek, maybe you because of a little bit of shared history, little over 20 years ago I interviewed with a man named M.K. Sharma not very far from here at Goleta, and he asked me the dreaded question, "So, Palash, where do you see yourself two decades from now?" And with the confidence that only a 23-year old or 22- year old cheeky lawyer can have, I said, "Sir, maybe doing your job, maybe your job."

DR. VIVEK MITTAL: Maybe what?

NAVEEN RAJU: Doing your job.

PALASH GUPTA: Maybe your job. Well, here we are 20 years later and you're doing the job that I had promised him that I'd be doing, yeah?

DR. VIVEK MITTAL: Thank you.

PALASH GUPTA: Okay, but he must have liked the answer he gave me the job anyway, and I guess that's where my question comes in. So, for the next four years as a young lawyer at Hindustan Levers, we fought a lot of litigation cases for rep food inspector would file a small case in Chhattisgarh because of a labelling which we could have otherwise settled or compromised on, and we didn't do it because we were Hindustan Levers and we fought it on reputation. But rep cuts both ways, right? Your reputation can hurt you if you're in open court. Is an expectation coming out of an arbitration process, is one of the key factors that you guys think of as General Counsel, the confidentiality involved that may be I'm going into a contract with a Party and if something goes wrong, I don't want to be embarrassed in open court; so, I'll do an arbitration clause because it's confidential and what may come out in evidence or in discussions is something that won't embarrass me as in-house Counsel? Does that factor into your thinking at all?

DR. VIVEK MITTAL: Answer is, 100%. You know, for our company and for Naveen's company and for Shalini's company, one of the biggest consideration into anything is our reputational risk, one of the biggest consideration. And we keep evaluating every situation, every potential or actual dispute or any notice or anything from reputational point of view, or even any post, any social media post. I think that's one of the considerations which is always on the table for a company like us. And we would always consider it before... And by the way, it's both ways. Sometimes we would want to go to court just to prove that it should come out and we should be... our reputation should be clean. Or maybe we go to arbitration process and then realize that, yes, arbitration process is probably better for us to keep things confidential. Both things, but yes, that's one of the biggest considerations. Thank you.

SHALINI SAXENA: I'm just going to add to that, you know. As a GC you cannot fail the newspaper test, ever.

DR. VIVEK MITTAL: Yeah. I think there are two more hands. Up to you Sharmishtha.

SHARMISTHA CHAKRABARTI: Okay, let's have... I'm conscious of the time is up, but let's have one more question perhaps okay, two more questions and then then we'll close it.

HIRESH CHAUDHARY: Hi good morning everyone. My name is Hiresh Chaudhary, I'm from CNS Law Chambers in New Delhi. My question is to the to the entire panel really on choice of Arbitrators. Particularly in domestic arbitrations we've seen that there is a hesitance to appointing lawyers in domestic arbitrations and that's something that's pretty unique to India, even though everybody is sort of aware of the merits and demerits of appointing only retired judges. But what would it change for this culture to, you know, catch up with similarly placed jurisdictions such as Malaysia, Vietnam, Indonesia, where it's the norm to appoint lawyers for most disputes, and it's only maybe some specialised disputes where the judges are appointed? Thank you.

SHARMISTHA CHAKRABARTI: To summarise the question, I guess the question is, you know, what will it take to change the culture in India to reflexively appoint former Supreme Court judges and instead appoint lawyers. You know, I'll take a stab at it and then I'll invite people to comment. Really, if you're... if you're coming to a law firm like ours, when we look at who to appoint as the Arbitrator, we'll look at a number of things, and including like who the other side is likely to appoint. So, sometimes what might be happening in domestic arbitrations is, if one side is appointing a former Supreme Court judge, then the other side will do the same thing. I've seen it also play out if one side is appointing a KC, the other side will want to appoint a KC. So, it's really dispute-specific but it comes down to in terms of changing the culture. It comes down to who are the people making the decisions. And the people making the decisions are really the GC’s assisted by people like ourselves. I personally have no inclination or predisposition to appointing former Supreme Court judges for each and every single dispute. But that said, I don't act in many domestic Indian arbitrations. So, I invite any comments from the panel on this point as well.

NAVEEN RAJU: I think this responsibility is ours and sometimes we fail it. We are the ones who should be driving this as decision makers within our companies. And I think there's a need for change, absolutely. It's not the judges; it should be the practitioners. And the problem is we come under pressure, like you said, because there's an initial appointment and then everybody just follows the same trend. There is a need for change, and hopefully our community will drive it.

DR. VIVEK MITTAL: Yeah, I think, two issues there. If you don't appoint former judges, then are you compromising on the process? Because process is also equally important in arbitration. Or if you're appointing judges, then are you compromising on the technical capabilities? You know, both go hand-in-hand. And there'll be a time, in my point of view, where you would want a person with technical capabilities plus legal knowledge. And I'm seeing, by the way, I'm advocating for people sitting here is that GCs should become Arbitrators because we have business knowledge. We have process knowledge.

SHARMISTHA CHAKRABARTI: Yeah.

NAVEEN RAJU: Where's MCIA? We should ask them to have an enhanced Counsel.

SHALINI SAXENA: Yeah, I'm not their panel back at you.

DR. VIVEK MITTAL: Yeah, I'm...

NAVEEN RAJU: Last time I was at a SIAC conference I asked them why they don't have in-house Counsel I would love to have a to appoint a senior say the GC, retired be a wonderful Arbitrator for an issue dealing with the technical dispute of oil and gas.

DR. VIVEK MITTAL: 100%.

SHARMISTHA CHAKRABARTI: I think that's a fascinating idea I mean, I don't know what the rules are for the reserve list, but if you're retired and your company allows you to when I'm looking to appoint someone like in a pharma dispute, for example, I'd rather have someone with pharma experience deciding that dispute as opposed to, you know, any former judge who... this is just one of... he's a generalist; he may bring process into place, but he will not have the subject area expertise; so, I'm all for this.

DR. VIVEK MITTAL: Yeah, by the way, MCIA is doing something on it and I'm sure that the I think there was an invite which I remember that they were saying that in-house Counsel should be appointed as Arbitrators. So, there's some discussion there but, yeah.

SHARMISTHA CHAKRABARTI: So, for next year's panel, I already have a topic in mind. And the last question; we'll close it please.

ALIM KHAMIS: Good morning. My name is Alim Khamis. I'm the head of disputes for the Middle East and a partner at Gateley Legal based in Dubai and across London. We've spent some time talking about the procedural aspects of arbitration today my question here was really for the in-house Counsel and General Counsel at the table. In terms of one of the substantive aspects of arbitration is Witness Statements. Obviously, the external lawyers are concerned about dealing with issues that were relevant and material to the issues in dispute and making sure that the Witnesses speak truthfully in as much as possible. What I find oftentimes is the Witnesses are sometimes reluctant for fear of jeopardising their own career, saying the wrong thing, prejudicing the interests of the business. And even if GCs and external lawyers are aligned in terms of, you know, they have the ability to recite or at least say what happened on the record, truthfully, the commercial part of the business may have a different view. Those objectives don't often align. And I often find that my clients, if there's GCs or legal directors are stuck in the middle. How do you navigate that internally?

NAVEEN RAJU: Yeah, it's... it's a tough one because getting people comfortable that, you know, what they... that what they depose is not going to be held against them... in some way during the course of the litigation is a difficult thing. I find that many times, folks are willing to depose because they think it is their duty, but then there are some who would be reluctant. And we've struggled to get them to come on board. And you don't want... to be on a point, you don't want a reluctant Witness to be deposed. So, yeah, it's that's a tough one, yeah.

SHALINI SAXENA: Actually I'm going to do it two ways. Witness of course is an extreme situation. You need people who go and talk to the regulators at a regular interval, at least for our organization. And I've seen that as a trend in GC which is where I learned it from, is we actually educate the person that's going in. What is he or she expected, what is the line of communication going to be where they can pause and say, we do not want to opine on it. I think that helps when they know that they can abstain from answering and they can move forward from that conversation. And that comes from only sitting down and educating people.

DR. VIVEK MITTAL: Yeah, US deposition preparation process is like the same, right?

NAVEEN RAJU: Yeah.

SHARMISTHA CHAKRABARTI: Yeah, just to add to that, like. I'm a US qualified lawyer and we have no ethical problems in preparing, sitting and preparing a Witness. And so we will talk with the witness and my UK colleagues, for example will have a hesitation in doing that. So, it depends on who you're engaging, we will work with the Witness to make sure when the attesting... We'll be truthful, but like you said, there might be a point in which way you answer a question in a particular fashion as opposed to another, and so it's a joint process and from in-house Counsel's perspective it is tricky because you have to make the decision, but to Naveen's point, you also don't want a Witness on the stand who just does not want to be there. So, if you can avoid it, you find someone else to do that job.

But all that said, thank you so much to my panel, to everyone, to Friven for flying to India from Hong Kong, Naveen, Shalini for flying in from Delhi and Vivek for making the trek from the other side of Bombay to Nariman Point. Thank you so much for coming. It was such a pleasure to have this, and thank you all very much for being such a participating and active audience. Thank you.

NAVEEN RAJU: Thank you.

ANUSHKA MANSHARAMANI: Thank you, Sharmishtha. And to our distinguished panel of General Counsels and Friven for bringing your perspective so clearly into the room. I would now request the panellists to kindly step forward for a picture. We will commence our next session at 12:30. Thank you.