

INDIA ADR WEEK 2026 – 09 SEP 2026**SESSION 5**

**CONFLICTS, REPEAT APPOINTMENTS AND PERCEPTIONS OF BIAS: WHERE
SHOULD THE LINE BE DRAWN?**

SPEAKERS:

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ANUSHKA MANSHARAMANI: We are waiting for Justice Malhotra to join us. As soon as she's here, we'll begin with the session. Thank you. We move now to our next session hosted by Clyde & Co and GSA. Few issues generate as much debate within the arbitration community as the question of repeat appointments and perceived conflicts of interest arise. As the same names recur across tribunals, the community must ask itself, where exactly should the line be drawn between valued experience and troubling repetition. Our session takes up this very question with the session titled "Conflicts, Repeat Appointments and Perceptions of Bias, where should the line be drawn?" The session will be moderated by Farid Karachiwala. Je is joined by Honourable Justice Indu Malhotra, Pavani Reddy and Sherina Petit. I would request the panellists to kindly come up on stage. Thank you.

FARID KARACHIWALA: Good evening, everyone. In the last session of the day, I hope we'll be able to keep the interest going and to ensure that you know, we make it as interesting as it was in the first when we started yesterday. So, a very quick introduction. My name is Farid Karachiwala, I co-chair the disputes practice of GSA based out of Mumbai. On my left is and I she won't need any introduction. But Justice Indu Malhotra, Justice Indu Malhotra, I think the only woman advocate who was elevated directly to the Supreme Court. She was also the second woman who was elevated as a Senior Advocate to the Supreme Court, as a senior advocate. When she was in the Supreme Court, she was also appointed by the Government of India to head and to be a part of the committee which was looking into the reforms of the Arbitration Act when the reforms then ultimately resulted into the amendments in the 2019 amendments. She, after her retirement in 2021, she acts as a full time Arbitrator doing both domestic and International arbitration. She's also a member of the Permanent Court of Arbitration and a fellow of the Institute Chartered Institute of Arbitrators. To her left is Pavani Reddy. Pavani Reddy is a Director in Clyde & Company. She has a wide range of international practice, both in arbitration as well as in litigation. She does disputes in Singapore, in the Middle East, of course, in the UK and a very prominent figure in the arbitration space. To her left is Sherina. Sherina is as popular in England as she is in India so Sherina is a Senior Partner with Stewart, she heads the international practice. She also heads the India practice. She's a part of the managing committee. She acts both as Counsel as an Arbitrator. She's a part of the... Or she represents she's in the organizing committee of the LIDW. I would call LIDW actually now as the London Indian Arbitration League rather than the international arbitration because you see more Indian lawyers in the LIDW and she's also a part of the LCIA.

So, without much ado I'm going to just start with what we are here to discuss and the topic is, conflicts, bias, repeated appointments, our Arbitration Act which was really enacted in 1996,

which kind of just followed the UNCITRAL rules, has undergone a sea of change. I mean, we've seen as to how the provisions of conflicts were dealt with since 1996, what the law at that point of time was then there were several reforms which were introduced in 2015. Those reforms kind of made it very, very difficult for people to accept appointments also because there were issues of conflicts and bias. So, my first question to Justice Malhotra would be, can you elaborate the jurisprudence on conflicts and biasness in the Indian context? And how we have evolved from 1996 till present date, and what is the jurisprudence on that? So, request Ms.

JUSTICE INDU MALHOTRA: Yeah, thank you, Farid. So, it's like this that when the 1996 Act was enacted it was modelled on the UNCITRAL Model law. So, it replicated that, you know, by and large. Now, you know, over the years we found that there were a lot of cases where there were repetitive appointments and you know, obviously, there is a bias of an Arbitrator towards the Party which nominates them repetitively. It's a source of revenue, etc. So, it was becoming problematic and then came the 2015 Amendments, which have been the biggest watershed in the Indian Arbitration landscape. Now, the one of the most eye salutory provisions which have been introduced, I will not go into others, but I do feel that there are a couple of other salutory provisions which have been introduced. But I will now confine myself to the code of conflict and the bias, you know, in the provisions regarding that in the 1996 act and that is Section 12, you know, which is with respect to the bias of an Arbitrator, prospective Arbitrator, is really dealt with. It has been completely substituted. What it has done is that it has followed largely the IBA guidelines, and it has incorporated the Orange and the Red list by way of schedules to the Act, and Section 12 has made it mandatory for a prospective Arbitrator to give a declaration that there is no conflict of interest and that they have sufficient time to discharge their duties. Now Schedule 5 is by way of guidance where they say that you can't be appointed more than two or three times by the same Party, that basically that is on the independence part, independence and impartiality that you shouldn't have dealt with, you know, the same subject matter. So, no conflict provisions have been provided in detail. I will not go into the length and breadth of it, but they are basically in Schedule 5.

Now there's a Schedule 7, which replicates the Red list where if a prospective Arbitrator falls in any of those categories, they are *de jure* incompetent to act as Arbitrator. So, right at the outset they can and for pending arbitration proceedings as in 2015, they said if Parties by agreement say that the amended act would apply, it would be applicable. And for two, the 7th Schedule is non-waivable except by express agreement between the Parties in writing and that is after the disputes have arisen. So, it should be a conscious, informed decision if you are willing for an Arbitrator who is otherwise *de jure* incompetent to act as an Arbitrator to, you

2 know, continue the proceedings in a particular case. So, those are basically the broad, you
 3 know, amendments which have been made in Section 12 and, you know, there are provisions
 4 for removal of an Arbitrator in Section 14 and Section 15 appointment of a substitute
 5 Arbitrator. So, that's broadly, you know, the scope of it. And one of the explanation one to
 6 Schedule 7 says that you know, close family relative cannot be appointed as an Arbitrator and
 7 they've defined it as a parent, a spouse, a child, a life partner, so there are five categories and
 8 a sibling. Those are the five categories which are specifically defined under close relative. So,
 9 that is the broad framework of Section 12 which has you know substituted the earlier provision.
 10 I think I'll stop at that because one can speak endlessly on this entire code of conduct, but I
 11 will not take you through that.

12 **FARID KARACHIWALA:** So, taking cue from that, Justice Malhotra, there are two things
 13 which come to my mind on the basis of what you've just said. One is close relatives and the
 14 second is the guidelines of IBA . Now the guidelines of IBA, which were looked at as guidelines
 15 for the purposes of amending our act in 2015. Those were the guidelines which were of 2004.

16 Thereafter, there have been subsequent guidelines of 2024 by IBA and which have
 17 incorporated several matters both in the Red List and in the Orange List. Now, considering
 18 that our Schedule 5 and 7 were incorporated in the Arbitration Act in 2019, in 2015 actually,
 19 do you think that those guidelines which were amended in 2024 by IBA, has any relevance to
 20 the Indian Arbitration Act, which requires an amendment? Or do you think that those 2024
 21 incorporations in the Orange and Red List are not necessary in our act?

22 **JUSTICE INDU MALHOTRA:** So, my view on this is I do not think that the you know, the
 23 Schedule 5 and Schedule 7 requires any further amendments, I think they are working very
 24 well for us and I don't find so much of litigation now emanating on these grounds. I think it's
 25 doing well we don't require further amendments. The second point is that, you know, we have
 26 given statutory force to these guidelines, which are otherwise soft law overseas in all other
 27 jurisdictions. I think my personal, you know, view is that these mandatory statutory
 28 disclosures should actually become a part of the statute in other arbitration jurisdictions also
 29 because it's very important that, you know, candid and frank disclosures are made, we find
 30 that in some of the Indian commercial arbitrations which are seated overseas in foreign
 31 jurisdictions, they don't abide by these, you know, strong disclosures and we had a case
 32 recently in, I will not give you the facts of the case, I'm sure most of you would be familiar it's
 33 called *MSA Global*, wherein Arbitrator had not disclosed a previous appointment by one of the
 34 Parties a managing director, and it's only when the arbitration was going on that the you know,
 35 this came to light when it went to the High Court by way of, you know, challenge to the

proceedings and then it was learnt that this, you know, Arbitrator had not made a honest disclosure. Now, it was seated in Singapore and you know, there was an objection raised, but it was they felt that it wasn't so serious, you know, which would entail removal. It came to India and the Indian courts took the view that the Schedule 5, Schedule 7 justifiable doubts are a part of the fundamental policy of India and irrespective if an award comes for enforcement to India, India will not you know, they will not implement it. So, when the matter was pending it, the High Court said that we are going to grant anti-arbitration injunction which is very rare in a foreign seated in fact, it's extremely rare. It's one of the few cases. The matter went to Supreme Court and the Arbitrator himself, in his pleadings disclosed that I had not disclosed this information because I felt if I disclose it I would not get appointed and that became a you know, a ground enough. He then eventually resigned from the Tribunal. But you know, these are issues which we do find and we find a lot of repetitive appointments. My belief is that we should have these mandatory statutory disclosures required by other arbitration statute. In fact, England has also made amendments in 2025. I think similarly, other jurisdictions must incorporate it because frankly speaking, what is an alternative mode of Dispute Resolution if it is not fair, if the Arbitrator is biased or conflicted, you can never have a fair adjudication. I think it's absolutely imperative that this should be done. And I don't think our act really requires any further amendments because I think we are doing very well with Schedule 5 and Schedule 7, I don't think we need to amend the statute any further for the present.

FARID KARACHIWALA: Thank you, thank you, Justice Malhotra. Pavani, if I can get you here taking cue from what Justice Malhotra said about the law in England and we are all aware that the law of England on bias the famous law is *Porter & Magill* and this has now been supplemented by a 2020 Supreme Court judgment in the *Halliburton Company* case. What really is the law in England so far as bias is concerned, I want to address this first to you and then I want to actually talk a little bit about what led to the amendment to the English statute on arbitration, but I want to take that separately. So, if you can just address the issue with respect to these judgments and what is the law in England so far as bias.

PAVANI REDDY: So, just addressing on the point about the statutory disqualification to start with. The main distinction is that, the both jurisdiction align on the point that they would like to preserve the neutrality of the arbitral Tribunal and the confidence in the Tribunal in terms of the practice where it differs is that the in England, there is there is only one section under which you can make an application to the court, but there is no automatic statutory disqualification based on the schedules like in India, the amendments have been made under

Schedule 5 and Schedule 7, there is no counterpart of Schedule 7 under English arbitration law. However, **Halliburton**, it's the Supreme Court has laid down the principles of apparent bias and the Party when the Party can effectively determine the arbitral Tribunal's impartiality has been taken into account and the principle is that if a fair-minded person is looking at it objectively, then would they come to a conclusion that this Tribunal was biased. So, it's more of an objective test rather than any principle based or schedule based. So, there is no similar schedule like Schedule 7 that the Justice... Lady Justice has described just now. But apparent bias, yes, it's based on only on the impartiality.

FARID KARACHIWALA: So, just wanted to go a little bit deeper as to why do we have the 5th and the 7th schedule just for information for those who may not be really aware when in 2015 the Law Commission decided, Justice A.P. Shah was actually heading the commission and he observed that if you do not have any specific objective criteria which is set out in the Act, it may not be appropriate or it will not properly resolve the issue of conflict and bias and which is why it was suggested. And thereafter incorporated that let's look at what the IBA has done and they have come out with two lists, the Red List and the Orange List. There's also a waivable Orange List. So, the 5th Schedule is those matters which would affect neutrality and there a Party could raise an issue of Biasness if that Party feels that the Arbitrator is fitting into any one of those categories. And then you have the 7th Schedule which actually deals with ineligibility and there an Arbitrator does not get the right to decide his ineligibility; a Party who's saying that this relationship of the Arbitrator is making him ineligible because he's so, so closely connected to a Party, he can take this issue directly before the court . Now, Pavani, you said that in **Halliburton** and **Porter & Magill** the fair-minded and informed observer principle was the basis on which the issue of biasness and the principles of biasness were set out by the Supreme Court. Now, is this the reason why impartiality became the amendment to the Arbitration Act, which now specifically says that you need to ensure that the relevant circumstances is such that it is the Arbitrator is not partial in any manner?

PAVANI REDDY: Impartiality is the main...

FARID KARACHIWALA: So, is it because of the judgment that the amendment took place in the Arbitration Act?

PAVANI REDDY: In essence, yes. The principles laid down in the **Halliburton** judgment those are the principles that have effectively been codified to ensure that there is an impartiality test, the yardstick is impartiality effectively. In **Halliburton**, there was there were issues about overlapping appointments, that is the main crux of the case. Basically, in

2 **Halliburton** matter they were two arbitrations that were commenced and in both by two
3 different Parties and the third-party, the Respondent has appointed the same Arbitrator in in
4 one of those arbitrations. So, effectively that came to a question, Halliburton said, well, in our
5 arbitration Chubb has appointed Mr. Ken Robinson and then in the other arbitration the
6 counterparty also appointed the same Arbitrator. So, it's effectively an overlapping issues and
7 they said that he might have some emotional and knowledge about the Parties because he's
8 representing all the Parties and therefore there is an issue of bias and because the Arbitrator
9 failed to disclose his appointment, which effectively the court looked into it but then the court
10 said yes, even if there was a non-disclosure, that doesn't automatically put the test as a bias. It
11 has to be determined by an observer and a fair-minded person to a third-party that there could
12 be an apparent bias in this case. So, just because there's a failure of disclosure doesn't
13 automatically create that impartiality and disqualification for the Arbitrator, but the yardstick
14 that the court said is that it has to be a fair-minded observer, looks at the circumstances, how
15 would they perceive that situation. So, it's more of an case-by-case basis.

16 Without going at length the reason for that, because London is known for specialist
17 arbitrations where certain categories of fields like insurance, Bermuda Form arbitrations, the
18 pool of Arbitrators is very limited. And those arbitrations, they are determined by the expertise
19 of the Arbitrator. So, where there is a limited pool, you don't have much Arbitrator the
20 overlapping or repeated appointment is inevitable.

21 So, what the court has not gone into that issue to say that the overlapping appointment will be
22 a... disqualifies, but the court said you have to look at each case on the circumstances and make
23 an objective test. So, the test is objective rather than by reference to the impartiality. So, that's
24 how the court has determined and the rule has been brought into place into the Arbitration
25 Act, which was amended on in 2025, whereby a requirement, a duty of disclosure has been
26 introduced. Now the Arbitrators have a statutory duty to disclose the relationship between the
27 Parties but if they fail to, that doesn't mean that they are disqualified immediately. Again, the
28 test is objective. You have to look at the circumstances what is the third-party is going to look
29 at sorry, that was a bit of a long winded but I thought I'll cover. Its **Halliburton** is such a
30 complex case you there is a risk that you may not cover all the points

31 **FARID KARACHIWALA:** But **Halliburton** is a case which is, you know, frequently visited
32 even by the Singapore court and I've not seen too much of it in our Indian jurisprudence, but
33 when I see judgments which are passed internationally. **Halliburton** seems to be right on
34 top over there in terms of principle, although I may mention that what Justice A.P. Shah did
35 in the 246th law that Law Commission report. In fact has incorporated whatever has happened

in the 2025 amendment to the UK Act way back in 2015. So, we were, I think two steps ahead in that sense where the legislation in India actually covered all these aspects at least 10 years back.

JUSTICE INDU MALHOTRA: So, just to supplement what Pavani was saying, in India also we follow the same test that, you know, how would a reasonable person perceive it. Schedule 5 by way of guidelines they are guides. So, they guide you that if such circumstances exist, you know and a challenge is made, then the test is of a reasonable person how they would view it, it's not automatic. Schedule 7 is certainly an your a person is ineligible to act as Arbitrator, that is a straightaway ground because they are extreme cases where you can't accept a person you know, wearing so many hats or having repetitive appointments by one Party again and again, it certainly causes a certain discomfiture to the Parties of the neutrality of such an Arbitrator.

FARID KARACHIWALA: Pavani, I have just one question before I move to my next topic. In Indian law, so far as ineligibility is concerned, you actually can go to the courts directly and challenge that this Arbitrator cannot be an Arbitrator, he is ineligible under the schedule. So, far as anything relating to neutrality is concerned, you are open to raise that objection before the Arbitrator. Now in terms of bias, what is it that England follows I mean, do you raise your objection of bias in terms of ineligibility and neutrality before the courts, before the Arbitrator, how does it go so far as the law in England is concerned?

PAVANI REDDY: Yeah, so how the distinction between the two countries is?

FARID KARACHIWALA: Yes

PAVANI REDDY: Is that in India we have bifurcated where it is a statutory ineligibility we run to the court whereas there is an apparent bias, other neutrality issues we keep it with the Tribunal. So, there is a two way process two roads...

FARID KARACHIWALA: Similar to India.

PAVANI REDDY: But in England there is only one route so it is considered under Section 24 because the statutory framework how the English infrastructure is based, statutory infrastructure is based on Section 24. So, you make an application to the Tribunal, the sorry to the court. So, the court has the ultimate supervisory power. The only distinction is that we have in this bifurcation of statutory ineligibility and neutrality. So, what you do is that there is only one apparent bias neutrality anything to do with that, two things you look into it, ultimate is court you can go to court, but before you do that based on the Arbitration Agreement, if your

Arbitration Agreements prescribes, there is a methodology that you have to first exhaust your rights with the Tribunal, you first run to the Tribunal otherwise you can go to court. So, in such situation. Statutory wise, you can run to court immediately. So, there is no distinction everything part and parcel impartiality, capacity of the Arbitrators, incapacity of the Arbitrators, neutrality, bias, statutory ineligibility; everything is covered in one parcel, there is no bifurcation. But the when you go to court is the issue because if the LCIA Rules or ICC Rules, the arbitration institutions might have their own rules which may prescribe that you have to first exhaust your remedy with the Tribunal before approaching the court. That is the only distinction, but overall the analysis how it is conducted is the same the test is always the same. How the Tribunal will do it the court would do it similar to India, but that's the only distinction we because we don't have Schedule 7.

JUSTICE INDU MALHOTRA: So, in Schedule 5 the challenge that is anomalies independence of an Arbitrator, that's independence of the Parties or even subject matter you know, impartiality. You raise it, if it is a you know, one of the grounds under Schedule 5, you raise it before the Tribunal and subsequently, you can challenge it before the court that is at the final award stage, but Schedule 7, you can straight away move the court under Section 14 because that is a statutory ineligibility to act as Arbitrator. They are extreme cases and if you see the schedule, you will realize that it you just cannot accept a person with these kind of grounds where they cannot act in a neutral and impartial manner and adjudicate fairly.

FARID KARACHIWALA: Justice Malhotra, I am going to my next topic which is on who can be an Arbitrator and we have the explanation 1 to the 7 Schedule, which lists out five categories of people who are considered as close relatives. Now when you look at the IBA guidelines. The IBA guidelines defines a close relative which would include any other family member with whom there's a close relationship, so you don't really need to have any immediate connection in terms of relative. But you could be closely in a relationship with that person and that relationship disqualifies that person to be an Arbitrator. Now this is what the IBA guidelines specify so far as who cannot be an Arbitrator. Now do you think the guidelines which is forming the base of our schedules, the 5 and 7 schedule, do you think that the close relationship or close relative definition which is there in our Act, needs to now be amended to follow what the IBA has said because there could be a situation where, say, a cousin who is not defined as a close relative, so far as the definition is concerned, but because he's so close to the Arbitrator, so that would disqualify. So, do you think that there's a need in our Act to follow what the IBA guidelines prescribe or do you think that the definition as is currently there is adequate?

JUSTICE INDU MALHOTRA: So, in my view the definition it specifies this explanation one to Schedule 7 which specifically says that a close family relative can be a parent, it can be a spouse, it can be a child, it can be a sibling or a life partner. Now to expand this, I think is really not required and this is these are statutorily defined. After all guidelines are in the form of soft law, they're guidelines. So, I really don't think by way of statute that we should increase the net of disqualification.

FARID KARACHIWALA: Thank you. Pavani, what's the position in England insofar as relatives are concerned? Who are who cannot be Arbitrators in terms of close relatives, is it like India or is it like a category which is beyond what is there in India or is it following the IBA guidelines, what is it that England follows?

PAVANI REDDY: So, fortunately or unfortunately, there is no distinction so as per the Act. It's effectively just only one application based on the objective test case- by-case, there is absolutely no Schedule 7 and that is what the key distinction between the amendments that were brought into the English Arbitration Act and the Indian arbitration that is the there is no methodology or Schedule 7. So, there is no distinction, there is no list statutory list it's always... it's a fairly flexible that as long as you can establish that the Tribunal lacks the impartiality, impartiality or you know, that is the test. So, it's the old Porter test and then that is what the *Halliburton* has also done, it's disclosure base

FARID KARACHIWALA: So there's no relative definition in that?

PAVANI REDDY: Absolutely. Well, the definition is that how connected but it's all comes to the fact based there is no statutory schedule or a distinction.

FARID KARACHIWALA: Sherina, there is no proximity which is defined in the Act there is no let me get you into this discussion now what is your view on repeat appointments do you think that it's a genuine threat to arbitral independence, or is it simply a reflection of expertise and market demand, what is your view on you know, when people go to the same people to be appointed as Arbitrators because of their expertise? Now just look at the situation which is like a commodity arbitration, where the pool is very limited and small now or a maritime arbitration where again the pool is very limited and small, do you think that this is something which is unnecessarily getting stretched in terms of saying that this could give rise to a bias? What is your view on this issue?

SHERINA PETIT: Thanks, Farid. I think principally if you're good at what you do, the Parties are going to want you again and that is why you have repeat appointments. And what

2 you don't want is a one hit wonder as well. So, you don't want someone who you've had once
3 you think he's they're fantastic, but then you're so scared to appoint them because of the bias
4 problem that you can't appoint them again, particularly if you have practically a high value
5 complex dispute. You're not going to take a one-year qualified person over there because that's
6 a recipe for disaster. You want someone who has the expertise, who has the experience and it
7 is that kind of balance that has to actually be brought and that's why I quite like the India
8 system. But I also quite like the soft law as well, and so, practically speaking, when I get an
9 appointment, the first question, the questions I ask myself, are: why am I getting appointed,
10 who am I getting appointed by and how many times have I been appointed by that person, by
11 that company, by that law firm or by whoever it is that's appointing or the and then the other
12 question I have is if in doubt disclose.

13 So, I had a situation where I was appointed by a particular institution, I made a disclosure at
14 the beginning of my appointment to the Parties saying, I just want you to know that I am being
15 appointed by the institution, but one of the law firms I have worked with, I've co-Counsel with
16 on matters. Those matters are over and this was so many years ago. So, I made that disclosure
17 and the Parties were fine with that. Then I then got appointed and along the way it was actually
18 quite at the start of that arbitration, one of the matters with that law firm suddenly popped up
19 again. It was a closed matter, it popped up again and I got contacted by another partner of
20 another office, and I said, okay, what do I do because I've made the disclosure, but then surely
21 I have a continuing right to disclose, which is anyway under the LCIA rules and this wasn't an
22 LCIA appointment. So, I called that institution up and I said, look, this is the problem, it's
23 another partner, it's another office, probably the offices don't even know what's going on, but
24 should I disclose or should I not? And they said, well it's up to you that it isn't really in the IBA
25 rules, this kind of situation, what do you do and then I just asked myself if I am calling that
26 institution and I'm asking the question I'm clearly doubting, I better disclose. And I disclosed
27 and I said, look, I don't see any perception of bias, I wanted to tell you that I have been you
28 know, that one of the matters has resurrected and genuinely the Counsel came back and said,
29 can you tell me which office and who is the partner? And then I said, well, I can't really because
30 then there's the whole confidentiality quadrant. It's like this is your law firm, maybe you want
31 to just make the inquiry internally. And I just said, look, I'm happy to stand down, this is the
32 start of the arbitration, costs haven't actually been expended because the arbitration was quite
33 slow in starting out and one of the Parties said we don't think you're going to be independent
34 and I said that's why I disclosed and I was really happy and I stepped down and I proposed
35 somebody else and that went on fine. And so I think, you know, practically the test is when in
36 doubt, disclose and it's not just about bias, but it's also about perceived bias.

2 You know, we just talk constantly about bias, but what about the perception of being biased. I
 3 certainly don't want to be in the public domain before a court with my name being bandied
 4 about honestly, whether I'm biased or not, I'd rather just not accept that appointment or I'd
 5 rather not appoint someone repeatedly on that. But I have also found like recently we had an...
 6 I had an arbitration, it was \$1 billion arbitration and the clause was for a Sole Arbitrator to be
 7 appointed. I called up the person on the other side. I knew the other side's Counsel and I knew
 8 they were sensible and I said, look, it's a sole Arbitrator. Should we amend the clause to go for
 9 three given that this is we're going into billions and we both agreed, no, we'll stick with sole
 10 and we actually both agreed the person who would sit as the sole, who we had both repeatedly
 11 appointed but both liked because of the high value complexity and we said we will trust that
 12 person with that mandate. So, we agreed it.

13 So, there are ways around it you know you yes, you look at the IBA Rules, yes, you look at all
 14 of that yes, you look at perceived bias, yes, you look at bias, you look at all of that, but ultimately
 15 in reality you just look at the situation and that's why I quite like the objective test as well in
 16 the UK.

17 **FARID KARACHIWALA:** So, you know, coming to what you've just said, do you think over
 18 disclosure undermines the confidence of creating concerns where none previously existed and
 19 you're complicating an issue which is otherwise very simple?

20 **SHERINA PETIT:** I think in terms of over disclosure, it's a paradox, right? Too little leads
 21 to a problem, too much leads to a problem as well. In the situation I just talked about did I
 22 disclose too much? I don't know, maybe I did, some person will say maybe I did, but actually
 23 I could sleep at night knowing that I had done my duty I don't need that appointment, it's fine,
 24 but also you don't want it to be used against you as well constantly and you don't want things
 25 like that to derail processes because the minute you're sitting in over disclosing, sometimes. It
 26 can cause a problem because you know, it's Parties are using it to delay the formation of the
 27 Tribunal as well. So, using that disclosure to keep causing problems, asking for more
 28 information and more information about the disclosure.

29 So, I think in that sense the point is not about over disclosure but meaningful disclosure, and
 30 I think that is the words that I keep in mind is this meaningful, do I really need to disclose that
 31 I'm sitting with Justice Malhotra and Pavani, on this panel? Probably not, but because it's not
 32 meaningful. But you know, something else may be meaningful and again, what is meaningful
 33 to that reasonable person to meet that objective test.

TERES

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2 **FARID KARACHIWALA:** So, sorry, Sherina, do you think that the current disclosure
3 standards, they are clear and sufficient? Do you think that there is anything that we need to
4 do or the you know, is there anything that is lacking in these disclosure requirements or do
5 you think that whatever is there currently in your statute in England is clear and sufficient and
6 you know, we can live with that and move on with our arbitration process?

7 **JUSTICE INDU MALHOTRA:** So, I just, you know, caveat that a bit.

8 **SHERINA PETIT:** Yes.

9 **JUSTICE INDU MALHOTRA:** So, also perceive it in the context not only of domestic
10 arbitrations in England, international commercial and particularly investment treaty where
11 we find that Arbitrators have a lot of biases and ideological biases, pro investor pro state and
12 you know, those kinds of things and so the composition really is determinative of the outcome.

13 **SHERINA PETIT:** Yeah, that is a big problem, I agree.

14 **JUSTICE INDU MALHOTRA:** So, that's why I want you to address that.

15 **SHERINA PETIT:** In fact, I mean it's a silly example, but one that I will remember when I
16 was very junior at a particular international law firm, I was told that a particular Arbitrator for
17 an investor treaty arbitration did not like Indians and I was told that, well, you don't look
18 Indian to some people's eyes, but don't go around banding to everyone that you're Indian on
19 the team. And I was like, well, maybe I shouldn't be on this team then because if it's going to
20 affect a particular client issues because that I mean, it's a different point that in today's day
21 and age, you know, that would have been a big hoo-haa there'd be 50 articles written about it
22 and it'd be all over LinkedIn about this person and stuff. This was a good couple of years ago,
23 but I, you know, it was it was exactly the point you're making. Like just try not tell people
24 you're Indian not that I'm wearing it as a flag on my chest, but you know, and you do see a lot
25 of that in Investor Treaty Arbitrations.

26 But what I think is that I do quite like the idea rules and I like the fact that institutions like the
27 MCIA and the LCIA and the ICC have adopted the IBA rules. I like the fact that the LCIA has
28 a continuing duty to disclose and that is really important because sometimes in the lifetime of
29 cases, particularly treaty cases, you will have a case going on for 5 or 7 years. And there will
30 there might be circumstances where there are continuing duties to disclose and it's just good
31 to keep that in mind and I'm glad the LCIA has put it now into its rules as well. And the MCIA
32 as well has looked at the IBA rules and it's got you know, if there's a reasonable doubt then you
33 know, disclose and look at that. So, but the question really is, what is reasonable and to who?

2 Because what is reasonable to me? As I said sitting on this panel, it may it's not reasonable to
3 me to be disclosing that I'm sitting with Justice Malhotra and Pavani and you but maybe it is
4 reasonable to somebody else. So, it's that balance again that that that has to be drawn.

5 **FARID KARACHIWALA:** Thank you. Thank you, Sherina. Justice Malhotra I'm now going
6 to move into something which is reappointments. Now, when we have a when we look at Entry
7 no. 22 of the 5th Schedule, it bars in some form person to act as an Arbitrator who has actually
8 been in an arbitration with one of the Parties on more than two occasions in three years. Now,
9 this is something which is a waiver-able kind of objection which can be done. Now when you
10 compare this with statutory appointments, so say we had a situation under the under the
11 Multi-State Co-operative Societies Act where the Bombay High Court was faced with a
12 situation where a person is appointing Arbitrators in respect of any disputes relating to Multi-
13 State Co-operative Societies Act issues. Now in this case this individual had done more than
14 ten arbitration with the same Party and the Bombay High Court held that because this was a
15 statutory appointment as such, this would not make that person to be ineligible. Now do you
16 think that such appointments would raise questions regarding potential bias because he has
17 been an Arbitrator in more than ten arbitrations with respect to that Party, whereas Schedule
18 5, Entry 22 says that you cannot do more than two arbitration in three years. What is your
19 view and do you think that it affects the independent decision making of that person?

20 **JUSTICE INDU MALHOTRA:** So, it's like this, the Maharashtra State Cooperative
21 Societies Act is a central enactment which was framed specifically for co-operative banks and
22 their members. So, it is a special enactment which has its own provisions. The most important
23 issue is there is no party appointed Arbitrator. The Arbitrator is appointed by the Central
24 Registrar. There's an appointing authority, there is a panel they maintain and the appointment
25 is done by the Registrar who are familiar with you know, this segment, it's a very specialized
26 segment of arbitration, but even the person who's appointed by the Central Registrar is
27 obligated to give declarations under Section 12. So, the procedure which is followed is under
28 the Arbitration Act, but the appointing authority etc. is with you provided. So, he, you know,
29 one person may be appointed ten times. If you find that it's not fine, you can object to it and
30 have someone else they have a panel. And this is not a Party appointment. So therefore, that's
31 a distinction and it's a standalone legislation which is a self-contained code. But they have
32 incorporated the 1996 Act with respect to the procedure to be followed, that you also please
33 give declarations that you don't have a conflict of interest with the Parties, you're independent
34 of the subject matter of the arbitration. So, those are provided and the general procedure is

followed, but the mode of appointment and the, you know, category of disputes is very different, So you need someone who specializes in that branch of law.

FARID KARACHIWALA: Thank you, thank you, Justice Malhotra. I'm now moving to something which is another form of bias, but it's not to the extent that we perceive conflicts and bias in the current state of affairs in India, but it's something which is related to subject matter or issue bias. Now subject matter or issue bias is where any legal or factual issue has previously been decided by that person who has been nominated as an Arbitrator. Now, if it has any kind of relevance in your dispute, will that become a bar or an issue of bias so far as his appointment is concerned, because he has already has a perceived notion with respect to the subject matter? Now this to my mind is not expressly set out in our Arbitration Act, but I think there is some form of it in England and I'm going to ask both Sherina and Pavani on it. But do you think that this issue of bias which is related to not any kind of independence, so far as relations are concerned with respect, but this is a subject matter but if he has a very, very hard thought provoking kind of made up his mind that this is how he has decided an issue in the past and which has some kind of relevance in the issue that he is going to decide in the present dispute. Do you think that view that he has taken would also become a point of bias which would affect his impartiality, for which he should in some form refuse the position as an Arbitrator, or can he go ahead and take up that position without anybody raising or pointing questions to him? Justice Malhotra? This is... yes, please. If you can go first then I'm going to ask.

JUSTICE INDU MALHOTRA: No, sure. So, this is actually called subject bias or issue conflict I think it is very important. Of course, it's not discussed very much you know till now. It's in fact, this is one of the first conferences where this issue has been raised, but it's certainly very, very pertinent and important. It's for instance, if a person not a person, a prospective Arbitrator has made his views on a particular issue, which is which is central to the dispute, which he is going to arbitrate and adjudicate upon and he has a particular view, then certainly there is a kind of a subject matter bias, you know, if it is being done. In his speeches and writings in various forms, it can be done. In fact, there was in the *Devas Mauritius versus Republic of India* there are two Arbitrators had been disqualified on the ground of subject matter bias because they had taken a very stringent view on essential security interests. So, they said they are not open minded to seeing the other point of view, and you want a person who is open minded and there's another instance I'll give you like for instance, a judge past a former judge past a certain judgment subsequently there has been, you know, a change there have been further judgments, you know, which have come but he is, you know, absolutely hell

bent upon ensuring that he is going to follow his own judgment and will not be open minded. That can also be a ground of bias in an arbitration it is an issue bias. That you've taken a particular view with respect to a certain issue, and that issue comes up in various cases. So, you are close-minded and you will not be open to hearing the other side's viewpoint. I think certainly it is a pertinent issue

FARID KARACHIWALA: So, Justice Malhotra, is this getting covered in our current legislation under the Arbitration Act? Do you see that we can because I've also not come across like how you have also not experienced, but I just wanted to get your thoughts as to whether our current legislation deals with such kind of issue or subject matter bias?

JUSTICE INDU MALHOTRA: So, subject matter it's not really there and I don't think too many issues have arisen but internationally they arise

FARID KARACHIWALA: Yes.

JUSTICE INDU MALHOTRA: Like particularly investment treaty arbitrations, you know, certain you know, the substantive protections which are provided, etcetera there it does occur and people are aware of it and they do raise they raise it.

FARID KARACHIWALA: In fact, in the West and I was when I was preparing for this, I it's actually given a term called 'double hatting'

JUSTICE INDU MALHOTRA: Right. That's yeah, so it's a where an Arbitrator is acting as an Arbitrator in one case on the same issue acting as the Counsel, right so there you know, so Issues in...

FARID KARACHIWALA: Could get intermingle, so what is what is the position in England on this subject matter issue bias I mean is there is that something that is considered as a ground of bias when you look into appointments a person has to, you know, give some kind of disclosures what is thoughts with respect to a subject matter, so that it doesn't affect his neutrality? Because neutrality is really the base of arbitration and so, is that something which is which is considered in England when disclosures are made?

PAVANI REDDY: Not specifically by issue basis but then *Halliburton* is such a holistic view it has taken on the Arbitrator's duty as to the disclosure. Now, earlier it used to be based on common law. There was an obligation to disclose and as Sherina explained that as an Arbitrator, what do I disclose what I should not like. For example, IBA sets out what you must, what you may or you may not there is a list of that. Earlier under English law, there was no

such rule or requirement, there was a general requirement that under an Arbitrator has a duty to disclose, but what happens since the **Halliburton** case that the duty is now a statutory duty where the Arbitrator has to disclose whether the existing Arbitrator or the to be appointed Arbitrator, the prospective one, to disclose the circumstances that might give rise to justifiable circumstances, which may lead to his impartiality. So, that is such a wide kind of obligation it covers everything where the Arbitrator believes so and then that test is not just one time, it is a continuous test. So, as Sherina also covered that there may be an arbitration going on for 6 or 7 years, and then suddenly you may have a circumstance suddenly you are appointed by another Party. So, that continuation obligation makes it more proactive that the Arbitrator has to think that not just, "oh, I've disclosed I've done my check box and I don't have to do it,." No, the **Halliburton** one thing that incorporated is they have to actually examine actually every time to there is an obligation to disclose and check all the time and this is not something that whether you have done a reasonable understanding or reasonable disclosure. It's actually goes beyond that what you should have ought to have considered as well. So, that takes a wider objective that you're considering every aspect. I could not think about that point, you can't say that. You should have as an Arbitrator. Think about those points that you know, we covered just now in the discussion. So, that is a wider statutory obligation and if somebody has not done it, then the test in the **Halliburton** suddenly comes to a third-party observer would that circumstance give rise to an impartiality? So that's why it has been kept in such a way, wide, that obligation the Arbitrator is always under that duty to, statutory duty earlier it used to be a general duty whereas IBA is a soft law effectively there is no but here **Halliburton** has brought that hard law into practice. So, therefore essentially it is the expectation that it will cover all those issue based buyers, apparent bias or unconscious bias and all those factors. But it has to be on a case-to-case basis.

FARID KARACHIWALA: Sherina, have you experienced this issue on subject bias?

SHERINA PETIT: I'm just going to give a very practical view, if you don't mind when a client comes to us and says we want to appoint an Arbitrator, the first thing we do is we do due diligence on the Arbitrator, right? So, we do a search of the internet, we do a search of LinkedIn, we do search everywhere what are the articles the person has written as Justice Malhotra said. And I'm also very careful now when I write my own articles because I don't want stuff quoted back to me in the flurry of writing an article that can be quoted back to me saying that is your view. That's not my view. It is a view I took because I was writing an article on a particular point, but of course it can so one is in today's day and age I think we have to be so careful of what we write ourselves and the interviews we give and all of that because stuff

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2 like that people are trawling the net to quote it back to you. And if they are not, they're not
 3 doing their due diligence by their client. So, say for example, there's an issue of arbitrability
 4 and I want to know how that person's thinking, so, I'm doing a search of the net to see what is
 5 what have they written on arbitrability on X, Y, Z what you know, have they appeared before
 6 courts because obviously arbitration is confidential. So, you don't know what tack the Counsel
 7 or the Arbitrator has taken in an arbitration but you do know what they've taken in court,
 8 right? And of course, sometimes you're given the hand of you have to argue this because you...
 9 Because that's your case, but that may not still be your view, right. And that's where the
 10 objective test comes in. So, we do the due diligence and then we say to the client, look, this is
 11 the view that XYZ has taken and this is actually quite favourable to our case and that's the
 12 whole art and science of choosing your Arbitrator.

13 So, and then obviously you are going to want someone to who has written favourably in that
 14 manner because honestly that's what I want to quote in my pleadings, when I'm drafting them
 15 before that person that, you know, learned Arbitrator, this is what you said in X, Y, Z article
 16 and I'm just quoting it back to you. So, but then the point is, is for the other side to object and
 17 say because hopefully they'd have done the same due diligence and they should be then
 18 objecting to say, well, no, we do not think this Arbitrator is appropriate whether they are
 19 biased, perceived bias etc., etc. on this basis and sometimes the Arbitrator themselves, I mean,
 20 I write so many articles, I don't remember what I've said in what article. Sometimes, the
 21 Arbitrator themselves are not going to know that I took this view or whatever in Article 10
 22 years ago, but actually may have completely argued a different point in an arbitration that's
 23 not disclosable and confidential. So, it's that reasonable point test that both Justice Malhotra
 24 and Pavani have talked about is about being reasonable. But also it's a fact of life, it's what
 25 happens with every case. You are going to want someone, at least you want to have done the
 26 due diligence of having someone on that panel that has written something favourable for an
 27 issue you are going to try anyway because ultimately you want to win, right or not.

28 **FARID KARACHIWALA:** Do you or have you, you know, as an Arbitrator been asked this
 29 question, that what's your view in respect of say, a general subject matter?

30 **SHERINA PETIT:** No, I haven't and I'm very careful when we're doing the beauty parades
 31 of Arbitrators as well, which I do very often because generally when it comes to high-value
 32 complex disputes, every client today wants to have that beauty parade of Arbitrators.

33 **FARID KARACHIWALA:** Yes.

2 **SHERINA PETIT:** And I am very clear because particularly the Indian clients want to know
3 I mean, besides having that rapport with the person, can I just slip in this thing, you know,
4 what do they think of fraud, what do they think of this? I'm like, no you cannot because
5 honestly, if that does come out in that beauty parade discussion, then if even if the Arbitrator
6 doesn't disclose it, I would, as a Counsel, have a duty to say, well, I don't think this person is
7 appropriate because actually now they are tainted because they know how you're thinking. So,
8 you yourself as Counsel have to have that restraint and stuff. So, I haven't but I've been asked
9 that but I'm also very careful when we're doing beauty parades, which we do often as I said.

10 **JUSTICE INDU MALHOTRA:** May I add to that?

11 **FARID KARACHIWALA:** Yeah, please, please.

12 **JUSTICE INDU MALHOTRA:** So, there's one issue which I wanted to raise whether I like,
13 you know, my panellists to contribute on this, I find particularly in international commercial
14 arbitration, even in domestic the Party loyalty of nominated Arbitrators is a big issue and
15 eventually, what happens is if both the you know, in a three member Tribunal, you know, both
16 the Arbitrators are, you know, have loyalty to their Party, then it's really one person who's the
17 umpire, you know, who throws the dice, whichever way he goes, that is what is going to be the
18 solution of the you know, that is going to be the end result of the arbitration. And that is
19 something which I feel is a very serious matter of concern because if you can predict the result
20 from the constitution of the Tribunal, it is problematic. I'd like to request you all to respond to
21 this.

22 **SHERINA PETIT:** I actually had a situation where a Party-appointed Arbitrator was clearly
23 being partisan to the Party that had appointed him. I'm not going to say the nationality of the
24 Arbitrator or the nationality of the Party, and it was an international Tribunal. And I could see
25 that the two members of the Tribunal immediately distanced him off because they knew he
26 was partisan. I mean, literally we had a disclosure application and we were arguing and
27 literally it was like but give these documents, it's like you're almost being an advocate for this
28 person, you are a Tribunal. So, you know, so, but I automatically saw that the two international
29 people immediately distanced that off. So, I think you have to be so careful as well with the as
30 you said, with the three-member Tribunal that actually, you need to have that force with that
31 three member Tribunal that two will, you know, and then probably in the discussion room say
32 you're being overtly biased, if that continues, then someone is going to call up and the
33 institution and say there is a problem, I have done that. I have called up the institution when

2 I felt my co Arbitrator is being biased to a particular Party. I've called the institution, I've said
3 I think you need to watch this arbitration and you need to watch this Arbitrator.

4 **JUSTICE INDU MALHOTRA:** Sherina, that's an institution what do you do in *ad hoc*.

5 **SHERINA PETIT:** *Ad hoc*, I agree *ad hoc*. It's a big problem. I agree.

6 **JUSTICE INDU MALHOTRA:** I find it very difficult and there was an investment treaty
7 arbitration and the Arbitrator Was just you know, was just wanted to appoint someone, you
8 know, pro investor, they were continuously in contact and this is a leading barrister from
9 England was continuously in touch with the Parties any name suggested would go refer back.
10 So, I find this very, very common and frequent and problematic.

11 **SHERINA PETIT:** I agree.

12 **JUSTICE INDU MALHOTRA:** I mean, I... in fact, I must tell you all today that in the **White**
13 **Industries** case, which was, you know, the first adverse award, I don't think we've really
14 suffered many hardly any I mean, India has been doing pretty well in its Investment Treaty
15 Arbitrations. Now, Toby Landau was the Counsel for India, Republic of India and the minute
16 he saw the constitution of the Tribunal, he said India will lose this case. So, you know it's that
17 bad today you can predict what is going to be the outcome and that is what I find very, very
18 seriously problematic. I find it everywhere I find it in domestic arbitrations. In fact, Mr. Prof.
19 Stavros Buckoslavsky has written on this in fact, he's justifying Party loyalty which I think is
20 not fair you have your advocates, you cannot, you know, expect the Arbitrators to be taking a
21 partisan view. They are not required to advocate the cause of the Party that is what I, frankly
22 speaking, think is the biggest challenge to arbitration today

23 **PAVANI REDDY:** I agree, Justice Malhotra, I mean, I had similar experience. Without
24 taking a lot of time because we have time.

25 **FARID KARACHIWALA:** And you're right, yes.

26 **PAVANI REDDY:** So effectively, I had similar thing it's more like the Arbitrator the Party
27 appointed Arbitrator when the Counsel was making arguments submissions, he was making
28 gestures wherever there was a point he would make gestures, do the you know, effectively, I
29 could see that and interact how many interjections he had interrupted our Counsel while
30 making submissions. We counted there were 150 on a day. So then we thought, okay, let's
31 make an application so we made an application to the Tribunal, we are flagging the issue. If
32 this continues then the application is going to come to court. So, next day we could see it

2 because there was no... we don't have to be nice to the Arbitrator, we have to protect the client's
3 position so we immediately raised the topic, we flagged it, there is an application coming if you
4 don't behave. So, I think it kind of had some impact.

5 **JUSTICE INDU MALHOTRA:** So, the view which has been taken by Prof. Stavros
6 McCluskey, it's on the basis of his empirical study of, you know, meeting and interviewing with
7 a lot of Arbitrators and they've all said that I think it's fair that we they should be permitted to
8 take a partisan view in the Tribunal, which I don't think is correct, then you cease to be an
9 Arbitrator and adjudicator, you can't be advocating the cause of the Party and that is why, you
10 know, these disclosures have become so important and believe me, it's even overseas even.
11 You know, foreign Arbitrators.

12 **SHERINA PETIT:** I mean also many times because you're talking about treaty arbitrations
13 many a times sometimes the Arbitrator will have been appointed by the previous government
14 that's changed and you see the Arbitrator turn for variety because they are not the person of
15 the new government.

16 **JUSTICE INDU MALHOTRA:** Yeah, yeah.

17 **SHERINA PETIT:** And that is happening that's happening in treaty arbitrations.

18 **FARID KARACHIWALA:** I think fairness and neutrality is something which really needs
19 to stand out right on top in any arbitration and anybody who's not doing his full duty as an
20 Arbitrator. I think he needs to then face the consequences either by court or move an
21 application. I think we've just about time for this. So, I thank each one of you. I think it's been
22 a very, very interactive session. Understanding it from both perspective, from our Indian
23 Arbitration Act as well as what is happening in UK, some of us have to take a flight out because
24 they're going to Delhi. So, please forgive us, I'm not going to even ask whether any of you have
25 questions, but I'm going to be outside, maybe some of us are going to be outside. So, please
26 feel free to address any questions you have. Thank you again very much and see you soon.
27 Thank you.

28 **PAVANI REDDY:** Thank you.

29 **JUSTICE INDU MALHOTRA:** Thank you.

30 **ANUSHKA MANSHARAMANI:** With this we come to an end to this session. Our sincere
31 thank you to the panel members for a candid and illuminating discussion and to the Moderator
32 for moderating with insight and precision. The session sparked rich conversation on

independence, impartiality and the evolving standards of Arbitrators conduct, which is a fitting note to close out the India ADR week 2026 in Mumbai. As we wrap up an incredible two days in Mumbai, we want to take a moment to reflect on what has truly been a landmark edition of the India ADR Week 2026. From spirited debate to deep dive panels on third-party funding, in-house Counsel perspectives, the rise of Indian Arbitrators on the global stage, arbitration strategy and the critical conversation on conflicts and bias; every session brought rich insight, robust dialogue and meaningful connection within our ADR community. None of this would have been possible without the incredible support of our sponsors, our partner firms whose generosity and commitment made this event possible and to every speaker, Moderator and most of all to you all our delegates who made the Mumbai edition truly memorable. Mumbai may be closing this chapter but the journey continues. India ADR Week 2026, now moves to Delhi, kicking off tomorrow and running through 11th September. To everyone who will be joining us there, we look forward to welcoming you and making the Delhi edition even more wondrous with more conversations, connections and more reasons to believe in the future of Dispute Resolution in India. Delhi will see addresses by Justice Sandeep Mehta and the Chief Justice of India along with the release of the results of the ADR survey. We will also be releasing the dates of the India ADR Week 2027 on 11th September during the closing of this edition. We request you to keep an eye on the dates of the India ADR Week 2027 on our website and block your calendars. For any sponsorship opportunities, please feel free to reach out to us. We look forward to seeing you in Delhi tomorrow at 8:30 AM. With this we come to an end. Thank you.