



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34

**INDIA ADR WEEK DAY 2: MUMBAI**

**SESSION 1**

**10th Oct 2023**

**10:00 AM to 12:00 PM**

**UNIQUE CHALLENGES OF DISPUTES INVOLVING STATES AND STATE  
PARTIES**

**Speakers**

Sheila Ahuja, Partner, Allen & Overy

Lucia Raimanova, Partner, Allen & Overy

Salim Moollan KC, Brick Court Chambers

Zarina Chinoy, General Counsel, Shapoorji Pallonji Group

Tarun Bhatia, Managing Director & Head, South Asia, Kroll

**SHIELA AHUJA:** Thank you everyone for coming into the room. I know it's tempting to stand out there and get your teas and coffees, but come and join us if you can. We're very lucky to be here this morning with a panel that I'm about to introduce for a topic that I think a lot of us have some experience of in some way or another. And that is "unique challenges of disputes involving States and State parties." Now we are mindful that there's a lot of topics this week across many cities, as part of India Arbitration Week. And what we're hoping is that we will be able to engage you from different aspects of this topic. And so, I'll introduce in a moment the different panel members you have, that will give us, I think, a very varied experience and set of views. So let me start by introducing Salim. Salim Moollan is... Salim Moollan KC is a Barrister, Brick Court Chambers. He specializes in 'International commercial and Investment arbitration'. He's acted as Counsel in high profile Investment arbitration cases, including a case that I and many other people have been talking about for over a decade, *The White Industries versus India* case, *Philip Morris, Australia*, and another case that has made headlines for many different reasons, *Cairn Energy and India*. He currently acts as



1 Lead Counsel in a number of prominent investment matters for both States as well as  
2 investors. And also in the commercial field, he acts in high value cases in various sectors,  
3 including energy and telecom. He also sits as Arbitrator, both party appointed and Chair and  
4 both in investment and commercial Arbitration matters. We then have, Salim's left, Zarina  
5 Chinoy, who's general counsel of EPC Division of 150 year plus Engineering and construction  
6 giant, The Shapoorji Pallonji Group. Ms. Chinoy has been at the helm of various matters, both  
7 'contentious' and 'non-contentious' for the group and will share with us her experience of  
8 various contracting roles with States as well as State- Owned Entities from her perspective, on  
9 the client's side. Then to my right and to Ms. Chinoy's left is Tarun Bhatia, who's Managing  
10 Director and Head of South Asia for Kroll. Tarun is in the forensic investigations and  
11 intelligence practice of Kroll. He's based in the Mumbai office here. Tarun has extensive  
12 experience in evaluating, measuring and monitoring risks across corporate India over the past  
13 15 years. And he's a well-regarded industry expert for financial services and structured finance.  
14 So again, from the perspective of sort of looking at it through a money lens, I suppose, and  
15 through a forensic lens, it'd be interesting to hear from Tarun on this topic. And last but not  
16 the least and straight back at the end of this table is my fellow partner, Lucia Raimanova, with  
17 Allen & Overy. Lucia has been based across various offices of A&O, and is currently the head  
18 of our Central and Eastern European arbitration practice. But has done a fair bit of work in  
19 other jurisdictions like England and Wales, where she's a Solicitor Advocate, and also here in  
20 India, including a long running matter which Lucia and I have been doing together. Lucia has  
21 15 years of experience involved commercial and investment treaty matters all around the world  
22 and also sits as Arbitrator. So, what are we going to do today.... Oh, sorry. And I'm Sheila, and  
23 I'm your moderator for today. And I'm also with A&O. I'm based in Singapore, but spend a lot  
24 of my life in different parts of this country, and I can't get enough of it. Okay. So just moving  
25 on to how we're going to tackle this topic today, what we're going to do is take the structure in  
26 chronological order, and I'm going to I guess put questions. I have the best role here. I just get  
27 to put questions and I'm going to invite the audience to as well, better for it to be interactive.  
28 And I would say controversial questions, I don't mind, but if the panel refuses to answer them,  
29 then we'll bounce it around other members. So, we will try and get everything answered, if we  
30 can. We're going to start first by looking at trends, nuances, risks, and challenges of disputes  
31 involving States and State-Owned Entities in particular. Now, of course, there are challenges  
32 in all sorts of disputes. Sometimes they are cultural. Sometimes they're just tactical.  
33 Sometimes they involve a particular counterparty or a particular client, depending on which  
34 side you're on. And that's what we want to focus on, is when you have, either as a client or a  
35 counterparty, somebody that is belonging to a State or is a State-Owned Entity, what are the  
36 trends that we tend to see? What are the risks and challenges of operating in that space? And  
37 then we're going to try and convert them to strategic considerations. So, building from our



1 past experience, when you're looking to matters next, what factors should you take into  
2 account when you know that the party that you're involved with, as I say on either side, is State  
3 related. And finally, I want you to walk away with something and so will I, from this panel,  
4 which is practical tips and anecdotes, just to take away with you on experience that we'll get  
5 from this panel. So, if I may start with the first heading of our structure, which is challenges,  
6 trends, nuances, and disputes involving States and SOEs or PSUs, depending who you are.  
7 Salim, if I can put you on the spot first, you made the mistake of telling me your extensive  
8 experience in this space on both sides actually for and against State actually Investment and  
9 Commercial, Counsel and Arbitrator, in Arbitration and Courts. So lots of different angles. Can  
10 you tell me if you can stringing a thread through that, what are common challenges that you  
11 see in disputes involving States?

12

13 **SALIM MOOLLAN:** Yeah. Thank you, Sheila. Yes. As you say, I've acted on both sides of  
14 disputes involving States. So perhaps to answer your question in three strungs. One would be  
15 first, the nature of your client as a State or Opponent as a State. I think the first thing that is  
16 obvious is that the decision making process would be much lower than having a corporate  
17 client. There's also much more difficulty in getting decisions at all. For example, it's often said  
18 that it's very, very difficult for a State to settle. Because the default option is the bureaucrat,  
19 which is special litigation. Then it's not responsible for anything at all. If you take the decision  
20 to settle then, of course, you can be accountable for it later down the line, further down the  
21 line. So, that's another common problem. And then still on this first trend of... the nature of  
22 your client. There's perhaps... I wrote down the word 'arrogance.' But it's not arrogance. But  
23 it's... bureaucrats will operate within the boundaries of the Domestic legal system. And I don't  
24 mean that only in India. It is everywhere. So, for example, if you take India, your normal civil  
25 servant would be used to operate within the constraints of Indian judicial review proceedings,  
26 for example. He will not think, or she will not think that the decision could be amenable to  
27 arbitral proceedings involving a procedure he or she has never heard of before, before a  
28 Tribunal that will not be an Indian Court and applying substantive standards, again, they have  
29 never heard of. And that creates problems. Because when you step in as Counsel and are trying  
30 to advise them as to what the risks involved are so foreign to what they accustomed to, that of  
31 course, tensions can arise. So, that's the nature, if you want of the client itself or opponents.  
32 Then the second strand would be in terms of procedure or there are particular challenges that  
33 arise because of a State being involved. Well, the same factors, of course, will come into play if  
34 you are before the Court of that State, then I don't need to deal with the problems that you  
35 might be facing. And even within neutral arbitration there is increasingly a procedural  
36 distinction being drawn whenever a State is involved. So, to take an example, some arbitration  
37 rules will be saying, "Well, if it's a state, it has to be 3 Arbitrators, the ICC rules, you know,



1 particularly careful”. Whenever a State is involved, the court will look at it with a very different  
2 eye. And some of you may know I shared the work of UNCITRAL on transparency in  
3 Investment arbitration. And the call there wasn't simply for transparency for investor  
4 arbitration, but for every arbitration involving States. And I think that's not a trend that we  
5 are speaking on. So that's on procedure. And finally, substance, where clearly you may have to  
6 face problems of immunity and again, you've got the different substantive rules that can apply  
7 in the realm of investment obligation. And that's something I think we're going to be  
8 discussing later on.

9

10 **SHIELA AHUJA:** Thank you Salim. That's a very helpful set of factors I actually want to pick  
11 up on the point you made about bureaucrats or people operating on behalf of the State who  
12 tend to operate or at least assume they can operate within their domestic legal system. And as  
13 a result, that can create certain tension, I suppose. I may be asking Zarina and Salim to  
14 comment on this. Do you then find that when you are dealing with a State... State-Owned  
15 Entity on the other side, your willingness to accept a more neutral forum... Is it just difficult  
16 to get through to them? Are they often unwilling to operate outside the parameters of their  
17 domestic system that they understand the best?

18

19 **ZARINA CHINOY:** Yes, Shiela, absolutely. I mean, you have to understand, as he rightly  
20 pointed out, “their mindset.” They are more bureaucratic. They have to work in a very  
21 constrained purview. They can't, let's say, walk outside the four corners of this room. It's not  
22 like a corporate where I can take it maybe to the promoters and maybe have a strategic  
23 discussion... and these are ministries. These are ministers. These are civil servants. And they  
24 have various structures, and they cannot move out of. So they have a comfort zone. And of  
25 course, they would prefer a venue, or a forum or seat whatever within their jurisdiction, where  
26 they understand it, where they understand the nuances, where they believe that they can  
27 control it as well. I mean, control, in that sense it's a mindset, right? It's in India. I can do it.  
28 It's in my jurisdiction. It's in whatever country, in Europe and Africa. I am a Minister there. I  
29 am a civil servant. I know how it works. It's easy for them to understand it in that sense. We  
30 as corporates are able to go anywhere. We like to diversify. We see the world with different  
31 lens. They see a word with a different lens. So, getting them to accept something neutral, yes,  
32 that's pretty difficult. In fact, if you talk about the beginning of a transaction, they will say,  
33 “these are our parameters. This is set, this we cannot move from.” And one of them will be the  
34 arbitration, probably. It's always there.

35

36 **SHIELA AHUJA:** And do you negotiate that with them Zarina? Do you see...

37



1 **ZARINA CHINOY:** We do attempt to negotiate it. But we do know very often that that line  
2 may not move. There are other things in the Commercial Contract that will move. But these,  
3 I've seen are mostly non-negotiable. They may give you a little bit leeway with the venue at  
4 best. But nothing else. And the law, the governing law will generally be of that country or that  
5 nation. That's not going... and that I haven't seen changed. I mean, you might have, but I  
6 haven't.

7  
8 **SALIM MOOLLAN:** I think also... maybe your experience would obviously be more relevant.  
9 I think as someone who does negotiate disputes, but what I see in dispute is that often when  
10 you speak to the client expos factor, they will say, "well governing law, we are dealing, doesn't  
11 matter much. Because we want to ensure the Neutral Forum." So, the real area of dispute tends  
12 to be where the dispute will be resolved. So that's the experience I have. Otherwise, I couldn't  
13 agree more with everything what you said. And to add, perhaps more facet to that, I think that  
14 also explains this backlash against Investment arbitration. We can discuss it to some extent,  
15 but I think one aspect which is not discussed that much. But I think we need to discuss... and  
16 I've been quite vocal in saying, "the system has to be changed." But I've always said the system  
17 cannot disappear. Why? Precisely because it is a forum that is neutral. Perhaps it ought to be  
18 tweaked. Perhaps it can be made different in other ways, but it is neutral. Because I do think  
19 it's a problem. Completely understand that bureaucrats will need to move within the four  
20 corners of the room. But on the other hand, they ought not to be immune to real scrutiny of  
21 their actions. And there's a problem when they rely on their own cause or whatever forum they  
22 know, there will not be real scrutiny. Which is really what Investment arbitration initially was  
23 supposed to be about... About the rule of law.

24  
25 **SHIELA AHUJA:** Of course Salim, do you think States do adjust their thinking or are getting  
26 better at adjusting their thinking when they know that the forum is a neutral International  
27 one, as opposed to home forum?

28  
29 **SALIM MOOLLAN:** Not really. Because it always comes to date. And what I mean by that is  
30 that the bureaucrats who will have taken the decision is not going to be someone at the  
31 Ministry of Law. It'll be someone at the Ministry of Telecommunications. It will be  
32 someone...you know... There'll be someone else. And so one needs to disseminate information.  
33 And when you see the way Argentina has dealt with it, they now have a system whereby  
34 quantity with a dispute. But they also disseminate information across their Ministries. And it's  
35 something we've tried to do here. And I can't say we've had much success so far. It's very  
36 important because then you prevent disputes from arising.

37



1 **SHIELA AHUJA:** And I guess pivoting from that. And maybe to Lucia here, when you are  
2 then advising a client on commencing proceedings where that client could be the State, or it  
3 could be the counterparty. But you know that the behaviour will be dictated by the factors that  
4 Salim and Zarina have set out. What factors do you take into account when deciding what to  
5 take to the client about whether or not they should commence proceedings in that neutral  
6 forum?

7  
8 **LUCIA RAIMANOVA:** Yes. So, I think we can all agree that no one commences disputes  
9 against States, in particular lightly, that's for sure. A lot of thinking goes into that. Obviously,  
10 the considerations will differ from case to case, but I would broadly put them into four packets  
11 if you like. So, there are considerations of the relationship with the Government after you  
12 commence the dispute. The consideration of the merits of your case, then time and cost and  
13 most importantly enforcement. So on the relationship, obviously the big question is how will  
14 the dispute affect the relationship with the Government? And if you are a business who is  
15 already exiting because something pretty drastic has happened so that you have to exit the  
16 country. You may not have the same considerations as when you are still operating in the  
17 country. If you are still operating in the country and you are also in a highly regulated sector,  
18 which is even worse than the Government has lots of tools to deploy to make your life difficult.  
19 Obviously, the Government will be careful not to commit another treaty breach, but, it can, if  
20 you're a bank, for example, look at your anti money laundering compliance a bit more  
21 carefully, or it can scrutinize your tax return a bit more carefully. So, you can expect a battle  
22 from other fronts as well, once you start the dispute. And even if it's a commercial dispute,  
23 which is a bit less political and you're not questioning the Government's sovereign powers, you  
24 have to ask yourselves, "are you going to get the next contract from the Government?", whether  
25 you're in a construction industry, for example, or if you are operating in a JV With the  
26 Government, you may face operational issues, right? Because even though the Government  
27 may not be deciding every day on an operational issue they do have decision making or  
28 approval powers, so that the consensus building may be a bit more difficult. Then moving on  
29 to the merits... obviously, you need to have a proper analysis whether you are likely to win. I've  
30 got some statistics for you as well. So, despite the backlash against ISDS, that Salim  
31 mentioned, you have to bear in mind that States are more likely to win. So, they win in 56% of  
32 cases, or some of them are also discontinued. And when you win, you are typically awarded  
33 only 40% of the damages claimed. And I'm quoting from a study conducted by our fellow  
34 partner, Matthew Hudson, who spoke here last year. And that's sort of takes us to the time and  
35 cost considerations, obviously you have to... these disputes do mean a substantial commitment  
36 of time and cost on the investors' part in particular. So according to this ANO study which  
37 captures data up to 31 May 2020 the mean cost for an investor is \$6.4 million. And then if you





1 lose, you may have to pay some or all of the cost of the State's defence. That is slightly lower.  
2 The mean amount is about 4.4 million and there is also the cost of the Arbitration. And in  
3 terms of the duration, these disputes the mean duration is 4 years, 8 months for EXIT, and it's  
4 5 months shorter for UNCITRAL. But then, Interestingly the amount in dispute, the longer the  
5 case can take. So, when you're looking at a class of claims above 1 billion, the average is eight  
6 years. So these are really significant time and cost commitments. Obviously nowadays you can  
7 also get funding, but still you have to have your ducks in a row. And then finally on  
8 enforcement. And no doubt Tarun will then have more to say on that. But obviously you will  
9 need to be comfortable that you will see some money in the end of the day. You're of course  
10 considering whether you have access to the EXIT Convention or a New York Convention, both  
11 are problematic in India. As far as treaty disputes are concerned. What history does this state  
12 have in paying out on awards? And if enforcement in the country itself is difficult, which it  
13 typically is for treaty dispute, then does the State have sufficient non-immune assets that you  
14 can enforce against outside of jurisdiction? And I think probably more on enforcement for  
15 Tarun.

16

17 **SHIELA AHUJA:** Thank you, Lucia. I guess we'll come back to these questions around the  
18 relationship with the Government. Do you need to maintain or be mindful of what's happening  
19 in a dispute process versus outside. But actually, I want to know from Tarun and Lucia just  
20 what you alluded to about enforcement risk. Do you get asked often Tarun, sort of upfront in  
21 a matter. I've got these lawyers telling me to pursue this dispute for X number of time and this  
22 is the merits and they feel quite good about it. But what's going to happen at the end? Am I  
23 going to see any light of day where money is concerned. And how do you deal with that? Or do  
24 you deal with that differently, where there's a State involved?

25

26 **TARUN BHATIA:** Thanks, Sheila. So, yeah, we always wish it comes to us sooner than when  
27 they actually do, because most of the things can't be resolved by that time. But I think  
28 specifically in India, and just without spending more time on it, one or two other challenges  
29 that we have seen is... broadly the thinking given we are a large country, so populist that... the  
30 fact that you're paying taxpayers money and there is some level of media noise. I wouldn't say  
31 scrutiny, also plays a factor and that influences even on enforcement. In our experience, all  
32 the points raised here are very relevant, I think increasingly because India has many SOEs who  
33 also operate outside India today. Whether the State itself is a party to the Arbitration  
34 Agreement becomes an important question today. And what we are increasingly seeing is the  
35 Hague convention being brought in more actively because there itself is a lot of procedural  
36 aspects involved. So, just on the process side, there's a lot of time that gets spent, and we  
37 believe that itself takes a lot of time. But beyond that from an enforcement point of view, there



1 are three key questions that you need to keep in mind especially in light of we are looking at  
2 neutral jurisdiction. The first is, will the Courts enforce the awards? That itself is important.  
3 And that's a question we get asked when there is a neutral jurisdiction because they want to  
4 know past incidents. How have they looked at experts recommendation or whatever the expert  
5 has kind of claimed? I think the second is, themselves being aware where their assets are.  
6 Because in *India Cairn* is a good example and there have been a couple of others where a  
7 threat of global asset search and attachment to the sovereign has been made. And we are  
8 increasingly seeing SOEs talk to us saying, "if there was a dispute which of my assets could be  
9 addressed?" And that's very pre-emptive. It's not as active, but that's a question being for  
10 posed by them. And I think the other thing which is becoming increasingly important, and I  
11 say that from some of our global experiences, 'the whole aspect of sanctions.' Because even if  
12 you need to do enforcement, if there are sanctions, then the local jurisdiction has a lot more  
13 stay. I think Russia is a good example where the Russian Courts need to play a role today when  
14 it comes to enforcement and attachment. So I think that's important. Two other points where  
15 we spend a lot of time is I think when you're thinking of enforcement, you have to think of  
16 attachment. And a lot of time we have seen situations where State, and how do you define a  
17 State gets questioned. And similarly, in SOEs is an SOE accountable? Or can you hold the  
18 sovereign also accountable? And that's where you look at from pure economic interest and  
19 control to aspects of who are the decision makers. I fully agree with what Salim said. I think  
20 the process in India is very regimented. If I can use that word... and that is something which  
21 delays the process. But we are now seeing ways that this gets countered. I mean, litigation  
22 funding is still relatively new to India. We've seen lot of people meet different stakeholders.  
23 But we are now looking at 'political leverage' as something which is being used even by India,  
24 because I think the whole story about, if India is attracting a lot of money, it will need to kind  
25 of toe the line. We haven't seen that play out. India's own view is that if the relationship was  
26 commercial, then you don't have immunity. That's the stance India has taken in the past. But  
27 we are today being called up by the Government on International, sorry, State-Owned  
28 enterprises where they are, the Claimant to understand, what can they do? When should they  
29 get in? So I think things are changing a bit more. but the timeline still remain very long.

30

31 **SHIELA AHUJA:** Thank you, Tarun. There's a couple of interesting points I wanted to pick  
32 up on and actually maybe get Zarina, your reaction as a... seating in the client seat... some of  
33 these... some of Tarun's comments about State- Owned Entity actually thinking proactively  
34 about asset tracing against it, actually. I just wonder how much of that do you see on the  
35 negotiation side? And we'll come on to what are things we can do differently or whatever from  
36 the start of a matter through to the dispute stage. But do you actually see that being taken into





1 account? Or is it really when something gets heated that somebody goes to Tarun? I wanted to  
2 get your sense at the negotiating table.

3

4 **ZARINA CHINOY:** So, Sheila hindsight is always 20-20. It happens both ways. There are  
5 times... it depends on the kind of State that you're dealing with that you may want to look at  
6 that upfront or are you in a hurry? Or whether... is there competition and are you bidding  
7 against a bunch of people? All of these factors have to be kind of taken into consideration. So,  
8 there's no one answer I can give you. Whether we see it at the beginning or the end it just  
9 depends on sometimes how the transaction plays out. And very often it doesn't come straight  
10 to the Legal Department to have a look at. It's commercial. At the end of the day, business is  
11 business. And that comes first. And when you're talking about asset tracing, we lawyers... we,  
12 lawyers always think of the worst in plan accordingly. Commercial people plan for profits. And  
13 I think that distinction is something that you need to take care of. I mean, that I need to  
14 understand before I can answer that question for you. And like I said, there are so many  
15 moving thoughts that's not an answer I can give you anyway in. Let's say I can't give you a  
16 generalised answer. But we do look at it. We do look at the ability of that State Entity to pay  
17 up. We do some... at least some level of risk analysis. Because it is necessary. At the end of the  
18 day, if we're not going to get paid, even that profit margin is 20% and we're not going to  
19 recover, how does it matter that we do the project or not? So we do look at it. There is some  
20 amount of risk analysis. There is some amount of business objectivity that goes into it as well.  
21 It sometimes does happen in the course of the project itself, not just at the beginning. It  
22 depends. And based on that we also do take a decision of whether we want to litigate, whether  
23 we want to arbitrate, whether we want to go ahead and fight. But you also have to understand  
24 that State-Owned Entities, especially when we do projects for them, they require upfront  
25 guarantees from us as well. So, they control some of our assets, some of our cash flow, and  
26 they do use it. I won't use the term blackmail, because that might be a bit harsh, but they do  
27 use it to control us. They do use it to force certain decisions that we have to make. So, we have  
28 to take into consideration gamut of things before that answer can be given.

29

30 **SHIELA AHUJA:** Thanks. That's really helpful. That's sort of proper commercial legal  
31 exposure, right? I mean, your comment about 'deals being done and people being focused on  
32 the profits versus how we look at it' is interesting. Obviously, some of us have spent all our  
33 careers being told by our transactional colleagues not to be anywhere near when a deal is being  
34 concluded. But then they just call you in the background and say, "Does this Clause work?  
35 Don't say no." But as you rightly say, hindsight is 20-20. I do want to pick up on this theme  
36 sort of that's coming though about and maybe moving into a strategic consideration, the sort  
37 of second arm of our discussion is when you are then looking at it as a matter of hindsight and



1 looking at your experience and maybe Salim to you. Do you ever get asked what's the point? I  
2 can go through a neutral process, but ultimately it's just postponing the inevitable, which is  
3 coming back to home for the state side. Why not just pursue them domestically and cut losses  
4 or factor that into your commercial bargain, as Zarina said, so what do you see somebody who's  
5 coming to you saying, what is the point of still going offshore to neutral forum, whether  
6 investor, commercial as opposed to just staying on the ground?

7

8 **SALIM MOOLLAN:** Well, I guess it depends on 'what the alternative is.' And also, it depends  
9 on the quality of the Courts of that given State. I think it's fair to say that the Courts of England  
10 could be more neutral about ruling against England Itself. Great Britain, or a State Entity than  
11 the Courts of some African countries might. It's just a reality. So you have to look at what the  
12 alternative is. Then I wouldn't just assume that you must come back home or to own turf in  
13 that as we preserve Tarun, you may well have opportunities to enforce elsewhere and the  
14 experience has shown that even when these are difficult, or not very successful, with long  
15 running sagas, it is a thought in the side of the Government. And therefore, ultimately, they  
16 want to get rid of it. So that helps. But I think the way I always try to think about these issues  
17 and perhaps also discuss it with clients is that you need to look at Investment Arbitration,  
18 because that's what we are now talking about. As part of the honorary of what you have. So,  
19 we're just discussing with Zarina... Is it something you look at when you're developing your  
20 project in the same way as you would say your tax considerations that you have access to  
21 investment arbitration? I think it's important to do that. Because it doesn't take very long to  
22 ensure that you have CNSPV that's incorporated in the right place. But it means that you have  
23 access to it. And States don't like it. They don't like for all the reasons we'll be discussing. The  
24 idea that they are going to be the Act of civil servants, of Ministers, of powers that be or going  
25 be... or going to be scrutinized before neutral forum. So there's a political angle to it that can  
26 be used cleverly. You should not overpay, but I think it's a useful, useful thing to have.

27

28 **SHIELA AHUJA:** Thank you. And just keeping to this theme about 'how to exercise that  
29 choice.' And just as an aside we... and it's in the public domain. So, I can sort of share this. But  
30 we at A&O and overreacted for a Japanese Automotive company, Nissan Motor Company  
31 Limited, for a treaty claim against India for the reimbursement of certain incentive payments  
32 as part of their wider investment into India... a plant in Chennai. And one of the key questions  
33 on the table was, 'which route should we go?' And after much consideration we sort of pivoted  
34 them to the treaty route, and that led to a settlement, which was really great. But it also had a  
35 lot of other clients call us and say, how come you haven't settled my case with the State? So  
36 sometimes, as you rightly say, you sort of factor that into your overall thinking. But it's just a  
37 leverage. It could be just...



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**SALIM MOOLLAN:** Nissan was... if I remember correctly, of course, you know much better, but a bit of a special case. Because it's from the outside, a little bit in the inside as well. It seemed that there wasn't much dispute that this was due. And it was a question of finding a way to get everyone to accept it without losing faith too much. I'm not sure that would translate into a more complex. Do you think that's fair? No?

**SHIELA AHUJA:** I think that's absolutely right. And I think ultimately it does also show you that when it comes to the battle itself, arguments are still made. But ultimately one has to step back and look at the commercial realities. What you're saying I absolutely agree with that. And actually, on this question of when there is something more complex you want, I think Lucia, you were saying sort of tends to be a three-member Tribunal, and Salim was saying that... How do you even take a decision when you're looking at commercial arbitration versus Investment Treaty Arbitration? The statistics you gave us, Lucia. Some clients would hear that and say, "I don't want such a long-drawn process. I'm just going to go commercial or not." So, what factors do you talk to clients about when deciding which way to pivot?

**LUCIA RAIMANOVA:** Thanks Sheila. So, Nissan aside... I tend to advise clients to go 'commercial' if possible. Because as it's coming out it's less political, less publicity around it. There is less call for jurisdictional objections, which tend to prolong the dispute, the Contract Laws are... the National Contract Laws are much more developed than International Laws. So, you do have the outcomes that tend to be more predictable. I also find that Arbitrators in commercial disputes are deciding about sort of breaches of contract are less influenced by sort of considerations of equity and how their decisions might be perceived by the public, which I find is increasing in this case with Treaty Tribunals. But I welcome Salim's views on that. Against that, of course the considerations that I already mentioned, that some States should take Treaty claims more seriously. So, you may likely achieve a settlement more when you go the Treaty route. Right? So, you can use it as a political leverage. Also, and enforcement consideration is important if you do have access to exit under treaty, but not under the contract. That will play a role in your decision. Because obviously EXIT is much better for enforcement. And also, if you need to challenge the actions of the Sovereign, such as a passage of law or bring in some sort of broader factual framework, such as a campaign against you that is not strictly contractually relevant, then it may be... better to go the Treaty route. And then I don't know if you want me to talk about both pursued in parallel. But I think maybe there are of course situations where you can pursue both in parallel, but you have the good reasons for it. And you also have to then face various objections that the State will bring. And I think Salim will probably have more to say on that because in preparation for this, I noticed he has written



1 a long article about 'parallel proceedings.' But you may face questions about double recovery.  
 2 So you may be expected to provide an undertaking that you will not seek double recovery. You  
 3 may even be forced to elect which route you are actually... or which arbitration you are  
 4 pursuing, or whether one of them should be stayed pending the outcome of the other  
 5 arbitration. You may face accusations of abuse of process. Then if the parties are same or at  
 6 least the previz of parties to boast arbitrations, you can also expect that the evidence and the  
 7 pleadings will be used in the other arbitration, so consistency will be key. And of course the  
 8 one Tribunal already renders their decision, for example, that there has been a contractual  
 9 breach or the other way that the State didn't terminate the contract in accordance with the  
 10 stance. If that decision is relevant to the treaty dispute, then you may be bound by it by the  
 11 *principle of res judicata*. So, these are some of the considerations that one is thinking about.  
 12 But maybe Salim has more to add.

13

14 **SHIELA AHUJA:** Yes, I would ask Salim if you want to add to that in particular, in a situation  
 15 where and you may or may not want to address this as part of your answer. Where having  
 16 agreed a certain forum, you find before you're even making this strategic decision, there have  
 17 been local proceedings already commenced somewhere which you then sort of discover the  
 18 existence of. How do you tackle that as part of your strategy?

19

20 **SALIM MOOLLAN:** Right. So, there's quite a lot in what you just said. I'm just going to try  
 21 and answer those quickly and as structured away as possible. First, I respectfully completely  
 22 agree with Lucia that if you have access, but there's some qualifications to a neutral  
 23 Commercial Arbitration in a... secondly safe seat against... Thirdly, a Sovereign Entity...I  
 24 would every day pursue that. And one should be quite careful to say one of those points about  
 25 what one means by a neutral seat and a safe seat. Let's take two examples. India... is India a  
 26 safe seat at the moment? I think the litmus test is always how are the courts ultimately going  
 27 to decide? How quickly, how safely? And I think everyone recognizes, we are not there yet.  
 28 We're working very hard on this. But you still get decisions such as this ***Stamp duty***  
 29 ***decision*** and that sets India back. So, perhaps in a huge case, especially if you're an Indian  
 30 company, Indian State you might not want to have your seat in India. One should not assume  
 31 also that all seats remain safe in the way we think about them. And that's why I was going to  
 32 talk very briefly about England. We've had a decision of the Supreme Court two and a half  
 33 years ago called ***Enka against Chubb***. That decided that the Law of the contract effectively  
 34 would normally govern the Arbitration Agreement and also decided that this would normally  
 35 take out all the non-mandatory provisions of the English Arbitration Act. So suddenly you've  
 36 agreed to an English seat with an Indian law... Governing Law and separability, which is a very  
 37 important protection to ensure the effectiveness of your Arbitration Agreement goes out. The



1 Principles of interpretation of your clause under English law don't apply. Indian law will apply.  
2 So, to give you a very concrete example, there was a decision in 2005 against one of the  
3 electricity regulators about tariffs. And the English Court said, "English law will decide  
4 whether this arbitrable or not?" Following Enka, that's no longer English law, but Indian law.  
5 And we've had a recent decision last year of the Supreme Court here in India confirming that  
6 that's not arbitrable. So, you think you've agreed to arbitration in safe seat? But you haven't.  
7 Because of a jurisprudential development. We're fixing it. And the law permission is now going  
8 to change it. But you have to be careful about that. So that's one aspect. Then just to answer  
9 two points that you raised... two points that you raised, Lucia...you said "you feel that in  
10 Western Tribunals now are more and more ruling inequity. Sort of trying to see how is the  
11 public going to perceive that." Perhaps others make the argument that these Tribunals are not  
12 aware enough of a public, International and Public Law and are too commercial. It being said  
13 that the proper analogy is not Commercial Law, but Administrative Law. So, there are two  
14 sides of the coin there. But I think the problem is the looseness of the standards. And the fact  
15 that you've got other Tribunals ruling, each differently, each separately on those. Which is why  
16 some of us are not seeing again, it's a panacea, but we need to consider whether there is a way  
17 of creating some systemic stability. And that's where the idea of multilateral investment court  
18 or an appeal mechanism, something to introduce less looseness, less flexibility so that we don't  
19 have that criticism. And so, we're considering that of course. On parallel proceedings... Yes. I  
20 gave A Hague lecture. It's intensely complex. So, I'm not... I'm not going to go into that. And  
21 finally on your question on local proceedings... Well, again if you've got the developed system  
22 of Arbitration Law locally, then there are mechanisms under the *New York Convention* to  
23 stop that. If you don't... then you don't. And then you end up in a White Industry Situation.

24

25 **SHIELA AHUJA:** Thank you, Salim. That's very helpful. I was hoping you'll take us through  
26 the lecture, but maybe we can... no, I'm kidding. Maybe for another time. But actually looking  
27 at the choice of system and how much sort of one has to think about that. And as you say,  
28 sometimes what's perceived as a right answer may actually not be for the issue that is prevalent  
29 on your particular matter. I wanted to pivot back to Zarina to ask you Zarina, when you are  
30 sitting across the table and you have and I appreciate... it may not be you, it may be the  
31 Commercial Team, and they sort of come to you and you know that the counterparty is another  
32 Commercial Entity versus a State Entity. Do you operate in a different sort of mindset of  
33 caution, I guess, relatively speaking, in those two different scenarios? Or does it not actually  
34 bother you at that level?

35

36 **ZARINA CHINOY:** No. Sheila that's extremely important. Whether am I sitting across a  
37 Commercial or a State, I... my mindset changes accordingly. Commercial, is easier. And it's



1 difficult. It depends on the level of dispute or the level of trust that we still have. In terms if it's  
2 a Commercial Entity, we both know that at the end of the day we would still both like to come  
3 out with some sort of win, like you said, 'safe place.' And that may be more a practical solution.  
4 With the State Entity, like we've all said, you have to jump through a bunch of hoops before  
5 we can get the decision. Everything is slow. Everything is more bureaucratic. There is that level  
6 of scrutiny. So, when they do send across a proposal of settlement, there will be... what is the  
7 settlement for? why it's happening? And therefore, why did it occur? All of those things come  
8 into play when they send... when they go to their settlement committee, et cetera. But in a  
9 commercial dispute, not so much. It will be across the board. And we will know and we will be  
10 able to talk about that easier. So yes, the mindset changes very much according to who is sitting  
11 across the table from me. 'What is it that I want' also at the end of the day. In a lot of senses  
12 time is money that we get. But if it's commercial it's money oriented. But if it's the State, like  
13 you said a lot of times, it's also about saving face. And when we go to a State Entity also one of  
14 us has said that it's very important to understand where our next business is coming from?  
15 And if that State is going to blacklist us, then if I'm sitting across the State, I'm going to be very  
16 mindful of that and my tactics will change accordingly. So it does play a big role.

17

18 **SHIELA AHUJA:** Thank you, Zarina. Just sticking to that. And maybe you... if I may... you  
19 know, you mentioned the prospect of what will happen to the future relationship as one factor,  
20 do you see any... are we wrong to just group States and State-Owned Entities all together? Is  
21 there actually a varying degree of how they approach these situations? So might there be some  
22 States where that's not likely to happen, but other States where it's almost inevitable? And  
23 then in another scenario might there be some situations where a State actually understands  
24 its obligations, but it just needs to go through for accountability reasons? Another point that  
25 was made, I think by Salim earlier, accountability reasons. It needs to go through the Hoops  
26 and be presented with an award before they pay. So are there actually factors which we are  
27 grouping, maybe unfairly in a very broad brush category?

28

29 **ZARINA CHINOY:** I would say Yes. State Entities, they are very...they are as diverse as we  
30 are sitting out here. There are some that are proactive. There are some that can take decisions  
31 quicker. They have committees set up. There are dispute resolutions that are set up and they're  
32 structured. They are acceptable to them. And then there are entities, of course, that are rigid.  
33 They have their procedural mechanisms. They have their bureaucratic mechanisms. So, yes,  
34 the spectrum goes all the way, North to South. That I will say. But in terms of the last question  
35 that you asked me in terms of scrutiny, that I've seen across the board. They have to be careful.  
36 They have to dot all the I's and dash the T's before that settlement comes across.

37





1 **SHIELA AHUJA:** Tarun, I was just going to ask you to add to that?

2

3 **TARUN BHATIA:** Yeah. So I think couple of things I think and sticking to India, our  
4 experience with different ministries has been different. So, even if you take one state or one  
5 sovereign, I would say there are ministries where the bureaucrats get it. The discussion is  
6 already three steps ahead and they appreciate they still need to go through the process because  
7 unfortunately in country like India enforcement from a different perspective. Enforcement  
8 agencies CAG that is playing an active role. And the more you work with bureaucrats, state  
9 owned banks, you realize that it's not just their intent. They are accountable in very different  
10 forms than many of us or a private organization. I think that also plays a role. But we have  
11 seen same sovereign two different departments approach it very differently where they  
12 ultimate decision making may still be similar, but they go about it very differently.

13

14 **SHIELA AHUJA:** Thank you. And Salim, I wonder if I might ask you if I don't know if there's  
15 any experience you want to share of this topic of different conduct by States sometimes. And  
16 what you see is not actually what's going on behind the scenes, of course, without divulging  
17 anything that...

18

19 **SALIM MOOLLAN:** Yeah. I completely respectfully agree with what Tarun just said. You  
20 cannot brush every Government Department with the same brushes. They are very different  
21 and it's interesting because I think for example, if this country were to do a survey of what's  
22 happened in cases, depending on how they react to it. Invariably, when we've had immediate  
23 Cooperative Departments, we've done incredibly well. I can give one example, because that's  
24 a positive one, which is the litigation against started by Mr. Krishnan with a Malaysian  
25 National against India the relevant Department engaged very early on, including in the  
26 selection of the Arbitrators with the process. And it was a resounding victory. Because the  
27 merits were sound et cetera. Much easier and they're working with you and trying to find  
28 solutions. And all the anecdotes first you need to insist and insist and insist to meet your real  
29 client, who's going to be the Permanent Secretary of the relevant Department. And then when  
30 finally you manage to get an appointment, you're going to have three minutes. Might need a  
31 bit more, and then you go into the room and there's about ten people walk in to the room.  
32 Make sure you don't say much and then you sat down and you're given a lecture about how the  
33 case is to be handled. I don't think it's very helpful, but you end up...you know, my answer that  
34 day, "you want anecdote, I'll give you an anecdote." That's wonderful. I mean, I wish I had  
35 more clients like you. Because then you don't need me, because if you do everything you've  
36 just said, you're going to lose the case anyway. So, why pay a lawyer? Then they listen. But you  
37 should not... you shouldn't have to do that. Yeah. So that's how it happens...



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

**SHIELA AHUJA:** Thank you. That's very interesting. And maybe that takes me to our final sort of segment on what are tips that we can take away from this panel and what you've shared with us and I mean, Lucia in some ways you probably get asked this a lot in your practice... what are pre-dispute measures... you know, Salim's interesting anecdote about... well, depends on how you actually handle the case in the background and the lead up to the commencement of the proceeding. But even before it's brewing, how do you.... at the transactional stage or at the operational stage... what are things that you can say to a client on pre-dispute measures that you can adopt to avoid escalation?

**LUCIA RAIMANOVA:** Well, just sort of as a general matter, I find that the Treaty is actually quite good in encouraging settlement. Because they always provide for a notice of dispute has to be served before you actually file a claim, and then there is a period of negotiations, cooling off period, 3, 6 or 12 months. I think the India Model B has 6 months. So it's actually forces you to negotiate. And you never know I would encourage everyone to try, we had one situation where military stormed a hotel. And essentially expropriated the hotel and the Government simply wasn't aware of its Treaty obligations. And so, when this was explained to them at the meeting, they just wrote a cheque to our client, compensating them for expropriation. So there was no need for a dispute .... That's rare. I admit. But it can happen. But obviously there is a lot more one can do before you get to the notice of dispute and there can be an engagement when a measure is also brewing. And I sit in Slovakia on the British Chamber of Commerce. So I do see foreign businesses and big foreign businesses engage with the Government throughout when they come into the country and throughout. So, what I find is important to have a line of communication with the Government where they're aware of the benefits of your project and also of your importance to the community as such and to the country. But also, of the problems you are facing so that they can help you. So that, if you have an open line of communication that always helps. You can also use your Ambassador. If you are a Foreign Investor, you should have frequent meetings with your ambassador to make sure the person knows you, knows what you are going through so that they can assist you at an early stage because they themselves have contacts the relevant State. And then when a measure is pending that may affect your business. Then it's always a good idea to be involved in also Industry Associations. Because there is strength in numbers. So I'm currently working on a case where the measures actually were agreed with the Government, between the Industry Association and the Government. There is one disgruntled investor and some acting for the State. But the other thing to be happy is the outcome. And then, of course, then we had another issue last year, where we thought it was futile, but both the client and us wrote all sorts of letters to politicians, including the President, had lots of meetings with everyone we could, with the



1 Members of Parliament, et cetera, et cetera. And in the end, the President rethought the Law.  
2 Because she found that the reasons, we were giving against it were called generally and it  
3 would affect the investment climate in Slovakia. We too, are still sort of finding our feet, just  
4 like India. So I would say, always try and never give up before you really have to fight and have  
5 the expense of treaty dispute.

6  
7 **SHIELA AHUJA:** Thank you. I actually have maybe an anecdotal question for Salim on this,  
8 which I'm just going to throw in there. But before I do that, I have an example of this cooling  
9 off period notice where under most Treaties you're required to serve it and we served it on an  
10 Asian State for one of our clients and they very politely responded very quickly as well and  
11 said, "we reviewed and studied your notice and please come and have a meeting with us." So,  
12 we flew there with so much optimism and we sat and reserved a very big local feast, which, I  
13 mean for me that was a done deal already. But I finished the feast with my colleague and at  
14 the end they said, "this is the only agenda item we had. We're not going to discuss anything  
15 with you, but we really hope you enjoyed our food and our culture. And we'll see you at the  
16 hearing." And then we flew home. And it was a very short minute of that meeting. So, Salim, I  
17 wanted to ask you just on the comment about success in that period where the treaty, or even  
18 a contractual mechanism requires you to engage in pre-dispute discussions on balance. I know  
19 it's subjective, but would you say that that's effective? Or is there a different way of doing it, or  
20 a different time in the chronology that one would do it?

21  
22 **SALIM MOOLLAN:** Yeah. My experience is not that great, I must say. These letters often  
23 end up. You can try and send them to various Government departments, but having seen it on  
24 both sides, to having seen it from inside, on States as well, we're often contacted after the  
25 cooling off period as a lawyer, after the cooling off period has expired. And I don't think it's  
26 being taken as seriously as it should. Of course, EXIT is pushing very hard now for mediation.  
27 We will see there that new impetus given by the Singapore Convention. I don't think the  
28 Singapore Convention does very much at all, but it creates a good balance. So one can use it to  
29 push things. I remain convinced that the real way to address these disputes is to prevent them  
30 from arising. Because I do think that most bureaucrats, most civil servants, most people in  
31 Government will normally act rationally, but they need to know what the parameters are. If  
32 you don't know that you're not going to be... Sorry, I'm going to put it bluntly. You're not going  
33 to be in front of a Court that will normally favour you. That has very limited judicial review.  
34 That would normally say the State doesn't have the money to pay for this. I'm not going to  
35 order anything. But you might be in front of a neutral forum with quite loose tenders, and you  
36 might end up being liable. You might think twice. So that's what needs to happen, I think.

37



1 **SHIELA AHUJA:** Thank you. That's very interesting. And just that. And picking up  
2 something else, that [UNCLEAR] said, which I thought was very useful as well as we've seen  
3 quite good use of this is kind of trying to work out focal points, like when you mentioned it's,  
4 your ambassadors or Industry Associations. Just trying to find before it gets into the formal  
5 process where you can still invoke these bodies to sort of help you. I wanted to ask you, Zarina,  
6 do you often or have you been in a situation where you have to think, like, how am I going to  
7 navigate this so as not to get to the formal stage where I lose control? And is this a proper... is  
8 this something that you as an organization or that you've seen others do in terms of trying to  
9 work out who are their data points in a particular dispute?

10

11 **ZARINA CHINOY:** I say it's a work in progress. It depends on if we move one step forward.  
12 Are they going to take it one step back? Are they coming back to us? It really depends on the  
13 kind of challenges we have in front. And it also depends on the level of complexity of that  
14 dispute itself. When you say that, ... one thing I will not agree with you is that if you think that  
15 I've come to the formal dispute resolution stage. And you believe that I'm lost control? No. I've  
16 always put it out there for everybody to know that a settlement can always be negotiated no  
17 matter at what stage. The number may move. And the number will move depending on how  
18 strong I believe my case is. But I don't believe that I would have lost control at any given point  
19 in time. That is something that I need to keep. Otherwise, there's no point in the dispute  
20 resolution. I'm not doing into a dispute resolution to lose it. I'm not going to win. So, I'm not  
21 going to lose that.

22

23 **SHIELA AHUJA:** I'm just pleased that there's only one thing that I said that you disagree  
24 with but I was going to talk about this idea of kind of constantly having one eye on when is  
25 the right time to settle or mediate and it doesn't.... of course, it can be at any point. Right?  
26 And some of our best settlements have happened on the first day of the Arbitration. Some of  
27 us walk away disappointed with our scripts and maybe read it to our children instead. But it's  
28 a good outcome for the proceedings. So yes, it can happen at any time.

29

30 **ZARINA CHINOY:** I'm thrilled if it's happening on the first day. I save cost. Right?

31

32 **SHIELA AHUJA:** Yeah. Absolutely. No, no I'm with you on that too. Wearing one hat. But  
33 actually, I wanted to ask maybe both of you from your perspective... I'll give you this mic in a  
34 minute... Do you think that at that stage you should already have been involved in helping  
35 them come up? Is it actually less a lawyer job and more an expert job to say, look, this is the  
36 figure you ultimately want to work towards, and that's how you're going to maintain leverage?

37



1 **TARUN BHATIA:** Yeah, I know. I have three lawyers here. So I can't say that's how it should  
2 be done. But yeah, I mean, as an expert, we do feel we are involved generally later than when  
3 we should be. And also, I think a lot of our work is educating and I think communicating.  
4 Because a lot of time expert is initially thought of from a testifying point of view, but we feel  
5 there's a lot of work behind the scenes that needs to be done at various aspects. A lot of time  
6 we are working along with the lawyers, especially when we are working with the State to kind  
7 of let them know the focus on transparency, objectivity and impartiality. Because many times  
8 we are in a situation where the State comes to us already with a number. This is what we believe  
9 we would be open to settle. Or this is what we should eventually agree to without maths  
10 backing it. It's their gut. And you have to spend a lot of time telling them my role is not to  
11 justify that number. My role is to help you through the process and that we are not your  
12 Advocates. We are here to kind of help you very impartially get the decisions, or closer to what  
13 you want. So I think that's been a challenge. In terms of when an expert should be brought in,  
14 I think as soon as a dispute starts. Heard the word complexity, and we are seeing increasingly  
15 disputes getting very complex. We are seeing the need for specialized experts and not generic  
16 experts. We have seen instances where you need more than one expert. And if you leave that  
17 too late I think you've lost the advantage that you could have had if you've prepared for it much  
18 earlier. And interestingly we have seen in some instances... it's much smaller proportion, but  
19 people asking us, ... I'm talking about States here before actually a proceeding commences on...  
20 "what's your step? Can you do a back of the envelope?" Not a very detailed. And I think they  
21 do that to set expectations in their hierarchy, because we are dealing with bureaucrats who  
22 ultimately need to go and represent to Minister and nobody likes bad news worst case in a  
23 political setup. So I think that's where we have seen some of the States come to us much earlier.  
24 I think one area and not always best for us as an expert is we do think many times Sovereigns  
25 especially don't do as much research on who's the right expert. And sometimes we have been  
26 brought in much later after they failed with an expert. And I think that's where somewhere in  
27 the process they haven't given it enough seriousness. But it's all a learning curve for them. But  
28 it does mean that they lose a lot of time. They lose a lot of money. And we have seen the  
29 Claimants get super excited when they hear who the expert has been hired because if they feel  
30 it's not the best by the State, that's where they feel they've won the game.

31

32 **SHIELA AHUJA:** That's really interesting. I was going to ask Zarina, and actually in a  
33 moment I might ask all of you by way of wrap up whether you can give us your top tip for what  
34 to do when you're in a commercial relationship or in a pre-dispute relationship with a State or  
35 State-Owned Entity. But Zarina, can I just ask?... Just on the back of what Tarun said.... Just  
36 all the factors that you're thinking about. I know you mentioned the idea is you never do...you  
37 try never to lose control, right? And you have to be on top of the situation. Is there anything



1 that you felt that has worked effectively, from your perspective, as a client that you've seen  
2 done, that you thought led to an effective, negotiated outcome?

3

4 **ZARINA CHINOY:** I am going to completely agree with Tarun. If I hire the right expert at  
5 the right time and I got my numbers straight, and I understand also where I'm going to be able  
6 to recover them from; my perspective on the end game is clearer. There's a straight line.  
7 There's a direct line to that. And if I am able to go in with that strategy and maybe change it a  
8 little bit but with the help of strategic partners like yourself and like Tarun, where we will see  
9 the evolving game. But we will know how we can get there. And we understand the mindset of  
10 the State as well. Because, Tarun, I'm sure you understand the mindset of... like you said,  
11 maybe they've come in with the wrong expert, maybe they've come in with the wrong idea, or  
12 they've just come in with the number that they hope to achieve. But there is no backup to it.  
13 There's no legal documentation to that. There is no substance to that. Then how do we sort of  
14 get past navigate that easier, more difficult. It depends. But we can get past that if it's just a  
15 number in the air. And I'll agree with him. There are times when we look at the expert and we  
16 do a little dance because we do know that we can get past this easier. And then we do know  
17 that sometimes a new expert will be brought in and we will find it harder. But mistake's already  
18 been made, so we will capitalize on that. So building on what you said. Yeah. The right team  
19 at the right time. Very important.

20

21 **SHIELA AHUJA:** Okay. Well, thank you very much for that. I'm going to maybe go through  
22 everyone, one by one if I can and ask you, ... it doesn't have to be just the one thing, but what  
23 would you then say to an audience if they were dealing with a State on your advice? And as I  
24 say, the State can be your client, can be a counterparty. It can be either way, but what advice  
25 would you give in that situation?

26

27 **LUCIA RAIMANOVA:** I think I'll take inspiration from Zarina. I think preparation is key.  
28 You have to know what your bottom line is. You have to know how the numbers work. So, yes,  
29 engage your expert early. You have to understand the Government there, their maintainers  
30 and how they operate. So I think a lot of thinking and preparation so that you can go in with a  
31 clear strategy and not just a number you are hoping to achieve.

32

33 **SALIM MOOLLAN:** The main thing I think is to act promptly. And to be able to come to  
34 relevant experts. And I would include lawyers within that as quickly as possible. So maybe if  
35 you're wearing the State, well, exactly... come to me. Come to me. No, no. But you know what  
36 I mean. On the State side, this would entail, which is also something that was trying to be done  
37 but hasn't yet been successfully done here, ... identifying and sharing knowledge across same





1 Ministries, as to who the right experts are, in which field to try and have an objective  
2 assessment of that, obviously to try and avoid nepotism, which is a problem everywhere, not  
3 just here. And to have a list of good experts, good domestic Counsel, good International  
4 Counsel that you can go to for these cases. And then not save that initial £100,000 sounds like  
5 a lot of money, but spending that money to understand exactly what the parameters of your  
6 decision making are going to be, is the best way to spend. And it may mean that you save  
7 millions after that. So, that would be my advice.

8

9 **SHIELA AHUJA:** Thank you. Zarina?

10

11 **ZARINA CHINOY:** Now I would say... Build on that, get your team right and if you're going  
12 to lose, don't try.

13

14 **SHIELA AHUJA:** That's actually a really good point, right? Like building up your  
15 preparation and actually investing in that strategy and then knowing then what to do and  
16 acting on it.

17

18 **ZARINA CHINOY:** [INAUDIBLE] says, "don't try."... Don't try. That's the best counterpart  
19 to understand.

20

21 **SHIELA AHUJA:** Tarun.

22

23 **TARUN BHATIA:** So, I think from again, closer to what we do, but broadly, having worked  
24 with Governments in different forms, what has worked is simplicity, I think. We have seen at  
25 times consultant try and complicate things for this stage.

26

27 **SHIELA AHUJA:** Don't mean lawyers.

28

29 **TARUN BHATIA:** No, that's why I was.... I was very careful. I said consultant. So where we  
30 have been most successful is where you can set expectations in various logical simple terms it  
31 takes some time for them to accept and my own personal experience, flowcharts work best  
32 with Governments. If you can tell them if you do this, this is what happens. And if you do  
33 this.... Because sometimes we go thinking we are the expert... I mean lawyers, consultants and  
34 so on. But I have come across lot of bureaucrats who are extremely sharp. They know the  
35 matter so deeply that if you ask the right questions you can actually get to the end point much  
36 faster. So yeah, simplicity.

37



1 **SHIELA AHUJA:** Thank you. That's really helpful and almost sounds like a very cohesive  
2 strategy in this group of you, which at least from my own vision, it looks like it would really  
3 work. Before we wrap up. I just wanted to ask, is there any questions from the audience to this  
4 panel. Not to me. You are not allowed to ask me anything, but you can ask the panel questions.  
5 Yes. I think you have a microphone coming your way if you can.

6  
7 **AUDIENCE 1:** Thanks for this session. This is Vicky. A very good perspective if you see from  
8 a 360° standpoint, how a lawyer would think the situation, how a consulting firm would do,  
9 and of course, how the Counsel will do so. India is what I've sensed till now, since birth is India  
10 is highly a sentimental market. And I see a lot of... I would say when it comes to involvement  
11 of States, State parties or even Union of India there are a lot of guerrilla techniques being used  
12 generally for setting up the tone in terms of the bureaucratic power. I just want to understand  
13 there would be some instances where maybe even you would have come across where it's  
14 actually shown as a might versus a corporate. And you may have to come up to those situations  
15 where you find a lot of pressure of dealing with counterparty being a State or a State party. So  
16 maybe it'll be good to understand both from what would generally Zarina you would do from  
17 a Counsel standpoint when you come up such situations and maybe also from the consulting  
18 law firm category. If you can understand what would your advice be when you come up with  
19 such situations where there's a lot of might been shown in terms of guerrilla techniques, it  
20 could be a lockout mass, it could be a strike or something, which basically takes you to a  
21 different angle?

22  
23 **ZARINA CHINOY:** It is true that we are a sentimental nation. But when you say,...  
24 personally, I have not come across a state where it's thrown something so nasty at me. I guess  
25 I'm going to say I'm lucky in that sense, but I haven't seen it personally. So I think from that  
26 sense, my experience in this is going to be limited, and I'm going to have to defer it.

27  
28 **LUCIA RAIMANOVA:** You just have to be prepared for any situation we had clients  
29 detained Imprisoned, deported, that's better than detained. And yeah. You would then have to  
30 work with the local lawyers, with media, with politicians, with ambassadors we have to have a  
31 fully-fledged team to not just of legal advisors to deal with the situation. But normally luckily,  
32 all we always manage to get out of it quite well. Then ultimately... then just went to the State's  
33 detriment if they behave in that sort of manner.

34  
35 **SALIM MOOLLAN:** Yeah. I think my experiences for this arena hasn't been as good as  
36 yours... we've had... these are highly political cases. Some States behave pretty badly. We've  
37 had a witness actually disappeared in the middle of his cross from one day to the next, and he



1 was found in the Persian Gulf. So it can get pretty nasty. And absolutely. I mean that's part of  
2 these cases that you call might against the Corporate Entity. And it all depends. I think it was  
3 very well described. I think by Zarina and Lucia, depends on what your relationship is. Is this  
4 a place you're going to still be doing business in or if not, of course, Tribunals have quite a  
5 number of tools that they can use in order to assist a Claimant that finds himself in that sort  
6 of position, with its directors being imprisoned, et cetera. You know, you've got interim  
7 measures that can deal with that.

8

9 **LUCIA RAIMANOVA:** Perhaps also, then when we act for States,... I mean I don't know  
10 about the other advisors, but we always advise against that, right? So, sometimes I will ask,  
11 should we stop these people at the airport or should we detain them... But, so you obviously  
12 advise not to do that. Everything has to be sort of really pristine and if the person is  
13 imprisoned, they should be cooperative and allow representatives to come and at least take  
14 Witness Statements, et cetera. Because they just come back to haunt you. So when the State is  
15 well advised they wouldn't do such things.

16

17 **AUDIENCE 2:** I have been in the Government Entity for last 3 decades. I heard the Mr.  
18 Moollan's, views on the pre arbitrations. I heard the views of Mr. Moollan. I met him a decade  
19 earlier in my Institutions for Overseas arbitrations. And I agree that pre arbitration  
20 discussions and the views of the chances of success it matters. Because we have been in one  
21 case, I was in the State HOD at CORD, Delhi. I heard the madam Zarina and Mr. Tarun about  
22 the experts. As per them, yes. There could be a better option if you go for the pre-arbitration  
23 settlement issues. Keep in mind your target, what is the strategy you have to adopt pre and  
24 during or post... and the most difficult part which we have faced recently before admitting my  
25 office is the identifying the real expert, KC Or QC in the LCI lender and how we can really help  
26 us to really understand who will be fit for this sector appropriate and expert the QC? yes or  
27 no?

28

29 **SHIELA AHUJA:** Zarina, before Salim comments... Maybe. Zarina. I don't know. I think it's  
30 a question around how you choose your Counsel. Obviously you have some choices on this but  
31 I wonder whether you have any general comments. And then maybe Salim, when you do get  
32 instructed, do they tell you why they come to you, for instance, is another way of putting it?

33

34 **ZARINA CHINOY:** Choosing your Counsel... It is quite an art. A lot goes into it. Your  
35 background, your experience, what we've heard from the market, what... Let's say other  
36 general Counsels tell me, we do tend to do a good deal of research because it's a good deal of  
37 money that I need to go to the management and say, we're going to have to shell out for you.



1 And then of course it depends on the level of complexity of the case as well. So how senior do  
2 we want to go? How is the State Entity? How robust is their case? How good or bad is our case?  
3 There's a lot that goes into it. It is an art. There's no one single answer. It's not just market  
4 reputation. If it was market reputation, then none of the juniors would get a chance. Right?  
5 But we do try and look at all sort of experience. I mean it's not like you are just a construction  
6 expert. So therefore I will come to you. I will have to look at the rest of your background as  
7 well to see what you understand, what you don't understand? How willing are you in working  
8 with me towards settlement? How willing are you to working with... Let's say my own Counsel  
9 that I've already got. Maybe in India and of course the fees do matter because when we do pay  
10 fees in foreign currency the kind of exposure that we've got on our balance sheets to you as  
11 well, with quite high. So all of those factors go into determining how I pick you.

12

13 **SALIM MOOLLAN:** It's quite a difficult question to answer. Maybe another way to look at  
14 it is... perhaps what I think people in my position, myself, what changes, what do we bring  
15 when we take seat? What is it we're trying to do? What is it that might help a client with those  
16 complex cases. I think it's a given. When you're looking for a State, you obviously want  
17 someone who can handle litigation. Of course, can you know... Master of Cross Examination,  
18 is able to do very careful, very well drafted written submissions, and an excellent oral  
19 submission. That's a given. Quite a number of people who can do that. What can you bring I  
20 think which is slightly different? And that's why I was saying the initial amount of money that  
21 you're spending in the beginning is to use your knowledge and use all this that you would be  
22 able to bring to the case, if it's fight to explain to the client in very simple terms. These are the  
23 options of quite a complex matter. And this is what I would recommend and why I would  
24 recommend it exactly as Tarun was saying... simplicity. And it's very interesting that the more  
25 years go by and the more simple your advice becomes. There are these anecdotes about say,  
26 it's 100 years ago going to... they're about to go to the cinema. And they get a complex brief.  
27 And they just write down "yes". And send back. That's the way it ends up. And also, someone  
28 who will actually, I would say someone who's busy. Because someone who's busy will not mind  
29 whether the answer at the end of that initial X amount of money is no.

30

31 **TARUN BHATIA:** I just add to that. I think also increasingly, especially for experts, I think  
32 how well prepared you come for your initial discussions. Because I don't think your PPTs and  
33 your creds are good enough, especially on bigger matters. And like Zarina said, feedback  
34 matters. We have seen increasingly feedback taken from Arbitrators and retired Judges on  
35 their experience is also equally important.

36

37 **SHIELA AHUJA:** Thank you. That's very helpful. Yes. One more question.



1

2 **AUDIENCE 3:** I have a very specific question. What has been your experience in realizing  
3 monies from the State parties or State Entities post award? Because as I know usually after the  
4 awards are passed the State will not pay you, at least in India. They will go in a 34. They will  
5 go in a 37. They will go in a Supreme Court. And in my experience only after a warrant of  
6 attachment is put on there probably on their Head Office you'll realize the money. So, I have  
7 not at least seen where after you get an award money are realized from State what has been  
8 your specific experience on this?

9

10 **TARUN BHATIA:** I think our experience has been slightly different. Of course, it's not that  
11 you win an award you walk into North Block or Delhi and there's a cheque waiting. That's not  
12 going to happen. So it's long tedious process after that. But I think in my recollection and  
13 maybe the others could have more context there. There have been only one or two instances  
14 where there is a threat of international attachment. I think there has been settlement in many  
15 matters by the Government where there have ended up paying. I think from an original award  
16 to the final payment, whether it was the white matter or even recently *Antariksh* and others.  
17 I think anywhere between 20- 50% was the final amount which was agreed and settled. So, I'm  
18 not... I agree with you that it's not that once you get the award, it's done. It takes many, many  
19 years. But I think there has been enough examples of actual payment. But again, I'll let others  
20 answer.

21

22 **SHIELA AHUJA:** I mean, I can. One thing I would also say to that is you do need a separate  
23 or as part of your strategy. I think the end strategy matters, right? Like right up front to what  
24 Lucia and Salim and Zarina was saying about planning your case strategy and approach,  
25 spending the money to work out what is going to be your approach. I think a very important  
26 part of that is what is the likelihood that they'll actually it'll be easy to recover sums? And yes,  
27 there's often a perception of 'if there is Court processes to be undergone?' Then sometimes it's  
28 not just that they want to be recalcitrant, it's that they have to, as a question of accountability.  
29 I was once opposite actually State-Owned Entity and they actually came to me very honestly  
30 and said we have no choice we have to. Whatever you're going to win, then we will take it into  
31 34, and then we'll see you in a year. And we said, Why are you doing that? You know that first  
32 of all, the seat was not India. So why are you bringing up 34? And the answer to that was, "you  
33 tried telling the people that I'm accountable to". So sometimes it's actually beyond it's like a  
34 set system that's very difficult to break. But what I would say is exactly as Tarun said. I think  
35 it's important to know that of the counterparty if that is what you're faced with and factor that  
36 into your thinking. The other thing I guess on that is that sometimes you do get some people  
37 who specialize in that. Like funders and people who will specialize and say, I'll take that risk



1 or help you with that risk and then you can get a cut off that now and walk away. So maybe  
2 that's part of your commercial sort of battling with that as well.

3

4 **TARUN BHATIA:** Political implications of a State being told to pay a billion dollars and they  
5 pay it. It will have huge ramifications. So there is a process you need to show.

6

7 **LUCIA RAIMANOVA:** Outside of India actually States do pay, most States, I would say, but  
8 of course when there are some where it's more difficult. As Sheila said, you can sell your award  
9 at a discount if a funder will have it and we have done that in relation to some awards. If you  
10 don't want to, then pursue the enforcement. In others, we did actually have payouts. And the  
11 other point is where they are a bit hesitant, it helps when they have sort of World bank loans.  
12 Because if you are at EXIT, you can then it can constitute the default and all their facilities. So  
13 that's proved quite a helpful. That's obviously not helpful for India, but for other States that's  
14 proven very helpful. And we got them paid.

15

16 **SHIELA AHUJA:** Thank you. I just want to say that I think we're between you and a short  
17 coffee break now, because there's another session starting shortly. So with that, I had some  
18 follow up questions, but I'm going to try and put it to a stop, but I would like to thank this  
19 panel. I very much agree with the views shared by the audience that it was just very interesting  
20 to hear all your diverse perspectives. And I think what was really amazing for me is it came  
21 together with a coherent strategy, in fact. So I hope you do take that away with you. Thank you  
22 very much for participating this morning. And thank you very much to this panel for coming  
23 into India, or coming into Mumbai for this session. I'm very grateful.

24

25

26

~~~END OF SESSION 1~~~

27

28

29