INDIA ADR WEEK DAY 2: MUMBAI

SESSION 2

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EFFICIENT MANAGEMENT OF ARBITRATION PROCEEDINGS

12:00 PM To 1:30 PM

Speakers

Arvindran Manoosegaran, Investment Manager, Omni Bridgeway
Baiju Vasani, Barrister, Twenty Essex
Abhijeet Shinde, Director & Head Legal, Welspun
Niraj Modha, Barrister, 39 Essex Chambers
Patrick Taylor, Partner, Debevoise & Plimpton
Abhileen Chaturvedi, Partner, Cyril Amarchand Mangaldas

ABHILEEN CHATURVEDI: Hi. Good afternoon, everyone. To the people inside and to the people outside of the room as well, I first begin the rounds with the quick introduction with everyone. I'll do this alphabetically. Abhijeet is Head, Litigation at Welspun Group of companies. Welspun group is in various businesses including advanced textiles, flooring solutions, infrastructure, warehousing, steal, oil and gas and employees about 30,000 people worldwide. At Welspun, Abhijeet is responsible for resolution of critical disputes with the group. Prior to joining Welspun, Abhijit has headed the Litigation department of Moda Group of Companies and has worked with Cyril Amarchand Mangaldas, Trilegal Bharucha Partners before moving in house. Next, we have in the panel Arvindran Manoosegaran from Omni Bridgeway, who's an Investment Manager in their Singapore office. He is responsible for assessing and managing funded cases throughout Asia, including Arbitration, Litigation and Insolvency claims. Arvindran began his career at Drew and Napier LLC, and besides his International Arbitration and Litigation practice, Arvindran has been appointed by the Supreme Court of Singapore as an *amicus curiae,* where he assisted the Court in addressing novel points of law. The third panellist is Mr Baiju Vasani, who's a Barrister and Arbitrator at Twenty Essex, London. He's also a senior Fellow of SOAS, University of London, and the

Fellow of the Charter Institute of Arbitrator. He's on the Arbitrator panels of various Arbitrary Institutions worldwide, including the International Centre for Settlement of Investment disputes. Baiju holds four degrees in Law, an LLB, an LLM, BCL, and a JD from King's College London, LSE, University of Oxford, and Northwestern University School of Law, respectively. Our fourth panellist is Niraj Modha. Niraj is a Barrister and Arbitrator at 39 Essex Chambers in London. He specializes in Commercial property and Construction, Litigation and Arbitration. His International Arbitration practice has a focus on India and the Middle East. Niraj is currently instructed as a sole advocate in an ICC arbitration seated in Goa relating to the construction of a manufacturing facility with a value in excess of USD $350,000,000. He's also a part of the team of more than ten counsels on a multibillion-dollar arbitration seated in the UAE arising out of an infrastructure project. Our last panellist is Patrick Taylor. Patrick is a partner in the London office of Debevoise & Plimpton and co-chair of the firm's Africa Practice. He focuses on Commercial and Investor Treaty Arbitrations with particular experience in the upstream, oil and gas, energy, Pharmaceuticals and telecommunication sectors. Patrick regularly advises parties and high stakes commercial disputes and enforcement matters and investors and sovereigns on investment protection and investment disputes. He has acted as Counsel in more than 50 arbitrations, and he frequently sits as an Arbitrator. Now with that over with the introduction round is over. I'll first set the stone. We've all experienced ad hoc arbitrations in India and we are infamous for long drawn, ad hoc arbitration proceedings in India, with all sorts of dilatory tactics right from arbitrate... the appointment and the Constitution of the Tribunal itself to the hearing stage and maybe which percolates through post final hearing stages as well. So, I'll first go to the principal stakeholder of the entire process of an Arbitration. The company and the client. I'll first go to Abhijeet. Abhijeet, could you please elaborate on what your experience as a Principal stakeholder of an arbitration process in India has been?

ABHIJEET SHINDE: So, traditionally, you see all the agreements before maybe 2010 or before that they all had ad hoc Arbitrations. The experience with the ad hoc Arbitration has been absolutely not in terms of what we expected out of the system, which was meant to express the entire dispute resolution. It has slowed down the entire process. There have been many reasons. One of the reasons that I think it has done the entire process has been part time lawyers who are practicing arbitrations. They conduct arbitrations after the court process. There have been judges who are retired and they practice the same process and procedure which they conducted throughout their careers into arbitration, which basically was meant to not follow the process, which was there in procedure. So that is the principal reason. According to me, just throw down the entire process of ad hoc Arbitration, I would say. One example I would want to give with respect to the experience that we had which none of the businesses

should ever have, is that, we had a Domestic Arbitration with the Singaporean party and the issue involved was very intricate, where there was no decision in any of the part of the world in terms of the subject matter of the dispute. The only reason the party came and settled.... The only reason the party came and settled with us was because it was an Indian Arbitrator and Indian Law governed Arbitration. So that's not a situation that anybody want to be in. We have businesses all over the world. And we also expect that the process, the arbitration and there are you know, there are no situations where either of the party has advantage in terms of the process or in terms of jurisdiction to conduct the Arbitration. What we've done internally, is that whether it's an agreement with Indian Party or International party. We've seen that we have arbitration process, including in all our agreements. The second thing we've done is we have Institutional Arbitration included in the Arbitration Agreement. That gives faith to the parties who are coming forward to us with respect to investment or JVs and doing business with us. They understand that we are very keen in doing business. We are not here to take advantage of the process or not act fair when there is a dispute. So that has instilled a lot of faith in terms of whatever transaction that we are doing today. It also acts as very fair for them to give an exit whenever they think the process is going to lead to some sort of a dispute. So one is, of course, that Agreement. The second is the Institutional Agreement that we are agreeing to. The third is we are choosing more in our agreements to have neutral seats so that the stakeholders, they find faith in the entire system that we are choosing and we have seen heightened investor participation in the company when it comes to dealing with us.

ABHILEEN CHATURVEDI: So, Abhijit. I think you've partly answered what my next question was going to be. I wanted to ask you that, "what are the steps that, as a company you may have taken to ensure an efficient arbitration process and is the approach different when it comes to a cross border contract or a domestic contract?" You briefly mentioned on it. But could you just elaborate on the sort of Arbitration Clauses that you might propose?

ABHIJIT SHINDE: So, the difference between the Agreements or the Arbitration Agreement we have internationally or domestically, is only in terms of the jurisdiction that we choose for... You know, which are absolutely arbitration friendly. And we have identified looking at all the past conduct of the interactions that these arbitration process has with court, the availability of good teams to assist us in all these arbitrations. And we have identified 2-3 jurisdictions where we go into the arbitration, negotiate an agreement, and then see that this is a neutral seat of Arbitration for us to go for Arbitration. So that's the broad process that we follow. But that has given a lot of faith to all our stakeholders to come and deal with us more. I think it's absolutely fair process to follow.

ABHILEEN CHATURVEDI: Thank you Abhijeet . That gives us a lot of food for thought for our panel discussion going forward. I'll come to Niraj now. Niraj you've seen how ad hoc Arbitrations and Abhijeet spoke from his experience could be slow as a whole process in India. What could be the possible learnings for ad hoc Arbitrations in India from Institutional Arbitrations seated outside India. Or am I just being naive over here? And it's immaterial whether an Arbitration is ad hoc or Institutional. It's actually the parties to the Arbitration, which makes the difference?

NIRAJ MODHA: Thank you, Abhileen. I'll give a typical lawyer's answer. It depends. But I think looking at the learnings or practices and procedures that can be borrowed and crypt from Institution Arbitration, I think I'd like to pick out three features. The first is professionalization. There's been visits that I've made to India over the last 8 years or so. Much greater focus on professionalization arbitration as a profession as opposed to as something lawyers do in their spare time. That isn't really law. And that I think is just going to continue with the increasing proliferation of institutional rules and the increasing popularity of various Arbitration Institutions. The second is that's more really the psyche, the psyche of Institution Arbitration. I think that's being borrowed and that's being incorporated into arbitrations in India that are ad hoc. The second is robustness. I've often found that arbitrators in India aren't robust. They're not required to be. The parties don't expect them to be. And I think with Institution Arbitration, Arbitrators are typically more robust. They're more willing. They've got the rules and the certainty of the institutional rules behind them to back them up, in a sense. So, you find there's more robustness there's less room for taking advantage in Institutional Arbitration. And I think that's something that could usefully be borrowed. And as I say, it's not really question of borrowing. It's just these practices becoming more and more prevalent. And the third is a very practical example of soft law. So, you'll find an Institutional Arbitrations, they will almost as a matter of course, incorporate provisions on soft law. What I mean by that are provisions such as the IBA rules on the taking of evidence, rules on disclosure and document production and there isn't the same kind of focus on that in ad hoc Arbitration, whether in India or elsewhere. Because it's up to the party. And this leads me nicely onto the parties because you'll all know. You can have one very willing party. Often the Claimant. Not always. And you'll have one recalcitrant party that will do everything it can to frustrate an Arbitration proceeding and the enforcement of any Arbitration award. So, party roles are important. What parties can do is important. Also, what an Arbitrator does is important. You can have any Institutional Arbitration. An arbitrator, who's appointed by one of the institutions, who's busy, doesn't really have the time possibly on the board isn't clued up in the same way. It's quite expensive and you can have an ad hoc arbitrator who is has the expertise is clued up, is willing to listen to the parties and take on board what the party say

and make decisions. So, it's not always clear cuts. But I find that the institutions help. Because as I said, you have those rules and certainty and the clarity behind to back up what an Arbitrator does. And so an Arbitrator knows, for example, if he or she is going to bifurcate, they're going to decide issues in advance or split issues, or if they're going to even make a summary decision, which most Arbitrators and ad hoc Arbitration wouldn't dare do it, whereas Institutional rules you can summarily determine in an unmeritorious dispute. So, if you've got those rules and if you've got that increasing professionalism and the changing psyche, so that arbitration is professional, I think those are elements and features of Institutional Arbitration that can rub off and actually have an effect on ad hoc Arbitration. Because let's be frank. Most of the applications in India are still ad hoc, and they still will be for some years. Because it will take a while for the Institutional rules and the changes that have been made in the last few years to filter through into disputes. So there is still lots to learn in that sense. But I see positive signs.

ABHILEEN CHATURVEDI: Thank you, Niraj it is quite true to say that the ad hoc arbitration set up is likely to continue for some time, at least before you move on to a setup where it's only going to be Institutional Arbitrations. But sticking to Institutional Arbitration for some time, Baiju, can I just come to you and in recent years we've all heard of emergency arbitration, expedited procedures, dispositive motions, bifurcation of proceedings these sorts of topics have been talked about in great detail. Do such concepts make the proceedings a whole lot more efficient? Or does practicality dictate otherwise?

BAIJU VASANI: Thank you. Thank you, Abhileen. Good afternoon, everyone. I think I'll focus on one of those which is dispositive emotions. So what we're really talking about are bad claims. And by bad, I mean, claims that are obviously defective. They're frivolous they're vexatious. You would really pull the lawyer aside and say, "hey, buddy, this is not a claim that you should have brought you should have told your client. Let's not bring this claim." Now, one way of looking at it is. Well, look, it's important that every client, every person has their day in court and they should feel heard and at the end of the process if they bought a broader bad claim you can say, "well, you lost but you were heard and here's the costs award against you. But you were definitely heard," and they go away and think, okay, the process was at least legitimate. I think we've moved to a point where we all agree that we must have a mechanism to weed out in International Arbitration. These types of bad claims that are simply hopeless. And we have to separate here what I would say hopeless claims from colourable, but unlikely claims. So we're talking about claims that are on the spectrum almost virtually unlikely to succeed. In court processes we know we have mechanisms to weed out these kind of claims. So, in the United States, we have what's called 12 B (6). You may have it here in India, its

essentially pre-trial motions, which says that you haven't essentially even stated a claim on which you can win. So even before you've gone through the discovery process, it's clear... it's facially deficient what you have said and therefore you can't move forward. We also have summary judgment, which you also have here in India, which is following at least the part of the discovery phase you have depositions and discovery process. It's clear that there is no issue over a material fact on which you can win and the other side is entitled to a decision as a matter of law. Traditionally in International Arbitration, we did not have such mechanisms built into the system, such that we could dispose of these types of claims. What you would have instead is a superficial clearing function by the institution. So, the institution, the ICC, the LCIA, or others would look at the claim that's brought to them and say, "well, is there an Arbitration Clause? Does it say LCIA? Does it say ICC? And to a certain extent, is this person a party? Or could they be a party to the arbitration?" and it continues to be quite a loose, superficial analysis of clearing functions, the way I like to describe it, of the institution. Then what the party had to do was to tell the Tribunal, "Look, you have an inherent power to form yourself a preliminary phase whereby we can decide certain issues or all the issues immediately and that is within your bailiwick." Now most rules have inbuilt enumerated within the process a specific mechanism to weed out unmeritorious claims. And I hope the audience will forgive me. I will read out just a few of them because I think they're important. Article 41(5) of the EXIT Rules, where you can file an objection that a claim is manifestly without legal merit. Article 29 of the CIAC Rules. You can file an application for early dismissal of a claim or defence if it's manifestly without legal merit or outside the jurisdiction of the Tribunal. Article 39 of the Stockholm Chamber where any issue is suitable to determination by way of summary procedure because it's manifestly unsustainable. Article 26 of the CIETAC Rules for Early Dismissal of Claims and Counter Claims similar to 41 (5) of the EXIT rules. 43 (1) of the Hong Kong Rules, where unmeritorious claims and defences and points of law that even assume to be correct would not result in an award in favour of that party. And Article 22.18 of the LCI Rules, where a claim or defence is manifestly outside the jurisdiction of the Tribunal or inadmissible or manifestly without merit. Now the ICC rules don't have, at least currently, such a mechanism. But it has been long regarded as a practice of the ICC that a party can ask for such an early consideration. So it's a good thing that we have now within International Arbitration, an enumerated specified mechanism by which bad claims can be weeded out. I believe before I pass the floor back to you, let me just put on my Arbitrator hat and articulate maybe the way one has to approach these questions because one has to be careful and the reason you have to be careful is, one, you have to have due process it's very early in the process. So, to say to a party, "I'm going to kick you out." Literally after five minutes without hearing your evidence, without hearing your witnesses, without reviewing the key of your submissions. That's a big step. So one has to tread very, very carefully. The second point, I think that's

important in International Arbitration, there is no appeal on the merits of my decision as an Arbitrator. Unlike in courts where you have summary judgment, you can appeal the question to a higher court and say, “Well, the judge shouldn't have taken a summary judgment decision in that case”, you don't have that here. So again one has to take it very soberly and carefully when making that type of decision. We also have to look out for… and this is incredibly ironic, but motions for dismissal, which are themselves frivolous. Right. So, what the party is saying is, “well, that Claimant's case is frivolous.” Actually, the application for dismissing the case is itself frivolous. So, one has to be careful of the balance between the parties. The key for me. And you would have heard the same word I said again and again when I read out those particular provisions. It's the word ‘manifest’. And so, what that means is that, ‘it is obvious.’ It jumps at you off the page, ‘that this is a case that has no legs.’ I don't have to do mental gymnastics. I don’t have to … if you go through these 10 hoops and come out this way, then you can see it has no merit. But any of those hoops after the evidence is heard, could actually turn out to be in favour of the Claimant. So unless it is obviously and there is literally no chance of success. You would let the case through. So it's important we have this mechanism to weed out such cases. But it's also important that we give people the chance for due process. And if the evidence will later show a case that initially looks difficult but will later show it to be meritorious. And these are the type of cases we should let through.

ABHILEEN CHATURVEDI: Thank you Baiju. This is while speaking about dispositive motions, you refer to certain Institutional Rules. Beyond dispositive motions, we also refer to emergency arbitrations, expedited procedures and the like. Today as Indian companies go out or there is more commerce in India, there are those many more institutions also coming up. How is it that one should choose an Arbitral Institution? And do the availabilities of procedures such as dispositive motions or Emergency Arbitration or expedited procedures. Does that in any manner dictate the choice?

BAIJU VASANI: I would say it's one factor, but I would put it quite low down the list. I think there are other factors that dictate. First of all, one has to have the question of institution versus ad hoc. That's a fundamental question. I like… having done Counsel work and Arbitrator work, in both Institution and ad hoc… I like institutional. It just sets a framework. It sets ground rules. It avoids unnecessary disputes and it just allows everyone to move forward on a more certain basis. But I think things like cost. One has to be aware of. Who are the arbitrators on the panel? If there's a failure to agree on, let's say a chair, who are the type of arbitrators that that particular institution can appoint? A scrutiny…I actually like scrutiny. I used to be a little bit unclear about the ICC court’s scrutiny process. So I'll tell you a few years ago, I sat on quite a large case as an ICC arbitrator, and I had a beautiful award. I was very

proud of it. I sent it off for scrutiny that 'this is going to come back.' Just absolutely, just thank you. A +. You're at school, and it came back with some very insightful edits. I was like, okay. I hold my hands up. That's pretty good so I like the scrutiny process. I'm a big fan of someone peer reviewing your work to make sure that it's absolutely a gold standard. I'm a big fan of that. I like good administration. I hate when I send filings off to an institution, and then two weeks later, they haven't acknowledged it or they haven't actually done any with it or sent to the other side. I like it when it's a snappy reputation. I think that's very important when you're looking to enforce your award somewhere around the world, if the institution has a worldwide global reputation that really helps in the enforcement process. So I believe to answer your question, I would think it would be one factor as to how it deals with these type of efficiency issues. But as you can see from the list I read out, it's a much of a muchness in terms of process. Really. There are other factors that I think one would look at more closely.

ABHILEEN CHATURVEDI: That's quite helpful, Baiju. And I'm sure there will be a lot of takeaways for the audience from that... 2 bits of yours. I'll come to Patrick now. And sticking to a little bit of practice of the arbitration itself, in your experience from both the Commercial as well as Treaty arbitration perspective, I know I'm digressing slightly away from Commercial Arbitrations, but does bifurcation of proceedings make the arbitration as a whole, more efficient? Or there is no one size that fits all approach in any cross- border arbitration?

PATRICK TAYLOR: Thank you, Abhileen. Well, first of all, thank you very much for inviting me to be here. It's a pleasure to be here. I confess to being struggling somewhat with the jet lag and being quite envious of you know, who looks extremely fresh despite the fact we're all on the same plane. I think coming to your question there isn't really a major distinction between Investment Treaty Arbitration and Commercial Arbitration on this issue. In a sense that Tribunals, when considering applications for bifurcation, are considering whether or not bifurcation would make the proceedings more efficient. And if it would, then that's a good reason to grant them. It's worth remembering that any issue can be bifurcated. Typically, you tend to see jurisdiction as being especially an Investment Treaty Arbitration jurisdiction being the issue that's most commonly bifurcated. But quantum is sometimes bifurcated and you can actually hive off any issue as a preliminary issue. If you think that it will be dispositive of the case, or will somehow make the case more efficient by perhaps simplifying what comes next. The major institutional rules, all have provisions dealing with bifurcation. The LCI Rule 22.17 the MCIA Rule 30.4, which allows for different partial awards on different issues. And ICC Rule 22 (2), which refers to Appendix 4, Paragraph A, and I was going to just refer to that specifically, because it actually encapsulates in one place, how efficiency drives the decision of a Tribunal on the question of bifurcation. So, a Tribunal under the ICC Rules has the right to

engage in bifurcation of the proceedings, or to render one or more partial awards on key issues. Court, when doing so, may genuinely be expected to result in a more efficient resolution of the case. So that subject, as in all the rules to an overriding duty which in the ICC Rules, is at 22(4) to quote, act fairly and impartially and ensure that each party has a reasonable opportunity to present its case, which is the due process point that Baiju was referring to a second ago. And that's generally understood to mean that a Tribunal can't prejudge the 'bifurcation question.' It can't say, "well, because I know that I'm going to find in favour on a dispositive issue. I'm going to grant bifurcation because that will make everything more efficient". And it can't say the opposite. It can't say, "because I know I'm going to fight against that. It won't make it more efficient. And therefore, I'm going to deny bifurcation." And that creates attention, which I'll come back to in a second. But when you're applying for bifurcation, you essentially want to say to the Tribunal that, "you think that there's a dispositive issue or an issue that would simplify the case. You think there is a *prima facie* argument that your position on that question will succeed. And can you argue the" ... and essentially that you can argue that point without having to admit all of the facts and all of the evidence and all of the expertise relating to the rest of the dispute. So that you don't have to go through all of those evidentiary phases in order to determine the bifurcated issue. The answer is 'yes' to that question. Then bifurcation should promote efficiency. And you ought to bifurcate. But two sort of war stories, as it were... the first is that a non-dispositive outcome will likely increase the overall time and cost of an Arbitration. And that's where the tension comes up with what a Tribunal can do to consider the chance of success and the arguments. And I confess that as Counsel, we sometimes push on this button a little bit by saying, "okay, well, we know you can't pre-decide the question." But what you can do, we say is, "look at the character and the nature of the issue that's being bifurcated. And if that's something on which there is a lot of jurisprudence, say, you know, these are typically objections on jurisdiction, often in the case of the Investment Treaty cases, where there has not been success or much success and therefore you ought to bear that in mind when considering whether or not to bifurcate. Now, in most instances, Tribunals quite rightly say, "Well, we're not going to consider the merits of the question". But it's also interesting that in most instances they will reject bifurcation, where there seems to be a correlation with how successful that argument has been in other cases. And the second war story is somewhat connected to the first one, which is the bifurcation can result in more resources and time being dedicated to each individual phase. And you see this a lot when you bifurcate quantum. Quantum is often dealt with in some might say ... too cursory in manner when decided with the merits. But if you bifurcate quantum, it's amazing how much time and effort and cost goes into those issues. Because the focus is all there. And I had this in a Telecommerce case that we did in Nigeria. They are seated in Nigeria and although the merits were supposed to have decided a lot of the issues that would go to quantum, quantum then became its own beast. And

I have no doubt at all that the cost of the quantum phase in that case were at least twice as much there would have been if they stayed with merit.

ABHILEEN CHATURVEDI: So somewhat leaning towards that there's no one side that fits all. Everything has to be looked at its own merits and facts. Niraj, I'll come to you now. We've discussed these certain institutional procedures... provisions. And we discussed certain essentials of an International Commercial or Treaty Arbitrations. I'll come to a more fundamental and more important question. So, to say, "how relevant would be the seat of Arbitration towards an efficient arbitration proceeding? And in your experience, as... Are there seats which are evidently more supportive of an arbitration process? And if they are so, then would it be advisable to designate a seat which is absolutely alien to parties, and purely because of inefficiency?

NIRAJ MODHA: Thank you.

ABHILEEN CHATURVEDI: Many questions tied to one...

NIRAJ MODHA: There are a few. We'll unpack them. But they're interesting issues, because we've talked about institutions and how institutions are attractive. Or having Institutional Rules and Institutional Arbitration is attractive. And in some ways, if you think about it, you have institutional rules in a seat that is completely averse to Arbitration, where the judiciary don't have a clue not talking about any specific jurisdiction yet, but judicially unsupportive, the people don't really understand. People... the Act is unevolved. Still in the process. Don't understand it. You can see quite easily that you'll have an ineffective arbitration. You have an award that's probably not worth the paper it's written on. So the seat is important and it's still important now. I don't think it's as important as it might have been a decade ago. But that's because there are now better seats. There are now jurisdictions around the world, not just in Europe, and in one part of the world, where there is a pro-arbitration consensus between in the judiciary and also between practitioners, where there is more awareness of Arbitration, Judges. Understand if you're going to court making application because you want to seek an anti-suit injunction, for example. They understand what you're on about, as opposed to previously, we've had lots of decisions in India and other places as well, where there hasn't been an awareness of Arbitration. So, the seat is still important, but there are better seats now, so it's less important. We all know as well as I mentioned, seat is significant because you want to be able to rely on a court to supervise your Arbitration. If you know you've got an application to remove an arbitrator because he or she is obviously biased. And you've got hard evidence to demonstrate that, you don't want a court to proceed on the basis of the Arbitrator's

jurisdiction. Or the Arbitrator's jurisdiction going to deal with... going deal with it elsewhere or another time or re-appeal the award which you often get. You often get those types of arguments in seats that don't have the same awareness of arbitration proceedings. And this leads me on to the second question. Are there preferred seats? I'm not going to be controversial and suggest seats that you should consider and seats that I would discourage you from. But you can look at the QMUL Survey. 2021 survey on the most popular seats and that will show you that London and Singapore, though I think it is skewed because most of the Respondents to that survey probably based in London and England, but there are very good seats. There are seats that are burgeoning that are actually coming on very quickly and strongly. Its... as it has always been with Arbitration. There has been traditionally a particular image of an arbitrator. And that's changed. And it's changing. There's more diversity. In the same way. There's been a typical image of certain seats. And they are now better. There are now better and more popular seats where you can be sure that you're going to get supervision from the court that is going to be helpful to the arbitration process rather than hinder it. And the third question that is, "is it wise to choose a completely alien seat?" And I think... depends, what you mean by completely alien? You can understand quite easily that if you have two parties from different jurisdictions, they might want to choose a neutral seat and a different jurisdiction that is not the same as one of those nationalities. And there's nothing wrong with that at all. The key thing is looking at the qualities of that seat and comparing that also with other seats that you might choose and looking at the institutional rules that you want to have as well, because as I said, institution and seat kind of go hand in hand. And if the language is not a problem, if you know that you're going to have a reliably neutral judiciary and you're going to have good administration. When I say administration, I mean Court Administration. You know that if you make an application to support your arbitration, it's not going to get tied up in court for 6 months or 12 months. When you want to get on with an arbitration, then I don't see any issue with choosing an alien jurisdiction in that sense. And we know now there's so much information out there. You can do your research. You know if you're entering into a Dispute Resolution Clause, or if you're entering into a Post-dispute Arbitration Agreement. You can create a bespoke Arbitration process. Often, it's easy to do that before you have a dispute that's arisen, of course. So, I think seat is still important to summarize. But not as important. Still important. But there's more choice now. So, no excuse really not to choose and to find a seat that is going to support your arbitration and ensure that you have your dispute resolved rather than clogged up in courts for years.

ABHILEEN CHATURVEDI: So, seats are developing. There are more choices available. But there have been situations, and I'm sure there would be situations in the future as well, where parties make contracts, they may designate an institution, they may have all sorts of

things there in their Dispute Resolution Clause and the most important integer, the seat may be absent. So in the absence of determination of the seat of arbitration under a contract, what would be the factors which will lead to the identification procedure? Rather designation of a seat in that situation.

NIRAJ MODHA: Thank you, Abhileen. I think that might be a trick question in some ways. Because in fact, you'll often find that an Arbitration Agreement will tell you the seat. It's relatively unusual to not know the seat when you look at its Arbitration Agreements. I'm not saying it doesn't happen, but Section 3 of the ***1996 Arbitration Act in England and Wales*** sets out a sort of stage-by-stage process. So, the seat in English Law is either chosen by the parties or it's chosen by an institution or some other delegated person, or it's chosen by the Tribunal. That's what the parties want, or it's chosen by the court. And the question there is the Court has to regard to all of the circumstances. So there is a step by step process. And in English Law... this is different in other jurisdictions, but in English Law, often, if you have the place or the venue, let's say it says London, or it says Paris that will lead to a presumption in the absence of any other significant country factors or indicators that that is your seats of arbitration, not just the place or the venue or the geographical place, but also the seats. And that is different in England, slightly different than the other jurisdictions. But that's what I'd suggest you look at the place or venue, particularly if English law applies to your Arbitration Agreement. And quite often that will tell you the seat. But if it doesn't, the institutions can help. So, the ICC has a provision in its rules where the Court can determine the seat of arbitration. The LCIA also deems London's to be the seat. You would expect that. Because most LCIA arbitrations are London, focus on London seated. And in the UNCITRAL as well, you have the Tribunal. But there's also an interesting concept as well about the seat moving. So, you might have the seat might first brush appear to be London, let's say or might appear to be Mumbai, or whichever city or jurisdiction. But that might be changed by the Tribunal. So, when an institution receives a request for an arbitration, it may look like it's a particular seat, and the Tribunal may decide otherwise and there is actually very little case law on this point. And what effect that has on the seat moving because there's a long time being a discourse in arbitration, between having national arbitration, international arbitration, de localized arbitrations. And at the moment where we are in English law currently is you have to have a seat, but that seat can very limit the circumstances be changed. So moving then on to the circumstances the court considers and as I say this is not a question on which there is any clear authority yet but the options are it could be the substantive law, or it could be what are the parties? Where are they? Where is the contract being performed? All of these things might indicate what the seat is supposed to be. But you can see and this is a practice point really if you're drafting contracts, we're looking for the [plain] clauses, you really want to have the seats

identified in some way, expressly, ideally in your Arbitration Agreement, in your contract, and that avoids issues later on down the line. And the sort of fun and games you get when the Arbitration Clause is probably pathological, it's defective and you end up having an ineffective Dispute Resolution Process. So, I think it's an open question, but the circumstances are... in English law certainly... the place or the venue is usually going to be the seat that normally answers it.

ABHILEEN CHATURVEDI: Thank you, Niraj. Now we've learned of different seats. We've discussed institutional procedures and we've also hinted at the fact that there are these institutional arbitrations and these foreign seats available because the business is expanding, we are living in a more globalized world. Unfortunately, with all these foreign seats and Institutional procedures, there is the question of costs as well. And which takes me to Arvind now. Arvind, from a third-party litigation perspective, how does a third-party litigation fund understand or identify an investable arbitration proceeding?

ARVINDRAN MANOOSEGARAN: An investable arbitration procedure just generally, right? Maybe I'll speak at a general level first before talking a bit more about procedure. And I don't think necessarily that our decision will be heavily informed by what the procedure is. Rather, we look at three things. One, the merits of the case, the second is recoverability, and third, whether it works out on the economics and the commercials. So I suppose in that context, if we look at the merits portion of it, if there isn't a very clear procedure, say for example, it is an ad hoc arbitration, then there is an opportunity that we would view with a lot of scepticism. Because of the reasons that have already been identified by some of my more esteemed colleagues on this panel, such as delay. And delay is not something that funders like to hear. And different funders will have different risk profiles, but broadly speaking that's not an attractive opportunity. The other two things are “Can the counterparty pay?” “Do they have capacity? And are they willing? How much is it going to cost them...cost us to fund enforcement proceedings, for example?” And the third is, “do the economics work out?” So, for Omni Bridgeway for our minimum what might be called ticket size claim of USD $10 million and not for arbitrations. And we can invest up to USD $1 million in order to pay the legal cost and other associated costs. So I guess that's the general answer as a matter of specificity procedure. If I can just make a couple of comments riffing off what my colleagues have said. It's obviously advantages to have summary proceedings or early dispositive motions, and so on in a set of rules, and that's always music to the ears of funder. But the other perspective I wanted to share with the audience is that that often amplifies the risk when it comes to enforcement. Because it is not uncommon for a Respondent to say that “their right to be fairly heard has been encroached upon as a result of an early procedure that has been

summary procedure, that has been adopted against them." And so, even if you avoid the delay at the earlier stage of the arbitration, when it comes to the latter part, which is enforcement...and by the way just to educate members of the audience who might not be familiar with how the funders earn their commission or profit and recover their investment, it's contingent on the case being successful and the Respondent pay. So if the Respondent engages in dilatory tactics later, such as trying to set aside the award, which they often do, and they say to the court of having supervisory jurisdiction, then they didn't have a right to be fairly heard. Just recognize grounds for set aside and the Curial Court often... and we know theory and practice defer.... the Curial Court often has to reopen it, even if it's meant to adopt a light touch approach. Then it makes the word susceptible to being set aside and therefore jeopardizing our investment. Does this sort of answer that?

ABHILEEN CHATURVEDI: Yes, it does and I'm glad that you clarified a bit about third-party litigation funding in itself. Because we've had a situation earlier this year where a third-party litigation... execution proceedings were filed against a third-party litigation fund. And the court had to intervene and say that, "no, they are not parties to Arbitration proceedings". So, that sort of clarification is definitely helpful. But coming back to you, Arvind. Does the engagement of these well-known institutions, experts, renowned lawyers and probably a large corporate Claimant such as Welspun. Does that make any difference when it comes to choice, for a third-party litigation fund? Do these integers play a major role when you decide whether invest in a dispute?

ARVINDRAN MANOOSEGARAN: Absolutely. So, one of the classic use cases of funding is the 'impecunious Claimant'. Right? So they don't have money to sue, use funding to drive a claim. What we're increasingly advocating for solvent corporates to use our funding because, instead of using their own capital towards their litigation expenses, which eventually becomes a drag on their profit and loss, you transfer that risk to the funder and get the funder to deploy that capital towards monetizing your litigation. So, you start thinking of the litigation as an asset rather than as a drag on your P&L or as a cost to the business from the company's perspective. Now a solvent company or a large company is preferable. Because... and this is speaking from real world experiences on some of the deals that I've been involved in, ... when the funded party gets tipped over into an insolvency process, things start to get a bit messy. Because of the appointment of liquidators, especially when you have multiple Claimants. And then questions start to get asked around the Funding Agreement we're facing a rather prickly situation where resolution professionals have taken a view that the Agreement doesn't bind the companies and they're looking to disavow it. And so that becomes a risk for us. And then where do we rank in terms of distribution? I mean that hasn't necessarily been tested in

different jurisdictions and certainly don't think it's been tested in India. But that engages another interesting question. Because the security party funder takes it's not the classic sort of security that you might be used to from traditional finance, which is hard security, hard assets. The only security we have is against the resolution, some being the proceeds from the action. And so, query 'what the nature of that security is, as a matter of the domestic law or law of incorporation of that entity and then where you have multiple Claimants whom we fund.' Then you have different sets of laws governing that. So, it becomes usually complicated and therefore, the solvent company, or company with strong solvency is something that we view as sort of a tick in the box. Right? 'Good lawyers.' Again I cannot underscore how important that is from a funder's perspective. Omni Bridgeway's investment style is active management of our investments. So that means that we work very closely with lawyers. And I can say hearing my colleagues on the panel with some degree of confidence, that I think working with them will be quite a pleasure, but I've also had difficulties when we've had to manage cases with lawyers who perhaps can't let go. And so it means that there needs to be a lot more case management when really the job of investment managers such as us is to source for new opportunities, deploy capital alongside the case management as well. So, if we have to work very heavily on managing and project management and support, then it kind of detracts from some key areas of our business. So I guess the third part that you're asked was the institution itself. So, I think I answered the question really here which is 'institutional rules much more preferable than ad hoc.'

ABHILEEN CHATURVEDI: Thank you. Now I'll just digress from commercial arbitration world to a little bit of Treaty Arbitration…discussion on Treaty Arbitrations and the efficiency over there. As a country maybe we took efficiency to a whole new level when we decided that instead of going ahead with the proceedings, we'll terminate our BITs with the idea that maybe then arbitrations against the sovereign stops. So, my question to you, Patrick, over there is slightly multi-fold. Does the termination of a BIT mean that the Arbitration Clauses in those become redundant? And what could be the possible impact of terminating of the BITs? And only if you feel comfortable does it mean that termination of a BIT impact FDI as well?

PATRICK TAYLOR: Thank You, Abhileen. Well, I won't spoil the punchline, but on that second question, I'm not going to be able to give any definitive answers either. But on the first issue, it really comes down to the effect and impact of Sunset Clauses. Many of you will be familiar with those, but essentially when a BIT is terminated it doesn't become redundant if it contains a Sunset Clause. The specific terms of the Sunset Clause need to be paid close attention to. But essentially, what it says is that, "if you invested and had a qualifying investment in the states prior to the termination, then for a period of some time, you are

continued to be protected from any measures that breach the terms of the BIT." And that period of time can stretch anywhere from just a few years to up to 20 years in some instances. It's almost always the case that a BIT does contain one of these Sunset Clauses. Not everyone does, but most of the time it does. And that's because the purpose of such a clause is to protect the legal expectations of the investor when they invest. And in many instances, you're talking about investors that have a very long investment horizon. So if you're thinking about investments in the energy, oil and gas sector, those are long term investments. The concessions may be 10, 15, 20 years, and so the point of making the investment, the investor will take some additional comfort from the fact that the BIT contains a Sunset provision. And it really is a very powerful clause. Because if you imagine a very major dispute with a recant State in running to the, say, tens of billions of dollars, you could easily see how it'd be worthwhile in that instance, for a State anticipating the arrival of a dispute to immediately terminate the BIT that it may be aware that particular investor has protection from before implementing the measures and thereby doing an end run around the idea of the BIT and the inducement to invest that was essentially provided by that BIT. Typically, Sunset Clauses are upheld by Tribunals. And there are examples of this that States have been trying to think about 'how they can work around the Sunset Clauses and get rid of them'. And most recently, and obviously, for those of us who practice a lot in Europe, is in the wake of the ***Achmea*** decision 23 EU Member States entered into a termination agreement to terminate all of their intra EU BITs, and that agreement attempts to nullify the Sunset Clauses by specifically terminating those as well. The effect of that agreement is yet to be seen because it's not been tested all the way through to a final decision, and I won't offer my view on which way it should go but there's obviously something to watch out for in this space. Now turning to the second point, the second question, whether the termination of BIT has an impact on FDI Clauses that's a highly vexed question. It's been commented on for many years that it's very hard, apart from seeing some general correlation between BIT and FDI Clauses . There's no definitive causation that's been noted between the two. There's a very off sighted article by Rachel Wellhausen in 2019 that talks about this. If you want some more details. There is anecdotal evidence that BIT do drive FDI Clause. And one example is the 2019 Queen Mary University Survey, which found that investors had a very positive view of ISDS as compared to other options, such as Court Litigation. And respondents to that survey noted that the availability of contract based and Treaty-based protections, along with the availability of ISDS were strong factors that influence their decisions to invest. There are other surveys and I won't go into them now… that also noted the critical importance of those of ISDS and BITs to decisions to invest. And one interesting observation by a few scholars, which is that it's quite common to see an investor that has had the protection of a BIT and been through a BIT process, reinvest the proceeds of that process back in the State that took the measures against their investment, suggesting that

the protections that were afforded to them by the BIT give them enough confidence to put their money back in. And we saw that with the BCC award, which my firm was involved in a more than $6 billion award, ultimately culminating in a settlement and the investor now being back in Pakistan, reinvesting in the project that it was originally kicked out of. So, I think that's a really interesting observation. And I'll leave just with one final thought, which is… if you have two equally promising investments in two different States, one of which is offering you BIT protection, and the other one of which is not, I'd have a guess that the investor is more likely to go for the one with the BIT protection and in a world where you're competing for investment, giving yourself that competitive advantage seems something worthwhile.

ABHILEEN CHATURVEDI: I'm glad you hinted towards the Party's preference towards BIT Arbitration process and the likelihood of receiving investment if there is one BIT in there. Which takes me to the next question that in recent years, of course, termination of BITs is something that we've seen. We've also come across situations where countries have renounced ISDS and they've contemplated alternatives to the existing form of Investor Treaty Arbitrations. Are there truly any alternatives available? And we've seen a lot of discussion on an investment code set up. Is that truly an alternative to an investor trade up, Investor Treaty Arbitration?

PATRICK TAYLOR: An investment court is potentially an alternative. But whether it's a good alternative will very much depend on what the features of that particular court will be. Other alternatives include the possibility of going to State courts. But that's not an alternative that investors find particularly appealing for obvious reasons. And still further alternative has been historically the ability to ask a State to intervene on your behalf, at a State-to-State level. But there are so many diplomatic reasons why that is problematic that it's not something that an investor would hang their hat on. And so, if there is to be an alternative to BITs and ISDS in the current form, it's likely to be some form of standing court. The format that we've heard most about is the format that was being pressed by the EU through the UNCITRAL Working Group through ISDS Reform discussion. And the format that it's been pushing ahead with for the seats and various other of the trade treaties that the EU is party to. But the format that they are contemplating does raise a couple of concerning issues, especially for investors. Some of the features or two of the main features. One is that it would force to a State to essentially preselect a standing body of arbitrators or judges that would sit in that court. Those would be tenured judges. And obviously, if you're a tenured judge and you're reliant on the States for your appointments, it doesn't really suggest that you're going to be particularly minded to find against the States that are appointing you and even if you did, maybe it would temper the approach you take to certain other features, such as Quantum. So investors might be worried

about not getting a fair shake with that particular feature. It's also been suggested in the European context that two parties to one of the treaties, two State parties could come together to agree a joint interpretation to be applied immediately in a particular dispute. Well, again, that's a pretty powerful weapon that a State could use against you. Again, tilting the balance towards the State. And a third feature is the ability to appeal the decision through an appellate process which is obviously going to extend the time and cost and arguably puts this kind of court out of reach for small and medium sized enterprises who simply won't have the resources to go through that kind of process. It's already a very long and costly process. So, I think an investment court may be an alternative. But probably the balance isn't quite there yet in a way that would give investors comfort that it's as good an alternative to what we currently have.

ABHILEEN CHATURVEDI: That's quite a perspective and all the more needed for India as an outward investing country not just looking at domestic commerce and with more and more investments going outside of India. Which takes me to Baiju now and this is the point that I wanted to particularly ask was that with both private as well as public investments going out of India and India, not just being a capital reporting nation anymore. What protections does the corporate India need while investing beyond the country? And in your experience or in your estimate, is corporate India reluctant or wary of ISDS as a dispute resolution mechanism?

BAIJU VASANI: Thank you, Abhileen. I think in some sense corporate India is lucky that India still doesn't have as much foreign investment as it could, and maybe as it should. And the landscape for corporate India remains very robust for them to invest domestically. And that's certainly when I talk to corporate and they say, “there's so many opportunities for us here. We have little appetite for looking abroad.” Then I said, ‘Well, what would make you look abroad. And they say, Well, a high return rate.’ And they're talking about 20% to 25% IRR at a minimum, which is a pretty decent whack if you think about it. But there are increasingly Indian corporates who are looking at investing abroad, often in Joint Ventures. And the question then, as Abhileen has put it is, ‘are they wary of ISDS or what are the other factors?’ Well, one of the risk elements of the IRR, the return on investment is dispute resolution that will increase or decrease your IRR, depending on what type of dispute resolution provisions you have. Now, the first thing I would say is Patrick talked about the EU. The EU Commission will tell you that litigation in the EU is fantastic. EU is rule of law and why not be in a court? But I would not want to be in a court in most parts of the EU whether that's Romania, Bulgaria, Spain, Greece. It really wouldn't matter. I would not want to be stuck as an Indian corporate or anyone else in a court process in any of those jurisdictions. Even if the EU Commission tells me that they are a rule of law-abiding States. Litigation abroad anywhere is riskier. And I

worked in the United States for 15 years, and we would often try and get what we call 'home court advantage.' So, we try and bring foreign parties to the United States because we knew, the moment we get them before a jury in the United States, game over. So, litigation abroad is somewhere no party ever wants to be. So, we want to have Arbitration, right? So, step one is Commercial Arbitration. And we've talked about Institutional Arbitration versus ad hoc. The number one issue, though I see with Indian corporates who agree to International Arbitration... and this goes to Niraj's presentation is 'the seat.' For me, it is almost a waste to agree to International Arbitration but then have the seat in the country from which your counterparty is from, particularly when the counterparty is the State itself or a very powerful State-Owned Entity. So, I've seen fantastic Institutional Arbitration Clauses against African Nations or against State-Owned Entities in that African nation seated in the African nation. And then what happens is, of course, then you give that court the ability... now it may not happen. It may happen. Obviously, one can't tell. But you open yourself up to the possibility from set aside to injunctions, to anything else that court wants to do of having your arbitration in the hands of that foreign agency. So, I would even.... I've often said to people, and it's a rule of thumb. It may be contentious, and maybe the panel would like to speak to it.... I always say rule of thumb, I would rather give up law than seat. Right? So, in other words, I would rather have Mozambique Law and London seat than I would have English Law and Mozambique seat. Right? I would give that up in a heartbeat. Because procedurally speaking generally, Contract Law in most nations are pretty similar Civil Law, Common Law. But you pretty much get to the same point. Now I say it's a rule of thumb because they may be nuances, which mean that actually that's a very bad idea. But generally speaking, you want to fight for seat and trade Contract Law. So, you have Commercial Arbitration. But there is as Patrick's talked about... ISDS and the key to any foreign investment then is 'structuring.' It is to see yourself as an Indian corporate, starting in India, where you want to invest and how to invest? And the way you do that is... essentially you take three things. You take ISDS protection, you take tax and you take corporate governance and you match the three together at the same time to have a structure that gives you the best protection in those three areas. So, those Indian corporates that I've talked to are very keen on ISDS actually I believe. And what I think is somewhat of a shame and I'll be happy to be corrected. But what happened, for example, in 1980s America is, in the `60s and `70s America did not have ISDS. They were slow to game. The Europeans were fast in the game. And then corporate America got together and went to USTR and State Department and said there's these things called BITs and we want them, because the Europeans are having them and they're investing abroad, and they're getting these protections. And we don't have them. And what the Government of India always has to remember that as much as it protects itself, it hurts its investors. Now that's not fully true because the investors can have a holding company halfway through a different entity, but now that's getting harder

and harder. But the Government must hear from Corporate India to say, don't just think of yourself. Also, think of us because we want to go abroad and we want to invest. And you also have to balance the equities between yourselves as Defendant and us as Claimants.

ARVINDRAN MANOOSEGARAN: This takes me to Arvind now. We spoke briefly on Third-party Litigation Fund a while back. And we just underscored the importance of an ISDS system for an Indian client investing outside of India, and which is likely to perhaps grow more in the future. But stepping away from that for a minute, what would be the concerns for a third-party litigation fund when it comes to jurisdiction like India? I mean TPLF has been in India, for... we've discussed TPLF for a long period of time. But we still see some sort of hesitation over there. And is it only an Arbitration proceeding that TPLF may be interested in? Or are there more opportunities? And is delay the only thing which is perhaps the cause of hesitation?

ARVINDRAN MANOOSEGARAN: If you're talking about India as a Respondent within the framework of Treaty Arbitration, I will say that some of my comments, which I'm about to make is not confined to the Indian experience. So, I'll speak again without particularly singling out India, if I may... and to summarize it's really a question of enforcement. So we've got quite a brilliant team that actually looks at the different risks associated with enforcing an international award in different parts of the world and it turns on whether or not the State in question has the capacity to pay and or the willingness to pay. And sometimes those two things are correlated, and sometimes they're not. So, for example, one in this year is if you have a very large award and oftentimes treaty claims and/or awards can have very eye watering amounts attached to them. But the State may not feel like it can comply, because there is a political dimension to it. Right? And so, that's something that we're certainly very cognizant of.

So, what really is the true value of the claim at one level, which is an assessment that will be done with the lawyers and the quantification experts. But at another level is even if that is correct, will the state be able to pay? Because if the award represents a significant part of its GDP again say Greece of the world... then no go. Or alternatively, it's too large. And it becomes a political question. Because I think now maybe I can comment specifically on India. I think it treats its domestic stakeholders or in the arbitration process, potentially differently from its foreign stakeholders. And that is again, a political dimension. In the infrastructure and construction space, there have been moves towards trying to unlock or unjam that process. Right? Because there's this whole liquidity crunch and contractors are going bust and so on and so forth. Whereas the attitude that it adopts to International Treaty Awards and its compliance of the same, is that these are foreign parties and so we would have to treat them

differently. Therefore, let's resist enforcement in whichever jurisdiction. And then I won't go into the authority in this form, we have more well versed with those cases and that's again, the experience that we see with other States as well. So if it's too large they will not pay the full amount. If there is a certain political sensitivity associated with the project, then you're in for a long fight. Which is something that we're experiencing with one of our investments. So, we certainly have to... when we look at treaty type claims against States. We have to look at it with a certain degree of circumspection, particularly when it comes to recovery. One other point I wanted to make connected to the recovery point is that States do... and I believe India has engaged in that kind of conduct where it emptied out bank accounts overseas in order to tort an International Award. And again, it's not unique to India. Many States do it. There is also a method that they employ where they ring fence their assets within SOEs, and then you have to engage in this convoluted debate about attribution. Right? And that's a jurisdiction specific exercise. So I'm happy to talk a bit more on the sidelines of the conference about how Omni Bridgeway has solutions for those things. I just am conscious of the time. Thanks.

ABHILEEN CHATURVEDI: Thank you, Arvind and I'm sure a lot of us will have more questions on that given the interest on the Third-party Litigation funding both within India, and going out of India as well. Abhijeet, I'll come to you now. We've heard a lot about different institutional rules, different seats, Third-party Litigation funding and what sort of procedures are there towards maintaining an efficient arbitration proceeding. Coming to you, from an in house perspective, how is it that from the company perspective, you ensure a timely completion of arbitration proceeding or litigation? And what would be the completion of arbitration or litigation for you? Because the panel before us, they had a very interesting comment that commercial people look for profits, and lawyers look for the worst-case scenarios. So, ultimately for the companies, when do they see the colour of money? So how do you ensure a timely completion? And what exactly is completion of proceedings for you?

ABHIJEET SHINDE: So, for us when you are looking at disputes, they don't start when actually there's a notice of arbitration. It starts much prior when we are drafting the Agreement itself. So, the time when you're drafting the Agreement. We look at drafting the Dispute Resolution Clauses in a manner which are conducive for Dispute Resolution. Okay. As I earlier said, we look at having fair clauses so that both the parties have enough confidence while entering to the contract that both parties are looking at doing business and not looking at taking advantage of the system itself. So that's one point that we keep in mind while we are drafting and looking at the entire process. The second thing which is quite critical, I think, is that the threat of early determination of a dispute itself acts as a deterrent for many parties to file frivolous cases. Okay, so that's something which is good when you're looking at

Institutional Arbitration. The second is that, that also leads to early settlement. People know that if there's going to be early determination, we know we want to go and settle the matter as quickly as possible before incurring cost, or maybe having an award against them. So, that's the process that we follow when we are... in fact entering into contract looking at all these things in terms of your seat, in terms of Institutional Arbitration along with that there are other things which are also very critical. So, most of our arbitrations arise from our infrastructure business that we have. And you are not prepared for arbitration unless your record keeping is complete. We do two things internally. One is that we have a very robust system where we keep records and which are available to everybody, including the legal team, while live as they happen with the subcontractors with the principals that you're working with. And the second most important thing that as a change that we've got in the organization is that we have people who are working with us for a long time stationed with each package of these construction contracts, or any of the Agreements that we are enforcing. So, that we have certainty of these people coming for evidence when we require them. So that's another point which is very critical. So that when you are entering to arbitration, we are very clear that the people who are going to be standing there and be your witnesses are absolutely ready and present. Your claim... when you file your claim, I think that's the time we should be absolutely ready for not only your expert with the numbers, but also your Witness Statements. And I think that ensures that you're absolutely prepared for the arbitration. In terms of realizing when the arbitration is over, we all look for... as a business, I think the intention is to settle as soon as possible and sometimes positioning in the arbitration matters a lot for us. So we are always looking at that opportunity, even during the arbitration, to see that the parties are looking at some sort of settlement. So that's the closure that we're looking at.

ABHILEEN CHATURVEDI: Thank you, Abhijeet. Now, before I open it to Q and A with the audience, I'll just come to all the panellists for one question recently we met an Arbitrator in Singapore, and the Arbitrator said, “I feel so sorry for the parties in the arbitration proceedings, because everyone or the someone or the other used to fall ill.” And they had COVID, they had dengue, they had all sorts of diseases. So must have been a really tough time. So yes, while the arbitrator did sound some concern, but that is one of the tactics that we see a lot often used over here. Illness and adjournments and extensions. So the opposite of efficient arbitration proceeding is a guerrilla tactics. So if I can just start from Arvind, if you could just help us with one guerrilla tactics and which you would have experienced. And how did you as a funder deal with that?

ARVINDRAN MANOOSEGARAN: Yeah, that's so interesting that people are still using pooling a sick leave as an excuse to delay proceedings in International Arbitration. I had not

heard of that one for a while. From our perspective... And I'll just make it very quick... one thing that we're increasingly seeing is parties, Respondents applying for security for cost against the funder, and they try and shoot it to the funder. And it's almost now done as a matter of cost. And different Tribunals have different attitudes towards that, depending on composition of the Tribunal, et cetera. Omni Bridgeway is quite unique among funders in the sense that we provide an undertaking to cover adverse costs. So one question that is debated is the adequacy of that cost undertaking. So, the Delhi decision that you alluded to earlier is very welcome. In Singapore, the Singapore Court has held that our undertaking is sufficient form of security. So I think the trend is generally favourable to funders, but we've certainly been hit with those sort of orders and the debate and the argument over there takes quite a bit of time in terms of delaying the process.

BAIJU VASANI: I'm sorry. Should we pass the line? This is pet peeve of mine... is what I would call sandbagging. So, you have a Memorial, counter Memorial reply rejoinder hearing and it's where you put in as a Claimant, the Memorial. You get a counter Memorial, which has a few Witnesses and a few experts that doesn't fully engage with the issues you put in your Memorial. You then put in a reply. And then suddenly in the rejoinder, the Defendant, the Respondent, comes out with new experts, new Witnesses. It's twice the size of the reply. And you haven't had a chance to respond before you get to the hearing. So I call that the sandbagging. How do you deal with it? I think first of all, you put in the Procedural Order, number one, at the beginning that 'this is what the memorial has to say, and this is what the rejoinder has to say, and it has to be responsive and has to be responsive.'

I think absolutely. You have to set that out at the first point. Secondly, often, if I see suspiciously we counter memorial where I think they're keeping what we call keeping their gunpowder dry I'll expressly state, I think they're keeping their gunpowder dry and they're going to come out with a lot of stuff in the rejoinder. And if they do, Tribunal, I'm going to scream and so be ready for that. So, I absolutely set the put the flag in and say, "I think this is going on already." If they then do it, I then say, "no. Okay. Before the hearing, we have to have a written right of response and not just go into the hearing call." And then, of course, absolutely. You have to ask for courts to sort of stop that behaviour.

NIRAJ MODHA: I think we've got to be careful with guerrilla tactics. I'm not a practitioner of guerrilla tactics, but what do you mean by guerrilla tactics? I mean, there is a wide spectrum, and it's a bit like the cricket. You have rules and you have the spirit of the game. And how do you define it? But there are certain things that are just wrong. My pet peeve is unnecessarily, excessive and repeated request for disclosure. What I'll do to change that is try to introduce a

trend that's been growing in England in the last two and a half years. There's been a pilot scheme for disclosure, and it's moving away from the pleading style... the Statement of Case... We still have pleadings in litigation and arbitration rather than Memorial. But having parties put up front what their documents are, the documents they're relying on and the documents that they know are adverse. So actually having some disclosure out there at the start and then having a two stage process for disclosure rather than having multiple repeated requests. Most disclosure requests I know from sitting on the Tribunal, most disclosure requests can be dealt with quite straightforwardly. You don't even need to have hearing, particularly for disclosure requests when you've got redundant schedules. So streamlining that process because otherwise, we're going to get to a situation where arbitration becomes just like litigation. Becomes bogged down. And that's one of the advantages at the moment of arbitration that it can be much quicker and more streamlined. So why spoil it by allowing parties to put in a necessary repetitive request. So, that's my pet peeve and what I do to avoid it.

PATRICK TAYLOR: So, the guerrilla tactics... I was going to mention is allegations of dishonesty against Counsel and parties. It's a trend that I think brew many years ago has just persisted in Arbitration and it creates a huge amount of cost in a dispute because of the need to deal with the allegations, it's very hard just to leave an allegation like that sitting on the record without being addressed. In England and Wales there are conduct rules that say that advocates and solicitors may not make allegations of dishonesty against a party or a Counsel on the other side without having a firm foundation for doing so and evidence, and also offering the other side an opportunity to respond. And if you breach that rule, you will be reprimanded by the judge. And that's a strong incentive not to do that. And I think there is something to be said for considering having that as a 'ethical rule', brought in for International Arbitration. And if you don't have it, in the sector and you are in , and you're dealing... There's an inequality of arms, as it were if you've got Counsel on the other side, you know, are not subject to that rule. You might consider asking a Tribunal to consider putting something to that effect in procedural order number.

ABHILEEN CHATURVEDI: Things to learn from all the Arbitrators, as well as practitioners. Abhijeet, we discussed one question with you while we were preparing for the panel discussion. We've recently spent a few years where we conducted arbitrations in a whole different manner. Given the fact that we conducted arbitrations online, is that something that the practice can learn from that increase efficiency in any manner? And is that something that can be practiced for good or that was just a brief duration of time things?

ABHIJEET SHINDE: So, it has its pros and cons and we've personally experienced it in our arbitrations that we've conducted. If you ask me, I don't think so. The entire arbitration can be conducted online, and it should not be. And I'll tell you my experiences. In one of the Arbitrations with the subcontractor, while the Cross Examination was being conducted through everybody's... you know, wherever they were... in the offices... The contactor was sitting in his offices and being cross examined. We realized that when he was answering, actually, it was coming, as if he was reading from something. So, in the next session, when we went for his Cross Examination, we ensured that there was one person attending while he was being cross examined, we found out that there was a screen being put up and he was being prompted for giving answers. So that's one experience which has completely coloured our experience in terms of how the arbitration has to be conducted. What I understand is if you leave out maybe the Cross Examination, which has to be absolutely fair. And the Tribunal has to understand the manner in which the witness is answering... his deminer, his un-comfort to certain direct questions, et cetera, which is very vital for the arbitrators to ultimately decide. And finally, the arguments. Because I think online, no matter how convenient it is, I don't think so, the Tribunal is quite attentive while the Arbitration is being conducted online, no matter how fresh you are, et cetera. It's always when you are sitting online, it's not that you are fully attentive to the arguments. And sometimes if you miss one of the points, it can be fatal for your Arbitration. So, all the other hearings, it's absolutely fine. I think all the procedural hearings, it absolutely helps the parties. Because it saves costs, time and energy of all the parties. But when it comes to Cross Examination and the final hearing, I think we should not go for online hearing. That's my personal experience.

ABHILEEN CHATURVEDI: I'm grateful for that. And I'm thankful that somebody actually said that. Yeah, it's not practically possible to conduct an entire proceeding online as much as we did it out of compulsion in some years back. I see the timer at 1 hour, 25 minutes. Are there any questions from the audience? There are a couple of... Yeah.

AUDIENCE 1: So, my question was pertaining to the bifurcation of the proceedings that we had discussed already. So, when we talk about bifurcation, there have been certain judgments one of the essential judgments that we read is of ***Glamis Gold***, wherein there were certain rules that were set out, which has already been mentioned by Patrick, such as the *prima facie* case, and the matters shall not be intertwined. So when we read different institutional rules, as you had already pointed out which talk about discretion while bifurcation of the proceedings. Do you think that the rules that have been brought through these cases should be inculcated within the Institutional rules? Or the discretion should stay? If you say, for instance, when we talk about intertwining of the matters, there could be certain ancillary

matters which could be intertwined. However, there could be other matters which could be dealt first in the preliminary hearing. So, do you think that discretion should stay or rather the stick adherence to the rules should be made?

PATRICK TAYLOR: I'd be interested in the views of the other panellists as well. In my view, the Discretion works. And I think it's important that a Tribunal be able to maintain that discretion in deciding. There are a number of factors, as I sort of alluded to some of them may not be divert factors that will play into a Tribunal's decision as whether or not it wants to bifurcate a process. And as Counsel, we often think about bifurcation as a very tactical question. It's not in... it doesn't always the discussion, as Counsel doesn't always come from only what will make the proceedings more efficient. It also comes for what do we think will be a better presentation of our client's case. And I think Tribunals need to have the ability to deal with that aspect of this. There also... This issue doesn't have to be dispositive. There may be many other issues. Reasons why you might bifurcate a particular issue. And I just think that it's hard to have rules for every single one of them. So in my experience at least the discretion works.

BAIJU VASANI: Yeah, I would agree. I don't think we need to codify what Tribunals use generally. And I agree with you ***Glamis Gold*** has a good articulation of the standard. I just wanted to pick up on efficiency of proceedings. I actually would disagree with something Patrick said earlier, which is on quantum and I don't disagree with you. I think you raised the point that quantum separately was expensive. I think we don't bifurcate quantum enough. I think actually we should bifurcate quantum more. It's almost seen as jurisdiction as easy to bifurcate that's normal. But then liability and quantum always goes together. And I think there's two effects of that. One is that we mush causations. Causation becomes a standard that kind of gets hidden somewhere in quantum and liability and not thought about enough. I think certainly from a Defendant's point of view. I think the second thing is oftentimes particularly in ISDS, a Claimant will claim many different types of liability. They'll say, expropriation, it's fair and equal treatment. Some reliefs, and they'll win on some and they'll lose on some and some things a breach of the Treaty and some things are not. But then the question is after you've gone through that liability exercise, do you lead to the quantum that you've articulated? And sometimes it's impossible to have that many permutations of quantum from these different liability findings. So I think we should start thinking more towards bifurcation of quantum as much as we do towards bifurcation.

PATRICK TAYLOR: I don't actually disagree with that. I think the fact that it costs more also probably reflects the fact that you tend to get better answers, objectively and Interestingly.

In the one example I was referring to causation became the first and major issue that was discussed in the quantum phase in exactly the way that you suggest.

AUDIENCE 2: Hi. I wanted to pick up on the sandbagging point. And this maybe goes across the board for everyone because it's more about what you've seen in practice. Have you ever seen an Arbitrator strike out evidence that's been submitted that way or is sort of a recalcitrant party just entitled to go ahead?

BAIJU VASANI: I was about to say, "I wish." Right? And then I don't know if I do wish? Maybe I'll make a more general point on that. And that you want Arbitrators to be more forthright but then if I'm the Claimant, then and the client says, "look, should we ask for a strike out?" Let's say we get it. Are we putting a poison pill in our process at the end of the day for a set aside on due process? Is it better to just let it in? We'll deal with it. It's not very good, we'll win. And then there's no argument at the end of the day. So I think efficiency. You have to think about efficiency at the moment in time, but efficiency of the whole process. So I'm not sure I would necessarily ask for a strikeout of the information. If I'm Claimant's Counsel, I would rather ask for right of reply because I'd have to think about set aside.

AUDIENCE 2: I suppose the scenario is more where you can't put in a reply without disrupting your whole time-table.

BAIJU VASANI: Of the hearing... Then I would ask for it ... Then I would ask for time at the hearing. So, I'd ask for an extra time to articulate, I'll ask for extra time on my Witnesses, right for my experts, I would definitely find some right of reply in the process. And if I don't get that, then I have a poison pill as part of a due process.

NIRAJ MODHA: Just following up on that, I actually completely agree I've had this type of issue. It wasn't quite as graphic and as bad as Baiju's example that he gave. But I've Arbitrators tend to tiptoe around these types of issues, and you will often get more time if you want more time to put in a further rejoinder... sorry, rejoinder. So, that's usually the way you go about it. I have had Arbitrators be more robust in striking out parts of the Witness Statement before that Witness has given evidence because the issues on which that Witness was giving evidence in their statement were not properly pleaded very full memorials. And I think you can find arbitrators being more willing to be robust at that later stage, but you make a good point about disruptions at the timetable. And I think that's unavoidable. You get sandbagged.

ABHILEEN CHATURVEDI: Are there any other questions from the audience?... One more.

AUDIENCE 3: Hi, I'm Vikram, from Singapore. One of the questions I had is to do with Investor State Disputes. Right now, if you look at the first generation of BIT Treaties and so on, they would have Clauses on exhaustion of local remedies. Then there was a whole generation of BITs that didn't have those, Clauses. The Tribunals generally said "this was not required unless it's a Denial of Justice Claim". But now you see these Clauses reappearing in the latest generation of Investment Treaties. And what are your views on whether this actually makes the process more efficient or whether it's just a lot more hurdles an investor will have to go through with a domestic State before you even get to the Tribunal?

PATRICK TAYLOR: It depends on the kind of dispute you're dealing with. Of course, there are so many different factors that can go into whether that would be helpful or not. I once saw in a Korean Treaty, a very unusual cause. That said, "you had to go to the local Court, but if you got a final decision from the final Court of appeal, you could no longer go to Arbitration," which was bizarre because it meant you had to go all the way up and to the courts of the Supreme Court. Then you had to withdraw your claim before you got to a decision there. That had a particular impact in that case. I think most often, though, in the kinds of disputes that we're seeing that go that do end up in ISDS where people are willing to commit the funds, the funds, and the time to bring those claims. Those are the kinds of claims that are very unlikely to be resolved in the local Courts.

BAIJU VASANI: Can I?... I'll just make three points. I think one, you have to give States the chance to correct a delict. Right? So, the idea is the executive made a mistake, that the judiciary will fix it, but that's still the State for it large. I like that. I accept that. I think that if it's functioning correctly, I think Patrick makes a good point that in a lot of these cases, no one's going to fix the particular issue. I think the second interesting thing about it is the length of time. I think five years. I think that's incredibly long. 18 months other ones too short. So how long do you have to exhaust for and are you really going to get a determinant answer in that time and then is that a simple procedural issue or a substantive issue like in the ***United States Supreme Court question of BG***, which is... if I don't exhaust does that mean there's no jurisdiction or is it simply something that futility or some other thing can just wipe away and I still have jurisdiction to move forward. And then I had a final point. That's completely... Oh, yes. The final point I had is this... is, I don't accept at all the notion that if you choose to exhaust local remedies and there is no fork in the road provisions and you get an adverse award, you are then only left with denial of Justice. I absolutely reject that as a matter of International Law you can go back to the executive actions for fair and equal treatment and expropriation. You don't say that you've chosen to go down this funnel. You

have to go down this funnel of exhaustion of local remedies. Now all you have is this decision against you. And either it's denial of justice or it's not. You lost the ability to complain about the Act underlying that judgment. I completely reject that.

ABHILEEN CHATURVEDI: Thank you Baiju. Any other questions from the audience? If not, then we'll draw this panel to a close. Thank you, panellists, and thank you to the audience. We had an excellent round of discussions. Now lunch awaits us. Thank you.

~~~END OF SESSION 2~~~