INDIA ADR WEEK DAY 2: MUMBAI

SESSION 4

10th Oct 2023

PANEL DISCUSSION ON 'RESOLVING DISPUTES WITH THE GOVERNMENT AND STATE-OWNED ENTITIES THROUGH ARBITRATION: BEST PRACTICES &; EFFECTIVE STRATEGIES'

5:00 PM To 6:00 PM

Speakers

Gathi Prakash Karrah, Partner, Cyril Amarchand Mangaldas, Mumbai; Co-Chair, Steering Committee, Young MCIA

Iyer Narayanan H, Executive Director - Legal, Hindustan Petroleum Corporation Limited, Mumbai

Oswald D'Souza, Group Legal Head - L&T Energy Hydrocarbon, Larsen & Toubro, Mumbai

Bindi Dave, Senior Partner, Wadia Ghandy & Co., Mumbai

Gaurav Gulati, Partner, Accuracy, New Delhi

Zarina Chinoy, General Counsel, Shapoorji Pallonji Group

HOST: Good evening. And a very warm welcome to the Young MCIA Event in Mumbai, as a part of the third edition of the India ADR Week, which celebrates and promotes 'alternative dispute resolution and its profound impact on India's legal landscape'. I'm Ishani Vohra, a Senior Director in FDI Consulting Disputes Practice in Mumbai, and a co-chair of the Young MCIA Steering committee. I, on behalf of my other co-chairs, Gathi, Shreya, Alipa, and the entire young MCIA steering committee, would like you like to thank you for making the time for being with us here today. And a special thanks to everybody who has flown in from various parts of the country and various parts of the world to join us. In a world where borders are becoming increasingly porous, businesses are expanding globally and the need for fair and efficient resolution of cross border disputes has never been more critical. International Arbitration serves as a beacon of hope a mechanism that bridges diverse legal systems and cultural differences for the resolution of disputes. It is in this context that MCIA functions and

has organized the ADR Week. Yet again. Young MCIA an integral part of the MCIA, is a group of like-minded and driven ADR practitioners dedicated to advancing ADR in India and beyond, by nurturing the next generation of professionals like many of you here with us and encouraging them to build expertise, foster robust network and share experiences. Ever since its launch in 2017, Young MCIA has been striving to be at the forefront of bringing change and growth to ADR in India, with its fresh perspective, innovative ideas and wholesome energy. In association with International Institutions, Young MCIA has conducted training sessions for emerging professionals and law students on ADR. It has also organized events, competitions, and initiatives to promote and deepen the conversation on this topic. This evening, Young MCIA has organized two very interesting discussions on contemporary and thought-provoking topics. First, we will have a panel discussion on the topic 'resolving disputes with the Government and State-Owned Entities through Arbitration: best practices and effective strategies'. This is a pertinent topic, especially given the geopolitical and economic dynamic in the country. The significant upsurge in India's infrastructure initiatives and the increased attraction of foreign investment. These conditions will continue to also expose businesses to a great deal of contentious cases in the fields with significant Government intervention and involvement. In this panel, experienced speakers would share their views on the best strategies to most effectively contribute to the resolution of such contentious cases. Next, we will have a debate on the topic Indian Court contribution in making India the next Arbitration hub. Is it a step forward or backward? Where on one side, we will have arguments emphasizing the vital role of the courts in fostering India's arbitration landscape. On the other side, we will explore whether the court's actions cause hindrances in achieving this objective. I hope this debate will encourage a meaningful dialogue, since India's future as a global leader in arbitration depends on how the judicial system facilitates arbitrations and health parties and the ADR community.

I would like to end with a quick note to our young professionals in attendance. I encourage you to seize this invaluable opportunity to learn from the wealth of knowledge in this room. Engage in discussions, ask questions, and build connections that will fuel your growth and development in the ADR field. Your energy, creativity, and drive are the forces that are shaping the future of International Arbitration. And to our esteemed senior professionals, your mentorship, guidance and experience are invaluable resources for emerging talent. We are grateful for your presence and your willingness to invest in the next generation. Your insights and wisdom serve as a guiding light for those who are just embarking on this journey. On this exciting day of discussions and networking, let us remember that the strength lies in our collective commitment to the field of International Arbitration. Young MCIA is more than just a community. It is a force that is collaborative and that wants to push boundaries of what's

possible in ADR. Without further ado, I'll hand it over to Gathi, to proceed with the panel discussion. Thank you, everyone.

GATHI PRAKASH KARRAH: Good evening, everyone and welcome to the YMCIA Panel discussion. Without further ado, let me introduce you to the stellar panel we have today. We have with us, Mr. Narayanan Iyer, who heads the legal Department of Hindustan Petroleum Corporation Limited. As its Executive Director, Legal. He joined HPCL in the year 1985. His vast experience spans three and a half decades of handling all kinds of legal matters in the oil and Gas Industry. This includes drafting and negotiating JV's, EPC Contracts, Project Finance and Loan documents, Managing Litigation and Arbitration. He must have handled over 100 arbitrations till date. Mr. Iyar is also a Cost Accountant and a Company Secretary. And in addition to a law degree, he also holds a Master's degree in International Banking and Finance. Welcome Mr. Iyer. Mr. Oswald D'Souza graduated law from Mumbai University in the year 1990. Mr. D'Souza began his practice at the Bombay High Court, and after the few years he moved in house with a Consumer durables company. He joined the corporate legal Department of L&T in the year 2000. Since then, he's acted as Legal Head for the shipbuilding, defence, nuclear, and heavy engineering businesses of L&T and is currently the group Legal head for L&T's Energy hydrocarbon Business and Wind pump business. He has extensive experience in handling transactions disputes, and mergers and acquisitions in various industry sectors, such as hydrocarbon power, shipbuilding, Nuclear, Defence, infotech, Finance, and a couple of others. Welcome. Mr. D'Souza. Ms. Zarina Chinoy, graduated law from Government Law College in the year 2001. She also holds a Master's degree in International Business Trade and Tax Law from the University of Houston. She's a qualified solicitor and is also licensed to practice in India, Texas, and New York. She's currently General Counsel EPC Division at Shapoorji Pallonji Group. She's a skilled negotiator of Construction and Finance Contract where the FIDIC or bespoke and also handles the dispute resolution. Welcome. Ms. Chinoy. Ms. Bindi Dave. She's a Senior Partner, Wadia Ghandy & Co. She handles the firm's disputes practice and specializes in Corporate Commercial Litigation and Arbitration, both Domestic and International. She also acts as an Arbitrator in Commercial Arbitrations. She represents domestic and foreign funds and other clients and disputes involving private equity investments, Shareholder litigation, Constitutional litigation, Infrastructure disputes including highways, toll, water, augmentation, among others. Apart from being an AOR and the Supreme Court, she regularly appears before the Bombay High Court, Arbitrary Tribunals, the NCLT, NCLAT et cetera. Welcome, Ms. Dave. And finally, we have Mr. Gaurav Gulati, who is a partner at Accuracy. He joined Accuracy in 2015 with over 20 years of experience. He has acted as a Damages and Quantum expert in various Arbitrations and specializes in Transaction and Disputes Advisory work. He regularly provides evidence on

Quantum, financial and transaction disputes. He's led various domestic and cross border M&A transactions and Private Equity fundraisers for clients across industries and geographies. He started his career in 1998 with Ernst and Young in the Middle East. Later, he moved to Canada to work with Alyan's Insurance and gained significant, significant finance experience in the North American market. Welcome, Mr. Gulati. My first question for this panel is for Ms. Bindi Dave. Ms. Dave, the Government is making attempts to strengthen India's position as a favourable jurisdiction for arbitration. For example, the Arbitration and Conciliation Amendments Act of 2019 and 2021, as also the India International Arbitration Centre Act of 2019, which is aimed at promoting Institutional Arbitration in India, and to promote India as a hub for International Arbitration. In your experience, what are the advantages or disadvantages of Institutional Arbitration, Vs ad hoc arbitration when resolving disputes specifically with the Government and or its instrumentalities?

BINDI DAVE: Hello, everyone. Hi, I'm audible. Mic is working right?

GATHI PRAKASH KARRAH: I can hear you clearly.

BINDI DAVE: Okay. So, thank you first for having me here. And.... Arbitration per Se is a topic of great interest to me because... I'll start by telling you this, that I cleared my law in 1996, and our Arbitration Act is also here in 1996. So I somehow feel that I have kind of groomed with the act and I've tried to do as much arbitration can could have come my way and I could have done it. So, in that sense, well, I'll start by saying that, "we still in India have a long way to go in terms of resolving all disputes by arbitrations." Because our contracts, all of our contracts still do not have arbitration clauses for this. So, there is still a lot of litigation work that is happening. And therefore, it's not that one could dedicate just purely in arbitration practice. So we do have a healthy bit of growth. But I have tried to do as much arbitration as I can. And to answer your question, Gathi, in terms of ad hoc versus Institutional.... Obviously as everyone knows, institutional Arbitration is still yet to catch up. All the earlier contracts did not have the Institutional Arbitrations as... Arbitration centres as, the preferred mechanism, and there are several reasons for it. To start with, I think people, there's a misconception that institutional arbitrations turn out to be more expensive. Which is actually, as I said, a misconception. And people are just about beginning to realize that. One would have to do and actually a compare between an ad hoc arbitration and an Institutional arbitration to be able understand the difference. But as I said, it is a misconception. Second, we do not have that many Arbitration centres as yet and for those parties who provide for Institutional Arbitrations in their Contract, that an elite lot who understands the importance. So as a result, you end up having still... because what most of us don't realize is that when contracts are drafted, very

least amount of attention is paid to Dispute Clauses. It's like a honeymoon period where nobody wants to think of a divorce and therefore very often, we have very confused and complicated Dispute Clauses. Fortunately, in our firm, we have a very healthy interaction between the corporate team and the disputes team, and whenever you have a concern on what to choose and all of that and we are there to guide them. But I don't think that happens everywhere. And as I said, most people don't realize the importance of it. Now these days you see most of the contracts having Institutional Arbitrations. But if you ask me the reason or the advantage or disadvantage, as I said, firstly, people are under this misconception, that it is very expensive, which it is not. Second, and most important is that all these institutions have rules. So there's a prescribed procedure. While of course, our Arbitration Act, also, in that sense, does have some sort of a procedure set in. But having Institutional Arbitrations always sets a proper regulatory mechanism. There's a proper rules in place which in ad hoc is as the name suggests, ad hoc. And if you have sensible parties and advocates representing both sides, then yes. Then even in ad hoc, you can have a sensible procedure. But unfortunately, when parties are in a dispute stage, the defaulting party, if I may say so, is not always very cooperative, and we'll always look at ways and means to delay and drag and defeat the process. And therefore, that's the other reason, which I feel is very important and which parties don't realize to start with where they are drafting the clause. And of course, in terms of Arbitrators, most of the institutions have a very eminent arbitrators on their panel, which in ad hoc is kind of.... Ad hoc, as the name suggests, it will be left to parties to decide. Also, in terms of costs, in terms of Arbitrators' fees... MCIA, for sure has some sort of a cap and it's regulated in that sense. Also, a lot of assistance is rendered. So, I feel all those advantages are there in the Institutional Arbitrations, which parties are now beginning to realize. And of course, so the new contracts that you see... as we speak today, most of them would have the Institutional Arbitrations. But the earlier contracts, when this was not well known and the advantages were not known, we still see a lot of contracts with ad hoc Clauses. I'm not sure whether that answers your question, but did you have anything else specifically which you would have liked me to address?

GATHI PRAKASH KARRAH: I think that was perfect. Anything specifically insofar as Government and State-Owned Entities instrumentalities in that context of arbitral versus...

BINDI DAVE: So, all the more, all the more, all the more, I think in the Contract where Government is a party, we've not seen.... I mean we've yet to see.... okay, let me rephrase that. Not all Contracts to start with have arbitration clauses. And even in the ones that have arbitration, it's not... hardly ever you will find an institution specified. Though Maharashtra Government now has a policy in place. And is highly recommending incorporating the MCIA

as the institution. Of course, it's a suggestion. So Maharashtra Government, definitely. I'm seeing that. But as we speak, it's happening now. But if you... and normally disputes would arise in earlier contracts... So, that's where there is a lot of reluctance. But as I said, we are seeing the times changing and hopefully things will improve for the better.

GATHI PRAKASH KARRAH: Thank you, Ms. Dave. Mr Iyer. My question, next question is for you, Sir. The retired Supreme Court Judge, Justice Hemanth Gupta, recently expressed his views on how the appointment of arbitrators should go beyond former judges to include experts from other domains. Do you agree with his view and would you nominate or agree to appoint a subject area expert in an arbitration?

IYER NARAYANAN H: Thanks, Gathi. 100% yes, we are in full agreement with the views of Justice Gupta. From the public sector side, I can't really say for the Government, but from the public sector side most of us are ready and willing to have subject matter experts as arbitrators. The difficulty which we find is however, the stumbling block arise, in case the matter goes to court for an appointment. Our experience is that Judges, by and large appoint retired judges as arbitrators. So even though we give names of persons who are subject matter experts, as possible persons who could be appointed and who are in no way connected with us, our experience is not good. I mean either the contractors are not willing or the court is not willing. And if at all, they extend themselves a little bit, they feel that they have done a favour by appointing a lawyer as an Arbitrator. So, I don't know... we need a long way to go to get subject matter experts of Arbitrators.

GATHI PRAKASH KARRAH: Thank you, Sir to extend the same question to Gaurav. Gaurav, as an expert in your view, would an arbitrator with subject matter expertise and not necessarily have a legal background? Would that be a good idea? Would he be a good arbitrator He or she?

GAURAV GULATI: Yeah, I totally agree. Just to give you an example, recently I was part of an arbitration where the entire arbitration was around a very technical financial issue and we had three judges we had experts from both sides. There were about six to seven expert reports. I don't think any of the arbitrators read those reports. Right? I'm just saying, though having one technical person like a hybrid Tribunal is something I think which should be the way forward. And similarly, I mean with the Government also, because most of these arbitrations, a lot of them are very technical, right? Either there's a delay issue or there's an oil and gas issue you need experts to understand and... what I understand.... I'm not a lawyer, but what I understand, that arbitrations are like fact finding. Right? It's not just a legal issue, right?

There's a lot of fact finding that needs to be done at the evidence stage. So I really think having a technical expert, in not all arbitrations, but in quite a few of them in the large one, specifically, the ones which involve the Government and the PSUs. I think it's a great idea.

GATHI PRAKASH KARRAH: Thank you, Gaurav. I think it also makes lawyers lives easier when there is an expert involved. So consensus there. Yes, of course. Mr. Iyer.

IYER NARAYANAN H: I would like to say that the technical experts, … they understand the problem very fast. So you don't need to waste time. One. Number two, they are not so much bothered about procedure. And what we found is that the moment a judge comes in as an arbitrator. I think he thinks that it's a court. So both sides privately, we beat our heads and we don't know what to do and we are at a loss as to the waste of time. So that's it.

GATHI PRAKASH KARRAH: Thank you, sir. That was very insightful. Mr. D'Souza, my next question is for you. With the introduction of the Commercial Courts Act, has there been a shift in your view towards commercial litigation as a preferred mode of dispute resolution over arbitration, specifically, in, say, for example, PSU contracts? And what factors do you think have influenced such attention, if at all?

OSWALD D'SOUZA: Good evening, to all. And thank you, Gathi, for inviting me for this seminar. I don't think Commercial Courts are a preferred option to be honest. I don't know why PSUs are now shifting from arbitration to courts? It's difficult to understand. I find Clauses in Contracts… PSU Contracts, now where they put in a range 20 lakh to 20 crores will be arbitration. Either below 20 lakhs by about 20 crores, we will go to the court. They don't specify commercial courts. They say courts. I don't know what the reason is? Maybe the reason… maybe that costs are prohibited now in arbitration. Secondly you don't get those kind of quality arbitrators have retired people who are arbitrators. And generally, the faith in the arbitration process may have somewhere been affected credibility of the process. I don't name PSUs. Maybe there is something that we need to do and Arbitrators, Lawyers, Counsel need to do to get this credibility up again where all parties feel safe and feel comfortable with arbitration. That's what I …

GATHI PRAKASH KARRAH: Thank you. Thank you, Mr. D'Souza. Ms. Dave, the similar question for you. In your view, is commercial litigation under the **Commercial Courts Act** at par with arbitration as a board of dispute resolution in terms of, for example, cost, efficiency, timelines, et cetera? Was that the hope when the shift happened from… I mean, the shift is happening from arbitration back to commercial litigation?

BINDI DAVE: So, I won't say that it was meant to be a shift from arbitration. And, well, it is not that I will definitely say. For several reasons actually. And of course, I'm speaking of Bombay. I'm not speaking for the other States and cities. In Bombay unfortunately, what we see is that the judges who have been assigned to hear commercial court matter, also have been given other assignments. So, they are not exclusively hearing commercial court matters. So, they are not able to give that kind of time. Second, we've had... Bombay is known for its backlog so that is always there. So, I don't think that it has helped in the manner that it ought to have or should have or was thought it would help, and I am definitely not seeing any decrease in the arbitration because of that, because I think clauses which have.... I mean, parties still provide for arbitration. Because, as I said, people are realizing. And especially with the amendments in the Act where the disposal has to be within one year, I think that has worked fantastically. And I've experienced it myself when we are trying to appoint to retired judges as arbitrators. They actually declined the appointments, saying that they will not be able to finish it in one year, and therefore that one year timeline is actually very seriously considered. Though of course the extensions are provided for in the Act itself. So, the point I'm making is that arbitration is still the preferred mode. And I don't think the Commercial Court, I mean, I'm hoping that it will actually help, but as we speak today, no, I think if I recommend somebody, I would still recommend arbitration.

GATHI PRAKASH KARRAH: Yes, Mr. D'Souza.

OSWALD D'SOUZA: One more thing is it shifting from arbitration to courts is also counterproductive, in the sense that the courts already logged with so many cases. It's going to be a long time before your case is heard and it claims are heard. It's going to be actually difficult for the PSUs to retain their Witnesses, retain documents for that long and Claimants are going to take advantage of that kind of situation. In the long term, the costs are going to be.... the cost and the risks are going to be very high for all parties. The party that can withstand that and kind of keep their witnesses intact, the documents intact, and preserve their documents properly will have the upper hand in the long term. Imagine a matter coming up after ten years, for the claim of 100 crores or 200 crores. I'm a project company. My claims are never less than 100 crores. And if I have to go to a Commercial Court and that hearing comes up after 10-15 years. Private company will spend a lot of money in preserving Witnesses, documents, getting Witnesses even if they have retired. I don't know what PSUs will do in that case.

GATHI PRAKASH KARRAH: Definitely it is Mr. D'Souza. I think when a couple of tenders that we've noticed which have included commercial litigation or gone back to it, I think maybe the hope was that commercial litigation under the **Commercial Courts Act** is going to be very different from what it has in fact turned out to be since 2015. So I think we can chop it off to that.

BINDI DAVE: I'll just add what we are trying to do. And of course, as I said, everybody is hoping that works. One is the peculiar jurisdiction, at least in Bombay, we are looking to increase and that's almost there. The other one suggestion. In fact, if one would have asked me is, our court fees are capped after a particular level. We are capped at 3 lakhs unlike all the other cities where everywhere else it is there, I don't know. So, that is something that should be considered to prevent frivolous adventurous litigation as we would once say. There are measures which could be adopted to improve the scene. But as we speak I don't think it's kind of shifted.

GATHI PRAKASH KARRAH: That's a great point. Ms. Chinoy, my next question is for you. In the spirit of resolving disputes and not necessarily through arbitration. The Government has recently... and by recently, I mean, less than a month ago, passed the Mediation Act, which Inter alia also applies to Commercial disputes with the Central and State Governments and or its instrumentalities... instrumentality. So as a first step, do you think parties are now likely to resort to this Pre–arbitrary Statutory Mediation mechanism? And specifically, since this has the effect of arresting limitation and offers like a time bound, structured process for resolving disputes, do you think practically it's going to make a difference? We have yet to see what actually happens. But what are your views on this new act and in resolving disputes with the States?

ZARINA CHINOY: See Gathi, in the first instance, having mediation... It's always great. Right? Let parties sit across. Try and sit and see if they can come to a conclusion quicker. Arbitration, as you know, is it's document heavy. It's witness, heavy. It's fact heavy. All of that. And then the Arbitration Award has to be written. It has to be reasoned. So, mediation is a great sort of first... let's say... it's less procedures, less hassle. It's the ability to try and get that handshake across. So, if it's mandatory, it would be great. It's not mandatory as yet. So, there are two paths to it. If it's between private parties, we always sit down in any case. It's not like we're going to say no if I have a dispute, let's say with... We won't say that we're going straight off to arbitration. We will sit across the table. We will try and see if we can mediate. We will try and see if we can resolve. If we can't, then we go on to arbitration or whatever our dispute mechanism is. With PSU's, a lot of big tenders that we come across in Shapoorji we have

mediation written into our Contracts anyway. And a lot of PSUs also do. I'm guessing I would refer to that. But we do have a mechanism by which we do, which we are required to mediate and mediate... There is a process. There is a procedure... Sometimes as an institution, also that's been recommended, which we have to follow, or there's a choice, whatever it be. So we will try. But with the PSU trying to mediate, they will say that we will come to that table but since it's not a binding process, since it's also a highly confidential process. The likelihood of us settling across the table is a little lower in that sense. But yes, it is a good first step. How far it goes, we'll see, because it's just a brand new Act. I won't keep my hopes up too high because a lot of other changes have to happen in the law for us to see where mediation will take us. It's a great first step. I mean, it is better than going down the whole arbitration route with the processes, the procedures, the costs, the time. It would be a great way to settle. But time will tell.

GATHI PRAKASH KARRAH: Mr. Iyer. I'm sorry. The next question is for you. The Government has recently introduced the *Vivaad se Vishwas-2* Scheme for voluntary settlement of contractual disputes which involve the Government and Government undertakings. What are your views on this scheme, sir? And its effectiveness in resolving disputes? What are your views and your predictions for the future and your experience so far, if any?

IYER NARAYANAN H: Yeah. We had the *Vivaad se Vishwas-1* in which a huge amount of claims have been settled. Now we have got this Contractual Disputes Scheme which has come *Vivaad se Vishwas-2* and it just really helped the PSUs. It makes it easier for us to settle, because we got a benchmark already as to the kind of percentages already prescribed in case an award is made 65% and in case of the 34 challenge has also been dismissed or it has upheld the award at that stage the Court stay, then 85%. And interest of course at 9% post award. So, most of the PSUs are by and large okay with it, provided for the feel that the claim and the award amount was reasonable to a large extent. So, that's a big if. What we have experienced in the past few years is that there's a huge padding of claims. And which is where the PSUs have become very wary of arbitration. So we would prefer that if genuine claims come up the PSUs will be very happy to settle. And in case it is padded up, then well, it becomes a little difficult. Because once somebody has written on the file or given an opinion at some point in time in writing that these kind of claims are not okay or something, then it becomes really difficult for us to function.

GATHI PRAKASH KARRAH: Thank you. Thank you, sir. Mr. D'Souza. The same question for you, but from a contractor's perspective, what are your views on the *Vivaad se Vishwas- 2* scheme? And its effectiveness… effectiveness in resolving disputes.

OSWALD D'SOUZA: The intent is good. We welcome the intent. I mean L&T is a company which always wants to settle the disputes. We don't get into arbitrations or courts. We'd like to avoid that and spend our energies on delivering and executing projects for the nation. But welcome step. I see a few issues in this, in the sense that one is there's a cutoff date of 31st Jan `23 put. Any award that comes before that date is only is the award that can be going for a settlement. I don't know why that date has been put? Maybe there's some reason, but it should have been kept open. If an award is challenged in the court and again there is another date for 31st March. That is one. Number two, the 65%. Number is too way too low. I mean, just imagine a company like us. We execute a project for 18 to 24 months. Then there are delays. Invariably, it goes up to 24 or 28 months. And during the project, we have a lot of claims that come up. We don't agitate those claims. We don't get into arbitration, because the project is under execution and we want to maintain a good relationship with the customer. We don't disrupt the project. We want people from the project to be moving out and sitting and doing arbitration. We wait for 24 months, 28 months and then finally, at the end of it all, we go and start negotiating with the PSUs. Negotiations take their own time. Another one year goes by. So, you spend about 30…. 3 years straight. Your money is stuck. Your costs are incurring. Interest cost, cash flows are affected. And then you think of going to arbitration. Then what do you do? You fight the arbitration for 18 to 24 months, get an award and then you say, take 65%. How do I, even as a General counsel, go back and tell my management that takes 65% after all that we have gone through? So I think that number is an issue. Secondly language in the scheme itself, I was wondering what it means. The second part is that you get 85%, is then there's a court award. I don't know what that court award is? Whether it's after 34 is disposed of or in the infant stage of…? Because, after 34 is disposed, I mean, if the Contract has succeeded, why would he take 85%? Because, by then we have got the money, and then the next step is only 37. And 37 doesn't impact us because it's very remote that anything is going to get reversed in 37, if it's a concurrent judgment. So these are issues that we have in the scheme, but I'm hopeful. The other thing that is missing in the stream is I think they should have covered disputes prior to award or while the arbitration is going on. Before the award is passed, or even before you get into arbitration if they would have covered that I think 65% would have been welcomed.

GATHI PRAKASH KARRAH: …at that stage, before you've incurred that…

OSWALD D'SOUZA: Absolutely.

GATHI PRAKASH KARRAH: Here's hoping for ***Vivaad se Vishwas-3*** which resolves on these issues. Gaurav, my next question is for you. As an expert, what is your general experience been in arbitrations where the Government is a party, whether as a Claimant or as a Respondent? And more specifically, in your experience as an Expert Witness in disputes involving the Government, what are the advantages and disadvantages of institution versus ad hoc and what factors do you think influence such a choice? And do you see it changing one way or the other?

GAURAV GULATI: Yeah, there's a positive change for sure as far as we are dealing with the Government. I mean, a lot of the Construction Arbitrations that we do in India domestically, almost all of them are against the Government. But it's been very heartening, at least for me last two years, at least there have been three arbitrations, which are very high stake where the Government has hired us as experts. Because usually it's a very cost driven... I know the PSUs... their hands are tied. It's very cost driven. But I think when the stakes are high... I think that change is happening and is important. Just to give you an example, in a recent arbitration that I represented the Government for, one of the State Governments, it was an over $2 billion claim. Now, if we don't defend that, you know, to me, it's my tax money. It needs to be defended, right? Like sir was saying there's a lot of padding up and all of that happens. I think it's important that that happens. To me, hiring experts, not every time, but I think it's important for matters which are large, which are huge, and which requires some technical or financial assistance. That's number one. Number two, I think the other thing is working with the Government these three arbitrations have really shown us a lot of... these are issues, but they're getting better but.... like document management. Most of these Contracts or most of these Contacts are maybe 7, 8, 10 years... like delays are huge a lot of times and you don't have ownership of documents there is a site involved. There's a head office involved, the legal, the contractual... I think we struggle a lot. I mean, even with the private contractors sometimes, but with the Government is another issue. I think that's something... I think they are also learning the way they're operating now with the contractors. They are the keeping the paperwork better. I think that's something which a lot of companies are ... the contractor, they're doing it, right? The claim management, or they're getting people professionals to come in, figure it out when they are ready, when something happens. I think that's something that in my experience was a challenge. Because you're working on half information. You're trying to piece the puzzle, I think that's another issue. But it's definitely improving. I think somehow we need to find a way, the entire environment of the PSU.. But then you understand even the

decision makers are like for.... decision making is another thing while our contract in that arbitration that I just mentioned. I don't think we still have a contract with the Government. It's just an LOI kind of a thing on the mail. Because it goes to various kind of levels, and all of that nothing easy there. I think these are the challenges that I see but frankly, I am positive. Because I am seeing that kind of a change happening with the Government. And I hope they defend the PSU.. and defend with good lawyers and with good experts. I think that's something which is required, especially the high stake ones. As far as the institutional versus ad hoc... for me, I think like Bindi said, that cost is something that everybody talks about. But frankly, it does turn out to be more expensive. A lot of these Domestic Arbitrations. Just to give you an example, I had written report and I was supposed to be cross examined for a day. And the Cross Examination went on for five days, just one, one witness. And obviously somebody's paying for it, right? I mean, somebody's paying for it whoever the client is paying out. So to me I think it's a very inefficient place for as an expert, because once you're given a procedural order in an arbitration, which is under some rules. You know, this is what it is, right? Here it's open to the Tribunal. It's open to the person who's cross examining you. I mean it's very subjective. So frankly I do think going forward... it's important that more and more arbitrations are under something like the MCIA, or ICC whatever institution there is and I think even the Government Contracts and all should include that. Because especially in domestic... If you look at the Domestic Arbitration, most of them there'll be a PSU or Government involved that's what I have to say.

GATHI PRAKASH KARRAH: Thank you, Gaurav. Ms. Chinoy, I think from Garav's answer the next question is that we all stop at... unfortunately, the contract does not have an Arbitration Clause, so we cannot do this anymore. But in fact, that is not the case. Because in an Arbitration Agreement that... in an Agreement that does not provide for Institutional Arbitration, an Arbitration Agreement. You can consent to availing administrative assistance by a suitable institution. So, there is a provision under Section 6, of the Act, which allows you to do so. It is just that you need consent. Only in this case it is post dispute. In your view, is that something that you have seen in your experience, people actually post dispute agree to an Institutional Arbitration. Have you ever seen something like that? And why do you think people don't go in for this and they feel like they agreement is a hard stop?

ZARINA CHINOY: Honestly Gathi, when the contracts that I see, most of them, the Institution is written in and there's not that much leeway to play with it. But if you ask me if it wasn't written in and somebody, come to me and said, “Shall we do an Institutional Arbitration?” Then I would just have to look at the facts. I'm not going to say ‘yes’ straight off. I do understand that it could be cheaper. It could be faster, it could be more efficient. But

which side of the table am I on? Am I in the right? Am I in the wrong? What are the kind of claims that I want? Is it that I would have to pay out or buy? And… I mean, there are so many things that go into this strategy that I would have to consider before saying yes or no. And then the kind of institution that they want to propose, the kind of fees that that institution have. Every institution is not built equally. So the fees, the sales would play a part. And then depending on that, the kind of lawyers that I'd have to choose, all of these have to be considered into the merits of the case. So, saying, "yeah, I'm going to do Institution." doesn't work that way. Would I do ad hoc, I would prefer not to. That, yes, I would say that that would be my personal opinion. Because in terms of timelines, in terms of how to go forward, in terms of execution, all of that ad hoc does become a little more difficult. But again, strategy is really important. Where do I want? What do I want? How do I want? Everything comes into play.

GATHI PRAKASH KARRAH: Thank you, Ms. Chinoy, It's not a simple yes.

BINDI DAVE: Sorry. I just add. Since you asked whether we've seen this happening…Fortunately I have. And in heavily contested matters. But I think it's very important to have a reasonable and sensible law firm or Counsel on the other side. Because while clients will think, like Zarina mentioned, whether you want to agree, not agree, whether you're on the right, wrong… and maybe not everything is black or white. But I guess there's different leverages playing. But if you have a practical and a sensible law firm… and I want to tell you of two examples. Not very recently, but since 1996 one is where we had a Dispute Clause Arbitration, but with three arbitrators, and no institutions specified and fortunately… and we were representing an individual against the MNC, … so, we were not nicely balanced, either…. But fortunately, the law firm on the other side and the Senior Advocate appearing, we could arrive at an Agreement, from three arbitrators we agreed to one arbitrator, we agreed to an institution and we had an award in less than a year's time. Another example was where we were representing a client who had, I think about 40- 50 separate agreements with different Group Companies with an IT service company on the other side so the principal parent companies would have entered into some sort of a Master Agreement. And then there were individual agreements amongst those 40-50 entities. And there was some sort of a global dispute which had arisen and I was to be the Claimant, and I would have actually been required to file or start some 50 odd arbitrations. Consolidation, of course, was one option that we would have had, but we actually discussed with the law firm on the other side and we said, "Look, I mean, I understand that I will end up spending, but so will your client." And the firm was very sensible and we made parties enter into a new Arbitration Clause. All those 40 entities on one side and our 40 companies on one side. Of course. It took some time to get there… and not all were Indian. So, if we had other laws kind of getting involved in lawyer is getting

involved in all of that.... But we actually achieved that. So what I want to tell you is, of course, from the several matters that I would have done, these are like two examples, but it is possible if you have sensible and reasonable advocates, I think.

GATHI PRAKASH KARRAH: I think it's very happy to see that you can actually separate the dispute from the dispute resolution instead of mixing the two up. And I think my final question, at least from me. And then I'll open it up to the audience. Ms. Dave Is, for you. The Government has recently constituted the T.K. Viswanathan Committee. It was in June 2023. To discuss reforms in Arbitration Law. In view of our discussions today, what reforms do you think are needed to improve resolution of dispute, specifically, where a Government or a State-Owned Entity is involved?

BINDI DAVE: So, the one that I really connect with because, I've experienced it on both sides and not necessarily only when the Government is on one side, is some sort of a power to the courts to be able to modify the award under 34. So, while I understand that this was there under the old Act, and there's been a conscious decision to not have this and there are judgments after judgments which say that you cannot read that into 34, though parties have tried that. But that is something... because I have seen a lot of arbitrations where the awards get set aside and you then kind of start *de Novo*. So, and as I said, I've been on both sides... And it's a huge cost for parties. So of course, I understand that it will open the floodgates and you will have more, you could have more problems on your hand. But the way the entry to 34 is now restrictive and with the conditions of deposit and all of that, I think we could have some similar tests being put in place. And I really think that the court should be empowered to modify is one recommendation that I definitely would like to make.

GATHI PRAKASH KARRAH: Other than the Supreme Court with initial inherent power.

BINDI DAVE: Yes. Apart from Supreme Court. That they've exercised. But then by the time you've had five rounds arbitration, 34, 37, and then...

GATHI PRAKASH KARRAH: The cost has gone up.

BINDI DAVE: Absolutely.

GATHI PRAKASH KARRAH: Is there anyone who would like to ask in a question to anybody, if you could? Please introduce yourself, and if you are directing it to a specific panellist, then if you could please name them. Would you like to come forward

AUDIENCE 1: Yeah, I am Prakrut, I'm a 3rd year student of law at MNLU. So, my question is, even though lately it has been getting better, we have seen a trend where State-Owned Entities are usually reluctant to submitting disputes wherein, they're involved to getting adjudicated by a private entity or a Tribunal. More so, if it's a foreign Tribunal. In those cases, usually they have some sort of legislation which requires them to take a previous approval. I think Iran could be an example where they had some sort of a Constitutional Provision, where they wanted that every time any State-Owned Entity or State submits to an arbitration, there must be a previous approval that might be sought. And that creates a lot of confusion between whether or not there actually has been an approval on part of the State-Owned Entity or not. And later when they see that the arbitration is not really going into their favour they pull in this card by saying that we never had a valid Arbitration Agreement. So how do we really find a solution into this?

GATHI PRAKASH KARRAH: Would you like?

OSWALD D'SOUZA: I am not sure I understood the question, but see, contracts in India, with PSU the Contract Clauses, Arbitration Clauses are very robust and there has never been a dispute that the clause itself is not valid or something. In fact, recently the Supreme Court upheld IOCL's very elaborate Clause on arbitration. Though it had so many layers to it. And IOCL have the complete discretion on whether to decide whether a particular dispute will go into arbitration or not? The Supreme Court permitted. I don't think we have that problem. This must be somewhere in Iran.

GATHI PRAKASH KARRAH: I think Investor State disputes is what you are referring to.

AUDIENCE 1: Yeah. Largely Investor State disputes.

OSWALD D'SOUZA: Sorry can't throw any more light on that.

GATHI PRAKASH KARRAH: I think the question.... So, I think the focus this discussion has been more on domestic disputes, but for Investor State disputes, I'm sure there's a different panel that you can attend tomorrow, who would be very happy to answer your question. Is there anything any other question that anyone would like to ask? Or I have more questions that I can ask ?

AUDIENCE 2: Good evening, sir. I'm Sabarnika. I'm an Associate at Bharucha and partners. My question is direct and more towards Mr. Gaurav, Mr. Gulati. Sir, you mentioned how PSUs are under pressure. They have to keep in mind costs when it comes to arbitration, because more often than not arbitration starts mostly in the courts with the appointment of the arbitrator or a Section 9 application. So, PSUs are a very wary in my personal experience, where they are very strict that we will not have any interim applications whatsoever. Let's just go straight on it's just head, to that extent Sir, to what extent would you recommend bringing in witnesses in a highly technical dispute? Because that would just prolong it more and more where we would want to then reexamine that Witness or most times and not... suppose it's a construction dispute. The person who was in charge of the work from the PSU has already retired by the time the dispute has started, or he's posted somewhere else. So there's a concern there for the company that you have to now arrange for the transport and if the witness examination is not completed in a certain amount of days. And PSUs are also very wary nowadays in the judgment of ***ONGC versus Afcon,*** we saw how detailed ONGC's arbitration process are. So, with that kind of pressure on PSUs, how do we, as lawyer as their lawyers recommend them in the terms of witness examinations?

GAURAV GULATI: I agree, the PSU, whoever is taking decisions, the PSUs are under a lot of pressure, that's for sure. I mean, it's not a simple thing. But, you know, like you said, you know, a lot of these disputes are very technical in nature. In normal construction will have a delay issue, right? We'd always have a delay issue. And until unless you defend it well.... like sir was saying that there's a padding from the contractor side or there's some... because you're not defending it properly. I think it's really critical that the Government starts doing that or the PSU start doing that and I don't know the lawyers here can answer how legally it can be easier for them. But I do believe that, right now also, we are doing an arbitration for a Global Contractor against the Government here, and we know, I mean we are independent experts. We are giving away. But we know that usually the Government will not get an expert, which is strong enough to kind of... you know, get the right point out of the arbitration. What is the technical issue and what is the answer to that? Even defend that or fight that, that's something that is required according to me, but I don't know what the legal issues are for them to be able to do this.

IYER NARAYANAN H: First thing is pressures are the first force there. But that is there for everybody. And we manage it. So that's fine. We are okay with dealing with arbitrations fast. The issue which I find is that the arbitrators want to go into evidence at that time it becomes little difficult sometimes because the persons who handle the contract, We are in a transferable job, so most people, because of some vague concept of vigilance, that person should not be

holding on to the same post beyond some years in PSUs and Government. They keep getting transferred, whether it's necessary or not. So what happens is the guy who was actually on the field or who was actually handling the contract, he is no longer available at this particular spot and easily available. So the new person who comes in, he has to go through the records and the files, and then he tries to make up. There we have an issue on that. And yes, we are ready to go to institutions also. The mindset is changing. At one time we had the mindset that it should be our employee who should be an Arbitrator. People have moved from there. We are willing to have outside people as arbitrators. The mindset today is only that we are willing to go fast also. But as long as the claims are reasonable, well, fine. Things will be fine. Okay. So, I am coming down to that. I mean, I'm coming down to that as an issue.

GATHI PRAKASH KARRAH: Thank you, Sir. Yes, of course, Ms. Chinoy.

ZARINA CHINOY: Just to add. Reasonableness is decided on both sides of the line... just to say that. I don't see PSUs ever admitting to any delays. They believe that the contractors always delayed. So, it's a question of both sides.

IYER NARAYANAN H: Since we are on this issue and you are lawyers, I think you may benefit from our experience. What is reasonable is, we expect that a contractor who, let us say takes a one crore contract. We'll get into nitty-gritties a little bit. So, it takes a 1 crore contract and 80% of the work is done. And thereafter he hesitated because he has financial problems or something like that or some issues he experiences in the contract itself while doing it. And he goes, now 80% of the work is done and let us say he's paid for largely on the 80% work and 20% of the work is remaining. Okay? Now, how much can a man claim for the balance 20%? So, we expect that most people who are doing business are wise, that in a contract of one crore, we don't expect a person to expend 2 crores or something. We don't expect a businessman or a Contractor to be that stupid. So a person, we expect that if he's a contract, he spend 80 lakhs, and he's got 80 lakh on the balance 20 lakhs, which is left unspent at best. You can claim maybe 5 lakhs or 10 lakhs or something like that but if a person instead of 20 lakhs, he wants to claim 2 crores and well, that's unreasonable.

GATHI PRAKASH KARRAH: Thank you, sir. I think we have time for one more question. Is there someone who.... Gentlemen here, please.

AUDIENCE 2: Okay, should I pass the mic to him? Because I will.

GATHI PRAKASH KARRAH: Yes, please. I thought we'll have some questions from this side.

AUDIENCE 3: Good evening, everyone. I'm Sudarshan. I'm an Associated Federal and Company. My question is more related towards the Commercial Courts Act rather than arbitration. So recently, the Supreme Court has said that the pre-institution mediation under 12 (A) is mandatory. Now if their parties are commercial parties, and there is going to be a commercial dispute. Do you think that this creates an unnecessary procedural hurdle for the purpose of the dispute? Because a party will not institute commercial litigation proceedings if there is a possibility of a settlement?

GATHI PRAKASH KARRAH: Anybody can...

BINDI DAVE: Sorry, what is the question again? You think that's something that's not going to work.

GATHI PRAKASH KARRAH: Is 12 (A) even really necessary? Did they have to make it mandatory?

BINDI DAVE: I agree. And in fact, in most of the matter, there's the carve out that if you are applying for entry and relief, add interim release, then you don't even have to go through that. And therefore, in all matters... in Bombay whether we like it or not, has become an ad interim court. And there won't be any matter that gets filed where you don't apply for ad interim. So yes, I agree. It is a bit pointless. And if parties genuinely wanted to mediate themselves they would have... obviously, as Zarina mentioned, a private party would definitely try that before getting into court. So yes, I agree but having said that maybe it's not that we can speak for all kinds of disputes, maybe a lot of times what does happen is filing of a proceeding itself acts as some sort of a leverage where the plaintiff is not necessarily seeking to snatch some order or something. Because you have a claim filed against you, you have to report that and all of that. So it does come with its own problems. And maybe, the earlier attempts at mediation may not have worked. Maybe it may have helped. I mean, I would presume that the Legislature has put this Provision examining and keeping things in mind. I'm yet to see it actually work and help, but maybe it helps. Thank you.

GATHI PRAKASH KARRAH: Yes.

OSWALD D'SOUZA: I have a different view. I think it'll help. You need to have mediation. And it's time bound mediation. I think 60 or 90 days that it prescribed. It'll help tremendously in getting the parties together and what happens is if you have a mediator who's an expert who understands the issues, the technical issues, the commercial issues, you can put both get the parties to see reason and get a settlement done. I have actually used mediation in some shipbuilding contracts with good results. So, I think that's well is welcome. Thank you.

GATHI PRAKASH KARRAH: I think it's the last question. I'd like to ask everyone if they believe that Section 29 (A) of the Arbitration Act, where you can extend the timelines for concluding arbitration. Whether you think that is working in today's date? Because do you think that the courts are giving timeline extensions without properly applying their mind to what has happened so far, how much time, depending on who the Tribunal is, et cetera, or do you think that it's something that is working perfectly fine and it's keeping the arbitration timelines in check?

BINDI DAVE: In my experience, sorry in my experience, I think it's working extremely well, both, it acts as a pressure on the arbitrator, and I have seen it on both sides. I mean, I've had the benefit of being an arbitrator, and I know I'm very conscious of the timeline. And I have seen it in other matters where the arbitrators themselves are very conscious. They want to... and as I said, in fact, not just after starting the arbitration, I have seen this... I've seen the Arbitrators actually take some sort of a backseat, and otherwise the tendency was to take as many arbitrations and matter... like how we, lawyers function. I mean, you want more the work, the better. But I have actually seen an experienced arbitrators refusing arbitrations because they are conscious of the timeline. So, one is at the arbitrator level, definitely. And secondly, even at the Court level, I have seen instances where unnecessary adjournments were granted and that's why there was not much progress and we've had... I'm not naming the judges, but we've had judges actually change the arbitrator. So, yes, I think it's working very well.

ZARINA CHINOY: We just did a Section 29, and we have to give details of why we needed that extension. And we had to put in a fair bit of detail. And the judge did ask us. We did have to substantiate that. And so I think that they are very aware of the timelines that they are extending. And so the reasons have to be cogent, they have to be clear and otherwise I don't think we'd just get it for the asking.

BINDI DAVE: One more example. This matter where we were doing, where we had a Tribunal of 3, and we'd not made much progress at all and we were in an application under

29(A), and the Bombay High Court Judge actually… yeah, and we kind of disband the entire Tribunal. And we then were … if I may say so, kind of pushed into having just a sole arbitrator,

GATHI PRAKASH KARRAH: So, they acted like a super institution governing the other.

OSWALD D'SOUZA: I have had mixed experience with that. Sometimes the arbitrators themselves are very conscious of the time limits and finish the arbitration very fast. I've had Arbitrations close out within twelve months also. But on the other hand, there are Arbitration where you keep getting extensions from the court. And what happens if on the Tribunal, you have 2 Chief Justices, retired. And you go to the Court for an extension, no, Court is going to refuse that extension. And it has happened over extensions have been granted for the asking without any reasons, without any delays.

GATHI PRAKASH KARRAH: I think timelines are one thing that everybody is very particular about in arbitration and generally in resolving disputes. So that is something that we hope does not change with frivolous use of 29(A) or granting. I think with that we will close this panel discussion. Thank you, everybody. Thank you so much to my stellar panel for being so patient and giving us the time. Thank you, everybody. Hope you had a great time. Our next event is a debate I would love if you could join us and we'll take a short break and then reconvene. Thank you.

~~~END OF SESSION 4~~~