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INDIA ADR WEEK DAY 2: MUMBAI

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SESSION 3

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10th Oct 2023

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IMPORTANT ASPECTS OF CONSTRUCTION LAW-INDIAN PERSPECTIVE

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2:00 PM To 4:00 PM

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Speakers

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Kanika Arora, Partner, MRP Advisory

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Puran Kumar, Head - Contract Administration, Larsen & Toubro

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Steven Lim, Arbitrator & Barrister, 39 Essex Chambers

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Vinodkumar Menon, CEO, IRB Infrastructure Pvt. Ltd.

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Sandeep Upadhyay, Managing Director of Infrastructure Advisory at Centrum Capital

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Limited.

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Moderator

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Mayank Thakur

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HOST: All right. So now I would call all the panellists upon the stage and take the charge. So,

I'll start with the moderator, Mayank Singh Thakur, senior partner, MASIN. Then our first

Speaker, Mr. Puran Kumar, Head, Contracts, Administration and Claims Management Larsen

& Toubro. Welcome, Sir. Then we have Mr. Vinodkumar Menon, CEO, IRB Infrastructure Pvt.

Ltd. Next, we have is Mr Steven Lim, Arbitrator and Barrister, 39 Essex Chambers. Next, we

have is Mr. Sandeep Upadhyay, Managing Director, Infrastructure Advisory, Centrum Capital

limited. Next, we have is Ms. Kanika, Aurora Partner from MRP. Advisories. So, before wasting

any more time, I would like to hand over the stage to Mayank. Over to you, Mayank. Thank

you

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MAYANK THAKUR: Thanks a lot Pallavi. A very good afternoon and warm welcome to all

ladies and gentlemen present here. Allow me to set this stage for the significance of today's

topic: Important Aspects of the Construction Law-Indian perspective.' I am Mayank Singh



1 Thakur; I am your host and moderator for today's session. We welcome all our panellists and
2 speakers who are industry experts and bring unique perspective and expertise knowledge to
3 shed their light on today's topic. But before we start our session, I would like to introduce our
4 distinguished guest. Our first panellist is Mr. Puran Kumar. Mr. Puran Kumar MTEch from
5 NIT, Kurukshetra. He's a seasoned professional with 28 years of experience in construction
6 industry, predominantly in the domain of contract administration and claims management of
7 infrastructure sector. He currently holds the position of Head Contracts and Claims
8 Management for Transportation Infrastructure, IC of L&T. His expertise includes handling
9 Construction Contracts, Project Management, Dispute Resolution, complex legal framework,
10 risk mitigation, building strong client relationships. Mr. Puran has actively participated in
11 various conciliation and arbitration proceedings, mediations and negotiations. Contributing
12 to fair and efficient conflict resolution in construction sector. Mr. Puran is passionate about
13 training and raising awareness in contract administration and claims management. And he
14 frequently speaks at Industry Events. Welcome Puran Singh. Our next panellist.... Hello ...our
15 next panellist is Mr. Vinod Kumar Menon. Mr. Vinod Kumar Menon, serves as a whole-time
16 Director and Chief Executive Officer of one of the Investment Manager of IRB InvIT funds,
17 India's first Infrastructure Investment funds. Mr. Vinod holds BTEch Degree in Civil
18 Engineering from BHU Varanasi, and brings with him 35 years of experience in Infrastructure
19 Development and Management. He is also well versed in infrastructure related disputes. He
20 has several decades of experience in Litigation and Arbitration, offering advice and handling
21 range of commercial disputes. Previously, he held the position of President Business
22 Development at this sponsor, IRB Infrastructure Developers Limited. Additionally, he
23 currently holds the role of Vice President at the National Highway Builder Federation a non-
24 profit organization. Welcome, Vinod, Sir. Our next panellist today, is Mr. Steven Lim. Mr.
25 Steven Lim is an Arbitrator and Barrister, having over 100 appointments as presiding Sole Co-
26 Arbitrator and Emergency arbitrator seated in Singapore, England, USA, India, South Korea,
27 Thailand, and Vietnam. He is also a member of English and Singapore pass. Mr. Steven has
28 extensive experience in ICC, SIAC, ICDR, SCMA, KCAB, UNCITRAL Rules and ad hoc cases
29 involving Indo-Pacific jurisdictions and further and involving Indian parties seated in and
30 outside India, as both Arbitrator and Counsel Mr. Steven has earned commendations such as
31 the 'Perfect Arbitrator', 'Extremely effective Arbitrator'. And then 'Outstanding up and coming
32 Superstar.' He is known for his competence, confidence, ability to manage cases effectively
33 while providing fair and impartial hearing to all parties involved. We welcome you, Steven.
34 Sir. Our next panellist is Mr. Sandeep Upadhyay. Mr. Sandeep has more than 20 years of
35 extensive experience in investment banking and corporate finance advisory focused on
36 infrastructure, energy and logistics sector with exposure of leading private equity, merger and
37 acquisition, public market, Project finance, Structural Debt and Finance structuring,



1 Insolventy and Bankruptcy Process. Mr. Sandeep joined Central Capital Limited in June 2008
2 and presently serves as Managing Director, Infrastructure advisor. He is an Alumni of XLRI
3 Jamshedpur and recipient of the prestigious Distinguished Alumni Award from the Institution
4 for his contribution in the space of infrastructure financing. Prior to Centrum, Mr. Sandeep
5 has worked with SBI Capital Market and IL&FS Transportation Network Limited. His current
6 role as a Senior Coverage Banker, Mr. Sandeep is responsible for sourcing and executing
7 fundraising and Corporate Finance Advisory deals across transportation, logistic,
8 conventional and renewable energy sector. Welcome, Sir. Last but not the least. Our next
9 panellist is Ms. Kanika. Arora. Ms. Kanika. Aurora is partner at MRP Advisory, who actively
10 contributes to Firms Arbitration Team engaging in Domestic and International Commercial
11 Arbitrations, mainly in construction, energy and infrastructure sector. Ms. Kanika holds
12 experience in High Courts, NCLTs and Legal Due Diligence. With Indian Law qualification,
13 she holds L.L.B. L.L.M. in Oil and Gas Law from University of Reading, UK and the Doctorate
14 in Business Administration from Swiss School of Business Management, Ms. Kanika has been
15 shortlisted for Dubai International Arbitration Centres, 40 young Practitioners Group, Forbes
16 Top 100 Lawyers in India, 2022 and Business World's Top 30 under 30 Lawyers in India, 2022
17 and also an Associate to CIArb, UK. A warm welcome to all of our panellists. Now, let's begin
18 the session. But before diving deep into the discussion, allow me to set state highlighting the
19 significance of today's topic. Construction Law in India, is a complex and ever evolving
20 landscape that significantly impacts two aspects of our industry. One, construction industry,
21 second, infrastructure industry. As we discussed today, we aim to highlight both challenges
22 and opportunities, providing you with valuable insights into navigating, the Construction law.
23 Construction Disputes whether arising out of delays, budget issues, financial issues or
24 regulatory conflicts can have far reaching effects. They can have impact on project timelines,
25 project budgets, and even to the reputation of these stakeholders. Understanding the
26 dynamics of Construction Law is not only duty of... required for legal professionals. It is also
27 required for all involved in the Construction Project. Be it Project Managers, Contractors,
28 Developers and even Government authorities. India is eyeing to become third largest economy
29 and construction sector will be the biggest contributor in it. Resultantly a lot of investments
30 are happening in the construction industry and disputes are unavoidable where investments
31 are involved. So, key to success is fair resolution or early resolution of the disputes. And
32 definitely India is becoming a breeding ground for construction disputes. And we all know
33 about the overload on our judiciary. Thus, the Alternate Dispute Resolution becomes very
34 important. Let me read out the latest Annual Report, Published by Ministry of Statistics and
35 Program Implementation. "In India, as of 1st December 2021, there were 1,679 Central Sector
36 Infrastructure Projects on Ministries monitoring. Out of these 541 projects are running behind
37 time. With a time overrun ranging from 1 month to 324 months. Original Cost of these projects



1 where USD 101 billion. Which is now anticipated to be 148 billion USD, which is an enormous
2 increase of 34%.” So, first and foremost reason of all these cost overruns is time overrun. Now
3 cost claims involved in the construction disputes are humongous. And prime reason for this is
4 time overrun. So, to resolve such disputes, the primary question that needs to be answered is
5 “who is responsible for delays?” And to answer that question, we should know the answer,
6 “who caused delay?” Parties are increasingly using services of International Arbitration
7 Institutions and India is moving forward for institutionalizing its own arbitrations.

8

9 And there are various Arbitral Institutes in India which administer both Domestic and
10 International Arbitration. Some of these are International Centre of Alternate Dispute
11 Resolution, ICADR, Inter... Indian Council of Arbitration, ICA, Delhi International Arbitration
12 Centre, DAC, and Mumbai’s own Centre of International Arbitration, MCIA. Our esteemed
13 panellists today are leading expert in their respective domains and they offer expertise and
14 their knowledge to us today. We will today deal with delay dispute, dispute resolution systems,
15 impact of external factors like COVID-19 and geopolitical events. We also see the role of Third-
16 party funding today, in our panel discussion and legal implication of the unlawful termination.
17 But before we begin our session today, I request all our audience to be ready with your
18 questions for a ‘Q and A session’ after our panel discussion. So let's get started. So, my first
19 question is to Puran Singh. So, sir, there is a Clause 20 in FIDIC, which consists of time bar. It
20 says, “any party which is facing delay has informed to other party within 28 days of coming to
21 the knowledge of such delay or such delay occurring.” So, my question to you is, from your
22 experience, do you find these clauses too stringent for Contractors to comply?

23

24 **PURAN KUMAR:** Good afternoon. Yeah, I find it very stringent. Particularly in India. Please
25 believe me we do not administer the contract as per its terms. We get carried away by a lot of
26 ego, a lot of emotions and the manner in which the current infrastructure jobs are coming, it
27 is so complex in nature. First of all, you have to handle the customer and within 28 days if you
28 pile up with the notices of intention to claim, it doesn't go well. First of all, you please
29 appreciate. Ultimately, the contract has to align with the law. Section 28 is very clear. The
30 contract which is not aligned is void. Why to keep such a provision which is not aligned? And
31 second and foremost is there are situation arises. I will give an example. Say, suppose some
32 ‘change of scope’ Provision comes, some additional work has been ordered by the customer,
33 that you want to execute. First of and foremost, your requirement will be to get paid for that
34 additional work which you do. But definitely it will have some time and cost impact. Please
35 appreciate if you also start asking and notifying the customer the impact of additional time
36 and cost, I am 100% sure with your experience in this country you will lose even the basic cost
37 of the work which you are going to do additionally. So, my experience has been it is too



1 stringent. I would suggest that it could be modified to a Provision wherein your right could be
2 limited to the determination made by the engineer who is independent to the project, might
3 have been appointed by the employer. So, instead of putting such a stringent condition, it can
4 be modified. In fact, to be very honest with you, it's not only stringent for the custom...
5 Contractor, but for the customer also. Even if the situation arises where he wants to settle and
6 make payment to you, it becomes very difficult for him to have the paper in line with that.
7 Because the Contractor might not have been able to give the server the notice upon within the
8 time. Then his hands also become tight. So, my suggestion would be modification and it is
9 definitely stringent. hope I have answered the question.

10

11 **MAYANK THAKUR:** Definitely, sir. You have well answered the questions. Well and it was
12 really nice to see and hear your thoughts on this. So, continuing with the same line, my next
13 question is to Mr. Vinod Kumar Menon. What are the significant issues that commonly give
14 rise to the disputes in BOT PPP Road Projects? And how do you address challenges such as
15 land availability, COVID-19, and contract process limiting claims in Indian Road Projects,
16 particularly in Arbitration proceedings, Sir?

17

18 **VINOD KUMAR MENON:** Good afternoon to all. I think this is the most pertinent question
19 with respect to disputes in India. As Mayank Singh has already told in his opening address,
20 that time overrun and cost overrun are the most important and most difficult tasks to be
21 answered or responded in any dispute in a Construction Contract. As far as my experience
22 goes, for all of you guys whoever is there in the Infrastructure Industry, the major issue in any
23 Road Project is the land availability. Because unless you have land, you cannot start the
24 construction. So land availability is a major issue. Then there are lot of numerous approvals
25 required for any Road Project to even begin. And those are... land acquisition is the major,
26 and second is the Environmental and Forest clearances. Then if it is close to the sea, there are
27 CRZ clearances and there's a... umpteen number of approvals required, which the client is
28 supposed to take before, to have these approvals in hand before even going for the bidding.
29 That is what the model RFP, or Model Concession Agreements requires them to do. But as
30 easy it is to be told, it is to be stated, it is very difficult to be done. Because, all these land
31 acquisition issues are connected to the local people. The local people it is difficult to control.
32 So, all these clients find it very tough to hand over this land to the Concessioner or the
33 Contractor. So, this is the major issue which happens in disputes. Now, as far as Arbitration is
34 concerned, it goes within the boundaries of any Contract. Now, boundaries of a Contract tie
35 up the Arbitrators to decide upon any issue. So, the 'land acquisition', if it is an issue, and the
36 client tells that publication of some 3 D or 3 E, whatever gazette publication is issued, so paper
37 on paper, the land is available. But when you go to the field, you find more often than not, you



1 find that the amount of land, the quantity of land available as on paper, it comes to you around
2 70-80% of that much. And for the balance, basically, 80% of land has to be given at the
3 appointed date. Appointed date is a commencement. So 80% has to be handed over, but they
4 have it on paper. 80%. When they give the appointed date. But when you go to the field, it is
5 not so. Maybe around 55% to 60% on... So, that is the starting point of the dispute. So, this is
6 what the panel of Arbitrators and the Counsels who are arguing for the matter deal with. Then
7 the other issues are, of course, the Environmental Clearance and other issues. They are dealt
8 with as per the Contract. But as far as land acquisition is concerned, this is the first and the
9 most major aspect which is arbitrated in front of the Tribunal. Thank you.

10

11 **MAYANK THAKUR:** Thank you so much for your answer, Sir. But then, definitely have
12 thrown a good light on land issues that give rise to the disputes. But one thing I would want to
13 understand from you again, sir. Follow up question. In fact, how COVID-19 circulars by
14 Government on giving time for the projects have been helpful in Road Projects?

15

16 **VINOD KUMAR MENON:** So, the question on COVID was bound to come.

17

18 **MAYANK THAKUR:** Of course, sir. We all are suffering.

19

20 **VINOD KUMAR MENON:** We are all fortunate to be to have beaten COVID and be here.
21 So COVID is such a rare occurrence in the lifetime of a human being that nobody could have
22 even imagined or gauged what would be the effect of COVID on anything, any aspect in life,
23 including infrastructures development. So, for COVID-19, when it happened, the Ministry of
24 Finance immediately announced the relief. That was a great step taken by the Government.
25 That they told the at least 90 days, minimum of 90 days of extension to the construction period
26 or concession period in case of a BOT contract, would be given by the Government. So, this
27 was a relief which was in line with the Provisions of the Concession Agreement. But this was
28 just a relief given by the Government. But now this relief has been taken as sacrosanct by the
29 clients and say that this is all that we will be giving. The question of political and non-political
30 event, that is a very important thing in COVID. COVID-19, whether it is a political or non-
31 political has not yet been solved by even the Courts of India. It is still running. But as far as
32 the concessionaires are concerned, it is a political event because... of course, epidemics are
33 covered under political.... non-political events. Non-political event means earthquakes and
34 Acts of God. So, it is taken as an Act of God by the clients. But the traffic movement and loss
35 of toll, toll collection or the toll plazas being stopped... were all ordered by the Government of
36 India, or Government of ... State Governments. So this particular directions by the State
37 Government have superseded the direct effect of COVID. It was not due to the impact of



1 COVID that the traffic reduced, but it was due to the order or the directions by the Court,
2 direction by the Government that this stoppage. That is why the contractors are fighting for a
3 political force measurement. Thank you.

4

5 **MAYANK THAKUR:** Thank you so much for your answer, sir. We've just heard two big
6 Wicks from industry, what are the major reasons of disputes in India, in construction sector.
7 But we also want to know what is the international perspectives of various construction
8 dispute in India. So my next question is to Mr. Steven Lim. So Mr. Lim, as a foreign
9 practitioner of Construction Law, how do you see Indian Construction Dispute market?

10

11 **STEVEN LIM:** Thank you very much for that question, Mayank. As you said in your
12 introduction, there's a tremendous amount of infrastructure work that goes on in India. I have
13 seen myself a number of India related construction cases involving construction projects in
14 India, and also most of the increasingly construction projects involving Indian parties,
15 particularly Indian contractors outside of India. And I'm quite impressed by how Indian
16 contractors go all over the world and do work in far flung places and then end up in Arbitration
17 in Singapore, which is where I see them. So, I see at it as 'a very vibrant sector'. If I could just
18 make some comments about some differences that I notice about how construction disputes
19 are dealt with in India, as opposed to internationally. It's not specific to whatever Indian party
20 or not how things are done in India. And it is also dependent on where the Arbitration is
21 seated. These are points which I picked up having sat in India, as well, in Construction cases.
22 One of which is how you deal with Expert evidence in construction. Expert evidence is very,
23 very important in construction cases. Many construction cases turn on technical matters, and
24 the Tribunal would rely on the expert to give evidence. Since quite often the Tribunal is not
25 necessarily expert in these particular technical fields. One thing that has gained a lot of
26 currency in International Arbitration is Witness conferencing. Where you have the Experts
27 sitting in a conclave and being examined together dealing with issue by issues. And I
28 understand this is not common in India. I've noted that and I think that that's something
29 perhaps you may want to consider, because I personally feel there's a lot of advantage in having
30 Expert evidence in Witness conferencing. It helps bring out the issues that need to be resolved
31 more clearly and focuses on the issue rather than having Cross Examination of each Expert
32 individually. Another aspect that I have... And this is a little bit progressing, a little bit more
33 generally... but 'how applications are heard,' is not too long ago. This is actually during the
34 pandemic or the Pandemic intervene. And I was supposed to be sitting in Delhi. But because
35 of the pandemic, we had it virtually. It was a Construction Dispute in India, under Indian Law,
36 had an international element because it involved International contractors with an Indian
37 employer. One of the issues that came up that was very obvious in the initial pleadings was



1 that there was a question of ‘time by the employer brought the claim against Contractor.’ And
2 the Contractors or it’s actually a Consortium of Contractors.... And the Contractor's defence
3 was question of time bar under Indian law. It became apparent to me as the case developed
4 and I was sitting with two retired Indian Judges so they knew how things were done in India.
5 It became apparent that the legal case developed a little slower than it does internationally in
6 that... the practice. And I'm told by the retired Indian Judges that the practice in India is that
7 “parties developed a legal case, present the legal authority closer to the hearing and not
8 necessarily as the case progresses.” So, we knew the case of time bar was raised, but it wasn't
9 clear exactly what the case on time bar was? And we had put into... the preliminary... the
10 procedural timetable, when I was chairing this case, I had put in the procedural timetable a
11 point at which after the pleadings for the parties to bring preliminary issues if they wanted to
12 thinking that time bar may be one of the issues they may want to raise and have us decide
13 earlier rather than later. But when it came to that point, the parties didn't raise any preliminary
14 issues. So the case then moved all the way through to a final hearing. At the final hearing, it
15 became very, very apparent. Because by that time the time bar, defence and both sides’
16 argument and time bar, it became much clearer. It became apparent that it was a very, very
17 crucial point. And in fact, in the award. In the end, the case turned on time bar. We found the
18 case was time bar. And I sat back at the end of it, thinking, if we had dealt with this a lot sooner,
19 we might have saved a lot of time. The parties had the choice to do so. We had put in the
20 procedural timetable, a point for which to raise the preliminary issue. They didn't. If we had
21 understood the case a little bit better earlier, we might have given the parties a thought, but
22 we didn't understand the case. So, that was an interesting experience for me in seeing how
23 Arbitration is done in India. And I wanted take this opportunity to share my views on this in
24 this forum. Thank you, Mayank.

25

26 **MAYANK THAKUR:** Thank you so much, sir. And when Mr. Lim was advocating about
27 hiring Experts in an arbitration. I was listening higher, MASIN in Arbitration. So, having heard
28 International view on Indian dispute market, in India, the major point of concern currently is
29 the escalation claims. We have seen lot of escalation claims that has been arisen mainly due to
30 geopolitical events of Russia-Ukraine war or similar and definitely COVID-19. So, my next
31 question is to Kanika. So Kanika, could you share your legal experiences in handling escalation
32 claims arising from, events such as COVID-19 and Russia - Ukraine conflict and affecting
33 commodities market in the construction industry? Additionally, what is the legal standing
34 under the Indian law for such types of case?

35

36 **KANIKA ARORA:** Thanks for the question, Mayank. I think this question is the most
37 trending question for all Contractors as of today, even though we are three years forward from



1 the lockdown, I feel this is the most prevalent question for all the Contractors. Yes, the kind of
2 work that my firm is engaged with is morally on behalf of the Contractors than the
3 Government. So, this is something which is a part of probably every Arbitration mandate that
4 we're currently handling right. Now and the reason why it is so relevant is because there is no
5 right answer as of now. And the biggest reason for that is because a lot of judgments are still
6 to be pronounced. They are still pending, as the fellow speakers also has suggested. When we
7 talk about the larger bracket of *force majeure* events and the recent examples being COVID-
8 19, the Russia-Ukraine war, it led to consequential effects, which have disrupted the global
9 supply chains. For example, the prices of steel shot up drastically, which was not at any point
10 contemplated when the parties were signing the Contract. Yes, contracts generally take into
11 consideration certain fluctuations in prices of input commodities but such a drastic and
12 significant increase was probably never contemplated by parties at the time of signing of the
13 Contract. So much so, that even though the Contract provides for certain fluctuations and
14 certain mathematical formula are given to come to some kind of consensus between the
15 parties, what it seems in two or three cases that we have dealt with is that, even those
16 mathematical formula could not capture the cost that was incurred by Contractors. It went
17 beyond the formula. And the dispute in primary comes to the point that, "look, the Contract
18 provides for a formula. We need to stick to it." And the Contractor then has to establish and
19 justify as to how this formula is not actually going to compensate the cost, and we need to go
20 beyond it. Interestingly enough when such claims are actually submitted to the employers or
21 before a Tribunal or before a Court. I think India has come a long way for the Tribunals and
22 for the Courts to understand the technicalities involved with such disputes. It was I think in a
23 recent judgment of in July 2023, I think it was a Delhi High Court judgment or a Supreme
24 Court judgment, if I'm not mistaken where the court actually went into the details of what kind
25 of a mathematical formula companies must use to justify their claims. And it went on to
26 suggest that "you can't just pick any mathematical formula or a thin air and justify your claims.
27 It has to be a formula that does not fundamentally change the basis of your Contract." So,
28 whether it may be, claims justified by *force majeure* eventually under Section 56 of the Indian
29 Contracts Act. When we talk about frustration of the contract, I think it was very broadly
30 interpreted term when we were in the position of COVID-19 and Russia-Ukraine war. Which,
31 if I have to suggest a single judgment to kind of understand what the position of courts when
32 it comes to *force majeure* events, it would be. Justice Nariman's destination in the
33 **Halliburton case**, where he goes on to explain how the courts must interpret *force majeure*
34 events. Because what was happening at that point of time is, there was a **Bombay High**
35 **Court Judgment** as well, where contractors were just abandoning projects because of the
36 lockdown. And the courts went on to say that, "just because there is a lockdown, doesn't mean
37 you abandon the project and you're relieved of your responsibilities. It has to make sense.



1 There has to be a chain of causation which needs to be proven.” So, in a way, I think not just
2 the courts, but even the Government bodies, PSUs are very mindful about such circumstances.
3 I think at least for us, we have seen a good positive response from PSUs, where they take the
4 initiative to understand these matters, the Courts are being... by way of notifications,
5 identifying, acknowledging the circumstances that we are in right now and taking necessary
6 steps to protect contractors and future projects. But I think when it comes to legal standing as
7 to price escalations, *force majeure* events, consequential effects, I think we're still two years
8 away from having a concrete answer.

9
10 **MAYANK THAKUR:** Definitely we don't have a concrete answer. But you have cleared the
11 air quite a lot. So, definitely we have understood how Indian Courts and Indian Legal System
12 is dealing with this situation, but definitely my next question is to Mr. Lim again. Sir, coming
13 back to you, what has been the position of Singapore Courts on COVID-19 related claims for
14 additional cost in construction contracts? And how should claims be... claims for unlawful
15 termination arising out, maybe for any reason, COVID-19 or any other reason are addressed
16 in Singapore?

17
18 **STEVEN LIM:** Thank you, Mayank. I'll take that question in two parts. I'll deal with the
19 COVID-19 claims and how that dealt with by the Singapore Courts first and then deal with
20 claims for unlawful termination separately. There's no doubt that COVID-19 was a very
21 significant impact on Construction Projects in Singapore justice, and everywhere in the world
22 a lot of projects have been delayed significantly because of COVID-19, and also the cost of
23 construction during that period shot up incredibly as well. Having said that, there hasn't been
24 a flood of COVID-19 cases before the courts. I think there are a number of reasons for this one
25 is Singapore, just as in India, came up with a number of regulations to deal with COVID-19 as
26 it was ongoing, including giving extensions of time to projects and prohibiting claims to being
27 brought and Contracts being terminated during that period. So, that ameliorated to some
28 extent. The havoc that COVID-19 could have wrecked in the industry there's also the question
29 that in Singapore, we have adjudications as a mandatory adjudication for projects. Many cases
30 get adjudicated and don't end up in court. And also, during the COVID-19 a special
31 adjudication was introduced called Assessment with Assessors rather than an Adjudicators',
32 but primarily the same thing dealing specifically with the impact of the regulations put in place
33 with COVID. There are, though a number of court cases which Interestingly deal with aspects
34 of the Contracts that relate to COVID-19. There was a case in 2022 so before we completely
35 out of the restraints in COVID-19, where the court had to deal with the question of the meaning
36 of *force majeure*, in the standard firm Singapore Institute of Architects Contracts. Most
37 construction in Singapore or buildings, takes place under the Singapore Institute of Architects



1 Contracts, with a very, very widely used Standard form. And that Contract had in.... under the
2 Extension of Time Clause, one of the grounds being *force majeure*. Which was not a defined
3 term in the Contract. So the Court had to determine what *force majeure* meant. And what they
4 said was that *force majeure* was a radical event that prevents performance of the relevant
5 obligation not merely making it more onerous and which is due to circumstances beyond the
6 party's control. And the Court found that this could include COVID-19. So, there was a
7 recognition on the part of the court that COVID-19 could, in certain Contracts, looking at the
8 definition of what's provided in the Contract.... In this case a *force majeure* that could include
9 COVID-19. There were also cases in the court on the question of whether COVID-19 could
10 constitute frustration of the Contract. It's in legal frustration in the Contract. These cases
11 involve Lease Agreements, not the Construction Contracts, but one can extrapolate from that
12 to see how that might be applied in a construction case.... The lease, in those two cases
13 involving Lease Agreements, the Court found that the Lease Agreements were frustrated
14 because of the intervention of COVID-19. And extrapolating this to the Construction context.
15 It is possible depending on the context, of course, in the terms of each Contract, to see whether
16 COVID-19 could have rendered the contractual obligations of the parties making it impossible
17 for it to be formed or radically or fundamentally different to what have been contractually
18 agreed and there is some precedent for this, not for COVID-19, but much before COVID-19.
19 But one can see how if the courts are willing to accept that COVID-19 can frustrate contracts,
20 how this can be applied to Construction Contract as well... Close to ten years ago, Singapore
21 had a crisis in the construction industry as well, because we import most of our sand for
22 construction from Indonesia. And Indonesia suddenly put in place a ban on the export of sand.
23 So there was a real lack of sand for construction in Singapore. And a case that come before the
24 Courts. And the Courts found that actually, there was frustration because what the parties had
25 contemplated was the use of Indonesian Sand for the project and the sand ban was an
26 unforeseen supervening event. So, one can see that no case has specifically come before the
27 Court dealing with COVID-19. But the courts have in certain circumstances depending on the
28 effect of the case seem that if the performance of the Contract is to be radically different and
29 the Court gave some guidelines and this that while an increase in cost in its own would not
30 necessarily be a frustrating event, but an astronomical increase might end certainly
31 construction costs went up astronomically during COVID-19. The Court also gave guidance
32 that literal impossibility is not required for frustration. But the unavailability of a particular
33 source from which subject matter of the contract was derived could frustrate the Contract.
34 And if COVID-19 had disrupted certain supplies, critical supplies that possibly could also then
35 come within the question of frustration. So we have seen the Singapore Courts being positive
36 in that sense. To giving relief under Contractual grounds for COVID-19 cases.

37



1 **MAYANK THAKUR:** Thank you so much for your answer. Definitely we have seen COVID-
2 19 has brought forward so many disputes and so many difference of opinion between various
3 parties and stakeholders of the project. But definitely one more thing we are dealing with in
4 day-to-day life after COVID-19, did happen prior to COVID-19 as well, but after COVID-19,
5 that is unlawful termination. So, my question to Ms. Kanika here, could you explain the legal
6 position of Indian law regarding specific performance in cases of unlawful termination and
7 construction contracts?

8
9 **KANIKA ARORA:** Yes, so as far as the Indian jurisdiction is concerned, getting a grant of
10 Special performance is extremely difficult, once a Contract is terminated. If we talk about the
11 ambit of Section 9, Petitions for Arbitrations, where we're looking for... a number of times it's
12 happened in court. That party would make a claim to specific performance under Section 9
13 and the courts always have this view that Section 9 is for interim measures, and it cannot
14 actually compel the parties to reinstate the Contract. An interim measure cannot be
15 reinstatement of the Contract. But then again, when we talk about the Indian jurisprudence,
16 we're talking not just about Supreme Court being the ultimate authority. We're talking about
17 different High Courts having different opinions. And this is one such case. This is one such
18 issue where we see the Delhi High Court being very strict about the permissibility of special
19 performance under Section 9. But we've seen instances of Calcutta High Court in Bombay High
20 Court, where the judges have in fact allowed it. But I feel like... the cases that we have read
21 and been a part of... I think in cases where the damage is so tremendous by that termination,
22 that it cannot be compensated monetarily. And reinstatement of the contract is the only way
23 where the party would not be aggrieved. In this case would be the only case where the Courts
24 or the Arbitrator Tribunal would consider Specific performance of the contract at an interim
25 stage. But otherwise in our experience special performance once the Contract, even though
26 has been unlawfully terminated, is something very difficult to be granted.

27
28 **MAYANK THAKUR:** So that's very enlightening. It's good to hear from you. But taking it
29 forward... not just unlawful termination and disputes arise on a very... other reasons as well.
30 And the biggest prime reason, as I said during my opening statement, that delay has been the
31 biggest reason of disputes. So, coming back to the industry big wigs, so, my question to Mr.
32 Puran is... so, could you elaborate, how do Indian Arbitrators typically resolve delay disputes?
33 And whether they commonly involve delay experts in their decision-making process? And one
34 more part of the similar question. The question very similar to it is. So do you think DAP is a
35 suitable method for such disputes to be resolved?

36



1 **PURAN KUMAR:** Unfortunately, in India so far, Arbitrators have not taken the help of the
 2 Experts. Now, as Mayank has told if another panellists have also said the major portion of the
 3 dispute arising in construction infrastructure is arising out of the delay and disruption. Even
 4 I also got bucket of claims I have. The biggest one is delay and disruption. And it is very
 5 important for an Arbitrator to educate upon whether ,delay has been caused by which party?
 6 Either it can be caused by the Contractor or by the Authority or by the *force majeure* event.
 7 *Force majeure* event, you may consider that it is either party has to bear their own cost. But
 8 definitely if you are not able to demonstrate the delay has been caused by the other side, you
 9 are not intact into the compensation. To arrive at this decision, an expert is definitely required.
 10 But so far as I said in the beginning itself, unfortunately in India has not yet come to that stage
 11 wherein arbitrators are taking the help of independent experts. Yeah, parties have been
 12 appointing experts from their own, and they testify before the Tribunal and try to demonstrate
 13 that their delay has not been caused by the affected party. But it is up to the Tribunal to what
 14 extent they will take cognitions of the fact presented for them. It all depends upon the Cross
 15 Examination. But I am very sure that the manner in which India is going ahead in
 16 infrastructure and international market is also catching up.

17
 18 We have opened the infrastructure industry, particularly for the international players. So,
 19 Internationals... only Contractors are not coming, Experts are also coming. So I'm very sure
 20 in coming days we'll see, Arbitrators are also taking the help of independent Experts,
 21 particularly for analysis of the delay and disruption. The second question Mayank, what you
 22 are asking is DAB. I don't have a good experience to be very honest with you. The intent is very
 23 good to have DAB. Mostly these claims are technical in nature, in the infrastructure sector, in
 24 construction industry. So, the basic purpose of a DAB is that you can appoint on the Contract
 25 commences very strict resume in the Contract within 90 days of appointed... appointed day
 26 or within 80 days of commencement or the moment you sign the Agreement, within 90 days
 27 you can appoint a board. Each party will appoint one. And both these... together they will
 28 appoint a presiding one or a chair. So they can visualize not only from the document, they can
 29 very much party to every event which is causing delay, disruption or any claim is arising
 30 because of change of this thing. But the problem is in India here that one party... in all big
 31 contracts and other side is the Government, and the officers are always afraid of
 32 implementation of the decision or recommendation of the DRB or DAB, whatever it is. So, they
 33 so reluctance in implementation unless and until it is binding or order of a Court. And all of
 34 you must be aware to the extent you might have got exposed to DAB Provision; it is not binding
 35 on either of the parties. It can very well can challenged in Arbitration. I would tell you my
 36 experience dealing with National Highway Projects. In the beginning, starting from you can
 37 say 2000 to 2013-` 14, till the time new regime came, every contract of National Highway had



1 the provision of DAB. And you would be surprised Success Rate of 3%. Only 97% of the DRB
 2 recommendations were challenged. Now again NHA is trying to implement that. But it
 3 becomes another layer. One more, even DFCC in Railway they are also trying to implement it.
 4 But again, there is a reluctance to honour the recommendation. I have seen the recent trend
 5 in High-Speed Rail. That also we have couple of jobs. They have started with very positive note
 6 that they have started implementing the DAB, but still, we have to see, how do they deal with
 7 them when it comes to the Delay and Disruption Claim. Initiative is good. Intent is good. But
 8 somehow, as it lacks the teeth for implementation, it's not so successful. But I am hopeful.

9

10 **MAYANK THAKUR:** Thank You, Sir. We all are hopeful and as you bring forward NHAI in
 11 your answer, yeah, definitely. We are talking about the biggest litigator in the country and we
 12 have with us, Mr. Vinod Kumar Menon. And so, sir, my next question is to you. IRB is one of
 13 the biggest concessionaires in the Road Sector. So, what are your views on SAROD and other
 14 schemes for faster and efficient dispute resolution implemented by NHAI. Are these schemes
 15 successful?

16

17 **VINOD KUMAR MENON:** Yeah, definitely SAROD has been successful, partially. SAROD,
 18 I will just explain what is SAROD first. It was formed by NHBF, that is the National Highway
 19 Builder Federation. That is a transitioner's body, contractor's, body, and NHAI, National
 20 Highway Authority. They formed a body registered under the Society's Act and formed a kind
 21 of Institutional Arbitration Body, in which they would select a panel of Arbitrators and the
 22 disputing parties may select those Arbitrators and form the Tribunal for settlement of the
 23 Disputes. It was started in 2012 or `13 with all good intentions and to have an affordable, cost
 24 will be less, or cost will be optimal and time. So, for that this SAROD was actually established.
 25 But with the time, the panel of Arbitrators bothered the National Highway Builder Federation
 26 members and they were not satisfied that...

27

28 The issue was that not many Judges were there in the panels. The retired Judges. Only
 29 technical members were there in the panel with, very few judges. So, this was a problem for
 30 the quality and... quality of Arbitration. Because interpretation of a contract, interpretation....
 31 legal as well as contractual interpretations would be more effectively done by the Judges. And
 32 not the technical experts. So the quality of the Tribunals somewhat reduced with the period of
 33 time. And another aspect was that the Builder Federation thought, felt that not many
 34 suggested members or the arbitrators were included in that panel. Obviously NHAI had the
 35 dominant... being a dominant partner in that.... but obviously but the SAROD is managing
 36 well. SAROD is doing its job. But in a limited fashion in any case after 2016, when the new
 37 Model Concession Agreement came, this SAROD was kept mandatory. So, obviously you don't



1 have a choice, so it has to be in SAROD. But we are... NHBF is trying its best to include some
2 judges in the panel.

3

4 **MAYANK THAKUR:** Thank you so much, sir. So, L&T is also dealing with a lot of projects
5 involving NHAI. So, Puran Sir, your quick views on SAROD and other efficient methods.

6

7 **PURAN KUMAR:** Yeah, actually, we have reduced our exposure to National Highway
8 Authority of India. So, I have very limited exposure to SAROD. But whatever I have, I have
9 good. I mean, the first and foremost advantage is that definitely it is very quick. I'm going to
10 finish on Arbitration within less than 12 months. And fortunately, I got a good Supreme Court
11 judge at presiding and other two also very qualified and learned panel of members. But as
12 Vinod sir just said, the biggest challenge in SAROD is that the panel... the panel, the manner
13 in which NHAI has made, although it appears as if it has been jointly made by NHAI and
14 NHBF, but it is going unilaterally. And it doesn't have a really wide range of panels,
15 Arbitrators. That is the one challenge. But at the same time, I would also like to take this
16 opportunity to bring forward what NHAI is doing on a very large scale. NHAI is also before
17 Arbitration. They are settling the claims through Conciliation Committee of independent
18 experts. They have formed 3 panels. 3 Committee. And you will be surprised that they have
19 disposed of about claim worth 45 thousand crore and the average amount of settlement is
20 roughly about 34%. So roughly 15 thousand crore of claim has been settled in last couple of
21 years and very efficiently, their target is that to settle the claim within a period of 3 months
22 and some of the claims even we have settled in 3 months.... Their normal time is 6 months.
23 We have settled certain claims in 3 months. But recently in NHAI there has been some
24 slowdown. So, this SAROD initiative, it will be really wonderful if they really have wider range
25 of Arbitrators. And if they continue to this settlement through Conciliation Committee of
26 independent Expert, I don't think any parallel system has been developed by any PSU or any
27 Government sector in the country. Thank you.

28

29 **MAYANK THAKUR:** Thank you. Puran Sir and Vinod, sir for your thoughts on SAROD.
30 With this, we move to next topic of discussion today Third-party funding. Just to introduce,
31 Third-party funding in Arbitration refers to the situation where an external party not directly
32 involved in the legal dispute provides financial support to one of the parties, which is usually
33 Claimant, to help to cover the cost of the... cost associated with the Arbitration proceedings.
34 The financial support typically includes legal fee, arbitration fees, and other expenses related
35 to the dispute. In return, the Third-party funder usually receives the share of the proceeds if
36 funded, party is successful in the Arbitration. Overall, third party funding in the Arbitration is
37 a tool that can provide Access to Justice, level playing field and enable parties to pursue valid



1 claims without being burdened by the high cost of arbitrations. It has become an important
2 tool in the world of dispute resolution, particularly in complex and high stake cases. However
3 it also rises the important ethical and regulatory consideration that need to be addressed to
4 ensure the fairness and integrity of the arbitration process. So with this introduction, my first
5 question to Mr. Sandeep Upadhyay. Sir, we have noticed that construction arbitration
6 worldwide often involves Third-party funding. You are involved in infra funding in India, and
7 construction arbitrations world over are generally Third-party funded. How do you see the
8 evolution of arbitration awards or claim purchase in India?

9
10 **SANDEEP UPADHYAY:** Thanks, Mayank. So globally, as we know, this concept of Third-
11 party funding against the Arbitration Awards is fairly well established, largely driven by the
12 developed nations. We've got Australia, UK, US, where this market practice in terms of getting
13 a Third-party funding by the likes of the Blackstones and the Blackrocks. And in fact, some of
14 these long term investors as well take a call. As far as India is concerned, we are at a fairly
15 nascent stage. I think it will be fair to say that we are at a very, very early stage from that
16 perspective. Global market if that has been growing at little less than 10%. Given that India's
17 base itself is low, one could actually expect a much higher growth rate. Having said that, I think
18 there is no formal endorsement from the Government in terms of a Statutory Legislation being
19 passed which is endorsed in Third-party funding. This, I think is a major impediment. There
20 is already a direction here or the guidance has come from the Government, that this could
21 actually be a very large part of solving the problems that we have in the construction industry.
22 We've already got stalwart from IRB and L&T here. And we know the kind of money that is
23 stuck for large EBC players. So, this could actually play a very, very important role in terms of
24 bringing the much-needed liquidity with the contracting firms. If you talk of clients like NHAI,
25 and if I'm getting the numbers right, I think with NHAI itself, the claims... outstanding claims
26 would be more than a lakh crore. And we all know NHAI.... I think all our friends would agree
27 amongst most of the regulators, NHAI has actually seen a more progressive regulator. And
28 with the kind of work that we are actually delivering in the road sector, I think it is very
29 important that some of these agencies like NHAI actually come to the forefront in terms of
30 resolving this matter. So from an opportunity point of view, I think the opportunity is
31 humongous. From a legislation point of view, we need to do much more as far as India is
32 concerned.

33
34 **MAYANK THAKUR:** Thank you so much. So, my next question is to you only sir. There have
35 been instances wherein infra companies have been purchased through NCLT process,
36 primarily due to their large value arbitration. So you want to share your views on that?

37



1 **SANDEEP UPADHYAY:** Well bankruptcy process when it was initiated 2016, was holding
2 a lot of promise. And one is not criticizing IBC. I think it has gone a long way in terms of
3 resolving and it is not seen as a Recovery process. It is seen as a Resolution process. But
4 Statistics 45% of the IBC cases have actually landed up into liquidation. So, when you have
5 recovery rate of single digits when it comes to IBC resolving a process, the statistics actually
6 states that NCLT may not be the most efficient process. Or that may not be the segment where
7 you would actually see, the nature of Claims may be bulky, but the probability of it getting
8 resolved is less. And my take here is one should actually see companies in three categories, not
9 just NCLT. In fact, there is a lot of resolution that is happening even outside NCLT, and that
10 is what the Government has been driving. Because the NCLT codes are essentially clogged.
11 That is where I see that there could be a huge opportunity in terms of financing the stress or
12 the claims which are stuck with the stress companies. Because the healthy companies will not
13 really need someone to come and fund their claims. It is the stressed company or the
14 companies into bankruptcy. Bankruptcy you have just discussed the process getting resolved
15 through NCLT. However in the stressed asset cases. Actually, there are a lot of stress asset
16 funds who are wanting to take a call on litigation or arbitration awards, which are stuck.

17

18 **MAYANK THAKUR:** Thank you so much then I would also want to hear out the Singapore
19 perspective on funding. So, Sir Steven Lim, My question to you many disputes which are GIC
20 funded have ICC Institution, Indian governing law and Singapore seated Arbitration. So what
21 is the process in such arbitrations for challenging them? Challenging the arbitral award and
22 how are Singapore Courts dealing with such challenges governed by Indian law? Sir, your
23 quick views.

24

25 **STEVEN LIM:** Thank you well, challenge of an award in Singapore is dealt with in
26 accordance with the UNCITRAL Model Law, that is Article 34, which I believe is the equivalent
27 to Section 34, the **Indian Arbitration Conciliation Act**. So that's the basis for challenge.
28 That's for setting aside an award, there's also the possibility of challenging a different way in
29 that if an enforcement is taken on an award, you can challenge enforcement of that award, and
30 that also takes place. That challenge also takes place under similar grounds, in the New York
31 Convention, which is the same as you'll find in Article 34 of the Model law. The set aside must
32 be taken within 3 months of receipt of your awards, as provided in the Model Law. In
33 Singapore, I should mention that there are two additional grounds. These are additional
34 grounds. In addition to what the Model Law provides for challenging an award to set aside an
35 award. One is that the award was induced or infected by fraud or corruption. The other one is
36 where there's a breach of Natural Justice. So, if the breach of Natural Justice has occurred in
37 connection with making of the award, which by which has prejudiced the rights of a party, I



1 say these are additional... although everyone would accept that if there was fraud and
2 corruption, that infects the award and the ground of breach of Natural Justice is also actually
3 if you think about it in the New York, in the Model Law itself under due process, that's not a
4 breach of Natural Justice is. Is a breach of due process. There is an uptick of cases in which
5 parties try to challenge an award on the ground of breach of Natural Justice, breach of due
6 process. A number of these have been successful. It's partly due to the complexity of cases.
7 Many of these cases turn on the ground of whether the Tribunal have failed to decide an issue
8 which has been put before them or the Tribunal decided an issue on grounds which are not
9 put by the parties. Some succeed because of just of the sheer complexity of the cases. And some
10 of these cases are in the construction space. The other question you had was, how does
11 Singapore courts deal with challenges to Indian law govern Arbitration Awards? Well, as some
12 of you may know, Indian parties are the largest foreign users of Arbitration in Singapore and
13 have been so for many years running. So a lot of Indian related cases get heard in Singapore.
14 Many of these are Indian law governed. And I have dealt myself with cases under Indian law
15 seated in Singapore and elsewhere. Singapore has... Singapore law has very common roots
16 with Indian law. The Evidence Act, for example, we have in Singapore, came to us via India at
17 that time. So the law that we have is similar. There is no difficulty for the Singapore Courts to
18 do with Indian law. In fact, when people study law in India, there's a lot of reference to Indian
19 law cases because, the routes to which we have common law in Singapore. But in addition we
20 do have in Singapore, Singapore International Commercial Court, which has a number of
21 foreign international judges on the Court. And one of these judges is Justice A K Sikri, who's
22 from India, who I know quite well. I sit with him in arbitration cases. So Justice Sikri is there
23 as an Indian law expert to provide Indian law expertise to the SICC.

24

25 **MAYANK THAKUR:** Thank you so much. I have been getting signals from my team that
26 you're overshooting, but still, we have time for a couple of quick questions. Sir, Sandeep sir.
27 Sir, my question is, what are the challenges do you see in arbitration, funding?

28

29 **SANDEEP UPADHYAY:** Very quickly. I think timelines timeline to resolve. That is the
30 biggest challenge. Quantification of these awards. That is the other challenge and then you
31 have things like Conflict of Interest, which is resolvable. So, in India, you have this law that 'as
32 a legal entity, you can't be funding an arbitration award.' And then you have two major
33 challenges, one being the NOC coming from the lenders. So, any of these companies and we
34 are not talking of bankruptcy here. We are talking of the companies which are stressed.
35 Invariably, you will have to go back to the lenders, get an NOC and only then you can think of
36 monetizing your arbitration awards. And that I think is a major impediment today.

37



1 Lastly, I think I was speaking to Steven and he told me that in Singapore you have a
2 qualification criterion for the funders, which perhaps is also there in Hong Kong. In fact, in
3 UK, there is a proper legislation to that effect. In India, we don't really have that. That brings
4 a little bit of fluidity in the whole process. And that is another point which is very sticky from
5 the point of view of quantification.

6

7 **MAYANK THAKUR:** Thank you so much. Kanika, your quick views. What is the position of
8 Indian Law on Third-party funding?

9

10 **KANIKA ARORA:** I think as Sandeep has highlighted very well is we don't have regulatory
11 framework on Third-party funding in India. We did have the case of *A K Balaji*, where the
12 court said that third party funding is permissible. But just because you have announced it as
13 permissible doesn't mean that it's actually going to take place. Because any such science... And
14 I would call it a science because it is a science in itself... To take place, one must know the
15 do's and don'ts of it. As Sandeep has again mentioned that the only regulations that we have
16 as of now is that; one, Advocates cannot be the litigation funders. And number two, the
17 litigation funders as given in the *Tomorrow Sales Agency case of the Delhi High*
18 *Court* very recently that they cannot be parties to the arbitration. Therefore, the award cannot
19 be enforced against them. It's all in a flux, to be honest. But nevertheless, I think it's a huge
20 market for India, which is completely untapped right now, especially with companies entering
21 into the CIRP process, so many of them have tremendous cases against government PSU's.
22 Strong cases on the merits of the case, but they're not able to pursue those mandates because
23 of a liquidity crunch. And this is exactly where funders come into the picture. I think before
24 we invite investors to India to actually start up the engine on this market, I think it's very
25 important for us to get a regulatory framework in place for the same.

26

27 **MAYANK THAKUR:** Thank you so much. I know we are running out of time but I can't help,
28 but I have to ask my favourite question here to all the panellists. Please answer within 15
29 seconds each. So what is the importance of Expert Fitness in an arbitration and what can be
30 done to increase the usage of various Expert Witnesses in the Arbitrations, be it Financial
31 Arbitration or Construction Arbitration or whatever? Your views very quickly, sir. Puran sir.

32

33 **PURAN KUMAR:** Already. I have said that it is very important, 'the complexity', to a
34 problem which is coming forth nowadays it is not possible particularly for judges to appreciate
35 the delay and disruption. very much required.

36



1 **VINOD KUMAR MENON:** I would straightaway take words from the mouth of Steven that
2 'Technical Expertise.' Technical expertise is required because the Arbitrators are mostly from
3 the legal background who would not understand the technical aspects of each and every case.
4 So it's very useful to have a Technical Expert Witness in an Arbitration.

5
6 **STEVEN LIM:** I think I've given my views on this already. I think it's critical in most cases in
7 Construction Contracts. The expert evidence is critical. It's not so much a law, but what is the
8 'Technical Evidence' on it. What can we do to increase the use utility of Expert Witnesses?... I
9 mentioned 'Expert Witness conferencing.' The other aspect as well is in how you deal with
10 Expert Evidence even before you get to that? Sometimes you find that if you have the two
11 experts giving their reports, before they've actually had the chance to sit down and discuss it
12 amongst themselves, they've taken certain positions and it's much harder for them than to
13 back down and to come to an Agreement. What is most helpful to the Tribunal that is largely
14 ignorant on technical matters is the experts agree. So, you tell the Tribunal, you know, what
15 are the technical issues and how they should be resolved the Tribunal will be very happy and
16 grateful for that. And to encourage experts to agree and not take too diversion paths because
17 they have taken positions earlier in the process. One thing we've adopted in International
18 Arbitration is to have the Experts meet before they actually give their reports. That's a trend.
19 I think that's something that's been quite useful in managing Expert Evidence.

20
21 **SANDEEP UPADHYAY:** Well, on the Dias we have three engineers, I'm sure technical
22 expertise actually go a long way both in terms of giving you an efficient solution as well as
23 qualitatively defining an approach. So, absolutely indorse the views.

24
25 **KANIKA ARORA:** I think from an advocated... Advocate's perspective, in any Arbitration I
26 think for us, the Expert Evidence that is filed is probably a winning bet, in our Arbitration, the
27 Cross Examination that follows. Because if that goes well, you've pretty much won the case.
28 So, yes, it's critical.

29
30 **MAYANK THAKUR:** So, thank you. Our panellists for views. And last question was meant
31 to get the good answers about Expert Witness. So please do hire MASIN. MASIN, is there as
32 your best Expert Witness available. So, we can take a couple of questions from audience if
33 there are any... yeah, I see a hand being raised. Can we have a microphone to sir?

34
35 **AUDIENCE1:** COVID pandemic is slightly different from any other *force measure* event.
36 Like for COVID pandemic, there are cases where 90 days to 180 days has been given for the
37 first wave of COVID, EOT, Extension of Time. But the thing is after one month of lockdown,



1 contractors were in fact, made to work on the project maybe for essential work, or continue...
2 in continuation with the main work. So, thing is like during that process of working contractors
3 have 3 events of compensation arising out of... I just wanted to have a view on those 3 aspects.
4 One is escalation, which is already provided in the Contract that escalation would be paid
5 during the original Contract and for delay events attributable to the employee. But the *force*
6 *major* is the event which is beyond.... it's not attributable to employer as well. So, the first
7 thing is escalation as per the formula. Second is abnormal rise in prices during that period and
8 third is your underutilization. Since contractor is made to work immediately after the initial
9 lockdown period of 30-35 days, is underutilization payable? Is abnormal rise is payable? And
10 is a normal escalation is payable under the Contract?

11
12 **PURAN KUMAR:** Yeah. I would like to answer your question very quickly and very pertinent
13 question. Because it has been addressed by our panellist member also. The first and foremost
14 is about the Escalation, for which escalation already provided. Once the customer has agreed
15 to give you extension, normally in all the contract... employer in the country... they have
16 allowed escalation as per the formula. Second, one most important the Ministry of Finance,
17 the circular which came and which was implemented on Ministry of Highways, they not only
18 gave relief in terms of extension, they gave two more, very big relief. One relief was that they
19 allowed the payment as per the quantum of work which you performed during the COVID, or
20 even prior to that. It was not only... so in EPC Contract, where you were entitled to payment
21 only as per the given methodology... Unless and until you complete that quantum over,
22 nothing is paid. So, milestone payment was envisaged into the Contract. Where they relaxed.
23 And you will be surprised to know the highway construction which was constructed during the
24 COVID. It has never been done. So maximum construction of highways was done during the
25 pandemic. Now, to answer your second question, it was not the case that contractor was
26 compelled to work. To be very honest with you, I have a contractor sitting in front of you. We
27 happily work because we got relieved all the payment which was stuck because we were not
28 meeting the milestone. The third and foremost benefit was given in terms of relief towards BG.
29 All Bank Guarantee as far as retention is concerned, was released. All cash retention was
30 released. Bank Guarantee is reduced from 10%, 7 and half percent, 5% to 3%. So all contractors
31 have happily worked. And third question to you is about the compensation. So compensation,
32 as Monica has also said it has not yet settled in India. Neither anywhere else in the world, but
33 you please appreciate... recently I was in one Arbitration, compensation you are entitled to
34 only when delay has been caused by the other side. As a contractor, we have taken a position.
35 It is not a *force majeure* event. It is an event because you compelled us to work, or there is a...
36 because of change in law, because of implementation of change in law. So, here you are under
37 obligation to reimburse. But recently in one of the arbitrations where Supreme Court retired



1 Judge was presiding, he said your entitlement goes off the moment you accept those reliefs.
2 Please appreciate it. Still, it has not... it is not a settled law. But just a cursor to you. You can
3 think in this line. You accepted the relief granted by the Government. You've got reduced your
4 BG, you got your payment, milestone reduced, you got your EOT and still you are looking for
5 under-pricing and extreme unprecedented hike. So those things are... little bit shuffle. But I
6 am very much... I'm not hopeful that those Court will give judgment in favour of the Contract.

7

8 **AUDIENCE 1:** Yeah, only issue is with the bespoke Contracts with Private Sector, where
9 references are made to the Government EOT and other norms, but the thing is escalation for
10 original contract period and for delay is attributable to employer. See, now this particular
11 scenario is not attributable to the employer. So, during that escalation... and Contractor is
12 made to work during that period and escalation is not paid during that period, though formula
13 exists. Stating this is not a delay attributable to the employer. So, there are these peculiar
14 scenarios arising out.

15

16 **PURAN KUMAR:** You will get the escalation. And *force majeure*, now a days, it is defined
17 into 3 categories. It was being told one by one. One, is a 'Political measure,' where political
18 event... wherein you will get full entitlement. One is the 'indirect political'.... where you will
19 get 50%, another is in 'non-political' where you will not get anything. So, you have to
20 endeavour to qualify it as a political event where you're entitled to. And I have not heard any
21 case, at least what we have dealt with, with several customers wherein they have denied our
22 right to escalation. And I am very much hopeful whatever dispute resolution forces available
23 in your contract, I don't think you will be denied with your right to get that escalation.

24

25 **MAYANK THAKUR:** Sir, your name and organization, please.

26

27 **SRINIVAS:** I'm Srinivas Mantri. I'm heading Contracts of Capacity.

28

29 **MAYANK THAKUR:** Thank you so much. Any more questions? from one more question.

30

31 **AUDIENCE 2:** Mayank, one more question. Actually, this Third-party funding... so for that
32 also the Technical Expertise is required to judge or merit the case, whether these cases have a
33 merit to fund or not? And the second question is, have you come across any case where due to
34 change of Government, particularly in India, in any State, the project is going on and due to
35 change in Government, Government either closest that project or changes the project
36 parameter specification drastically? So any such cases. Also, you came across.

37



1 **SANDEEP UPADHYAY:** So, the first one I'll take. On the funding, yes, absolutely correct. I
2 think Technical Expertise from the entire Dias was of the view that it'll go a long way in terms
3 of solidifying your claim and hence a funder backing you. I think on the Government part if...

4
5 **MAYANK THAKUR:** I can take that question, actually, I have an experience where I was
6 working on a claim and the claim majorly arisen because the Government of in a particular
7 State changed. And I don't want to name the State and Government at this State. But the entire
8 claim rested on that. Sir, your name and organization, please.

9
10 **ABHIJEET:** Abhijeet Modak, Heading Subcontract in Capacite Informatique.

11
12 **KANIKA ARORA:** I just want to add to the second question that was just put up.
13 Contractually speaking, this is a problem, not just in India, but in politically vulnerable
14 countries across the world, whether it may be Venezuela, whether it may be currently Israel,
15 whether it may be France a couple of months ago. And this is the reason why in major Infra
16 and Construction Contracts, we must... I mean, a transactional lawyer must look at the
17 Stabilization Clauses that need to be inserted in the Contract. That if there is a change in the
18 Political scenario of the Country, it should not impact the progress of the project. Of course,
19 that's a longer discussion for another time. But just to give a glimpse of that.

20
21 **MAYANK THAKUR:** Thanks, Kanika. I can take one more question. One last. Yeah, sir. Can
22 we have a microphone here?

23
24 **AUDIENCE 3:** Hi. My name is Gopal Modi. I'm from Biking India. We construct the
25 smokestacks for power plants. Just a two part quick question. One is to do with escalations,
26 and sort of a continuation. Can you be denied Escalation?... so we work with EPC Contractors
27 and our Principal Clients are generally PSUs? Can you be denied escalation if the escalation is
28 there between the Principal Contractor and the EPC Contractor, and we have not got it in a
29 contract? And the second part is there's been a scenario that the Principal Company has
30 actually issued a notification that the COVID extension will be given to all EPC Contractors
31 and currently we've not been passed on that benefit. So just what are your views Kanika or...?

32
33 **MAYANK THAKUR:** Kanika, you want to take that question?

34
35 **KANIKA ARORA:** Yes. I'll actually pass the mic on to Mr. Puran and Mr. Menon as well
36 because they'll give you a more commercial way of dealing with a situation, but the way we
37 look at it is, to check if your Contracts are actually a back-to-back Contract with the main



1 Contract. A lot depends on that. But when we talk about price escalation, if I had the chance
2 to deal with that, I would definitely claim it. See, granting price escalation right now is
3 something which may not have been inserted in your Contract, but that does not mean that
4 you cannot ask for price escalation. There have been judgments in the past. Various High
5 Courts as well as Supreme Court, where the price escalation was not provided for in the
6 Contract and yet because of unforeseeable circumstances, that price escalation was granted.
7 So the answer is Yes.

8

9 **PURAN KUMAR:** Yeah. I mean what she has answered. One more thing just I would like to
10 add to there. It all preliminary depends upon the kind of Contract you have entered with your
11 main Contractor. I mean, it will be governed by that. Which you know very well. So even if it...
12 it not specifically covers, ... first of all, it will go on by that. If you are able to get... bring within
13 that Provision... Wonderful... Even otherwise, you will be very much entitled to.

14

15 **AUDIENCE 3:** So, can we approach the principal customer in the event that the EPC
16 Contractor is not passing on the benefit that's been actually given to them? In spirit, it's been
17 given so that the subcontractors benefit from it. Right? So, it flows sort of down. But can we
18 enforce it by approaching the princi... In your experience?

19

20 **PURAN KUMAR:** We are receiving a lot of such communication... but, to be very honest
21 with you, normally I would answer that I am not a Party to the Agreement. So, otherwise, even
22 at the highest level it is being undertaken. When they make the Principal Employer also, they
23 make a party to that. And Kanika can throw more light.

24

25 **AUDIENCE 3:** I am not... waste everybody's time. We'll take it off the...

26

27 **KANIKA ARORA:** I'll just try to coherently speak on this, is that, it may not be in the best
28 interest to actually approach a non-signatory at an initial stage, when you're discussing this
29 issue. What would generally happen is that you're going to approach the Contractor under the
30 Sub-contracting Agreement, and then it is on that Contractor's onus, whether they want to go
31 and claim this from the primary employer or not? Which may at a later stage, when the two
32 Arbitrations are concurrently running, may all be joined into one single arbitration. But really
33 speaking it cannot have a snowball effect. You will claim from X that expert claim from Y, if
34 they want to claim from Y. But the... but your entitlement to your claims does not depend on
35 the success of excess claims on Y. I think this is where the mediating company always traps
36 the Sub-contractor.

37



1 **MAYANK THAKUR:** So, I think there's one more hand at the backside. So let me first take
2 that question and, ma'am, you have to be very quick in question. And we need to answer it
3 quickly.

4
5 **AUDIENCE 4:** Sorry, I'm not from the general the policy of people sitting over here. I'm from
6 academics. I'm professor Adity Prasad. I teach at Prof.... Ajinkya DY Patil University and I'm
7 doing my PhD in MSME Dispute Resolution from Xavier Business School, Essex, UK. I have a
8 rather offbeat question to you, sir. You recently stated... and from the... you know gist of the
9 discussion that that basically ensued over here today. I can understand that the importance of
10 Expert Witnesses and testimony is very important in course of Arbitral proceedings. At the
11 same time, it was also validly, brought that the need for having retired judges is very much
12 important. Now the two possibilities under the Indian **Arbitration Conciliation Act 1996**,
13 for both of these accommodate happens to be either the appointment of the Arbitrator under
14 Section 11 of the **Arbitration Conciliation Act** or Section 9, 17, coupled with Section 27 of
15 the **Arbitration Conciliation Act**, wherein you can have an Expert Witness or a testimony.
16 Can you tell me because of the lack of empirical data on what exactly constitutes the
17 preference, the corporate preference and attitude with respect to a dispute resolution policy?
18 Can you tell me what exactly is the expectation of the companies today, specifically in India,
19 with respect to the appointment of the Arbitrators? What exactly do you want? And if you want
20 an independent Arbitration Expert, like sir said, where exactly where would you find the
21 accommodate under Section 9, coupled with 17, which is the power of the Court or the Arbitral
22 Tribunal to give an interim relief? Or under Section 11, wherein you want a Technical Expert
23 and at the same time, you also want retired judges because there have been many of the reports
24 from industry itself, like White and chase or PWC, where you say that the retired judges are
25 not suitable for the quality of the Arbitral Awards. And that's one of the reasons why India
26 doesn't have a suitable, ... as a seat it is not suitable. It is not under top 5 Arbitral Seats. The
27 Tactical advantage is not there missing.

28
29 **MAYANK THAKUR:** Your question is to?

30
31 **AUDIENCE 4:** The sirs sitting over here. It can be taken by the renowned arbitrator. I'm
32 sorry. I'm very bad at remembering the names.

33
34 **VINOD KUMAR MENON:** I will take that. Okay so it was a very long question. So, I will
35 answer in two or three parts. So you were referring to the importance of this Technical Expert
36 Witness asking... like petitioning to the Court under section 9 and 17.

37



1 **AUDIENCE 4:** Sir, after the 2015 Amendment, it has to be for the Tribunal first and if it is
2 not possible a convenient...

3

4 **VINOD KUMAR MENON:** You see, the Arbitration process goes like this... In any Dispute
5 Resolution under any Contract in India, it goes like this. There is a dispute, which has been
6 crystallized by a party. Then it goes through a conciliation process, the Parties attempt for
7 amicable resolution, right? Then if it is not getting amicably resolved within a certain limited
8 period which is prescribed under the Contract, then it goes for invocation of Arbitration.
9 Whoever is the Claimant, they invoke the Arbitration and appoints his Arbitrator. Nominates
10 his Arbitrator from any of the panel. As you said, what are the criteria for the appointment of
11 Arbitrators? The Arbitrators are there in the panels, so many institutions have their
12 Arbitrators. Retired Judges are there, Technical Experts are there. So many Leaders of the
13 Industry are there for dealing with such Arbitration cases. So, the party decides, this may be
14 an Arbitrator who might be able to resolve it in an amicable and fair manner.

15

16 **AUDIENCE 4:** So, why do you see Appointment of Retired judges the lack in institutional
17 arbitrations, which NHAH has? You said that the biggest problem in the SAROD is that the
18 Retired Judges are missing and they only have Technical Expertise and they don't have people
19 who could interpret the law. Why is there an overarching indulgence towards having retired
20 court judges when it has been significantly pointed out from the industry itself that it happens
21 to be one of the biggest glass ceilings? Why India doesn't have the Tactical advantage as the
22 seat of Arbitration? that's what sir...

23

24 **VINOD KUMAR MENON:** No, no... whether India needs to be in the top 5 of the Seat... in
25 the Seat of Arbitration? That is not the question here. The question here is, India itself, as you
26 said, one lakh crores of worth of cases in one... under one particular client itself. So, India
27 needs a seat for its Domestic Arbitrations. We are not there. We have to encourage the
28 International Disputes to come to India. India already has a lot of Disputes in hand and the
29 Seat of India is for majorly for dealing the Indian disputes over here.

30

31 **AUDIENCE 4:** I wanted to know your preference in the Dispute Resolution Policy.

32

33 **MAYANK THAKUR:** Just a moment. Ma'am, I would request since, we are very running,
34 very short of time and the discussion is taking long. I request everybody to connect with the
35 speakers when they're off the podium. Since we have been warned by MCIA to either close it
36 or will bargain. I have to close it now. And thank you everyone for coming. And I thank all of
37 my panellists and speakers for their enlightening thoughts and we would love to catch up again



1 on similar events. We invite you all to a high tea session organized by MASIN just outside this
2 hall. Please join us there. And please feel free to interact with our panellists and everybody
3 available on floor. Thank you so much. Thank you, everyone. Thank you to the panellists again.
4 Thank you.

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~~~END OF SESSION 3~~~

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