INDIA ADR WEEK 2023 DAY 3 - MUMBAI

SESSION 6

ROLE OF GCs IN RUNNING EFFICIENT & EFFECTIVE ARBITRATION PROCEEDINGS.

6:00 PM To 7:00 PM

Speakers:

Nitesh Jain, Partner, Trilegal

Ankush Mehta, Senior Partner, Cyril Amarchand Mangaldas

Ms. Nidhi Parekh, Head Legal, Essar

Zarina Chinoy, General Counsel, EPC Division, Shapoorji Pallonji Group

Moderator:

Rajendra Barot, Partner, AZB & Partners

HOST: So, I have some bad news to announce there's no coffee break between these two panels. So you all are all bound to stay inside this room without any coffee for just one more hour before we break for cocktails and dinner. But with that I would like to call upon our last panel of the day today. So I'm going to chastise Neeti on the mic and tell her to release our panellists and let them come on the stage. Absolutely. So we'll start our next session, which is the panel discussion on the "Role of General Counsel in Running Efficient and Effective Arbitration Proceedings" and I'd like to call the panellists on the stage. The panel will be moderated by Mr. Rajendra Barot, Partner, AZB & Partners here in Mumbai. Welcome Rajendra. We have Faraz Sagar. Oh, you're in his place. Okay we also have Mr. Nitesh Jain Partner at Trilegal. Ms. Nidhi Parekh who's the Head Legal Essar and Ms. Zarina Chinoy General Counsel, EPC Division, Shapoorji Pallonji Group. So, thank you and welcome to all our panellists.

RAJENDRA BAROT: Hello. Good evening everyone. Thank you very much for organizing this panel, which is going to throw up a lot of interesting questions. And I guess questions that relate to what happens when the rubber hits the road. So we've heard about arbitration clauses.

And we've heard about implementing the arbitration clauses. But the question is, is it really effective and is it really efficient? So we thought what we would do is we would present views by a mixed panel. So what I'm going to do is I'm going to have a brief introduction of the panel. So we've got Zarina here who is the GC in Engineering, Procurement and Construction Division of Shapoorji Pallonji Group. She's a solicitor and she has over 19 years of experience, and her specialization is negotiation relating to construction and finance contract as well as dispute resolution, including ICC arbitrations. Sitting next to me is Nidhi. She's, the Head of Legal of Essar and has over 16 years of experience across multiple sectors, including oil and gas, infrastructure, mines and minerals, petrochemicals. So apart from the two GCs, we've got two practitioners. So we got Ankush Mehta who's a Senior Partner from Cyril Amarchand Mangaldas. He's also a solicitor since 2002, has over 18 years of experience in advisory and litigation matters. And he does a lot of commercial disputes and white collar crime advisory. And then we've got Nitesh Jain, who's a partner at Trilegal. Over 16 years of experience, litigating before Indian courts, including Supreme Court, High Court, Trial Court, Tribunals, Regulatory Commissions. Nitesh does a lot of international and domestic commercial arbitration. Also does white collar crimes and insolvency matters advisory. So to start a very brief introduction to what we propose to do, what we thought was we'll break this up into four parts and I think it needs no introduction in arbitration clause, because if you are doing a contract in India, and unless it's one of those issues which cannot be arbitrated, I think an arbitration clause is a given. So what would you typically look for in an arbitration clause? And let's start first with the industry so you want to go first Nidhi?

NIDHI PAREKH: Good evening everyone once again and thanks. I'm happy to share the panel with all my esteemed colleagues here. I hope I'm audible. Thank you. So, as we spoke in the morning as well, and we discussed, arbitration clause is a no brainer. You cannot not have an arbitration clause in today's day and age for various reasons, not only from the perspective of the enforcement but also cost effective, time effective. And I speak a lot from the business industry because I work in-house. While we, of course, want the matters in our favour, and we want to win each and every litigation that's out there or arbitration that's out there, but you also have to ensure that it's cost effective. And that's one major concern a lot of business teams and promoters keep in mind and the management keeps in mind as well. When it comes to arbitration clause.... So of course, we've established that we need the arbitration clause with the evolution and the amendments we see - what we saw in ***Anupam Mittal*** and ***Westbridge*** case that now the Arbitration Agreements needs to have a seat. As I discussed in the morning, I would not be in favour of that. And as I said, it should be implied that if the seat or the law for Arbitration Agreement is not mentioned, it must be implied that what is there in a Master Agreement applies here as well for the Arbitration Agreement as well. Apart

from that, what I have as a standard practice been doing over the last couple of years is ensuring that mediation has been a part of my dispute resolution clause. So my clause generally reads that the parties will first mediate, failing which if in 90 days they can't come to a resolution, the matter would be referred to arbitration. Now, depending upon the stakes involved, the other side the nature of the claims, et cetera, you decide if you want one arbitrator, which is the rules you want to take into consideration domestic, institutionalized, which one. And your claims decide which and how mammoth of a task do you want this arbitration to be. If it can be resolved through mediation, I think that's the first resort you should go to because from an industry that I come from, for example, from oil field industry, it's a very niche industry. So everybody knows everybody. Every crew member who's working on my rig, would have at some point worked at your rig and the other rig and XYZ at every possible ring. So, the information floats very quickly and you will always land up doing business with the same people over and again over the couple of years. So to ensure the relations stay intact, your business relationships stay intact, you might want to consider mediation over arbitration. The other important points in the clause should be, of course, the venue, the seats, the language, and as COVID has taught all of us as far as possible to keep it online for administrative work, and the preliminary meetings. May be something like cross examinations, et cetera, and hearings can be taken offline, but everything else otherwise can be considered to be kept online as well. So that's how I would go about drafting my arbitration clause.

RAJENDRA BAROT: Thanks. So I think obviously, when you have the luxury of choice because there may be occasions where you do not have the luxury of choice, it depends on your counterparty. So Zarina, what's your take on how much of flexibility have you seen when it comes to an arbitration clause? And what do you think are must have because I'm sure there are occasions when you are given an option of saying yes or yes.

ZARINA CHINOY: Yes, yes, yes, lots of lots of choices sometimes. I think the question merits me breaking it up into two parts. Am I looking at a private party in front of me? Am I looking at a government or an institution or a PSU in front of me? Depending on that, my arbitration clause itself will change. If it's a private party, like Nidhi said, everything can be discussed. Everything is open. Everything has a negotiation point. In fact, there are gives and takes in each case. There are some things that they may want there are some things that I may want and there is a good enough barter system in that respect. So that works. But in cases where I am looking at a government, a PSU or a state entity, then the arbitration clause may in fact be fixed in stone, sometimes. They will not deviate on anything. There are times they will not be, of course, seat venue, I'm sure you've all seen this. They are more comfortable in jurisdictions

they believe that they can or they have some sort of control or at least an image or perception in it. None of those then will change. But in cases like in private parties every single thing in that arbitration clause has a time and a cost effect. So you have to be very calculative in what you are going to put down. It's not that I am generally comfortable as a GC with a seat in Delhi. No, it doesn't work like that. It depends on also the kind of work that is going to be envisaged in that contract. The kind of disputes that are envisaged. If the disputes are going to be high value, if it's a construction dispute is going to be high value, then you are going to look at a seat which is going to be easily accessible. Lawyers, the teams, the experts, everything around that has to be structured initially itself in order for you to prepare for the worst case scenario, and we lawyers always prepare for the worst case scenarios. That is why we have arbitration clauses in the first place. So given that we take a great deal of effort in drafting these clauses. We take a great deal of time. There's a lot of negotiation and a lot of thought process that goes into each part of these clauses. And we do sometimes look at arbitration. We do break it up in the sense that if there's a certain quantum of dispute, if it's below a certain dollar value or above a certain dollar value, we say this kind of arbitrator, this kind of forum, and we will try to break it up. Yes, it makes it more complex. But at least there are directions. There's no second guessing in that case. So when the dispute comes, we open it up, we have seen that these are the challenges. This is where we're supposed to go. Point A says one arbitrator or three arbitrators. The forum is discussed. Parties are – I mean the dispute the kind of disputes are there. If it's all written in stone, at least we have a guideline to start with there.

RAJENDRA BAROT: Thanks, Zarina. So I think the learning is an arbitration clause gets tested when things are not hunky dory and so therefore, what are the standard mistakes that we see? Or what would you want to avoid? I mean the saying is the simpler your arbitration clause, the better it is. But Nitesh, in your experience, where have you seen hurdles come up when parties are fighting, and the arbitration clause is what everyone resorts to?

NITESH JAIN: So the arbitration clause, I mean, of course, we are saying arbitration clause. It's called as the midnight clause right? This is the last clause at 11:50 somebody will call that we have to sign it by 12:00. Please bless this clause, and then we litigators will ask questions. Right? And we'll ask few basic questions as to who are the parties? Nationality? Where are the companies incorporated? They're like, no, no, please don't ask all these questions. Just bless this, okay? And then we'll be like, okay, does it say any dispute arising out of or in connection with? They are like yeah, yeah, this is there. So which means it's very broad. I had a dispute last week where the arbitration clause didn't start with any dispute arising out of, right. So the dispute was whether your arbitration clause is narrow or wide. Thank you the other issue was whether your arbitration clause includes dispute in relation to management or not. Courtesy

Mr. Barot who's sitting here. I again had an argument to say that management word forget about the arbitration clause it's there somewhere else in the shareholders agreement, and therefore you can incorporate because luckily that clause said any dispute in relation to anything that's set out in this agreement. So again, you have to have some struggle. Other common mistakes, and where we struggle is whether it says seat, it says place, it says venue. Then you keep fighting for it. Do you have an exclusive court clause, whether it is subject to arbitration or it's the other way. Again, there will be dispute there. Whether it's a unilateral appointment or it is that the parties have decided whether it will be sole or three arbitrators. Again, there is a dispute there. A lot of times there is a thought that goes into whether it has to be institution or ad hoc. And nowadays institution because you have the option of emergency arbitration within 14 days, we have actually seen results. Within 14 days, it's actually decided. But then the other issue is, if you're opting for institution and emergency whether are you doing it in India or outside India. Outside India, whether emergency arbitration order, whether it's an order or an award, whether it's enforceable or not. And then you again, file Section 9. Again, there are a lot of disputes, right? I think we can do the entire ADR week only on arbitration midnight clause. It has that much of capacity in terms of disputes and the issues involved. The other few issues is when you have multiple agreements, whether you have a consolidation liberty or not. And what about joinder? If you have an institution rules, of course, it will cover everything right. What about confidentiality? Do you want to agree? Not agree. Whether it's provided under the act, not there in the act. So these are few components where individually, you can have various disputes and therefore, you certainly need to invest a lot of time in terms of finalizing what exactly that you're looking. And this I think comes more by experience. I think that's where the role of GC, which is I think the right identified topic by MCIA on this right, which is I think in terms of how the experience of GC in terms of the sector industry, the counterparty, if they can give us the right information their experience. I think that's where the GCs and the lawyers can sit together and come up with a good solution and to minimize to whatever extent at least we can when it comes to arbitration dispute.

RAJENDRA BAROT: So Ankush if you could just add your thoughts and again I have a view on whether it's a midnight clause anymore because I think life has moved on. People have learned that while experience is the best teacher tuition fees could be too high. So I don't know Ankush if you have a view.

ANKUSH MEHTA: No, I do. I do. Thanks. No, I've heard the panel very closely. I'm not sure if we are looking at arbitration as a complete solution to all the issues, right? We're all litigation lawyers in some form. We've experienced innumerable hurdles in some form when it comes to implementing or action in the arbitration clause. The question is I'm going to try and give a

different perspective. The question is, is it the right approach for the company or the client as a whole, that you necessarily must have the arbitration clause. Yes, we all discussed there are commercial contracts, and they should have. But I was just discussing in the pre-panel sort of conversation that we all talk about arbitration in a commercial setup? What about arbitration in a non-commercial setup? A family dispute, et cetera. What about arbitration or an alternative approach. Let's say mediation. Let's say no arbitration. Let's say courts where you are in continuous engagement with the counterparty over different contracts, right? You will initiate an arbitration in one. What happens? Is there an ability to continue to work with the counterparty again and again? Third, I think the focus on mediation should not be undermined. I know we are not undermining it. But especially when contracts at least in my own experience, especially when contracts are long drawn out, if you have parties in between firing off Section 9, et cetera, it impacts the overall ability for the contract to get concluded or achieved. So yes it definitely has its benefits. No doubt about it. And in terms of where it began and where we are today we all know how courts in India, at least in a larger sense, are lesser keen to intervene in arbitral awards. But I just want to leave my take by saying that look, I'm not sure. Other than a midnight clause 04:00 a.m. Clause, it's been given different names, I'm only not sure whether it's a one formula fits all. I'll just leave it with that.

RAJENDRA BAROT: Thanks. To kind of summarize, I have seen the approach to an arbitration clause evolve in last 20, 25 years. I have seen that really an arbitration clause is something which does get a lot more attention than what it used to. People are mindful that the reason why you want to go to arbitration is because you don't want to burden a court, which is already burdened. And even when it comes to an interpretation, if there is room for interpretation, and remember as they say, copper wire was invented when two lawyers were fighting over a penny. So if there is space for interpretation there's bound to be delay. We've seen, I mean, I remember there was a time when mark on fraud and arbitrability and Respondents used to come and raise fraud as an answer to say this issue cannot be arbitrated because they have said fraud. And the Claimant will say I've not said fraud, I have said misrepresentation. And that was interpreted by courts. It took about ten years. So the elephant walks, it can't dance because that is just the size of India. And I think my takeaway is we are much more proactive now in dealing with the arbitration clauses to put a challenge for the transcribers *hazaron khwahish aisi ke har khwahish pe dum nikley; bahut nikle mere armaan, lekin phir bhi kam nikley*. So I'm sure all of us will keep evolving. So now let's go to the second bucket. The second bucket is when there is a dispute, so obviously, when there is a dispute, it's the in-house counsel who will come to know about it first. But let me now try and turn the question on its head. So, let's start with you Ankush. When a client would approach

you, what have you seen as a standard process that a client would expect? Obviously bearing in mind that nobody likes litigation, but we are necessary evils.

ANKUSH MEHTA: So, I think off late we'll agree with one thing that the kind of disputes that are emerging, it's not always, and with due respect to my colleagues and actually friends, it's not always the GC who's approaching us. Right? There are different types of disputes. For example, technology. Very often you will have somebody else in the GC or along with the GC, there is somebody else who's giving you instructions. Other than that I think client as a whole is extremely well informed, extremely clear on what he or the client needs to achieve and extremely clear in terms of practicalities. I think today we don't have to have the standard lines of I mean every client, and I know it's unsaid, but I will still say it. Every client will ask you what's the percentage of success and our standard answer is we don't give percentages, But I think other than that the client also knows the answer. So I will just add a couple of points here to say that because the client is aware and focused and in fact, that penetrative enough to know that really who is the best person for the job sitting in which law firm, counsel, et cetera. This kind of education doesn't need to be given to the client at all. And this is across India or globally. So I think with that in terms of us as lawyers spending time in explaining ground realities, at least at least sort of that time significantly come down.

RAJENDRA BAROT: Sure as I said it's an amoeba which is trying to take a definite shape, disputes. So the effort that you are seeing from the government Nitesh, what's your take on the Mediation Act?

NITESH JAIN: So I personally believe that mediation is going to be the game changer when it comes to resolving disputes. Court of course, is not the solution. We have seen dependency of cases and the time it takes of course, arbitration is where parties are not able to resolve their disputes. Somehow, you have to resolve it. But I think the various advantages of mediation, and thankfully, the government, because of the Singapore Convention finally, we have a domestic act now where, and the biggest advantage of mediation now is that the settlement agreement arising out of mediation now will be treated as a decree of the court, which is where I think the key lies. So you don't have to -- so Singapore, of course, has ARB made Arb right? You start arbitration mediation and then convert that into an award. And therefore you have a consent decree. That's not required anymore, right? I think in any dispute, if you have a mediation clause which is mandatory, which I think it should be now, according to me and the act clearly defines in terms of which matters can be referred for mediation. What are the grounds of challenges? And it's very, very interesting to see the grounds, right. They are very, very minimal. It's on fraud, corruption, very, very minimal. So you do away with 34, 37, all

those grounds. Because it's a decree of the court, you straight away, go and challenge if there is any dispute. The other advantage of mediation is that the parties are sitting across, commercially, applying their mind and resolving and finding a solution, which is actually what the parties always intend to. All these legal issues in relation to seat, whether it's management, whether it's arbitrable, not arbitrable, whether we should do it, enforceable or not enforceable, I think all those the major legal hurdles can easily go away if parties are actually very serious in resolving issues. And therefore the government's attempt of actually making this as an act, according to me, will be very, very helpful internationally. Also, India has signed it. It has to be ratified. But because now we have the domestic act. Now it will help us. But this can happen only, of course, if you have that mandatory clause in the arbitration clause, right. Luckily the definition of mediation in our act also includes conciliation, right? Because a lot of the arbitration clauses, it says conciliation. But I think because of the act, the conciliation will also be included in the mediation. So that's how the catch point is. But of course, at the end of the day it all depends whether the parties are willing to resolve by way of mediation or not. Which is why there is a time period provided which is 180 days, which can further be extended by 60 days. And there's also a mechanism that if you fail after two attempts then you don't have to continue. You can just straight away go and start the next step. So I think it's a welcome step. It will save cost. It will save time. It will save lot of disclosure what we say in the arbitration. If you are able to resolve it commercially, nothing like it because at the end of the day, even after getting an arbitration award, when you are at the enforcement stage, you end up settling and negotiating and commercially resolving the issue right, which I think you can achieve by way of meditation. So to my mind I think and that's where the role of GC, I think just to stay on the topic I think in every clause the GCs ensured that, yes, mediation is there as a pre-arbitration step. I think it can resolve a lot of these disputes.

RAJENDRA BAROT: Sure. Now let's see, how good is the pudding. Right? So let's ask Zarina the proof of what are your views? What's absolutely necessary for a successful mediation in my view is an environment where people are able to discuss the strengths and weaknesses of their case without any apprehension. So Zarina does the pudding is it delivered?

ZARINA CHINOY: I'm guessing you're asking only in terms of confidentiality.

RAJENDRA BAROT: No, no across.

ZARINA CHINOY: Across. So one thing I want to answer Nitesh I assume you that needy. I agree with you that mediation should be written in, that would be good practice, good contract writing. But even if it's not written in, there is nothing to bar two parties from sitting across

the table and mediating at any given stage, whether the arbitration started or it's ended, it doesn't matter. Mediation can be a part of your process, no matter when. You do not need to shut that door. If you choose to shut that door of course you have strategic requirements, or you have some plan or mitigation or whatever it is in place. But that door doesn't shut merely because it's written or not written into a contract. As regards actually talking and hoping that the dispute resolves across the table, you need a couple of things, a couple of ingredients to this pudding as you would say. You need two like-minded people or at least some like-minded people who are both on both sides of the table, willing to talk about settlement. Who are willing to discuss that yes, there is a dispute maybe it's not only due to my fault or only due to your fault. Let's see if we can find a way to meet midpoint or closer to some point. If there is no impetus, if there is no desire on one side of the table, no matter how hard this side works, it's not going to happen. No pudding is ever going to form in that case. So it really takes two to form this and that dance will be incomplete if it doesn't happen that way. In terms of confidentiality, in terms of them having a sort of safe space, yes. I completely agree. That is something that is essential where they can talk about it saying that. Yeah, I know it was my fault. They're going to say that I'm not going to be able to take it out of this room or I'm not going to be able to prove it outside this room. But maybe because it was my fault here at this table, at this juncture, yes, maybe we can talk about a settlement or a number that's more reasonable here without arbitration. So, yes, that is something that would be a great benefit to mediation also. And I would also say that in mediation like you mentioned, it takes away all the complexities. It takes away legal dispute, I mean the various challenges, the fraud. It takes away things that external counsel might bring in to try and impede, or perhaps expedite the arbitration. It just allows two parties, normally without that dispute resolution, without that arbitration process to talk, maybe as friends and try and see if they can resolve it. That is a great first step. But there is a lot of work to be done. It is only a first step. I think there are a lot of other things that have to change in our law for mediation to go as far as we want it to go. Maybe take it to a point where I'm not saying it would take away arbitration altogether, but at least bring it close enough to that.

RAJENDRA BAROT: Sure. So obviously, and Ankush spoke about... yeah so you spoke about family disputes. And that's how as all of us know the Indian law is that if there is a family settlement agreement, which very often would be result of whether you call it mediation, conciliation, intervention that semantics. If there is ambiguity, even then, all efforts should be made to enforce it. So before I come to you Ankush, Nidhi, do you think the GC's involvement in the mediation talks, especially to draft non-binding documents, et cetera, does that assist the process? And I'm going to come back to you Ankush.

NIDHI PAREKH: Before I answer that question I'm going to add towards what Zarina just said right now. As she correctly said the intention of the party which matters the most when it comes to mediation. Now, I have noted in my experience as a mediator and mediating on matters as well, I've observed and attended some matters of mediation in the US. It doesn't matter if you are a large conglomerate and one of them was a large conglomerate against one of his ex-employees. The large conglomerate did not wait for the employee or the ex-employee to come down on his knees and wait till the ego is broken and then bring him to the table. He was completely in the wrong and me being with the mediator, while I was with the mediator, I heard the witness the company had against the ex-employee, but they still chose to settle the matter. I find that ingredient missing most of the times with Indian conglomerates with all due respect it's also because if I were, we still come from that perspective that if I'm seeing more than I should be, then there's something wrong. *Dal mein kuch kala hai.* If we evaluate from every perspective and realize that maybe I'm just doing this in the spirit of mediation and just to get done with the matter so that everyone can go home and not live on bad blood that needs to be developed in our thought process very, very importantly. So intention is extremely important as far as mediation is concerned, in my opinion. To answer Rajendra's question, yes, I think GCC should be involved with everything that's been drafted and not being drafted. No as in-house, no for day to day work as an in-house counsel, I generally make it a practice that there is a brain. One of the most important thing is you break walls you break ice and you're talking to your business teams on day to day basis or you have a nice camaraderie with them because they should be able to approach you when they have an issue or you should be able to talk to them without intimidating them, that what are you doing is wrong. And we hence ensure that every email which might be crucial, goes through the lawyer's table if it's required. The purchase orders, or most of the documents in the company like NDA or purchase orders, et cetera. are standardized, which will require mandatory reviewing before signing off. But that reviewing will become minimal. So we would have the GCs involved because for us to work with the business team is extremely important. A lot of them shy away to bring them on the table to even disclose because they're generally in the defensive side think that we have not done something wrong because they think we're going to hold them hostage for whatever reason. And that's not the case. So, GC's involvement, I think is extremely important to explain the business team is how it goes and take it from there.

RAJENDRA BAROT: So I think the first inning is over. So before we start the second inning any questions, we are at the halfway mark. I've got a question here. I've got a question. So, why don't we start with you? We're going to give her a microphone, or is she going to oh, I can hear you very clearly. Yeah.

AUDIENCE 1: My question to all of you is that, post pandemic inflection, there is an overarching shift towards the espouses of technology, which has created a wide space for online dispute resolution, which not only hints or rarely provides a dispute resolution. It also does talk about dispute containment. So my question is how has that meta morphed your dispute resolution specifically clause arbitration clause over a period of years. And at the same time if there is a concept. I was not aware of midnight clause which is signed, do you have a predetermined identified policy for industry specific disputes? Do you have something predetermined kept in your mind?

RAJENDRA BAROT: Nitesh do you want to take that?

NITESH JAIN: SEBI came up, I think last month they came up with their own arbitration rules, in terms of a lot of dispute used to be referred to scores. They have come up with their own system in terms of how we dispute in relation to SEBI matter will be resolved by way of an arbitration. They have their own rules that includes technology to a large extent. So you have a specialized regulator dealing with this. A lot of institutions are now coming up with their own rules in relation to technology. I think technology, it is sort of an essential part of any dispute resolution mechanism. So even if it's not there in the rules, I think the understanding is even if the Arbitral Tribunal is there, if it's only a procedural hearing, if it's a CMC has to happen, you don't need to do a physical hearing there can be a virtual hearing. If you're recording evidence, there is difficulty as far as the witness is concerned, right. I think there is an understanding that some lawyer can go with that person and they can be technology around to take care of everything. So I think technology is sort of inbuilt in the process already but a lot of institutions are putting rules in relation to arbitration. Lot of courts have of course come up with their own guidelines and so are the arbitration solutions.

AUDIENCE 1: So is India still far from something like cyber settle, which happens which is nothing but settling out your options with respect to going into dispute at the very first instance? Do we still have something like that in India for dispute containment?

RAJENDRA BAROT: Not that I'm aware of.

AUDIENCE 1: Cyber settle is basically a dispute containment mechanism where an online....

RAJENDRA BAROT: I understand the concept. What I'm saying is I'm not sure if there's something in India. Okay. Sorry. Can we move to the next question? Because you want to shout or you want to wait for a microphone?

AUDIENCE 2: Good evening. My question is for anyone from the panel can answer. It is in respect of Section 12(a) of a commercial act makes mediations mandatory. Now, after this mediation bill, which has passed where mediation has become optional. So what will be the situations of a mediations if the clause is there in an agreement?

RAJENDRA BAROT: So obviously, 12(a) will prevail because it's a specific clause that deals with Commercial Courts Act.

AUDIENCE 2: But Mediation Act has come, and now...

RAJENDRA BAROT: It doesn't matter because 12(a) will throw

AUDIENCE 2: But then what will happen sir. Basically, in case if the act says that it is optional, and if the earlier 12(a) of commercial, let's say, is as per the Supreme Court direction, that it is mandatory, then there will be an inconsistency.

RAJENDRA BAROT: No, therefore in my view 12(a) will still prevail. That's the way I look at it. To kind of ease this into now the third bucket, as I call it, that we've had an arbitration clause, which is not pathological we've had whatever alternate dispute resolution that we tried, and now the arbitration is starting so let's have two perspectives. And let's first start with the industry perspective if I may call it on, how do we make it make it more efficient? So what are the, what are the points that cross your mind in terms of who should be your arbitrator. Should you go to which counsel. What else can you do in terms of use of technology to ensure that you can save money because nobody likes spending money on a dispute. So why don't we start with Zarina, and Nidhi, and then I'm going to go to the two counsel.

ZARINA CHINOY: So disputes here. Right? So I think the first question is, what is the dispute? What is the nature of the dispute? What are the numbers involved? What are the types of claims involved? If we have to do at least a basic evaluation of those. If we find that there is a significant claim or that we need to fill a hole there, do we need to bring in to determine the validity of our claims? Do we need to bring in a lawyer to even assess whether from our contract perspective, from our construction or from our expert perspective, will these claims be able to hold up in an arbitration in a court wherever. So the first part is definitely evaluation. Evaluation with your commercial team, evaluation with external experts and maybe some Counsel help as well. So we would definitely take that into play before we decide that yes, we are going to file a notice of arbitration or take it forward from there. The second

thing we will definitely need to do is to see whether our claims have enough backup, enough evidence to support it. Do they have a contractual validity from where they are, where they're going to bring them? Do we have enough documentation and evidence that this claim will be substantiated in the process. I mean bringing a claim is easy enough. We have to look at it from the other side. Are they going to be big enough holes where they punch through and we have no claim left? So we've spent all this money on a claim that we believe that we should have got, but it will not be substantiated in law. So all of these have to go through a review process. They have to be analysed. There has to be a risk analysis process of all of this. Documentation in India has been a little lax. All of us are working on getting those processes in place. That is – a lot of times my external counsel will come and say, where is this memorandum? Where is this letter so and so, so and so? We need to substantiate that this is the best part of our claim, and I will not be able to show them this. So those processes, we are working on them, they are coming into play, we are getting better at it. But there is still some work to be done in that case also.

The next part of the arbitration of course then, depending on the kind of disputes we have, we have got to go into selecting arbitrators. We will of course sit with our counsel and see who would be the right person. It is quite an art. It is not a science where we will say, here are the buckets, here are the points, and now we will discuss and we will select. It doesn't work like that. It has a lot of complexity. It has also in terms of where they have decided, what they have decided, in terms of what the arbitrators themselves feel. So, none of these are easy enough. And when you do all of these, do we see merit in going for a whole arbitration itself? And again like you said, with Nidhi, with Nitesh, is there a possibility to mediate and just try and figure out if we can just settle it? We always do try, no matter at what stage. That is what we feel we have to actually start with. Then I am going to let you go on to the next process.

NIDHI PAREKH: We have our own made up setup. We will start with our arbitration at any point of time, leads to mediation and close it through consent terms if we want to. Like I said that is why intention is the most important point. When I have an arbitration on its way, as Zarina said and I echo what she said, the industry expert, it will be great to have an arbitrator or a learned lawyer who has turned into an arbitrator from that industry experience. Because every domain has its own issues. And as you also said about the industries where you come from, that matters a lot. Because that is a practice which is followed. And that practice has to be also taken into consideration why you take care of the procedural laws of arbitration. Why you take care of the laws of the seat etc. One of my concerns would be enforcement when I know the seat is different, the venue is different, the governing law, hoping that there is not a separate implied or a different governing law for the arbitration agreement itself. So I would of course be concerned about the enforcement of how – I would discuss it with my external

counsel as to where is it going with the enforcement perspective. How do we think it is going to work in our favour or not. The interpretation of some particular clauses as maybe required, which is a subject dispute of the matter. Legal opinion on some particular issues that maybe required before we start off, and that guy would start off much before my pleadings are on, because once you have identified your facts, you have got your documents in place, and companies nowadays are very well efficient and we have our data management system and everything is in place. Documents are preferably standardised as much as possible. But still, that is how we have disputes. One more thing I'd keep in mind apart from the arbitrator and my counsel being an expert in that industry, is how progressive is their thought process. Are they tech savvy? It is important that they deal with that, because ultimately it all comes down to my cost as well. And I have to constantly think about how my management is going to - how I am saving my management a buck. Maybe they can put that money into better use eventually, but that is an important aspect and that works a lot in favour of GCs also. Not from just the money perspective, because they know. They are of course – they want to win every litigation. It may not be practical. But you need to give them practical wins as well as far as we are evolving through the litigation as well. So the practicality – I mean I have had matters where my arbitrators have been so practical and they are like, no, no, no. We will just do an online hearing, even if it was not there in the arbitration clause. They have said no, these are all issues can be dealt with online. I don't want you all coming here. We will finish this, and only crucial hearings will be taken offline. So these are the points I would take care of that as far as preparations are concerned.

RAJENDRA BAROT: I am sure after the session, you are going to have a long queue of people asking you for this list of arbitrators who are willing to cut costs. But this is one perspective. Now, let's just reverse the perspective. And I know Ankush was making a point which, sorry I forgot to come to you earlier, but why don't you say from a counsel's perspective here is a client who says you want to start arbitration and this is our level of preparedness. Where do you think it could be more efficient? What are your recommendations? What are your standard checkpoints if I may call it?

ANKUSH MEHTA: I think there has to be a complete alignment between what the GC and the legal counsel are thinking. I think that outcome has to be common. You cannot be pulling in different directions to say no, this is what you will get. And I think the time of sort of being -- not being completely candid about where your case stands, I think those days are gone, because the question of or the level of accountability that exists today is way too much. So, where I see this standing is that we expect that general counsels like the two ladies on my left I mean, they would or their organizations would definitely first ask for an analysis of really

what are the strengths or weaknesses in our case or in our defence. I don't think any of these organizations of that level or anyone is going to move ahead without that. And thereafter I think there's going to be a call taken internally in terms of whether this claim should be taken ahead. This claim should be dropped. And at the end of the day, it's going to be a number that is sitting on the balance sheet, whether this is worth it or not. So I think that's definitely one big call, and we see a lot of deliberation before a green signal is given, that okay, go ahead and take this forward etc., etc. I just want to limit it to that. I think before the actual arbitration begins, I think the level of internal consideration is just way too much. And that's why I feel the GC's job is extremely tough, because they are completely sandwiched between the management's expectation and the realities of court.

NIDHI PAREKH: Ankush, thanks a lot for echoing that. I'm really happy to hear that from a lawyer. Seriously. But I'll just add to what Ankush said. In addition to the GC and the external Counsel being on the same page, it's also important you have the business teams on the same page. Like I said a lot of times, they just shy away from giving you information. I might have a claim -- We've had these incidents where I have a million dollar claim against a company who's connected to some Royal family in some jurisdiction, and I would not know that information. I would not know if I'm going to be roping them in for my future contract. I do not know what's the value they add. So before I go head on fighting with them, I would want my business teams or my management to inform me that how do I want to deal with them and where exactly was the problem. Because they are the people who are on ground reality taking day to day correspondence, discussing... their tonality might have irked someone. You have to keep these things in mind. And that's why having them -- And believe me when I say this, if you think two lawyers discussing this difficult, try discussing with a business team, Any department, HR or professional, the operations team or the IT team. They will not open their mouth and discuss anything because they think you're going to hold them ransom for something or the other. So to bring that break that ice and make them talk is a task in itself, and all three of them should always be in the same page.

RAJENDRA BAROT: So I think that's where I think an outside counsel helps because my experience always says that when the outside counsel says that put your signature on this and know that if suddenly something comes up and blows in your face, then don't look at me. And I think that is often an easy answer. So, Nitesh, if you could just briefly tell us what else do you think, would you think of here comes an arbitration, Tribunal appointed and clients says, how do we make this more efficient?

NITESH JAIN: Yeah. So I think there are various quick steps, which should be followed as a matter of protocol if an arbitration has been commenced. Of course you have identified the correct your nominee and the Tribunal right. If there is any sector specific, you have that specialized Tribunal, so that on technical points somebody's there to understand that. There is a detailed fact finding that has to start already in parallel before even you get the procedural order and there are timelines for statement of defence. So that fact finding has to happen you need to have experts already whether you need fact expert. Do you have witnesses? Do you need external experts? And I think their role in deciding your response to notice of arbitration or notice of arbitration heads of claim it has to happen at this stage. It's very important to see what all evidence documents that you have whether you have the ability to claim privilege on those documents. I mean the law of privilege works differently for different jurisdiction. For common law of course the correspondence that in house has internally right in UK, Singapore, US you can claim privilege. In India because of the Advocate's Act and the Bar Counsel's Rule, you can't claim privilege right while you start preparing and if you have an expert, you have to be very careful whether the work product that's happening is for the purpose of litigation so that you can start documentation your engagement and qualify that everything is for the purpose of litigation. And therefore you can claim privilege because you know, in discovery, somebody is going to ask, and therefore you should start doing that. You may in parallel also, if you think you have a good case, start identifying the assets of the counterparty that if you have an award after 18 months right, then do you need to go in parallel or along with the arbitration emergency? Do you need to get Section 9? Do you need to have some sort of security right for the purpose of enforcement. So I think there are various steps that you need as a part of preparation, that you need to follow, whether it's external people, consultants, engagement. You have to think on all fronts.

RAJENDRA BAROT: So while you are holding the microphone Nitesh, let me ask you this. So now let's go into the final bucket you've done your prep. So what I did in a BIT is at the first hearing I went with a memorial. So when the Tribunal said let's now define the timeline, I said no here is my memorial, so let's talk about the reply memorial. It depends on how aggressive do you want to be? Are you okay with your costs being accelerated, because when you draft a memorial before starting. But those are all strategic calls that you take. But now the arbitration is underway. So what do you think are precautions that parties can take in order to run an efficient process? And I know that we have to kind of crunch everything into this 1 hour and I had Neeti coming and telling me, I don't know. I think it meant nine minutes, but so what are your views Nitesh?

NITESH JAIN: So to efficiently run any arbitration, irrespective of whether it's an institution ad hoc, whether you're doing it domestically in India, outside. Right. I think that preparation has to start from day one. And I think some of the points have I already covered in terms of preparation, is that I don't think you can wait for your procedural order to come as you rightly said, and to see that okay the witness will come only after six months. I think you have to work backward because if you don't have a fact witness, if you don't have an expert, I think in your heads of claim, you can't identify those issues. So I think arbitration is all about forward thinking from day one and which is where I think the issues of privileged document discovery, all those things come just to see what is that you have in order to go aggressive or to be defensive. If you don't have and you'll end up disclosing a lot of your cards, then as Nidhi rightly said that you might as well just go and settle. Right. So I think it's the reality check according to me from day one that identifies the efficiency of an arbitration. I'm cutting my answer short keeping in view of the time.

RAJENDRA BAROT: Thank you I really appreciate. And again just to add my two bits before I go to Ankush is, what I have learned and I actually intend to put it on my CV that I've done three Bombay High Court trials. Because if you ask a Bombay High Court Counsel, how many trials have you done, they say we are Exhibit Five lawyers. But one of the first things which a very senior advocate in the Bombay High Court told me is, that when you draft a plaint, the temptation to add adjectives what you should resist because remember, the monkey is going to sit on your back when the matter goes to trial. And that's what I would say, as I said about an arbitration clause. I would say that about a pleading. I would say that about procedural order. The less you say, the less is the chance that there'll be complications. But your view on this?

ANKUSH MEHTA: So, I'll keep it short. I'll just say two things. One is just the person at the chair, the arbitrator, I think he needs to be task and firm and not give indulgences. And Secondly, conciseness in approach, whether it's pleadings, whether it is affidavits, et cetera. I think these two things should sort of reduce the delay according to me.

RAJENDRA BAROT: So sorry anybody else? Exactly because I thought it was eight minutes. And suddenly, honey, I shrunk the kids has happened. So do you want to go first Nidhi? The question is during the arbitration in your experience what can make it more efficient?

NIDHI PAREKH: Identifying the witnesses beforehand and preparing them for the avalanche that's going to be thrown towards them because I can prepare ten witnesses who might turn up on the last days is my luck they'll find ten different reasons, and we cannot

impose upon them that you have to be my witness in the matter. And like I said discussing the business prospects again with the companies etc. and future over those industries is important. So discovery of documents is your evidences, your documents which you want to disclose, et cetera, the preparing of the witnesses. I think these are the most important points in housekeeping and in your documents a lot of times the business teams clearly do not keep a lot of documents with them they think are not important, which we might consider are important. So you literally have to go through each and every document more so of a document to ensure if it's really adding to your matter or going against it. So the housekeeping work increases for us as GCs by and large with that.

ZARINA CHINOY: And I echo everything you said. I just think that you need to do your asset tracing. If you're going to go in for an arbitration, where at the end of the day, they're going to say oh it was an SPV, we have got no assets, maybe you need to cut your losses at that point in time. So I think that will also make it more efficient from your standpoint and from costs.

RAJENDRA BAROT: Thank you very much. So just to, I think we've got a couple of minutes left. Although here it says time is up. Any questions that we can answer in a couple of minutes? Okay that's great. So, in summary as all things keep evolving, I think change undoubtedly is the only constant and all of us keep learning. So hopefully nobody should say that what we learned from histories that we don't learn from history. Thank you very much.

~~~END OF SESSION 6~~~