INDIA ADR WEEK 2023 – DAY 5 DELHI

SESSION 3

ARBITRATOR'S DISCLOSURE OBLIGATIONS: WHEN IS IT ENOUGH?

12:00 PM To 1:30 PM

Speakers

Hon'ble Mr. Justice U. U. Lalit (Retd.)
Mr. Baiju Vasani, Barrister & Arbitrator, Twenty Essex Chamber
Dr. Sanjeev Gemawat, Group General Counsel, Vedanta Group
Ms. Smarika Singh, Partner, Shardul Amarchand Mangaldas & Co.
Ms. Ananya Aggarwal, Counsel, Shardul Amarchand Mangaldas & Co. (Moderator)

MS. ANANYA AGGARWAL: Hi. Good afternoon, everybody. Thank you for joining us for this panel discussion. I'll just quickly take a few minutes to give a little brief introduction of all my esteemed panellists here. We have Justice Uday Umesh Lalith, who is a former Supreme Court judge. He served as the 49th Chief Justice of India. He was one of the 6 Senior Counsels who were directly elevated to the Supreme Court and the second such person to become the Chief Justice of India. During his tenure as Chief Justice, he brought about major administrative changes and authored various landmark judgments. He's now regularly appointed as an Arbitrator in various high-profile matters and also delivers lectures at various prestigious law schools of India, such as the Jindal Global Law School, the National Law Schools, and even the Bombay IIT. Thank you so much sir, for joining us. We have Mr. Baiju Vasani. He's a barrister and arbitrator with 20 Essex in London. He's an expert in the fields of Investor State disputes, International Commercial Arbitration, and Public International law, with a remarkable career spanning two decades in international law firms. Mr. Vasani has represented both States and investors under EXIT and UNCITRAL rules and also played a vital role in advising on Investment Treaty negotiations and drafting. He has an active *pro bono* practice and also holds the position of a Senior Fellow of International Law at SOAS, the University of London, where he teaches International Arbitration to postgraduates from around the world. We welcome you, Mr. Vasani and thank you so much for being here.

We have Dr Sanjeev Gemawat, a highly accomplished professional known for strategic thinking and business acumen with impressive credentials as a Chartered Secretary in India

and the UK, as well as postgraduate qualifications in the law and Doctorate specializing in Insider Trading. He possesses a diverse… he possesses a diverse skill set. Currently serving as the Group General Counsel for Vedanta Group, he has nearly three decades of rich experience across a wide range of industries. His exceptional achievements have earned him prestigious titles, including recognition as one of India's top GCs by renowned publications such as Forbes, India, and The Business World. We welcome you, Sir. Thank you so much. We have Ms. Smarika Singh, who is a partner at Shardul Amarchand Mangaldas' Dispute Resolution and Arbitration Team. She focuses on litigation and arbitration matters. She has extensive experience in both domestic and International Commercial Arbitration, along with related litigation. Her arbitration experience spans across various sectors, such as construction, hospitality, shareholder disputes, and across various jurisdictions. She regularly appears before the Supreme Court of India, the Delhi High Court, Tribunals, as well as all major institutions across the globe. Thank you, Smarika, for taking out the time and being here. It's indeed an honour for me to be a part of this distinguished panel. Just a brief introduction of the topic today. Our topic is, 'Arbitrator's disclosure obligations: When is it enough?' Now, disclosure obligations of arbitrators uphold a very fundamental principle of arbitration, which is transparency. The provisions of the **Arbitration Act**, which require the arbitrator to disclose any circumstance which may give rise to justifiable doubts was introduced by an amendment in 2015. It also introduced the 5th Schedule, which lays down situations which guide the arbitrators to make such disclosures. Now, the extent and impact of these disclosures is what we will be discussing today. And the intent of the session is to give a legal as well as a more practical insight into these obligations. Now, without further ado, let me kick start this panel. My first question is to Justice Lalit . Sir, what is your opinion on the disclosure requirements under the 5th Schedule? Are they wide enough to encompass any situation which may cause such justifiable doubts?

JUSTICE U. U. LALIT: Good afternoon, everybody. And welcome to the session. See the Schedule which got amended and included so many diverse topics has expanded the matter perhaps, I think way beyond the expectations of anybody. It now includes situations where perhaps not just the shareholder or having an interest in the property, but even communications or even relationship with the Counsel in question or the law firm in question can also give rise to and it must be disclosed clearly. So therefore, to that extent, perhaps I think the requirements of the law after the amendment are more stringent, more wide than what we had before the Amendment. I'll just give you two outlines. Two decisions before the Amendment. One was by **Justice Ravindran and that Indian Oil** or something. Correct. Where the argument was… that you are… in fact, it was an ad hoc arbitration, a named Arbitrator, who was the employee of one of the parties. So therefore, the argument which was

canvassed was that there will always be some kind of bias when the arbitrator takes the seat, but that was rejected by the Court, saying that the parties have chosen to go to arbitration before the named arbitrator. Similarly, I had the occasion to deal with a matter prior to amendment, which was **Arawali.** We also followed the dictum, which was laid down by Justice Raveendran and said that if the parties wanted it, even if he happens to be the Managing Director of one of the parties, the arbitration must be before such named arbitrator. So therefore, this was the scenario. Now look at the situation which is obtaining today now today **TRF,** which was decision rendered by Justice Deepak Mishra's bench, that a party would not have the freedom to appoint a nominee or nominate an arbitrator. Correct. So TRF went to that extent. It can't be the arbitrator himself. We took the matter further in Perkins and said that if the party cannot be the arbitrator, then the party should not even have the right to nominate an arbitrator. So therefore, the kind of detachment, the kind of sort of distance between the party and the arbitrator is now the hallmark of the amendments which have been brought in. Naturally, the disclosures also have to be very precise, very clear. And perhaps if a person gets appointed repeatedly by one party as an arbitrator, then that can be a subject matter, and one has to disclose every time. So therefore, not just the fact that you are associated with somebody as a law firm or something, because it happens repeatedly in some of the foreign jurisdictions that persons coming from the same law firm they get appointed as arbitrators. So therefore, now the situation is that perhaps I think the disclosure matter has become very, very stringent.

MS. ANANYA AGGARWAL: Thank you, sir, for your valuable insight. I do agree that the 5th Schedule has kind of put in place a lot of stringent practices which have to be followed. And we all know that the Genesis of the 5th Schedule comes from the IBA rules and especially the red, orange, and green list. So, Mr. Vasani, my question to you now is that the IBA very comprehensively laid out these situations which could lead to justifiable doubts which under the three lists. So, in your view how do you think these requirements have been when they've been introduced in the Indian Arbitration Act? Do they confirm to the international practice? What's your view on that?

MR. BAIJU VASANI: Thank you Ananya. When we go to court we only hope and pray that we get a judge that is going to see things our way. When we go to arbitration, one of the beauties is we get to appoint an arbitrator that we think is going to see things in our way. What we can't do, though, is appoint an arbitrator, that we know is going to see things in our way. And so, what we are looking for in any arbitration is someone who is independent and someone who is impartial. To find some sort of common practice. In 2004, the IBA, the International Bar Association, put together a series of rules they did so under a traffic light

system of red, orange, and green. So, the red list was those situations where it was impossible that the person was ineligible to take a position as an arbitrator. That was called red non-waivable. Then there was red waivable, which was a serious situation and if disclosed, both the parties had to say, "it's okay we understand that situation, but we find it okay." That would be red waivable. Then there was orange, and orange was those situations where, depending on context, it could go to red, it could go to green, but it had to be disclosed. And then the parties and the arbitrator would discuss it and think about whether there would be a challenge. And then there were green, which were situations where… they needn't be disclosed at all. So, the key things about this traffic light system is that they were non-exhaustive. So, there could be many other situations in which there were red situations, orange situations, and green situations. The problem Ananya, before I get to the Indian context is that these are what we call 'soft law'. They're just guidance. They're just what Common law and civil or practitioners got together in a room and decided these seem like pretty good situations to have in red, orange, and green. So, let's say I was to start today an LCIA Arbitration in London, and I was looking for guidance as to disclosure, I wouldn't find it in the LCIA rules. I would just find the justifiable doubts which I think everyone agrees is a pretty good common universal standard. I would not find it in the **English Arbitration Act** because there are not standards in there as to what are or not justifiable. So if I was to make a challenge to an arbitrator in that situation I would not have anything concrete within which, to say "this should have been disclosed, and it wasn't disclosed." The IBA rules would, as I said, would be soft law. So, what they would tell me is here are some guidelines, which I can then refer to and may be persuasive, but that's the limit of those IBA rules. So, when I look at the Indian structure, I actually think it's very progressive in the sense that it codifies in legislation those same standards. And I understand having… I put them side by side, and I can see that there is pretty much almost a virtual overlap between the Red situations and Orange situations. And I think that that is a very progressive move because it forces mandatory disclosure of clear issues in a way that in other jurisdictions you just don't have. So, I would say that actually in that sense, India is ahead of the game in its legislative approach, where in other places you continue to have the vague concept of justifiable doubts, which then lead to arguments as to what that means and whether that is or is not a situation. Because the IBA rules as good as they are, as interesting as they are, are soft law and just the opinion of a bunch of lawyers in a room.

MS. ANANYA AGGARWAL: That's totally correct. And I hear you that the Indian system has kind of given a legal status to these lists, which is great. And as Mr. Lalit said that the disclosures have to be very particular, have to be very they are very stringent. So, Dr. Gemawat, from a client's perspective, I mean, when you have an arbitration and when arbitrators give such detailed disclosures, how likely are you to direct your Counsel that if you see something

is off to kind of challenge the appointment of the arbitrator? What are the things you look at when you take this decision?

DR. SANJEEV GEMAWAT: Ananya, interesting question. And I think normally traditionally, we have not been bothered about all the disclosures, particularly when I talk about the big corporates normally there are people of repute or the retired judges. They have certain credentials and reputation. So normally we don't bother. But then this is not the case today. And the difficulty today, what we are having is ... and I'm answering it in two folds. One is from an industry standpoint, in a legal ecosystem, we don't have sufficient number of arbitrators and sufficient number of lawyers. So, from a bar and bench standpoint, we are lacking people. So, in a situation like this what kind of people we are getting? The same set of people. Now, if you make the same set of people ineligible or if you doubt that because of one or the other relationship there would be justifiable doubts, of course there is, but the difficulty is can we continue with this kind of arrangement, particularly in a legal ecosystem where we lack sufficient skill? But that having said so, today when the list as far as Schedule Five is concerned, that list is illustrative in nature in my view. It's not exhaustive, so relationship can be of any nature. But then if I don't... if I don't put a question mark when the disclosure is made, then I would lose my opportunity of challenging that. So, the only option which is available with me at that point of time is to scrutinize the list very carefully. And wherever we feel that there is any doubt in terms of impartiality or independence, there is no option but to challenge that. So, this is how I'm looking at it. And I will answer some other topics.

MS. ANANYA AGGARWAL: Thank you. And I totally understand your point of view because we see this on a daily basis, because the pool is a little limited and we always end up appointing retired judges. And the credential is so much you don't think there's any need to challenge really. So, Smarika, my question is, as a Counsel in what situations would you recommend your client to challenge an arbitrator?

MS. SMARIKA SINGH: Thank you Ananya. Under the Indian Arbitration Act if anything, that falls... if the disclosure falls under the 7th schedule that's... for as a counsel for me is a no go. I would definitely advise my client to go ahead and challenge it. Of course, you leave it to them to decide whether they want to waive this because the law provides for it. But the 7th Schedule is something that is a no go for counsels. And as you just discussed, of course, they all fall from or they cover parts of the waivable and the non-waivable red list under the IBA. When we get into the larger 5th schedule from not the first 19, but so on and so forth, those challenges we would actually go into the subject matter and then decide whether it's worth making that kind of challenge, because as Mr. Gemawat... Dr. Gemawat also pointed out, the

pool is so small. Do we need that kind of challenge? But at the same time, we must be aware that if you don't challenge it within the prescribed time limit, then it's done and dusted. So, as a Counsel, our advice is often to challenge it. If it's under the 7th schedule, it's a no go for us. And if it's on the broader scale, we definitely decide whether or not to challenge because otherwise the ship is sailed.

MR. BAIJU VASANI: And I just wanted to add something from the international context to see if it's true in the Indian context. In the International context, we don't challenge unless we think we're going to succeed. Because if you challenge and fail, you're going to have a wounded arbitrator. And that wound, you fear is coming back to you. So, I wonder whether by preserving your challenge, you are potentially harming the arbitrator and potentially of you. And I appreciate that it depends on the credibility of your challenge. Right? So even on the even on the 5th schedule, you'd put something forward that has legs. So even if it fails, it doesn't fail because it was frivolous. But how does one go about in the Indian context of a challenge that fails.

DR. SANJEEV GEMAWAT: I just want to make a comment here. And the difficulty here is the law provides a mechanism where the same Arbitral Tribunal could be deciding the fate of that challenge. Now, in a situation like this, parties would have a precarious situation whether to challenge or not, particularly if had it been a situation there where there are some business interests, et cetera understandable. But then if there are retired judges, how can you challenge that? And because there would be one or the other reasons your challenge is bound to fail. So now these are the difficulties which industry would face. And I think appropriate for me to comment here is that, we do observe at times during the proceedings bias of the arbitrators. And it's very apparent, can we do anything about it? Because there... the proofs require so difficult to prove all those things. Now that is what the difficulty is. So, the way in which I look at these provisions are that these provisions are meant to push the industry to go for an Institutional Arbitration. You will not face these difficulties the moment... because Schedule 5, Schedule 7... it's very harsh. I would say heavy, harsh. But the difficulty is do we have option right now? So far as ad hoc arbitration is concerned, you will have to follow that process.

MS. SMARIKA SINGH: Mr. Sanjeev, there's one incident that I particularly want to point out is that, which is what I experienced last year is, we had an Arbitrator. We nominated an arbitrator and suddenly we get to know that he has retired and was part of the law firm which was representing the opposite side. Now we did not have objection to him being on the panel because we know his credibility. And he's one of the best brains in the industry. But surprisingly, it was the opposite side that took the objection. Yes. Said that while he's retired,

that there'll be some retirement benefit that he's deriving and therefore he shouldn't continue. You'll be surprised that ICC actually changed our nomination. It's an incident where we didn't object of any impartiality of our independence but we had an arbitrator changed. So, there is no straightforward answer to that.

MS. ANANYA AGGARWAL: I think these are all questions which we'll discuss a little more in detail now, as the panel is going on. So, let's dwell a little deeper into it. So, Mr. Vasani, I have another question for you is that, what is the expectation from the arbitrators in your experience, are they expected to disclose all circumstances which give rise to justifiable doubts? Or is it only those facts which they think would give rise to justifiable doubt?

MR. BAIJU VASANI: So, I think what we can all agree on is that justifiable doubt is the standard. There are probably 3 main ways one can determine the question of justifiable doubt. Three sets of eyes. One is the eyes of the arbitrator, him or herself, that's one. Two is the eyes of the party, and three is the eyes of an objective Observer. I think everyone agrees that the eyes of the arbitrator him or herself is not the standard, right? The subjective standard of the person who is being appointed is certainly not the standard of justifiable doubt. So, we can put that one aside. The one where I think we don't get uniformity throughout different nations and standards is whether it's in the eyes of the party or an objective observer? For the reason that a justifiable doubt in the eyes of an objective Observer made subjectively to that party for whatever reason may be okay or vice versa. What would be objectively, okay to a reasonable third party for that party for some historical reason may not be appropriate. So, the way I like to think about it, and certainly the way I do my disclosure is, I do both. I layer what maybe the objective standard? So, what a reasonable Third-party looking at me thinking, has he disclosed something justifiable? But I also take any knowledge I may have of that particular party. And I add that as an additional layer onto the objective standard. Such that even if it's not justifiable to an objective person. I know that there is something about that party that they may have justifiable doubt. And I think this broader disclosure is starting to get attraction particularly in the United States. So I've had cases, where… and some may find this leads to issues and I think that this is a good segue into the next question, which is where literally I appointed someone who then gave a disclosure that he and I met at a conference ten years ago. And we had a conversation and maybe he watched a video that I was in and all sorts of strange tangential relationships that I had with this person. And I thought to myself, “it's out of hand.” But at the same time, the idea is that they are just saying, “this is me. This is everything I have”. There can be no question because I have been absolutely transparent. I'm not making the decision of justifiable doubt or not. I'm just telling you everything.

MS. ANANYA AGGARWAL: Dr. Gemawat, your input on this?

DR. SANJEEV GEMAWAT: Well, considering the scheme of the or the legislative framework, I think it is all the more important for arbitrators to disclose everything. Let's accept this reality that Schedule 5 is only illustrative in nature. Justifiable doubts, this independence, impartiality these concepts are subjective in nature. The difficulty is if you don't disclose and that is subsequently challenged, your award is bound to get set aside under 34. Now that is the moment you say, if you disclose, then in that situation it is difficult for you to say that it is partial or impartial. But then if you don't disclose and the award is against the counterparty, then there's bound to be an observation that there was partiality and all that. Now, considering this framework, I think it's all the more important reasons, even for the clients to consider that the arbitrators should be making all disclosures and there should not be any exception.

MS. ANANYA AGGARWAL: I hear. And what I understand is from hearing both of you is that you both think that the arbitrators should give a full and complete disclosure. It's not a subjective disclosure. And it's a detailed disclosure. My thoughts on this. And my question is to Justice Lalit, that do you think this is a double-edged sword? That... detailed disclosures, does it encourage parties to challenge to make more challenges? And as Dr. Gemawat said, if you don't make the disclosure, then and if something comes up, then also you are challenged. So how does one?... what's your take on this?

JUSTICE U. U. LALIT: See, this is my personal view, that what is expected of an Arbitrator is far too stringent a requirement than what you expect of your Judge. I'll give you two examples. I happen to be nominated as the presiding arbitrator at the instance of two nominated arbitrators, they chose me to be the presiding arbitrator. One of the parties was a joint venture entity which was promoted by a well-established company on Indian company side, a multimillion company and I happen to have 500 shares of that company. So, I disclosed it saying that, “Yes, I do have certain shares, just 500. Nothing substantial. Nothing sort of to be influencing the decision at any stage on the commercial side. “But one of the parties they just sort of made it known to me that perhaps they would not like me to be the presiding arbitrator. I stepped back recuse myself. So therefore, that's where the stringent requirement. If I was a Judge and the very same company was before me as one of the parties and perhaps going by the normal law, if you don't have anything substantial as a financial stake in one of the parties before you, you won't even bother to disclose that. Correct? So therefore, what is expected of arbitrators is far too stringent. The next as a judge, I had an occasion to deal with a criminal matter where the Managing Director of a company was in a prayer seeking

anticipatory bail. We granted him bail. Correct. Next time the very same company came up on another issue and now that very company is one of the parties in an arbitration before me. So, I felt that I must disclose it as a fact that, "look here. I've already taken a particular stand as a judge. Nothing to do with the subject matter of the present dispute before the Arbitral Tribunal but in the past as a judge, I have taken this." Now, the schedule doesn't speak of a role of a judge. schedule speaks of role of an advocate if you come from the same Chambers, if you come from the same law firm, if as a lawyer, you had advised, et cetera, et cetera. But I consider that the spirit of it and as my learned one of the members said, it is not illustra.... It is not exhaustive. It is illustrative. So therefore, I took it as my responsibility to make it known to everybody I, in fact circulated the orders passed by me as a judge. This is the other extreme. So therefore, I think that having seen the stringency which emanates from this schedule, it is always better that whenever in doubt, please disclose. That's what I would consider it.

MS. ANANYA AGGARWAL: Sir, if you don't mind me asking, did they actually challenge after you circulated the orders?

JUSTICE U. U. LALIT: No. That is what perhaps I think to their credit they also understood that these are completely different matters. And that's what I said as a judge, if a very same matter had come up before me there wouldn't have been any disability. I wouldn't be required even to disclose that. As a judge, you don't have choice in the matter, whereas as an arbitrator, you are actually chosen by the party. So therefore, that is why the requirements have to be tougher, have to be stringent and no doubt about it.

MS. ANANYA AGGARWAL: I do hear you. And I mean it is true that the job for an arbitrator is much more difficult than anybody else. So, Smarika. What's your take on this?

MS. SMARIKA SINGH: I think Let's all agree the outset that disclosure per se doesn't make an arbitrator impartial or the arbitrator is not independent. Having said that as Justice Lalit just said that his disclosure.... in his case, disclosure was based on his personal experience and with the 5th schedule being illustrative in nature, I think it is important that one discloses to what one thinks may be an issue later on because that's the last thing you want is your award being set aside on the basis of any of the fact that it's not being disclosed. And I generally feel that there's nothing as exhaustive, or a more detailed disclosure or not so detailed disclosure, because here you have arbitrators who have been in this field for far too long, so they make good disclosures. Rather than let's term it as good disclosures and calling them as 'detailed disclosure'. I think that's the need of the art to make good disclosures and not... in Mr. Vasani's case not make disclosures of attending conferences together, those kinds of things.

MS. ANANYA AGGARWAL: I hear you. What I think is that there's a balance between a good disclosure well, it has to be detailed, but it has to have a balance. But do you think that as a party or as a Counsel when a disclosure comes, is there any situation in which a party or a Counsel goes out and does some research on their own to kind of just make sure that a good disclosure has been made so as to say?

MS. SMARIKA SINGH: Ananya, honestly, everything is so available on the Internet now.... Yes. Absolutely. You have every you have access to all kinds of information our LinkedIn profiles carry literally everything that we've done. So, wherever a party nominates an arbitrator, we definitely go back and look at their profile. We definitely do our research. It may not be that detail, but I think all lawyers here do that. I think a given....

MS. ANANYA AGGARWAL: Dr. Gemawat, do you also believe in this practice?

DR. SANJEEV GEMAWAT: I think that is one of the basic parts of our profession. That we know this is the ecosystem. We know what kind of arbitrators we have. We know what kind of lawyers we have. So, that sufficient research, not only the lawyers are doing, but then we, as in house counsels, we also do that kind of research and some reality check Ananya. Here the difficulty which we face is that who would be challenging this? Particularly when on your panel, there are retired judges. Now that is the difficulty which we face. Other people. We can always challenge. The lawyers are ready. But normally the relationship between the lawyers and the bar and the bench is such that people don't have that daring of even challenging this. And it is, from a client standpoint, it is our difficulty to push the lawyers that needs to be challenged. So, I think that is what... and I think that awareness, perhaps is required.

MS. ANANYA AGGARWAL: And Mr. Vasani, like, internationally?

MR. BAIJU VASANI: Yeah. So, there is technology now, which allows you to... so, you don't have to go searching individually in Google, you just put a name into a particular database and that technology will tell you everything that is already aggregated about a particular individual. The second thing I would say and I think this is critical for lawyers is actual knowledge and constructive knowledge. So, if you know... So, let's say the arbitrator didn't disclose something. But that information that wasn't disclosed is publicly available. So you didn't actually know because it wasn't disclosed. But the standard is not always actually it or could have known or should have known so constructive knowledge. And then there's the question that if that information was in the public domain and you didn't make yourself aware of that fact, but

could have simply by looking at it has your challenge time expired because of that failure to look publicly at the information? So potentially there's a negligence lawsuit waiting. If you don't actually do that exercise.

MS. ANANYA AGGARWAL: And I think we've all talked about the 5th schedule so much now, and it is very interesting the situations which have been laid down therein. There are few of them which have which are the most common ones which keep propping up. So, something like repeat appointments. So, Dr. Gemawat my question to you, as a client, are you more likely to challenge an arbitrator who has received more than three appointments in the past three years? Or, as you said, because you trust the credentials of the arbitrator so much that you wouldn't think that it's actually...?

DR. SANJEEV GEMAWAT: Yeah. So, I think it's an interesting question are in a normal situation and particularly the big disputes are there, normally arbitrators are coming from you know... they have credentials, reputation, et cetera. So even if there are appointments, it doesn't bother us. But then at times there are different kinds of arbitrators. We have a mix of the skill set. And there, of course it would raise my eyebrows undoubtedly, that should I be checking it further? So, it depends. It's very, very subjective. Very subjective. But then yes, as a client, we need to be very careful on that. And if suppose we have any doubt of any nature then we certainly raise those objections. But fact remains, as I said in my opening remarks also, we don't have sufficient numbers. The same set of people have been engaged by us also. And on multiple other occasions. So, I think we need to be objective in terms of assessment. But having said so, we can't ignore this completely. We need to be careful whenever this proposal comes.

MS. ANANYA AGGARWAL: And Justice Lalit, do you think that this should have been a criteria which should have been included in the 7th schedule so that it would lessen the possibility of any kind of biasness?

JUSTICE U. U. LALIT: See, according to me a very delicate situation may arise. Supposing if an arbitrator gets nominated in the first matter by a party and there is no association with that party. So therefore, the disclosure is completely silent on the relationship with that party. And then the same arbitrator gets nominated in a second matter by the same party.
You would disclose so far as the second matter is concerned about the fact that you are already an arbitrator in one matter. But would you disclose in the first matter that your repeated engagement in the second matter, correct? And that's why one of the best cases which actually came up before UK Supreme Court at **Halliburton** correct? Lord Hodge. Then the person

concerned had disclosed everything, whatever he had, he had he had done some three arbitrations earlier. So therefore, that was disclosed very fairly but it so happened that the very same person later had got an engagement to be an arbitrator in one or two other matters. And that part was not disclosed in the first set of arbitrations. So therefore, it's a very delicate balance. And that is why, according to me we are asking for tremendous amount of stringent conditions and requirements from the arbitrator correct? As a judge, you won't even bother. Union of India or Stay or State appears before you a number of occasions you deal with those matters. Big corporations, municipalities keep appearing before you. The very same municipality may appear so therefore that is never taken as a disability for a judge. But for an arbitrator, it stands on a completely different footing. Because the party nominates party selects a party is actually sort of a party autonomy comes in play. And since you are a private tribunal, so therefore, all the more stringent or off requirements. So therefore, at times it may happen that **Halliburton** is a very beautiful case to actually study on the point. So therefore, this is where, it sort of hits you. Yes.

MS. ANANYA AGGARWAL: Taking a clue from what you said and isn't disclosure supposed to be like a continuing obligation?

JUSTICE U. U. LALIT: It has to be.

MS. ANANYA AGGARWAL: So the point about if the arbitrator gets appointed on a second. Then you disclose it in the first. And wouldn't you think that that is...

JUSTICE U. U. LALIT: I may go a step further. Because what normally under the UNCITRAL model law justifiable doubts correct? Is about what? Is independence, impartiality. But the disclosure contemplated by Indian scenario under our act also takes into account one more facet of the matter. That is to say that he shall be able to finish the matter within twelve months. Now supposing in case he takes up an urgent assignment midway, "should he? Or should he not disclose that?" That's also a very delicate issue. So therefore, at times the disclosure part of the requirements of disclosure can be multifaceted when it comes to our schedules and our requirements.

MS. ANANYA AGGARWAL: that's true Sir. And just from a Counsel perspective, Mr. Vasani and Smarika, my question is that how do us counsels deal with repeat appointments from an international perspective, from a domestic perspective?

MR. BAIJU VASANI: Yeah. So, without any criticism of the Indian context, we have a bigger pool of arbitrators. We do appoint retired judges, but we also have barristers we appoint. We have professional arbitrators who are people who come out of law firms and decide they are just going to be arbitrators and nothing else. Law firm partners often sit as have a busy arbitrator practice. And we have many non-lawyers who sit as arbitrators. So, the concept of repeat appointment is actually less and less of an issue that I've seen in the international context over the years. That's not to say it doesn't happen. And of course, the IBA has the three and three. The three appointments in three years. But if you think about that, that's a pretty hefty standard. To get to get three appointments in three years is a lot. I would say on your point of continuing disclosure the 2014 Amendments to the IBA rules had an obligation to disclose a new appointment by the same party or the same Counsel. So that was actually added in 2014 to the rules to have an obligation to disclose. How does one deal with repeat appointments? I often find that repeat appointments... and you saw this in **Halliburton....** are very difficult to prove. That because of repeat appointments, there is some sort of impartiality or independence issue, right? Because often it's the same Counsel. How do you say? Well, they keep appointing you. Therefore, they are a financial source of your appointments and therefore you will.... it's very convoluted. The party again, it's a very difficult argument to make. There's not a direct, tangible conflict that you can point to, and it's somewhat amorphous. So, I find it a difficult argument to make. What I do is, I do what's called 'a lock in letter', which is a.... it's not a challenge. It simply says, that, "we take note of the fact that you have been appointed by this many this" .... and let's say they haven't disclosed two other appointments from the same Counsel, which we have found.... "We have also noted from public records that you've been appointed in this case and this case by the same Counsel. However, we accept the fact that you are independent impartial. And we welcome you onto this arbitration." Now, what does that do? I'm not challenging you, but I'm telling the other two arbitrators right to have a look and at the same time, I'm telling you, I'm watching you right? As the arbitrator. So, it's not challenging. And it's being very respectful. But at the same time, it's saying, I know, and now everyone knows but welcome to the arbitration.

MS. ANANYA AGGARWAL: Everyone's watching you. Okay, yeah. Smarika, do you have any input on this?

MS. SMARIKA SINGH: From Indian Law perspective, this, three years and three appointments. There is a reason why this has not been part of the 7th Schedule. Because, I think even the Legislature recognizes the limited pools that we have in India. And let me tell you, as counsels when we nominate arbitrators.... of course, apart from this, threes to three, ... it's based on the subject matter and their availability. And the limited pool that we have

here.... these are arbitrators who carry impeccable reputation. So, there is a certain amount of respect. And you go with a certain degree of confidence that these people are independent and impartial. So hence, for me, again, this three-to-three rule is not such a big detriment. Unless, of course, there's something jarring which comes out. But I don't see that as a big detriment.

MS. ANANYA AGGARWAL: So I think my takeaway from this discussion seems to be that while this repeat appointment is a situation under the 5th Schedule, we don't really see it as something which really affects the doubts of the impartiality or independence of the arbitrator. So, moving on another one of the situations which doesn't actually find place in the 5th Schedule, specifically, but it's of importance to all budding arbitrators, or aspiring arbitrators like us is with 'relation to law firms.' So, Dr. Gemawat, and my question to you, do you think that lawyers working in law firms have a more onerous requirement for disclosure? For example, if there's a large law firm and we've represented several companies, subsidiaries of those companies. Do you think that the lawyer has to disclose each and every subsidiary that they've worked on so as to complete this requirement? Do you think it's a more onerous requirement like that?

DR. SANJEEV GEMAWAT: I agree with that undoubtedly for lawyers, particularly working in law firms, serving multiple clients and they need to disclose everything. If they don't disclose, there is always an issue in terms of challenging this later. We can very well say that whether it needs to improve in terms of independence and impartiality. But then the fact remains that is subject to that challenge. What I see is that from a legislative framework, we have given all the description but just compare it with a law firm, which is doing advisory in transactional.... Transactions. They are the same firm. Perhaps at times, same partners. But then they keep two separate teams. They maintain that Chinese wall. That mechanism can also be provided in terms of when a disclosure is made, I think there should be some undertaking also that we would be maintaining Chinese wall even if we are providing services to these clients. Because at times it happens that the same party would be applied also. They have continuing relationship. I think that needs to be addressed. Because that is the gap which I see. And the second gap, which I see is that there is a change as far as **Arbitration Act** is concerned. But then there is no corresponding change in the Code of Conduct for lawyers. I think the moment you do that the Board of Conduct and the undertaking part, perhaps this issue might get addressed.

MS. ANANYA AGGARWAL: Justice Lalit, do you have anything to add to this?

JUSTICE U. U. LALIT: It has been dealt with very beautifully and succinctly. I'll just give another dimension to it. See, A and B work together as lawyers. Both became judges of the High Court and both are retired now and they share the same office from which they operate. In matters where A becomes a nominee Arbitrator, he along with somebody else chooses presiding arbitrator to be B. And when B, along with somebody else becomes the nominee arbitrators in another arbitration they choose A to be the presiding arbitrator. This is something goes on for about say six to seven instances. As a lawyer, the matter came before me and my client wanted to challenge this. To say that, "sir, this is to my mind. This is not something a good practice." The schedule doesn't say anything on this. Of course. The schedule came in 2015. When I was practicing, there was no such schedule. So, the only thing was justifiable doubt. My advice to the client was "sorry, sir. Please don't do that." And this is exactly what he said. "Please don't rub the arbitrators the wrong way. Otherwise, you will have a wounded arbitrator. And that's something which you cannot possibly sort of take that risk." So therefore, there are multiple kind of possibilities. Perhaps all those possibilities are not dealt with and have been sort of discussed in the schedule. Therefore, what... according to me and the learned speaker, it is true that this is only illustrative. So, one has to see the spirit behind that. And the spirit behind that is if there is anything which as he rightly, said... anything, which a third party may entertain a justifiable doubt then anything which comes in that realm, in that circuit, in that circle, or that compartment must be disclosed completely. That's where we stand.

MS. ANANYA AGGARWAL: And we all come back to the thing that the job of an arbitrator is most difficult when it comes to disclosures. And in law forms another issue, which comes up very often, Smarika, my question to you is that, law firm partners often hold executive positions in arbitrary institutions like the CIAC, the ICC, or the MCIA. Do you think that that should serve as a disqualification for other lawyers who work in the same law firm but don't hold positions in the institution? In an institutional arbitration, which is administered by these....

MS. SMARIKA SINGH: I have one sitting right here. But on a serious note, I don't think that should be a detriment. If I have a colleague partner sitting, let's say on CIAC board or an ICC board, does that mean that SAMCO, as a firm, cannot participate in any of the arbitrations that are under CIAC rules or under ICC rules? I think that's too onerous to ask. And I frankly feel that's Literally stretching the idea of impartiality and independence to no good. Yeah. It's actually to no logic.

MS. ANANYA AGGARWAL: I agree with you, but honestly, this has actually happened to us. Not once, but twice. So, these are actually like litigants are taking so as to say advantage of 5th schedule. In that sense.

MS. SMARIKA SINGH: They have a wounded, arbitrator.

MS. ANANYA AGGARWAL: Okay so now the next issue that we wanted to discuss. And Dr. Gemawat, you can have your view on this. Do you, before suggesting an arbitrator for your case, do you check whether your prospective arbitrator has taken any position in law on that issue, whether for or against. Is that a consideration that you have in mind when you're selecting an arbitrator?

DR. SANJEEV GEMAWAT: Well, that is one small part of the process. But then the important thing for a client would always be that your arbitrator should have the subject matter knowledge, and they should have certain amount of business acumen. They should have certain amount of commercial understanding. And if they lack that, they would not be the right fit to decide the commercial matters. And I think that is what the industry faces, the problem that we don't have that kind of sufficient skill set. So this is one part. The second part is yes, undoubtedly at times because of certain judgments of certain retired judges I'm talking about. Then that gives us some certain amount of mindset of people that what kind of mindset they would be having while they would be deciding the matter. And again, that gets linked with the commercial equipment that gets linked with the business understanding. And I think that is what would matter and I think as industry, as clients we are careful on that.

MS. ANANYA AGGARWAL: And Justice Lalit, I know you mentioned earlier about the case where you circulated the orders when you had passed but is this an issue which you're conscious of or does it happen to you often, when you sit as an arbitrator that you're influenced by any position of law that you may have taken while you were a judge?

JUSTICE U. U. LALIT: As one of the earlier Speaker very beautifully put it, there are three pairs of eyes. One pair is that of the arbitrator. The second pair is of the party. And the third pair is a dispassionate third person. Whatever I may consider is not something which is going to impact or affect. My impartiality and independence is my perspective to the matter. I must actually put myself in the truth of a third party. And then consider whether.... is there anything which would lead to or give rise to justifiable doubt? And therefore, see from the perspective from the pair of eyes of that third party. So therefore, rather than strain yourselves, put

everything before that third party. Let him let him take that call. So therefore, that's why I always go by this idea whenever in doubt, disclose everything.

MS. ANANYA AGGARWAL: So, you would have a string of orders to disclose every time.

JUSTICE U. U. LALIT: It's bound to happen now, what else can I do? Therefore, it has to be.

MS. ANANYA AGGARWAL: Okay so now, Mr. Vasani, just from the international context of it, lawyers and law firms often sit as arbitrators as we have already discussed and as you said. And at the same time, colleagues have cases with similar issues. So just tying in these two points, do you think that this is a disqualification for an arbitrator, that the law firm has cases pending on similar issues?

MR. BAIJU VASANI: Yeah, so this is the double hatting issue. I just lauded the benefits internationally of law firm partners sitting as arbitrators. And one thing I see in the Indian context is that this is not a great phenomenon as you would have internationally. But there is the benefit in that of having a greater pool of arbitrators. The drawback is this concept of double hatting, where a law firm partner, or in fact, anyone who is still acting as counsel, I do both arbitrator and counsel, where that person is sitting as arbitrator in Matter A and Matter A deals with a particular issue. And is counsel in Matter B where a same or similar issue is in play, or that person's law firm is dealing with issue B. And when you have that situation, you are potentially in a situation where you could create jurisprudence as an arbitrator in matter A, that you would then use to your benefit or for your law firm's benefit in matter B. There are now prohibitions being brought against this. Now one could argue that as an arbitrator, you have confidential awards, so it's not really jurisprudential. There's no real precedent as a matter. So even if it came to the fore, it's not binding. Even in ISDS it's not binding, it's still simply a persuasive value. But still it is a practice that potentially could be very invidious and at the same time, I think there is an understanding that double hatting is not something we should prohibit per se. Because I think it's very important that younger lawyers get the opportunity to sit as arbitrators. Because otherwise we are going to have a very limited pool. And we're going to have people who attend conferences like this, who've done L.L.Ms abroad, who have practiced in fantastic law firms, who never get to sit as arbitrator. And then we would be missing out on a pool of arbitrators that are potentially fantastic at what they can do. So the best way to do this is to allow people to act as lawyers and as arbitrators, starting off in smaller matters and to develop their skills. I can tell you that I am a much better arbitrator because I have been a lawyer and I am a far better lawyer because I've been an arbitrator. So having sat

on both sides, I now know what to say, not to say because sitting on this side of the bench I can see what I want to say or not.

MS. ANANYA AGGARWAL: I totally agree with you, and I know we're running out of time just one last small issue that I wanted to discuss and Mr. Vasani we can start with you only. What kind of... and this is the issue which does not find place in the 5th Schedule at all... is what kind of personal relationships should be disclosed by prospective arbitrator?

MR. BAIJU VASANI: Yeah. So, I think one has to be careful here. Because, sometimes professional and personal are blur. You can have friends in the industry. I think certainly... I can tell you; I never appoint an arbitrator I don't personally know. Right? So, I, ... that's just... its very open. That's the whole point in having an arbitration. That's now... and as I said, that doesn't mean that person is going to rule in my favour, but I know them, I know they will listen to what I have to say, I think, I know how they think, I've looked at their prior work, etc. etc. But, certainly, family, right, is obviously clear. Although I thought about that in Indian context where everyone is uncle and everyone is *bhai*... That would be far too big. But, certainly, family, we have romantic present and past which is sometimes difficult, if the past romantic was illicit or something, no one wants to bring up. I think, friendship, beyond professional, so, it's not just "let's grab coffee at the periphery of conference, but let's get our kids together for a play day and hang out with our spouses on a regular basis," The most interesting one, which I find fascinating and I don't know if it's ever come out, but it will, is enmity. So actually, it's the opposite of personal relationship where you hate each other. Right? Now in a long career, I can think of maybe two people that one was. This is an interesting one. One was an arbitrator. I challenged. It wasn't a great challenge. I accept.... Looking back. But at the time the client needed it. It was successful, but he did not take it well. And he resigned. But he resigned with a lot of vitriol and that would be to this day not happy with me for making the challenge. Another is a lawyer in a very contentious case where it became quite aggressively personal. Unfortunately. But sometimes these things happen. Who I can imagine sitting as arbitrator with me. I would challenge for enmity, but that is a very interesting one. And who would admit that, "I think you hate me so much that you are not going to rule independently or impartially on the case?" So, that one for me is a fascinating potential topic for challenge.

MS. ANANYA AGGARWAL: That would be really interesting to see how that challenge plays out, though. Justice Lalit, I mean, my question is to you now. Do you think it is correct for an arbitrator and a lawyer who's appearing before that arbitrator to interact during social events? And where should one draw the line? Because the friendship and the relationship between the bench and the bar is quite prominent. So where should one draw the line?

JUSTICE U. U. LALIT: See famous Chief Justice, former Chief Justice of the Supreme Court once said, "as a judge don't lose your friends who are already your friends. But as a judge, don't make new friends." So therefore, that's where it applies when people come from the same bar, same staff and that's exactly how it must be. I'll tell you there are certain lawyers that my friendship with them goes beyond just having a cup of coffee. So therefore, we hanged, perhaps I think go together go to certain vacations together. When I became Judge, I followed this logic or this principle that they won't appear before me. So, it was something like conversation between me and those set of lawyers to say, "do you want me as your friend or do you want me as your judge? Choose". And they chose the friend in me. So therefore, they refuse to appear before me. Where the same logic will apply when I become the arbitrator. So therefore, that is exactly why I say that the logic or the parameters or the requirements which are there when you are a judge and a lawyer, same logic or same requirements must apply when you are an arbitrator and a lawyer appearing before you. So therefore, that's where it stands. But over a period of time, you make friends with somebody and you like that particular person. So therefore, there is a possibility that perhaps you may develop friendship, which may go beyond just having a cup of coffee together. Then perhaps I think the call has to be taken by either of them not to appear before the Arbitral Tribunal and the arbitrator not to take up the matter which is initiated by that particular lawyer. So, it applies both ways.

MS. ANANYA AGGARWAL: Thank you so much. I think we've run over time, so I just want to thank all the panellists for the very insightful thoughts. I think it was a very interesting session. I hope you all enjoyed it and I hope everyone enjoyed it. So thank you so much. Does anyone in the audience have any questions? I'm so sorry.

AUDIENCE 1: The twelve months, rules actually suggest availability of the arbitrator and his ability to manage his calendar. As part of the disclosure should he be saying that I'm already an arbitrator sitting in three arbitrations, and I won't be able to accept another appointment or if he is overconfident, should he actually still disclose that he is sitting in three arbitrations already?

JUSTICE U. U. LALIT: See, that is exactly why it depends upon his subjective sort of an analysis. Take for instance, it's the very first assignment. So, there is no difficulty. He can as well finish in twelve months. Now repeatedly there are 2nd, 3rd, 4th or more assignments what should he disclose when the 5th assignment comes in? So therefore, he must naturally disclose all four earlier. But should he not disclose in the first assignment that look here, you repose confidence in me saying that. "I don't have enough number of arbitrations before me. So

therefore, I'll be able to dispose of all the matters. But now that I am saddled with four more arbitrations. What is the scenario?" So therefore, putting this why, because disclosure, according to Indian standards, is that you must also be able to finish the matter within conclude the proceedings within twelve months. So therefore, the disclosure has a different significance, not just your interest in the person concerned or in the property, but something beyond that. So therefore, it's a continuing obligation so far as to disclose all these material facts. Theoretically, the arbitrator must disclose, but practically, I don't think that perhaps this attitude or idea is followed to the hilt.

AUDIENCE 2: Can I ask my question? So, there was as a solution to the consequences of a wounded challenge, wounded arbitrator. One of the solution that was mentioned by the panel. I don't remember who was Institutional arbitration, when the challenge was to an ad hoc arbitrator or ad hoc Tribunal. But then again institutions have their own way of dissuading challenges. I don't know what the figure is now, but some time ago, SIAC just challenging the Tribunal, you had to pay $8,000. So that's again not a good thing. So, what you have to say about this? And second question is I repeatedly heard this expression, limited pool. My question is, where are you getting this information from? I know, literally hundreds of trained, qualified, smart people desperate for an appointment. How do you say there is a limited pool... limited pool in India?

DR. SANJEEV GEMAWAT: The fact remains that if you notice, of course, this data is not available in public domain in terms of how many arbitrations are going on, because it's all private records.

AUDIENCE 2: That is the second question you're answering?

DR. SANJEEV GEMAWAT: Yeah, second question I'm answering. But the fact remains that in industry most of the people, most of the lawyers, most of the in-house Counsels are GCs. They are aware that who all are available as arbitrators, who all are available as lawyers. So, the fact remains. And it's a reality, that we don't have sufficient number of arbitrators. When I talk about arbitrators, I'm right now talking about retired judges only. Because the tradition has been we can very well say that...

AUDIENCE2: Then you're limiting your pool voluntary.

DR. SANJEEV GEMAWAT: Exactly, because you are limiting your pool for the simple reason that this is what the trend is. As regards your first question is concerned, you will have to remind me again because that was targeted towards whom I am not too sure.

MR. BAIJU VASANI: I can answer the first one on Institutional. So, where the Institutional arbitration has the court or the board who decide the challenges that posted the Tribunal? If it's the Tribunal that decides, it's the same, whether it's ad hoc or institutional, there's no difference. The difference is where the court decides the challenge or a board decides to challenge, not the Tribunal. In those instances, I have found, in my experience two diametrically opposed factors. One is at the beginning of a case. So, before the case has started the ICC Court, for example, or the board is very keen to avoid conflict of interest. So even the slightest potential conflict, they say, "let's just move this arbitrator." So let me give you an example. Two weeks ago, the LCIA Court appointed me to a matter as sole arbitrator, I disclosed and I didn't have to disclose. But I disclosed that I had been appointed by one of the law firms on the Claimant side five years ago. Right? But the matter was ongoing and I disclosed, I said, but it doesn't affect my independence impartiality. And it's five years ago. It's not three and three. And the LCIA court decided not to move ahead with my appointment, right? Now I have no issue with that because they want to avoid even the slightest hint or perception of conflict. So, I find Institutions at the beginning of the case very keen to avoid any conflict. Once the case has started and then a challenge comes in the middle of the case. Institutions are very keen to avoid anything except really meritorious challenges. Because they don't want to derail the arbitration process. And I find challenges that I think actually on balance should have been accepted, were not accepted by the Court, but of course by the ICC Court, the LCIA court. But of course, you then have the final court, the National Court, to have a set aside issue. But I think the interesting part of that is you have the Institution which acts as a balance or an anchor on the question of the challenge.

AUDIENCE3: I'm Santosh Pandey, from Sarthak Advocates and solicitors. And the question is to Justice Lalit. Does the arbitrator's disclosure have to be as exhaustive as to include the publicly available details or is it that a party is supposed to do a due diligence over and above the disclosures made?

JUSTICE U. U. LALIT: See whatever the party may choose to do by way of certain research or analysis is for the party to do that. What the law obliges the arbitrator to make the disclosure and certain items have been put in the concerned schedules. So therefore, his disclosure must deal with every single facet of that and when he says that, "I don't have any interest in the property or in the person's concern," that must be true and faithful disclosure. He could not

depend upon the party to find out real facts or real circumstances behind that. So, it's the arbitrator's obligation is to make the full disclosure.

MS. ANANYA AGGARWAL: Thank you so much. I think we can take the balanced questions during lunch, maybe. Okay. Thank you, everybody. Thank you.

~~~END OF SESSION 3~~~