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MUMBAI CENTRE FOR INTERNATIONAL ARBITRATION

The Changing Landscape

of Arbitration in India

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Ms Niyati Gandhi: Good morning, everyone, and welcome to the second annual conference of the Mumbai Centre for International Arbitration. Thank you all for joining us today, and our special thanks to all who have travelled across the country and even the world to be here with us today. I am Niyati Gandhi, an advocate with Aarna Law and the current co-chair of the Young MCIA.

The theme for the conference today is The Changing Landscape of Arbitration in India. With the constantly changing landscape of arbitration in India, there is a lot to talk about.

Please join me in welcoming our special guests for the plenary session. First and foremost, please join me in welcoming our chief guest, the Honourable Chief Justice of India, Mr Justice Dipak Misra.

Please also welcome our guest of honour, Honourable Justice AK Sikri, who has authored not one but several landmark judgments on Indian arbitration law.

Finally, please join me in welcoming Shuva Mandal, the group general counsel at Tata Sons Ltd, one of the youngest and most influential general counsel in India.

Thank you for joining us today.

Finally, please welcome our CEO, Madhukeshwar Desai, to kick off the day's proceedings with the welcome address.

10:11 Welcome address by Madhukeshwar Desai

Mr Madhukeshwar Desai: Thank you, Niyati.

Respected Chief Justice of India, Justice Dipak Misra; Justice Sikri; Chief Justice of the Bombay High Court, Justice Manjula Chellur; Honourable Judges from the Bombay High Court; Tata Group GC, Mr Shuva Mandal; ladies and gentlemen.

When we launched the MCIA last year, I concluded my speech by saying that I'm confident that the MCIA will succeed. I'm confident that the MCIA will succeed because it's the collective aspiration of the people sitting in this room, on the stage, in the courts and even outside India that the MCIA should succeed. It is this collective aspiration to see India establish itself as a successful seat for arbitration that propels us.

I also continue to speak from where I left off last year to drive home a point. We are here to build on our commitments, to continue to improve as an institution, never stop learning, never stop innovating and pushing perceived boundaries. While there's a lot that we have accomplished in the past year, there are a few things that I would like to highlight.

Without mincing words, everyone here understands and appreciates that the manner in which arbitration is conducted in India today is far from ideal. Like every

10:13 change, this change too can be brought about only by the next generation.

In February this year, we launched the Young MCIA, a platform for young arbitral practitioners to come together and create a fraternity of like-minded individuals interested in arbitration. Over the past year, Young MCIA has conducted training programmes, in association with international organisations like, HKIAC and AFIA, to train young lawyers on the difference between court practice and arbitration practice, drafting and pleadings and, in our next edition, the art of cross-examination. We believe that these training programmes, besides imparting knowledge, will allow for our lawyers to distinguish between court practice and arbitration practice.

This community, in a short span of nine months, has already crossed 300 members, a feat for which I must congratulate our Young MCIA Steering Company. For the upcoming year, we will have more training programmes and more members in the Young MCIA.

Arbitration in India has acquired a dubious name as luxury litigation. A large part of this has been linked to the fact that arbitrations are conducted for the lack of availability of proper arbitration venues and five-star hotels. This is far from ideal for

10:15 arbitrations to be conducted and unnecessarily inflates the cost of arbitration.

Last year, we saw India's first and only tuned-for-arbitration facilities. Keeping in mind our commitment to building an ecosystem for arbitration, we don't limit the use of our facilities by linking it to our rules but keep it open for ad hoc arbitrations as well. In fact, in the last year we have had over 155 arbitrations conducted at our premises.

We offer our rooms at significantly subsidised rates and encourage the use of our facilities, specifically our facilities such as our arbitrators' lounge, breakout rooms, and we encourage the use of live transcription.

In fact, we have this conference, like we did with our last conference, live-transcribed to show the benefit of these services.

We are happy to report that our facilities are built to a standard that is truly international, because we have the Permanent Court of Arbitration and the MCIA that has signed an MOU for the PCA to use our facilities for their hearings in India.

However, the biggest milestone this year, not just for the MCIA but for the arbitration community, has been that the Supreme Court of India has asked the MCIA to act as an appointing authority for an international

10:16 matter under section 11 of the Arbitration Act. While this is a huge demonstration of faith by the courts in the MCIA, to my mind what was important was the message that it sent out globally: institutional arbitration had the support of the highest court in India.

For those who ask why this wasn't done before, I end by quoting the French poet Victor Hugo, who said nothing is stronger than an idea whose time has come.

Thank you so much.

Ms Niyati Gandhi: Thank you, Madhukeshwar.

May I now please request Shuva Mandal to address the audience.

Address by Shuva Mandal

Shuva Mandal: Honourable Chief Justice, Honourable Judges, Honourable Judges of the Bombay High Court, all of my seniors here, fellow lawyers, it's a great pleasure to be speaking in front of such an august audience.

Madhukeshwar mentioned that it is incumbent on the young generation of lawyers to take this forward, changing the arbitration landscape in India. That is largely true, but I think we need the guidance and support of the existing generations and their learnings, because we are on the threshold; like in many sectors of our economy, where we have the ability to make that change, it's a window that won't come again and again.

10:18 The next 10 years will see probably a tripling of the Indian economy. With that, for business houses like ours, the rest of the institutions will have to play a very key role in supporting that growth, and it's not easy. We are harsher on ourselves than we need to be. There are a lot of impressions about the arbitral system, the judicial system. That is not all true; there are a lot of positives.

If we look forward, the crux of the issue is what is it that we can do to support this growth that is going to come into India. If you historically go back, in the traditional way of the three pillars of our constitution -- the Government, the legislature, the judiciary -- if there is one pillar that has time and again withstood attacks, built its reputation, won the confidence of people, it is the judiciary. That is one point we need not debate much.

But with that also lies the opportunity to set in place an alternative dispute resolution system and the arbitration system. So what has really happened over the last two years that we keep speaking about this changing landscape?

Sitting in a business house, I can tell you. It is not the right word to use, but I think it will easily communicate the idea. There is a fear of

10:20 the enforcement, if I were to put it very clearly. There is a fear of the enforcement, whether it is the regulatory system, the judicial system, and what was missing in the arbitral system. If you really step back, we spend many hours discussing enforcement of awards. It's a chapter in itself. But in a lighter vein, the fact that there is discussion on enforcement of an award, it kind of beats the issue. An award is an award; it is there to be enforced.

There is a general respect among people for these institutions that have now evolved. Litigation has never been a win-win situation for businesses. It's never been a win-win. We spend several hours much more than we spend in courts trying to avoid litigation. But with growth in the economy, we are invariably left with the situation where we will be left with the outlier cases which go into dispute resolution.

People are looking for effective, speedy remedies, not because they like speedy remedies but because, very simply, the cost of capital in getting locked in litigation -- not in terms of costs; of course, it's a large part of it. But the fact that the principal issues of capital are locked into it makes business and projects unviable, and therefore, the speediness of the arbitral system.

10:22 There are low-hanging fruits. There are several big things we can do, but there are a few low-hanging fruits that can change it. For one, and in a much lighter vein, there are more lawyers than non-lawyers in this room. The arbitral system needs a greater and more active participation from arbitrators who are non-lawyers, with the non-judicial mindsets necessarily, because an arbitration is not the classic adversarial system of dispute resolution. There is a consensus approach. There is an expert approach.

I believe that if institutions like the MCIA also start inducting, promoting, if you may say, a non-legal approach to some of these arbitral resolutions, that facilitates both the legal approach plus the respectability and the enforcement of these awards in the judicial system.

The second which can be greatly helpful is the rules of natural justice. Natural justice is fundamental to business, to resolution of disputes. But typically, as a general rule, the parties involved in arbitrations have a certain sense of sophistication, have a certain sense of understanding of each other. There needs to be a slight relaxation of those rules, because people tend to abuse those rules more often than actually benefiting from them. That would be of great advantage if

10:23 the general direction in which arbitral laws develop is towards a more relaxed approach to enforcement of natural justice rules.

Institutions like MCIA have started the trend of preventing the export of the legal profession. It is not that arbitrations were not popular in India; they have always been, but it has been exported. A lot of major arbitration, for lack of institutions, have been exported, like several things that have happened to the rest of our country: capital markets have been exported, industries have been exported. Here is the opportune time for us to bring back all these institutions into this country.

We need not have 153 cases in the SIAC, as we saw in 2016. We could have had at least 50 of those cases in MCIA. What is required for that is a proper system for arbitration, and that system, institutional arbitration -- pardon me saying this -- is often confused with just good conferencing facilities. I think that is a very small part of the arbitration.

The heart of the institutional process are the rules, the emergency arbitrators. It is the alacrity with which rules are enforced. It is the fact that there is a time process through which it can be resolved. The culture is developing in India.

10:25 There are a few steps more to go, but I'm confident we will get there.

Coming to the changing landscape, I can tell you that business houses are worried. There was a time when several of my colleagues in the business industry would say, "Oh, it's a litigation, it doesn't matter, it will take nine years, ten years, it's okay, we will play it out".

People now think, rightly so, "What is it that we can do to resolve it?" People are taking their contracts more seriously. If the arbitral process develops a lot more, it will help in that a lot more.

Last, but not the least, where I started off, there is an increased requirement to have experts -- technical experts, valuation experts, accountants -- playing a more active role in arbitrations. A vast majority of disputes that go into arbitrations are not about, per se, legal principles as much as it is about complex oil and gas contracts, complex valuation issues, what are the principles to be adopted.

Typically, people rely on experts to depose before an arbitral tribunal comprising judges. Experts will be experts. But the determinators of the dispute need to be people with those technical skill sets. So it is important that, as institutions, we socialise

10:27 the concept of arbitrations outside the legal fraternity because a lot of value is also there.

I will be hearing the debates later on today, and we are posed a very interesting point. We have an evolving arbitral law, judicial interference has significantly reduced. There is more clarity in the laws. The overarching principle of public policy has been diluted. People feel more confident.

I must specifically commend the Delhi High Court, which has specifically gone a long way in enforcing awards, especially foreign awards. They have not balked at large amounts. They have not balked that these issues will trigger challenging, well-established Indian legal principles.

There's a general concern amongst people who challenge arbitral awards: what is going to be the security deposit I have to give? It's a good concern. It means you are not going to go scot-free on an appeal process for the next six years just because the system gives you that chance.

We are well posed the "doing business in India" controversy. The legal process, legal enforcement, we need to up ourselves there.

With that, I would like to thank all of you and welcome you. We look forward to a great conference

10:28 today.

Many thanks.

Ms Niyati Gandhi: Thank you, Shuva Mandal, for your insights.

I invite Honourable Justice AK Sikri to address the audience.

Address by the Honourable Justice AK Sikri

Justice AK Sikri: Good morning, everybody. My esteemed and revered Chief Justice Dipak Misra and his wife, Mrs Misra, sitting here; Mrs Manjula Chellur, Chief Justice of the Bombay High Court; Judges from Bombay High Court, past and present; dignitaries who have come from other countries; many very, very familiar faces in the arbitration world and from our country, who are really the torch-bearers; my wife; ladies and gentlemen.

Or should I use the expression I learned? I think I should send that message also. There was a memorial lecture which I was supposed to give, and it was presided over by Professor Baxi. He said to let's now use a neutral term, "gentle persons", instead of "ladies and gentlemen". I say "all gentle persons sitting here".

Let me first congratulate MCIA for organising this second annual conference. MCIA is barely two years old, and within this short span of time it has really

10:31 travelled a lot. It's not taking baby steps, going by the age of this institution, but big leaps forward. It has been recognised in India. It has made its presence felt in the international community, and I think it will do well in the near future as well. When we talk of this subject, The Changing Landscape of Arbitration in India, I'm sure it is going to play a pivotal role in the process.

Coming to the topic, I will start by narrating some instances, or features and anecdotes. The first is a couple of days ago, in the newspapers, it was said that in the Ease of Doing Business Index in India, the ranking of India went from 130 to 100, 30 steps in one stroke, which is a big achievement.

If you had read the reasons the World Bank has given, the two main reasons were that we have made significant statutory changes in arbitration law, bringing it in tune with international standards. Of course, that was the purpose when the 1996 act was enacted, but going by experience of how it worked and certain difficulties which were faced, they were sought to be overcome by these amendments.

The second was bringing in legislation insofar as the insolvency regime in this country is concerned, which is the IBC, Insolvency and Bankruptcy Code in

10:33 India. Again, it is a very, very significant statutory step.

Second, it must have been in 2005 or 2006 that we had gone to Singapore, a few lawyers from Delhi and judges. We were led by Justice Lahoti. We had interaction with the Singapore International Arbitration Centre, SIAC. It was their invitation to us.

Of course, after visiting the SIAC premises, in the afternoon there was an interactive session with three speakers from the Indian side and three speakers from Singapore. Amongst the speakers was Justice Lahoti, I was there, and the President of the Bar Association at that time.

First, we were to speak. We were speaking about what is the statutory regime as well as the Arbitration Act. In those days there were difficulties which were faced because of Bhatia International and ONGC Saw Pipes, so we were almost defensive in trying to explain the reason behind those judgments and how those judgments are still not the roadblocks.

For Singapore, the three speakers who were there were the CEO of SIAC, the Attorney-General of Singapore and one judge of the Supreme Court of Singapore. They didn't talk about what the law is and the nuances of

10:35 law, statutory provisions, et cetera. The chorus was, "Look, SIAC is best, the infrastructure, come to this country". That is what the SIAC representative said. The AG said that the Government gives full support to this SIAC and the Government is ensuring that it works. The Supreme Court judge, Justice VK Rajah, said, "Look, the judiciary is also supporting not SIAC in particular but arbitration culture in this country by minimal interference. So Singapore has the best environment, best atmosphere".

The third incident I wanted to share is that last month only, SIAC had its conference in Delhi. Our Honourable Chief Justice was the keynote speaker in the evening. In that session, our Honourable Chief Justice spoke, and a minister from Singapore was there, and she spoke. Thereafter, there was a panel discussion of lawyers from other countries, which was moderated by Mr Nankani, and the topic was Hard Talk, hard talk about the arbitration system as such, which has come under some ridicule for some reasons, whether there is a future for arbitration at international level or not.

Why I have narrated these three instances, as I progress further in my address, I will share with you. Coming to the first: India's ranking because of these

10:38 statutory amendments. In the aftermath of Bhatia International and ONGC, the Saw Pipes case, it was felt that some amendments are necessary across the board. The Law Commission was given this task, and on the recommendation of the Law Commission these amendments came into existence. Everybody knows; I don't know have to say much on that.

I want to emphasise here something which, in an emphatic manner, was emphasised by our Honourable Chief Justice in the SIAC address also. Look, there has always been a problem as to the purpose of arbitration, whether it is served by arbitration proceedings or not. The two things required are it has to be cost-effective and it has to be expeditious, where proceedings don't take much time.

That was not happening in our system, which are taken care of by the amendments. There's a cap on the fee, and there's a time limit which is provided to the arbitral tribunal to give the award, the time by which they have to give the award.

There's a thirst for institutional arbitration because ad hoc arbitration with a five-star culture and not arbitration culture was prevalent in this country. That has to be taken care of and that has been emphasised in these amendments. This has, coupled with

10:40 IBC, as I said, put India within 100 countries insofar as ease of doing business is concerned.

Once these two things are there, still delays take place because of certain other reasons, and it becomes still a costly affair because of certain other reasons. On that, I admire the topics which are chosen.

The first is on the arbitration clause itself, how it has to be worded. It has been the experience that, when these contracts are entered into between the parties, all details are worked out very minutely insofar as whatever is the subject matter. If it's a collaboration agreement, suppose one party has agreed to give its know-how, et cetera, to the other party, or an investment which is being made. But when it comes to arbitration clause, up to now, at least, not much effort is made, and maybe a cut-and-paste policy is adopted.

Particularly in international arbitration, that became the area of concern. If we talk in the context of what happened in India, starting from Bhatia, there was the seat of arbitration and whether, under section 9, the Indian courts can interfere with even those proceedings which are going on outside. So these disputes had been there.

Insofar as international arbitration is concerned, there are three sets of laws which apply. There is

10:42 a law of contract, which governs the relationship and how the contract, et cetera, is to be interpreted, various clauses, which law would prevail, the law of which country.

There is a law of arbitration agreement, which may be different from the law of contract, which is lex arbitri. And there is law of conduct of arbitration proceedings, curial law. It has given rise to where is the seat of arbitration, where is the venue of arbitration and all those nuances, from Bhatia's journey up to BALCO, and thereafter Reliance I and Reliance II, as well as Reliance cases. I have been a party to these judgments.

We felt that all this could have been avoided if there was a proper arbitration clause, particularly about the seat of arbitration and the venue of the arbitration, and it would avoid delays. If there is a dispute as far as the constitution of the arbitration is concerned and where the arbitration should take place, and the arbitration process doesn't get started, naturally the clause which is in the arbitration law, that the award is to be made within 12 months, won't be triggered. But delay takes place. The dispute has started, but the parties are still struggling as to where this arbitration proceeding is to be conducted,

10:43 which is the seat of arbitration, because much depends on that. And ultimately, which is the court which has the jurisdiction, even at the interim stage or final stage, to deal with such an award.

Therefore, this becomes very, very important and it can avoid delays.

The second stage is the conduct of arbitration proceedings. Insofar as conduct of arbitration proceedings is concerned, yes, a time limit is provided. But the challenge is to stick to these timings. Here, I would say there are two significant aspects which are to be kept in mind and which can go a long way in taking care of this time frame.

One is, instead of ad hoc arbitration, we have institutional arbitration. It should be not limited that the parties in the arbitration agreement are agreeing for a particular institution. That is a welcome move. That should happen. But in addition, under section 11, applications dealing with these applications, the High Courts and Supreme Court can refer the matters to such institutions, because much of the care is taken by the secretariat of MCIA or such institutions, and that can be provided.

There is a provision for scrutiny of the arbitration, at least from the stricter point of

10:45 view, and there is no such mistakes apparent, not going into the merits of the decision which is given by the arbitral tribunal, which minimises the chances of challenge to the award. It may give some strength as well or some facilities for the arbitral tribunal to decide the case appropriately and early.

The second aspect, which I said was a few days ago, in one of the functions organised by ICC, relates to the conduct of arbitration proceeding by the arbitral tribunal. Here, some bold steps are to be taken. What I have read, and what I emphasised there also, I can say in a nutshell because there can be a detailed discussion on that, as of now, what happens in arbitration proceedings, unlike court proceedings.

In court it is a judge who is in charge of the court proceedings. He controls the proceedings. That doesn't happen in proceedings before the arbitral tribunal. It is the parties. Whether it comes to pleadings, detailed pleadings, evidence also, the affidavits filed running into 1,000 pages, and then cross-examination of the witnesses which may go on for days, how this has to be conducted. The arbitral tribunal would only be taking note of the proceedings. The arbitral tribunal, or the arbitrator, should play a more positive and effective role.

10:47 There are three different authors who are great arbitrators in the international field. That is a recognition which they enjoy. They are David W Rivkin, Michael E Schneider, and the third is Karyl Nairn, a QC. They have described the approaches, which are almost the same. Therefore, I will not say each of the approaches but will sum up these approaches.

Rivkin calls it a "town elder" approach. Michael calls it a "commissioner model" approach, as we have court commissioners. Narin calls it "diagnostic consultant" approach.

If I may sum up and summarise these approaches in a few seconds. Instead of coming only after the pleadings are complete and issues are to settled, joining the proceedings and thereafter sitting for examination and cross-examination of witnesses, including expert witnesses -- which is one of the sessions here -- the arbitrator would take charge of proceedings or would at least participate in the proceedings from the very beginning.

In the beginning itself, it is an approach that, to some extent, I feel is taken from courts and to some extent mediation techniques also. He will have a first meeting, even when the pleadings are not complete, and maybe a statement of claim has come by the claimant

10:49 which has been filed, and would discuss what are the issues, what are the business stakes.

There may be a dispute between the parties but the parties may like to go on with business relations. What kind of decision is needed? Issues? Claims? After discussing this, it can lead to the curtailment of the pleadings, the evidence, on certain aspects, where evidence may not be required at all.

I can demonstrate it by giving detailed reasons, but there's not the time. I'm only emphasising that a proactive role by the arbitrators is needed. To that extent, and to give authority to the arbitral tribunal, some changes or modification in the rules of the institutions are also needed.

I told you about the first instance of India jumping from 130 to 100. All of you know that there's one Mr Amitabh Kant, who is the CEO of NITI Aayog. His write-up was there two days ago in one of the newspapers. He is a friend, so I called him, congratulated him.

He said to me one thing. "From 100, we can come to 70 or even we can go higher if one thing is done: enforcement of contracts by the judiciary". Some measures are required. With that, when the arbitral award is passed, the third level, which is how we

10:51 enforce the awards and how we enforce the contracts, the judiciary coming in to being.

I was happy to hear that the Delhi High Court is doing very well on that behalf. The Government has also come out with commercial courts. The Bombay High Court, Karnataka, Delhi and many others have set up commercial benches. What is required with the judges who are also posted there is that it should not be a routine roster change, one after the other, but it should be those who are well equipped with commercial laws, having that commercial sense. I admire my Chief Justice. We have one or two benches, but mainly Justice Rohinton Nariman is given these cases.

Let me tell you another example, in a related sense, as far as the IBC, Insolvency and Bankruptcy Code, is concerned. There was a resolution processed by the NCLT, the National Company Law Tribunal as to timelines. I think 180 days is prescribed.

I can share with you and when I find it, all those cases. It is a new court which has come into existence, hardly, and operationally it is hardly seven or eight months ago. All those causes which have landed up in the Supreme Court have been decided within one or two months from the filing of the cases. I think two judgments I have authored, three or four Justice Nariman

10:53 has authored, which I have read in the reports. That is the kind of work culture which is required.

I come to the second instance, our visit to SIAC, where SIAC was saying all this. The time has come when we can also boast. It was rightly mentioned that after BALCO, as far as judgments are concerned, in the judicial approach there has been a paradigm shift. There is an approach of minimum interference with the award. The judiciary has exhibited that. I have seen in many journals worldwide, it is appreciated.

The only problem is delay, which is to be taken care of. These are some of the aspects we have to give our attention to, and hopefully India will become the hub of international arbitration as well.

Thank you very much.

Ms Niyati Gandhi: Thank you, sir, for sharing your views.

Shri Suresh Prabhu, the Union Minister for Commerce and Industry, was unable to join us today. However, he has sent his regrets and, thanks to technology, a video message to address the audience.

Shri Suresh Prabhu (via video message): Let me congratulate Mr Madhukeshwar Desai for initiating this very brilliant idea of setting up the Mumbai Centre for International Arbitration. Knowing this young man, Mr Desai, I'm not surprised by his innovative idea. He is full of talent,

10:55 versatility, initiatives, and, therefore, he has obviously come out with these very interesting ideas. I am sure we can only benefit from this.

There are several business disputes which should go into the alternative dispute resolution mechanism. Going to the civil court should be the last option because courts are already crowded with so many litigants waiting to get a verdict from them.

If you have an alternative system which the Parliament of India created, of arbitration, it will ensure that disputes are resolved speedily. It is a burden of the courts that will get justice, and in the process we will be able to solve this problem.

But many times arbitration goes abroad because people have faith in that. We need to create good institutions in India in which people will have confidence and therefore they will come to this institution and we will have a lot of benefits from that. I wish to congratulate Mr Desai once again.

Unfortunately, I'm travelling and not in India. I'm participating as the Commerce Minister of India in very important events globally. Please excuse me for not being here physically.

I assure you of one thing, I will provide full support to this institution and ensure that such a young

10:57 body matures soon to become a globally acceptable, globally respected and globally renowned body through the sheer competence and integrity of the people who operate it.

Thank you very much.

Ms Niyati Gandhi: It's always wonderful to hear support coming in from the Government.

Finally, I invite the Honourable Chief Justice of India, Mr Justice Dipak Misra, to address the audience. Justice Misra has formerly headed the National Legal Services Authority and is the country's foremost proponent of arbitration, alternative dispute resolution and even online dispute resolution.

Address by the Honourable Chief Justice Dipak Misra

Chief Justice Dipak Misra: My esteemed colleague Justice AK Sikri, Chief Justice Manjula Chellur, Mr Desai, Mr Mandal, Justices from other courts, Honourable Judges of the High Court of Bombay, Mrs Misra, Mrs Sikri, ladies and gentlemen.

I had a text but I thought I shall speak to you. I was asking my wife in the morning why I have come here. This young lady, Neeti Sachdeva, sent an email to me. I don't know her. I asked AK Sikri and he said it's a good organisation, the MCIA.

She met me and I discussed certain things with her

10:59 so I agreed to come. My purpose of coming here is my interest in arbitration as a facet of the alternative dispute resolution system and I also believe in institutional arbitration. And if the MCIA is doing institutional arbitration, they need commendations, and I congratulate it.

Second, she said that this is a young institution. The longevity of an institution is not the mark of credibility. Young or old, it's the temperament, it's the attitude, it's how you run it that matters. So please do not, for God's sake, call it "young".

Third, Mr Desai -- I don't know him personally; I've talked to him -- quoted a line from Victor Hugo, the great French novelist. It is a beautiful line: When an idea's time has come to stay, it stays. I will add to it. It not only stays, it concurs. The idea of institutional arbitration has come to stay in India. Therefore, Mr Desai is correct in quoting Victor Hugo.

Mr Mandal had so many concerns. I will address only one concern of his, which also my esteemed brother called a concern. An award passed by an arbitrator who has passed the award through arbitration, or an award which is passed through the institutional mechanism or institutional arbitration, cannot be a paper tiger. Enforcement is the cornerstone of any result that comes

11:01 by arbitration or a decree of the court.

Section 34, amended in 2015, imposes the cost, the amount to be deposited. They are not there for the moment. My learned brother Justice Sikri said India has travelled from Bhatia to BALCO. Bhatia created some confusion. BALCO cleared everything, made it prospective. Then how do we deal with that interregnum period expressly or impliedly ruled out? He was a party to Reliance I and Reliance II. I have written two independent judgments. One is Harmony and the other is Roger Shashoua. Indian courts are not scared of accepting the foreign jurisdiction if the parties agree by their agreement.

If the arbitration clause refers to express elimination or implied ostracisation, we have to accept it as interpreters of law. The confusion between "the seat" and "the venue" sometimes meets. In fact, in Harmony we have explained there are so many things that have been added, how the English curial law and the substantive law would both be applicable. So we are marching ahead.

Coming back to Mr Mandal's comment. He spoke of the Delhi High Court correctly. An award is passed by the Delhi High Court. They come in, a petition. The culture hits hard. I thought the best way -- I have

11:04 done this myself -- to stop these challenges altogether, one case there was an award of $650 million. I said if you put $350 million, we issue notice and direct stay of the rest. Failing which the appeal goes.

In one case, they deposited; in the other case, they did not.

When the decree order comes, we say we withdraw the amount without prejudice. No bank guarantee. Nothing. Realisation of the amount is the most thing that matters to a litigant. That's vital to any arbitration. That's the point over here.

Let's come back to the growth of arbitration in India. I'm not going to tell you the history about 1872, what the West Bengal legislation did. I'm not going to say what the Britishers did thereafter. I'm not going to tell you of the Code of Civil Procedure and arbitration. I'm not going to say about the growth of the 1940 act or the 1996 act.

In 2015, an amendment took place just to eradicate certain difficulties and also to streamline. I always feel the economy is never static, life is never stagnant. The economy and law move together, and when the economy and life move together, the law comes as a conduit by it to connect. Here, the 2015 act has connected in three ways.

11:06 First, anyone who goes for arbitration wants a speedy disposal. The amendment emphasises on the time, extended time, that ensures that the arbitrator passes the award during that period. Thereafter it curtails the fee, and it gives a bonus, a statutory bonus, a recognised one. This one part is quickness.

The second, cost-effectiveness. There's a cap. People are eager not to take many arbitrations but to finish them. The pressure is on. The arbitrator can award, cost awards, actual cost. Unless an adjudicatory process is cost-effective, eventually it may not be helpful. And that purpose, the amended act shows.

The third is very important: To ensure objectivity and impartiality of the arbitrator. It makes an eligibility criteria, one; second, disclosure; third, removal. I will tell you about the eligibility criteria. On the law of contract, the law postulates the managing director shall be arbitrator or his nominee. The issue arose if the managing director is disqualified, whether he can nominate X, Y or Z. A great man. A great jurist. The court answered "no".

If you are ineligible to arbitrate as an arbitrator, you can't nominate an arbitrator. This stands in contradistinction to the right to nominate an arbitrator as a party. The party nominating and self-arbitration

11:09 are two different concepts.

Disclosure, I must say, has gone as almost a different kind of motivative injection. Do not do it, because eventually your award may be set aside. These are the safeguards that have been taken in the 2015 act.

Justice Sikri was my colleague in the Delhi High Court while I was the Chief Justice. After I came in, we amended the rules. The Delhi High Court has an arbitration centre. The court adjunct arbitration centre, presently it is named the Delhi High Court International Arbitration Centre. They appoint arbitrators and ask them to function as a shelter. They are guided by those centres.

This is court adjunct. That's different. I've travelled to three places in India, and I've found private individuals, private sectors are getting into institutional arbitrations. They wish to make a mark.

These institutions -- two are in Delhi -- are institutionalising arbitration. I must tell you, our act, our legislation provides an interregnum measure. An arbitrator, during the process of arbitration, can enter into mediation.

You see, what is mediation is not specifically defined in our jurisdiction. I attended a moot court competition where children from Singapore, Hong Kong and

11:11 other places, the United States, UK, many European countries, were addressing negotiation. Some of them debated with regard to the amalgamation of companies. But some of them addressed with regard to solution of disputes.

The arbitrator can take that role affirmatively by negotiating with them, that you can settle. I'm not saying that you should impose upon them. Justice Sikri has told about three methods. All three methods, according to my understanding, can merge into one. A dialogue.

Dialogue, ladies and gentlemen, stands on a different footing than monologue. Supposing the arbitrator listens to you for silence for hours. Meaningless. You don't know what's going on in his mind.

May I digress for a while, when I say about this monologue and dialogue? Sir Winston Churchill was the Prime Minister of the United Kingdom before India had independence. Ottley was a member of his cabinet. At one point of time, Ottley said that this decision was not discussed, how it has been affirmed? Churchill was imperialistic, a man of different character. He said, "Mr Ottley, this has been discussed on the last occasion; it's final". Mr Ottley had to politely remind

11:13 Churchill, but to no effect, "Sir, a monologue is not a decision". A monologue is not a decision. Therefore, the arbitrators are required to have some dialogue on certain occasions during the process of arbitration.

The other day, when the SIAC meeting was there, the minister has come, and I said, "There is no competition. In the Asia-Pacific region, there has to be collaboration. We must respect your institutional arbitration, as I would expect you must respect ours".

India is growing. Our economy is growing. We appoint today the highest court, the centre to nominate. Sometimes we do nominate centre to centre, but now sometimes people just centre to nominate. We believe this institutional arbitration is more effective than ad hoc arbitration. Therefore, there has to be mutuality, respectability and also to see how we really can improve the arbitration.

There can be no doubt that the time has come. India will take a pivotal place in the world of arbitration. Simultaneously, in the international field, we recognise the contribution of all concerned, especially in the Asia-Pacific region.

I am sure this conference will take a step towards that, and the young souls who have devoted their time and energy will make it successful. If they need any

11:16 help by way of conference and discussion, definitely if I don't have the time, Justice Sikri will be available, and if I have the time, I promise to come.

Thank you for being present.

Ms Niyati Gandhi: Thank you for your support and encouragement.

I invite Neeti Sachdeva, the registrar and secretary-general of the MCIA, to deliver the closing remarks.

Remarks by Neeti Sachdeva

Ms Neeti Sachdeva: Honourable Chief Justice of India, Justice Misra, thank you for accepting our invitation to be here to extend your support and to extend the support of Justice Sikri as well to this institution and to institutional arbitration. We really feel very encouraged, and we hope to get back to you very soon to have more and more support from you. Thank you very much on that.

Thank you, Justice Sikri, for your unrelenting support always. We, as the younger generation of arbitration, as we call ourselves, are always happy to have your support and encouragement.

Thank you, Mr Mandal.

We are thankful to Mr Suresh Prabhu, who could not be with us. It is good to have the support of

11:17 the commerce ministry and the encouragement.

I would like to thank Mrs Chellur, the other judges of the High Court for being here and gracing the occasion.

Thank you, Mrs Misra and Mrs Sikri, for your presence as well.

We are thankful to all of you present here and for making this conference a success.

MCIA has made significant progress in the past year, but let me assure you, this is just the beginning. We have lots to achieve. We have, over the past years, spread awareness about MCIA tirelessly, and I am happy to report that there has been a significant rise and uptake in the use of MCIA Rules. In fact, we see a trend where MCIA clauses are now being incorporated into the drafting of clauses with India as a seat.

We will continue to do the same in the coming year, and for the benefit of the participants present here, we will be very happy to have discussion meetings to discuss MCIA Rules. Please feel free to reach out to us any time.

We are delighted that not only the Indian community but also the international community has welcomed MCIA with open arms. Within six months of its establishment, MCIA conducted its first international road show in

11:18 London. Over 75 participants attended the event, hosted by White & Case in the London office. Who is who of the international arbitration world in the UK attended the lunch, hosted by Clifford Chance. Various other law firms and the chambers of UK welcomed us and extended their support.

We will continue to spread awareness about MCIA in India and continue to do roadshows in different parts of the jurisdictions of the world.

In order to push the reach of the MCIA to different jurisdictions, we will, over the course of the following year, establish the MCIA Users Council to engage with experts and in-house counsel from India and different jurisdictions. The Users Council will serve for the MCIA to gather inputs on our rules as well as academic support and for everyone to connect under the umbrella of the MCIA.

I would like to conclude by narrating a story. Here it goes. There was a sign on a shoe repair shop in downtown Boston which was run by an immigrant fed up with the complaints of the customer, so he put a signboard outside his shop which was in the form of a triangle. On the top of the triangle was "fast service", then "low price", and "high quality". Below was a line that said "Pick any two".

11:20 I assure you this could have been the situation of arbitration in India, but not any more with the presence of MCIA.

I'm delighted to report that for the first matter we had from the Supreme Court, we appointed an arbitrator within 72 hours of receiving the reference. I assure you, MCIA will continue to work efficiently, with high quality and at reasonable prices to make MCIA a world-class institution and India a preferred destination for arbitration.

Needless to say, we seek your support and encouragement to do all of this. I thank you once again for joining us today, and we look forward to your support for and active participation in the conference. Thank you very much.

Ms Niyati Gandhi: Thank you, Neeti.

May I now request Justice Rebello to offer our token of appreciation to the Chief Justice of India.

(Presentation of tokens of appreciation)

Ms Niyati Gandhi: Thank you, all.

We will break for tea, and I would request you all to return by 11.45 am.

(11.24 am)

(A short break)

(11.50 am)

11:50 Ms Niyati Gandhi: Thank you for joining us today.

I invite Mr Nish Shetty, co-chairman of the Mumbai Centre for International Arbitration, to offer his opening remarks.

Opening remarks by Nish Shetty

Mr Nish Shetty: Good morning, ladies and gentlemen.

It gives me great pleasure to open the substantive discussions at the second annual conference of the MCIA.

The theme for our discussions today is The Changing Landscape of Arbitration in India. I've been involved in arbitrations involving India or relating to India for some time now, and I've been observing from Singapore, where I'm based, the developments in the arbitration space in India. It's fair to say the last few years have been a period of significant change. It started with the BALCO decision in 2012, but the pace of change has really picked up in the last two years.

I want to highlight some examples of that. This has been touched upon by members of the judiciary this morning, and one of the big items of change is the legislative changes that have taken place through the amendment.

The amendments to the Arbitration Act came in in December 2015, just when we were about to complete the final draft of the MCIA Rules. The amendments came

11:52 in, and then we had to make further changes to those rules to take into account the changes.

In the end, we have a set of rules that takes into account the latest position on the ground in India. But from a change perspective, from a landscape perspective, those amendments to the Arbitration Act have been very, very significant.

Again, those following the development of arbitration law in India before that would be aware there was a consultation paper making its rounds for almost a decade. There wasn't much clarity as to when any of the items within the consultation paper would be accepted. All of a sudden, in December 2015, almost out of the blue, the amendments came into force, and they represent a significant step towards promoting arbitrations and arbitration India.

Through those amendments, significant inroads have been made in terms of arbitration law, from the narrowing of the public policy exception to the strict time requirement for completion of arbitrations, to the removal of the automatic stay, to the introduction of IBA Guidelines as a schedule to those amendments, in relation to conflicts in particular.

While I know there are debates about whether

11:53 the amendments are perfect, to me that's not the question. The question is: have the amendments been effective in taking arbitration to the next level? I think the answer must be an emphatic "yes".

Yes, some fine-tuning needs to be done, and I know that in terms of that fine-tuning, consultations are underway at the moment. It already has had a significant impact on the way arbitrations are being conducted on the ground in India. That's the first change in terms of the landscape.

The second is the promotion of institutional arbitration in India. You would have heard various speakers this morning talk about how institutional arbitration is the way to go, principally because the prevalent ad hoc arbitration method has, frankly, not worked out within the Indian context. Yes, we have ad hoc arbitrations outside of India as well, and perhaps they work in different ways depending on the jurisdiction. But certainly in the Indian context, they have not worked as well as they ought to have.

Insofar as the setting-up of the MCIA and the buzz it has created both in India and internationally, that has been part of this change in the Indian landscape. It's been an integral part of that change in the Indian landscape towards institutional arbitration.

11:54 As many in the room will know, Mumbai, which is in the state of Maharashtra, is part of or beneficiary of a policy introduced by the Government of Maharashtra that encourages institutional arbitration. As part of that policy, government-linked entities in public sector undertakings, as they are called in India, are required now, are mandated, to use institutional arbitration in the contracts that they enter into when arbitration is the preferred mode of dispute resolution.

That is another welcome, far-sighted initiative on the part of the Maharashtra Government. It remains to be seen whether other parts of the country will follow suit and similarly encourage institutional arbitration. Even if they don't, I think it's telling that the Commerce Minister himself is delivering the message that institutional arbitration is the requirement. It is telling the Chief Justice, who you heard this morning, delivered a similar message. Justice Sikri, a very senior member of the Supreme Court, is delivering that message as well. It does bode well for India, from a landscape perspective, that institutional arbitration is being embraced.

In terms of development and the change of the landscape in India, the other development I wanted to highlight was things like conferences such as the one

11:56 we are in right now. Quite apart from the MCIA, SIAC, ICC and other institutions organising conferences such as this, in October last year the NITI Aayog organised a conference focused on arbitration, held in Delhi. It was very well attended by both international and local practitioners, but really the message is that the NITI Aayog itself organised it, and for those who are not from India and who don't understand the significance of that, it's effectively the replacement body of the planning commission that has such a huge role in the development of Indian policy.

The NITI Aayog itself is focusing on arbitration. The fact that the head of the NITI Aayog, Amitabh Kant, who was referred to earlier, has also suggested that enforcement of arbitral awards is the next step towards ensuring India jumps another perhaps 30 or more steps within the ease of doing business ranking is, again, a very positive indicator from a landscape perspective. It is something else to look forward to.

Straight after that NITI Aayog conference, a very high level committee was set up, headed by the Honourable Justice Srikrishna, to look at the state of arbitration on the ground here in India. A detailed report has been published, again in the public domain. It's online, and you can read it.

11:58 Debates are ensuing at the moment as to whether the recommendations of that report should be followed, will be followed, will not be followed, et cetera. Again, to me that sort of debate misses the point. The fact that a report of that nature was commissioned in the first place is indicative of where arbitration has come within the Indian context. That's what we need to celebrate. Arbitration is important in India and it's gaining importance.

In terms of arbitration practitioners and the interest of arbitration among those arbitrations in India, that is the aspect that one needs to bear in mind. That interest is reflected both from those who are on the ground here, in India, and from those who are operating in the arbitration sphere outside of India but with an interest in India.

Starting with India, for the longest time arbitration in India has been conducted as an extracurricular activity. Once you are done with your litigation matter, between 4 and 6 or 5 and 7, together with tea and biscuits, you conduct your arbitrations. That's been the norm.

The result is obvious. The result has been that arbitrations last as long, if not longer, than the court process -- and as we all know, the court process does

11:59 take a long time in India. With the amendments to the act and the timelines that have been imposed, there is a greater awareness of how arbitration should be conducted: in a timely manner, in a cost-effective manner. And that is changing, not everywhere but it is certainly changing.

There is greater exposure to the way international arbitrations are conducted because Indian parties and Indian counsel are going outside of India and participating in international arbitrations. Whether in London, Singapore or elsewhere, they are certainly participating.

The other trend, insofar as that is concerned, is that younger lawyers, those in universities, in Indian universities, are participating in international moot court competitions and the like and gaining exposure to the way things are typically done in the arbitration world. All of this bodes very well.

In the same vein, MCIA has been conducting training programmes for younger arbitration practitioners throughout the year, which are always oversubscribed. Other organisations such as the IBA and ICCA are organising capacity-building activities on the ground here in India. Certainly, there is both interest and the ability to now learn how international arbitration

12:00 and arbitration generally ought to be done.

Just in terms of arbitration conferences, which are a perennial favourite among arbitration practitioners both here and elsewhere, I would say that as recently as three years ago, getting 50 people into a room to attend a conference on arbitration was difficult. Today, we have a sell-out conference yet again, over 230 participants.

Just last month, in the middle of October, just before Diwali, there was a series of arbitration events in Delhi spanning almost a week. All the key institutions were there organising these events, and almost every single one of them was fully attended. What's the message there? People are willing to take time away from their busy schedules to attend these conferences and participate in discussions and dialogue about what's going on in the arbitration space. That can only bode well.

In terms of arbitration practitioners within India, I've always said that the time is now for there to be an arbitration bar, such that it's no longer an extracurricular activity but practitioners on the ground in India treat this as their primary role, meaning they are arbitration practitioners full time.

I know a number of the top firms now have

12:02 individuals who do that, but I would welcome that change in the landscape to go beyond just the top firms into the broader arbitration market in India.

I've dealt with those within India. Let's talk a little bit about those from outside India, including myself. If you look at the programme today just as one example of who is interested from outside in arbitration in India, you will see some very senior names from all across the globe who have taken time off from their busy schedules to come here and participate in this dialogue about arbitration in India. That happened in October in Delhi as well. All this indicates a significant change in the arbitration landscape in India. I don't see the strength reversing. In fact, I see the strength becoming far more significant and far more apparent in the coming years.

In conclusion, I would say this. The landscape in India for arbitrations is changing rapidly. There are issues still, but those issues are being resolved. For those practitioners in India, I say embrace this change, help shape it. For those from outside India, I say take notice, as the end point of this change may result in this being among the most important arbitration destinations in the world in the coming decade.

I will throw one metric out there to justify that

12:03 point. I'm told that today there are 50,000 ad hoc arbitrations being conducted in India as we speak, ongoing arbitrations. If you aggregate all of the cases that one has in SIAC, ICC, LCIA, et cetera, it won't even come to one per cent of that number. That's what one has to play for.

If ad hoc arbitration moves to institutional arbitration and international arbitration practices come to the ground here, then there will be a significant rise in arbitrations on the ground here conducted in accordance with international best practices.

The MCIA will play its part insofar as that is concerned, but there will be other institutions as well in due course, perhaps. But what is more important is that the arbitration landscape will continue to evolve even beyond what has happened in the past few years.

We have a full schedule ahead of us, and I look forward to hearing all of the panellists and moderators. It remains for me to thank all of you for being here, and I hope you have fruitful deliberations throughout the day. Thank you very much.

Ms Niyati Gandhi: Thank you very much, Nish, for your encouragement and efforts at the MCIA.

As we move on to the substantive discussion, I want to highlight once again that time savings and efficient

12:05 administration take priority at the MCIA. Therefore, our substantive sessions are going to have some rules.

Each session will be 45 minutes, and 15 minutes will be saved for questions and answers. As the substantive discussions go towards the end of the 45 minutes, we will highlight that they are going towards the end of 45 minutes with a 5-minute marker, a 3-minute marker, a 1-minute marker and, finally, when they are going over time, a "Stop" sign.

I invite to the stage our panellists for the first session, on negotiating contracts and the importance of arbitration clauses. I welcome Mr Cyril Shroff, Mr Janak Dwarkadas, Mr Nakul Dewan, Mr Richard Menard, Ms Rohini Roy, and Mr Robert Hunter.

Session 1: Negotiating Contracts

Mr Cyril Shroff: Welcome, everyone. It's my privilege, with my colleague Nakul Dewan on my left, to moderate this panel. It's indeed a very distinguished panel. We cover not only so many legal systems but so many points of view. It will be a very interesting debate ahead.

I'm not here merely because I'm a great fan of institutional arbitration. I think it's a reminder to corporate lawyers who draft these contracts that you should really be mindful of some of the nuances that we are going to discuss, because this, as we presently see,

12:08 is the typical 5 am clause that gets negotiated. I think that's how I would justify my existence over here. Nakul is a great practitioner in this, and we are looking forward to running this together.

I will introduce two of my co-panellists on my right and then Nakul will do the rest.

It is a great pleasure to introduce you, Janak. You are beyond introductions. As one of the most senior members of the bar, thank you for being here. I won't go into the formal CV, which is in the programme.

My friend on the extreme right is Richard Menard, from Kim & Chang, who has had a diverse career in arbitration and litigation, having practised in the US and now based as a foreign attorney in Korea. Clearly a major player in this space. Thank you for being here.

Mr Nakul Dewan: Adding to our diversity, we have Robert Hunter, who has lived and worked in London, New York and Frankfurt. I mean, all these will give you live experiences about different countries and jurisdictions. It will also tell you that a lot of the problems that we face are very similar. Cyril pointed out the 5 am clause.

We also have Rohini Roy. Rohini plays a very critical role in our discussion. The reason she plays a critical role in our discussion is, A, she is part of

12:09 one of the largest PSUs in India, BHEL, and, B, they invest outside of India and have a presence in 83 different countries. It is no longer a case of a PSU looking at an arbitration clause for disputes which have arisen in projects in India, because she is looking outward. What you get from here will be extremely critical.

Before Cyril kicks off the session with his first question, let me tell you that we had a discussion amongst the panellists a week ago, and what we realised -- based on the last MCIA conference -- is that the audience is a very sophisticated, very knowledgeable audience. So the bar that has been set for our speakers is very high. They're not here to simply tell you, "Well, don't have a bad clause, have a clear clause". They are here to tell you lots and lots more.

With that, let me ask Cyril to kick off the first question.

Mr Cyril Shroff: Thanks for that, Nakul.

My first question is on the more broad question of the setting between the arbitration movement on the one hand and the rise of commercial courts as a concept, and how these two themes are playing out. There are murmurs in the broader arbitration and disputes community that we can't take the trajectory of the rise of arbitration

12:11 for granted. It has certain flaws and drawbacks, and there is not a complete disenchantment with the normal court system.So there is some competition playing out over there.

The commercial court theme, both in India and overseas, have different dimensions as well. The first question is on commercial courts.

Richard Menard, given that commercial courts specialise in having judges who are commercially trained, do you consider it important for parties to have an arbitration clause in their contract? What is the future of arbitration in this context?

Mr Janak Dwarkadas: Thank you, Cyril. Good morning, to everybody -- or maybe it is afternoon by now.

The question that has been posed is: do you believe that commercial courts, in that sense, having been set up in India, would render to some extent the need for commercial arbitrations?

I would begin by saying that in the normal course, it is not everybody who can afford the luxury of a commercial arbitration. We all know why. You have to pay the judges, first of all, besides the fact that you have to pay your lawyers. If it is, of course, seated outside of India, then it depends where the seat is, you would have to incur those expenses too.

12:13 Having a commercial court within the country, of course, provides a viable alternative to the litigating public, provided, of course, it is an effective tool or dispute resolution mechanism.

India has taken that step with the idea of improving ease of doing business. With that, we have a Commercial Court with experienced judges. At the district level it's called the Commercial Court. At the High Court level, it is called the Commercial Division, followed by a Commercial Appellate Division. They are supposed to be manned by expert judges. Of course, there is streamlining of procedure, there are strict timelines to be observed. There's a case management system, et cetera, et cetera. There's a provision for summary judgment, as you know, and what not. And there are time limits within which the case has to be disposed of, both at the lower court level as well as the appellate court.

Having said that and having looked at the advantages, the real question is: at the practical level, or on the field itself, is this working out?

Let me tell you the drawbacks. Today we find, as practising lawyers, we do not have any publicised statistics to show whether the disposal rate or the disposal by the commercial court has, in fact, been

12:14 as effective or it is showing such results.

But even then, in the absence of statistical data, let me tell you, as a practising lawyer, there are some inherent difficulties in implementing the provisions, principally because we have a system in India where the judges of the High Court are assigned work by the Chief Justice of the court. There is a practice, as you all know, in the High Courts that the Chief Justice rotates the judges from time to time to give them the benefit of diverse experience, the experience of diverse laws.

That doesn't help because it is not as if the commercial court judge remains in the commercial court or the commercial division at all times. Equally, at the appellate stage also, it is not so. You have the rotation of judges with the result that there is less continuity.

The other problem is that judges themselves, who may be heading the commercial division or the appellate division, are required to discharge various other judicial functions and look after several other matters under various other jurisdictions. So that also adds to the problem.

The third thing is that you have transferred pending cases, which are defined as commercial disputes, to

12:16 the commercial courts and the commercial divisions, with the result that there is a backlog of commercial disputes. There is a backlog of other disputes which are already pending in the High Court, and the judges do not have the facility or the ability to effectively deal with the new role that they have now been assigned.

Of course, if it goes to the appellate court, then the appeal court is equally flooded. There are backlogs, delays and what not. I would say that this law is in its infancy. If it stabilises and systems are put into place -- and really put into practice -- we may see a shift towards commercial courts as a viable alternative to commercial resolution of commercial disputes. That is how I would like to put it as far as India is concerned.

My friend, of course, would tell us more about the international experience.

Mr Robert Hunter: Thank you very much. There are three critical factors at the highest level in the choice from an international point of view. The most important usually is the question of enforcement. The main reason for the growth of international commercial arbitration as a form of dispute resolution in international trade is the New York Convention, to which there are now 157 state parties. That alone would justify a choice of

12:18 arbitration over litigation where there's any doubt about the enforceability of a commercial court judgment in the place you are likely to want to enforce.

That may change over time because there is a Hague convention on choice of court agreements, which will be for neutral forum courts what the New York Convention is to arbitration. At the moment, there are only three parties. However, the United States and China have signed, and that may present a greater challenge in due course. Singapore is already offering a commercial court for that purpose.

The second critical factor is the question of finality. In arbitration, typically there is only one instance. You may like that, you may not like it, but it is a difference to litigation. That instance is typically subject only to review of due process by the court of supervision and any courts of recognition.

Thirdly, and most difficult to summarise shortly, is the question of the respective roles and functions of courts and arbitrators. One aspect of this has been touched on by my colleague. The court's primary function is, as one of the three branches of government, to administer justice, and that role goes beyond the determination of individual disputes to the rule of law in society as a whole. As we have heard, courts

12:19 have to organise those procedures within the constraints of the public allocation of funds and resources and weighing the interests of society as a whole.

An arbitrator, on the other hand, is appointed by consent of the parties to decide the dispute for that dispute alone. I'm leaving aside the more complex questions of treaty arbitration.

This creates a number of fundamental differences, and the manifestations of these are hugely complex and far-reaching.

A couple of examples. It frees a procedure from any requirements of national proceedings. This allows a dramatic potential to increase the efficiency and any cultural neutrality of proceedings with regard to every aspect: scheduling, place of hearing, language, degree of formality, informality, innovation, confidentiality, communication, cybersecurity, even whether there should be an oral procedure at all. This has many advantages for international parties.

Secondly, it leads to a different relationship of the tribunal to the parties. As Justice Sikri said this morning, it gives the parties a great deal more control over their procedure and, to the extent they cannot agree it, a tribunal should know that it owes its existence to the will of the parties. So the parties

12:21 are, in my view, entitled to expect a service mentality in terms of the efficiency and convenience of the procedure.

Thirdly, most controversially, it possibly introduces a more subjective element into decision-making, deriving from the fact that the arbitration tribunal is an ad hoc tribunal.

One legal scientist has written that the judiciary, through routinisation/habitualisation, has an emotional disengagement, which he described as a capacity of anaesthetising the heart in contrast to the personalised justice of arbitration. I shall leave you to ponder the accuracy of that one. Thank you very much.

Mr Cyril Shroff: Would anyone like to add anything to this before we move to the next question?

Mr Nakul Dewan: We have a general broad idea now. I want to go straight into a more specific question, which is closer to the topic of negotiating contracts and the arbitration clause.

One of the problems that we have often faced is that when you have large high-value contracts -- you know, let's look at $100 million, $200 million, $300 million contracts -- you end up having a clause which provides for three arbitrators, provides for an institution and also provides for the neutral venue. All that is very

12:22 expensive, but the reality is that out of that $500 million contract, you end up with a dispute which may just be $100,000.

My question is first to Rohini and then to Richard. In a situation such as this, when you know that you might have a small-value dispute arising out of a large-value contract, what do you do when you are negotiating? Do you think about it? Is it relevant?

Ms Rohini Roy: There are two ways to look at this question. One being how important is a claim value when it comes to landscape procurements. Unfortunately, there seems to be a big divide between how the private sector handles this and how a public sector, or the government sector, handles this. Primarily, this difference comes because of the way and the scale on which the procurement is done, where the claim value itself, coming from the public sector's viewpoint, could be a very minuscule consideration.

It is agreed in general, theoretically at least -- and we don't all like to probably agree on this -- that a sole arbitrator is much more cost effective and perhaps reduces some of the perils that a three-party tribunal may have. But there is a reason why, despite all of these advantages, people keep using and reusing the three-party format. These go beyond the claim

12:24 considerations.

I think part of the problem lies in a fundamental question of faith, especially for the public sector or the government sector. Faith plays a very important role. We are all in a century where arbitration itself has lost quite a great deal of faith, at least speaking from the Indian perspective, and even when we do our international disputes, we find it difficult to trust the process in terms of time, cost, the kind of decisions and the kind of technical expertise. So faith plays an important consideration, because of which we have the emergence of the three-party format.

The other consideration which plays an important role and why this sole arbitrator is not selected is probably the issue of expertise, because we find it difficult to find a pool of arbitrators who seem to have both the legal as well as the technical expertise together. When it comes from the construction industry, like mine, for example, the technique plays an equally important role, if not more. It becomes difficult then to select a normal three-party, a normal sole arbitrator format. And the three-party, we believe, at least one of them could be disposed technically. Not that this comes without its problems.

But the other issue is also the social and cultural

12:25 ethos, because there is, whether we like it or not, a tendency, a natural tendency, to go towards the social and cultural sentiments of the parties. So if there are arbitrators who are region-specific, it is very natural for them to tend and bend towards or understand the cultural arguments, the political and social arguments of the parties. These are some of the considerations.

Plus, I think the difficulty that we face, especially for public procurements, is the fact that most of these, when you are a service-based industry which is providing business essentially to international clients, it is a very client-dominated contract. Most of these are tenders and they come with their own no-deviation formats of clauses.

Typically, the arbitration agreement, in my experience, is not something that they are willing to negotiate on. It is true that it is mostly all institutional and we expect a very standard procedural framework of rules, but it makes it difficult to have party autonomy in negotiating such clauses.

Mr Richard Menard: Answering the same question from the private sector perspective, my first observation or thought -- I would welcome my colleagues' thoughts about this as well -- is that in a $100 million or

12:27 $300 million transaction, it can be assumed that it is very unlikely that a small value, like in the hundreds of thousands or low millions, dispute is going to mature into an arbitration, an open dispute. Of course, it does happen.

But the benefits of a three-member tribunal that Rohini has just identified are important, and they come at a cost. It seems to me also that in broad terms, the marginal costs associated with a three-member tribunal represent a modest -- not insignificant, but modest -- part of the overall cost of an arbitration.

If that marginal, possible marginal, cost handicapping the likelihood of a relatively low-value dispute maturing at some point in the future is enough to give concern at the time of negotiation, then it seems to me that the only obvious solution to that, which comes to my mind, is to leave the number of arbitrators unspecified in the contract, assuming the arbitration clause provides for administration by an institution to allow for the institution to make that determination in the usual course.

Another alternative, which I would not ordinarily recommend, would be to build in some kind of a decision matrix into the arbitration clause, such as a threshold

12:28 claim value. That sort of thing invites all sorts of mischief, I think, as we all understand. That would be my general approach.

My general advice in relation to negotiation of arbitration agreements is to provide for a three-member tribunal rather than to leave it unspecified, and certainly almost never to recommend a sole arbitrator to be specified in the contract for essentially the reasons that Rohini well articulated.

Mr Janak Dwarkadas: If I could add to this. One solution probably could be section 7 of the Arbitration Act India, which says that in this part, arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes. One practical way out, as I see it, could be that certain disputes which are below a particular monetary threshold may go before a single arbitrator, whereas disputes over a certain amount may go to a three-member tribunal.

Mr Cyril Shroff: I have used this in some contracts where we have a two tier clause.

If will move to the next question and we can dig deeper a bit.

The actual drafting of the arbitration clause involves the draftsmen and the negotiating team making choices, choices on a number of things: on

12:30 the institution, ad hoc versus institutional and the institution itself, choice of the number of arbitrators, time limits for completion, costs, choice of seat, distinction between seat and venue, fixing of fees, measures, et cetera. There's a whole lot of detail around determination of the clause, and the impact of these choices manifest themselves in actual outcomes, good or bad, later.

The question to Robert and Rohini is: when drafting an arbitration clause, what factors should be kept in mind to ensure that there is maximum efficiency and minimum inefficiency arising out of poor choices? What have we learned from experience and what should the draftsmen be careful of?

Mr Robert Hunter: Our moderator has said that we should not insult your intelligence by speaking of clarity or clarity alone. Nonetheless, it is the single-most important point. An unclear clause is inefficient.

Beyond that, my second point is the choice of ad hoc or institutional. In some cases, ad hoc can be efficient, but in my view it requires sophisticated parties, a common will to achieve efficiency and an ability to choose an efficient tribunal.

Those are very hard and dangerous things to take for granted. The benefits of an institution can be very

12:32 great, but there are many species of institution. I shall concentrate on what I perceive as the benefits of the MCIA, or some of them, from a review of the rules, but I have not yet used those rules myself.

In my view, it offers a high degree of institutional administration, and with it much increased chances of efficiency. I will highlight a handful of points.

The first is quality assurance. That takes the form, first and foremost, as a veto over arbitrator appointments, and, therefore, the ability to exclude unsuitable ones based upon those objective criteria and upon experience. It also includes the power to deal with challenges, takes that away from fellow members of the tribunal, and ultimately it will never completely be away from the courts but at least an interim and probably final stage.

And perhaps most importantly, the ability to remove non-performing arbitrators. Non-performance might be wilful, accidental, fateful. I have one example at the moment where we consider our chairman to be physically unfit. It is a very difficult situation to deal with if an institution doesn't have the power to step in.

A second strong factor in favour of institutional efficiency is the ability to police the timetable, and

12:33 that can be sanctioned by the first point.

Thirdly, it reduces the need to involve the courts in problematic situations. That can also dramatically increase speed and possibly predictability.

It offers, fourthly, a number of efficient procedures which you may or may not need, but if you do need them, they could be significant, such as consolidation in appropriate circumstances.

Fifthly, the MCIA and the ICC -- though not all institutional arbitrations do by any means -- offer efficiency in some degree of quality control of the award. So at least a review by the institution may avoid obvious formal deficiencies that could be profoundly inefficient later, resulting at worst in the nullity of the award itself.

The third point -- I will pick up my colleague's final point -- is that efficiency can be achieved by an intelligent choice of procedures. I will take one isolated example. There are many. The MCIA Rules offer the ability of the institution to apply expedited procedures upon the application of one party. That comes into play at a threshold of 10 crores, so disputes underneath that will be eligible for this application and decision. The ICC offers a similar procedure, but it's automatic for disputes of $2 million or under.

12:35 That offers, in fact, a more profound duality of proceedings, of choice of proceedings, than just a sole or three arbitrators. It offers a deadline of six months for final decision. It imposes a choice of a sole arbitrator against any other provision in the clause. It enables the curtailment of all procedures. It even allows the decision to have a document-only process, at the discretion of the tribunal.

Effectively, it is a different species of arbitration within a single choice of jurisdiction. As a party, you can use this imaginatively. I have discussed this with German enterprises of a large scale, who would not typically arbitrate or litigate disputes under thresholds of, say, $5 million or $10 million, or euros. They are actively considering, and they even have chosen, to apply the expedited rules in their agreement to disputes under that amount. But I would be very interested to hear my colleague Rohini Roy's views on that.

Ms Rohini Roy: I'm not going to add much particularly to this question. I think Robert has covered quite a bit already. But I do believe that, increasingly, we are at a day and age when the common interpretation of having a very detailed arbitral clause is put to test and

12:36 questioned, because when I draft and negotiate contracts now, I'm not so sure if it is of any particular advantage to have a very detailed arbitration clause, although theoretically, again, we are aware of the various benefits and advantages that a detailed clause may have. But this has seemed to play havoc in the industry because I think too much detail as well as too little detail, both can be very, very hazardous. In our experience, we have not dealt very comfortably with any of these either way.

While the seat being specific and the procedural law being specific, the amount of evidence being specific, the quantum of dispute being specific and also the issues which need to be framed in the disputes being specific is of particular advantage, we have still managed to get ourselves stuck for years on these issues, despite their clarity, and sometimes that clarity itself can be ambiguous.

When we talk about clarity in drafting, it's not a very particularly easily achievable target. Since now, we have an industry where there is a lot of interpretation on even the most clear of clauses. We have continued to find ourselves getting stuck on these clauses, even if they are very, very detailed.

I won't take more time on that question and we will

12:38 move on to the next.

Mr Nakul Dewan: Thank you. The message is loud and clear: clarity.

We have this 5 am clause. Again, it's absolutely no reflection on corporate lawyers -- we have one of the most senior corporate lawyers sitting right next to me so I have to be very careful when I get into this. You have horribly drafted arbitration clauses. I will arrow two people for something very specific, and I want to go into war stories to make you realise the magnitude of the problem.

A typical defence a lot of Indian parties take when they're arbitrating outside of India is to come with this legal theory: seat is different from venue, different from place. So if you say "Venue, Singapore", it means "Seat, India". And you go and debate about this before the arbitrator, you debate about this before the court where the arbitration is being held. You debate about this before an Indian court. How do you do all of this? It is absolutely unbelievable.

Richard has had some experience with that in the context of a foreign arbitration and I would like Richard to share with you his experience.

After Richard, so that the discussion flows smoothly, we will hear from Janak, who we all know is

12:39 one of Bombay's and India's senior-most litigating lawyers. I'm sure in the past he has had the experience of effectively arguing these clauses before the courts, and, with respect, derailing some arbitrations in that process. Janak's experience in this would be absolutely valuable for us to understand the magnitude of the problem.

Mr Richard Menard: The matter Nakul was referring to, the peculiar arbitration clause arose in sort of a peculiar way. It wasn't really the 5 am issue. We've all had enough experience with very badly drafted arbitration clauses. This one came about because the arbitration clause in the original draft contract was a fairly standard domestic Indian arbitration agreement providing that the dispute will be governed by the Indian Arbitration Act and all the rest, which I'm sure most or all in the room are familiar with.

In the course of the negotiation, the non-Korean party, which was a Korean party, proposed, and this was accepted, an amendment that the venue of arbitration shall be Singapore. There was also an amendment providing that it shall be governed by international law. Whatever that means.

The Singapore bit came in in that way, that the word used was "venue". It was clear that the business people

12:41 who inserted this language, I hope without the benefit of outside counsel, meant "place" in the juridical sense, that the arbitration will be outside of India, it's going to be in Singapore. That will be the place, the seat, of arbitration. But the word used was "venue" and nobody, in all likelihood, gave it much thought, until the dispute broke out and it was in arbitration.

In that event, the notion that "venue" really meant "seat" was ultimately accepted and the arbitration proceeded in Singapore, but not without a relatively long and uncomfortable prelude. The moral of the story, I suppose, is just avoid the word "venue". Period.

Mr Janak Dwarkadas: I don't propose to talk about my own successes. I know that we are before a very educated audience. I was intrigued when I saw the expression "pathological clause" used in the question. The author of that clause appears to be a gentleman called Frederick Eisemann, who said that a non-pathological clause is one which must contain four elements. There must be a mandatory consequence of the arbitration agreement. Example, contrary to that would be where you say the dispute may be submitted. The second is that there should be an exclusion of intervention by state courts in the settlement of disputes. Again, the clause itself might provide that courts in Bombay or courts in

12:43 India will have jurisdiction along with the arbitration clause. The third is to confer a power upon the arbitrators to decide the dispute. The fourth is that the procedure for rendering the award must be capable of ultimate judicial enforcement.

These are the four requirements. Anything that does not comply with these four is regarded as pathological or a diseased clause.

I would like to give you an example of what happens when you have a pathological clause because the consequences can be rather disastrous. Let me start. I know I'm going back in history by telling you the error that was committed in the Bhatia International case, and this will illustrate what I'm going to say next.

In Bhatia International, there were two errors committed by the Supreme Court. One was to define the court in such a manner as it had nexus with the cause of action and where it arose. The result of that was that it became a very narrow definition. In other words, it eliminated having a seat of arbitration in a neutral place. That was one consequence.

The second was that it destroyed the principle of exclusivity. What is the principle of exclusivity? The curial court or the arbitration -- the court which

12:45 has supervisory jurisdiction over the arbitration proceedings would not be the court where the seat is located but could also be an Indian court, because part I would not have been excluded expressly by the parties.

This was, to some extent, attempted to be cured in the BALCO case. But the BALCO case said only after 6 September 2012, agreements which are entered into will not be hit by what was described in the Bhatia doctrine. So that did not help. That is why, in 2015, the act had to be amended, and now we have a situation where the 2015 act recognises that the seat can be in a neutral place.

With that change having been made, what is the need for the seat? Why is it so important? Because seat is, in my view, equal to jurisdiction. There are three laws which can apply, as you all know, to an arbitration agreement: The law governing the contract, the law governing the arbitration procedure, and the law governing the arbitration agreement.

Particularly where they do not identify the seat, the difficulty that arises is that the law governing the supervisory jurisdiction would then become a question mark. That is exactly what fell for consideration in two leading cases before

12:46 the Supreme Court. One was the case of Enercon. I did have something to do with it in the lower court. Ultimately it was decided by the Supreme Court.

The principles which are enunciated have been clearly laid down now, that the curial law, or the court which will apply the curial law, should be exclusive. You can't have two different courts applying, otherwise it will create a problem, like it was created after Bhatia.

What happened was in Venture Global, the Supreme Court was compelled to extend that principle to say that an award rendered outside India, which would otherwise be an international commercial award, would be challengeable even in an Indian court. To avoid this duality, supervisory jurisdiction must be exclusive, and that is why, in Enercon, there were two problems. One was that the language used was "venue", London. The second was that there was no machinery to select the third arbitrator. So the Supreme Court had to decide whether it had jurisdiction to exercise any powers as the curial court.

The Supreme Court said "venue" in that particular case meant venue and not the seat, and it came to the conclusion that since all the three laws which were to govern the arbitration were Indian, they said that

12:48 the curial law which would apply to the arbitration proceedings would be Indian, and, therefore, they had the right, or the jurisdiction, to appoint the third arbitrator, which was left vague in the contract.

The second judgment was a judgment of Justice Gogoi, sitting and exercising powers as a designate of the Chief Justice under 11(6) of the act, where he had to decide what is the meaning of the word "Singapore Chamber of Commerce" which was introduced into the arbitration clause.

The parties were Pricol, an Indian entity, and Johnson & Johnson. Johnson & Johnson went to the Singapore Arbitration Council and got an arbitrator appointed. The Indian entity went to the Supreme Court and said, "There is no such thing as a Singapore Chamber of Commerce. They have no business to go to the SIAC and you have the power to appoint an arbitrator and not the SIAC".

The Supreme Court resolved it by saying that there is a manifest intention to go to arbitration, "We will not allow it to fall. There's no such entity like Singapore Chamber of Commerce; SIAC would, therefore, by default, be rightly the entity. And since the seat is Singapore, we will allow Singapore law to be the curial law and decline to interfere with the appointment that

12:49 was made by the SIAC".

So that is the relevance of seat, and that is why these 5 am clauses sometimes cause a lot of problems, which may be, as has been described, laughter to lawyers but brings tears to lots of us.

Mr Cyril Shroff: Let's take a few audience questions, and if time permits I will have a couple of other questions.

Participant: We have gone through one agreement where there was a clause, a foreign arbitration. Initially the matter will be referred to an architect, but there was no specific name of an architect. The point was how the things will move forward in that, who will have the jurisdiction to decide who is the architect for that.

Mr Nakul Dewan: If parties don't agree on the name of the architect, then go to the arbitrator and get the arbitrator to make that decision.

Mr Janak Dwarkadas: I think your question was that the arbitration was to be conducted by an architect. Is that your question?

Participant: No. Before going to an arbitrator, the parties will first go to an architect. If the architect parties don't agree with the architect, then they will go for arbitration.

Mr Janak Dwarkadas: The parties would have to select

12:51 an architect by themselves. I don't know whether section 11 would apply to such a situation because the jurisdiction of the court, the arbitration court, does not extend to any stage prior to the arbitration in that sense commencing. So it might fail and it will go straight to arbitration. It can't be a mediation either.

Ms Rohini Roy: This is probably in relation to one of those expert determination clauses, and typically these multi-tiered agreements -- I agree with you -- create a lot of confusion. At this stage, I don't think it's possible for us to really approach the courts at all. We would have to go through the expert determination process, and only if it fails would you be allowed to continue with the arbitral process.

Mr Cyril Shroff: I think in his example it is not even an expert determination. It is quite ambiguous as to what it really is.

Participant: I have one question, which is actually a live and funny case. Now with section 9 being no more valid after the arbitral tribunal is constituted -- and probably someone needs to look at this because section 17 gives the right to the arbitral tribunal to pass an interlocutory injunction, or some relief. Unlike court, which is an institution by itself,

12:53 an arbitral tribunal is people. What happens when the arbitrator or the arbitrator is not there, is not available? Let's say he is out of the country or dealing with something, and there is an urgent requirement for an interim injunction, injunctive relief. Section 9 now being out, isn't that something that the act probably should have been more circumspect on? They have completely excluded section 9 after the tribunal comes into place.

Mr Janak Dwarkadas: I don't think you are right in your assumption that section 9 has been excluded, because it is only in such cases where the arbitral tribunal would be more competent to decide. Then in that case alone, the section 9 court would not intervene.

But I think what you are trying to say is that once the arbitral tribunal is constituted, it is provided that the application would be made under section 17. But the unavailability of an arbitral tribunal immediately restores the jurisdiction of the court, because it can't be that a party that requires urgent relief is left without a remedy.

Participant: Thank you.

Participant: We have a judgment in 2016 which spoke about multi-tiered arbitration clauses and the Supreme Court finally said that this is a result of party autonomy.

12:54 Given the situation in India, where the disputes between the parties had arisen some time in 2001 and 2004, and the verdict of the Supreme Court comes in in 2016, that's when, after this, there will be another round of arbitration between the parties, would you say that multi-tiered arbitration clauses are something that should be welcomed in India, or that's a practice which should be somewhat curtailed, or better arbitration clauses to be drafted in those terms?

Ms Rohini Roy: The multi-tiered system does have its advantages in the sense that it provides an alternative from arbitration itself. But again, the question is essentially of perspective. At the moment, I'm thinking that the multi-tiered is not a solution because it does not signify an end. When you are a business house, you would want to concentrate on your core industry and not want to devote so much time to the process of continuously arbitrating and exposing yourself to multiple forums.

What the multi-tiered clause effectively does, especially when you are dealing with a large-scale industry, is nobody is happy with the process. So it may be binding; the problem is it's not final, and eventually you are going to again start the process either through an arbitration or otherwise through

12:56 an appeal.

I think somewhere down the line, if we want to make this a more effective process, we need to stop it at a certain stage. Or otherwise, if you're unable to stop it because of natural justice issues, then we need to limit the number of forums in which this could possibly be opened. Yes, personally, the multi-tiered system, it's really doubtful as to what kind of help it's giving us now.

Mr Robert Hunter: If I may provide a war story there. In terms of pathology, you need to be careful. We have a case at the moment where a colleague is an arbitrator under a new expedite procedure, and the question arises on these clauses whether you are creating problems of jurisdiction or admissibility in your multi-tiered procedure, which you should definitely not do.

At worst, you might find that your agreement to arbitration is actually subject to some step which may be difficult to perform. A less severe but nonetheless time-wasting form is if you make your access to arbitration admissible only upon the performance of a prior step, which may be abused.

I have an amusing war story on clauses more generally. I seriously had a case before a major international institution on an arbitration agreement

12:57 which stipulated arbitration in New York.

The institution seriously said, "We should spend our three days in that state Albany, not New York". If you take that to its extreme, by agreeing something like Paris, you might find yourself in Texas. It might be helpful to be specific about your geography.

Participant: We have heard a lot about pathological clauses this morning. My question goes to the Indian legal practitioners there. How do Indian courts deal with pathological clauses really? I mean do, they try, as far as possible, to interpret the parties' agreement to arbitrate and try to send the parties to arbitration? Or are they more in the other sense? I ask this because I practice in the jurisdiction where it is sufficient to say "arbitration", the clause for arbitration for the parties to be ultimately sent to arbitration. That is why I would like to know what is the Indian courts' position, if one can be generally deciphered on these sorts of clauses.

Mr Nakul Dewan: The answer is "yes". If an Indian court sees that the parties have intended to arbitrate, then issues such as seat, venue, whether you need an expert determination -- all of that falls by the wayside, and Indian courts do try to encourage parties to go for arbitration. Janak mentioned the Pricol judgment, where

12:59 there was no institution which was specified. An Indian institution was specified, and the Supreme Court said, "Well, there can't be an inexistent institution, it must be the SIAC". So again, all that is just the push that you get from an Indian court trying to push parties to arbitration, if they broadly see that parties wanted to arbitrate their disputes and not go to court.

Mr Cyril Shroff: The courts do apply principles of interpretation to find out what the real intention was and to fill in the gaps or delete some unintended language. Pricol, Enercon, all these judgments will be in support of that proposition.

Mr Janak Dwarkadas: To answer your question, besides Enercon, in my note I have at least four other Supreme Court decisions, all of which have been rendered in the recent past, where repeatedly the Supreme Court has said that if there is a manifest intention to arbitrate, they will save the pathological clause.

Participant: I had a question about the use of mediation alongside arbitration. Given the potential difficulties with multi-tiered or escalation clauses and the ways they could be used to disrupt arbitration, what does the panel think about other ways to encourage the use of mediation alongside arbitration, whether through cost rules or otherwise?

13:01 Mr Richard Menard: It's difficult. Unless there's a multi-tier format in the agreement and mediation is a prior step, it's difficult for me to see how, as a practical matter, an arbitral tribunal that has been appointed in accordance with the arbitration agreement can direct or even encourage the parties to pursue mediation or any other alternative form of resolution of the dispute.

You suggest through a cost mechanism. That might be a very indirect way to do it, but it seems to me that having the arbitral tribunal, the arbitrator directly involved in directing a mediation in the context of a pending arbitration is quite problematic. And in my mind it creates more problems than it would solve, again, as a practical matter.

Mr Robert Hunter: My own experience is that the best way to encourage mediation is to institutionalise it within corporations. I would be interested to hear your view of that. Even if you began a mediation -- and I've had personal, very bad experiences of being cut adrift by my client during the mediation -- a mediation will only work if it personally engages the decision-maker.

The only way to ensure that happens is to have a policy within the corporations, and I would start by encouraging Indian corporations to do that.

13:03 Participant: In a contract where US law applies and the venue is specifically specified as Hong Kong and LCIA rules applies for an arbitration, in case if the award is being granted by the arbitration tribunal, then where it will be challenged? Because the clause does not mention anything about the seat of an arbitration.

Mr Janak Dwarkadas: As I mentioned earlier, it will be a matter which will have to be gathered from the contract, its interpretation, as also sometimes the closest connection test. In Enercon, the Supreme Court even applied the closest connection test to decide whether or not the seat would be India or the seat would not be India.

So it is a matter of interpretation, whether the intention was to call it "venue" or really to call it "seat". If the seat is outside India, the challenge would not be in India. If the seat is India, the challenge would be in India.

Mr Cyril Shroff: Thank you, panel, for your thoughts and sharing of wisdom. I really appreciate it.

Ms Niyati Gandhi: Thank you all. May I please invite Charles Bear QC from Fountain Court Chambers to hand over tokens of appreciation.

(Presentation of tokens of appreciation).

13:05 Session 2: Industry-specific Experience in arbitration

Ms Niyati Gandhi: Our next panel is on industry-specific experience and arbitration in India.

May I please invite on stage our moderator, Justice Rebello, former Chief Justice of the Allahabad High Court.

Mr Promod Nair, managing partner at Arista Chambers.

Mr Phillip Capper, partner at White & Case.

Mr Shai Wade at Stephenson Harwood.

Mr Mysore Prasanna, senior adviser at Aarna Law.

Mr Ganesh Chandru, executive partner and head of international arbitration at Lakshmikumaran & Sridharan.

Justice FI Rebello: Good morning, everybody.

We shall be dealing with industry-specific arbitration and the expertise which is required in that field. In that context, while the speakers will be dealing with their specific knowledge of the subject in the specific area of their expertise, we shall, thereafter, also consider the issue as to whether, considering the expertise of the particular field, it should have arbitrators who are industry-specific or arbitrators having a legal knowledge, like lawyers or judges, or a blend of both.

We will start with each of the speakers. They have

13:10 some time to dwell on the subject of their choice.

Mr Capper: Thank you very much, Mr Chairman. Good afternoon, ladies and gentlemen. It is a great privilege to be asked to come and share in this second annual conference of the MCIA.

It's not only a privilege to be here but it is a pleasure to congratulate the MCIA on its development and success. I've been asked to say a few words by way of introduction as to what makes arbitration on construction and engineering projects, major infrastructure projects, different.

As you all know, the single-most distinguishing feature of such projects is that it is economically not feasible to know at the time you enter into a contract what will be the eventual scope of work. That is the single-most distinguishing feature.

What effect does that have? Well, change management and time management become the most crucial issues on the project. Behind me it says "The Changing Landscape of Arbitration in India". Certain things don't change.

The degree of change and the lapse of time on projects are unavoidable. Their management is, today, changing and improving, but I regret to say that disputes are inevitable.

What are the features that distinguish construction?

13:12 At least two others are relevant to arbitration. The first is the multiparty nature, this temporary coalition of teams that come to work on the design, construction and delivery of a project.

But also there is an unusual interdependence of these projects on external factors, external bodies, external environments, external commissions. That is why I say that disputes are inevitable.

Is there anything else that is changing? We have already talked at the end of the previous session about ways of achieving fast determination of key issues. Such projects do require fast determination on key issues. Is the employer entitled to interfere with the selection of subcontractors? Must that viaduct be demolished and rebuilt? Is a take-over certificate now to be issued? Can the employer lawfully call that bond?

Litigation will not solve those questions, and the challenge is whether arbitration can solve those problems. We are seeing a constant search for fast techniques ideally that work well with arbitration. We discussed multi-tier dispute resolution provisions.

Where FIDIC contracts are being used -- International Federation of Consulting Engineers, which you know very well in India -- the old engineer's decision has given way to dispute adjudication boards.

13:15 It has already been mentioned that one of the greatest difficulties in my field of arbitrating international infrastructure projects is the interface between dispute adjudication boards or other pre-arbitral steps and the arbitration itself.

What difference does it make to arbitration that we are dealing with a major infrastructure project? Apart from those pre-arbitral step problems, the huge question is how to deal with the evidence. This confronts us on document production. It confronts us on the inevitable use of experts, of which we will hear more later in the day. It presents very real questions about the selection of arbitrators, their qualifications and their ability to manage what are typically long arbitrations, heavy arbitrations, and ones which therefore typically get split, bifurcated. They get bifurcated into the admissibility questions, the liability and quantum issues, but often procedural steps as well.

So with those few thoughts on what makes infrastructure arbitration different, I pass back. Thank you.

Mr Promod Nair: Thanks for that.

Moving on from construction and engineering disputes, could I request Shai Wade to speak about

13:16 the particular characteristics of oil and gas disputes, and specifically upstream oil and gas disputes.

Mr Shai Wade: Good afternoon. Thank you very much to MCIA for inviting me to speak here. It's a pleasure and a privilege.

I will touch very briefly on upstream oil and gas arbitration, and if I have time, I will also perhaps touch on a different type of arbitration, which is commodity arbitration.

My thoughts are centring on what we need to know and do to successfully arbitrate disputes in those sectors. My overall thesis is that to do this well, you have to understand two things. You have to understand the economics behind the transaction and the contracts that have evolved through the economic requirements relating to the industry.

In the case of upstream oil and gas, we have, for the past 150 years or so, worldwide, been dominated by the process of searching for and producing upstream oil and gas, or in the upstream sector. To know and understand how to advance those arbitrations, we need to understand the contracts that have evolved through the economic and, now more often than not, political pressures that are involved in that process. So we have to understand production-sharing agreements, which

13:18 involve governments. We have to understand the relationships between parties that come together to explore for and produce oil, joint operating agreements, farm-in, farm-out agreements, joint bidding agreements.

But we also have to understand the technical process, which is often highly complex. We need to know, to understand and sometimes even read seismic production contracts, how that process occurs and what it looks like on paper. We need to understand the technical side of extracting oil from the ground, be it onshore or offshore. These are areas which require a great deal of technical expertise, without which we probably fail in conducting an arbitral process that is efficient and cost-effective.

At the other end of the cost and profit spectrum often is the world of the commodity arbitration. If we say that the world has been dominated by hydrocarbons for the past century or two centuries, then international trade has dominated our life for far longer, probably from before the advent of the modern nation state even, and certainly from the very beginning of shipping.

To understand and lead arbitrations successfully in that sector, again we also need to understand the economic pressures that operate and bring about

13:20 the international trade and the technical aspect of bringing large quantities of one product from one part of the world to the other.

We need to understand here the modes of finance. We need to understand the modes of transport, and we need to understand the sales contracts that have developed around this area. This is a peculiar area where the level, in relation to disputes in particular, of costs or amounts in disputes tend to be far lower than other areas of arbitrations we see. Yet the level of expertise in relation to the conduct of these disputes is far higher, often, than other types of arbitration which we come across.

This is an area of practice where each particular contract of commodity has developed a separate type of arbitration, with specialised arbitrators from that field alone, an area in which arbitration has internal appeals procedures, an area in which we need to understand not only the type of commodity which is being dealt with and its particular feature, but also the roles of ship masters, the roles of shipping contracts and shipping surveyors.

With that point, I will pass on.

Mr Promod Nair: Now to localise the discussion. Ganesh, are there any India-specific nuances to oil and gas that

13:21 you see in your practice?

Mr Ganesh Chandru: What I'm going to focus on is upstream issues, upstream oil and gas. When it comes to disputes, we are talking about industry-specific arbitrations, and when it is upstream you really require that expertise. Whereas in disputes which arise out of the oil and gas industry here in India, there are a lot of roles that lawyers play. The way you interpret the contract, the jargons used in these contracts. Some of these contracts have a lot of room for interpretation. That's typically how most of these disputes are played out.

The kinds of issues that time and again arise are things like a delay in completion of project. If there is a delay in completion of project, obviously the employer is going to say that it's the contractor who delayed, and, therefore, they withhold monies for liquidated damages, which are typically encompassed in these contracts. Whereas the contractor would say, "Oh, no, you had additional works and this is a variation to what was agreed between us". These are some of the issues that do arise.

When you are looking at offshore projects for platforms or laying of pipelines, there's a lot of other issues. For example, the contractor's vessels may be

13:23 there, there may be other vessels for other contracts which are operating in the same area. There may be interface issues, which are typically part of the disputes between the parties. So at the end of the day, it revolves around these issues, which I come across quite often in oil and gas disputes.

To distinguish that from another sector, I will move into disputes arising out of highway projects in India. It is very unique to India. It's not just a project that is awarded. A lot of government involvement is there, both the central government and the respective state governments.

Right from land acquisition issues by the authority. Usually there's a concession agreement given to a particular concessioner to develop a particular highway. There could be issues of non-collection of toll, which may be a big issue. Typically in such contracts, there's a force majeure clause, and either party tries to invoke that and say there was a force majeure. Force majeure is not necessarily something like an act of God, which is a non-political event. In most of these contracts, there are indirect political events and political events that are part of force majeure.

For example, you look at strikes or demonstrations

13:24 that could be an indirect political event. But, for example, there is an order from the Government or from the court, reworking a permit that could be interpreted as a political event. These are the things. Termination of the project is another major issue in highway projects because, based on force majeure, even they could terminate the contract, either party, and the question arises: how do you determine the termination payment? There, sometimes, you would require expertise, which is required not only in this but also in oil and gas.

These are the two sectors in my practice which I think are very, very interesting issues. I think lawyers and arbitrators have a lot of roles to play by both in how the contract is interpreted.

Justice FI Rebello: In our growing economy, mergers and acquisitions are an important aspect. We have Mr Mysore Prasanna, senior adviser at Aarna Law, to speak on the subject.

Mysore Prasanna: A couple of caveats. Number one, I was asked to jump into this seat last night. Number two, I've always been a general counsel, and it's only in the recent past that I have been engaged in private corporate practice also as an arbitrator in various international commercial disputes.

13:26 From my experience, M&As typically has a very high potential for disputes if the relationship between the parties is not managed efficiently. More than anything else, the overarching requirement in an M&A transaction is to preserve that element of trust which will make parties understand each other and carry on.

It's said very often that a 50/50 joint venture is a recipe for disaster. Unfortunately, there have been sufficient examples of that being true. A lot of people who have entered into joint ventures in India with various parties have experienced that difficulty. Whether arbitration is going to really help them or whether they would like to cut clauses and have some kind of an exit, it's a huge challenge, and you can never get it right.

Cross-border M&A will have a different kind of problem. Particularly if it is inbound, then you have various issues. If you are outbound, if you are doing joint ventures in different jurisdictions like China or various other places, the biggest challenge is, of course, language. To get everything right is extremely difficult.

One of the things as general counsel I used to ask, before signing an arbitration clause, is what do I do? Is it good to arbitrate or is it good to litigate?

13:28 Dispute resolution became a more strategic issue than a boiler plate approach. I'm not going to bung in an arbitration clause because it's the midnight clause and they're all tired and we want to be done with it and we want to get to the signing page.

In my opinion, that is in fact an extremely important step, to consider the overall context of the contract and to see whether you really need an arbitration clause or whether, given the facts and circumstances of the cases, it will be good to have an open-ended clause. Because as general counsel, it's not necessary for me to have an arbitration clause today; I can always think about arbitration when disputes arise. Until then, I keep my options open. There are different ways different general counsel think, depending on which industry they are in.

In areas like technical collaboration, one of the disputes is all about whether one of the parties has indulged in reverse engineering. The question of non-compete: Is there a breach of non-compete, and is that non-compete provision really enforceable given an overreach in terms of geography, time period and all that stuff? That is another area where it could be a problem for arbitrators to really get it right.

Valuation is another big area where people always

13:30 have problems, and there are two experts expressing three opinions. An arbitrator is completely lost as to how to get it right, which opinion should prevail. You can never get it right. It's absolutely difficult to have it decided in a perfect manner.

There are a number of issues in mergers and acquisitions. There are unincorporated joint ventures. For example, I've been a party to unincorporated joint ventures where two people come together to operate an oilfield. If they have a dispute, what happens to the relationship of this venture with the Government? It's a big, difficult issue today.

It all depends on how well the M&A agreement provides for it. There could be share purchase agreement disputes, share subscription agreement disputes, post-closing disputes. You can imagine, any kind of dispute; they are all there in M & A, different hues and colours.

To conclude, it has a significant potential for disputes, but if it is well managed the disputes can be minimised.

Mr Promod Nair: Thanks, Pras. With that overview, it is a good idea to discuss some general issues which might straddle each of these industry sectors, and probably the best way to get to the bottom of some of those

13:31 issues would be to ask very specific questions.

To take a step back, given the various industries that we have discussed, are there any industry-specific tweaks that you would make to an arbitration clause, or would a boiler plate arbitration clause work just as well in each of the industries that you have described? We can start with Phillip and then go around in the same order in respect of each of the industries.

Mr Capper: Two points. First, almost certainly some form of structured multi-tier escalation of disputes, some form of relationship of the arbitration agreement to a faster interim step. The second point: don't say anything else.

Mr Shai Wade: I have introduced two different industries and they are very different in their approach. The upstream oil and gas industry tends to be very non-prescriptive, adopting boiler plate with no amendment. In my experience, on the whole that works very well. It allows the parties to choose arbitrators who understand the industry, and then it allows the arbitrators to conduct proceedings that are relevant to the particular dispute without being constrained to a great degree.

On the other hand, the commodities industry is very prescriptive. It tells you who you can appoint, it

13:33 tells them what they can do, and then it allows you, probably, to appeal their decision as well. Whilst as advocate I find that a rather frustrating way to go around things, for the industry, it has worked for many generations very well. Sometimes I wonder whether the rest of us can learn something from the greater degree of specificity in arbitration clauses.

Mr Ganesh Chandru: As Phillip rightly pointed out, it is very important to have a clear clause. He rightly said, "Don't say anything else". A gentleman in the previous session raised a question: what if the clause says "refer it to an architect"? Then leave it open-ended.

If you look at most of the dispute resolution clauses in either oil and gas or in road projects or any other major, big projects itself, usually, typically, there is a clause for negotiation prior to the proper dispute resolution. Sometimes they talk about conciliation or mediation.

It is indeed good to have an escalation clause, but the most important thing is that it has to be clear so that it doesn't amount to a lot of disputes in itself. So it may be very important for the parties to discuss that bit; if they are going to put negotiation, who is going to be negotiating? Sometimes stop management. What is stop management? How many days? They need to

13:35 say, "You try it for 30 days". It has to be clarity there. If it is mediation, again, please be clear. If you are choosing an institution for mediation, then you need to put that in.

In the previous session, there was a question on one of these cases in India about two-tier arbitration. In my view, I think that should be completely avoided because then you are going through the process all over again, like Rohini pointed out. You are commercial people. You don't want to be arbitrating between one centre and then go and act before another centre.

I guess you need to be extremely careful when you draft this clause. It is good to have an escalation clause actually, but it has to be clear. That would be the message.

Mr Mitra: I always believed in having a tiered approach to a dispute resolution factor. The starting point is about the good-faith resolution. The two parties coming together to find out, particularly if there is a very strong difference of opinion at the board level, it is much better to have a mechanism where that matter is actually referred to those two principals, the shareholders.

More often than not, it does get resolved because on the board, the nominee directors may have a difference

13:36 of opinion or they may not like each other's face, but the point is that you need to find out some way to diffuse that particular tension.

I agree with Ganesh. I'm a firm believer mediation is gaining ground in India. I think a tiered approach to dispute resolution which contains the mediation clauses is extremely important, and mediation has played a big role in making sure that relationships continue and not get out of hand.

Mr Promod Nair: Moving on from the arbitration clause to the arbitrator or, rather, the choice of arbitrator. How do you decide what kind of arbitrator would be the right fit for a specific dispute? Is it a good idea to name an arbitrator in the contract or specify qualifications or attributes that a arbitrator must have, or is it best to leave it to an institution than to determine who might be the best arbitrator for a particular dispute?

Mr Shai Wade: My views on choice of arbitrators is, as far as possible, never predetermine the attributes or the people who you wish to have appointed. As far as possible, leave that in the hands of the parties and leave that decision to be made after the dispute has arisen.

I am not a great believer in institutional choices.

13:38 I understand the pressure that comes from the requirements of impartiality, yet I also believe -- and my clients often tell me that they want to have some buy-in into the process of choosing arbitrators so that they personally have trust in at least one of the members of the panel.

In that regard, I think that the commodities style arbitrator panels are probably the wrong way forward. Yet where they have struck a chord with me is that I believe also that the choice you do make after the dispute has arisen should be a person who understands the ins and outs of the nature of the contract you are dealing with.

If you are arbitrating about an upstream oil and gas contract and your arbitrator doesn't know the difference between an opcom, fincom or carry or a cash call, then you will have to spend a lot of time educating them, which you would probably rather avoid.

Mr Capper: Again two points. The first is a short war story, where a telephone call gave me what I think was the best compliment in my life. I should say that I'm just a lawyer, I've only ever studied law and taught law.

A gentleman phoned me and introduced himself, an American counsel, and said, "You won't remember me".

13:40 I said, "No, I do remember you". He said, "You were the sole arbitrator on a arbitration". I said, "Yes, it was about a silicone manufacturing plant in France. How can I help you?" He said, "I want to appoint an arbitrator. We have an unusual clause: one lawyer, one accountant, one engineer. We have appointed the lawyer, appointed the accountant and that is why I'm calling you". I said, "Sorry, I don't understand". He said, "We need an engineer. You understood about the manufacturing part. We would like to appoint you". I said, "But I'm a lawyer". He said, "Are you not an engineer?" And I said, "No". And here came the compliment: "Are you sure"?

I would join my colleagues in saying not to specify the qualities of the arbitrator.

My second point is this and this is a real practical problem that one observes as counsel. That is, you can get quite difficult asymmetries in three-arbitrator tribunals, especially if one of the parties appoints a very dedicated technical specialist and then you are left, say, with two lawyers, and that party could even be an engineer, a qualified lawyer, and then the remainder of the tribunal are two lawyers. That gives rise to difficulties. If the chair relies too much, for example, on the technically qualified person,

13:41 there are some practical difficulties.

Mr Ganesh Chandru: Most of the points have been covered. One issue which was raised this morning during the inaugural session by Mr Mandal was that many people in India mention that arbitration has been hijacked by lawyers, that actually it is the industry people who need to be involved in the decision-making process.

It is definitely a good point. In the Indian context, a lot of engineers sit as arbitrators for small disputes, but I guess a very important aspect is that they need to go through the training as to how to write an enforceable award. If they are technically qualified, fantastic. But at the end of the day, you need to make a decision, right? That is where MCIA is doing a fantastic job by starting this training process.

Going through this training, even the Chartered Institute of Arbitrators in India is connecting training programmes. That is very, very essential if that dream is to be a reality of not just having the legal profession but also others becoming arbitrators.

Mysore Prasanna: M&A is marriage annulment. It is a question of trying to preserve the marriage and not get it annulled. I would certainly go for mediation. I'm increasingly believing in mediation as a way of making sure that the marriage continues. If it has to

13:43 go to arbitration, I never will appoint experts as arbitrators. I find it very, very difficult because if two experts end up being arbitrators, you can imagine what a chaos it will be. I would rather have experts play their role assisting the arbitrators, or arbitrators themselves appointing an expert, in order to determine some of the issues, like valuation.

In fact, there is one case, very quickly. There was a breach of confidentiality that one party alleged the confidentiality breach resulted in diminution in shareholder value. It was a mind-blowing case, where the arbitrator, a lawyer, and other two judges, all ad hoc arbitration, they had absolutely no clue as to how the diminution in value can happen if you have breach of confidentiality.

The experts had to be brought in, but the experts could not get it right. So it is a very, very tricky situation. You can never get it right but you need to think through and perhaps get inspired by international precedence and see how to handle it.

Justice FI Rebello: Just to add to this, a personal experience. I was presiding arbitrator and I had two architects by my side as co-arbitrators. The matter was heard and finally I had the two architects giving me two different advices, diametrically opposite to each other.

13:45 So much for the experts.

Participant: I agree with the views of the panel that, if you have expert arbitrators, they should be properly trained in the process of arbitration by a reputable institution. I'm qualified with CIArb London. But our experience is very bad. I'm also with the Bombay High Court and Delhi High Court. We do not get any such assignments. There is a sort of quarterly. And what was said earlier by Mr Mandal was right, that the arbitration process has been hijacked by lawyers.

I don't want any comment on this one, because it is a fact I'm saying it. I just want to share about being industry-specific.

Recently, there was a multi-crore dispute between a Pune-based company and Government of India relating to nuclear power. There were four disputes but two were, one, that if the contract had been signed at a particular level of the employer, then he would nominate the arbitrator from a panel. If not, it would be the ministry, relevant ministry, who would appoint.

When the dispute arose, we found out that neither of them had maintained any kind of panel. Then it had to go through to the High Court for the appointment of arbitrator under section 11, but the project was of strategic importance and they could not have gone and

13:47 wasted time.

Ultimately, since both wanted to continue with the relationship, they had to go for mediation, and then a person like me could successfully mediate in two months. Thank you.

Justice FI Rebello: Are there any questions?

It looks like people are hungry. With that, we bring the session to an end. Thank you very much, and I thank all the panellists.

Ms Niyati Gandhi: Thank you all for joining us. May I please invite Mr Robert Hunter to hand over our tokens of appreciation to the panellists.

(Presentation of the tokens of appreciation).

Ms Niyati Gandhi: Thank you all once again for joining us. We will now break for lunch, and we would request all of you to come back for the next session at 2.45 pm.

(Luncheon)

(2.44 pm)

Session 3: Developments Post Amendments to the Arbitration Act

Mr Rahul Donde: An amazing lunch can only be followed up by an amazing panel. After a lot of food for the stomach, we give you a lot of food for thought.

Our next panel is on the topic developments post amendments to the Arbitration Act.

14:47 We have a great panel lined up for you. I work at Levy Kaufmann-Kohler, based in Geneva Switzerland. I am on the steering committee of the Young MCIA.

I will introduce the next panel to you.

As moderators for this panel, we have Pallavi Shroff, the managing partner of Shardul Amarchand Mangaldas, with over 34 years of extensive experience in litigation, arbitration and competition law.

We also have Mr Nicholas Peacock, who is the head of the Indian arbitration practice of Herbert Smith Freehills, and he is based out of London.

For our speakers, we have first Mr Madhur Baya, the founding partner of Lex Arbitri, a firm specialising in international commercial arbitration.

Raj Panchmatia, of Khaitan & Co.

We have Mr Sitesh Mukherjee, who is a partner of the dispute resolution group at Trilegal.

Finally, we have Taeko Suzuki, who is an attorney.

Mr Nicholas Peacock: Thank you very much and welcome everybody to the post lunch session. Firstly, I'm delighted to be here. Congratulations to the MCIA on a stellar first year and another very impressive conference. We have a very august panel here. I'm particularly privileged to be co-moderating

14:48 the session with Pallavi Shroff.

We hope we will provoke some thoughts from the floor which we will ask you to share with us later on in the session. We will try to cover four topics under this general heading of "Development Post Amendment to the Arbitration Act". I think for my part, what will be very interesting will be to get the views of our practitioners inside from inside and outside India on what they view as the important changes and what is happening in practice. We know what the act now looks like, but what is happening on the ground?

The three broad topics we will try to cover are going to be timelines, what is happening to timelines; arbitration appointments; grounds of challenge and institutional arbitration, how is that developing.

I will hand over to Mrs Shroff to kick off the first topic and introduce that.

Ms Pallavi Shroff: There have been huge changes to the Arbitration Act in 2015, very, very welcome changes. All of these changes are very important and relevant to doing business in India. India is the fastest growing economy in South Asia and probably most parts of the world, if you look at it.

How are we going to sustain and how are we going to attract investments and growth in India?

14:50 Amongst the various factors that are important, such as the size of the market and an educated population, I think even more important is the fact that there is a commitment to honour contracts, and if there is a dispute or a problem, there is an effective dispute resolution mechanism.

Our courts are effective but not as effective as an investor would like. We have independent courts, but the sheer number of cases that a judge has to handle can be overwhelming. Therefore, the alternate dispute resolution is very, very important.

Also, international investors typically want to have a neutral arbitration, neutral arbitrators, therefore arbitration is quite important. How an arbitration progresses in a country could be one of the key factors in attracting investment and growth for any economy.

Therefore, the changes that have come are very, very welcome. As our Chief Justice said this morning, they satisfy all the criteria that are typically relevant for any arbitration process in a country.

Having said this, there are a few critical stages in the arbitration process, the first of which is the appointment of an arbitrator. Several changes have been brought in the new act with regard to the appointment of an arbitrator. To kick off

14:51 the debate, I would request Taeko to say a few words and then we will have a discussion amongst the panellists.

Ms Taeko Suzuki: Good afternoon, everyone.

I'm the co-leader of the India practice team of Nishimura & Asahi, a Japanese law firm. I stationed in Mumbai and Bangalore in 2012 and 2013. I'm now back in Tokyo but I travel to India every two to three months.

With regard to the appointment of the arbitrator, in my view, there are three key changes in the amendment act.

First, the amendment act made the appointment of arbitrators an administrative decision rather than a judicial decision by the Supreme Court, the High Court or the institution designated by the High Court, while it was the Chief Justice or his designates who heard the matter before the amendment.

This helped expediting the process of appointment of an arbitrator by reducing the burden of the Chief Justices but also allowed to introduce expertise and a flexibility in allowing the arbitration institutions, like the MCIA, to play a role in the appointment process.

Secondly, the act provided a specific timeline, providing that such an appointment should be allowed to be disposed of expeditiously and within 60 days.

14:53 The act now sets out the specific timeline of 60 days, which is, in my view, very unique. For example, the Arbitration Act in Japan, primarily based UNCITRAL Model Law, does not provide such a specific timeline.

This timeline sounded quite aggressive, considering the Indian court practices where systematic delays, unfortunately, do exist. In one of the cases before the amendment, it took almost one year and a half until my Japanese client received the decision by the Chief Justice of one of the High Courts, adjudicating that there is no arbitration agreement, thus no appointment shall be made. It was quite discouraging for my Japanese client, consuming such a long time just in the process of appointment.

Further, even in Japan, where the court proceedings do not face too much delay, it takes about two to four months, or average, for a court to render a decision on the issue of an appointment.

However, along with the first key change I just discussed, this has helped in expediting the process of appointment in general, and the 60 days timeline has proven to be practical in a case where the MCIA were designated to make the appointment of an arbitrator within three days, which Neeti discussed in the beginning of the conference.

14:55 Thirdly, the amendment act provided the model fee schedule for courts, while there were no such fee schedules in the old act. This provides clarity and foreseeability with regard to the arbitrator fees, especially in ad hoc arbitrations.

Mr Sitesh Mukherjee: One of the highlights of the changes in the appointment of arbitrators, I would think, is the conflict of interest provisions. We were discussing it among ourselves before this session, and people had different views on it.

To my mind, the fact that India has so many ad hoc arbitrations means that there aren't any institutions supervising these arbitrations. It therefore becomes necessary to ensure, and go to great lengths to ensure, as the amendments through the introduction of 5 and 6, that the arbitrators are completely independent.

The Chief Justice himself, in a recent decision, as we saw in the morning, set the tone by saying that if the person who is appointed as the arbitrator under the contract is not qualified or is disqualified because of conflict of interest, then even his appointee, who may be a very well-known jurist, his appointment would not stand.

So I believe that that's a very strong message that the amendment sends out. It goes a long way in ensuring

14:57 that the court, when they look at the odds, have greater faith in the arbitral process.

Ms Pallavi Shroff: You may have a different view. Have we gone too far in trying to ensure independence impartiality?

Mr Madhur Baya: Since I love automobiles, I will relate it to automobiles. There is a concept of understeer and oversteer. If your car is not turning as much as it should, it is an understeer. You are not turning the way everybody in the world was expecting us to. Suddenly, we have over-corrected that; we have gone to the other extreme, and a slight turn can bang you into a wall now because you have over-legislated by bringing in all these guidelines into your statute, leaving it open to courts to interpret it.

When you leave to it a court and you have 29 states and some 25 High Courts in India, you have an issue of 25 different interpretations coming in until one day the Supreme Court decides one way or the other. That leads the industry and investors into a tizzy as to what is the correct interpretation, whether this particular term in either schedule 5 or 7 means X, Y or A or B, should it go there or not go there? And that is undesirable.

Mr Raj Panchmatia: I quite agree with what you are saying,

14:58 but if you also look at what this has led to, we have seen various High Courts passing contradictory judgments on appointment of arbitrators, while the guidelines were brought in with a view to streamline the process of appointing arbitrators and ensuring that there is no bias and things like that.

Some of the judgments have diluted the guidelines now by giving a statutory interpretation. Of course, as it has been brought into the schedule, brought into the act, it has become a statute. But were they actually meant to be interpreted in the manner of a statutory book? I thought these guidelines should have remained as the guidelines rather than bring in as a statute.

This is creating a lot of problems. You are getting judgments from the Punjabi and Haryana High Court, judgments from the Chennai High Court. This has diluted the entire process, where the appointment of government nominees as arbitrators has been okay -- of course, with some caveats, but they have still been okay. I don't think that was the intent.

The other point that I wish to make regards the fee schedule. The fee schedule was brought in with a view to have some benchmark for arbitrators beyond which they could not go. But the fee schedules were to be accepted

15:00 by each High Court. I don't think more than one or two High Courts in India have accepted these fee schedules. There's a lot of confusion regarding that.

Second, there is also a confusion in the minds of the arbitrators whether these fee schedules are for ad hoc arbitrations, court-appointed arbitrations or also for institutional arbitrations. The act says it won't be for institutional arbitrations. There is a confusion where the parties have not gone under section 11 but were appointed under an ad hoc arbitration, whether the fee schedules will apply or will it apply only under section 11.

Mr Madhur Baya: When the arbitrators have not been appointed by the court, arbitrators obviously request the parties -- it is a polite request which the parties never decline -- that the schedule is not to be followed and there is a different number which is always put down to parties. I think that is not what the intention of the legislator was when they brought in this.

Ms Pallavi Shroff: Also, we saw one extreme where in several cases, particularly in the public sector enterprise, they would appoint the same judge for 10, 12 or 14 arbitrations. It was almost that the other side would never feel comfortable, knowing that the same judge had been appointed 14 or 15 times. How could you

15:01 expect independence? That was one extreme we faced.

Or the nominee; five names were selected from a panel and you select one. Where was party autonomy in even appointing their own arbitrator? There were a lot of problems to begin with.

Was the solution making this an absolutely cast iron thing, written in the statute? Perhaps not. What is something else that could have been done? Could there have been more guidelines under the act itself which had sort of a statutory flavour but not statutory itself? How do you make people come up and say? A lot of the arbitrators were not even willing to come forth with a declaration or a disclosure as to how many arbitrations they were doing for either party or being appointed by a law firm or a lawyer to do arbitrations.

That certainly influences the way an arbitrator might think. So we were at one extreme, and now we have gone to the other extreme. I think it is always difficult to find the balance, but sometimes we feel having the other extreme is better than not having anything at all.

Nick, what is your perspective? You have seen these guidelines typically followed in international arbitrations. You always have a declaration or whatever, and most of the institutions require

15:02 a declaration in any event without these guidelines being statutory.

Mr Nicholas Peacock: Sure. This is a solution to the Indian situation. I think that's the point that you make. You are entirely right. You come from a situation where arbitrators were being appointed in a manner that I don't see in any other jurisdictions, clearly party-related arbitrators deciding cases, particularly in relation to PSUs. You have a situation where the use of the IBA Guidelines, which by and large are adopted in most international commercial arbitrations in the major centres, are taken as read. They are the benchmark against which conflicts are judged. You have to ask yourself how do you make them applicable, and, if not mandatory, you have to put them into the minds of arbitrators taking appointments here.

There may be a number of ways it could have been done, and certainly I'm not aware of any other jurisdiction that has gone to the step of putting these IBA Guidelines into the legislation itself. What will happen when they are updated? We will cross that bridge when we come to it. The IBA moves quite slowly as well as the Indian Parliament. There may be a coincidence of timing there.

It is unique, but let's see if it works. There was

15:04 a solution that was needed. Let's see if this one does address the problem.

Ms Pallavi Shroff: The only thing that we can hope for is there is not so much interpretation or diluting of these guidelines by way of High Court decisions so as to bring the problems back again through the back door. That is what we have to hope for at the moment.

The purpose is very important. In a way, they serve the purpose for which they are brought in. The LCIA and the ICC -- all of them require a declaration of independence, but it is not as prescriptive as our schedules are.

Mr Sitesh Mukherjee: It is the problem that we have with such huge numbers of ad hoc arbitration. If institutions were there to administer some of this stuff, these would be par for the course for those institutions. But in the Indian context, we won't have a way to bring them in unless they are legislated in some form or mandated in some form.

Mr Nicholas Peacock: It is not just the ad hoc issue. You are certainly right, that is one of the reasons you don't see these declarations of independence in debate in many other jurisdictions because, of course, if you are going under institutional rules, you do what the institution asks you to do, including declaration of

15:05 independence, and these days also time and availability to take on the case. If you don't fill those in, you don't get the case.

But there are other jurisdictions. Hong Kong is another jurisdiction that has a thriving ad hoc arbitration market, and, indeed, some industries in the UK as well. I think it is partly ad hoc but also partly where arbitration had got to in India, and where the appointment process had got to, that perhaps left the Government feeling that something fairly dramatic, possibly oversteer, had to be done.

Mr Madhur Baya: I think you have hit the nail on the head when you say this declaration. Two things come to mind immediately from an experience and practical standpoint. One was in an arbitration where the arbitrator did not make a disclosure. This was in August 2016, whereafter the amendments had already been legislated.

We said, "Sorry, we have a problem. You haven't made your declaration". He said, "I'm impartial and independent". I said, "That's not what the act requires you to do. Please look at the schedule". He refused to give that declaration, ultimately reiterating that he already said he was independent and impartial. That is one.

The second was I was in a situation where

15:06 an appointment was offered as a sole arbitrator by an institution. They sought a declaration of independence and impartiality. As luck would have it, one of the counsel for one of the parties was someone who had instructed me in a matter in the Supreme Court. I had to disclose that.

The other party -- this was a multi-unit public sector undertaking. There was a dispute in relation to a particular unit of that PSU. I had no instructions against that unit, but I had two instructions which were still in correspondence. It had not gone into a dispute, per se, but I had instructions from clients against another unit of the same PSU, and I felt compelled to disclose it should anyone have any issue with that.

I'm glad I did that because obviously the institution came back and said, "Sorry, I think people have a problem with this". But do we go down to this minutiae in terms of disclosing every little thing that may someday give rise to it. An apprehension about the lack of independence and impartiality is where things are going at.

Mr Raj Panchmatia: I have one more point, one more practical difficulty. When we appoint an arbitrator, sometimes it is possible that these arbitrators have not

15:08 maintained a record of the number of arbitrations they have appeared in or they have given written opinions to, or even consulted with. Over a period of years they have given opinions, been appointed as arbitrators, and possibly the arbitrators may not have that record. When you ask them to now give a declaration, and if they have not maintained the record, how good is that declaration?

Ms Pallavi Shroff: It is a question of how far back in time do you want to go? If you have done one piece of work for the client, maybe five years ago, are you going to say that you are disqualified? It should not become a tool for misuse or to eliminate arbitrators who may be competent and who are nominated by the other side.

That's where we have to be very careful, and it has to be very judiciously played around with -- used very carefully. It can be played around with very easily!

Mr Nicholas Peacock: It is a good starting topic. There is more to be said on that, but let's move on to the next topic.

We will deal with timelines under section 29A, which has me excited. We now have this act, we have the amendments, this requirement for the award to be produced within 12 months of the tribunal to be appointed. We have a possible six-month extension by agreement, an 18-month drop-dead for the mandate of

15:09 the tribunal, save with court approval for an extension, which, again, is pretty unique in global terms.

Possibly some more oversteer, Madhur might say.

Mr Madhur Baya: I digress for a bit. There was a father and son and a donkey, and they were walking past. People in the village said different things at different times to the father and the son about how cruel they were that they were both riding the donkey or how foolish they were they were keeping the donkey on their backs and carrying the donkey.

This is what has happened with timelines. Are timelines something that should be prescriptive or not? This debate has raged on for 15 long years, as we speak. The first time it came around was in the 176th Law Commission Report, it went through its first draft amendments in 2003, where it was one year, plus one year. Curiously, the provision was that if the timeline was exceeded, you have crossed the one plus one year, then an application will be made to court, court has the power to grant, and an obligation to grant in that situation, an extension. The arbitration would only be suspended but the mandate would not terminate.

Came a report in 2010 which said, ah, that's not right, you should have no timelines. There's no-one in the world who has timelines. Look at Singapore, the UK.

15:11 Nobody has timelines.

Revision three. We come to 2015, where we again have timelines. Timelines which are 12 months plus six months, and thereafter it's in the hands of the court, which has consequences in terms of the mandate of the tribunal, consequences in terms of costs, consequences in terms of tribunal's fees. And interestingly, if there is a 20-month delay, the tribunal stands to get zero fees and they probably will have to refund the fees. That is how far it goes.

The timelines, while it is one topic, which is 29A, there are, within that, sub-topics in terms of the obligation of the court to dispose of an application within 60 days. I was talking to practitioners from various jurisdictions within the country. I believe the one court which has been granting extensions of time is Delhi. Bombay yet does not have an application.

There was a curious case before a court, where the commencement of the arbitration predated the amendment. An application was made to court that the arbitrator has taken more than a year, he has not rendered the award, his mandate has terminated. It was said, "You, the court, now invoke your jurisdiction and give us some reliefs". So it was a little convoluted.

The court said, "Look, it is something which is on

15:12 retrospective and prospective applicability, and we don't think it is retrospectively applicable, it doesn't apply". Even if it did, the consequence of him having missed the timeline, and if you don't consent to an extension, the provisions of section 15 are brought in, which means you can apply to the court for the appointment of a substitute arbitrator. But that does not mean that things have ended, nothing can be done in the arbitration; you need to come to us under the jurisdiction.

There are timelines in other provisions as well. Obviously there are those in terms of the time that the court can take for disposal of a challenge, under section 34; the time within which an arbitration must be commenced after the relief has been granted, under section 9; the time within which the arbitrators obviously need to render their awards. There are multiple points, data points for timelines, and there are some which obtain under the Commercial Courts Act, which tie in with the timelines under the act.

From practical experience, I haven't seen, of the section 34 applications that we have filed, any one of them being disposed off within a period of 12 months, unless there is a different experience across the table.

Ms Pallavi Shroff: Maybe the one odd case that gets

15:13 disposed of for unexplainable reasons, as I would put it. Everything just got expedited and you go through.

This "timeline" term, I will say two things about it. Fixing timelines sounds very attractive, but having to go to court is a danger. One, it increases the intervention of the court far too much than you want. Secondly, the 29A subsections provide that, as for application for an extension of time, the court shall endeavour to decide within 60 days. The word uses "endeavour". There is no mandate. Given the workload, 60 days could well extend quite a lot beyond. That is another danger of delay.

In one of the cases that I have done, I filed an application for extension in one of the lower courts, and I received an order of extension after nine years, by which time the parties didn't want to pursue the arbitration and the key witnesses had gone. It was meaningless to have that application granted. We don't want these kinds of delays.

The fear exists because of past experiences. While it looks very good, there is still an underlying fear that the courts will not be able to complete this -- not for anything else except the sheer backlog of work a judge has every morning.

Mr Raj Panchmatia: Timelines are there in the various

15:15 provisions, and while it is good to provide for timelines, what if you don't comply with your timelines? Those consequences of default have been provided for within the act. For instance, you have to appoint an arbitrator within 30 days/60 days of your section 9 order, but what happens if you don't? Why doesn't the act provide that the relief should stand vacated? Automatically we will start appointing arbitrators, that would help.

Again, under section 34, the provision has been made mandatory that the courts will decide within a period of one year. It's a mandatory provision; it's not an endeavour. What happens if the court does not do it in one year? There are no answers to this. These things need to be looked at again, probably, and either amended or corrected. This is necessary.

Mr Nicholas Peacock: You are in good company in terms of wanting to look again at the amendments so soon, and the Srikrishna report has asked to do just that. Let's assume that this will stay in place for a little while, what is happening, what is the impact, what is happening to arbitrations on the ground?

Mr Sitesh Mukherjee: Psychologically, there is some degree of pressure of review by the courts, and we must keep in mind a lot of the arbitrators are respected judges who

15:17 have retired, and therefore they would be very keen themselves -- it's something that we have seen -- to make sure they do their best to comply with the timeline.

But for the courts, in the event that the timeline is not complied with and extension is generally required -- it could happen in many industries. For instance, in a construction contract, which goes on for four or five years, sometimes it does take that amount of time and you may have to go for an extension, after 18 months, for another six months, all for genuine reasons.

But the courts are being unnecessarily burdened with this whole exercise of extending time, looking into the reasons. I don't think the judicial system has the infrastructure to deal with these kinds of cases in the short span of time they are required to be dealt with. Oftentimes when you have these timelines and they are not followed, it has the opposite effect, causing dismay among the people who want to rely upon it.

One must be careful about the timeline. Particularly important is the one-year timeline for hearing objections. The courts should set the trend and follow that timeline. It will go a long way in promoting the objective of some of the amendments.

15:18 The arbitrators are trying their best. The courts are also. In the Delhi High Court, the experience is that their applications have been disposed of fairly quickly. The pressure of timelines and a breach of a rule play upon the minds of people who are trying to uphold the law, which is a good thing.

This is where I think the act also missed an opportunity. The amendment should have, in my mind, been a template for institutionalising arbitration, try to have the courts rely more on institutions like the MCIA, like the order that was passed by the Supreme Court. MCIA responded with equal vigour by appointing an arbitrator within 72 hours. If a timeline extension is required, why not allow one of the institutions to deal with that?

These timelines are fine, but for the administration of that, the court probably needs either specialised judges or the development of institutions like the MCIA to administer them.

Ms Taeko Suzuki: I completely agree that having timelines gives a lot of comfort, especially to foreign investors, because we can now foresee when a dispute may finish. I also agree that institutional administration will help a lot.

Ms Pallavi Shroff: The speedy disposal of any arbitration

15:20 is very, very important. Could we have achieved that by other measures rather than by fixing this timeline of 18 months? And how we came upon 18 months and not two years, we don't know. I could well say that two months is a better timeline and more realistic than 12 months or 18 months. And coupled with a lack of infrastructure, which Sitesh just mentioned.

Now for the measures like saying that an arbitrator must commit that he has time for the matter and he will be available for day-to-day hearings and not have three hearings in a day. You know, you do one hearing in the morning, one hearing in the afternoon and one hearing after 5 o'clock in the evening.

I have been in arbitrations with a set of three arbitrators who did a cross-examination of witness until about 4 o'clock, and at 4 o'clock until 8 o'clock, they did another arbitration. It just so happened that the same three arbitrators were there in another arbitration. They walked from one venue to another, and they sat down and did the next four hours of the arbitration in another matter.

That is not the right way to do it. You have to spend adequate time on these matters, and they have to be taken far more seriously than evenings from 5 o'clock to 7 o'clock. Even the bar has to develop and accept

15:21 that fact and not want to do everything at the same time, going to court to do all your matters and then going to do an arbitration.

Mr Madhur Baya: Probably the biggest feature of the way we practice arbitration is the very same advocate, the very same client, the very same matter. If it's an arbitration seated in India, they will take a few sessions, and "a few" can mean 10 or 20 sessions to cross-examine a witness. But if it is an arbitration seated, let's say, in London or Singapore, or any institutional framework and even ad hoc, they would be happy to do that within a period of four hours. Why? What changes?

Other than the factor of transcription, which obviously is a very important tool for controlling time and costs, it is just the measure of saying that this is how it works here: we can do it at our ease and our pace. That is not on. It is for all stakeholders to control time. It is not just for arbitrators and courts; it is for us. Parties, lawyers, everybody has to contribute in this process for this to work. Twelve months and 18 months, according to me, for 90 per cent-plus of the cases that most of us do, is a sufficient timeline. Eighteen for sure; there are very few cases which require more than 18 months. Globally,

15:23 18 months is not a strange timeline. It is a pretty normal timeline to look at.

One other aspect this touches upon is the ease of doing business. We are 164th on enforcing contracts largely because of the delays we have in court and in process. It is in our hands and in our interest to control and remedy that so that we go where we go, and it doesn't make a difference to lawyers but it does make a difference to our clients.

Ms Pallavi Shroff: One other issue that you may want to think about is suppose the mandate is not extended for any reason at the end of the 18 months. God forbidden it's not, what happens to that claim in arbitration? Is it saved by limitation, because the Limitation Act does not save time in an arbitration, or does it get dropped? How do we work through that?

Mr Madhur Baya: The immediate reaction is that there is distinction between 29A and section 32. All that happens is, if the timeline is not extended and you have crossed your limit, then the mandate of the tribunal falls, fails and falls away, if it is not extended or the court refuses an extension. But the arbitration does not end, therefore your limitation issue will not really arise. Your arbitration is on foot, you will have a different tribunal. Whether you have to go back

15:24 to an evidentiary stage, whether you have to go back to a predecessor stage, only the new arbitration and panel can tell.

Mr Sitesh Mukherjee: In a lighter vein, you could use the argument for having pursued the wrong remedy for extension of time.

Ms Pallavi Shroff: Having come to this stage, another important aspect is the grounds of challenge. Huge amendments have been brought about in what can now be grounds of challenge.

Mr Sitesh Mukherjee: We are still 164th in the world in terms of enforcing contracts. If you were to go by just that data, it would not be very encouraging. The act really has gone a long, long distance in ensuring that the mindset change takes place in terms of the grounds of challenge, which have been a matter of debate in Indian courts. I will quickly elaborate on what those grounds of challenge are and how they have changed. Then we will lead the discussion.

In terms of foreign awards, as well as international commercial arbitration seated in India, there was an ongoing debate on whether an award which was rendered contrary to Indian law, in other words, patently illegal, could be a ground for interference by Indian courts. Initially, in the 1990s, we had a law which was

15:26 quite clear, which said that it had to be something more than just being contrary to Indian law. That was a judgment of 1994. But ONGC in 2014 changed all that, and the judgment went on to say that if an award was rendered contrary to an Indian statutory provision, then it was a patently illegal award.

That meant that basically every court faced with an award had to see whether the award was violating some statutory provision or not. It opened the floodgates for examination by court, and in the Indian context, a further scrutiny means more time, and time is what Indian courts really don't have because of the huge pressure of the population and the pressure of the cases.

NITI Aayog recently came up with a paper which says that in India, it takes 2,500 days to enforce an award. At the same time, you find that 80 or 90 per cent of the awards get arbitrated. The reason for the entire delay is the burden on the courts, and by enhancing the grounds of challenge to include statutory violations, clearly the court took upon itself a task which was unnecessary.

Then, of course, there were judgments from the Supreme Court which clarified finally that it was not every award which was contrary to Indian law which

15:28 could be challenged. Finally the amendments settled the issue very well from the point of view that it actually impacted the mindset of the judges, I would think, the way it is drafted. It clearly says that the award cannot be reviewed on merits, and it also excludes the ground of patent illegality in the case of foreign awards and in international commercial arbitration awards seated in India.

Both foreign awards and international commercial awards seated in India are at the same level so far as the scrutiny of the courts are concerned, and by taking out the ground of patently illegal test from the scrutiny, the legislature clearly sent a message that that is not an area that the court needs to get into. We still have to deal with that in the domestic awards scene, where if the award is held to be patently illegal or has to be scrutinised on that ground, although the legislator specifically again said that merely because an award is contrary to law it should not be set aside, the award should not be set aside by the appreciation of evidence. But that is something that is still there for domestic awards.

Again, at some level, I was trying to find out why this distinction is there. The Law Commission Report explains it neatly. It says that under the current

15:29 circumstances in India, it is probably necessary for Indian courts to exercise that level of supervision on domestic arbitration. Why? Clearly, the answer is more institutional arbitration. The judges, the judicial system does not have enough confidence in the domestic arbitration process, and therefore needs to do closer scrutiny.

At least again here, if it's an institutional arbitration, if it is an arbitration by institutions like the MCIA, the legislator should make an exception and eliminate this ground for patent illegality of domestic awards.

Ms Pallavi Shroff: We have one more topic to deal with and then we will have a further discussion. There are a few points to discuss even on this: whether there is an impact on India becoming a hub for arbitration and for us to even encourage foreign parties to do arbitrations in India because of the existence of the availability of the ground of patent illegality.

That is for a larger debate which we can have after.

Raj, can I ask you for your opening remarks on the last topic which we touched on, institutional arbitration? How do we build upon large institutions and institutions like MCIA, and what role can they play in the whole conduct of arbitration as well as

15:31 the growth of arbitration in India?

Mr Raj Panchmatia: Today, by far, the MCIA is one of the leading institutions in India. By and large, you have seen that for arbitration, 95 per cent of arbitration in India is ad hoc. We should be able to swing 5 per cent of those into institutional arbitration, and there would be enough arbitration for every institution in India.

It is very important that as a mindset change, people move from ad hoc arbitration to institutional arbitration. It has far too many benefits and advantages. We have standardised rules. We can have experts who have looked at the rules. The rules are tried and tested in different conditions. You have quality of arbitrators on the panel. The process is well defined. I think that will be the key thing for any institution.

Infrastructure, yes, is a very important process. We need government support in institution-building. We have seen that SIAC and HKIAC have had complete government support when these institutions came up. Fortunately for the MCIA, the state government has been supporting them completely, and, therefore, it is very important that the governments support the institution. Fortunately, the Supreme Court has also recently

15:32 appointed MCIA as an appointing authority, which is a very positive move by the Government itself and the judiciary.

The Government has been given many recommendations where it has been suggested that the Government should give a push to institutional arbitration, have well-defined institutions, well-defined rules, processes, have training for arbitrators, maybe accreditation for arbitrators, which will build in a good and credible institution. If we have a good and credible institution, I don't see why we should not move away from ad hoc to institutional arbitration. And the more the better. There are enough arbitrations in India. You have more competing institutions standing up, no problem. But presently, I think the MCIA is far, far ahead in time.

Mr Madhur Baya: I'm reminded of a notification which the Department of Justice, Ministry of Law & Justice, Government of India issued on 1 September 2017, wherein they have said that 48 per cent of all arbitrations and disputes in India are by the Government, government departments and government entities. There's a need for speeding up this process, for decluttering the judicial process. They have said that you could go to various forms of alternative dispute resolution, including

15:34 mediation, conciliation, arbitration, et cetera.

There is a list of about 17 institutions which offer these services, and I'm happy to say that MCIA is one of them. I had to make this point because this point hadn't been made since morning, and that is a very good sign. A credit to you guys.

Mr Nicholas Peacock: Some interesting topics there, and will open up to the floor. Before we do, one comment from me.

As Raj rightly said, arbitral institutions need support from the Government, support their existence, make sure that we are here for the long haul. Of course, they also need hands-off from the Government. Make sure we're here, but don't get involved in how we operate, how we decide decisions, how we appoint arbitrators. I'm very happy to say, as a council member of MCIA, it is very much the case with this institution, and let's hope it will be in others.

Are there any questions or comments that you would like to make, in particular on how you are seeing these amendments are operating in practice? If you are from a court in not Delhi or Bombay, we will be interested to know if there are applications for extensions being heard and what has happened to them.

Participant: I just had a question about the time limit

15:35 and interim relief applications. My experience in the ad hoc arbitrations that I've seen is that parties are still making applications to the tribunal for interim relief, but they are either quickly settling them or being encouraged by the tribunal to do so, obviously because of the pressure of the time of the 12 months coming up.

I want to ask whether that was your experience and what effect it is having on the clients on the kind of immediate protection they can get.

Mr Madhur Baya: From a practical standpoint, we all as lawyers know that no client would settle because of timeline. Clients are commercially minded. What is happening -- and it has always happened, even before the time limits were imposed -- is that tribunals have encouraged parties to close the disputes if they have a fair sense of where things are.

Retired judges, such as Justice Rebello, who is here right now, have a fair sense of where the parties' cases really are. We have seen tribunals encourage parties to resolve it at all stages, even before time limits and post time limits. But what time limits have done essentially is, A, widened the pool of arbitrators, if I may say so. Some very busy arbitrators are not able to take these mandates, and courts such as the Bombay

15:36 High Court have been appointing young lawyers as the arbitrators.

With them, obviously, a wider pool of arbitrators who are not judicially trained may have a different set of priorities, and they may sometimes encourage parties but nobody does that unduly. So that is not the guiding force.

Participant: Sorry. To be clear, I'm not talking about settling the overall dispute; I'm talking about settling the interim application, basically by consent.

Ms Pallavi Shroff: Going to courts is always almost the first thing that parties need to do. In most cases parties rush through court even before the invocation of the arbitration happens. The minute you know there is a party, the tribunal is formed, which quite often takes three months. The courts today are very minded to immediately refer the matter to the tribunal, go before the tribunal. The order is now enforceable as if it were an order of the court. That is a huge move to push towards.

This had started earlier. In a number of matters, the court would say to please go to the tribunal, it is now constituted. It is now part of the statute.

Mr Sitesh Mukherjee: The experience in the Indian courts in getting an interim order is far better than getting

15:38 a final order. If you were to look for an interim order it would be filed quicker, because the judges are also mindful that it takes time to resolve the issue finally because of the delays in the process, so they are very keen to balance the problems in the meantime. They pay attention to it and make sure that it remains balanced.

Participant: I have a question on the timelines and the mandate of the arbitrators ending. It is a twofold question. First, how likely do you think the court is going to be taking into account the stage of the arbitration is in when that 18-month mandate ends? If the arbitration is close to an ending and even if then the mandate is over, technically, within 18 months, do you think that the courts are going to take practicalities into account and not order a reordering and then allow that arbitrator to just continue?

Second, even if that is not the case, how practical do you think the courts are going to be in ordering rehearings? Let's say if something is at the witness evidence stage, or something is at the document discovery stage, how practical do you think the courts are going to be in not having a new arbitrator or new arbitrators come and listen to the case once again?

Mr Raj Panchmatia: Some of the judgments that have come out from the Delhi High Court have had similar issues.

15:40 The timeline was over but parties did agree to get the timelines extended, keeping in mind the stage at which they were. They had finished the evidence and only final hearings were left, and the courts did extend time.

There have been applications where, just because of the complexity of the matter, the courts have extended time. By and large we have seen, in those orders at least, courts are extending time.

Ms Pallavi Shroff: I think they will decide how much to extend the time. Do you need another six months, can you do it in a shorter time? If it is only the award that is pending, they might do it in a shorter time. I think it is a totally relevant factor.

Participant: I practice in the Bombay High Court. I want to answer that question whether an extension has been granted in Bombay. There are 10 or 12 cases in the last few months where extensions were granted by the High Court. But as you rightly pointed out, they determine the stage at where the matter is reached, whether it is post-evidence or whether the witnesses of the plaintiff are completed, what stage it is. Depending on that, then the extension may be granted for six months.

My question now is: do these timelines justify where these timelines are now used strategically by

15:41 the respondents, where they file a counterclaim six or eight months after the initial arbitration has started? So do the timelines then get revised, or do the original timelines continue?

Mr Nicholas Peacock: Good question.

Could you tell us how quickly the Bombay Court has been dealing with these extension applications?

Participant: I think on the very first day. You file an extension application, you mention the matter, it's listed and allowed.

Mr Nicholas Peacock: It is quick, no backlog or delay in deciding?

Participant: No.

Mr Nicholas Peacock: Who wants to deal with the mischievous counterclaim halfway through a 12-month time-limited arbitration?

Mr Madhur Baya: It is the same arbitral process. Why should it reset the timelines? There is no question of timelines being reset.

Participant: But how do you finish that in less than six months when the first one takes 18 months to finish?

Mr Madhur Baya: The respondents have taken a tactical call. It is for them to determine how they want to manage. They are in the position of the claimant there; it's for them to manage their affairs. At the most, parties will

15:42 go to 18 months from the start of the appointment of the tribunal.

Mr Nicholas Peacock: I suppose if you are the tribunal, you may look at said party and ask them why they are doing it so late, and perhaps say "Do you really want to bring this as a counterclaim when I have limited time to consider your case? You can always bring a separate action, of course, in your own arbitration. If you want to make it now, you might need to explain why you hadn't made it before. In any event, I will do my best to hear it in the time allowed to me".

Ms Pallavi Shroff: Or just rush through the whole process. If that is what the respondent wants, then rush through the process. I don't think it is 18 months for claim and 18 months for counterclaim.

Participant: I understand that, yes.

Ms Pallavi Shroff: It doesn't say that.

Participant: Ever since this amendment act was passed, there have been conflicting judgments regarding the applicability of the amended act to court proceedings, especially section 34. So what is the correct judicial position as of now?

Ms Pallavi Shroff: We have to wait for the Supreme Court to decide that, because the courts are divided across the country.

15:44 Mr Madhur Baya: The next hearing in the Supreme Court is on the 21st of this month. Wait and watch. One doesn't know.

Participant: If you have the timeline issue of 12 or 18 months, how does that interact with the need for a fair trial for the parties? It ties into this counterclaim question. Isn't the risk that if you rush through an arbitration, it exposes the tribunal to a challenge at a later stage?

Ms Pallavi Shroff: Let me ask you a question the other way around. Most arbitrations globally finish in 18 months without a question of there not being a fair trial, so I don't see why we, in India, cannot do it in 18 months with adequate time for arguments and everything else.

It may mean there's a lot more burden on the tribunal to read the cases, to read the papers and appreciate it, but I think when push comes to shove, we can all do those in 18 months.

Mr Madhur Baya: There was a Formula One case which ended in one month and two days flat. Nobody had an issue with that. It was pleaded, evidence was led, hearings were conducted, an award was rendered. It was an ICC case.

Mr Nicholas Peacock: Let's not forget the commercial imperative and the clients who are largely absent from the room. Those who are here I suspect would agree that

15:46 you would rather have good justice in 18 months than perfection in 20 years, even assuming you get there.

Thank you very much for all your questions. Thank you to the esteemed panel and my co-moderator for this very interesting session.

Ms Pallavi Shroff: Thank you for being here post lunch and still wide awake.

Mr Rahul Donde: Thank you to the speakers and the panellists. It's definitely one of the most productive Saturday afternoons I've had in a long while. I would like to invite Mr Phillip Capper, partner of White & Case, to hand tokens of appreciation to our panellists.

(Presentation of tokens of appreciation)

Session 4: Hot Topics of Arbitration

Mr Rahul Donde: I invite our next panellists on the stage. It's nearly 4 o'clock and time for something hot. Not afternoon tea in this case, but hot topics in international arbitration.

We have an excellent panel lined up for you. I invite Mr Adrian Winstanley on the stage along with the rest of the panellists.

Mr Adrian Winstanley is a solicitor and arbitrator in the UK. He has over 17 years of experience at the top of the LCIA as registrar and director general

15:51 and was also the LCIA's executive director.

Mr George Burn -- not the American comedian -- is the head of international arbitration at Berwin Leighton Paisner.

Mr Naresh Thacker is the head of litigation and dispute resolution at Economic Laws Practice.

Mr Aditya Sondhi is the advocate general of the state of Karnataka.

Mr Charles Bear, Queens Counsel at Fountain Court Chambers.

Mr Adrian Winstanley: Thank you for your continuing patience in this excellent conference as the day wears on. Zia is not here. She is not hiding but she is, I believe, on her way to co-moderate this panel with me.

As introductions have already been made to the panellists, we can press on. Everybody has his or her own particular hot topic in arbitration. It is important to stress that some topics remain hot for a number of years and some are hot as in very recently off the press. We have a mixture of those.

We will do things differently with this panel. We would like to present each of the topics and then go to discussion among the panel and on the floor rather than leave everything until the end for Q & A. We will see how it works, if it is all right by you.

15:52 We will start the session with the broad topic of conflicts of interest and regulating the conduct of counsel, a subject that has been touched upon by the last panel as well.

Charles will go next on the subject of third-party funding. George is on summary judgment in arbitration, definitely a very recent hot topic.

Naresh will conclude on the subject of expedited procedure and emergency arbitrator.

Given the time constraints here, I intend to impose a limit of seven minutes on each of the speakers, after which we will throw the topic out for discussion among the panel and the delegates for another seven minutes before moving on to the next.

Mr Aditya Sondhi: You are a tough taskmaster, the Eddie Jones of international arbitration, if you will.

I believe that there's already been some discussion on conflict of interest, and I was interested to see that what was left deliciously vague in the Indian Arbitration Act prior to the amendment, which was a need simply to disclose justifiable circumstances that led to an arbitrator's independence or impartiality being doubted, is now a laundry list borrowed largely from the IBA's Red List, Orange List and Green List, and codified in the Schedule of the Indian Arbitration Act.

15:54 I think at first blush, it's a welcome development because it crystallises, in a sense, at least the dimensions that arbitrators must think along before making disclosures and reflecting on conflict of interest. But on the flipside, I find that the more you define and the more you sort of list out, the more it takes you into interpretation. I was amazed to find recently that this question has already reached the Supreme Court. The Indian Supreme Court had to decide on whether Justice Lahoti, the Former Chief Justice of India, was disqualified from being an arbitrator on a dispute involving the Gas Authority of India, whom he had given an opinion to some years ago on a completely independent matter.

The List or the Schedule itself does not deal with that as a disqualification per se, but perhaps for good order's sake, the arbitrator made that disclosure to the parties, and what's amazing is that that was then taken up to the Supreme Court, questioning his impartiality.

On a slightly stretched interpretation, even though that aspect of him advising a party previously on a separate dispute may not be expressly a disqualification, the existence of a business interest under Schedule 7, which is our Red List, would disqualify someone from arbitrating.

15:55 I think rightly, the Supreme Court turned down the challenge holding that a business interest is a direct pecuniary interest involved in the dispute of the parties and surely cannot be extended to having professionally advised a party to the dispute on an independent matter.

But what I think this suggests to me, as an intuition, is that if something like this involving an ex-CJI could be dragged all the way to the Supreme Court and it can cause embarrassment to arbitrators, then I think the tendency to litigate now on interpretation of Schedule 5 and Schedule 7 is going to increase; the aspects that were left vague earlier, in many ways the counsels also ignored. I'm quite sure that prior to the amendment, something of this sort would never have reached the Supreme Court but now it has.

The other aspect for me is -- and this is something that I personally grappled with as well -- to what extent does this list close the circle? It is only a guide to your impartiality. It is not the last word on it. So what happens in situations where one is approached as a senior counsel to act as an arbitrator by a law firm for whom you have appeared previously in independent disputes?

15:57 The List by itself does not deal with it. Schedule 7 has a reference, I think in entry 3 or 4, which talks about an arbitrator acting currently for a law firm as an absolute disqualification. But by implication then it suggests that, if you have previously acted for a law firm, that by itself would not disqualify you. But then, do you need to make that disclosure? Or, do you let it slide? Do you, as an arbitrator, leave yourself open to finger-pointing later on for not having disclosed something of this sort, or do you do the good thing and disclose it? I always err on the side of caution and make that disclosure, but that disclosure then has other ramifications because parties who don't want you as counsel are going to pick that up and say, "Well, you have made the disclosure, now the consequences must flow. We have an objection, therefore, to your continuing as an arbitrator or being appointed as an arbitrator on the matter".

These things can make things slightly piquant, I think, for seniors who are being appointed, and this is not an academic dispute; I was very interested to find that this precise question went to the Bombay High Court, and there was a senior counsel who was appointed as an arbitrator by one of the law firms for whom he not

15:58 only appeared previously but continued to appear. In my opinion, continuing to appear for a law firm as a senior, maybe on an independent brief, is something that does fall within the meaning of Schedule 7.

Interestingly, the Bombay High Court took a different view; the Bombay High Court held that appearing or acting for a law firm which is a law firm in the dispute means not as senior counsel for a firm, but in fact means appearing for that firm as a client. By way of illustration, the Bombay High Court said there are instances where law firms go to court themselves as litigants, for example, on matters of service tax, or Bar counsel-related issues and so on.

I think that is giving the benefit of the doubt to the arbitrator; I don't think that was the intent. I think when, as seniors, you appear for law firms for a hefty fee, these are matters that necessarily must be disclosed.

I have a direction from Adrian to wrap up in one minute, so let me very quickly cover two points. One is: what is the effect, then, of not disclosing your conflict? I was involved in a litigation where a retired judge -- whose daughter happened to work for one of the law firms previously, and that law firm was a party to the litigation -- did not make a disclosure.

16:00 Now, this was something very well-known to both sides, but one of the sides kept their powder dry, let the arbitration take place, failed in the arbitration, and then raised that as a matter to challenge the award. I think this is something we also have to look at: when challenging an award, to what extent do these non-disclosures vitiate the award completely? Are they derogable or not? Should they lead only to strictures on the arbitrator or lead to the award itself being vitiated?

I did also want to talk a little bit about counsel conflicting arbitrators, but maybe I will come back to that, time permitting.

Adrian.

Mr Adrian Winstanley: Thank you very much, Aditya, for sticking to the seven minutes. We can certainly discuss the other question, which is an interesting one in this next seven minutes of discussion.

Just one observation. Something that has concerned me slightly about the proliferation of guidelines is in place of the normal considered, let's say, process by which one decided whether or not one may be conflicted, there is a danger these days to enter into a box-ticking exercise, and satisfying that, you move on.

The flipside of this is that when I was in the LCIA

16:01 in a different life, it was not uncommon for arbitrators who had been nominated to call me and say, "Look, this is worrying me, ought I to disclose it?" My reaction may have been, "Well, certainly not, it is neither here nor there, but now that you have raised the question in your mind and therefore with me, yes, you must disclose", so there is a little caution about where we are going with regulations.

Who would like to kick off on the panel with any observations on what we have heard from Aditya?

Charles?

Mr Charles Bear: I just wanted to say I think the fundamental question is always what is the perception of the reasonable observer. I think we have to take it back to that underlying principle. We are really concerned about it in the arbitral context because we are concerned about the enforcement, which is ultimately the issue. Under the New York Convention, is it going to pass the test of due process? If it doesn't, then the whole process has been a complete waste of everybody's time except, of course, for the losing parties, who are slightly less concerned about that.

We have to ask ourselves: what is it that the reasonable observer is taken to know? That is the

16:02 critical question, is what is the information base that we apply? There was an example that was very well-known in the London scene and internationally about counsel and arbitrators from the same set of barristers' chambers where, when this was considered by English judges over the years, they said, "Well, what could possibly go wrong? We are all good chaps, we know each other, you can trust us". Of course, if you don't come from the cloistered world of the Inns of Court, then perhaps it doesn't look quite so clear-cut, so the question is: how do we define the reasonable observer? What is she taken to know, as it were?

Mr Adrian Winstanley: Thank you, Charles.

George?

Mr George Burn: I have to bear out to a large extent what Charles has already covered. Fundamentally, I think it is very important to remember that the arbitration process belongs to the parties; it doesn't belong to counsel, it doesn't belong to the arbitrators, it doesn't belong to the institutions. With that in mind, I would always want potential arbitrators, very much, to err on the side of disclosure -- I think it is absolutely right and proper -- and then judgments can be made from there.

I think, of course, there are situations when very

16:03 cynical challenges are launched with an eye on frustrating the progress of the arbitration. Of course, that happens and of course that ought to be dealt with in a robust fashion, but at the same time, that's a price that, in my view, is worth paying for having a process that functions, that is reasonable, that belongs to the parties and is trusted, above all else is trusted.

The last thing I would say on this, it is very unfortunate when one sees arbitrators tenaciously hanging on by their fingertips to appointments, arguing that they are not conflicted, that there is no issue. Maybe they are right in some of those scenarios; often they are wrong, but maybe sometimes they are right. But in the end, the starting point has to be: the process belongs to the parties. Everybody needs to be able to trust in the process.

Mr Adrian Winstanley: Thank you very much, George.

Naresh, do you have anything to say before we invite the audience to comment?

Mr Naresh Thacker: I don't really have anything much to offer, but it has already been said, whatever Aditya said, I completely agree with that. One of the things, obviously, is that you always start off wanting to know whether there are any conflict situations or not, and

16:05 I remember the time just before the Act came in; there really was nothing, there was no way of knowing if the Indian scenario whether there was an actual conflict or otherwise, and now you see a flurry of activity once you seek to nominate the arbitrator, because no arbitrator really wants to be in a situation of a conflict, obviously, and therefore you have now disclosures which come more often than what you would not have expected to otherwise happen in the earlier scenario.

So I think it is a good thing. It's a great thing to happen for arbitration in India. Need of the hour, and it came at possibly the right time.

Mr Adrian Winstanley: Thank you, Naresh.

It would be unfair to ask Zia to comment this stage because she has just arrived, but if there are any questions on this specific topic from the floor, we would be delighted to take those in the next few minutes.

In the last couple of minutes that we have before moving to the next topic, Aditya, you mentioned the question of counsel being introduced late into proceedings and creating conflicts; would you like to have a couple of moments to talk about that, perhaps?

Mr Aditya Sondhi: Yes, please. Thank you, Adrian.

This is something that we see in court a lot, where

16:06 parties engage counsel to conflict the Bench from hearing a matter. It is a very sharp practice, it's part of forum-shopping, but it's fairly rampant. But in court circumstances, even if that should happen, it's not difficult for a case to move from one Bench to another by special orders, and for a matter to then be taken up once again expeditiously.

But as we know, in arbitrations the very constitution of a tribunal is sometimes a long-drawn process, and if an arbitral tribunal that is well underway in the proceedings is conflicted midstream, then that is going to mean going back to square one, reconstituting the tribunal, which we know is not an easy task, and possibly starting proceedings de novo. That can, I think, be severely bad for the tradition of arbitration. Obviously, the onus then is on the counsel that is being approached solely with a view to conflict the tribunal, because you already know the composition of the tribunal, and I'm happy to see that the LCIA Rules have already pre-empted the situation -- Rule 18.3 -- by providing that when a party to an arbitration proceeding intends to change counsel midstream, then that change must be intimated to the tribunal, and the tribunal must approve that change, failing which, literally, the new law firm or the new

16:08 counsel cannot appear.

That is something that perhaps MCIA can look at, and that would certainly be a step in the right direction. Otherwise, if counsel let their guard down and indulge in something unscrupulous of this sort, it will look terribly bad for arbitration.

Ms Zia Mody: That is actually the right rule to have. I remember that we used to have a judge who had very strict rules. He had a list of counsel who could not appear before him, finished, that's it. So if the matter was before him, he was the one who was going to get the audience, and whoever the client chose as counsel could not choose from that prohibited list, which is a tough way of saying "You cannot conflict me out of hearing your matters". I think the LCIA Rules is something for MCIA to look at, to see if this works.

Mr Adrian Winstanley: Any other comments from the panel on that particular point? Naresh, George?

With perfect timing, we shall move on to Charles' intervention, which is the subject of third-party funding.

Mr Charles Bear: Thank you, Adrian. And hello, Zia.

It is a great pleasure to be here. I'm coming to talk about third-party funding. This has been a very big development in my home base in London, as I'm sure

16:09 you all know. In particular, in litigation, commercial litigation, I would say that a very significant percentage of business-related disputes are now being funded by third-party funders, effectively by funds which have been set up in order to exploit this opportunity.

I'm sure you are all familiar with it, and it comes from the confluence of two phenomena. First of all, globally, there is too much capital chasing not enough assets. So people who have or administer that pot of capital are looking for things to put it into, and litigation has become one of those things.

Secondly, the cost of major commercial disputes has gone up, if not exponentially, certainly geometrically, because of electronic documents, lawyers' fees around the world rising.

The combination of that has led to an interest in funding, even on the part of major corporate clients or ultra-high net worth individuals; it is now worthwhile considering funding, taking a haircut of whatever it might be, 20 or 30 per cent on your possible returns, in order to lay off the costs, and indeed the costs of an adverse award, if you're in a fee-shifting jurisdiction.

What does this mean, legally? Well, it raises, in

16:10 my opinion, problems under four headings, the four Cs: confidentiality, champerty, costs and control.

The confidentiality issue arises in this way, that funders have to scrutinise cases. They have to decide if they want to put their money into the business opportunity. They bring no baggage, there is no grievance, they are not compelled to litigate or get involved. They have nothing to prove.

In order to carry out that due diligence, they need legal support. They tend not to employ their own lawyers. They tend to use panels of external lawyers to vet the cases for them which are brought to them by the clients or indeed by the law firms involved.

They have to find people to sit on those panels. Some of those people, therefore, are going to be senior lawyers, perhaps not on law firms, perhaps independent senior lawyers who will be able to vet the case and bring their experience. In order to vet the case, obviously you have to be told about it. You have to get lots of privileged information. You have to see it.

This creates a potential problem when we come to consider whether the people involved in those funding panels are going to be asked to sit as arbitrators. The extreme case would be in a matter which you had looked at. Even if you have not done that, if it's

16:12 a case funded by a funder in which you have some interest, not a business interest, as such, but which you are associated with, where you sit on one of their committees and you help look at it, even if there has been a Chinese wall in place, how does the other party to the arbitration know whether or not that Chinese wall is effective? And indeed do we ever think Chinese walls are rarely effective?

So when we come to consider the question of disclosure, the question of conflicts of interest, the question of the perceptions of the hypothetical reasonable observer that we were talking about a few minutes ago, there is an immediate issue that arises. In my opinion, if you are somebody who wants to be an arbitrator, who regularly sits as arbitrator, you should really steer clear of funders because it will cause big problems.

That's one issue.

The second issue is champerty. It comes from the Latin campi pars, a division of the spoils, and at common law around the world, this was unlawful. Indeed, it was a tort and a crime, although that has usually been abolished now but it remains unlawful as a matter of public policy, according to traditional common law, to enter into an agreement to divide the fruits of

16:13 litigation.

In England, we have had a lot of indirect consideration of this, and it has been accepted in a very English way, that is to say, without anyone ever saying that the old rules have changed, we have just tacitly accepted that this is no longer the way we do things. The way we do things now is to accept that third-party funding is not champertous at all. It is part of access to justice. One man's tort is another man's access to justice, it seems.

That is not necessarily the case in every jurisdiction in the world. In India, I imagine, it has not been so accepted judicially. In Ireland, there was a decision of their Supreme Court, the High Court, last year, which said that this is still unlawful, champerty is still unlawful. It was the case of Persona and Sigma. The case was brought by Harbour, one of the big funders, and they lost.

Let's look at this in the relevance of an arbitration context. You have an arbitration funding which takes place in a country, in a jurisdiction where this is perfectly okay. But then you come to enforce an arbitration award which has been obtained through the funding of the claim. Will it be said, well, enforcement of that award, let's say here in India, for

16:14 an international arbitration is against a fundamental rule of Indian public policy, which even under the most recent Supreme Court decisions would still be regarded as a fatal objection because it has been obtained through the funding of litigation, which is a social evil that a fundamental rule of Indian policy prevents? That is something which has not yet been tested and which needs to be carefully borne in mind if you are going to enforce in a jurisdiction where champerty is still alive is kicking.

The third issue is costs. In litigation, where we have fee-shifting, so in the UK, the funder can be ordered to pay at least the amount of costs that it has agreed to contribute. If you fund a case and you lose, you, the funder, must pay. That seems obvious and fair.

Arbitration raises a different set of issues because it will be said that the funder is not a party to the arbitration. Well, what jurisdiction does the arbitral tribunal have? Has there been an implied submission, at least for the purpose of that? Or are there yet some other forms of redress which we could obtain maybe using contractual rights in the country of the funding agreement?

One way is to do what Gavan Griffith did in a recent decision, which was to order security for costs. If you

16:15 know there is a funding agreement, at the very least, the funder must put up the money and then we don't need to worry about enforcing the cost award.

If I have another minute left, I will talk about control. The one condition which appears to still remain under the law of champerty is that the funder shouldn't have control of the litigation. That would be regarded, it seems, as improper. What they do have is control over the purse strings. They can say, "We don't like the way this case is going, and under the terms of the funding agreement, we can pull out if we determine you don't have a good enough chance of winning". You can tell me what you like about control, but somebody says, "I'm going to turn the tap off", he controls what I'm drinking. That is my attitude. Those are the issues that remain.

What we can say with some confidence is that funding as a practical phenomenon, A, is here to stay, and, B, is jolly good news for everyone in the litigation industry.

Mr Adrian Winstanley: Thank you very much. Impeccable timing.

Just a thought, before I throw it open to the panel and the floor, third-party funding now, of course, is big business. We understand that, it is with us and

16:17 will be with us from hereon in. But to some extent, there has been funding from elsewhere around litigation and arbitration for a very long time, whether it is one's wealthy uncle, whether it is your local bank, whether it is an associate company, and so on, and of course that has not raised the same issues as are raised now by this industry, if you like, of third-party funding.

Zia, do you have anything to say on the subject?

Ms Zia Mody: I think that every claimant is required to disclose if he has third-party funding, am I right?

From an Indian point of view, it is more than likely that this would be considered as against public policy for the moment. It's not been tested, but champerty is still the law, and I think the moral hazard in the judge's mind will still be perhaps deeper than the "access to justice" argument. So it will be interesting to see if, when there's an Indian party involved, just to make sure the award is enforceable against the Indian party, should it come to India, the third-party funding risk needs to be highlighted to whoever is a party to the agreement.

Mr Adrian Winstanley: Thank you, Zia.

Anybody else on the panel? Naresh?

In the meantime, could those of you out there please

16:18 be thinking about a question or two, that would be grand.

Mr Naresh Thacker: It's interesting that we say that this is something which has not been tested in the Indian courts. Actually, there is a decision of the Supreme Court of India, a 1952 or 1954 decision of Justice Vivian Bose. That was a matter where the issue actually was of champerty, one of the lawyers having done a champerty deal, and therefore the question was whether that is against public policy or not.

In that context, the judges actually, in paragraph 11 of the judgment, go on to say that while champerty for a lawyer was not allowed, funding, nonetheless, by one person to the other, could be allowed as not being against public policy, though they have not used those terms, but what they have said is that that that is a matter of contract between parties and in a given case, that could be something which could be seen in a positive light.

Nonetheless, having said what they have said, they really did not go into that issue because that was not an issue really in the matter. So what they did was that in the very next paragraph, they left it for some better facts-based case to decide on.

It's anyone's guess what happens when an issue of

16:20 this kind goes to the Indian courts now.

Mr Adrian Winstanley: Thank you, Naresh. I heard Zia mutter, "Don't count on it", as you were recounting that. George.

Mr George Burn: A couple of observations. First of all, as Charles referenced, this type of thing has existed in different forms for a long time around the world. What do insurance companies do when they have legal indemnity policies? What do trade unions do? What do protection and indemnity clubs in the maritime industry do? All of these exist to provide financial support to those who are litigating in one form or another. This is just another version of the same thing.

That's not to say there are not some important issues to deal with. There are, and the disclosure issues and the idea of security for costs applications that might flow, this is a slightly tricky area. But to my mind, there's no principled objection, be it on the basis of moral hazard or anything else, that should prevent us allowing this and encouraging it, because in the end, it really is about access to justice.

I have had a number of cases which have been funded, and although Charles references the possibility of control as a risk item, to be honest, from an anecdotal fashion, I say that that might theoretically be

16:21 a problem; actually, the funders I work with never want to get in your way, respect that we are the experts, that the case is going to work best if we do our job, our clients are able to give proper instructions, and we keep the funder fully briefed. So it is never, in reality, in my experience I have never heard of it being a real problem. But I understand that there could, in theory at least, be issues there, and there are certainly some hints at some -- not exactly third-party funders, more the hedge funds that are coming into this world who may be approaching things in a slightly different way.

The final thing I will say on this subject is that far from being something to be suspicious about, I think it should be encouraged, but I'm very critical of the third-party funders out there at the moment. To my mind, they are not taking on enough risks. They are looking for safe cases too often, and also, they are safe cases with a very high minimum amount of recovery.

So if you have a case that is a substantial international arbitration case, where their projected recovery is anything less than $20 million, frankly you won't get it funded, straight off the bat, no matter how good it is. If it is over that threshold, you will find it difficult, if there is even a small issue in the

16:22 case, they are not willing to take on serious risk at the moment. And I think it is a very immature market. There is a lot of scope for new players to come in, they are coming in, but they need to be taking on more risk, not less.

Mr Charles Bear: Can I just briefly respond on that point. Everyone will have their own experiences, it is not a completely transparent market. I was involved in something recently where there was an unusual case, and there were two or three funders who were interested, in fact putting forward competing proposals, it was certainly not free from risk. The reason the case hasn't yet gone forward is because the underlying clients who were actually being offered a full indemnity against their exposure aren't willing to take it forward. Every case is different. I'm seeing a lot of competition between funders to get their money out and deployed. You have a lot of people who set up these funds -- city boys, if you like -- they have to make a living, and they can only make a living by investing in cases. So I would say there is an appetite for risk, and that is where the control issue comes in, because they are also conscious of the fact that they cannot always get an accurate opinion from the lawyers who have been dealing with the claim.

16:23 Mr Adrian Winstanley: Thank you, Charles.

Aditya, anything to say on this?

Mr Aditya Sondhi: Yes, I would like to make an analogy with the Supreme Court of India's rules on public interest litigations. As many of you may know, when a PIL is filed in the Supreme Court, one of the mandatory disclosures is as to what is the source of funds for the litigation. The moment that disclosure is made, it links up to whether it is a bona fide funding for access to justice, as Charles argued, or the counter, which is simply shadow-boxing and mala fide litigation.

I think the same test needs to be applied even to arbitrations. When we talk about funding access to justice in arbitration, then the question is: what is the nature of the transaction between the funder and the recipient? Is it alone or is it contingent upon the outcome of the litigation? Is there a share in the proceeds of the award? After all, it is for good reason that we don't have a contingency fee practice for lawyers in India.

Otherwise, why not have lawyers fund arbitrations subject to the outcome of the result? So I do think that there is a serious ethical question to be asked as professionals in this matter. It's obviously a policy decision to be taken after much thought, but my prima

16:25 facie view is that if something like this was to be taken up to court and tested on the touchstone of section 34, public policy, corruption, morality and so on, I have serious doubts whether it would pass muster.

Mr Adrian Winstanley: Aditya, thank you very much.

Naresh.

Mr Naresh Thacker: Adrian, just if I may add. Now that Aditya mentions about the Supreme Court truths, there is, in the CPC, a provision which requires disclosure of funding, if any. CPC and Maharashtra, if I'm not mistaken, has actually made rules around it. So the Civil Procedure Code, in a way, recognises that third-party funding is actually around, and that if it is there, you need to disclose it.

Mr Adrian Winstanley: Thank you.

I see a couple of hands.

Participant: The two observations that I wish to make is that champerty as a matter of Indian law is not actually illegal. We don't have the same position as it obtains in England, or it used to obtain in England. This position is right from Privy Council days up until now, so that is one.

The second issue: Aditya, I don't think I would agree with the analogy you draw with the PILs, because PIL has an issue with funding, because typically you

16:26 would have a PIL against public projects or things of public importance, and who is this funding this is usually in issue because there is shadow-boxing there.

The third observation is that when it comes to third-party funding, the practice worldwide is, nobody puts their hands in their pocket unless they have had an independent determination of what are the chances of success. Only at a hit rate of 60 per cent plus will they even say that "Here is a proposal for third-party funding". It is not that every case will get third-party funding. So there is an assessment which is independently made, what are the chances of success, and depending on where you get at, there is this percentage of share which you have from the spoils.

So it is all pretty much okay, according to me.

Mr Adrian Winstanley: Thank you very much. One other question.

Robert, is it?

Mr Robert Hunter: Yes, Robert Hunter. Three very, very quick questions.

First, Charles, I am absolutely not an expert in champerty, I don't even know the Latin root. But are the objections based upon the more public aspects of administration of justice, or are they relevant only to litigation and not to a private process of arbitration?

16:27 The second is, it seems to me that there is nothing to prevent the parties dealing with the question of disclosure or even of funding in their arbitration agreement. That may be an argument that perhaps differentiates it from litigation. It seems to me a very significant point.

The third is, in terms of India becoming an international seat, it would be hard to say it's part of jus cogens against funding; perhaps you could, but it would be rather extreme. You could take the approach of the English Unfair Contract Terms Act and say that if the dispute would not otherwise have any connection with India, at least it should be allowed for disputes that have no such relationship.

Mr Adrian Winstanley: Thank you, Robert. Can we, in about a minute flat, between Charlies and Zia, perhaps, just deal with that couple of points, Charles from the direct question and Zia from the Indian perspective.

Mr Charles Bear: To answer to your question, the roots of champerty indicate that a promotion of disputes is regarded -- or was -- as the underlying problem, and that would apply, in my view, equally to arbitration as well as to litigation. It would also mean that it also wasn't particularly relevant whether the parties had dealt with it in their agreement, because it isn't

16:28 a matter between the parties. Perhaps Zia will be able to say more about India.

Ms Zia Mody: I think that this issue is not settled, and it is out there, and will be tested. I think it would be sage advice to tell clients that there is an issue about enforceability, the issue of third-party funding. Borrowing from a bank to fund a litigation is different from saying, "I'll get 80 per cent, I'll get 20 per cent, I'll get 70 per cent". And I think that is how the courts would have to test it, to view it, and to come to a determination. I personally feel third-party funding is here to stay, globally. I think in the Indian context, how it gets nuanced and the moral hazard in the judge's mind is dealt with, is still out there.

Mr Adrian Winstanley: Thank you very much. We are now going to move on -- yes, that's a good idea. As an amateur dramatist in my earlier life I could always project my voice but not to this extent, I think.

George is now going to address us on the question of summary judgment in arbitration. George, thank you very much.

Mr George Burn: Thank you very much, Adrian. Before I address the audience on the topic at hand, let me just first of all say what an honour it is to be here to be able to make a contribution to the excellent initiative

16:30 that is the MCIA, which I am positive is going to see the conduct of arbitration both international and domestic develop apace in this country.

The second introductory point I just want to make, in case anybody present is Sikh, is to wish everybody the best for Guru Nanak Jayanti, which I believe falls today.

Summary judgment. Even the phrase, to my mind, slightly jars, because judgment is something that a judge in a court will issue rather than arbitrators in an arbitration will issue, but let's not get too hung up on the semantics of phraseology. What does it mean? It is essentially a process by which a tribunal or a court grants judgment on a claim or a defence, because there is no genuine issue, material fact, or fact, and the moving party is entitled to judgment or an award as a matter of law.

It's effectively short-cutting the process. This really sees us wrestling with two core elements in the philosophy underlying arbitration. It is a clash of the desire for efficiency of process on the one hand, and fairness on the other. That clash is probably, to my mind, best elucidated by the text of the Arbitration Act in my own jurisdiction, the English Arbitration Act of 1996, section 1(a) of which provides as follows:

16:32 "[T]he object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense."

I think it is worth emphasising those words: without unnecessary delay or expense.

The point here is, how do we manage, in individual cases, how this works? You can look at provisions in legislation such as section 18 of the Indian Arbitration Act, which is very close in textual terms to article 18 in the UNCITRAL Model Law. You can look at section 1 of the English Arbitration Act and section 33 of the English Arbitration Act. All of these instruments and many others speak to this desire for efficiency of process but also for fairness, and there are many cases in which one butts up against the other and it is difficult to work out the best way forward in order to respect both.

Let me really start by looking at a case I was involved in last year. I was representing a bank, an international development bank, that had lent about $40 million to a Mongolian mining company. The mining company had defaulted on the loan. It was a lot of money, of course, but essentially the claim was a debt claim. It was a very simple vanilla debt claim that the bank sought to pursue. It had an arbitration clause in

16:33 the loan agreement governed by UNCITRAL arbitration rules, so it instructed my firm to bring the arbitration in order to take the first steps towards recovery.

The claim was very simple. The respondent came up with a very, very creative defence, and a very substantial counterclaim for approximately $120 million, but the nature of the counterclaim, although very creative, was, in the end, very thin in terms of legal rationale. So we looked at this and we said, "Well, even if they're right on all of the factual points that they allege here" -- our client told us that they were wrong on virtually everything, we were still going to win; that defence was going to fail, the counterclaim was going to fail. So we presented the request to a very well-respected Singaporean sole arbitrator and said, Look, we need to shortcut this, get rid of the defence and counterclaim -- not because they are entitled to present it, but because they have presented it and it won't work, whatever happens, they are going to fail; why should we invest huge amounts of time and money in this thing that is going to fail?

The arbitrator, in the end -- he's a superb arbitrator, I have no problem with that -- he wasn't sure enough that he had jurisdiction to grant us our application. So rather than reject our application on

16:35 the merits, he said, "I'm sorry, I don't have that power. We are going to go through the whole arbitration". I would say, off the top of my head, about three-quarters of the lawyer time spent in that case was spent dealing with this defence and counterclaim, because it raised all sorts factual issues. We had to look for documents in London, in Hong Kong, in Mongolia, we had to interview various witnesses in various countries, we had to deal with all sorts of things to deal with what was always a very weak case. We did win, great; that's fantastic, but it cost a lot more time and a lot more money to do so.

But the real question here is: why did the arbitrator feel that he couldn't give that sort of order? Well, it's understandable -- and there are lots of authors who will say that this is something where there is not jurisdiction, if it is not spelt out in the rules or any arbitration agreement, it is going a bit far, it is encroaching on a party's right to be heard, the right to due process. That is really the core issue.

Now, there are some arbitration rules which do indeed have this power. There was a report by the ICC Commission on Arbitration for Banks and Financial Services, and this is something that comes up very

16:36 regularly in that world, and the users there said that one of the problems with arbitration is that there is not enough power to deal with things summarily.

But recently, the ICC has issued a practice note which says actually, it may not be spelt out in the ICC Arbitration Rules but there is enough scope in Article 22 which sets out the powers of tribunals to deal with things, and arbitrators can proceed confidently on that basis.

But still, there are still plenty of people, good authors like Gary Born, like Judith Gill, who quite rightly draw attention to the absence of text in rules or clauses. Gary Born says the best thing to do is write it into the clauses, advice I wholeheartedly endorse. But there are some rules that have started to emerge that have provisions like this. The Singapore International Arbitration Centre, very familiar to many people in the room, in rule 29 in its latest set of Rules, has a procedure for dealing with it. It talks of manifest lack of merit.

The Stockholm Chamber, which will be less familiar here but it is very familiar to anyone working with parties or projects in the former Soviet Union, also has something in article 39 in its Rules.

I would love to go to the detail of those because

16:37 there is some interesting differences of approach in those two provisions, but suffice to say there is something there at least for parties to get hold of, something that can be used fairly to bring to an end claims, defences or counterclaims that lack proper legal merit, and this is to be welcomed, we should be confident in encouraging it; it is what users of arbitration generally want, rather than allowing arbitrations to continue with too much time and too much cost involved.

Thank you very much. Can I just say, thank you also, Rahul Donde, for the reference to the American comedian at the beginning. I actually haven't heard that reference for a few years, so I'm delighted that someone so young as Rahul knows who George Burns is.

Mr Adrian Winstanley: George, thank you very much indeed. It might be interesting to hear from the Indian perspective about the whole question of summary judgment in arbitration.

Aditya, would you like to say a word?

Mr Aditya Sondhi: I'm reminded of the provisions under the CPC dealing with summary suits, Order 37, where, when a court is confronted with a case under that provision, it needs to determine whether a defence is moonshine or not, and if found to be in bad faith or

16:39 an afterthought, the court does have the power to then proceed to summary judgment. That is the same analogy that was then extended under the Indian Companies Act of 1956 while dealing with winding-up petitions for inability to pay one's debt and, as was customary in many case, the defence surfaced for the first time when summons of the case went to the respondent. There was no inkling of a dispute pending the litigation, there was no reply to a statutory notice; in fact, there may be instances where the debt was in fact admitted, acknowledged in the books of account and so on.

Those were principles that were developed both under Order 37 and in liquidation, and I would think that it would be apposite to extend them also to arbitration, of course with a specific provision in the Act, because in the absence of such a power vested in the tribunal, there is a very good chance that when challenged under section 34, the court sitting in judgment over the award may say that "You have not followed full process, you haven't heard the defendant, you have not given them an opportunity to lead evidence", and so on. But I do think, to deal with exactly the sorts of cases mentioned by George, we need an express power of this sort.

Mr Adrian Winstanley: Thank you. I have just seen an alarming note that says "Five minutes", and I think that

16:40 may apply to the entire session although to be fair, we started a little later than our allocated time, so you will have to indulge us to some extent. Btu on the basis of that warning, we should move to the final presentation, otherwise Naresh will have no time to say anything at all.

Naresh, would you be kind enough to let us have your remarks on the question of expedited procedure in arbitration -- and emergency arbitrator, but I didn't say that simply because you may not have enough time. But we will give it a go.

Mr Naresh Thacker: Thank you, Adrian.

Time is money. I now understand it completely. Adrian has been drilling that into all of us all the time, and now Rahul has made it all the more clear.

Obviously, expedited procedure steps in exactly for that situation, to help you to address both time as well as cost in arbitration. Under MCIA Rules, Rule 12 is what addresses the expedited procedure rules. There are two situations in which you can actually have expedited procedure; one is where you have the amount involved in the dispute -- whether it's the claim, counterclaim, or a setoff defence -- which is not more than INR100 million. The second is where the parties actually agree.

16:41 Now, one of the situations is that to start off with the expedited procedure, the party really needs to make an application to the Registrar. Obviously, what it means is that there is no opt-out provision even in the expedited procedure. Once you are in the rules, once you have accepted the rules, you have to accept them wholeheartedly, and you will, if a party starts or wishes to start an expedited procedure, you, as a respondent, will have very little say, really, if at all, to actually stall that process.

What is the procedure? It can actually allow you to shorten the time limit under the Rules. Whatever may be the time limits, those may be shortened. Appointment of sole arbitrator, notwithstanding any agreement between the parties, one of the issues always has been for expedited procedure, the party autonomy, the fact that it actually takes away a part of the party autonomy, and this is one of the aspects of party autonomy which is taken away; if you have agreed on three arbitrators, you may have to lose that and you may enter into a situation where you can, at best, have a sole arbitrator. Obviously, that is an issue which will be decided by the chairman after having had discussions with both sides and after having considered the submissions on both sides.

16:43 The tribunal has to hold hearings, and that's surprising that the rules actually say that the tribunal will actually hold hearings unless the parties have decided otherwise. So if the parties actually do believe that the hearing is necessary, then obviously the tribunal will continue. If not, and if the parties agree not to have the hearing, it is only on those situations that the tribunal will actually go on documents only -- which obviously, in the Indian context, it means that a lot of time will have to be spent on the cross-examinations, on the final arguments, and we all know what happens when we get a speaker spot anywhere, whether it is here, at MCIA, or at any other tribunal.

Award to be issued within six months. The time limit can be extended under exceptional circumstances. What those exceptional circumstances are anybody's guess, and I'm sure over time we will all understand how the subjective element is actually dealt with.

Insofar as the award is concerned, the tribunal actually is to state reasons for the award unless the parties have agreed otherwise. So the tribunal will be required to at least give a summary of the reasons before an award is issued, and I can understand why, because in the Indian context, again, if there was

16:44 a decision which was merely given without any follow-up reasons, certainly that is amenable to challenge in the courts.

Interestingly, if you see section 29(b) of the Act, that, as well, provides a fast-track arbitration procedure, quite similar to what you have in the rules. Therefore, to my mind, the MCIA Rules really, in that sense, supplement what the act now requires. All in all, to my mind, great. It is the summary procedure that we have been talking about, and to my mind, if correctly used, can really, really help not just shorten the time but also a lot of expense, which actually people do end up spending in a long-drawn battle, can really be taken care of.

I really have just one minute. I don't think emergency arbitrator is something that I can cover. Just one question.

Mr Adrian Winstanley: Naresh, I just want to clarify with the organisers.

Forgive us, but we started five minutes late. With your indulgence, we would like to overrun by five minutes, if that is permissible. Thank you very much.

Naresh, please, in a minute or so.

Mr Naresh Thacker: Thanks. On the issue of emergency arbitrator, again, there was a question which had come

16:46 in one of the sessions in the first half, and the issue was that what happens in a scenario now, when once the tribunal is constituted, you really in a sense lose out on the benefit of section 9, and you really have to go to the tribunal under section 17, and the tribunal is on a long leave. What do you do? Though that situation is actually addressed by section 9 itself, because section 9 brings you back into the realm of the court, but there is help at hand through the process of the emergency arbitrator. You have the MCIA Rules, Rule 14 which allows you to seek the constitution of an emergency arbitrator between the time that a reference has actually been made and the time that a tribunal is actually constituted.

The application needs to contain four things, four elements: what is the nature of the relief; what is the urgency that you actually have; what are the reasons for the entitlement; and notice to the other side.

I want to touch upon one topic on emergency arbitrator. That is the question of enforcement. Emergency arbitrator, even if you look at the rules per se, you look at the definition of "tribunal", it does not actually include an emergency arbitrator. You look at an award, the definition of "an award", it does not take into account, in that sense, the order of the award

16:47 of the emergency arbitrator.

If you look at Rule 20 by itself, it calls the order as an award. Whatever term you may need to give or you want to give to the order, it really remains an interim order of the tribunal. How it will be dealt with by the courts and the Indian courts are actually dealt with in two of the current -- or if -- I don't know whether I can really call it current, because the first time this issue arose was in 2014 before the Bombay High Court, and the Bombay High Court -- sir, I will just complete my point.

The Bombay High Court said that while they did not recognise the emergency arbitrator's award or the order, but they passed an order under section 9 in the same terms. That is exactly what the Raffles Design -- the Delhi High Court said.

To my mind, there is an indirect way of enforcing the award of the emergency arbitrator, and that is exactly what I would expect the courts normally to do.

Thank you.

Mr Adrian Winstanley: Thank you very much. I shan't be encouraged by Zia to do as she tells me that Indian moderators normally do, and that is simply to ignore all the requests to stop. We shall stop there with apologies that we were not able to take questions from

16:49 the floor on some of these, but recommend that we have a conversation over cocktails later if there are burning questions you would like to bring to members of the panel.

Thank you very much indeed.

Mr Rahul Donde: Thank you very much for another invigorating session. Our apologies for being militant with the time, we are trying to get away with this whole Indian Standard Time concept.

I invite Mr Promod Nair, Managing Partner, Arista Chambers, to hand over the tokens of appreciation to our esteemed speakers.

(Presentation of tokens of appreciation)

Mr Rahul Donde: We will have a short break for tea now. I do request everyone to be seated back in the room by 5.15. You can carry your tea and coffee cups back into the room with you.

(4.51 pm)

(A short break)

(5.19 pm)

Session 5: Role of Experts in Arbitration

Mr Rahul Donde: Our final panel for today discusses the role of experts in arbitration. The moderators for this session will be Mr Vikram Nankani, who is a senior

17:20 advocate with the Bombay High Court, and was earlier the head of dispute resolution at Economic Laws Practice.

Joining him as co-moderator is Mr Shreyas Jayasimha, who is the founding partner of Aarna Law, a law firm specialising in international arbitration.

As the speakers, we have Mr Cecil Abraham, a senior partner of Cecil Abraham & Partners, Malaysia.

We have Anand Desai, the Managing Partner of DSK Legal, a leading law firm in India and, if I may say, an upcoming Bollywood actor with a small role in Amir Khan's latest movie.

We also have Mr Matthew Gearing, the co-head of the global arbitration group of Allen & Overy, based out of London.

Finally, Mr Howard Rosen, the Senior Managing Director of FTI Consulting, and head of the Global International Group in the Economic and Financial Consulting segment of FTI Consulting.

Mr Vikram Nankani: Good evening, and thank you friends. It is lovely to see that we have a large fan following. This panel will be obliged to you guys to sit here patiently for the last session.

A message for those who are hanging out in the corridor, please tell them that the organisers have

17:22 made sure that they will not get cocktails until the end of the session, so they might as well spend their time fruitfully here.

The topic today is the role of experts. The more said about this topic, the less it is, and therefore we are always going to find something different to exchange thoughts on the subject.

There are many issues which arise in the context of experts. When do you conceive of the idea of having an expert in an arbitration? When do you brief an arbitration? What is the right time, or the appropriate stage of the proceedings when you would consider having an expert as a witness in the proceedings? Is it at the beginning? Is it after the pleadings are completed? Is it at some later stage?

Then, of course, what kind of brief would you give to the expert? The instructions that you would give. Would both parties give separate instructions, would there be a common set of instructions?

Then thereafter, the discussions between the experts, how would that be handled in a situation? Would the tribunal run the proceedings as far as the joint meeting is concerned, would the parties and their lawyers have a bash at each other's experts?

Finally, of course, is the question which is often

17:23 now cropping up in many proceedings: a "clean" expert versus a "dirty" expert. So can you have the presence of one expert sitting by your side, who virtually plays the role of a fact witness fully involved in the issues, fully involved in the subject matter of the claim, there to assist the party and the party counsel in trying to demolish the independent expert, and thereby earning the popular tag of a "dirty" expert versus a clean, independent expert?

These are some of the issues that we will grapple with today. I'm sure that you are going to get a lot from the panel to my left. My co-moderator for the evening is Shreyas Jayasimha.

Let me just kick off by posing the first question to Tan Sri Cecil Abraham.

Tan Sri, when do you think the expert should be appointed, at what stage? And are you in favour of party-appointed experts or tribunal-appointed experts?

Tan Sri Dato' Cecil Abraham: Good afternoon to everybody. Firstly, can I join all the members of the panel in thanking the Mumbai Centre for inviting us to speak this afternoon.

To answer the question that is posed by Vikram, the issue is really whether a party-appointed expert is better, or whether a tribunal expert is better. This

17:25 would really be answered in a different way, whether we ask the question of counsel or whether you ask the question to the tribunal. I would take the view that the appointment of individual experts by respective parties, the joint appointment of a single expert by the parties, or the appointment of an expert by a tribunal, and even the appointment of individual experts by respective parties, and then coupled with tribunal-appointed neutral experts, has its advantages and disadvantages.

For this purpose, I think we really should look at the concerns of each mode of appointment. Some of the common concerns of each party appointing their respective experts' witnesses could briefly be said to be as follows. Firstly, a lack of impartiality. The common view is, I suppose, party-appointed experts are really seen as hired guns producing evidence brought by the party presenting it. Sometimes, if you look at expert reports, it really looks and resembles the arguments of the party who has appointed them.

Secondly, sometimes there is a lack of clarity in the reports in that they are too long, too complex. I suppose the reason is the party-appointed expert has been instructed by a party and not the tribunal, and, of course, they perhaps have a different perspective and

17:27 focus compared with that of the tribunal.

Sometimes there's a lack of coordination between the two experts appointed by the parties, and if they are submitted simultaneously, they may not even correspond with each other, they may be based on different fact, different scientific approaches, different assumptions. Sometimes they may not even address the issues. So it is really difficult times for the tribunal to bridge this gap between the reports maybe without the help of another expert.

Some of the concerns insofar as the tribunal-appointed expert is, I suppose counsel may distrust the appointment of the tribunal-appointed expert in the sense that they have no control over the expert, especially as to how they perceive critical elements of the case should be presented.

The tribunal-appointed expert may also lack information, the flow of information between a party and its corresponding party-appointed expert is usually much smoother than perhaps between the tribunal and the tribunal-appointed expert. There may be also lack of clarity, and then different standards of impartiality and independence might arise.

If you look at modern arbitral practice in international arbitrations, I perceive that the use of

17:28 party-appointed experts has really eclipsed the practice of leaving such appointments to the discretion of the tribunal. There are grounds, really, for both parties and the arbitrators to prefer party-appointed experts, and for the reasons I've already given, in the sense that there is greater control over the matters which will be put to the expert for his or her opinion, which arguably pares down the potential for irrelevant testimony -- hopefully.

For the tribunal, this approach may be preferred because it relieves the arbitrators of the logical and procedural responsibilities of appointing an expert. I take the view that there are many counterarguments against the use of party-appointed experts, in particular, one would see it as a development of the battle of experts where two opposing experts testify sometimes with diametrically opposed contradictory positions and sometimes even using technical jargon that is almost irreconcilable, and tribunals may feel at a loss to determine which expert is correct.

One should also consider the case of arbitrations involving both party-appointed experts and tribunal-appointed experts, where the question of technical expertise is required in an international arbitration, say, in respect of liability and quantum,

17:30 it is usual for parties to present their experts from the independent experts that they have retained.

Then it is really up to the tribunal to weigh and compare the value of that expert testimony in order to reach a conclusion. However, as I said, sometimes the evidence of the experts is so technical, and the tribunal may have difficulty in reaching a decision, so they may, in those circumstances, seek the assistance of a neutral expert. But if they want to do that, either they do it at the outset of a complex case or at a later stage.

I would think that the tribunal should appoint and engage with the expert sooner than later, and in any event before the final hearing. This is so that the expert can present during the oral testimony of the party expert.

Insofar as what stage, it is best to engage with the tribunals. This should be done at the preliminary meeting or at case management, which should be held to try to narrow down the issues and contention in which the experts' evidence is required. If it is necessary, one can hold further meetings or a number of meetings to try to narrow down the issues which are agreed in expert evidence, and also maybe with a number of experts that should be called in any hearing.

17:31 Mr Vikram Nankani: Yes, the challenge is, no doubt in the case of tribunal-appointed arbitrators, that the tribunal should be proactive. If you say that the expert appointment should be made at the earliest, we are expecting the tribunal to have a fair degree of the issues involved, knowledge of the issues involved in the matter, for them to take a decision as to an expert to be appointed and what type of expert to be appointed.

On the other hand, the party-appointed expert, Martin Hunter, to quote him, was very cynical when he said that the main disadvantage of an expert is that the expert evidence presented to the tribunal is bought by the party presenting it, and so it needs to be openly challenged for credibility through other mechanisms.

I will throw some light whether this is an area which requires some degree of regulation, maybe through soft laws or other mechanisms.

Mr Anand Desai: Thank you. I think the aspect of experts in arbitrations in India is a fairly recent phenomenon, by and large, compared to international arbitrations. I think a lot of Indian experts believe that they are really acting for the party rather than being independent and giving an opinion that is independent.

In terms of protocols, we don't have any as such in India. We have the law, of course, section 45 of

17:33 the Evidence Act, section 26 of the Arbitration Act. In some institutional arbitrations, there is also further protocol, guideline assistance in determining how they should conduct themselves.

But possibly the whole issue of understanding the role amongst themselves as experts before they take on the assignment, and also the duty of the party concerned appointing the expert, that, please give your opinion as your independent expert opinion, rather than just mouthing what I'm saying on the facts and fitting the experts into that -- would help a lot.

I do think that a protocol would help. Guidelines often help. Because a lot of people are ignorant as to what is expected of them when they get appointed in a place like India.

Mr Vikram Nankani: There is a CIArb protocol in the use of party-appointed experts, so we have that guideline which can be very usefully used in a given case.

Howard, from your experience, how would you reckon the appointment of an expert, and an independent expert at that too?

Mr Howard Rosen: Thank you. I've been an independent expert for over 35 years, and in the early days of my career, in the early 1980s, most of my work -- and I'm a financial expert -- was done in national courts in

17:34 Canada and the US. I used to hear the same kinds of complaints from judges and from counsel, that experts were hired guns, that they knew who was paying them, and they tailored their opinions to suit their clients.

I think it's a cynical point of view. I think there's certainly some experts out there that would lead you to believe that we behave in this way. But there's a few things that protect the courts and clients and counsel from experts behaving in this manner. It's difficult in commercial arbitration to achieve the same result, but in the national courts, judges wrote opinions in their findings, and where experts behave badly, judges frequently cited the experts as being unhelpful, biassed, just not good experts.

The other thing that I think mitigates the risk of experts behaving in this manner is the fact that most experts belong to a professional organisation, much like lawyers belong to a law society and there are rules of ethics that govern the behaviour of lawyers. I'm a chartered accountant and and a chartered business evaluator, and the rules of my professional organisation govern my behaviour, and govern what I put in my reports, and govern what it means to be an independent expert.

So, I think when courts and counsel are looking at,

17:36 or arbitral tribunals are looking at experts, they need to be thorough in understanding who these experts are. In national courts, to become an expert, and to offer expert opinion evidence to assist the court, you have to be qualified in most common law jurisdictions through a series of questions and voir dire. In international arbitration, there is no such process; if you have produced a report you are assumed to be an expert. So there's no gatekeeper keeping experts that don't have professional qualifications out other than instructing counsel.

Certainly, in treaty arbitration cases, which are public, you will see decisions where certain experts are cited for being helpful or unhelpful to the tribunal, and that has a way of identifying those experts that are not behaving as experts should.

In answer to the original question, which is, should there be party-appointed or there be tribunal-appointed, I think that the party-appointment of experts allows the parties themselves to determine what kind of expert they want, what kind of background and experience they're looking for, and they have a sense of control over their own case, and they can decide on the cost and the risks associated with hiring their own experts.

The tribunal-appointed experts, I think, remove that

17:37 optionality from clients and counsel, and, again, if it is your case, I think you should be able to decide who the experts are that are going to assist you in the presentation of your case.

Mr Vikram Nankani: I think there is an inbuilt mechanism or some kind of a sanction in the very appointment of an expert, because you cannot lose your independence and your integrity. Just to quote my friend from his article, which he very usefully forwarded this afternoon to me, it says that experts are also less likely to make patently false statements when challenged by their peers for fear of being caught out and the associated reputational damage.

So maybe there is no formal mechanism for an expert to file a declaration, but I think there is some kind of an inherent implied check in the system.

Mr Shreyas Jayasimha: We have only one testifying expert on the panel so he is going to get some more of these questions.

Howard, we have so far -- I know you are a damages expert, but just for the benefit of the room, and since you run a large practice which has many types of expert, could you elaborate on the various types of experts that are in fact available to parties? And as proceedings get more complex, you might wish also to add, to your

17:39 response, the time at which these experts are appointed to differentiate them from the advisory team and from the independent expert who might be testifying at a later stage.

Mr Howard Rosen: Thank you. Well, first, you know, I think most cases that I've seen globally are, if I can say, over-experted. There will be too many experts retained. I'm on a case right now in February, 13 experts retained in support of the quantum claim. 13.

Many of these issues are not matters of expertise that the tribunal requires expert opinion evidence to assist the tribunal in understanding the issues and arriving at a decision, so I think there has to be more rigour and discipline from counsel than simply saying "Well, there's a bunch of issues here, I will use an expert". I don't know if it's an abundance of caution or a lack of understanding or, in some counsel's case, laziness in not dealing with these issues, but you cannot solve every issue in a case simply by hiring an expert.

The different kinds of experts that we run into. I'm a quantum expert, so I have experience in economics, accounting and finance valuation. I do a lot of industry work in certain types of industries, but I would not call myself an industry expert. So

17:40 I'm a subject matter expert, but in our firm, or in other firms like ours, you will find people that have industry experts, and they can be telecoms experts, oil and gas expert, mining experts, whatever kinds of experts that come from those industries and have true expertise.

They're not just people that know where to look things up and can assist a court in writing a report by looking up reference material; these are people that possess true expertise and can give opinions. As I said in my last answer, there is no real gatekeeper in international arbitration that would qualify an expert. Anyone who produces a CV can call themselves an expert. So, in the selection of experts, counsel, especially, because you are the gatekeepers initially, have to be very, very rigorous in examining the experts' credentials to ensure that they have that kind of expertise.

As for timing, it sounds like it's a little self-serving but we always like to get involved as early on in the case as possible. The reason that you bring a case before an arbitral tribunal is principally to recover damages. There may be other reasons behind the case but principally it's to achieve an award of damages, or to avoid an award of damages.

17:41 So there may be a legal construct that you use in your case but, when it's analysed from a quantum point of view, will not actually produce substantial damages or will expose your client to substantial damages. So having an expert who can advise on the framework for damages sort of as the case evolves, as you discuss the legal theory, as opposed to after the arbitration is filed and the initial pleadings are completed, when you don't have an option of changing your strategy, in my opinion is advisable.

There was a reference to a sort of "clean" expert and a "dirty" expert, and certainly, if you are a true independent expert, you should be free from bias or intent. You're not there to help your client win; you're there to assist the tribunal in understanding technical issues. You should avoid the use of jargon and your report should be short and understandable. You know, a brilliant expert who is a brilliant analyst who cannot communicate simply does not achieve much in a hearing. But these are the "clean" experts, the people who come as independent experts. But your case may require someone on the inside who can help you with strategy, and to think about how your case should be presented from a quantum perspective, and how to deal with the opposing side's quantum expert, and how to deal

17:43 with cross-examination of that expert. So you may need someone who is an advisory expert who is not going to give you an opinion, and those are referred to as the "dirty" experts.

Mr Shreyas Jayasimha: Thank you for that.

Matt, you have interviewed several experts as well. Can you share if there are any best practices in interviewing experts, also, maybe confidential information that you need to share with the expert at the outset, as a logistical matter, and, at the same time you wish to retain the sense of independence. So, over to you.

Mr Matthew Gearing: Thanks, Shreyas. Let me start deliberately by not answering your question but by applauding Howard on something he said, which is it's extremely refreshing to hear an expert as esteemed as Howard saying that many cases are over-experted.

I completely echo that. I echo it often against myself because sometimes I think I'm responsible for ensuring cases become over-experted at the end of the day, but we all know how the bandwagon starts, one expert leads to another, an 80-page report leads to a 100-page report, leads to a 120-page report in reply.

So in a roundabout way, my first answer would be to say, before you even interview an expert or even think

17:44 about an expert, ask yourself once, twice, three times: do you really need an expert?

I think in the area that Howard practices in, in quantum, it's less controversial because there are many exercises in quantum where you obviously do need an expert. You need an expert to convince a tribunal as to the validity of your DCF analysis. You need an expert to tell you how much you can claim by way of loft profits. In many other areas, if you are dealing with jurisdictional merits, you should ask yourself extremely carefully whether expert evidence is required at all.

Now, dealing more directly with your question, I think, certainly, when I'm involved in selecting experts, we look at two things. First of all, we look at genuine expertise, and secondly, we look at experience in giving evidence. Sometimes the two don't necessarily match up, because sometimes you can find someone even from your past experience or a colleague's experience, or you will reach out to other people in the room, in gatherings like this, and someone will say, "You know, I had a pipeline arbitration a year ago and I had a terrific expert", and you will have a pipeline arbitration and off you go and speak to that expert.

Genuine expertise is what we would look for, first

17:46 of all. If you don't know the expert, often a simple phone call and an exchange of emails may be at least enough to get you up and running. But then you have the question of, well, how are they going to be in front of the tribunal? How are they going to write their reports and how are they going to be in front of the tribunal? In that case, of course, if you have seen them yourself, then that's the best recommendation.

In quantum, to mention quantum again, most of us are very used to seeing quantum experts and most of us have our own ideas as to the quantum experts we like to see and we like to instruct. If you are going a bit off-piste into more difficult areas, then, again, you are perhaps going a little bit on faith and reputation rather than personal experience.

Mr Shreyas Jayasimha: Just a quick follow-up with you on that, going slightly off-piste myself, the large practices, such as perhaps your own firm, and perhaps dealing with large expert bodies like Howard's firms, do you see practices emerging on best practices to perhaps not instruct the same expert overtly beyond a certain set of number of matters, and is there a time gap that you keep between engaging one expert to going back to them again? Is there a practice emerging in the market?

Mr Matthew Gearing: Yes, I think there is. There are other

17:47 representatives of big firms in this room and they may have a comment, but I think a rule, a soft rule which is not bad to adopt, is to take the three-and-three rule, which has emerged for past appointments by arbitrators by the same counsel or the same party in respect of arbitrators, and apply that to experts. Very roughly, within my firm, we will ask ourselves, well, have we appointed this expert -- or, I have to say, this whole organisation -- three times or so in the last three years? If we have appointed them more than three times or so in the last three years, then it's not that we definitely won't appoint them, but we will certainly consider whether someone else can fit the bill.

Mr Shreyas Jayasimha: Thank you.

Anand, you talk about the under-utilisation of experts in India, but do you see particular types of disputes where experts are under-utilised with the, for example, emergence of economic jurisprudence in competition law, and now perhaps the new oncoming follow-on claims apart from the claims that are existing within the competition law framework or any other use of experts that you see?

Mr Anand Desai: Both are clearly very relevant topics where you need expertise to come in. We are also seeing much more complex contracts now, in terms of large projects

17:49 which have their own complexities in terms of technology, what is a liability, who is responsible, et cetera. I really believe, for a lawyer or an arbitrator to have that expertise himself is highly unlikely.

I think what is more exciting currently, at least for me, is when you have disputes involving technology, with artificial intelligence, you have blogchains coming up, and those are even more complex for people like us who have not understood how these things work. A simple thing, as an example, an email that is put into evidence, I think India still very few people understand how an email can be traced, how the headers are supposed to be looked at, et cetera. So whether the email really was sent on that date and time or not, itself is something that befuddles several lawyers and arbitrators.

So, with emerging technologies, with emerging areas, there is huge scope -- necessity as well -- to have experts, to my mind.

Mr Shreyas Jayasimha: One point that I don't want to miss out is the emergence of the professional Indian law expert. There is a small body of people who are testifying on Singapore law in Singapore courts, London courts, international arbitrations seated elsewhere. Do

17:50 you see a new breed of the Indian law expert, or is it still the retired Chief Justices who are the Indian law experts?

Mr Anand Desai: No, I think there are more and more coming out, which is good. The caution I put in my earlier answer continues, that often I see them putting in their opinion of the facts rather than limiting themselves to the law.

Tan Sri Dato' Cecil Abraham: I think in my experience, when we are dealing with the question of Indian law, Indian lawyers tend to go to retired judges of the Supreme Court to give evidence on those issues. I mean, I've only come across one or two instances when a senior advocate has been asked to give evidence, and then when he's ranged against the next Chief Justice of India, I suppose the tribunal sometimes has to decide who is be given more weight as such. So I suppose for those reason, we tend to see more and more ex-judges giving evidence on Indian law before arbitral tribunals. But perhaps one of the things is maybe professors of law should come before tribunals as well.

Mr Vikram Nankani: Thank you, Tan Sri. I'm not as young and bold as Shreyas to raise a very controversial topic. I will move away from retired judges versus professors.

Let me start at the beginning where the whole

17:52 concept or thought process of getting an expert involved is concerned. Obviously, if one party puts his hand up to say that we are going to put in an expert, the other party, if not for any reason, will like to counter-balance it with an expert from their side. Now, there will obviously be an opportunity for joint meeting between the two expert, but in that joint meeting, are they going to be looking at two different poles, north and south? Suddenly, they discover and found out that there is very little in common on the instructions which were given to them. So what is the solution? Is the solution to prepare a joint common memo where both parties will agree on the set of questions to be sent out to the expert, and both experts would simultaneously give their views on those agreed questions?

That is really a vexed issue. Matt, what are your views on this?

Mr Matthew Gearing: Thank, Vikram. A couple of points. I think, again, in terms of controlling the proliferation of expert evidence, the 80 pages becoming 100 pages becoming 120 pages, et cetera, the best way is to agree a common set of instructions at an early stage. First of all, you said that if one party wishes to put in an expert, I would challenge that and I would say, certainly in this day and age, many proactive tribunals

17:53 are saying, well, just because a party wishes to put in an expert, that isn't enough; the tribunal has to be satisfied that the admission of that expert evidence is going to materially assist.

This goes back to the old chestnut about arbitration, arbitrators being proactive. If they are being proactive, if they have read in and they have thought about the case, they will be more confident and they will be more able to say, "Well, do you really need expert evidence in that area?" But once you have got over that hurdle, whether the parties are just doing it and the tribunal is allowing it or the tribunals are positively engaged in the process, then a joint memo and a joint set of instructions is obviously the way to go because it avoids the two ships passing in the night phenomenon.

But I have to say, it's still quite a rare thing that you actually see that. Again, because I think where there is a dispute between the parties as to what they want to tell their experts to do, it's quite rare that a tribunal would be confident enough to intervene at what would normally be at a fairly early stage in the arbitration and resolve that dispute and to say positively, "No, the instructions will be this", or "The instructions will be that". But if you can do it,

17:54 and if the tribunal is engaged, and the counsel are open-minded enough to allow it, joint instructions approved by the tribunal must be the way to go.

Mr Vikram Nankani: Any view, Howard?

Mr Howard Rosen: Yes, I feel pretty strongly about this. There's a lot of gamesmanship that goes on in the world of treaty arbitration right now, whereby a claimant expert will write a report based on instructions from counsel. The respondent will respond to that report with only a criticism but not offer a positive view on damages at all.

The reply report is written by claimant's expert addressing those criticisms, and then, in the rejoinder report, for the first time, the respondent's expert will now put forth a different view of how to calculate damages in a different number, at which point the claimant's expert doesn't have a chance to respond.

So you get this phenomena that we see frequently of two ships passing in the night, where a tribunal has the battle of the experts; one expert says it's worth 100 and the other expert says it's worth 0. What's the tribunal to do? You know, they look at the credentials of the experts, they both are well-credentialed experts; the reports sound plausible, sound reasonable; in the absence of some very thorough

17:56 investigation by the tribunal in witness conferencing, they're left with two reports that aren't very helpful. So it's very, very frustrating to be an expert in those types of cases.

As a matter of course, if in one of the earlier procedural meetings the tribunal takes an activist approach and says, "I want to see the instructions counsel has given to experts, and I want to make sure that you, as counsel, can instruct your experts to do whatever they do, but included in those instructions we are instructing you to make sure that your experts respond to each other so that we get the evidence on all of the issues from both experts", and so whether it's done as a joint letter of instruction to both experts, or whether counsel, through the tribunal, consolidates those two sets of instructions, it has to be done.

Mr Vikram Nankani: In the interests of time, I will not stick to the script, so let's go to the related party, although the point which we had slotted for discussion in the next is also equally interesting, on privilege in relation to experts.

We move on to the related topic -- assuming we don't have that happy position of joint set of instructions to experts, we still have one more opportunity where the two experts could meet together and come up with

17:57 common points of agreement or disagreement. But the moot point is that at such meetings, would you or would you not allow party counsel to remain present, or would you leave the two experts to be on their own and try to sort things out between themselves?

What would you like to say on that? Firstly, we will get the Indian perspective. Have you had any experience of joint meetings and have you seen any joint meetings happening without the counsel remaining present?

Mr Anand Desai: I have not seen one without counsel present, because the sense is the counsel have to govern what the experts are heading towards.

Mr Vikram Nankani: Matt, what are your views on this?

Mr Matthew Gearing: Yes, I've seen many where experts meet without the counsel being present. Sitting here, of course the correct thing to say is that counsel shouldn't be present because well-briefed experts should be able to meet and they should be able to collaborate and they should be able to narrow areas of difference and then genuinely assist the tribunal, which is, of course, their function.

I mean, that must be the right thing. Of course, when it comes down to it, and your counsel and you know what are the good points of your case, and you think you

17:59 know what are the less good points, then that becomes quite a difficult thing to allow -- although it does increasingly happen. But actually, the critical thing, it seems to me, is not so much whether the experts meet on their own, whether by telephone or face-to-face without counsel, but it's whether the product of that meeting is presented to the tribunal without counsel getting involved.

So if two experts meet, and quite often if they both sensible people, will come to a measure of agreement on a number of points, if they produce a joint memo, which would then become something on the record which is sent to the tribunal without counsel getting involved, then that can genuinely cut through many issues. But if they have to, which is often the case, go back to counsel before they can sign off on that memo, then much of the progress which is made in the meeting is then undone when counsel get involved in the memo. It's something that Howard and others and I were discussing earlier.

Howard, you said you had experience of that, I think.

Mr Howard Rosen: Yes. Very briefly, I've had many, many meetings with opposing experts in arbitration hearings, where counsel attends the meetings and requires a review of the joint expert report, or input to it. Any measure

18:00 of agreement, any measure of progress is immediately undone, in almost every case.

Again, I know it's hard for counsel to lose a little bit of control and trust their experts to meet and act sensibly, and on issues that are not matters of law, that are just matters of whatever your expertise is -- whether it is economic, engineering, or whatever it is. You have hired your experts for a reason, and you trust their judgment.

You know, when we do a joint expert report, we can eliminate two-thirds of the issues usually, if counsel does not get involved.

Mr Shreyas Jayasimha: Before we open for questions, do you have any expectations of the institution when it comes to experts? For example, there may be situations where institutions are called upon to appoint experts in the absence of agreement between the parties, or the tribunal not making that decision. Do you see any role for institutions at all when it comes to experts?

Tan Sri Dato' Cecil Abraham: Well, I have never come across such a situation, because it's either the parties appoint the experts, or the tribunal. I think those are really the two options that are open.

Mr Shreyas Jayasimha: A quick reason for that was that -- for example, appointing authority rules, LCIA has it,

18:02 a few other institutions have it, and though rare, arbitral institutions are in fact called upon to appoint experts.

With that, may we open it to the floor for any questions. I see one at the back. The lady.

Participant: More than a question, this is actually a comment that I would like to make on something that was said earlier about the two experts, like two ships passing each other in the night and how the respondent's expert rarely ever replies to the claimant's expert, that Howard brought up.

I wanted to share an experience that I had recently in an investment arbitration case where something like this happened. The tribunal then, because it was completely lost with all these conflicting figures and positions that were put to it by the two experts, asked the experts to quantify each objection that the respondent had to the claimant's claims. Each of the experts presented the tribunal with a factual matrix, so the tribunal had to choose and say, "Okay, if I retain this position, then this is the amount of the claim that could be knocked off, this is the amount that could be added on". In the end, that sort of gave the tribunal a good roadmap through the damages claim, and helped them to come to an ultimate quantification of the claim

18:03 which they really appreciated in the end.

So that could be a possible solution. It worked very well in this particular case, and I don't know if any of you have had experience with something like this. It would be interesting to hear about that.

Mr Howard Rosen: I can tell you my own experience. Experts are usually given 20 or 30 minutes to make a presentation to the tribunal before cross-examination. In every single case where I testify, that's exactly what we do. We have basically a bar chart that starts with our number and reconciles to their number, and there is a different box in a different colour for each one of the issues where we differ.

A lot of the decisions, though, have an interactive effect, so you can give an approximation for each one of them, but it can't be exact. But it is very helpful for the tribunal -- unless they disagree with both experts. And because in these cases, the experts have been so disagreeable, they may not rely on either of them, and then they really have no help. You will see in the reason, when you read the awards, sometimes tribunals say "The experts really weren't that much help to us, but here is some evidence and here is how we get to a number".

But, yes, that is something that experts should

18:04 always do in every single case.

Mr Vikram Nankani: Any more questions?

Yes, please.

Participant: My question is directed to Mr Rosen.

You mentioned about conflicting reports and addition, subtractions, variations. At least as far as the judiciary is concerned, at least in this country, we are more bothered with the truth. If the reports are manipulated, I don't think that it would give a correct picture in the award. After all, even an arbitrator wants to know the truth, and if it's an inconvenient truth in the report that is not given, what do you do?

Mr Howard Rosen: What we try to do is always try to bring it back to common sense. A lot of people, when they read expert reports, get lost in the technical aspects of them, but in the end, arbitrators should always remember that the market ultimately determines the amount, the value of an asset or a business. It has to make sense.

If you have a respondent expert that says that there's a gold mine that has been expropriated, it's worth nothing or worth negative, that is obviously incorrect. I mean, it's a gold mine. We all want a gold mine.

So when we present our evidence, what we look for

18:06 is, we say, "Okay, we have valued something in a number of different ways and we have reconciled the number", it could be a low number, a high number, it depends what the facts are. But then we look for other indications of the value in the market place to give some context to it, to give some common sense about it.

When arbitrators hear technical evidence and read technical reports, if the experts have done their job, they should not be left wondering. They should really understand the basis of that particular valuation, and it should make sense in context. If it doesn't, then the expert, or the experts, have not done their jobs. So it should never feel like the truth gives you the wrong answer.

Mr Vikram Nankani: I think that is a fair answer, because many times, even if their expert is objective, six is to one, nine is to the other. So there are always two sides of the coin, and both are equally genuine. So that is a possibility. With that, any more questions, please? Right at the back, yes.

Participant: My question is something with regard to what Mr Rosen has just discussed in the last question, and also something that came up in the second session. If you have a conflicting report of experts that come out in arbitrations, is it that much more imperative, and is

18:08 there merit in having experts who sit on the panel as arbitrators themselves to be able to cut down on the kind of jargon that comes out in the expert reports and actually bring out a clear award in finality when you have an arbitration proceeding?

Mr Howard Rosen: There are two schools of thought on whether experts should sit as the fourth arbitrator or even as the third arbitrator. I mean, I've done it twice, I've sat on an arbitral tribunal and as sole arbitrator, but these were on quantum issues.

The Cairn position is that the tribunal will just rely on the expert blindly to determine the quantum issues, and that the tribunal won't discharge their responsibility as lawyers and judges, and so that's the position I've heard that's sort of against having their own experts sit behind them on the tribunal and whisper in their ear.

The positive side of that is, if there is someone up there that has a command of the technical jargon and the science behind the expert report, when the experts present their evidence, they're more likely to be completely transparent. But I think, instead of going through the step of appointing an expert to the tribunal to advise them, and it's sort of going against my own self-interest, the better way to ensure that you get

18:09 a reconciliation between experts and frank disclosure from experts is to have witness conferencing, have the two experts sit side by side and allow the tribunal to put questions to them and say, "Okay, Expert A said this, Expert B, what do you think?" And have them have a conversation to reconcile their differences in front of the tribunal. You get a very full, frank discussion if you do that.

Mr Matthew Gearing: Just to say, I think in international commercial arbitration or in treaty arbitration, it's pretty rare to see an expert per se appointed as arbitrator. It does happen, but I've rarely seen it. I think most of the time you will get a situation -- you hope to get a situation where the arbitrators know something about the underlying issues. Gas price arbitration, for example, a case where you wouldn't really appoint an arbitrator who hadn't done at least several of those cases before, but it is rare that the arbitrator's knowledge of the issues will be so deep, so profound as to dispense with the need to appoint an expert. That's in a situation where you go off and appoint an expert if you really need it.

Mr Vikram Nankani: Could you think of a situation where an expert doubles up his role and an award comes before an Indian court? What do you think would be

18:11 the reaction?

Mr Anand Desai: I think it is a very broad question, it depends on the nature of the dispute, but if it is a purely technical dispute, I think it will stand.

Mr Vikram Nankani: So a person can wear two hats? George?

Mr George Burn: Thank you, Vikram.

This is really to develop a point that Matthew Gearing made on expert selection and appointment. In my mind, at least, I think there's a distinction to be drawn between different types of expert. So you will remember that Matthew made the two points that when he's looking for an expert, he's looking for somebody who is really well-versed in the technical field, first and foremost, and then, as a secondary matter, would look at their testifying experience.

I think you were alluding to this, the same point, so I don't think I disagree with you, Matthew, but just to develop the point, I think that first one is really what it is all about, really. In certain areas, like quantum, what you get is very highly-developed technical ability from people who are also very good at testifying, with teams behind them who are good at developing the material that is required to testify well. So you get the highest quality technical analysis

18:12 from the very same people who are experienced technical testifying experts. You also find that in areas like delay analysis in major construction disputes, or the technical issues that go into bunker disputes, in shipping disputes.

But there are other types of experts in very technical areas where, actually, in my opinion, the experts who have some testifying experience may not be the best people. They may not be as deeply embedded in that technical field and be able to give the right compelling analysis of a particular point.

I had a case last year in which one of the fields of expertise that was required was soil analysis. Both sides instructed experts who were effectively academics, who had little-to-no testifying experience -- certainly the guy on our side had no testifying experience -- they were very rough and ready because they had never done this stuff before. We briefed them but they were not familiar with what was required of them in this process, but it was much better to have two experts who really, really understood this particular academic field.

So I think there are those two different areas. Some areas, you want testifying experience; some areas, actually, I would kind of move away from the ones with testifying experience.

18:13 Mr Vikram Nankani: On a slightly different note but in a related context, you may have a very good expert who may turn out a very robust report, but when you put him in the box, he sort of crumbles and the whole case falls on its face. When you are appointing an expert, how much weightage would you attach to his demeanour, his outlook, his articulation and his horizon, if I may use that expression?

Mr Matthew Gearing: Can I just say something.

I completely agree with what George says. I think mostly you look for underlying expertise first and then experience as an expert in the witness box, second. All I would say is that I have noticed in recent times that the second factor is emphasised a lot. You find that there are now league tables or statistics published by institutions saying, "We had X hearings last year, and our experts were cross-examined Y times". You know, they possibly wouldn't be doing that if the market didn't think it was important. So maybe George and I are in the minority in that regard in thinking that you really primarily look for underlying expertise.

Having said that, if your proposed expert has not given evidence before, of course, you are going to probe a bit more really how they come across. But a simple conversation should elicit that. Do they articulate

18:15 complicated concepts simply? Do they speak well, to put it shortly? If they do, you would probably think that, combined with their expertise, they may be a good expert.

Mr Vikram Nankani: With that, we will have to close. Would you like to wrap up, Shreyas?

Mr Shreyas Jayasimha: Thank you to each of the panels. As an audience, there is much more to experts than that very short word. This is a conversation that has just begun. Howard said that experts always come last. Maybe to the organisers, maybe this is a topic that even in conference experts come last. Maybe we could advance these sessions on expert, it remains superficially addressed if it is in the last session. Thank you very much to the panellists and to the organisers.

Mr Rahul Donde: Thank you to the panellists. I invite Mr Nicholas Peacock, partner of Herbert Smith Freehills, to kindly hand over tokens of appreciation to our panellists.

(Presentation of tokens of appreciation).

Mr Rahul Donde: George Burn, this time the American comedian, once very famously said the best way to give a good sermon, in his case, is to have an excellent opening, to have an excellent ending and to get those two as close together as possible. Not the case with

18:19 this conference, which has been absolutely excellent through and through.

With that, I invite Mr Vyapak Desai, co-chairman of the MCIA Council, to give his closing remarks.

Vyapak Desai: Thank, Rahul. I will make sure that it is as close as possible.

Before closing the conference, let me put some statistics. Today, we had more than 230 participants coming from 10 different jurisdictions, including, of course, several cities in India, London, Singapore, Japan, Canada, Bangladesh, Switzerland, Sri Lanka and maybe many more. We had six sitting judges, including the Chief Justice of India, including the Chief Justice of Mumbai, and 12 sponsors. Most of the names are pretty visible, as the stage demonstrates.

Most of the audience still staying back at 6.30 on a Saturday. Can we have a huge round of applause.

(Applause).

As we have done through the day, we have been ruthless to each of our panellists, to each of our panels. As promised, we are going to end this conference right on dot, maybe a little early, at 6.30, before we hit the real bar.

That only assures the audience here and the users of MCIA, the community here and elsewhere that, if we can

18:21 do even for a conference in India, on a Saturday, I'm sure we can administer our cases as efficiently and as effectively as we have done for this conference.

Let me thank the people who have done the most hard work today, the people from DTI. Can we have an even bigger round of applause for them. I think they have done a fabulous job, I don't know how many of you saw how on the job they were, they were on the dot when they had to change certain things, they were understanding 10 different accents, making the transcript so well that that also shows that if such a facility is used in an arbitration, how effective it can be: it can easily save a lot of time and cost and bring the efficiency which we always want.

Of course, these services are available, if you have an MCIA venue or even an MCIA-administered case, so please ask for that whenever you use MCIA's services. We are also going to put the transcripts and the full video of this conference on the website of MCIA for people to see what they said, what they heard, whether it was right, whether it was wrong. I'm sure, with the kind of audience we have, there will be enough debates along that. That's most welcome.

Let me go back to what Rahul said: we should end where it started.

18:23 As Madhukeshwar pointed out in his opening speech, he brought the concept, or he mentioned the concept about collective aspiration of MCIA. I think that reminds me of, I would say, a statement which I have read somewhere, I don't remember whose statement it is, but it says something like this, that if you want to go fast, go slow, if you want to go far, go together. That's what I would say. Put MCIA in the league where we want people to come together, take this whole cause of bringing the institutional arbitration at the forefront, because if we have such a good law, which is ever-changing, as the topic of today's conference is, and it's addressing all the concerns of all the stakeholders, if we have such a great counsel available, from several parts of the world in India for India-related disputes, then nothing stops us from becoming the torch-bearer, as MCIA, to bring the institutionalisation to the forefront.

Again, as Justice Misra said, institutionalisation is here to say, and I'm sure MCIA will be remembered as part of the history to bring the focus at the forefront of the arbitration world.

Thank you.

(6.25 pm)

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