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Resolving disputes in Construction Industry: Africa and India perspective

Transcription of Proceedings

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Paresh Lal: I think we'll just wait for people to log in. Just give us a minute and we can see the participants are pouring in. We'll just start in a minute's time. Yes. I think we can start now. Good evening, everyone. Welcome to the fourth and the last session of the third day of India ADR Week, organized by the Mumbai Centre of International Arbitration. We'd like to express our gratitude to Link Legal and The Lagos Chamber of Commerce International Arbitration Centre for hosting this event, for hosting the session. We have a stellar list of speakers today, but let me introduce the topic today. This session would be devoted to discussing the manner in which we resolve disputes in the construction industry specifically. We're looking, we're looking at the perspectives from both India and Africa. We have a stellar list of panelists and speakers today. This, let me take a minute to introduce all of them to you. First off, we have Anand Srivastava, senior partner with Link Legal. He is qualified to practice in both India and the state of New York in the United States of America. He is recognized as a legal leading practitioner by Legal 500, chambers, IFLR, to name a few, for practises in aviation projects and infrastructure, corporate M&A and of course Dispute Resolution. We also have with us, Mr. Atul Sharma, who's the managing partner of Link Legal. He is a Chair of the aviation committee of the Indo-Pacific bar association and Regional President of the Indo - American chamber of commerce. He has over 40 years or more of 40 years

of experience in corporate litigation, arbitration. Of course, Mr. Sharma is recognized as a star and elite practitioner by publications, such as Chambers, ALB and Legal 500. He's definitely as has been recognized among the top 50 legal icons in India. We have Mr. Nusrat Hassan, who is the co-managing partner of Link Legal. Hassan has been the Chevening scholar in his day, specializes in international arbitration dispute resolution. For the past three consecutive years, Mr. Hussain has been named as a top 100th lawyer in India, by the IBLJ. He's won the dispute resolution lawyer of the year at the Legal Era Awards in 2019 and 2020. We have Mr. Martins Okonmah, who is a senior associate with Aluko and Oyebode. He's a member of the international arbitration group of the firm. He also works in the energy and oil and gas and power infrastructure practice. He's been an arbitrator and a counsel, a number of international arbitrations seated in various jurisdiction under the rules of eminent arbitration institutions like the ICC. Finally, we have Ms. Funmi Iyayi, who's the managing director of the Lagos Chamber of Commerce International Arbitration Centre. She's worked as the general counsel of the Lagos court of arbitration. She has been the CEO of the centre in, she joined as the CEO of the centre in January 2018 and then became a board member in December, 2018. She is a member of the number of arbitrational institutions across Africa and has been actively involved in disputes across the region. We are grateful to have all of you here

with us and speaking to us today. Before we begin the session, we will have Mr. Sharma and Ms. Iyayi address us briefly. With that, we will hand it over to Mr. Sharma to begin his address.

Atul Sharma: Thank you Paresh for introducing us. This is a very interesting session because if we look at the gamut of the construction disputes, they are substantially different from a normal commercial dispute. And the obvious reason is that a project covered under a construction contract or a multitude of construction contracts is going to last for a few years. Maybe sometimes we know of a decade as well. Of course, for various reasons. And the multiplicity of reciprocal promises covered not under the same contract but a large number of set of contracts makes it more complex. Now, if we look at in normal commercial contract you're only talking of a breach or two, all attendant facts are in support of the breach or an opposition of a breach, which just happened at a point in time or maybe at two or three points in time at the most, because there could be multiple obligations arising out of the same contract. But so far as a as a construction contract is concerned, you can never have a point in time where you can say that the contract has been breached. The reason obvious is because of multiple obligations and a continuous nature of a construction contract, there could be large number of distinct sets of facts, which could impact the progress or otherwise of the project. Therefore, if we looked

at the nature of typical claims which are arising under a construction contract, the complexity is at two levels. Firstly, the heads of the contract, typically heads up contracts under a construction contract. The second of course is with regard to the technical aspects which underlie the entire set of facts which are the basis for adjudication of a construction dispute. That is precisely the reason construction law is in itself has very specialized field. You can't have a commercial contract, as a subject matter of an arbitration, where you can say that a commercial law of arbitration or law of a particular commercial nature is governing that arbitration. But in the context of a construction dispute, you can very well say that construction law per say is a branch of arbitration. You cannot, you could have obligations which do have the role and interplay of other commercial statutes. For example, SEBI. You could have, but the underlying determination is essentially under the substantially under the contract law, the Contract Act. If you look at the technicalities that are involved, when we are talking of a construction contract, we are talking about delays, we are talking of causative events which leads to the dispute. Those events can be concurrent, sequential and even parallel. There's a concept of parallelism in construction disputes. You need to understand the baseline drawback programming, the float, the critical path, the basing, the acceleration. This is so far as, only illustrative or few

illustrations of technicalities that are involved in a construction arbitration. If you look at the heads of claims, essentially, there could be, you know mainly its arising from the delays, but then there could be subsets of delays as well. Because you can have a delay to completion, delay to progress, disruption, claims on variation, overheads, profits. And for example, I'll give a simple illustration when you're determining the claim in relation to overheads. When you come to the head of this overheads, you need to be very clear as to what is the basis on which you're going to get this claim. Is it going to be determined by purchase formula or Amden. And likewise, that are large number of concepts, we need to be very clear as to what is the basis on what manner you are arriving at the reasons for delay. The delay analysis itself is a big science which has evolved over the years. So, considering all these factors, construction disputes are substantially different from the general genre of dispute. This is a genre by itself, which requires not only technical competence but also understanding how the interplay between these the technical side of construction and law happens. In fact, there is so much of jurisprudence which is evolved so far as the technical and techno legal aspects of construction disputes are concerned that a large number of it has become, to come to be recognized as standard jurisprudence governing these disputes. So far as the general jurisprudence is concerned because most of the contracts contain arbitration

clauses there has not been large amount of jurisprudence which has evolved particularly in India from a court side in the, on the merits of the matter. That is also because the grounds of interference have been squeezed. Therefore, a large amount of your ability to succeed in an arbitration is substantially dependent on knowing the nuances of the technical nuances, having a bearing on the legal interpretation of the contracts, as I said. Whether it is in relation to the technicalities of the nature of the claim or the specifics of the facts governing each event which has happened on the site. Of course, it is compounded further by the fact that when you're talking of construction dispute, you're not talking of only one contract, you're talking of subcontract. You can, you're talking about delays attributable to other contractors. So, the large number of issues, which are involved in. Therefore, we need to have a very different approach to an arbitration under the in the construction space. So, I think with those opening remarks I will hand back to Paresh and then of course we can have Funmi coming in, very keen to hear her.

Paresh Lal: Thank you Mr. Sharma. That was a fantastic synopsis of what we're going to discuss about. I'd like to of course, call upon Ms. Funmi to share her addresses. Welcome ma'am. Thank you.

Ms. Funmi Iyayi: Thank you Paresh and hello everyone. I'm considering this is an international arbitration, I think it's safe to say good morning, good afternoon and good evening, depending on where you are. It's actually mid-day, here in Lagos and I understand it's about evening in India. And then for people joining us from everywhere else, Hello! So as introduced, my name is Funmi Iyayi and I head the Lagos Chamber of Commerce International Arbitration Centre, which popularly called LACIAC. That's the acronym. I will basically just want to spend a few minutes speaking about who we are, introducing our institution, because I imagine that this may be the first time you're hearing about LACIAC. If you just give me a few minutes of your time, I'll just quickly run through who we are and then getting into the panel session. So LACIAC as an institution set up by the Lagos Chamber of Commerce and Industry, which is one of Africa's oldest Chamber of Commerce, it's over a hundred years old. The vision in setting up LACIAC is to provide what we call tailor-made dispute resolution solutions to businesses with a local or international across all spectrums of claims. Whether it's a small claim or a large scale. And so, it's called the Lagos Chamber. It's by no means Lagos a Nigeria institution, we're actually global and the LACIAC can be administered globally anywhere in the world. We have a keen focus in Africa and we promote African seats in administration of dispute resolution processes. With respect to the topic of today, construction,

we do have rules that, I mean, Mr. Atul just mentioning how peculiar construction disputes are from general contractual disputes. And LACIAC has adjudication rules and expert determination that, you know full cost over the construction contracts. Addition to that, we of course have arbitration rules, which are an adaptation of the UNCITRAL Rules and also the ICC. We have a Mediation Rules and we are actually one of the only institutions on the continent that has a portal for online proceedings. When I say online proceedings, I'm not referring to just virtual hearings, what going to put out on, which parties can commence and conclude their entire dispute resolution process virtually, without cost for any physical paper or communication. As I mentioned, we have a keen African focus. We also adopt the court system very similar to the ICC. The LACIAC courts monitors and scrutinizes awards. And the members of LACIAC courts are by no means, they're international arbitrators from all over the world. I actually encourage everyone to visit our website, to find out more about us. For practitioners that are here with us today, please engage me or, find out more about LACIAC on our website or our LinkedIn page. We hope that we'll be able to advise you. Clients going forward to consider, you know inserting LACIAC clauses, especially for the Africa related business. It's a real pleasure for us to be here today. We believe very strongly in collaboration and we're happy we have had a relationship with Neeti for a while and we're very happy to be

participating in the India arbitration Week, my colleague, Ngo Martin and I. Ngo is part of our management team, in addition to being a senior counsel in one of Nigeria's foremost law firms. As we go into the panel session, he will be answering questions from the counsel's point of view. And I will pretty much bring on the institutional perspective to the discussion. Thank you very much for having us here. It's a pleasure. Thank you.

Paresh Lal: Thank you Funmi. We will now begin the session and I'll hand it over to Mr. Nusrat Hassan, who's going to be the moderator for the session. Over to you Mr. Hassan.

Nusrat Hassan: Thank you Paresh. Thank you very much. Good evening. Good afternoon, Ladies and Gentlemen. It's an absolute pleasure to be moderating this esteemed panel. As you have all gathered primarily the questions which we are, which I will post to this esteem panel is going to be from the perspective of construction disputes. I would also like to welcome all the participants and request them to do put all your questions in the Q&A chat box, which is which you will find in the bottom of your screen. And we will take up these Q&A questions, at the end of the session. In the event, we do not end up due to paucity of time answering each and every question. We will respond to you by email. With that, let me

start with my first question to Atul Sharma and let's try and get his perspective of his four over four decades of experience in the construction disputes. Atul one of the questions that arises, we all know one of the pivotal phases in the process of an arbitration is choosing an arbitrator. So, what qualities should you seek in your wide experience, you should seek in an arbitrator for complex construction disputes?

Atul Sharma: Nusrat, as I said in the beginning that construction disputes are quite unique in many ways. What I would be very keen to understand when I'm interviewing an arbitrator would be his experience, not only as a lawyer or a judge. What I would expect to know from him is as to how many similar kinds of construction disputes he has been an arbitrator in. I will give you an illustration. I was doing this Swiss Chamber Arbitration. We had incidentally, the clause said that the and it was a dispute between an Indian and a German party and it required that the arbitrator has to be neutral. And we interviewed about seven British arbitrators. And the focus of course one was that, of course, large number of arbitrators do understand the contract law, the aspects of breach, of course the principles of contract law and also, they have dealt with construction contracts. Construction contracts themselves are of such specialised nature. So, this was a dispute related to a windmill

manufacturing, the unit manufacturing. And therefore, we needed somebody to understand the technicalities, including the licensing issues which would arise in licensing and technology like this. It is these kinds of things which are very important apart from the standard knowledge of law and the experience in the construction space.

Nusrat Hassan: What about? A question to you Ngo Matins is, is it a similar experience, in Africa? Would you approach selection of an arbitrator or would you look for the similar qualities in, would it be normal to do that in your region?

Ngo Martin: Thank you Nusrat. And good afternoon. Good evening, everyone. You are absolutely correct. It's, it's very similar experience with Nigeria and for large parts of Africa, which effectively is, you want to ensure that your arbitrator has the technical nuances to understand the issues as they play. Atul has coined a very interesting phrase, which is the tech-legal, aspect of construction dispute. You want to ensure that your arbitrator understands the interplay between the technical issues itself and of course the legal issues that arise. You are just not looking for purely an arbitrator with legal qualification but someone that understands and who has been involved in similar arbitration disputes that dealt with a similar technical issue. I give an example. We just

concluded a FIDIC based Yellow Book arbitration disputes, where one of the key issues that arose in dispute had to do with the under certification by the contract administrator. The question had to do a lot of value, interim payments certificates that were issued valuing the extent of work that had been done. And because of the nature of technical issues involved we wanted to ensure that we're not just getting an arbitrator that understood FIDIC contract itself, but also had that technical expertise to understand that process of interim payment valuation by the Quantity Surveyor and the issue of certification by the contract administrator. And, and that was the kind of expertise we're seeking in appointing an arbitrator. I mean, the other thing to add to that is, I mean, this is not specific to construction dispute, but you want to ensure that your arbitrator will have availability. One of the key issues we see, especially in some institutional arbitration, has to do them, you know timely rendering of award. You want to ensure your arbitrator will have the time. Because most experienced and most experienced arbitrators usually have a lot of arbitrations they are dealing with and will have very little time. You want to ensure that they have availability to deal with your disputes. Thank you.

Nusrat Hassan: All right. Thank you. Thank you, Ngo. I think you've made the point or it seems it's very similar. You used the, I think you picked the right word by saying techno legal.

I think that seems to be the right word. When, when you're looking at trying to choose the arbitrator, especially in construction disputes with that kind of experience. I think one of the issues specific to construction disputes which is, which is I think much more unique to in the construction world, Atul is with reference to multi-party disputes. How do you approach an issue, what is your experience been in multiparty? Because you, especially in construction there are so many concerned parties which is normally very different from the regular arbitrations probably different from a shareholder's dispute. So, what's, how do you approach that aspect? I think this is a complex issue and we'd love to hear from your experience. How, what's been your experience with it?

Atul Sharma: Nusrat you are absolutely right. Whole construction space has so many components. I'll give you an illustration. When you are talking of construction, you would also be talking of a PPP. So, PPP will involve construction, operations, you know earning out of the project and that will also involve financing. Now, if you look at the multitude of contracts having different, having interlinkages in terms of termination payments, in terms of step-down clauses, in terms of equivalent project relief, all those need to be intertwined very, very well. Therefore, but the difficulty is, that it is not always that every contract will have an arbitration

clause. Now, if you look at this typical illustration, which came before the Supreme court in Duro Felguera. Now with the same contractor or its parent company which has issued the parent company guarantee. This contract will split into six, it was in relation to material handling contract on a plot. Now it was split into six contracts. Somewhere off shore, somewhere on shore. The Supreme Court was stuck with the situation. It is the same project but then they couldn't do anything about it. They have to say that because you can't club the international domestic disputes. Now compare that with what happened in Chloro Controls. They said, there may be each contract doesn't have arbitration clause but there's a commonality. So, what they said was, you have to look at direct relationship with the party, to the signatory party, commonality of subject matter, composite transaction, mother and ancillary agreements, common objects and collected bearing on disputes, composite reference will achieve the ends of justice. Now this is easier said than done. Because it involves a lot of facts, lot of obligations you need to see within those contracts. I had a very interesting example. I was doing, I was to invoke a dispute in relation to a project which was being, which was awarded and now can speak about it because the dispute is now in public, it’s in public domain, because the matter is now pending in the High Court, 34 is still pending. Here, the road was to be built by a concessionaire, NHAI road. There were two states support

agreements because the road was passing through two states, Haryana and Punjab. Now, if there is a breach by Punjab and Haryana of its obligations in relation to constructing an alternate route, then first you had to get it determined under the parent contract of concession from NHAI and then go to States and invoke arbitration, which means three arbitrations. I was struck with a very strange situation. So, I devised a methodology. I went to the writ court because state governments were all subject to writ jurisdiction, got a composite reference made and now the question arose, now there are three arbitrators. Who will nominate whom? So, we were allowed to nominate one, NHAI nominate one and the state governments were allowed to nominate one. So that these are, very creative solutions to be found by multi party disputes. They're a lot we can talk about but I thought broadly this will be a contour which you will encounter in multiparty situations. And of course, one more thing, so far as the institutional arbitration is concerned, there is always a, the rules will always speak more about the joinder of causes of action, joinder of parties. But in India the ad hoc rules, it’s a difficult proposition.

Nusrat Hassan: Yeah. On that que Atul, I going to go to Funmi and ask her, how does her institution cover this kind of issue on a multi-party? Does it, do you have a specific, do you

cover it specifically in your rules? Or how does that, how does that play out?

Funmi Iyayi: Yeah. Thank you Nusrat, and then just as Mr. Sharma had said, Yes. The, our rules have specific provisions for joint of parties. As I mentioned, we have an arbitration rules, as well as adjudication rules. And for construction disputes, adjudication is one of the more utilized rules for construction disputes. Now under arbitration rules, parties are, it's a bit more, it's a bit rigid in the sense that the tribunal will only join a party, if they are a party to the agreement, right under the arbitration rules. But under the adjudication rules on the other hand, there's a broader interpretation to the adjudicator can join parties to an ongoing adjudication, if the dispute is related to the dispute before the adjudicator and even when they are unrelated disputes, but then they are connected to the same contracts, the adjudicator can join parties. So there's a broader prospective, when the adjudication may be separate disputes arising from one contract or they may be related disputes arising from different contracts and the adjudicator has the discretion to join the parties. The other thing that Sharma mentioned with respect to appointment of tribunal in multi-party arbitrations, for instances, as also in our rules, the parties are typically just heaped in one to all, claimants are claimants and, they would have to make that decision of

appointment and then all respondents are respondents. I think it's very interesting what he just, where he had and what was done with respect to appointment of tribunal members. Having said this where parties are unable to make appointments, even in a multi-party proceedings, LACIAC would then make the appointment for the parties using our list process. Yeah. So that's about it with respect to the multiparty proceedings. Where that it is, how parties can be joined in arbitration, which is you must be a party to the contract, going in adjudication on the other hand, when, if you're not a party to the contract, but then the dispute is related to what is before the adjudicator in terms of contractual documents, adjudicator has discretion to join the party. With respect to appointments that tribunal would typically have all claimants, the multiple claimants and the multiple respondents as one appointment. Thank you.

Nusrat Hassan: Thank you Funmi. Anand, I have a question for you related to the question, the earlier question with regard to multi-party disputes. What is the effect of back-to-back clauses in construction arbitration? I think this is, you find these issues arising, it's a common issue. How, what is your experience and how have the courts reacted to this?

Anand Srivastava: So, it's an important, point, Nusrat. Thanks. Back-to-back contract is usually a contract we're in a

contractor enters into a subcontract with its subcontractors on a back-to-back basis by mirroring the main contract between the, between the main contractor and the employer. These conditions normally, you know would include, provisions for equivalent project relief, which Mr. Sharma was saying. So, the benefits of the main contract are passed on to the subcontractor or issues such as the subcontractor gets paid under the subcontract, when the main contractor gets paid under the main contract. Or we have seen cases where the liability of the main contractor to the employer is backstop to the extent of the subcontract works, to the same extent under the subcontract. And our Supreme Court, in the past, we have had decisions which are contrary, depending on the facts presented. So, on one hand we have had decision, a decision from the Supreme Court where the Supreme Court has held that the subcontractor cannot claim from the contractor unless the main dispute under the main contract which would include the claim of the subcontractor under the subcontract have been decided, or is or it's entitlement to pay is also not originating. Unless, any compensation in excess of the claim adjudicated under the main contract is there. And to that extent, what is payable or allocable to the subcontract works, would be decided. And this is a fairly recent decision, of course, in relation to the L&T versus Madan Lal Harbanslal Bhayana decision, 2015. On the other hand, we have had a decision where, the Supreme Court on a different set of facts

limited the back-to-back contract only to the technical conditions prescribed under the main contract, leaving the contractor harbouring liability. Basically, which means that while its obligation, while the obligation of the contractor to pay as sealed by the award in favour of the subcontractor is covered under the first arbitration under the subcontract, it could, it would be sustained. The award in favour of the main contractor in the arbitration between the employer and the main contract would possibly be set aside. Therefore, you will find that the main contractor is left uncompensated and liable to pay the subcontractor from its own pocket. This is again in the same year, in 2015, the Supreme Court in Acorns decision basically, held the same thing. And it would therefore depend on how the arbitration agreement is drafted and how the contract conditions are drafted. Because both views, whether that a contract and therefore arbitration proceedings are to be held on a back-to-back basis or they are two separate matters, Order 12 Rule 6 applies, you cannot have, they are two separate contracts, rights get decided separately. And a very important point, I think after 2015 that has come in is in Section 8 of our Arbitration Act. The words party to the agreement have now been followed by the words or any person claiming through or under them. And this is consistent of course, with the international arbitration piece. Therefore, we are seeing that more and more, it is very important how you draft your clauses, especially the

arbitration agreement and because the courts are very clear they could actually hold it limited only to the technical conditions and not the arbitration agreement per se.

Nusrat Hassan: Right Anand. Thank you for the detailed explanation. Ngo Matins, you heard Anand speak what, how the courts have taken more or less both views. Is there any specific view in terms of in the African region, in Nigeria where you are?

Ngo Martins: Nusrat thank you very much. That described quite a very interesting perspective from what we see in India. In Nigeria specifically, the Nigerian courts are still very, they have a very rigid approach to the issue of privity of contracts basically. And they typically want to treat, the main contractor and the owner on that main contract itself and then the sub contract on that subcontractor under the subcontract itself. That principal is still is still very much the general rule that operates. Of course, there are some exceptions to that rule. I think in this specific context of this discussion it's important to highlight that the same provision that have mentioned in the Arbitration Act in India or is also available under the Nigerian Arbitration Act. In which case there is a liberal definition of parties and the parties is not just a signatory to the arbitration agreements

where the parties also is one who is claiming under or through a party to the arbitration agreements. Interestingly, there's a recent Nigerian case law on that point where, which involved, the parties to the arbitration agreements were actually JV partners and the JV entity itself was not a main party to the arbitration agreement. When an award was made, there were, the award was challenged on the basis that the award was made against a non-signatory. What had happened is that the court of appeal enforced the arbitration award and rejected a challenge to notify the award on grounds that the award was against the non-signatory to the arbitration agreements. Interesting is the points is the rationale, because the court had held that the tribunal was justified in extending the arbitration agreement to a non-signatory. Because the evidence showed that the non-signatory performed the obligation under the contract on behalf of the project sponsor. The court was influenced by the fact that the non-signatory was a special purpose vehicle, with no independent objectives of its own, set of specifically to perform the contract on behalf of the project sponsor. So, I think the question then is you know, are you likely to see this kind of interpretation in the construction context. I mean, it's still open to debate. There's no clear judicial authority on that point. Of course, a possible argument that could be made is that the subcontractor had performed the works in his own rights under the subcontractor agreement and for nor on behalf

of the main contractor. I mean, it's still it's, that's basically what we see currently in terms of that issue in Nigeria.

Nusrat Hassan: Yeah, I think, yeah, this is a very interesting, I think this we could have spent some more time on this issue, but I think due to paucity of time, I'll move to the next question. That, that was, that is interesting to know Ngo Martin from your end. Now once the tribunal has been formed, once the tribunal is formed, we always there are applications, which come up, which raises the issues one of the parties will raise jurisdictional questions. What are the jurisdictional questions, which are, which do come up in you've seen in your experience, Atul in so far as construction disputes are concerned.

Atul Sharma: Nusrat, there can be quite a few objections to the jurisdiction. For example, noncompliance with the arbitration clause in terms of getting <inaudible> decision or getting a pre arbitration, mediation or conciliation invocation, excepted matters, res judicata, accordance satisfaction, exceptions of fraud. All these are standard jurisdictional challenges. But I came across a very interesting situation. In fact, there could also be a situation, where there could overlap on the jurisdictional aspect as well as privity. Now in a subcontracting situation I

confronted a very strange situation. I fight claims on behalf of a contractor and the hundred percent of the contract was subcontracted to a sub-contractor. One question, which was raised for the tribunal has no jurisdiction because of the disputes, what you are raising today are the claims of the subcontractor. Therefore, the tribunal has no jurisdiction because you must first establish that you have suffered the loss vis-a-vis your subcontractor and therefore there's an intermingling of jurisdiction and privity. So these are the typical situations. Then the question arose as to whether a claim, which is premised on the claim of a contractor, which has been executed by a subcontractor is it in the nature of indemnification or is it in the or it can survive only on the restitution basis? So, these are typical questions which arise but of course one has to deal with the facts of each case and arrive at what could be the right approach.

Nusrat Hassan: That's, that's really interesting. I'm going to jump over to you, Ngo Martin. You heard Atul talk about what are the issues, which do arise in so far as jurisdiction issues are concerned in so far as construction disputes are concerned. What about in your region?

Ngo Martin: Yeah Nusrat. Thank you. I think there are, there are similar types of objections we see across jurisdictions. I mean, I've been involved, I've been involved in two

international arbitration very recently. Where we've seen very, so I mean, in one of those cases the objection that was raised, I mean, it’s a FIDIC based contracts. As you would expect to the pre arbitration steps that ought to be taken. An objection was raised regarding noncompliance with the correct contractual procedure. The claimant had gone directly to arbitration without complying with FIDIC clause 20.2, which requires reference to DAB. And you know, the clip that respondent had the objection was raised. The claimant argued that the FIDIC clause 20.2 was not mandatory and therefore should not be enforced. And that if mandatory, the FIDIC clause 20.2 should fail for uncertainty. Because the parties have not specified the appointing authority in the contract and finally that the respondent had waived their rights to insist on compliance with FIDIC clause 20.2 subclauses. Of course, the tribunal rejected, and it was those arguments and upheld the contractual mechanism, basically insisting that you have to go to DAB first of all, for before triggering arbitration. And on an interest in arbitration an objection that, I’ve seen very recently, and that's basically because of this flow down clocks, since you are referring to Nusrat, where a subcontractor without being alive to issues and to the terms and obligations on that, they had contracts. Typically, a flow down or back to, a flow down on incorporation clause is inserted in the subcontract, where in a subcontract, where a subcontractor agrees to be bound, is notified and agrees to be

bound by the obligations in the main contracts. What had happened here, was that when the claim was raised, when the arbitration was commenced, the respondent had raised the counter claim and on the basis of certain interesting sets of rights, a set of clauses in the head contracts against the subcontractor in relation to other contracts by affiliates of the main contract, main contractor. And when this was raised, sub-contractor had raised an objection to the counterclaim, on the basis that the disputing question did not arise on the arbitration agreements, or were not connected to the arbitration agreement itself. I mean that's dispute is still very much, very live and it's still ongoing and the tribunal is yet to determine it. But that shows you the interesting, the interesting issues that arise regarding and flow down clauses or incorporation by references clauses, where, all manner of obligations are taking on without fully understanding and appreciating the extent on implication of this obligation in the dispute context. Thank you.

Nusrat Hassan: Atul. Taking, what Ngo Martin just mentioned, in how is what is your experience of the DAB, role of the DAB in a multi-tier dispute resolution process?

Atul Sharma: Nusrat in the Indian context, if you look, the DAB has lost its relevance, frankly speaking. I have a very funny situation which I am encountering. Now, it is a non-

binding DAB decision and the contractor has, the employer, the decision of the DAB was against the employer. And the employer has given a notice of dissatisfaction. Now again, and what is happened, is the employer has, because I am not aggrieved as a contractor. So, I can't invoke arbitration because there's a decision already in my favour. Now there's no mechanism within the contract wherein I can enforce that. Because he, if he has given a notice of dissatisfaction, he needs to invoke arbitration, but he not chose to for about six months. What could I do? So, I have to file again, go back to the High Court under 226. Now that matter is pending, we seeking the direction, because in this case, fortunately, it was again a Government Entity. So therefore, we would ask the court to issue a rate directing them to initiate arbitration. So, these are typical things. And in fact, DAB decisions I had a similar another experience in Bihar. I mean notwithstanding, it was a binding decision. Payments were not made now what do you do? Again, a very difficult situations and DAB could be a very good mechanism to really put, a context of problems from a cashflow perspective, but unfortunately it has not worked.

Nusrat Hassan: Okay. I think, Ngo Martin, you've already dealt with, the issue of the DAB. So, I'm going to jump to the next question. We are slowly running out of time and I want to ensure that we can get as many questions answered within this group. How, I think one of the issues specifically in

construction matters which do come up is the role of the expert. I think, in fact if I'm not wrong one of the questions that has popped up also is on the, asking on the role of specifically experts in so far as construction disputes are concerned. I think, probably experts have been around in India which has been now a much more common phenomenon but in construction disputes you've seen it from a very long time. Now Atul I am going to pose this question to you. How important are the appointment of experts and engagement strategies in India in so far as construction disputes are concerned? I think we have lost Atul. While Atul is getting back his signal, he's back. Atul did you hear my question? I'm not sure. You froze for the last few seconds last. Yeah, I think he is?

Atul Sharma: Yeah, so Nusrat I think experts are of course, very key component of a construction arbitration undisputedly. Now after the amendment to Section 26 the tribunal can also rely upon expert, but a very interesting question again came. In an Indian context it is very common for the tribunals to say that we want to go on a site inspection. He is a tribunal and an expert now. I mean, there was an argument and I said, look there could be a view that the tribunal member, the arbitrators should be sitting in the dock because they can't be doing a fact finding for either of the parties. If they want to appoint an expert, they should have bought an

independent expert and that is not binding on them. These are typical situations and experts do have a very significant role in a construction dispute especially from the perspective of valuing claims and arriving at the and doing the delay analysis.

Nusrat Hassan: Right Atul. Funmi what about you as an Institute, how do you, approach the issue of experts? I think, specifically in construction disputes, I guess there wouldn't be a, there wouldn't be a dispute, where you, where you may not require an expert to come in as a witness.

Fumi Iyayi: No. So, I mean, typically the rules do allow for parties to appoint experts and then for the tribunal as well actually to appoint experts, there's that liberty. So, tribunal can appoint experts too. Then the cost of that of course, will be borne by the parties and then parties also at liberty to appoint their own experts. But, for parties in appointing experts it's really important that they sort gauge not just how sound expert is academically but just the expert's ability to go through cross examination. Because that's something else that in practically in an arbitration that you would see, you could have a sound expert. When he subjected to hot tubbing, for instance, or even cross examination, the expert is then not able to properly put forth his opinion and then that's detrimental to the party. What I

mean, I'll typically just say, once it's clear from the procedural or preliminary meetings that parties are going to appoint experts, or there'll be hot tubbing you really need to be careful in your appointments.

Nusrat Hassan: Yeah. Thank you Funmi. So, I guess, I guess your institute is very well equipped to sort of deal with these appointments.

Fumi Iyayi: Absolutely. Absolutely. And, I mean, it's really the parties' prerogative who they appoint. And then like I said, the tribunal also has that prerogative to appoint and so the parties may have, each have experts, but if the tribunal feels that, because, the purpose of the expert, as we all know, is really for the purpose of the tribunal, to understand those technical points. If the tribunal is and our rules allow that and if the tribunal is still not clear on positions even with the testimony of experts then they're allowed to go ahead and appoint one that will clarify issues to them.

Nusrat Hassan: Thank you. Thank you Funmi. Anand over to you. I think one of the questions arising from the experts, I, I cannot not ask this question, is what is your view on hot tubbing? How efficient is it the process in so far as when you're dealing with experts? We all know that hot tubbing is

now one of the most talked subjects in India and now getting more popular.

Anand Srivastava: Yeah. Firstly Nusrat, I'm happy to confirm that hot tubbing process is now with statutory force in India. Our Delhi High Court Rules, in Rule 6 Chapter 6 now specifically provide for hot-tubbing after the Micromax Industry's decision in April, 2019. After exchanging written reports as all of us know amongst the experts, a joint statement of experts with the agreed issues and the not agreed issues is produced. And then basis such joint statement on the not agreed issues there is hot tubbing with a directed discussion of the tribunals and the tribunal of course moves issue by issue with the experts. And therefore, to speak to your question, hot tubbing has several advantages from our experience of having engaged in such processes in the disputes that we are engaged in. I think the most prominent benefits could be categorized in three buckets. Firstly, I think it leads to a less adversarial environment where the experts are less likely to maintain their extreme positions. As you know from what we are trained into understanding psyche. In a coalition setting where you meet the same people who reiterate the same position again and again the position becomes extreme. And in cases where you are in a less adversarial situation where you are between professionals, it is therefore a less adversarial setting than the traditional setting. And

there is therefore removal of the experts from questioning by counsel until or after all the relevant expert opinions have been espoused. Therefore, it is much, much easier to make concessions by the experts. I think the second benefit that I see is that the promotion of the independence of experts is a great, great value that is added by hot tubbing because it separates the experts as an independent person from the factual evidence that the party retaining the expert has given. And therefore, the expert can give his own views in a more free manner. And lastly, I'm conscious of time. It encourages representatives and judges and experts to focus on issues prior to trial and to clearly identify the issues of disagreement. And time at trial is therefore saved by this focus. It is much easier to evaluate each disagreement before moving on to the next. So, I think hot tubbing virtues are recognized and of course most of us practitioners favour it immensely.

Nusrat Hassan: Okay. Anand, thank you for that detailed reply. I think, we can appreciate how hot tubbing, why hot tubbing is becoming more and more popular as a form to engage with experts. I think I'm going to pose them, as we are running out of time. I have a few questions more in my bag, which I would love to pose to this panel. And, I think, Anand if you can probably also give us throw some light on when, when the arbitrator is writing an award of his powers to award costs

and interest and in so far as, before I go to Funmi maybe you can give the perspective from the Indian perspective. Maybe then Funmi can come in with her institute's perspective especially on costs and interest.

Anand Srivastava: Nusrat, as we know, interest can be awarded at all stages, I'll just take interest first. Whether it is pre reference, pendente lite or post award. And, subject to party autonomy, which our Section 31(7) provides it opens with the words, unless otherwise agreed between the parties. The arbitrator is free to award interest, pendente lite or pre reference. However, if there is a prohibition clause or the parties by agreement have agreed then of course the words unless otherwise agreed between the parties comes in and the arbitrator cannot give interest. However, the position is significantly different because in post award interest there is no option for the parties to contract out of interest being awarded for the post award period. And in case the award is silent. Then there is a statutory rate of interest, which is 2% higher than the current rate of interest. Now coming to costs. I think India has adopted the traditional rule that the costs follow the event. I think that has now incorporated in our new Section 31(a). And therefore, unless the arbitral tribunal records for reason and writing the general rule is, that the unsuccessful party shall be ordered to pay the costs to the successful party. And the tribunal can decide, you

know, what costs are to be paid, the amount and when. And of course, another important move is that the award of costs is now independent of the Code of Civil Procedure process, and that these costs that are awarded have to be reasonable. And while awarding the costs the tribunal has to take into account by mandate of law now, the conduct of parties, whether the parties have succeeded or not succeeded, were their frivolous counterclaims raised. We have seen in the past, like, claims of in construction especially, 10,000 crores is raised. The arbitral award is 800 crores. And also, the response of a party to a settlement, was a reasonable settlement offer refused. All those things are now mandated in our law and cost and interest is therefore now, fairly, you know well decided at least under the Indian legislation.

Nusrat Hassan: Thank you. Thank you for your rather lucid reply. Funmi, what's, would you like to add to what Anand has stated?

Funmi Iyayai: I mean, with respect to our rules, it's not very different. What I would just, first of all, define what costs and interest awarding include, the cost of registration and the registration fee, the arbitral tribunals fees, all expenses borne by arbitrators, tribunals expenses, every other expense, the experts fees as well as expenses, whether its experts appointed by the parties or the tribunal and then cost

of engaging legal counsel and then institution's fees and expenses. All this common under and are defined as cost. Now, I position with respect to how cost is and it is no different from what Anand has said. In principle, generally the cost is borne by the unsuccessful party. However, the tribunal does have the discretion to apportion costs based on the reasonable conduct of parties. Anand had mentioned, whether the parties responds to a settlement or factors like things that the tribunal will consider in determining the reasonable conduct of the parties. And then also the proportion of victory, parties whether the parties, the successful parties, which way is significant compared to the loss of the other party. Those are the things that would typically be considered in awarding cost. Yeah, that's pretty much it, so it's not very different from what Anand has said. It's pretty much similar in the position.

Nusrat Hassan: Thank you. Thank you Funmi. I, I did want to ask one more question to this panel on the enforcement, but I've been nudged by the by the organizers that we are just running out of time and I want to deal with the questions. So, I was thinking to probably go to the questions directly and a very interesting question is asked. I'd probably prefer to have Atul's view and probably the view from also from Africa. Atul, can you hear us?

Atul Sharma: Yes. I can hear you. Because I had to switched off got my camera. I was having some connection problem

Nusrat Hassan: No. No problem. How attuned, because this is something which we've discussed before. How would attuned a contract in the construction industry to the specific issues, which arise in construction dispute?

Atul Sharma: If you look at the gamut of the largest set of contracts in India, we have, we have been trying to adopt FIDIC, but then we do violence to FIDIC and to that extent, we need to hold our hands and ensure. Because FIDIC is a standard or maybe NEC for example. NEC is completely different denomination, but FIDIC is a kind of contract which is essentially, fairly balanced and but the problem in public procurement is public authorities don't want a balanced contract. They want a contract uploaded against the contract. I think, it is very, very important that we have a standardized contracting regime. Somebody asked me this question I don't know this today itself that. Yeah. That do we have the CPWD and PWD provisions any more relevant, which were the old, old world contracts in construction. They've all were pretty standardized. Everybody knew the enables and the precisely knew how it works. But since we are now going moved away from CPWD and PWD contracts we have moved to FIDIC in big way. I think we should leave that as it is, because then you

have a large support of international standards and practices which come to your rescue. That is, I think it's not a very happy statement in India so far as contracting is concerned.

Nusrat Hassan: Okay. Funmi, do you want to? Or Ngo Martin do you want to take it, take this question from the, from your region?

Ngo Martin: I mean, I'm happy to respond to the question. I, I'll use Nigeria as an example. Because the practice is in from jurisdictions to jurisdictions in Africa differ. In some African jurisdictions, you have subset of standardized templates for public procurement works, which, you're meant to, which are all public works, needs, new procurement needs to be done through sorts of through those templates basically. Except, accept there is an exception that's given to you, someone that forms of, someone as standard, someone as forms of contracts. Maybe because the project involved and multilateral development banks and finance by and where they have those foreign financials has a standards and approach to giving out financing for project itself. What typically, additional to public and public works using Nigeria as a case study, there's a standard contract that has been developed by the Bureau of Public Works by, which you used to procure at works that attend at actual bureau. And there are also other government agencies. Because Nigeria is a federal system,

where you have various States and governments, governments at various different levels and various federal and <inaudible> house, those also have developed some form of standard template. But in reality, the reality is that, many of these contracts are heavily lifted from the FIDIC, the FIDIC template, basically. So, I mean, the differences maybe you would see one that is tailored more to the 1999, FIDIC standard form and some other ones that are particularly much, much older. They borrow from much older books that were in place that led up to the 1999 FIDIC forms that we know today. So, but that's exactly what we see. So typically, once you are familiar with those forms, you always, see constants of those clauses and where they were provided from.

Nusrat Hassan: Thank you, Ngo Martin. I have another question. Atul this is, I think a pretty interesting question, which, with your experience, it will be quite relevant. Your view would be quite relevant. The question is, are there provisions, construction companies can include in their contracts, especially with government clients, PSUs, et cetera, that can help them achieve speedy time bound settlement of the grievance's disputes. Separately, if there is any recommendation the panel would make to government of India to enable this to happen, what would such advocacy be? What might you have the construction company's lobby be with the Government of India to enable the settlement? So

basically, asking what are the things you should include in the, especially in the contracts with PSUs, et cetera, when they are, or when they're coming out with the tenders ultimately. What should be there? Because I think that's a pain point, I guess, coming from a lot of construction companies.

Atul Sharma: Yeah. So Nusrat if you look at, the fundamental problem, which I see, is nobody's willing to recognize and come to an interim decision with regard to a claim. That typically, if you notice a large part of the claims arise because of the failures of the public sector employers and what happens is that the industry is starved of cash. It doesn't have cash flows, even certified bills are not paid. There should be now, some standardized provision within the contract itself. I'm not suggesting that you have an adjudication procedure as you have in UK, for example. You will have these technical courts which will give you a decision in seven days' time, if you accept it and implement it, it's fine. If you want to challenge you to go to arbitration, but then the whole cost will be to your account work. But that is binding from a certain perspective. And therefore, what can be brought into is in what are all of the troubleshooting clause within the contract, wherein in a situation like this, an interim decision is given, which is binding subject to the final outcome of that decision at any

point in time. Because that puts, that can put the contractor in cash and that's where the industry can really sustain itself. And the biggest problem today in the industry has been it is cash stapled because even the admitted, the bills which are approved or not paid. On the other hand, the employer is saying, I am unable to pay the LD's because you have delayed. This is these kinds of alternative solutions have to be found out. Otherwise, the industry is going to have a very tough time.

Nusrat Hassan: Thank you. That's, that's useful. That's very useful. I think I'm going to just take the last question to, anybody can come in. While quantifying damages in large infra project contracts, contracts often merely file auditor certificates to quantify the claims and do not file supporting, underlying documents in support of its claim. I think it's more, I think the question is more, what happens? How does the tribunal treat this if the underlying documents, though, there is a certificate of the auditor? I think there might be some personal experience of the participant who has put this question. What do you do with this?

Atul Sharma: I can only say, this much that you can't have 5000 books of vouchers been produced before a tribunal. It has to stop somewhere. So, you could have illustrative vouchers, et cetera. But ultimately there is a sanctity to the auditor's

certificate, and the cost certificate which he has issued. Ngo-Martin to give really his perspective to this.

Ngo Martin: Yeah. I mean, I mean, regarding, regarding auditors' certifications on these issues, and it's not very clear to me in the context basically, which is what I'm trying to fully understand. But just like, Atul said, that typically, tons of documents in relation to this sort of things, the contract administrator is oftentimes has to certify lots of things that I have to be while the works are ongoing. So, those basically those are things that are peculiar with the construction dispute itself. But, I'm not sure, I'm very clear in terms of, and I'm trying to locate, unfortunately, I'm trying to locate the question on the platform and I'm not quite very clear exactly what's the direction in or what's the context around it?

Nusrat Hassan: I think, really the question is if one of the parties producing the auditor's certificate without the underlying documents, so should the tribunals accept that as the auditor's certificate as a quantification of damages and not really need necessarily go into the underlying documents?

Funmi Iyayi: Right. I see basically, I mean, again, it depends, it depends on the language of the contracts. Basically, I am doing some of this in some of these, some of

these contracts, and basically, they say, well, you know the certificates is, it's you know, is it prima facie document certifying, you know, the content that relates to those issues. Especially where you have, I mean, I give, I say this in the context of, where you know works internal of works has to be certified on an ongoing basis and the and the payment is required to be made on the business of those certification itself. So usually, it's the language that typically determined the language of the contract. I think it's an interesting question, because when you look at the FIDIC 1999 contract language as well as the 2017 contracts there's quite a distinction in the language in relation to a provision around certification for the purposes of payments basically. In the 1999 FIDIC contract, it's seemed to suggest that payments have to be made based on this certification. That's pretty much fine out on the question is spelled. What's in relation to the 2017, my recollection and probably it's useful to check it again. Where my recollection is that yes! Certainly, in addition to the certification, the contract administrator who is issuing those certification needs to be able to furnish certain documentation and provide certain explanation around how those conclusions were reached. Based on that, it's basically gives opens another scope for arguing and disputing the certificate itself.

Nusrat Hassan: Thank you. I think last question, I would put to you Anand, this is from Montek. You spoke about hot tubbing. Isn't that perhaps more useful when tribunals are well prepared on the quantum, damages, material and issues? And when issues can be distilled in a manner that allows both experts to engage on those issues properly? If overlap is limited, then hot tubbing may not be as useful, any thoughts?

Anand Srivastava: Yeah. I think it's a good point. Thanks, Montek for raising it. I think the process requires that the that the experts exchange their full reports and then at least the process that we have followed in the disputes, that we are engaging in. And then the experts sit together and prepare a joint statement. I think a full exchange is the best way possible. I would agree with that. At least that's what we have seen in practice. So, I'm not sure how productive or I'm sure like a partial or only some issues being hot tubbed would definitely have its own limitations. But what we have seen as maximum benefit is where there has been a complete exchange of the reports and a joint statement is prepared with the agreed or not agreed issues. So, I would tend to agree with that. Yes.

Nusrat Hassan: Thank you, Anand. I don't know if I have the time, MCIA will have to tell me if I have any more time to ask the remaining questions or we'd probably have to deal with

them by email? Pavni is our time all over? Is it? Paresh?

Paresh Lal: Yeah. I think we are beyond the time today. I think for the remaining questions, if the participants have another question to ask, I'm sure the details of all the panelists and the speakers are with them through brochures and specific questions can be, can be sent across. I hope you can find the time to answer them.

Nusrat Hassan: Yeah, definitely. We will answer those questions, which we have missed. We did not have the time to answer. But I would like to thank the panel for their insightful view. And, before I hand over to you, Paresh, I'd just like to add the fact that it is very interesting to have our African friends, friends from Africa. Because just to give people some statistic, the least recent business standard has, stated that the business between trade between India and Africa would be close to 117 billion. So, there are a lot of infrastructure companies looking to explore in business in the African region. This has been a very relevant, I think this is very relevant and I'm sure we're going to have more discussions around this, between these two regions. I personally thank our friends from Africa for devoting their time and giving their insights.

Paresh Lal: Thank you to all the panelists and the speakers. It was great to hear a number of issues that we would only come across specifically in the construction disputes. Thank you everybody for sharing their perspectives. I mean, at least at my end, I've taken some fantastic strategies from Sharma, taking some fantastic perspectives on hot tubbing, from Srivastav. Funmi and Ngo Martins, thank you so much for sharing the views from Nigeria and from the region of Africa. All of this will of course help all of the participants over. At some point of time, we were above 100 people listening and learning from this discussion. That brings us to the closest session today. For the participants and the attendees, please remember that, the session was being recorded. You will get the transcripts of the session at a later point of time. Just a reminder that today was just the third day. Tomorrow is another new day, lots of fantastic sessions lined up. We start tomorrow at 10 o'clock in the morning, and the session will be on Mediation in the coming years. So please do join in for that. And thank you. Thank you everyone for the great learning experience.