
**Lifeline of Arbitration**

**Session 2**

**Dilber Devitre:** So, hello everybody I think I can see we've already got a few participants now on the on the webinar so if it's okay with everyone we'll start this second session of the MCIA, Young MICA Lifeline of an Arbitration webinar series. And today we're going to be speaking about managing and strategizing pre dispute phase in an arbitration. So, joining me today on the panel are Sanjana Pramod & Shreya Gupta. I'll briefly introduce us and then we'll dive straight into the session because we unfortunately have a lot to cover. And we only have one hour. So, we're going to do our best to cover these topics. But we have to warn you in advance that this is such a vast topic and there's so much that we could say about this, that we will not be able to do a deep dive into a lot of the issues that we will be discussing today. But if you have questions, please feel free to feel free to put them into the chat box or the Q&A box and if you can direct your question directly to one member of the of the panel so we know who has to answer and it will help us to then answer your questions more efficiently. So just a quick introduction. My name is Dilber Devitre I am associated Homburger in Zurich, Switzerland and also a member of the young MCIA steering committee as Sanjana and Shreya. Sanjana is in Sydney, Australia right now, she is an associate at DLA Piper and Shreya is also in Bombay right now. And she's an associate at Shardul Amarchand among others. So that's the three of us today. And we're really happy to be on this panel and share our input with you on this pre dispute phase and how to go about doing it. So, if we move on just a really quick quote, a quote, something to motivate you. And for you to understand why this whole, this whole phase is so important. It's not It's not wrong to say maybe that arbitration sometimes it's quite like war. And you're getting into a battle. And you have to prepare when you go for battle. And you have to prepare when you go for arbitration. So yes, if you want to win, you have to first prepare, and then go ahead into battle. So that's really important to know, to know what you are going to do and how you are going to go ahead. And that's exactly

what we're going to be talking about today. Probably if you could go to the next slide, we will show you what we are going to be discussing today. The first topic we will cover with you today is basically a pre assessment of the case. So, before you go into any arbitration before you decide to go into arbitration, what do you assess? How do you assess how do you make that decision on whether or not to go into arbitration? Is it worth going into the arbitration or not? These are some of the issues that we are going to be covering with you today, which you need to look at as a counsel when arbitration or potential arbitration comes onto your desk. How do you how do you go about preparing for this case? So very briefly, whether you want to be sued, or you want to sue, do you want to be the claimant or the respondent? do you how do you prepare evidence, your preliminary assessment of the case? How do you make sure you have all the evidence you need going forward? And to make the strongest case that you can? Very important step, how do you review the contract in the arbitration clause? That is something that is so crucial and so often overlooked, and causes so many problems down the line that we have to look at this right now? What are the jurisdictional issues that you could potentially come up against when you start your arbitration and how do you best deal with them before the whole arbitration starts? How do you how Make sure that you have the least problems going on into your arbitration. Asset tracing, because ultimately, you know, if you launch an arbitration at the end of the day, you want to enforce your award. That's the reason you're going into arbitration and you want to be able to enforce it, and you want to be able to recover the damages that you have, hopefully been awarded. So how do you make sure that that's possible and doable, and still an option at the end of the arbitration? What are the nature of reliefs that you can ask in an arbitration, and what are the costs? That's a very important factor that has to be also thought about upfront. So, these are some of the issues that we need to think about before we launch into an arbitration. And we're going to look a bit more in detail in some of these, some of these issues. So, thank you Pavni. So, the first question that I mentioned, is to be sued, or do you want to sue, so you can decide there's an arbitration looming on the horizon? A client has come to you and said, look, we think we have a case we have a breach of a contract here with this particular party. These are these and this is what they've done. What do you think, do you think we should go into going into arbitration or not? Now, very often in especially in huge big arbitrations, complex arbitrations, construction disputes, post M&A disputes, you can have a multiple of claims and counterclaims, the other party may also have claims against you and you know this before you're planning to go into arbitration. So, it's a strategical choice, it's a good idea to take a step back and think, do I want to be the first person to launch this arbitration? Do I want to be sued? Or do I want to wait for my Counterparty sues me, and then there are a lot of elements that go into making this decision about whether you want to be the claimant or the respondent. If

your claimant and if you choose to start and launch the process, you obviously have a few advantages, you have the advantage of being you know, the first... the first person... the first mover's advantage, you're the one who chooses. Maybe in the forum, if the if the clause of the arbitration agreement allows you to choose between variable forums, you set the framework of the entire case, you choose the first the first step in choosing your arbitrator. But on the on the other hand, if you're claimant, it's up to you to prove your case, generally, sometimes some people say it's a bit more comfortable being in the respondent's position because you don't have to, you don't have to prove your case you have to disprove the other party's cases, so the burden of proof is a slightly it's slightly different. So, some people prefer to be a respondent and wait to be sued rather than actively suing the other party. This also depends a lot on the client's needs on the on the reputational risk the client wants to wants to overtake or not or for example, on the client, if it concerns an IP dispute, and you want to send a strong message to your competitor, some copycat competitor is copying your product and you want to warn people and say, Hey, we're not, we're not fooling around here, we are really going to take this seriously, you may want to sue this competitor to make a statement to the market saying, you know, we're really serious about protecting our IP rights, etc. So, there are a lot of considerations not just legal, but tactical, reputational, costs also play an important part in this in this decision, because this claimant and most arbitration rules, what they also do is if you are claimant, and the respondent doesn't pay, for example, the advanced and costs then most arbitration rules ask the claimant to advance the entire amount. And then at the end, after the adjudication, you may or may not get that back depending on the on the final award and the final cost award. But you have to also maybe be ready If you know that your respondent is unlikely to make the advance payment, be ready to pay up the entire advance upfront which some companies may find difficult some clients may not want to do. So, there are... there are a lot of elements that go into... into this decision. Like I said, I can't unfortunately go into detail into all of them. But if you have any specific questions, please feel free to put it into the chat and we'll be happy to happy to try and answer them. The next slide if we go on, Pavni? Is also a very, very, very important step and as an associate and maybe as a junior associate, this is something that a lot of us, a lot of people, a lot of you have to... have to... will have to do or have already done. A client comes to you and says we want to launch an arbitration. We think we've been I don't know the contract has been breached or they copied our products or yeah, we want to go ahead with arbitration and they come to you and they give you often you get a whole ton of documents by email on a USB key and it's your job as a junior associate then to go through all this evidence and its very important for you to check this this evidence really show what the client is trying to... what the client wants to show me? Will this evidence help me down the line,

will it be able to be used in the arbitration? Do I have the evidence, I need to prove the pertinent facts in my arbitration going down the line? This is also the time when the client may want to think about document retention policies, you may need to retain some documents, probably useful for the arbitration down the line, or you may want to consider at this stage, I don't have the evidence I need but I know my Counterparty has it. So, Will I be able to get that evidence in document reduction? Is it how likely is it that I will be able to or will not be able to get that evidence that I need for document... in the document reduction? Those are the considerations that you would be thinking about at this stage. Also, identifying your key persons in the company in your client's organization, they could be witnesses down the line in the arbitration, and they may have a very important role to play in improving the facts. So, retaining these key persons are they likely to quit? An arbitration we know we try to make it as fast as possible, but it can go up to at least two, maybe three years? If you're lucky, maybe longer? I mean, it all depends on how long and how complicated the process is. Will these people be around? More importantly, are they likely to support what you're... Support the organization that is your client? Or is there an issue between this person and the client and then you may not want to use them as a witness, if you're scared of what they might say or not really, you know, support your position? These are questions you need to raise right from the start and adjust with the client. Make sure you have this set out before you... what should I say before you pull the trigger and go off for arbitration? Expert evidence - Do I need expert evidence on this case? And if I do, do I know an expert? Or can I find an expert, does the know a client an expert? Is it possible to find an expert that is... that can give me this expert evidence that I need sometimes very niche field and you need a very particular type of experts, it's good to think right in the beginning and look for the right kind of expert that you... that you need? Because if it's especially if there are a few people qualified in this area, you don't want the counterparty to pick out the... get the best one. So, you want to maybe approach an expert proactively. Also, it damages the expert, this is a very, very important and interesting thing, because you may have a claim under the contract. And you may... you may have a wonderful case, but what about your damages? I mean, if at the end, after doing all of this, you're going to get peanuts, because maybe the damages aren't that high and there are other reasons. There was a duty mitigation and you did mitigate whatever, maybe you're not in the end going to get that much. And then you have to advise your client upfront and say, look, do you want to still do going for this arbitration, it's going to cost you XYZ, and you could at the best get ABC back. So that's another choice that the... that the client has to make, and that you as a counsel have to upfront tell them about. And obviously when doing all this I mean, you have to be very thorough, but you also have to be very efficient, because sometimes you could be running against time, you could be...

client wants to file quickly, so, there's a lot of consideration to take into... at this... at this point of time as well. Pavni if you could quickly run to the next slide? Yeah, this is also a very, very important step in your pre dispute phase, thoroughly examining your arbitration clause. And if you do this thoroughly right at the outset, this can avoid a lot of problems down the line, check to seat, check the language, check the number of arbitrators that you... that you need to appoint or you need to have for your arbitration.

Is there any escalation process before you can go to arbitration, now depending on some jurisdiction, this could be seen as mandatory or not mandatory and if it is mandatory, and we jump the gun and go to arbitration who knows maybe the tribunal will find itself, not competent, maybe award will be set aside? This really depends on jurisdiction that you are in so you need to check as for the Lex arbitri, what the consequences are of not complying with these escalation processes prior to prior to starting in arbitration. Think - do you want to go into institutional or ad hoc arbitration if your clause doesn't already mention this maybe it mentions ad hoc and maybe with the client you think maybe institutional would have more advantages. So, at this stage, you could, these are the things you could also propose to your Counterparty in the request for arbitration if you want to do something differently than what the clause says. And if the counterparty agrees that it may be more efficient, then they may, they may be okay with that, for example, we've had clauses that set out... that asked for three arbitrators, but in the end, the dispute... the value in dispute, and the issues weren't so complicated. So, we all agreed, a sole arbitrator would probably work just as well and it would be cheaper and the counterparty agreed to that we proposed it and the counterparty agreed. So, think about also, you know, the parameters of the arbitration that are set out in that clause, do they really fit what you want for the arbitration going forward? And with any, any possibility to negotiate or propose something to the counterparty and either they agree or not, think about your arbitrators think about who you want to... want to appoint? And how do you want to appoint that person, you may want someone very, very specialized in a particular field or someone who understands the key issue that is going to be discussed in the arbitration. And if you want that, then think about that, and you want that person sort of to be not have to be party appointed arbitrator. So, your party appointed arbitrator, think about that, and start the... start asking that person if they're not conflicted out if they have time to take on your arbitration, etc. So, think about these issues again, thinking of these issues, again, upfront and before the arbitration starts is also quite crucial. And I think we go to the next slide. Yeah, this is what I also mentioned in the beginning, just a few issues... jurisdictional issues that you'd also consider, obviously, this is linked to now the examination of your arbitration clause that the...we just saw, but decided the clause... if the clause, for example allows you to do parallel

court proceedings or the choice of forums, which forums do you want to go to? Do you want to go for arbitration or litigation these are also, questions that could come up based on the... based on the wording of the clause? Obviously, this is if the clause allows you to do this, or is the dispute that you think of launching, is it arbitrable? Is it an arbitrable dispute? Is the issue arbitrable? Or is the tribunal likely to say, this is not an arbitrable issue? Check that under the Lex arbitri. Are there any limitations issues, you need to... you need to you know, move fast if there's a limitation issue involved. And finally, in very, very complex arbitration, there could be multiple people that you would like to name as respondent or claimant conversely, if you're the respondent, and it probably makes sense, take a step back right in the beginning and think about who you want to name as you're responding. Do you want to consolidate two arbitrations? Do you want to add people to this arbitration? Can you do that down the line? Or is it better to name these people as respondents right off the bat, these are these are very interesting issues. Like I said, they're all so important, and we could have seminars on each and every one of them. But I'm running out of time. And so, I'm going to quickly hand over to Sanjana now who's going to go ahead with the next topics that we will be talking about. Over to you Sanjana.

**Sanjana Pramod:** Thanks so much Dilber. Pavni me if we could please move on to the next slide? Great, so I'll be dwelling into asset tracing. Because an arbitral Award is essentially a tiger with no teeth, if you have difficulties in allowing the other party to pay it out. It is therefore crucial that parties consider this in their pre-assessment of the arbitration. And otherwise, it may prove a very tiring exercise to go through an expensive arbitration and finally, not recover any of the amounts stated in the award. So thorough and professional asset search is very important in the pre-disputes phase to uncover finances, assets or debts that are not evident on the face of it. And this would help parties maneuver and strategize what their aims and the arbitration should be. An asset tracing also helps parties and planning out what interim relief may be beneficial for them, for instance, freezing injunctions. So typically, the assets that one would look out for are cash, commodities, property, shares, planes, or even yachts, for instance, in the Yukos enforcement efforts, as we've seen recently, there was a seizure of assets ranging from intellectual property rights for vodka brands to a historic building in Paris, and also assets associated with space programs. So you can get as creative as you like. The first step though, I would say is to undertake a basic company search to find out if there are any lien or charges on the company's assets. Also do an insolvency search to ensure that the company has not entered into voluntary or involuntary administration which can seriously impact to enforcement efforts against the company. Now keep in mind that asset tracing in itself is also quite expensive. It is therefore crucial that the... it's a

commercial decision. And that the companies to weigh out whether the amounts recoverable are actually worth the costs. Common problems of course are assets dissipation and offshore jurisdictions because there are several SPVs that are headquartered off shores, and they don't actually hold too many assets. Language barriers in certain jurisdictions can also be hampering your asset tracing efforts. Moving on to the next slide, we'll talk about costs because naturally clients are very concerned about costs and time. Therefore, undertaking a proper cost benefit analysis and budgeting is very crucial. And this is often a continuous exercise because legal costs keep rising, which concerns clients. So, managing client expectations in terms of costs also help to gauge when to deploy mediation and settlement discussions. So, the costs would primarily involve the arbitration expenses, which would include arbitrators' fees, filing fees and associated costs, and party costs, such as legal fees, counsel fees, expenses relating to witnesses, third party expenses fees, sorry, third-party expert fees, document production and there like. Moving on to the next slide, we'll talk about third party funding. And I can't stress and emphasize how crucial TPF has become in the current context and the liquidity crunch that's being faced around the world. So, through this part of the session, I will outline the concept of TPF. When TPF may be appropriate for you, the advantages and disadvantages and practical tips in approaching a funder and also issues to consider when dealing with a funder and Shreya will pick up on the position in India thereafter. So, moving to the first question on the next slide, please?

TPF - What is TPF? So, Third Party Funding (TPF) is when a party that's not privy to the arbitration proceedings provides funds to a party for that arbitration in exchange for an agreed return. Now typically the funding will cover the funded parties' legal fees and expenses incurred in the arbitration. The funder may also agree to pay the other side's costs and provide security for the opponents' costs if the funded party is so ordered. The number and range of institutions that are now prepared to finance litigation and arbitration have increased substantially. So, it doesn't only include specialized third-party funders, you should also watch out for insurance companies, investment banks, hedge funds, and even law firms in certain jurisdictions where the local laws permit. Moving on to the next slide. So, when is third party funding appropriate for you? It's really helpful to have a preliminary checklist for this purpose. At the outset the seat of the arbitration is important as this will determine whether funding is even permitted under local law. On the other hand, the place of enforcement is also important as the fact of funding may be used to raise public policy arguments to frustrate or deny enforcement. Funders are unlikely to fund cases that do not involve damages. So, it's crucial that your proceedings actually claim a monetary relief as opposed to declaratory relief. Funding and arbitration in itself is a high risk investment. So, funders will require certain investment to quantum ratio. So, unless the fund specifically specializes in funding

Small Claims, funders will generally only fund high value claims. Funders will also require good prospects of success. They will undertake their own separate analysis of the claim and only fund it if they have confidence in it and the weights being advanced. And founders will obviously want to know about the target - The Respondent. Whether the respondent is able to meet the claim, costs and interest. Whether respondent is a state, the funder will want to know what its payment record is like when it comes to paying out arbitration awards. The funder will also want to know where the assets are situated because enforcement risk is a key concern. If these assets are situated in jurisdictions where enforcement is difficult, that may deter some funders. Now moving on to the next slide. Advantages and disadvantages of funding - Now the obvious advantages are necessity. If a claimant doesn't have the means to pursue a meritorious claim, then third party funding is a great choice. It also helps to lay off some of the risks that are involved in expensive arbitration arbitrations and unpredictability of costs. Validation because funders carry out such an extensive due diligence of your claim that the fact of approved funding alone validates your claim. And you can on that basis form your case strategy, and it may also encourage early settlement between the parties in some cases, coming on to the disadvantages because this is often rarely spoken about. Third party funding is quite expensive in the sense that a successful claimant will generally have to pay a significant proportion of damages recovered to the funder. Also, there may be some loss of autonomy on the part of the funded party, especially when considering settlement options, as the funders may reserve the right to approve settlement. And depending on the jurisdiction, funded parties may be required to disclose their funding. And this may prompt the respondent to make an application for security Of course, there are also substantial costs involved when packaging the case for presentation to a funder, which I'll touch upon in the next slide. So, moving on to the next slide. Approaching a funder. It's very crucial to find the right funder who you because TPF is a developing market with new funders entering and when choosing a funder, it's important to ensure that the funder has sufficient capital to meet all liabilities that could arise. And they should not ideally be an issue when dealing with a reputable funder with an established track record. However, proper due diligence should be carried out if there are new entrants in the market. Now what do I mean by packaging a claim. So initially, when you decide that you want third party funding, you would ideally have an informal chat with a funder about your claim. If the funder is interested, the next step will be to package that claim so that the funder can carry out full assessment of the merits. So typically, a funder will require key documents and evidence so that proper case analysis can be carried out any legal advice and opinions given by the legal team and counsel and information on the respondents' position, although the funder will carry out due diligence on its own, and a detailed budget, including the number on cost of expert

witnesses that are likely to be required, and the timeline setting out the anticipated process after the hearing. Now moving on to the next slide, I'll touch upon the issues to consider when dealing with a funder. So, privilege and confidentiality because a funder will need to be provided with confidential information as early as that preliminary chat stage I just spoke about. So, it's therefore sensible to enter into a non-disclosure agreement at this early stage. Packaging a claim also will in a variably involve sending privileged documents and legal advice. So be careful to craft your non-disclosure agreement accordingly. Exclusivity because once a funder... once you approach a funder, they may ask for exclusivity. This will occur as early as the initial chart, and before the funder is about to incur significant costs reviewing your case. And this could be not such a great deal for you because you can't approach other funders in this time. And there's no guarantee that the funder reviewing your case will even give you the funds in the end of it. Also, settlement because when parties are generally in settlement talks, there may be dis-aligned goals between the funder and the funded party. For instance, the funded party may be agreeable to settle for a lesser amount, but the funder may not be. So, it's important to see your agreement with the funder and ensure there's a procedure to settle disputes between the funder and fund funded party, should they not agree to the settled amount. Reporting requirements isn't really an issue, but it's generally something to keep in mind, because funders will most likely adopt a light touch approach. For instance, in common law jurisdictions, the funders will be conscious of the need to maintain an arm's length distance. So, they'll only require limited reporting, usually on a quarterly basis of key stages of the arbitration. Now, the most important issue that's relevant to international arbitration is that arbitrators are often selected by parties. And this gives rise to potential conflicts of interest. When an arbitrator or his colleague, his or her colleagues, or firm, have a relationship with a funder involved in the case. And this in turn can give rise to procedural and ethical issues. So, I know that I've spoken a fair bit and I'll leave it to Shreya. Now to touch upon the significant issues and position in India and the next steps. And please feel free to use the chat box to ask us your questions.

**Shreya Gupta:** Thank you, thank you Sanjana. Pavni, can we move to the next slide please? Thank you. In a nutshell, the basic position is that third party funding is not barred in India and has never been barred in India, the only concerns that arose previous Well, whether it could be considered as opposed to public policy or not? Now, as far as lawyers are concerned, Indian law is very strict that a lawyer cannot or a lawyer representing a particular party cannot have a monetary interest in that particular case. And that was one of the reasons that reasoning... that was one line of reasoning actually, that the Supreme Court took when it said that third party

funding by a person other than a lawyer is fine. The Bombay High Court took that one step further, and said that, even if a person is a qualified lawyer, as long as they're not practicing or registered under the advocates act, they can be third party funders. So, the bar has been slowly reducing. And what we hope to see in the coming years is where a party who is or a person who is a lawyer, registered under the advocates act, but has absolutely nothing to do with a particular case can also be associated with or have a relationship with funders. As Sanjana mentioned, one of the key things to keep in mind as far as third party funding is concerned is that the arbitrators should not have any sort of relationship with a funder, or their firm should not or no member of their family should, because that could lead to potential arguments of conflict of interest. And it could just be, you know, the entire arbitration either by parties, raising issues on the on the independence and impartiality of the arbitrator or using it as a ground for challenge going forward. With that, we close the discussion on third party funding. Now, if we can move on to the next slide, please? Thank you. One of the key issues in an arbitration, the first step really is forming a team because before you can decide whether you want to be a claimant/respondent, initiate legal proceedings or not, you need a team. And that starts first and foremost, with engaging counsel engaging a law firm, and also senior advocates of QC's, if you're depending on the jurisdiction, you're in, and working together with them to decide your strategy to review the merits of your claim and then take the matter forward. The second would be experts, which are whether for quantum or technical experts, but they are very, very necessary in several complex claims. So typically, when you're looking at disputes arising out of specialized areas of law, it is very common to engage experts. And as Dilber said, it's important to know whether you will have a potential claim on technical aspects of a matter before initiating arbitration rather than when you're at the evidence stage. Because then you find yourself in a fix that you just can't get out of.

When it comes to choosing experts, though, it is slightly important to make sure that you review the terms of engagement quite closely, because what we see sometimes is parties on their own, go out and engage with some experts to give them reports. But these experts do not agree to give evidence in the arbitration at a later stage, that leads to increased costs, because you have to engage somebody else, you can't rely on the report that they've given you because it would all be hearsay evidence. And the subsequent experts that are appointed may not necessarily always agree with someone else. So that becomes important. It's also common in arbitrations, to use third parties to help with discovery. So, you can have a situation where you take an image of a server of a company server to recover all documents that there are, and also to sift through these documents. And well only keep us relevant because there are times where you have 10s of 1000s

of documents and a very little time span within which they have to be analyzed. So, a lot of times it's easier. But in each of these cases, you have to keep your responsibility as the lawyer intact, so privilege must always be protected. One way of going about most engagements with third parties is to ensure that your engagement letter has a confidentiality clause. If it does not have a confidentiality clause before sharing any of these documents with them. You would enter into a confidentiality agreement with them. That is something quite important. And at times, when you are working with co-counsel, you also may want to depending on your jurisdiction enter into a common interest privilege protocol, which permits lawyers representing different parties to discuss the case and make sure that their common goals are met and that their cases are aligned. This is something you may see a little more often in a case where you have multiple respondents, for instance, who are being sued under the same contract for similar issues. Could we move on to the next slide, please? And now we come to Well, what I believe is the crux, which is actually strategizing the arbitration, there are a number of things that you need to think of and look at before the actual proceedings begin. The first among these is the appointment of the arbitrator, interim reliefs, whether you should go to a court or tribunal. Interim reliefs, which is which court will have jurisdiction, whether you can go for a faster proceeding, such as an expedited arbitration or a fast-track arbitration, emergency arbitration and identification of preliminary issues, we will deal with these one by one in the following slides. Could be moved to the next slide, please? Thank you. As Dilber was saying, there may be times that the contract provides for a panel of three arbitrators, but you find that the dispute is not that complicated, and the monetary value is quite small. It is always open to parties to agree to a different constitution of the tribunal. So, if you have a clause which provides with three arbitrators, you can agree for one and the other way round holds true as well. But of course, it has to be only by agreement of the parties. The next step is if parties cannot agree to appointing an arbitrator, then what are your options? Now, if your arbitration clause provides for institutional arbitration, then you would go by the institutional rules and either go to the registrar to appoint an arbitrator on your behalf, or however, whatever the rules prescribe in that sense. So, for ICC arbitration, for instance, you have the ICC court, otherwise, you have the registrar, who does the appointment for you. If it is an ad hoc arbitration, then and if it's seated in India, then you would have to go to local courts. Under the Arbitration and Conciliation act, that would be section 11. And if it is an arbitration between purely Indian parties, then you would go to the relevant High Court. And if it's an international commercial arbitration, which means that if even one of the parties has international presence, then you would go to the Supreme Court for this appointment. The arbitration and conciliation Act does contemplate setting up of specialized institutions to take on this role. But as of now, the power is

still with the courts and you still have to go through the entire court system to get your arbitrators appointed. Now, it's not necessary always for your arbitrators to be lawyers, you can opt for arbitrators who have expertise in whatever the subject matter of your dispute may be. So, if you have a maritime claims dispute, you can go opt for an expert, if you have a construction dispute, you can again opt for an expert if it's a very complicated derivatives transaction related dispute, you may benefit from having someone with domain knowledge on the panel. And the other really good thing about international commercial arbitration and well now even under the arbitration and conciliation act is that nationality is no bar. So, you have a very wide pool of arbitrators to really pick from, and it would be good for everyone to take advantage of that. And, you know, you learn international best practices, and in general, it's very beneficial. What is to be kept in mind, though, is that the arbitrator must always be independent and impartial. That is non-negotiable. Whether you are having arbitration in India under institutional rules, ad hoc or even foreign seated arbitrations. You can't have somebody who has any sort of interest either in the subject matter or a relationship with the parties or any monetary interest. Could we move to the next slide please? Thank you. Now, interim relief is also something which gains quite a bit of significance and the reason for that is because while your appointment of arbitrator is ongoing or you know if your tribunal is yet to be constituted or if you simply cannot wait at all and need urgent protection, you need to invoke, file an interim application either by invoking the jurisdiction of an institution or the arbitral tribunal or local courts, whichever court would have jurisdiction over the subject matter involved. Now, section nine of the arbitration and conciliation act in India permits parties to go to court and seek interim relief at any time before, during or after an arbitration. But before the award has been enforced. Before it's quite clear, there is no arbitral tribunal. Therefore, it's always open to parties to go to court. During is only if the arbitral tribunal cannot grant efficacious relief to a party. Typically, that would arise in a case where you seek interim relief, touching upon the rights of third parties or when you need third party compliance for something. If you do go to court before your arbitration commences, then after the award has been passed, you must initiate arbitration within 90 days. Now, the arbitration and conciliation act makes it very clear that relief under Section nine would be available even in a foreign seated arbitration until and unless it is expressly barred by the contract. So, if it's excluded, you can't opt for it, if it's not well and good and interim orders passed by a tribunal today are also earlier, it was not so preferred because there were no means to enforce it. But today, the Supreme Court has made it very clear that an interim order passed by a tribunal is enforceable in the same manner as an order passed by a court. And you can also sue for contempt of that order. Of course, that is, as far as domestic tribunals are concerned, including emergency arbitration tribunals in domestic arbitrations. The

law is not quite so clear when it comes to enforcement of interim orders in foreign seated arbitrations. Can we move on to the next slide, please? Thank you. When you decide to go for interim relief before the court, the question that you then have to ask yourself is, where do I go? Which courts do I go to? And the simple answer to that is you go to the court, which has jurisdiction over that particular asset or whatever right you are seeking to enforce. For example, if you want an injunction against the sale of a property in Mumbai, then the Bombay High Court would have jurisdiction over that, and you can't go say to Delhi and have it, because they simply would not have territorial jurisdiction. So, you can go to whichever court has territorial jurisdiction over the subject matter. I'm not going to go into the entire discussion of state versus when you, you know, because it's very interesting, but that is a whole debate in itself. So far now, I think this much is enough for this topic, and I am happy to engage in any discussion going forward on this and we can answer questions, of course. Just one last point before we move on to the next slide is the Supreme Court in 2021, has held that two Indian parties can opt for a foreign seat of arbitration. So, while parties can still choose a foreign governing law for their arbitration agreement, it is still open to them to come to Indian courts to seek interim relief. If that is the appropriate court. Can we move on to the next slide please? Thank you. Arbitrations typically go on for at least about 12 months. If you're lucky in most cases, it may extend to about two to three years. There have also been arbitrations which have gone on for seven years, that that we've seen and been part of. But institutions and the legislature recognize that there is benefit in moving quickly. Justice delayed is justice denied. So instead of making parties languish for all those years in simple claims, it is possible to opt for either a fast-track arbitration or an expedited arbitration. Now, expedited arbitration would really depend on institutional rules and more often than not, it is available either (a) if parties agree or (b) if the monetary value involved in the dispute is low, it's typically for lower. So, for instance, the SIAC rules say that if you have a claim of less than 6 million USD... SGD sorry, then you can opt for expedited arbitration. Similarly, the Indian arbitration and conciliation act under Section 29(b) provides for a fast-track arbitration, but that can only be opted for if both parties agree in writing. And that in itself is a very high threshold to meet because when you are in the arbitrations fear, chances are that parties are not going to agree on pretty much anything. But if they do agree, then there are various benefits such as the arbitration will be by a sole arbitrator, which is similar to most institutional expedited arbitration rules. It is more often than not decided on the basis of documents only there is no oral evidence or arguments staged in the proceedings at all. So, it is something which can be opted for, but it's not free from speculation, because the losing party may always try to challenge it and say that they didn't have an opportunity to present their case, for instance, or that the award is not reasoned or

that, you know, it's opposed to public policy, there are a number of excuses that can be used to defeat the purpose. Can we move on to the next slide, please? Thank you. Tying in with interim relief is also emergency arbitration. Because emergency arbitration is probably one of the quickest methods of getting some sort of urgent relief. Typically, an expedited arbitration is completed within 14 days. So, you know that there can't be anything faster than that. And that includes rounds of pleading. It includes a hearing if required, and even in this span of 14 days, it's possible for parties to ask for a preliminary order on day one on day two. So, on day one, you can file an application for an emergency arbitration, get a status quo order and then have an emergency arbitration award within 14 days anyway. And emergency arbitrators award is not free from speculation as far as enforcement is concerned though, because recently in the Amazon judgement, what the Supreme Court has decided is awards passed in emergency or arbitration in domestic arbitrations are absolutely enforceable. However, the law is not quite so clear when it comes to foreign seated arbitrations. These awards most institutional rules provide for a typical time frame during which they will subsist and after that time frame is over. If the tribunal is constituted the tribunal may vary or vacate the emergency arbitrators order, and parties can even ask the tribunal to revisit emergency arbitrators' decision. Could we move on please to the next slide? Thank you. And the last part of this bucket is identifying preliminary issues. We've already discussed that during the course of this presentation. So, it should go quite quickly. You have to identify jurisdictional objections, because those are objections that can be done away with right at the beginning. If there is no jurisdiction, your arbitration is well cut short and you don't have to incur the time and cost in actually pursuing the entire claim. The scope of reference, a lot of times, you don't have a framing of issues stage as such, and arbitrators go by the four corners of the reference to arbitration. So, you need to be sure that your reference to arbitration includes everything that you want the arbitrator to issue an award on. Arbitrability of the dispute - Of course, there are a number of cases which deal with arbitrability. But with general rule, at least in India, is that any dispute which deals with the rights of parties inter-say is arbitrable, but something which impacts the rights of parties with respect to the larger world and not arbitrable for instance, winding up of a company. That is not arbitrable. Joinder and non-joinder of parties. So, if an arbitration, if you are a respondent or, you know, even if you're a claimant, if you are a claimant, you have to decide who all you want to bring your claim against. But it's also possible that under one contract, you could have a number of parties, the arbitration is only invoked against one such party, but the others have an interest in the proceeding. Therefore, it is possible for them to be joined as parties to the arbitration. There's also consolidation, which is, more often than not, when claimants initiate proceedings with similar issues under the same contract against

different parties, separate proceedings against these different parties, it's to gain a tactical advantage, it is so that the arbitrators will not get the benefit of hearing everybody and getting a holistic view of the dispute. And also, because it's more money that has to be spent by the respondents to defend the same claim, there could also be a chance of conflicting decisions in both arbitrations, which basically means that, you know, you've caused enough heartache to the counterparty and a lot of times that is the aim. But these are issues which you can decide at the outset at the beginning of an arbitration and file appropriate applications before the tribunal if required. Similarly, you could file an application for bifurcation of the dispute as well, but that... all of these depend on the facts of that particular case. Could we move on please? Thank you. And with that, we come to what are your options for alternate dispute resolution mechanisms. The first is contractual requirements. It is... A lot of contracts have a multi-tiered arbitration clause. So, it may say that parties must engage in good faith discussions or in mediations for a particular span of time before they can refer their disputes to arbitration. A lot of times in most jurisdictions, these clauses are held to be binding on parties, and you must comply with them. If you initiate an arbitration without complying with them. It's possible that the tribunal may say it's... it's premature, and you know, go back discuss and then you can come back. The second is legal requirements. It may also happen that where arbitration is provided as a matter of statute, the statute itself may contain such a requirement, in which case, it's also more often than not mandatory, it is possible for parties to say that it would have been an exercise in futility for us to engage in any such discussions because it's clear that parties agree on nothing. But it's worth giving it a try anyway, just to reduce the scope of objections. There are cost considerations as well. And these cost considerations are arbitration is by no means a cheap method of dispute resolution. It's very effective. And I would always encourage people to opt for arbitration as opposed to other methods of dispute resolution for purely selfish purposes. But other than that, it is always, always, always advisable to take an opportunity to settle a dispute as opposed to enter into an adversarial process. There are a number of ADR methods, you could have mediation, you could have expert determination, you could have conciliation, and you could have negotiation. But each one of them has their own benefits, which I don't think we have time to discuss right now because we only have five minutes to go and we will get to the Q&A session. And it's also important to see whether you want to opt for institutional arbitration or ad hoc arbitration, or institutional ADR options or ad hoc ADR options. And that is something which more often than not will be written into your contract. But if it's not written into your contract, then parties can decide. And timing settlement or in a lot of cases, ADR does not have to be right at the beginning only. It's an option you can explore at any time. For instance, now we're seeing you know, Med-Arb protocols where parties

can opt for mediation, even in the middle of an arbitration and then if it's unsuccessful, go back to arbitration and settlement is also as an option, which is always open to parties. What you need to really see is whether you have the tools or you have enough leverage to get your client what they want, or get your client are more beneficial outcome than they would have by going through the entire arbitration process. And with that, we just come to our concluding section, can we move on please? Thank you. In these boxes, we have essentially just summarize what we've spoken about in the entire presentation. But the important point to really remember is that any dispute resolution process, including arbitration is messy, it's kind of like making a hamburger. There are always going to be things, you know, falling from one place to another. The second thing to remember is if you strategize it, you can make it and if you're prepared in advance, you can make it as less messy as possible. That includes a cost benefit analysis that includes you know, doing all your homework in advance so that once you start proceedings, you're not scrambling to see what your next step is. And the last point that I would like to make is, this cannot be a static process. You strategize at every stage, you have to review your strategy at every single stage, because things will change, you will find new evidence, pleadings may change things, your parties... your clients' appetite for the dispute may change things. And it's very important to keep evolving your strategy and being open to you know, modifying what you thought. And with that, thank you, everyone, for listening and for being there for this presentation. Hopefully, we have been able to help you and hopefully these tips are useful. Thank you.

**Dilber Devitre:** I think we have time maybe for one question, and there's one on the chat but I'm not 100% clear what the party means by... Alright, stamp duty. Okay, so he just confirmed he's talking about stamp duty. So, I'm going to phase out here because in Zurich, Switzerland stamp duty is something that is so, so typically Indian. But I do know of disputes where it can delay, it can cause a slight disruption, it's completely, you know, detail that can that can derail things a bit. But I don't know Shreya if you have any experience with stamp duty, because that's totally out of my scope.

**Shreya Gupta:** Yeah, sure, so typically, what happens in the Indian context is where stamp duty has not been paid on an arbitration agreement, the tribunal or the court will not refer a matter to arbitration. And so, you need to have any document which comes into India has to have relevant stamp duty, if it's not stamped your matter will not... your arbitration agreement will not be enforced. Courts typically impound these documents, have them adjudicated, and then once parties pay the relevant stamp duty, then you can go ahead with your appointment of the arbitral

tribunal. If I think that was the question, I'm just looking at the question box to see if there's anything that I've missed as far as this is concerned. And I think we have one more question, which is, if a court case is pending from the pre arbitration stage, but the arbitration went ahead and the award was rendered, what will Indian courts do if seized with an enforcement claim? Will they wait for the earlier court to decide or will they enforce the award right away? So, in this case, the second you have an arbitral tribunal constituted your section eight, section 45, or your section 11 applications would fall away, because these are... section eight and section 45 are to enforce an arbitration agreement and compel parties to go ahead with arbitration. Section 11 is for appointment of an arbitrator. The second you have a tribunal, these sections become irrelevant. And the proceedings also as a result become irrelevant. Therefore...

**Dilber Devitre:** The question doesn't arise, right?

**Shreya Gupta:** Yes...

**Dilber Devitre:** It quit the arbitration and you go to enforcement, normally you wouldn't have this problem.

**Shreya Gupta:** That's right, and courts will enforce it. I think that's all the questions we have. Thank you. Thanks, everyone.

**Dilber Devitre:** Thank you so much, everybody.

**Sanjana Pramod:** Thank you.