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SESSION 5

GUERRILLA TACTICS, TRIBUNAL INERTIA, AND PROCEDURAL BREAKDOWN: WHO REALLY DERAILS ARBITRATION?

SPEAKERS:

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ALISHA SHARMA: May I please request everyone to kindly be seated as we would now like to begin our next session. Ladies and gentlemen, we now arrive at the final session of the day, which is hosted by Lexster Law. Arbitration is often championed as an efficient and Party driven mechanism for resolving disputes. Yet in practice, proceedings can be derailed by a range of factors such as obstructive conduct by Parties, delays in Tribunal decision-making or breakdowns in procedural discipline identifying where the real fault lies and how they can be addressed remains a pressing concern for the arbitration community. Rounding off the day, we now turn to this very question in our closing session which is on "Guerrilla tactics: Tribunal inertia, and Procedural Breakdown: Who really derails the arbitration?" The session will be moderated by Mr. Shantanu Agarwal and will be joined by Mr. Ciccu Mukhopadhaya, Mahesh Jethmalani, Dr. Mahmood Hussain and Ms. Olga. I would now request everyone to welcome our Moderator and panellist on the stage. Thank you.

SHANTANU AGARWAL: Good evening, everyone. And thank you for joining us for this session of India ADR Week 2026. Let me start with the scenario that most of us will recognise a dispute begins with a straightforward contract and a reasonable estimate on how long the dispute resolution should take. 18 months later, the Tribunal is grappling with 4th Amendment to the pleadings. There is a tonne of expert evidence nobody called for. The timeline has been redrawn several times over and nobody remembers the original timeline. Something happened along the way and today's panel here is to answer a simple question: what exactly happened and who is responsible? Our title asks "Guerrilla tactics, tribunal inertia, and procedural breakdown: Who really derails arbitration." It is tempting to look for a single villain. I recall an incident, a personal experience in an arbitration where we were involved, for the Claimant, an Indian private entity litigating against the government of Rwanda under the Rwandan laws under the aegis of Kigali International Arbitration Centre. The Tribunal, a multinational Tribunal was formed, the Arbitrators were from France, Singapore and Nigeria. The government entity was being represented by local Counsel. The terms of reference were entered, procedural timelines were set and pleadings, evidence, everything happened on time. Right at the onset of trial, there was a challenge filed by the counterparty government of Rwanda before the local courts challenging the Tribunal on the grounds of bias. The institution, Kigali International Arbitration Centre, stood on the sidelines watching, unable to do anything. Ultimately, the challenge was defeated but in the process we lost six months in the dispute resolution. What also happened in the process was the Tribunal started acting more cautiously because of the allegation of bias. So, like I said, it is tempting to look for a single villain, maybe it is the aggressive Counsel deploying every trick in the book, maybe it is the Tribunal, too cautious to draw a firm line because a firm line may look like bias

or maybe this is where things get really interesting. There is no villain at all. Maybe the problem is a system which incentivizes this very behaviour we all want to stop. We have a panel that has seen this from every side, a Counsel for states, a Counsel for private Parties as Arbitrators sitting inside the Tribunal, and as people working to change the rule themselves.

Let us introduce them our first panellist, Mr. Mukhopadhaya. We are honoured to welcome him. Mr. Mukhopadhaya is a senior advocate with over 35 years in dispute resolution and in my view, the face of India in international arbitration community. Having worked very closely with him and in a way, one of my mentors in this journey of 15 years, I can vouch for that. He has served twice as the Vice-President of ICC International Court of Arbitration. He sits on the Counsel of the ICC Institute of World Business Law, the core committee of the ICC India International Arbitration Group and the panels of Singapore International Arbitration Centre, the India International Arbitration Centre and the Delhi International Arbitration Centre. As Counsel, he has appeared in more than 225 arbitrations across jurisdictions under the aegis of ICC, Singapore International Arbitration Centre, LCIA, Delhi International Arbitration Centre, Kigali International Arbitration Centre, Hong Kong International Arbitration Centre, to name a few. He also sits regularly as an Arbitrator in multi jurisdictions he has also regularly appeared before the High Courts and Supreme Court and has a rare vantage point of seeing how India's court and the arbitral processes meet and where they collide. Please join me in welcoming Mr. Mukhopadhaya.

Our next speaker, Mr. Mahesh Jethmalani, a man who needs no introduction. Perhaps, the most dynamic personality on this stage today. An Oxford PPE graduate, he studied law in London and was called to the English Bar in 1980. He enrolled at the Bombay Bar the following year and was designated Senior Advocate in the year 2005. For more than 40 years, Mr. Jethmalani has appeared before the Bombay High Court, the Delhi High Court, the Supreme Court in some of the closely watched criminal, commercial, corporate and constitutional disputes of our time. From 2021 and 2024, he served as a nominated member of the *Rajya Sabha* chosen by the President of India for his eminence in the law. Very few at the bar have moved between the courtroom and the legislature, as he has and fewer still with advocacy as formidable as it is elegant. Please join me in welcoming Mr. Jethmalani.

Our next panellist is Dr. Mahmood Hussain. He is the founding partner of M&CO Legal in Dubai, one of the leading law firms in West Asia with a strong presence in Africa. He has spent more than 20 years as a Litigator and an Arbitrator in the UAE and the wider Gulf. He has acted as Counsel and as Arbitrator in over 50 international arbitrations under the ICC, the LCIA, the ADCA and the Dubai International Arbitration Centre. He has also helped build the system itself he was a part of the team that set up the DIFC courts in Dubai and served as the

first Deputy Registrar. Today he chairs the ICC, UAE Commission on Arbitration and ADR. Not many people have sat on both sides, inside the court and inside the Tribunal in one of the world's fastest growing arbitration hubs, Dr. Hussain has. Please join me in welcoming Dr. Hussain.

And finally Ms. Olga Tsvetkova, Managing Partner of Brevia Legal. She has practiced for nearly two decades across Russia, Switzerland and UAE. She began in the government as deputy director of the Department of International Law at Russia's Ministry of Justice there she led the team defending Russian Federation in major investment disputes. She then moved to private practice and founded Brevia Legal with offices in Abu Dhabi and Moscow. Today, she also advises the Russia's Ministry of Economic Development and UNCITRAL Working Group 3, where the future Rules of investment Arbitrator arbitrations are being written government private practice and drafting table itself. Olga may be the only person on this stage who has sat at all three. Please join me in welcoming Olga and all our panellists.

In this session, we have about an hour I'll begin with a few questions to each of the panellists, followed by a brief round of cross questioning amongst the panellists will we leave the last few minutes to the floor. Let us begin. I'll begin with Dr. Mahmood Hussain. Dr. Hussain, as the Chair of ICC, UAE Commission on Arbitration and ADR, you are closely involved in shaping the procedural framework of arbitration. From that vantage point, where do you see the biggest procedural exposure lies? And who is the most responsible when gaps are exploited to derail an arbitration? Is it the Parties or the Counsels or the Tribunal itself?

DR. MAHMOOD HUSSAIN: Thank you very much. I think this topic is a timely, and I think the good news is 20 years is still, the tactic is there, so nothing has changed. But when you ask a room full of lawyers, Counsels and Arbitrator about who is responsibility. The Counsel always will tell you, it's Arbitrator because they are passive, they are not acting like a judge. When you ask the Arbitrator, would say the Counsel and as well the General Counsel of the company, who fund the Counsels, who does the tactic. So, if you ask younger lawyer will tell you, no, neither one of them, it's the expert who came just to arbitration, who does not know how to manage the case like a judges, who hasn't been in the courts, and who dump us with a lot of document 50,000, 100,000, 200,000. And then Arbitrator wouldn't tell them anything. When you look those are everybody blame each other in the system but when you see where is the weakness, where is the point where a guerrilla tactic happens, it is start with Arbitrator appointment and disclosure. So, it's a partial problem of Arbitrator who does not fully disclose. Let me give you a real case. A well-known Middle Eastern Arbitrator was appointed. At the same time the Respondent, he knows one of his team member knows a lawyer in his firm. He approached him with a document and he said, listen, give us the rating for that, no need for

you to review, just give us blank rate, we don't want cap, we don't want any lawyer. We will don't tell him cap. He said, okay our rate... he send them the hourly rate, that's it. He disappeared they actually because the Arbitrator didn't know because he didn't have a conflict check in his system, he didn't know who approached who, and then when the proceeding continued before the hearing, one week they challenged the Arbitrator and told him, you have given an opinion on that. He said no, he said it was you and you were copied in the email by the way. He didn't check the email, he didn't know the Party, he didn't know who is he or what is the matter because he see it's coming from yahoo. But the thing is the document he didn't check because they sent it, they didn't want to start before thing happened. He recused himself and proceeding took longer time as well. So, basically one of those is a partial, I would say responsibility of the Counsel because the Counsel has as well obligation toward the Tribunal in order to help the Tribunal to do expedite matter.

Now another tactic which comes, which frustration happen to the proceeding is disclosure, because we imported all of those disclosure. I remember one of those cases: one month before the hearing the expert has dumped on us 250 or 50,000 document, new documents. Now we complained to Tribunal and Tribunal didn't do anything. Why? Because the Tribunal were worried after the case I asked the Tribunal member the settlement happened, why did you allow it? He said, no, because of due process, we didn't want... but by the way, you should be happy you got the judgment. I said no, it's not about the process, integrity of the process, how the process is that. Now what I said to me, I don't want that judgment to be challenged and I don't want to be in the market knowing that one of my award was set aside. I said, what is the problem? The judge who set aside your award he had in he may be over 1000 of his judgment was rejected by appeal or by the cassation. So, basically why should you be worried in 100 case, you have one time in your life somebody challenged. A great Arbitrator and the court seen their award status set aside, and it's not a problem. Have a nerve and say for the people, no, this is wrong. You have to look to different way. Another tactic is multi contract multi Parties because when it happened the jurisdiction challenge they don't come one time because lack of control and efficiency in the Tribunal, they come in different time challenging the proceeding or jurisdiction of the Tribunal and they submit different times, with a bad management, not having a proper system in a place, which we are unfortunately, we don't have an arbitration, a system that we can manage it now certain institution like ICC, Hong Kong, SIAC, they are trying to provide the Arbitrator with a systems and all of that, but still it's not efficient, it's not helpful.

Now the other thing I think which is frustrating, the Tribunal, is that the new tactic, which is most of Counsel would do it because Counsel comes to the arbitration, not because they wanted to sit and get the judgment, because they want to prepare themselves for nullification.

So, you would see them, they record their objection during that and I remember I was sitting with one of international Counsel who was handling arbitration, I said, where is the ground? He said, "yeah, we prepared it for you." There is 20 ground. And I said, what, give me example, he said, "One of the ground: We minuted at the minutes of the meeting." The witness were sitting outside. The witness who finished he sit with the other witness and he told them what is the discussion, what the question they would ask them. I say, how did you know? So because they were sitting and we minuted in the minute of meeting. So, basically all of these issues is coming and now the tactic is that we prepare for the future. On the other hand, I think the problematic issue is whether Tribunal itself. Tribunal is not taking and not utilizing the authority and power they have if we go to ICC, for example, Article 22 oblige the Tribunal to conduct the proceeding in an expedited manner and in efficient manner and this is means if the reading of this article, we can expand it. They can take any measurement is appropriate in order for them to protect the integrity of the proceeding. Then Article 17 of ICC same would go they take a measure to protect the integrity of the proceedings. So, all of that they're giving you when you go to international laws for example, in UAE, the same article is in the law, not in the institution only or not only that. I will give you one example. For example, one time I told the Counsel who was behaving badly, in that I said, by the way, you are a Counsel in UAE, and the advocacy law in Article 200, it require you to respect and in a good manner deal with the fellow lawyers, fellow judges and Arbitrator. Arbitrator is mentioned, it's simply, I said, listen, if you continue I have to report it to the bar, your prospective bar. Then after that Day 2, 3, 4 and 5, he was really respectable and he know that we will take a measure against him. So, we still have a lot of measures because all times the Arbitrator will say we are not a judge, we don't have all of that. There is no contempt of the court, but you have still have a procedural aspect that and you should have a little bit gut feeling to say, you know what, I will take it let them to set aside my arbitral award. The same judge who set aside your arbitral award, it's one arbitral award in your life. He has his judgment has been hundreds of times set aside by appeal or by cassation by all of those courts and that's where we see as a Counsel as Arbitrator because we sit on the board, we actually.

SHANTANU AGARWAL: Thank you, Dr. Hussain, that sets the tone nicely. Mr. Jethmalani, moving on to you, sir. Arbitration was sold as an escape from the formalisms of the National Court meant to be faster, cheaper and less rigid. If this panel is right that Guerrilla tactics, Tribunal inertia and procedural breakdown are what actually derails arbitration, has arbitration simply rebuilt that formalism from scratch without safeguards such as open hearings, appellate review, published precedents and judicial tenure, sir?

MAHESH JETHMALANI: I'm going to put on two hats today. I mean the problem obviously exists, you know, the whole purpose of introducing arbitration was really seven-fold.

Arbitration, first of all, was to reduce court burden. It was for speedier resolution expert decision- makers in the subject matter concerned Party autonomy that is choice, procedure and place of arbitration, confidentiality for businesses wishing to protect commercial information or reputational issues, flexibility rather than the rigid procedure of courts, and in international commerce, a neutral mechanism for resolving cross-border conflicts under international conventions, the New York Convention, the Geneva Convention. Now first, I'm going to look at my practice. I have to tell you that I am basically a drifter into arbitration. My bread and butter, as most of you know, is criminal law, right, but over the last 2 or 3 years, I have thanks to mainly to Mr. Agarwal and his firm and of course some government arbitration contracts drifted into arbitration and I rather I rather liked the practice. But during the course of my practice, there are many lacunas which have come to my notice, right. Now out of these seven points which I actually mentioned right as being the rationale for supplementing courts with arbitration, I think arbitration has worked pretty well except in the first two grounds which I mentioned, the first two rationales, which is reducing court burdens and speedier resolution. But by and large, it solved the problem.

Now the question as to who derails? You know, it sort of assumes that somebody is responsible for it. Now if you have to pinpoint a particular entity or a particular participant in the arbitration process as being responsible for derailment, right, I would say everybody, whether it's the Tribunal, it's a participant, a Party through his lawyer or the institution itself; in varying degrees, they're all responsible. But the question is what permits this right, what is the factor which allows all these participants to actually indulge in delays. And the answer is and I look at it now as a lawmaker. And therefore I want to throw out some possible, you know, solutions to this. I think the real answer is: it's inbuilt statutory inertia and primarily, amongst this the statutory provisions which cause delay other timelines. I think (a) the timelines are excessive and (b) there is too much flexibility given to Arbitrators to extend timelines. If there was a strict... if timelines were much shorter than they are, I'm now referring to our own Arbitration and Conciliation Act in this country. If timelines were much shorter than what they are right now. And if on the other hand, you know, the statutory change made the relevant amendments, I think we could dispose of arbitration and arbitrations could really be a solution to the first two problems that is reducing the court burden and more importantly, speedy disposal of what they're supposed to do. Let me just add a little caveat here. Reducing court burdens will never be the outcome of arbitration procedures because to some extent you will help it reduce the burden. But looking at India, for instance, there is such a docket explosion in this country that just and you know, it's only a limited activity which really goes to arbitration, which is commercial disputes. So, it's not going to reduce the court, to a little extent, it is going to help corporates resolve their issues confidentiality and all the other advantages are going to kick in.

There are three levers which I take in turn. First, appointments that are data-driven and verified so that the Tribunal is competent in commercial disputes and demonstrably conflict free before it sits. Second, a statutory default calendar, the timing issue, the timelines with economic teeth, timelines that apply unless displaced for short recorded reasons and arbitral remuneration tied to the award being delivered on time. Third, costs and interest that are assessed in real-time at each procedural milestone, so that every unnecessary or frivolous application carries an immediate price rather than the distant one. Now do those three things and formalism, do those three things and formalism becomes unnecessary because delay simply stops paying? And that's what we have to achieve. Now look at the statute look at first the constitution of the arbitral Tribunal. I come to my first point. Section 11, that's where the arbitral Tribunal is appointed by a court. Delay often begins before the Tribunal exists once arbitration is invoked, the counterparty stalls at the appointment stage itself and the remedy lies in Section 11. The provision is designated as summary, a summary limited inquiry because the court really only examines a very limited aspect and that is the Section 11 court in this country, now by a Constitution Bench has a very limited remit, and that remit is that it merely has to see whether an Arbitration Agreement indeed exists and nothing else. Right? Now where courts drift into a merit-style inquiry, they defeat the section's own design and delay the Parties before the process has begun. Section 11 already states that an endeavour should be made to dispose of applications within 60 days. In my view, that period should be shortened to 30 days and made mandatory by statute in the interest of expedition. What is the point of giving a 60 period window for a Tribunal to be appointed when all you have to do is appoint the Tribunal and start the proceedings? What is the need for? So, there is in-built statutory inertia in the at the very outset, all right.

Then we go to the qualification threshold of Arbitrators. I bring this up into different subdivisions so that, you know, it struck me that there's a lot of need for a sweeping reform of our own Arbitration Act, mainly on timelines because the timelines itself built inertia in this sense that it gives no incentive for the arbitral Tribunal to complete the arbitration until the very last day. So, appointment should require demonstrable knowledge of civil and commercial law and actual experience of conducting commercial disputes as Counsel or judge before courts or Tribunals, not mere seniority or a technical background unconnected to adjudication. An Arbitrator who has never conducted a commercial trial is poorly placed to control pleadings. I mean, you know, that old joke comes to mind where that sometimes you read an unqualified Arbitrator's award and you kind of think that it's the height of schizophrenia. Because it's like, you know, a sole Arbitrator writing a dissenting judgment. You can't understand which side he's written this judgment for the past the award for. An Arbitrator was never conducted a commercial trial is poorly placed to control proceedings, rule on evidence or manage a hearing efficiently. Inertia at the Tribunal level very often traces back

to this cap. Looking ahead, institutions such as MCIA should move from self-declared expertise to verify. A published, and this is important, a published database of profiles recording the Arbitrator's sector experience, awards rendered, average time from closure of proceedings to award and Section 34 outcomes, so that Parties appoint on data rather than reputation alone. Too often I hear in arbitrations in this country that this gentleman is the person to go to he has the most arbitrations, right? So, we don't just want reputations now, we want Arbitration Tribunals to be appointed on the basis of past performance, the criteria of which I just mentioned.

Then fair disclosure with teeth. So, not just fair disclosure, Dr. Hussain pointed this out that fair disclosure is very, very important and it's derailed many arbitrations to which he's been a Party to. But it should also have economic teeth. What is the meaning? There should be some enforcement disclosure under Section 12 of our Act read with the 5th Schedule, in particular Entries 22 and 23 on repeat appointments of our act or the corresponding institutional rules should be a continuing obligation, not a one-time formality at appointment with a clear consequence. So, the consequence is important; removal cost sanctions for non-disclosure discovered later. So, a defaulting Arbitrator who fails to comply with Section 12 and the 5th and 7th Schedule should pay a price for that non-disclosure. If that doesn't happen, if you don't have that deterrent right, no other statutory provision is going to enhance or enforce full disclosure, fair disclosure. Now, institutions such as MCIA, SIAC, ICC should be required to actively verify Tribunal impartial... Tribunal impartiality against a maintained database, not merely receive them and file them. Now, a repeat appointment database; this is also important. The type of database you have what should it be... what should be its essential attributes? A centralized database recording the Arbitrators name against the Party agent and advocate who appointed him across matters would expose patterns of repeat appointment that create structural bias risk. Most major institutions already maintain internal records the gap is that this data is not cross-checked systematically before appointment and is rarely available to the opposing Party or the Tribunal itself for conflict-checking purposes. Institutions should be required to run this check as a standing pre-appointment step, not merely retain the data passively.

And then finally align the Arbitrators economics with speed. Tribunal inertia is partly a pricing problem. Now, Section 29(a) already tells the court, lets the court cut fees for Tribunal course delay but only after the fact and almost never in r practice the fix is to build the consequences into the fee itself a whole bag of 20-25 percent. Now that all the all the international ICC, etc., all have that a whole bag hold back of 20-25percent released on delivery of the award within the Section 29(a) period and reduced for any delay the Tribunal has caused timely. Then timely

disposal then becomes the Arbitrator's own interest not merely a Parties aspiration, so that's how you disincentivise Tribunals from creating delay at every stage.

Now here's a statutory problem. The statutory problem timelines are excessive. Let me just give you the examples the Limitation Act doesn't prescribe a special period for invoking arbitrations courts have held that the residuary Article 137 of our Limitation Act, three years applies equally to arbitrations? Now what's the rationale for this and I disagree with the rationale and I'm sure most of you will disagree with it too when you hear about it. The Supreme Court's reasoning in ***Bharat Sanchar Nigam***, a 2021 judgment was essentially the cause of action accrues on the same date regardless of whether you are going to a court or an Arbitrator, right? The Claimant eventually chooses, so there's no rational basis to shrink the clock says the court. There is no rational basis to shrink the court just because arbitration was the chosen route but it begs the question, it begs the rationale. The rationale is that you are getting arbitration for a shorter timeline. Just because you're, there are two streams on a cause of action (a) arbitration (b) the courts that doesn't mean you keep the same limitation period for both because then you've forgotten the very rationale of arbitration which is speedy disposal. That judgment is rationale is seriously open to question and it needs to be reversed. Interestingly, this creates an internal asymmetry within arbitration law itself arbitration gets three years but challenging an award under Section 34 gets only three months plus a 30-day condonable extension, a far tighter window than the original one. Now what's the rationale for that what are you doing in a, what are you doing in an arbitration proceeding, you're filing a Statement of Claim the other side files his defence. What do you do in a memo of appeal under 34? You take the grounds, you look at the judge the award, find out it's... you have limited you have a limited scope for challenge on the 34 and you take it to a High Court under 34. What is the need for having two different timelines for these two different, almost identical time requirement procedures, an appeal and a Statement of Claim? None. So, a lot of this has to do with statutory change. I'm saying our statute for instance the Arbitration and Conciliation Act has an inbuilt incentive to delay matters. We can cut it much shorter and we should because our arbitrations are taking an inordinately long time. You know, in a recent arbitration, I did for the PWD in a construction contract, I completely... I realized that there was there was no need to lead any defence evidence. The Plaintiff, the Claimant put an elaborate Statement of Claim and he examined a witness, right, the witness's Examination-In-Chief, his affidavit went into thousands of pages, right. With a little bit of cross-examination, I was able to I thought demolish the entire claim. The claim was farfetched, right. I didn't put the defence witness. Since then the case was concluded after all the evidence of recording and arguments within a period of less than a year, the award has been passed, right, and the claim, there was a claim of about 450 crores, 90 crores was awarded which of course, we will challenge but, but, but the bulk of the claim was completely frivolous and the court so held. Now unless you

disincentivize these kind of proceedings, courts are never going to... even the limited role of supplementing Tribunals, even the limited role of supplementing courts will not be achieved far from, you know, reducing the burden altogether.

Okay, so here's a concrete proposal. Amend the Limitation Act to prescribe a one-year period from accrual of the cause of action for... please tell me if I'm overstepping my time limited because I can go on and on, I've got too much material here, right? And I won't feel hurt. I may cry a little afterwards, but I won't feel hurt, right. The one-year period from accrual of the cause of action for issuing a Section 21 notice coupled with the mandatory pre-invocation notice of dispute, that stops the clock and triggers a short negotiation or mediation period. This preserves access while restoring arbitration speed premise at the front-end and dovetails with the pre-institution meditation philosophy of the... mediation philosophy of the Mediation Act 2023. The time limit for invoking arbitration after a successful Section 9 application should also be regulated. Section 9 presently requires a Party that has obtained interim relief before commencement to initiate arbitral proceedings within 90 days of the order? Why? He's got his interim relief, he's going to sit on that interim relief for 90 days. Why are you giving him 90 days for this? Or within such further time as the court may allow. In practice, a Party armed with an interim order has little incentive to move quickly, so shorten the time period for which he can hold on to his sometimes misconceived interim order.

Now the pleading stage is also an extremely important stage where delay commences on both sides of the table. Delay in fact, compounds most visibly at the pleading stage and I've seen that practice in *ad hoc* arbitrations has treated the statutory outer limit as a target rather than a ceiling. Now, the statement the Section 23(4) of Arbitration Act sets a six-month outer limit for completion of pleadings. In practice, this six-months allowance should be apportioned between the Parties, not treated as a shared indulgence. Example, statement of Claim to be filed within one month. I've just been given my first warning, it feels like Parliament again.

SHANTANU AGARWAL: You're welcome to borrow my time.

MAHESH JETHMALANI: All right, so the period for each of this all the three stages, Statement of Claim, Statement of Defence, Rejoinder and reply to the counterclaim should all be one month each. So, you have a three-month time period for pleadings then framing of issues. I promise I'll finish in 1.5 minutes. Once pleadings are closed, the framing of issues becomes a second battleground for delay Parties routinely propose inflated lists full of peripheral, overlapping or undisputed issues, the Tribunal should prune the list rather than accept it wholesale striking out issues, striking out issues very important procedure on this, you know, provision under the Civil Procedure Code, striking out issues that do not arise on the pleadings or can be subsumed within the broader one. A lighter, a tighter list narrows

evidence and argument at every later stage. Two practical tools solutions: The Tribunal should circulate its own draft list on closure of pleadings and invite objections within the short time-fixed window instead of inviting competing lists. And two, any issue capable of preliminary determination injunction jurisdiction a pure question of construction should be identified at framing and decided first. The issue should expressly empower tribunals to summarily dispose of claims or defences with no real prospect of success.

Now the last part. Expediting completion of pleadings suggesting statutory reform. There should be deterrent costs. Counsel and Parties must be active and file their pleadings with expedition treating the timelines as binding rather than negotiable. The Tribunal, for its part, must be vigilant against Guerrilla tactics such as repeated extension requests etc., etc. If there is a repetitive pattern of vexatious delay, the Tribunal may escalate the quantum of costs occasion on every such delay. This is how you deter and punish unnecessarily delay. A Tribunal that enforces the timetable from the very first filing sets the tone for the entire proceeding. One that indulges the first extension has already lost control of the last.

I'm almost there. I can see the finish line. Imposition of costs and interest. Section 31(a) of our Act again, already permits costs to follow the event and to reflect the Parties conduct, but Tribunals overwhelmingly defer all costs to the final award, by which time the delay has already been bought and paid for. Costs should instead be assessed and payable at each procedural milestone, a rejected adjournment request, a failed application, a late filing. So, that guerrilla tactics carry an immediate price rather than a distant one. Under Section 31(7), pre-award interest should ordinarily run from the date the cause of action arose and post-award interest at a rate that is genuinely compensatory, so that it is never economically sensible for the paying Party to prolong the proceedings. And finally, there should be a delay ledger. The award should annex a short table, attributing the time consumed in the proceeding to each Party's applications and to the Tribunal itself. This informs the allocations of costs and interest, gives the Section 34 Court, the Appeal Court an accurate picture of who derailed the arbitration and feeds directly into Arbitrator performance data, closing the loop between conduct in this case and appointment in the next. I am grateful for the time, and I apologize for the excess time.

SHANTANU AGARWAL: Thank you, sir. If I heard you right, the solution is in more definite rules with better incentives.

MAHESH JETHMALANI: Not just rules, statutory provisions, the Act.

SHANTANU AGARWAL: And from what fell from you, I remember Justice Chawla's words from the Bombay High Court that the Arbitrators duty to disclose is that of utmost good faith

and with what sir said, a fair disclosure at times helps in speeding up the processes. Moving on to Olga. Olga, you have set on almost every side of this question inside a straight legal department.

DR. MAHMOOD HUSSAIN: If you allow me, I wanted to comment in one minute what Mr. Jethmalani said.

SHANTANU AGARWAL: Yes, please.

DR. MAHMOOD HUSSAIN: I think cost is paid by the clients. So basically, lawyers doesn't really care about it because they know that because most of lawyers are short term, I think one of issue as well we have which addressed by Mr. Jethmalani the institution is not doing a good job in monitoring putting AI to check the conflict of interest of those Arbitrators and social media and all of that another thing we have a conflict which we are not addressing, which we are... it's a blind spot which is the Arbitrator a court of arbitration mostly they are conflicted and that's why sometimes you would see Counsel ,he knows his friend or his colleagues in the firm sitting there, he will protect him so that is another issue so I agree with you if you were in UAE, 85% of Mr. Jethmalani of guerrilla tactics will be disappeared with your suggestion, thank you.

SHANTANU AGARWAL: So, Olga, moving on to you, you have sat on almost every side of this question inside a state legal department, in private practice representing major multinationals, and you have also advised on the reform of the arbitration system, who do you think really derails arbitration, especially in light of recent geopolitical situation?

OLGA TSVETKOVA: Thank you, Shantanu. I will have only three comments on that, and I will count for you to see the finish line from the very beginning. So, one when the new disputes come to us, the first question we would think of is what is actually the real game here? And I learned this lesson being a state Counsel, but that equally is relevant to any private dispute because at the ministry you are not often, you know, your brief when the dispute starts is not often, you should win the case. It is more often that you need to align and to see how the case fits the overall sovereign position across other negotiations, other proceedings, other disputes and future exposure. And then you have an external Counsel for the state, who has different mandate, to win the case. And so these are two factors that constantly, you know, you need constantly balance them throughout the whole proceedings. And the effect your procedural behaviour and your position very much. I'm not saying that it is a question whether the Tribunal should engage with this broader context and how, if any? But it just sets the context we don't see in arbitration automatically.

The second point is that some mechanisms, including state courts mechanisms available domestically, should not be perceived automatically as an abuse of right or guerrilla tactic. I'll give you an example. There is the so-called Lugovoy law, well known in Russia that gives, it's actually a provision in the Russian arbitrage procedural code, state code, that gives Russian Parties sanctioned Parties the right to go directly to state court and to file their claim there when they can't find justice under the initial arbitration clause. And I've seen it from both sides as an Arbitrator who is finally suddenly faced with a two proceedings arbitration and parallel court proceedings and as a Counsel who had to file both arbitration or defend in arbitration and file state court proceedings and my outcome is that it may be guerrilla tactic, but it may also be that you really cannot find justice at another forum initially agreed. Let's say there were a number of cases, where and I saw it myself where you could just not find any competent Counsel in a specific country under the laws of which arbitration was agreed. So, and then you go to court because it's just your only way to resolve the dispute or at least to get your claim heard.

And the third point is that and I will make an unpopular pitch, given that arbitration conference. I think we should actually think of arbitration less than pre-arbitration stage, as Counsel advising the client because at the pre-arbitration stage, we are negotiating the solution of the conflict. When it comes to arbitration, when the claim is filed, the only thing we negotiate normally is the outcome of the specific proceedings and that's often is just too late to discuss the solution. So, perhaps overall I would reframe the topic you're raising today and I would say that the real question, at least from Russian Party's perspective and you asked about geopolitical context as well, is not, you know, what derails arbitration procedurally. It's about how we ensure that the Party feels that its claim opposition is heard and that the file is not just processed by the Tribunal but you know, properly and attentively heard. And I think if we fix this sense, at least part of what we see as guerrilla tactics will just fall apart because the Party will understand that this is the forum where it can be... it can actually give all arguments, and they will be, you know, heard with the how they should be heard. So, that's my three comments.

SHANTANU AGARWAL: Thank you so much. It's a reminder that the rules are only as good as the world they operate in, Mr. Mukhopadhaya, the last word is yours on this. You have seen this as a Counsel as an arbitration Arbitrator across a range of jurisdictions from inside the ICC court as well. In your experience, do guerrilla tactics surface more often in *ad hoc* or institutional arbitrations? And where a Tribunal is constituted under the institutional rules, is it actually better equipped to deal with them or does the institution's own machinery sometimes become the tool by which a Party derails the proceedings?

CICCU MUKHOPADHAYA: Thank you, Shantanu. Before I deal with maybe there are two questions or three, which I'll take in turn. I mean, I'm very worried by some of the things that the panellists have said here with Mahesh and Olga, in particular because I think half my business will be lost if all of that is implemented and many of you as well, I think. No, but seriously, I think some of the recommendations are very, very sort of timely and very much needed in this country. Coming now to what question has been put to me firstly, guerrilla tactics and I might use GT in short for some times, you will find them surfacing both whether it's in institutional arbitration or an *ad hoc* arbitration, can be equally disruptive in both cases. And I think ultimately as I go down the line you'll find that I think it's really the Tribunal which can control all of this, no institutional rules, whether it's *ad hoc* or institutions, you'll find a strong Tribunal can always control any guerrilla tactic and bring any arbitration into line to be efficient. But I must caution one thing, not every procedural step taken by a Party or every step which delays or a challenge which delays the Tribunal's work or the arbitration can be said to be a guerrilla tactic. There are many times where genuinely there are procedural steps to be taken to protect a Party's rights, a challenge to be made to protect the Party's rights and that goes down to the issue of disclosure, which both Dr. Hussain and Mr. Jethmalani have highlighted quite effectively. So, with that caution, I would say that guerrilla tactics can take place in various stages of an arbitration.

The first stage itself is the pre-arbitration step. Nowadays, you have most contracts have pre-arbitration steps as a mandatory procedure before you go into arbitration or invoke arbitration. Parties try to delay those process, you can always try to act in good faith or look at acting in good faith to really negotiate, but you have it in mind that I'm going to drag this negotiation on as long as I can, but I have no intention to settle; that's the first step, which is a tacet guerrilla tactic, which a Party may not even realize is happening.

The next step is, of course, you don't appoint your Arbitrator or enter into protracted sort of discussions on choice of a sole Arbitrator, that also can delay.

The third step is you compel a Party, a Claimant in most cases to go to the court in India at least under Section 11 of the Act if it's not an institutional arbitration, an *ad hoc* arbitration. And as Mr. Jethmalani said, that itself is fraught with delays a Section 11 petition we have seen in the past can take a year sometimes it can be done, it's supposed to be done in 60 days but hardly ever does it happen. Of course, there are cases which will come in the first day itself the court appoints because the Party doesn't object. But more often than that there are some objection or the other raised, the jurisdictional challenge raised, multi-party issues arise which then delay the appointment and all kinds of sort of tactics are used in order to ensure that the arbitration does not take off. That's the first stage.

The next stage is during the arbitration proceedings starting with the Statement of Claim. Sometimes, we'll find a Claimant itself who thinks that offense is the best defence actually files a claim and actually should be a Defendant or Respondent and therefore he's not interested in actually moving ahead with the arbitration, procrastinates on the claim you see, I think there's a judgment of the Supreme Court when a Claimant's case was terminated because no Statement of Claim was filed, and yet the Supreme Court at the end of the day remanded it back to the Tribunal to say that, look, since the last moment that the Claimant had come forward with an application to say that he wants to file the Statement of Claim, look at it again, now that completely defeats the provisions of the Act itself, but there you have a Claimant who is in a sense adopting a guerrilla tactic to delay. The Respondent of course, files a Statement of Defence but can take forever in *ad hoc* arbitrations, particularly despite 29(a) and despite the six-month timeline. I only the other day, I came across a case where I think 14 months after the Tribunal's Constitution, after about 12 months of the order saying that your Statement of Defence with counterclaim, if any had to be filed, the Party files a counterclaim and yet the Tribunal allows it in. If these things are not prevented, then guerrilla tactics will always be the heyday for all Respondents or Parties which want to delay.

The third step is of course, post award or in fact I would say prior to the award, when the award itself is reserved, you have many occasions when the award is reserved and then there'll be a challenge to a Tribunal member or sometimes to reopen the case because some new fact allegedly has come up, which entitles the Party to make some new submissions etc. Every stage of the arbitration therefore, can be thwarted by guerrilla tactics. How do you control that? Does the institutional rule the fact that there's an institution actually help to some extent? Yes, because most institutions at least the ICC, the CSS, the LCIA, etc. keep a like a tight watch on the timelines and what is happening in a case. They monitor and make sure and do write to the Tribunal separately if they find that the Tribunal is not acting proactively enough, there is some control, but ultimately, in my view and the experience that I've had, the real test is the Tribunal's own strength. The conviction that they are not treating a Party unfairly by saying rejecting the right of filing a, you know, a Statement of Defence or taking such procedural steps which are precipitative but meets what is required in the circumstances.

The next step in an arbitration where you will find a lot of guerrilla tactics being adopted is the discovery stage. You'll find Parties will dump thousands and thousands of documents, maybe 1 or 2 documents in all of that is relevant to the case, hope that the other side will not, in trying to decipher through all of these documents, come across that important or relevant document, but yet it is not a case of non-disclosure.

Another tactic which I have found very often being deployed is: Parties don't file the core documents, the main documents in support of the case at the time of the SoC or SoD and at the evidence stage suddenly you will have 10,000 pages of documents being filed. And then you have a very short time to prepare for, you know, for rebuttal statements or cross-examinations and Tribunals somehow don't get it. You may complain, but they always allow the documents in because they think natural justice, especially in the Indian procedure where you think that the court will think why was the document not allowed? It could have been allowed? And Tribunals, I think, just fear that whole concept that a court might set aside the award only because of due process or denial of natural justice because some document filed late was not allowed to come. That's the second stage.

And of course, as I said, another problem that in Indian arbitrations in particular, and I think it doesn't happen as much in institutional arbitrations even seated in India, is adjournments. Any excuse, any frivolous applications will come up to adjourn proceedings on the last day. We have in fact a very, very live case some of us here up in that matter. The hearing is tomorrow. There's an interim award which has been sought for. The pleadings are complete. Yesterday we get a letter that the Counsel for the Respondent is not available and the Tribunal of course was very, very upset, did pass a sort of a very critical order but yet ultimately, said that we'll hold a procedural hearing to fix the new dates. So, they've got away with what they want, but this is typical in *ad hoc* arbitration, I think something with Mr. Jethmalani with his sort of so-called drifting into arbitration has definitely encountered by now. And you can take it from me because I've been in arbitration with him. He's not a drifter into arbitration at all.

That takes me to the connected and second question. Does the institutional framework better equip a Tribunal to deal with guerrilla tactics, or does it happen that the institution's own machinery becomes a tool to derail proceedings? As I said earlier, yes, I think institutional frameworks do help in controlling guerrilla tactics but not beyond a point. I doubt if the institutional rules itself become a tool in derailing proceedings. It is more as to how adept Counsel on either side is to be able to effectively derail the proceedings and how more adept the Tribunal is to thwart that guerrilla tactics. Actually. I mean, I must say that there are cases where I've been as Counsel where you find this guerrilla tactic going on and there are cases where I've been a Tribunal member and you see that there are, you know, guerrilla tactics which at least to the best of my ability if I'm the chair or a sole Arbitrator, I definitely don't allow it to happen. But yet I'm very mindful that you cannot deny a right, which is a genuine right to a Party.

With that comes the only last question that one has to address the question of what should be done, is it *ad hoc* or is it institutional, which is the better way forward for guerrilla tactics to

be prevented? And in my experience, it is neutral. It is entirely the job of the Tribunal to control. The Tribunal must have the confidence in its... in itself must have confidence that and not really bother that if the court tomorrow is going to set it aside, so be it. But if you give a well-reasoned order as to why you think the Party should be denied that opportunity again and again, then the court will also and it's unlikely that the court will ultimately interfere with it. With that, thank you, Mr. Agarwal.

SHANTANU AGARWAL: Thank you, sir. Thank you so much that was insightful in fact, I must say I agree with you that the Tribunal has the real power to control guerrilla tactics from personal experience, we are right now in an arbitration where the Tribunal was constituted about 14 months ago and the pleadings are not yet over, Section 29 has been given a complete go by in the name of principle natural justice be that as it may, we are running out of time and I'll request for ten additional time from the organizers and instead of doing a cross panel, I would request for any closing remarks starting with Olga, a one minute closing remark and then I will request the audience to put some questions to the panel.

OLGA TSVETKOVA: So first of all, thank you very much. That was very insightful and it was... it's my first time in New Delhi and I'm very happy that I had the chance to hear your views on the topic. So overall, I think we came to the moment where we perhaps would all agree that it is the Tribunal who is the master of the proceedings and we can't expect the Parties, the Counsel, the Parties or even the arbitral institute to do that role because Parties have different interests obviously, and this is only for the Tribunal to become itself a frame of the proceedings. And I think many international arbitral Tribunals, which I've seen perform this function very well. And I think there are a lot of procedural tools already at the international arbitration level, and we discuss it a lot in UNCITRAL working Group 3, it's all there. We can use a lot of, you know, the toolkit there, so it's only a question of how masterful normally we use it in practice. Thank you.

SHANTANU AGARWAL: Thank you so much, Olga. Dr. Hussain any closing comments?

DR. MAHMOOD HUSSAIN: Yes, I think one of the question people ask me always whether Indian lawyers choosing UAE as a seat is a guerrilla tactic to restrain the enforcement because Section 44(b) of Arbitration Act, India didn't notify that UAE is respiratory so basically they are asking this question. I think there is a case which is a genuine why they would come to Dubai because first of all, interim relief and worldwide freezing order that the DIFC gives. For example, let me give you example we had a case arbitration, pre-arbitration and we wanted to restrict the other joint venture Party from entering the plant, which is waste control, which is very dangerous for public health. We requested that 5:00 PM the DIFC registrar registry to give us hearing. 9:00 PM, they said, 11:00 at the morning you would have a hearing. 11:45 If

I'm not wrong is Tariq Khan, who's one of our colleague from India he received he were in front of the judge for 15-20 minutes, he convinced him, the judge said within 20 minutes, 30 minutes you will receive it. We received the order restraining that. This is one of the issues that Party comes to UAE. Another thing is because in UAE as well, whether the DIFC or mainland that you can continue your execution and execution, if you a challenge does not stop the execution and you finish appeal and concession challenge within 6 to 7 months. Now some of them genuine because the asset would be overseas or UAE. So, basically it's logical to do it but if all assets in India that's for me is a question mark. Why would he do that? Because probably he is thinking about the enforcement? So, to give a challenge to other Party to enforce because he believes strongly that he will lose the case, but there is a lot of genuine and there is sometimes when the asset is not overseas, not it's all allocated located in India, that raise for me a question mark.

SHANTANU AGARWAL: Thank you, Dr. Hussain. Mr. Jethmalani any closing remarks, sir?

MAHESH JETHMALANI: I'm going to make my closing remarks as short as my opening remarks were long. So, I'm going to just say this that it was a great pleasure being in this very, very distinguished crowd. I mean, I've known Ciccu for a very long time. It was a pleasure to meet our guests from Russia and from the Emirates, and I look forward to interacting with both of you and certainly trying to help you in smoothing out all the problems you may have across jurisdiction.

DR. MAHMOOD HUSSAIN: We need your help.

MAHESH JETHMALANI: We need to have.

DR. MAHMOOD HUSSAIN: And we need to take you to UAE so we can reduce the 75% with your recommendation of guerrilla tactics.

MAHESH JETHMALANI: I've been to the UAE very often, I have many friends but now I have a very good one too, so I look forward to it. Just one thing you know, I want to just point out that our Indian arbitral tribunals are actually I want, I want to commend them, they're really very good and I think three of us here have been in a matter. Of course, I was called in very late because they wanted a slanging match so they called me so.

SHANTANU AGARWAL: Mr. Mukhopadhaya, the last word is...?

CICCU MUKHOPADHAYA: You know, I think I echo what Mr. Mahesh has just said, but the problem is that there is always a bad apple and they spoil the whole, you know, framework and that's what we need to avoid somehow and I think some of the recommendations that

Mahesh said that we need to introduce statutorily would go a long way against that and I'm very, very, very focused on conflict issues and a database of appointments, I think that's one of the most important things in the Indian perspective, particularly apart from internationally as well. Thank you.

SHANTANU AGARWAL: Thank you to all our panellists a couple of questions from our audience over here. Can somebody help her with the mic, please?

ANANYA: Good evening. Hello, good evening. My name is Ananya. I have a question for Mr. Ciccu Mukhopadhyay. Sir, as institutions become more proactive with earlier case management and stronger administrative oversights, is there a risk that efficiency starts overriding Party autonomy?

SHANTANU AGARWAL: Thank you, Ananya.

CICCU MUKHOPADHAYA: No. I don't think there's any such risk if the balance can be achieved by the Tribunal. Again as I said, it's always up to the Tribunal. There is an important factor that the Tribunal must look at both sides equally, which is our Section 18 of the Act and all every institutional rule has that requirement and therefore if you balance the proceedings and you look at it equally from both sides, there's always a way to find that you will not let any of these machineries come in the way and actually derail proceedings.

SHANTANU AGARWAL: One last question?

HARSHIT: Good evening, my name is Harshit. So, I have a question arising from the various recommendations that were given by the panel today. It has been very rightly pointed out that delay, every delay is not guerrilla tactic and so while some of the recommendations have been to attack the delay which is cover the consequence through statutory remedies, there have also been... we've also spoken about attacking the tools or identifying the tools of guerrilla tactics. So, my question is can in a realistic scenario, can we actually attack the consequence and limit the time available in arbitration without risking jeopardy to the Party's interests? And if not, and if you have to attack the tools, can there be guidelines like IBA rules of evidence or other protocols that can be made available to the Arbitrators to conduct them better?

SHANTANU AGARWAL: Thank you. Sir, Dr. Hussain, please.

DR. MAHMOOD HUSSAIN: Yes, I think there is the tools are available for Arbitrator to do expedited but the problem is with I said the cost follow the event. So basically, the problem the cost comes on the client not on the lawyer I think we have to shift the rules and say okay, some cost has to be paid by the lawyers as well who delayed, who did this, all of those tactics. Now the institution is not doing enough, honestly speaking, let's say I wrote article in bench

and bar regarding conflict of interest within court of Arbitration which sit. There is no policy conflict of interest, there is no any way to know who decided on this matter relating to your challenge, we don't know. I don't know whether it's a sir, Mr. do you know, you don't know who's sitting, who's deciding and how they decided, we don't know about it. So, an institution has to start with them if we talk about transparency, we want the Arbitrator to be transparent, the institution has to start with themselves. As Mr. Jethmalani said, we have to implement more robust system, we have to check and balance check database collaboration between institution to check, how many times is appointed all of that has to be, AI to check where is the social relationship, check the internet, check if they have they have a relationship. So, all of those issue has to be, performance has to be major of the Arbitrator if I'm coming because he was saying yes, because I know X and X will say, oh, he's always in the cases. So, I'm appointing but he's good in construction, he is good in energy? No, because all of that institution has to see. I see institution has to take big jump and it will be leap but if they don't take, we will be in the same places. Why Mr. Jethmalani was honest and open because he's outside of the box and he's looking inside and he's entering inside and for sometimes and he's seeing, and he's saying all of those problem and he say there is a solution, simple solution guys. And we are in the problem it's our did, a spot that we cannot see it because we cannot see that spot and this is my onus opinion about the matter.

CICCU MUKHOPADHAYA: It's the first part of your question I should. I think, you know, timelines are a bit of an issue because to curtail too much of the timeline can actually affect the merits of a case. If you log off international arbitration with huge stakes and things like that, the documentation itself is a lot. So, there is an optimum timeline, but each, I think every Tribunal really knows what in the facts of that case is the timeline to maintain where Parties have their full say, Party autonomy is not lost but yet there is a reasonable or a quick enough, in that sense determination of the issue. And the most important thing is once the hearing is over, a Tribunal should not sit over the award for n number of days or n number of months in one case. I think it's a reported judgment of the Delhi High Court, eight years.

DR. MAHMOOD HUSSAIN: This is, this is shocking.

SHANTANU AGARWAL: The organizers are now breathing down my neck we have already overrun our time we have heard the delay is dressed up as patience armed with principles of natural justice. We have seen institutions that look stronger on paper than they feel in practice and if there's one thread running through everything said today, it is this: Nobody on this stage believes that there is one single villain or even a single side of the table to blame. Please join me in thanking our esteemed panellist Dr. Mahmood Hussain, Ms. Olga Tsvetkova, Mr. Mahesh Jethmalani and Mr. Ciccu Mukhopadhaya.

DR. MAHMOOD HUSSAIN: Thank you to the organizer for not employing guerrilla tactic against us genuine one.

SHANTANU AGARWAL: My thanks To MCIA in India for bringing this community together and for giving us a stage where people actually say what they think. Thank you everyone. Thank you. Alisha?

ALISHA SHARMA: Thank you to Mr. Shantanu and our panellist for that candid and insightful exchange. It has given us much to reflect on as we consider what truly stands in the way of arbitration living up to its promise of efficiency. I would now request our panel to kindly step ahead for a group picture. With this, as we bring Day-1 of India ADR Week 2026 Delhi Edition to a close, we would like to thank each of you most sincerely for being with us throughout the day for your presence, your engagement and the many thoughtful conversations that have taken place both on and off the stage. We look forward to welcoming you all tomorrow for Day-2 as we will begin our first session at 8 AM in the morning. Thank you so much everyone.

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