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## India Arbitration Week 2022

### Session: India poised to become 3rd largest construction dispute market - IS INDIA READY?

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#### SPEAKERS NAMES:

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3. **Kirindeep Singh** : Partner, Dentons
4. **Prateek Jain** : Partner, Masin
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7. **Vikas Sinha** : Head Legal, DFCC



## **Shreya Jain**

Good afternoon, everyone. Welcome to this very interesting session as part of India ADR Week 2022. Our esteemed panelists are going to be talking today, about India being poised to become the 3<sup>rd</sup> largest construction dispute market and whether India is ready to take over that mantle. We are really honoured to be joined today by some amazing speakers, and I will make quick introductions.

So, we have Anirudh Krishnan who is the Managing Partner of AK Law Chambers. We have Mr. Atul Sharma who is a Partner at Link Legal. We have Mr. Kirindeep Singh, who is a Partner at Dentons. We have Mr. Prateek Jain, who is a Partner at Masin. We have Mr. Shourav Lahiri, who is from Atkins Chambers, we have Ms. Shruti Khanijow, who's a Partner, MRP Advisory, and we have Mr. Vikas Sinha who's Head of Legal at DFCC.

Thank you so much everyone for joining us, and we're looking forward to what I'm sure will be a very, very interesting and knowledgeable session. Before I hand over to Shruti, I just wanted to let the audience know that the video and transcript of this session will be available on [adrweek.in](http://adrweek.in). So now over to you Shruti, to start the session. Thank you very much.

## **Shruti Khanijow**

Thank you, Shreya. Good afternoon, everyone. Thank you for joining us today. The topic of today's discussion is construction industry poised to be the 3<sup>rd</sup> largest industry in the country and along with the development in economy, the dispute resolution services also become very pivotal. And today what we're trying to look at is, is India ready to go ahead with support of dispute resolution process to this industry as such, and what are the differences and distinguishing factors that we can have from our esteemed panelists.

Just to give you an overview, Mr. Lahiri will be able to help us and explain to us and bring his expertise into the discussion, from various other jurisdictions, including the countries he has been based out of. Mr. Kirindeep Singh will bring in his expertise from Asia Pacific region, where he has been based out of and practiced for a very, very long time. Mr. Anirudh Krishnan and Mr. Sharma will bring in the Indian perspective. Mr. Prateek Jain will bring in the expert perspective and Mr. Sinha, who is the most important user of this industry and arbitration practices, including all the other area practices, will be able to give his perspective as to if he thinks India is ready, if all of us think India is ready, and how ready is it?

Taking the discussion forward, the first question that I will like to pose to all the panelists, in fact, is what do you think is the current situation? And let's do a reality check. Is India actually ready? And what is it that's really required for us as Indians, and the Indian dispute resolution sector, to improve upon? What is it that other jurisdictions can perhaps learn from us if at all? And that's the first question and perhaps, Mr. Singh, would you like to start this discussion?

### **Kirindeep Singh**

Yes, please. Can you just repeat the question?

### **Shruti Khanijow**

So, we were just doing a reality check. Is India actually ready to support the 3<sup>rd</sup> largest construction industry in the world? All the dispute resolution services. What is it in your perspective that India lacks, can improve upon and what is it that we can borrow? What has Singaporean experience been?

## **Kirindeep Singh**

First let me just say, I won't say don't think but India cannot replicate the SIAC. I'm not being arrogant by saying this. I'm being realistic. And the reason I say this is because India is very different. It's a very different country. It is a much larger country, a much, much larger population and you have a whole host of different cultures in India. So, it's not possible to replicate what the SIAC has done. But what I would say is, it is possible to replicate certain practices of the SIAC and I wouldn't just say certain practices of the SIAC, but also certain practices of other renowned arbitral institutions that work, and these practices which I will just elaborate on, what we call the basic foundations of a strong arbitral institution.

So first of all, I think what India needs to look at is, and that I will confess it's already in place. It's the arbitration rules. There needs to be a framework of rules that provide for the procedural framework for efficient and enforceable resolution of international disputes, construction disputes especially. So that I think is already in place, in terms of the several arbitral institutions that you've already set up. And they have a good frame of rules, I believe, in place.

Secondly, what India needs to work on is a panel of well renowned and diverse arbitrators. And if you're looking at the construction industry, we're talking about those who are well-versed in the construction industry. And you are not really talking about lawyers, we are talking about experts, you're talking about it. I mean, I can't under emphasize the word internet. So, if you want to truly become an arbitration center, that attracts international arbitrations, and especially international arbitrations in the construction dispute space, then your panel of arbitrators need to be quite varied, and you need to focus on international arbitrators who are well versed or experts in construction industry.

Thirdly, there needs to be transparent financial management. What do I mean by that? The fees of the arbitral institutions need to be very transparent. And also, let's be realistic here, we are in a competitive world, they need to be competitive, your arbitral fees need to be competitive, you

need to look at what SIAC is doing, look at what LCIA is doing, and maybe the ICC is doing. And you need to have transparency and also competitiveness in terms of your arbitral fees.

The fourth point, I think I only have five or six points. The fourth point is support from the, I wouldn't say from the Government, but from the legislative framework. And I believe India is working hard on that in terms of the amendments to the Arbitration and Conciliation Act, you need to have a legislative framework that recognises the finality of arbitral awards. It means arbitral awards that are obtained internationally to be easily enforced in India, and you need to have a judiciary that supports arbitration. India is on the right direction. But you need to have a judiciary that supports that supports arbitration.

Just two more points. In India, well, the Government organizations, the Government departments, the PSUs, they play a big role in the construction industry. And I don't know whether it's possible, but just to throw it out there. Institutional arbitration should be made mandatory in all government departments and PSUs as well. That's the points that I have. But what I would like to emphasize before I end, is, there should be a concerted effort.

Now, if you don't mind me saying this, at the moment, I'm seeing quite a few arbitral institutions in India that have been set up, I can understand because you have different states and all that. But what India may want to focus on if you want to replicate, is having maybe a mean arbitral institution, if that is possible, and maybe the Indian panelists can weigh in on that as something like the Indian International Arbitration Center, which is a new name.

I know there are diverse regions, there are diverse states and all that, that is why you have different arbitral institutions, but you can think of branch offices throughout India, of one arbitral institution, with a uniform practice, but of course, custom made for the different states and different cultures, and the different practices. So, that, in brief, is what I think India needs to do. If it's not, it can't replicate SIAC, but if it's going to replicate some of the practices that have made SIAC and other arbitral institutions what they are today.

## **Shruti Khanijow**

Okay. Thank you so much, Mr. Singh. I pass the mike on to Mr. Sharma. And I remember discussing with him earlier on this need of experts, specifically trained arbitrators, in terms of handling construction disputes. So, Mr. Sharma what are your views on India's readiness to handle the market?

## **Atul Sharma**

If you look at the Indian construction market, we have had a situation wherein we never had the talent, we never groomed the talent that was necessary to really work as expert arbitrators or even expert witnesses, that's why you see there is an inflow of a large number of organizations setting up businesses in India, in this kind of services. So, the fundamental of course, the quality of arbitrators, as Kirindeep has summed up most of the points, but quality of arbitrators is a very significant aspect of a successful regime.

Let us understand that, when you talk of a dispute, in any case, you talk of law, in one part, but at the same time you talk about the expertise in the sector. So that is the second part is something where we are lacking substantially in terms of having that talent, not only as expert witnesses, not only an expert, you know, who can manage the arbitrations, but also as arbitrators. Of course, I'll come to, in the latter part of the discussion, come to this whole debate about retired judges, and why judges should be so active in the regime.

But of course, one of the reasons, obviously, is that you really don't have a bench strength of experts who can act as arbitrators, even their counsels, for example, there is not a single or maybe not more than two or three senior counsels, whom you can say that they are good expert arbitrators. So that is one part of the problem. But then, of course, as Kirindeep said, the

fundamental problem is that, we have not gone we have been talking of the Delhi International Arbitration Center for 3-4 years.

And of course, when it comes to foreign arbitrators, we brought in Schedule 8, then we found you had stepped on your own foot, and then we tried to remove that from the statute book. And, yes, of course, if you don't have a bench strength, you need to have foreign arbitrators, that is one part. The second part is that you at least have an institution, we have been talking of the Center for three years now, maybe four years, you brought in the legislation, I think four or five years ago, but you have done nothing about it.

And so, and this is a center, which should not only be looking at arbitrations, because one model could be that you create a center which has divisions within itself, you can have an IT ITES division, you can have a construction infrastructure division, you can have commercial disputes. And there are a tremendous amount of expert bodies, NASSCOM in IT. Maybe similarly in construction, there is a whole lot of, bodies who are competent to, advise the center, and of course, commercial disputes there can be FICCI, agencies like that. That is one part.

Coming to the quality of arbitrators, it is only recently that we started realizing it. We were very fortunate, as a firm, to be involved last about two years ago, two and a half years, we have trained about 20-30 non judges as arbitrators in the construction space. RICS is now going to start, after this training, its services in India, I think they will be launched in November, December, we are evangelizing programs schedule. So that is one bit you know, which needs to be taken up on an institutional basis.

And so much so that we have done about 20 retired judges, we have trained with quasi legal and technical sessions being taken for them, to understand what the disputes are all about. So, these are only few points, which of course Kirindeep has covered virtually everything. So, I just want to emphasize on these two points.

## **Shruti Khanijow**

Alright Mr. Sharma. I just take the focus away from the law aspect of it, to more of a user aspect of it. Mr. Sinha, what are your comments on readiness of India and what Mr. Singh and Mr. Sharma threw light upon, in terms of the gaps here and what we can do better to be more ready?

## **Vikas Sinha**

So, thank you for inviting me to the seminar. A very good afternoon to everyone. In as far as the readiness is concerned, I would like to say yes that we are ready. And by readiness, I do mean the most important aspect of any activity, that is the mind. As far as our exposure to the common law system is concerned, and our legalism is concerned, I think we're fairly developed and as a democracy, we do possess the necessary intellectual capacity to be playing a leading role in international arbitration. Having said that, what I do think is perhaps, and as a user, I can certainly say that, is there is a lot of anecdotal data going around.

So, for instance, the Delhi International Arbitration Center was spoken off as missing. But there are other international arbitration centers which are in operation in the country, the Mumbai Centre is one. Now, there is no way that a user can decide as to which arbitration center is a more efficient one, is a more professional one, is one which is going to give a set of arbitrators which are more capable of addressing the dispute at hand. So, there is a need to provide clear, transparent data, and that comes for the arbitrators as well.

You have various portals giving information, as to how different international arbitrators have been performing, what is their background, what are the typical areas on which they arbitrate, whether they have in a particular arbitration, gone with a claimant or otherwise? And so it is for delay, all kinds of experts. So, I think there is a need to shift away from anecdotal information to information which is more readily usable by the user.



I would also like to add, that the whole legal field in general, and I'm sure this is true for the bureaucracy as well. It is a lot esoteric, and one has to really make a lot of effort in order to understand the nuts and bolts of the system. It has taken me a lot of effort to realize how an arbitration has to be really conducted. And for an exceptionally large organizations like mine having to struggle, I only were to fear what the others will be going through.

The other aspect is, of course, now that we are a growing economy and a growing sector, perhaps there is a need to develop the protocol. So, for instance, you have the Society for Construction Law protocol being implemented here. Of course, there are only two models available all over the world. But we are the 3<sup>rd</sup> largest construction industry. Perhaps there is a need to make a lot of legal systems native, and therefore more suitable to our ecosystem. I will just stop here, thank you.

### **Shruti Khanijow**

Thank you, Mr. Sinha. Just to add this point again, the 2019 amendments to the Arbitration Act, in fact, resonated and tried to do exactly what you've mentioned, to ensure that the users are not misled, one and have readily information available. There's an Arbitration Council of India, which is contemplated, and we're yet to see it coming to function. And on this point, I'd like Anirudh to please add his bit on what and how ready do you think India is?

### **Anirudh Krishnan**

I think we certainly are more ready than we were 4-5 years ago. I think so far as resolving construction disputes are concerned, we have come a fair way. But that said, the journey has just begun. I think we have many more steps to take. And in this regard, I think Mr. Sharma briefly mentioned about having more experts involved, expert witnesses. I think 5 years ago, you would never see a delay analyst being examined in any Indian arbitration. Today, that's not the case. You still have a delay analyst, in perhaps one in seven or one in eight arbitrations, but that has to

increase, because at the end of the day, when you look at complicated construction disputes, you will have to establish which are the critical delays for which you need to lead evidence. It can't be a rough and ready formula which the arbitrator adopts.

Now in this regard, in order to ensure that a proper and accurate delay analysis is possible, we also need to improve our record keeping. Now when you do an Indian domestic construction arbitration as against an international arbitration for an international project, where the record keeping is far better, you would usually see that only one or two methodologies are possible in India to do a delay analysis based on the records that are maintained during the project, and usually this is the IAP method. Maybe Pratik can come in on it, at a later point of time. And this is, in some cases inadequate. Therefore, if you require delay analysts and you require experts, you need proper data to be maintained based on which the delay analysts can prepare their analysis. This is coupled with the issue of handling costs, because usually when you bring in experts, the cost goes up.

Perhaps we also need a regime that encourages third party funding. While third party funding is today recognized, practically we don't see too many domestic arbitrations, where there is 3<sup>rd</sup> party funding. A practical problem that I have seen, when I've interacted with a few funders is that, a lot of the Indian companies tend to have a lot of debt. And they look at that as a huge insolvency risk, which is a disincentive to a lot of the funders. So, perhaps, we need to have some kind of regulation regarding 3<sup>rd</sup> party funding that would incentivize more 3<sup>rd</sup> party funding in matters. Thirdly, I think Kirindeep mentioned this briefly, in many Indian arbitrations, you have a PSU on one side. Now, if that is the case, and about 70 to 80% of the arbitrations, I would think that the PSU is the respondent.

Some PSUs have modernized their approach, but some still continue to engage lawyers who are not really specialists, and they look into contract management at a much later stage, once the dispute has arisen. By which time it's too late. There are a few certainly that have progressed quite a bit in the last few years. But there are still a few organizations, where there is scope of

improvement. And when you look at PSU disputes, you also have a problem where a person sitting at the head of the PSU, cannot take a decision to allow a claim of the contractor, even if the claim is a legitimate claim, simply because tomorrow there will be a CVC inquiry, as to why that person took that decision.

So, we could also look at a regime where, you have a list of identified experts and identified mediators, who can look into the legitimacy of claims of the contractors and sign off on those claims. And if a payment is made by a PSU, pursuant to such a sign off by somebody from the committee, there should be no CVC inquiry. If we can look at a regime of this kind, a lot of disputes can be resolved, prior to the arbitration stage. In a number of cases, you have a 20 crore claim, it starts off as a 20 crore claim, but as you start the process and it goes to arbitration, the 20 crore claim becomes a 500 crore claim. If the 20 crores is paid on day one, a PSU may be able to avoid the 500 crore claim at a later point. So, these are a few points. There are, of course, a number of other issues, but I think I'll leave it there for the moment. Thank you.

### **Shruti Khanijow**

Thank you, Anirudh. I'll pass on the question to Mr. Lahiri. What is your experience been handling Indian disputes specifically under Indian law or even under English law? How do you see India's readiness currently, and what is still required for us to do?

### **Shourav Lahiri**

Thank you. So, I think all the panelists so far have covered many of the important areas. I mean India is going to be a very large construction market. By default, it's going to have a very large construction disputes market. It's just the nature of the beast. My perspective has been primarily on cases where there has been at least one international party involved. International contractors who are used to do constructing projects all over the world, whether in Asia and the Middle East, etc. are used to a certain manner in which construction disputes are arbitrated. Anirudh spoke

about it, Mr. Sharma spoke about it. Having expertise from the analysts, quantum experts, sometimes they take for granted. So that is one area. I think India needs to look at beefing up to provide that sort of support to the legal team.

In terms of the success of other jurisdictions, if you look at Singapore, if you look at Hong Kong, if you look at London, all three of these have fairly specialized construction bars. I won't get into the issue of arbitrators, because that's quite commonly talked about, I won't add anything to that. But having a specialist construction bar, which has lawyers, who are doing construction disputes as a predominant part of their practice, means a number of matters can be dealt with in shorthand. So, as people who are specialists in industry, there is a certain language jargon that develops, a certain way of communicating with the tribunal, that can convey very complex concepts of the differences between interpretations in a very short, succinct manner.

Construction specialists in these jurisdictions and in Dubai, we see the same thing, are used to these concepts, are used to doing construction cases as a predominant part of their practice. So, I think there is a great opportunity in the Indian legal system, for a specialism to be developed in construction. I think that's going to up the levels of performance, of satisfaction for clients like Mr. Sinha, and for other clients, of the support they get. I think my experience of working with Indian lawyers, sometimes it's co-counsel, sometimes they're on the other side, is that they're very bright. So, the quality is there. Having seen arbitrators who are former judges, having seen matters go to the courts, for setting aside for instance, I've seen the quality of the judges is second to none.

So, the raw material is there in India, we just need to focus a little bit, I think on certain specialized practitioners, involvement of experts. I think Anirudh also pointed about record keeping, all of this comes with a greater awareness of parties, of clients and advisors, to what's needed to win a construction arbitration and to win, I don't mean to win when you don't have merits, to win a meritorious case, because the biggest tragedy is that a client may have a very meritorious case. But unfortunately, because of the lack of certain of the support items, they don't get to succeed.

So those I think, are really the key points that I would add to the what the others have said with which I completely agree.

### **Shruti Khanijow**

Thank you. I'll now move on to Mr. Jain, and request him to put on his views specifically experts role now has heightened, as compared to ever and given the fact that India's respondent is more or less the Government companies, how do you see your role evolving? And how has it been so far?

### **Prateek Jain**

So, thank you Shruti, for asking that. Actually, it's a very important question to ask in the Indian scenario, because I believe the use of expert witness in the construction arbitration across the globe, is already a well-established and widespread practice. However, the same in India is one of the least understood topics, as Mr. Krishnan and Mr. Lahiri also highlighted the importance of the delay expert and quantum expert in others. So, this Indian scenario is literally lacking much of the awareness, I should say.

So, basically, the use of expert witnesses, can be very beneficial addition to the evidences produced before the tribunal, especially from the point of view that the evidence, opinion and guidance of an expert witness is considered to be very helpful, to project or present the party's case before the tribunal in a way that will assist the tribunal to reach the conclusions which are associated with specifically with the complex and technical issues. Now, why it is an important thing for the construction arbitration because construction arbitration, almost 100% cases tend to be technical in nature. Therefore, it is very frequently desirable, if not essential, I should highlight, to appoint one or many expert witnesses to provide the independent opinion.

Now, for the last many decades, the international courts and counsels have already recognized the importance, but in India, as I said, this importance is still lacking. As I think Mr. Krishnan just mentioned, some numbers. I'm not sure whether those numbers are correct or close, but Mr. Krishnan said that out of 10, maybe 7 construction arbitration are still not using the experts. Now, if that is the case, definitely considering the technical nature of the construction arbitration, we believe that there's a major gap of the pleading being in that format, which tribunal may be very well assisted to give its conclusions, can be closed by using expert witnesses. Now, since change is inevitable, in recent times Indian arbitration is seeing a multi-fold growth of recognizing the expert witnesses in this case, however, there is still far to go.

Now, if we, to answer your second question, that what are the various capacities and the roles that an expert can play or generally assist the parties, tribunals as well as the overall alternative dispute resolution process. The major fields are the forensic delay analysis, I believe Mr. Krishnan and Mr. Lahiri both talked about this, a few minutes back that forensic delay analysis is something, which really requires in almost 100 person cases of time, if a construction dispute is there, the most primary dispute will be the dispute on time, that is to say how much of extension of time the contractor, which is usually generally the claimant is entitled to. Based on that assessment, then the further assessment of the actual losses that he may have incurred will come to picture.

Therefore, the very primary dispute and delay analysis, needs to be done, that needs to be done through using various forensic tools available and there a forensic delay analysis expert is very much required, in almost every construction dispute. The second field is basically the quantum analysis or the claim quantification, which comes very next to delay analysis. Then the third and very close field is on the variation analysis, that is to mean the change of the scope analysis or disputed change orders, because changes have tendency to affect both time as well as cost. So, in order to understand the effect of those changes, which happened in the scope of work of the contractor, it is very important to analyze and this again can go very technical and maybe out of the purview or expertise of the tribunal or the lawyers, and hence an expert may be required for it,

There are other technical engineering matters also, which require very frequently the expert witness services, some can be linked to faulty design and the specifications in the contract documents or changes in the geotechnical conditions as mentioned in the tender or the contract documents. Certain structural and metallurgical defects, that may have led to some losses to the contractors or employers, hydrological studies and other technical feasibility studies, on which the contract conditions were based, basis on which the contractor was supposed to work. Now, again, the most important thing I would like to end my point here with the last statement, that the evidence, opinion and guidance of an expert witness, are very much important, from the point of view that they assist the parties to present their case and that assists the tribunal to reach the conclusion in a easier way.

So, with that, I think I will be closing, thank you.

### **Shruti Khanijow**

Thank you, Mr. Jain. So generally, in arbitrations, the problems that we hear and, and these are the grievances of Indian arbitration and dispute resolution process, that even though you get an award in specific time, after 2015 amendment to Arbitration Act, the enforcement of these awards is still a challenge. Mr. Sharma, my next question will be to you. What, according to you, are these enforcement issues specifically? Once the Arbitration Act finishes and delivers an award in time, the Civil Procedure Code takes over, and then the enforcement timelines of that follow, along with the commercial courts act at certain High Courts this is consistent, certain it's not. So what is it that India can improve on for improving its readiness?

### **Atul Sharma**

So, it's a very good question, because at the end of the day, what the law recognizes is that an award is akin to a decree. Now for the purpose of execution, it has to go through the rigmarole of

the Civil Procedure Code Order 21. But having said that, frankly, I will deal with it in two parts. First is after the amendment, there is this very good development across the court system, wherein courts have, of course, the automatic supervision being out of the window is one part. But the second is the courts, at least the major courts have become very proactive, in terms of ensuring that parties are put to terms, so far as the decretal or the awarded amounts are concerned.

But a very critical aspect, which is not being given due attention is asset tracing. And the process, well I don't know if I have an answer, because any amendment to an Indian law would necessarily entail a whole lot of, the system getting to it, because the commercial court system. Because if you look at the commercial courts today, at the end of the day, the Commercial Courts Act came into being, there were certain special provisions, but then it was the same set of courts which were dealing with it. So, if that is the situation, then no amendment is going to work. So, you need to have some specialized tribunal, if you really want to bring in a special regime for ensuring that the arbitral awards are enforced in a timely manner.

Then you need to have a special set of courts, but I don't know with our experience of IPC, etc., any new set of courts is going to resolve the problem. But I think, the second part, which I said earlier, was an asset tracing mechanism and regime. Because at the end of the day, any jurisdiction where you need to have an enforcement of a judgment or an award, it's not only the asset, it's also the lifting of the corporate veil, because most of the entities today are corporates. And that tracer kind of a jurisdiction, there need to be some amendments in terms of, you know, specific laws in the CPC, as to whether the court should have the power to go behind a particular transaction, in relation to the asset which are traced.

And of course, we did do away with the Benami Act, but still, there is a lot of camouflaging which goes on, and people try to hide all the research behind structures. So those are the areas where we need to give some attention. But frankly, I don't have a ready-made answer to whether bypassing the CPC is going to do the trick? I think it has to be, because why I say so is because



if you look at the entire regime, whether it's an upholding of awards, whether its enforcement, it's the Supreme Court which has taken the lead, in terms of laying down the jurisprudence, and I think that's the only thing which will work, because Article 142 is a very big tool that we have. And of course, you can have an argument that in a given case, that is an exercise under 142 and special jurisdiction. But having said that, that becomes the guiding principle behind this whole enforcement regime.

### **Shruti Khanijow**

Thank you, Mr. Sharma. Anirudh, the next question that stems out of this discussion is the inconsistency between different High Courts approaches in terms of enforcement, how they've interpreted different parts of a construction contract when it comes to play. So, do you think there is a need for consistency one? And second, how can that consistency be achieved? What is the practical impact on a user like Mr. Sinha, to choose a specific seat, even within India for, for conducting the arbitration and the jurisdiction?

### **Anirudh Krishnan**

Inconsistency, you would find in every area, but I think it is quite marked when it comes to construction. I can think of at least 2-3 crucial issues where High Courts have varied. The first is, how do you deal with parallel delays? Do you go for the Malmaison approach, or do you go for the apportionment approach? Delhi High Court follows the Malmaison approach. Bombay High Court follows the apportionment approach, and these two are drastically different.

Secondly, how do you deal with exclusion clauses, one common clause that you would find in a number of PSU contracts, is that even if the employer is responsible for the delay, the contractor would not be entitled to costs, they would only be entitled to a time extension. Now, these clauses, which are commonly known as exclusion clauses, have been held to be enforceable by the Supreme Court in 6 or 7 judgments. There are 3 or 4 other judgments of the Supreme Court,

where exceptions have been carved out. And these judgments do not refer to the earlier set of 6 or 7 judgments, that hold it to be enforceable. Now, some High Courts have considered all the judgments, there is a judgment of the Delhi High Court, and they harmonize these various issues.

And so, if you go to Delhi, there are Delhi high court judgments that consider everything, and then say that there is an exception to the exclusion-clause-being-enforceable rule. Therefore, if you are in Delhi, as an employer, you need to be aware of those exceptions. But if you go to a number of other places, you go to Kerala, you go to Karnataka, you will not find any High Court judgment that harmonizes this and tribunals by and large, tend to follow the first 6 or 7 set of judgments, they try their best to sort of fall within those.

So, as an employer, you can take benefit of such clauses better, if you are in one of those other seats within India. Obviously, this is not an ideal approach, because, you know, all of these are only Indian law, and Indian law has to be the same across India. So, if there is a requirement for consistency, that will come only if the Supreme Court considers all these issues and lays down the law. Well, another out of the box idea that I have, but of course, it requires a lot more tinkering and fine tuning is perhaps look at a National Construction Court.

We need necessary amendments, though, and we need the right kind of expertise amongst, the Judges who sit in these courts, perhaps a challenge to an arbitral award, which pertains to construction could be before the National Construction Court, where it is one court that decides the issue, and then you would be able to ensure consistency. Of course this requires a lot more thinking through, because it will have other ramifications, that require a lot of amendments. But that's perhaps one way of obtaining consistency, because I don't see each of these issues going to the Supreme Court on a consistent basis.

## **Shruti Khanijow**

Thank you, Anirudh. Shourav, I want to have your perspective on this. What do you think India can do? And comparing to the jurisdictions in London and Singapore, Mr. Singh, that this consistency can be achieved, one and what is it that other prominent jurisdictions have done to bring and streamline the process of enforcement and selection of seat by parties?

## **Shourav Lahiri**

It's interesting that most of the discussions that I've been involved in in India, always veer towards the issue of enforcement and activity of the courts. Now, internationally, setting aside or resisting enforcement in the courts, is not the default position. The efforts are always made to get the answer right, when you are in the arbitration tribunal. Because if you look at Singapore, if you look at London, for instance, the likelihood of you being able to overturn an award are very slim. And that's why I've said to many people, the arbitrator is more powerful than a Judge.

So instead of worrying about what might happen, if it gets into the court, I feel that going forward, we should try and get the right answer in the arbitration, through the support and involvement of everybody who's been involved in the construction project, the experts, the lawyers, and the arbitrators, so that the answer that comes out, even though of course, there will be a party which will be on the losing end, as that's the case in most arbitrations, at least that party doesn't feel hard done by, enough to want to challenge it from the courts.

Because if you're really talking about challenging it in the courts, I can see the kind of problems that Anirudh talks about in a federal structure. India is a completely federal structure, with each High Court having jurisdiction over certain of the matters that come within its seat. Can't really compare it to a place like London or Singapore, where there is really a unitary court system. And there is, therefore, consistency in decision making through the courts, which in a way makes it

very attractive for parties to arbitrate there, because you're sort of sure that when it does go to the courts, it will be really on very exceptional grounds that an award will not be upheld.

The difficulty in India, I think, sometimes is more in even getting a date to be heard. Not in the quality of the decision making in the courts, it's the delays and getting the setting aside application heard, that is I think quite frustrating for people. So, we can't remedy that in this tribunal or even in a broader committee in this sort of seminar. But what we can do is, make efforts to improve our presentation of the case, helping the arbitrators come to the right sort of decision. The only similar sort of thing I've seen in what's happening in India is, in a little bit of a federal structure in the UAE, for instance, where I do have some experience, where people tend to prefer to seat their arbitrations, even if they are governed under UAE law, seat the arbitrations in Dubai, rather than in Abu Dhabi, or some of the other Emirates, because there is a greater sophistication in the practitioners and in the courts in Dubai, if a matter were to be sent to it.

So that's market forces really, market forces tend to dictate this and surely, that's what's going to happen even in Indian law, Indian seat arbitrations, there will be a court or a city with a High Court that will naturally gravitate towards being a preferred choice. And that will come from the consistency of decision making in those courts, adherence to what's generally best practice or recognized principles in international tribunals, international cases. The fact that a higher court may differ from a lower court, is not necessarily an indication that there is any issue with the system. The Supreme Court in Wales often disagrees with the Court of England. In fact, most of the recent cases that we see, Triple Point, Kabab-Ji, all these cases, which are major cases in England, they have a difference of opinion as the matter goes through the court.

So, a divergence in views of courts is not necessarily a bad thing. But because that's part of a unitary court system, the effects are felt less widely compared to that here. But we have to work with what we have, Indian court systems, or Anirudh's proposal of a single court, I think, is a laudable proposition, but probably very difficult to implement. And therefore, we work with the models we have, rather than wish for better models. And I think there's a lot that can be done,

with the current system, that is to really improve the quality of presentation and decision making in construction disputes in India.

### **Shruti Khanijow**

Thank you so much. And because we are running out of time, I'm going to take questions from the participants to the session. One of the questions is for Mr. Sinha, you're handling one of the biggest railway projects in the country. What are your views on the usage of experts in domestic arbitrations? Specifically, large scale arbitrations which require a lot of paperwork?

### **Vikas Sinha**

The idea of the expert is to demystify, and it has to be demystified to the tribunal. I certainly can say for myself, that when it comes to demystifying, I perhaps end up more complicated, in my explanation to whoever I have to, to all the stakeholders. So, the fact that an expert is required, does not really often offer the expertise required for the dispute resolution. So as an institution, I totally support the idea, that any large arbitration, must have experts and must have all the relevant experts. And I also have a request to all experts, that you must offer your expertise in a language which is understandable.

Unfortunately, all of us, or at least I do, seem to be overwhelmed by the urge to prove that I'm an expert. And unfortunately, that is a big restriction, in as far as the user utilization is concerned. Another problem is that you don't have enough experts and therefore there is the need on part of a lot of institutions, maybe arbitration institutions, maybe institutions like NICMAR or any engineering institution, which offers courses on arbitration and construction arbitration in particular, to generate these experts, so that genuine experts are available for resolution of the disputes. There are far too many people pretending to be experts, and that is to the detriment of the people, and perhaps also to the arbitration tribunal. So. it's a big shout out for expert services. And there is also a caution in terms of quality that is available.

**Shruti Khanijow**

Thank you. I think another question that follows from Mr. Sinha's comment, will having trained arbitrators or experts as arbitrators reduce the reliance on experts as such during the process? And will that not result in an economical arbitration? That's one of the questions and I'll leave it open for the panelists to respond.

**Prateek Jain**

So, I would like to take lead on that and maybe someone else can add. So, basically, the roles and responsibilities of an expert and the tribunal is very different. And to answer this question, basically, for example, a matter is related to an assessment of extension of time. Then, of course, given the large nature, large magnitude of the construction project and the enormous amounts of documents and the detailed analysis that is required, it will not be possible for an arbitration tribunal, to execute such an analysis on his own.

Rather, if the both the parties hire relevant expert, as Mr. Sinha correctly mentioned expert need to know what he is required to say. So basically, then, if both parties hires relevant experts, and they can contribute to present their analysis in a way which tribunal can understand, then it will make it easy for tribunal but again, to answer this question, I don't think it will be a proper to have the tribunal doing an analysis of this kind.

**Shruti Khanijow**

Mr. Jain, I think the question is slightly different and your views are absolutely correct. Experts' role and arbitrators role is absolutely different. But the idea of the question, which I think is, to say that experts bring in a lot of value, that's correct. But if you have arbitrators who are trained in

construction arbitration or the issues, will that not bring the cost of arbitrations down because the reliance on experts would reduce? I'll pass it back to Mr. Krishnan.

**Anirudh Krishnan**

I feel that while it will certainly help to have experts on the tribunal. Of course, experts who are sitting as arbitrators cannot replace experts who are expert witnesses, but they will know which of the sides expert's testimony is actually reliable or not. I actually think, and we did a complicated construction matter before a mixed tribunal, where there was one technical expert, there was one judicial member, and there was one financial expert, who could really help out when it came to quantum issues. And I think this kind of a tribunal is ideal for construction disputes, because you need a little bit of all three areas.

**Prateek Jain**

So, I second Mr. Krishnan on that actually, this is correct.

**Kirindeep Singh**

If I could just add to that. I think the direct answer is you can't train, you can't have an institute to train arbitrators. Arbitrators take on their roles later on in their careers. It goes back to what I said at the start. India needs to have a panel of international arbitrators that are specialized in construction. This could be ex-Judges, this could be lawyers who are specialized in construction, it could be experts who have certain years of experience, in a particular area delay or quantum or whatever it is. So, the solution is not training the arbitrators, but the solution is having available to the users of the arbitral institutions in India, this panel or this range of arbitrators that have this construction expertise. So, you know, training arbitrators in that way I don't think, that is a solution.

## **Shruti Khanijow**

Another question that I think the audience has written for us, is the discussion on 3<sup>rd</sup> party funding, there is a lot of funding for construction disputes that picked up internationally. But when we look at India, the domestic market does not seem to have these funding available specifically for large construction disputes. What do you think is the roadblock?

And how can we go and improve this and attract more investment into construction industry, specifically, because it was mentioned, it's the most prone to insolvency because of debts not being paid or disputes not been resolved in time. Mr. Lahiri, what is your view on this?

## **Shourav Lahiri**

3<sup>rd</sup> party funding in construction arbitrations internationally, makes up a relatively small proportion. And my experience is, the reason really is, it's very difficult for an external funder to make an assessment of the likelihood of their recovery in a construction dispute at an early stage. My sense is 3<sup>rd</sup> party funders tend to go for the more sure-shot cases, where the issues are maybe few, but the outcome of the issues are significant. So, we see this quite a lot in investor state arbitration where an investor cries foul, and if he's right, then the recovery for him is significant.

And 3<sup>rd</sup> party funders usually work on the basis that they will take a percentage of the recovery. I don't anticipate in India or internationally, 3<sup>rd</sup> party funding in construction disputes, of the nature that people on this panel and the audience are used to, really taking off. It's just not a creature that lends itself to third party funding. In terms of enforcement, you would really be dealing with 3<sup>rd</sup> party funding in terms of financing the cost of litigation. If you wanted to have protection from insolvency of the losing party and get recovery despite that, 3<sup>rd</sup> party funding is not the answer.

For that you would either need a parent company guarantee or some sort of financial bond, or better due diligence when entering into the contract. Those are not things that can be solved.



Those are commercial matters, not arbitration related matters. Within India, I'm not as well qualified as others, Anirudh and Mr. Sharma, Mr. Sinha to talk about how much it's catching on or it's going to take off. But my experience, looking at this industry over the last 5 to 7 years, is that I would not expect 3<sup>rd</sup> party funding to play a big role, in the usual construction dispute. A single-issue construction dispute, possibly an interpretation of a legal point that has millions of dollars riding on it, possibly, but otherwise, no.

### **Shruti Khanijow**

Thank you, Mr. Lahiri. With this, I think we've come to the end of our allocated session. I'd like to thank all the panelists and invite MCIA Mumbai to take over.

### **Neeti Sachdeva**

Thank you Shruti, and thank you to all the panelists for joining and to Masin, for hosting this session. I'm hoping that you will be able to join us for the other sessions as well. Today is just the first day of the ADR Week. We have some very interesting sessions lined up for the rest of the Week as well. And as Shreya had mentioned in the beginning, at the end of the ADR Week, we'll have all the videos and the transcripts of all the sessions on the [adrweek.in](http://adrweek.in) website. So, for all of you who missed it or joined in late, please feel free to visit the website. Thank you very much.