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Session: International Arbitration and Mediation: Complementary Systems to Preserve Business Relationships and Effectively Resolve Disputes

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SPEAKERS NAMES:

1. **Gregory Vijayendran,** : SC, Partner, Rajah & Tann
2. **Ila Kapoor,** : Partner, Shardul Amarchand Mangaldas
3. **Vivekananda Neelakantan** : Partner, Allen & Gledhill, (Moderator)
4. **Rashi Dhir,** : Senior Partner, DMD Advocates
5. **Sapna Jhangiani KC,** : Advocate, Arbitrator & Mediator

Stuti Gadodia

Okay. I think we are ready to start. So, a very good afternoon, everyone. My name is Stuti Gadodia. I am a Principal Associate at Freshfields Bruckhaus Deringer in Frankfurt, and a member of the steering committee of the Young MCIA. I'm very pleased to welcome you to a panel discussion at the India ADR week, which is jointly presented by the Singapore International Arbitration Centre and the Singapore International Mediation Centre. The topic for today's discussion is International Arbitration and Mediation, Complementary Systems to Preserve Business Relationships, and Effectively Resolve Disputes. This is a topic I personally am very interested in.

And I'm very, very much looking forward to this discussion. We have put together a stellar panel with leading practitioners from India and Singapore. I will now briefly introduce our moderator for the discussion. So, we have Vivek Neelakantan, our Partner at Allen & Gledhill in Singapore, who's going to be moderating this discussion. Vivek acts as Counsel as well as an Arbitrator in International Arbitration proceedings, and previously, Vivek was Deputy Registrar and the Head of South Asia at the SIAC. Vivek has also practiced at the Supreme Court of India. I will now hand over to Vivek and I'm looking forward to a great discussion.

Vivekananda Neelakantan

Thank you very much, Stuti. And good afternoon and good evening. Welcome everyone to this joint session hosted by the SIAC and SIMC. With me today is a panel, as Stuti said of senior practitioners from India and Singapore. It's likely that you know of them already, and you can probably find their detailed profiles online. But just to introduce them very briefly. Firstly, we have with us Mr. Gregory Vijayendran, Senior Counsel, who's a Partner at Rajah & Tann LLP in Singapore. Gregory is the immediate past President of the Law Society of Singapore, having been the longest serving President of the Law Society of Singapore. He brings with him of course many decades of experience and expertise in Civil and Commercial litigation and Arbitration.

We also have with us today, Miss Sapna Jhangiani, Queen's Counsel, who's an accomplished Counsel, Arbitrator and Mediator. Sapna is with the Attorney-General's Chambers in Singapore and was previously a Partner at Clyde & Co. classes in Singapore, specializing in International Dispute Resolution. In 2020, Sapna earned the unique distinction of being the first female lawyer in Singapore to be appointed a Queen's Counsel. Next, we have Mr. Rashi Dhir, who is a Senior Partner at DMD Advocates in New Delhi, India. Rashi heads the firm's corporate practice group, and he brings to the table close to three decades of experience in corporate and Cross Border Transactions and International Taxation.

He is however no stranger to international disputes, and has been involved in numerous complex investigations, issues of corporate fraud and regulatory issues. Last but not the least, we have Miss Ila Kapoor, who's a Partner at Shardul Amarchand Mangaldas in New Delhi, India. Ila specializes in International Dispute Resolution and is particularly experienced with International Arbitration and Mediation. Before joining Shardul Amarchand Mangaldas, Ila worked for several years at an International Law firm in New York, and as an advocate at the Supreme Court of India. With that, let me turn to the topic at hand for our session today.

I'm sure none of you are strangers to the concepts of Arbitration and Mediation. However, over the decades, with the focus on international arbitration as an adjudicative alternative to court litigation, there was the fear that Mediation was somehow left by the sidelines as a means of Commercial Dispute Resolution. However, I think it's fair to say that there is a renewed interest in mediation as a complementary mechanism for Commercial Dispute Resolution. In July 2021, in a seminal address at the India-Singapore Mediation Summit, Chief Justice of Singapore, Justice Sundaresh Menon, identified three arcs of the revival of mediation as a Commercial Dispute Resolution mechanism, beginning in the early 1990s.

Chief Justice Menon in that address underscored the basis of the rekindled interest in mediation in Singapore as being premised on four fundamental factors. And I think those are important for us to look at while we get into this discussion. First, he identified the factor as being a check on the growing trend of litigiousness that was taking hold in society. Secondly, to provide a more economical and less adversarial way to resolve conflicts, and in this way to enhance access to justice. Third, to ease the judicial caseload. And fourth, to promote recourse to amicable and

harmonious means of conflict resolution, which was seen as being consistent with Singapore's culture and values.

Each of these factors hold equally true, I think, in our collective view, to the Indian context as well, and reflect the renewed interest in Commercial mediation in India as well, from about 1996. In recent years, I'll just say that our particular interest is the Singapore Convention on Mediation, which has sparked interest in mediation as a Commercial Dispute Resolution mechanism. All of us, many of us had the privilege of being witness to the signing of the Singapore Convention, by 54 countries, including that of India. The Convention has now been ratified by 10 countries globally, and efforts are continuing to ensure that the Convention is as successful as the New York Convention on the recognition and enforcement of international arbitration agreements and awards.

With that brief introduction, we have much to discuss with our panel today. And without further ado, let me invite them to share their thoughts and views on some of the issues and questions that arise in the context of the use of Arbitration and Mediation As Commercial Dispute Resolution mechanisms. Our approach to the panel today will be to broadly tackle issues from three different perspectives. One, to look at issues that arise from the end user's perspective. Secondly, to consider issues that arise and are relevant to an external counsel or a lawyer representing end users. And three, to consider issues that impact the neutrals involved in these processes, such as arbitrators or mediators, as the case may be.

Now dealing with the first bucket of sub-issues. Let me attempt to kick start the discussion by raising the somewhat simple sounding but fairly complicated question of how and when a party should select arbitration, mediation, or some other form of dispute resolution mechanism, either in a contract or otherwise, to resolve disputes in the commercial arena. And perhaps I can begin by asking Sapna to comment on that issue and share her thoughts.

Sapna Jhangiani

Thank you so much, Vivek. Can I just start by saying, what a pleasure it is to be here on this panel with my friends and colleagues. So, I'm going to start with some statistics. Some of you may have heard of the Singapore International Dispute Resolution Academy known as SIDRA. It's a think

tank for dispute resolution in Singapore and it's a very important part of the thriving ecosystem that we have here for dispute resolution. And for the past few years, they have been conducting a survey of both counsel and in-house clients on dispute resolution mechanisms. And so, I have with me the latest report, I don't know if you can see it, I highly recommend looking it up online. Tons of statistics there but let me just highlight a few to kick off this discussion.

So, SIDRA, in their survey, asked users what influences their choice of either Arbitration, Mediation or Litigation, and speed and impartiality were important factors across all forms of dispute resolution. Now, because of the topic of today's discussion, I was particularly interested in what factors influence the choice of some kind of mixed mode mechanism. So perhaps arbitration and mediation, or a dispute board with a more binding form of dispute resolution, or even a binding form of dispute resolution, together with an early non-binding evaluation method. And, interestingly, when you look at why users opted for a mixed mode or for just mediation, the overwhelming answer, the most important factor was the preservation of the business relationship.

And then users were surveyed as to how satisfied they felt after the Dispute Resolution mechanism. And for mixed mode mechanisms, 71% of them said that they were satisfied. The second tier of reasons for opting for mixed mode mechanisms included both speed and cost, which 41% of users said was important. So, my final statistic for you. For users who had used a mixed arbitration and mediation mechanism, how did that mechanism arise? In 71% of cases, it was through the contract. So, it was pre agreed. In 47% of cases, it was external counsel’s advice after a dispute arose, 24% it was in house counsel's advice and 24% it was an opponent’s request. So, people are talking about these mixed modes. But it's clear that one key factor is the preservation of the business relationship. But I think costs and speed are very important as well.

Vivekananda Neelakantan

Thanks, Sapna. In fact, the statistic I have here in my notes, seems to be consistent with that is the Queen Mary University Arbitration Survey in 2021, which also noted that about 59% of respondents preferred post COVID that they will select mixed mode Dispute Resolution mechanisms, as opposed to only arbitration or other forms of ADR. And I believe that number is almost twice as much from just five years ago. Ila, I want to get your thoughts and just following

from what Sapna said in terms of how you advise users and clients, I'm sure you get called upon to comment on either clauses that go into contracts, or by clients who are seeking your views once they are in dispute. What's your take on this in terms of what factors they should take into account as to whether they choose one of these mechanisms or a combination of them?

Ila Kapoor

Thanks, Vivek. So, after Sapna, she sent out that statistic, I tried to look for similar statistics in India, and I don't believe we have them. And the reason is that mediation really isn't as popular as it is in Singapore and some other parts of the world. We have a Mediation Bill of 2021 and once that comes into effect, we may see that change. But mediation is not alien to our Commercial Courts, as well. We do have the Commercial Courts Act in India, which mandates pre litigation mediation, whether it's something that is just done as a formality at this stage, that's yet to be seen and the statistics on that aren't clear. Now, in my own experience, like what Sapna said, preserving the business relationship is one of the most important reasons for parties to go into mediation as opposed to an adversarial process.

So, we have a party, which is in a long-term contract. For example, a Hotel Management Agreement, that's a place where they don't want to terminate the contract, but maybe just renegotiate it. That's a good way to use mediation, rather than an arbitration. And in India, particularly, we have commercial parties who may want to terminate this contract with a particular client, which is the Government of India, but they may have several other contracts, and they don't want to alienate the Government or get on a blacklist. So, the way to deal with that in that situation would be, to mediate that dispute as amicably as possible, rather than drag it through the courts or through an arbitration process.

Vivekananda Neelakantan

That's a big thumbs up for Mediation, I hear. Gregory, do you see situations, factors, where that doesn't hold true? Maybe when parties need to urgently seek, I don't know, interim relief, or some other situations where it may not be appropriate, or even in a contract for that matter, to even put in that nature of a clause.

Gregory Vijayendran

Yes. Thank you, Vivek. And just to add on to what my colleagues have also offered. Yes, I mean, really, it's horses for causes, and it's about trying to identify the appropriate dispute resolution modality for the specific dispute in question. It is true, as you have alluded to, that in cases involving interim relief, where you need to apply for injunctive relief, for example, you would not be able to achieve that goal in a mediation setting. And so, you will need to rely on arbitration or litigation, as the case may be, where it's more coercive and the courts are empowered to make the appropriate order that might just preserve the status quo, as opposed to the more consensual nature of mediation.

Dialing back also to Sapna's point about the SIDRA survey. In many ways, I think this acute focus on business relationship, certainly is a plus in terms of mediation, and in some settings, you're able to revive it, but it certainly settings when parties want a clean break, it's clear they want to go their separate ways, then it would be sort of reliance on arbitration, and the other piece relates to enforceability. We still have some way to go in terms of the Singapore Convention on Mediation that you touched on. But, certainly when it comes to arbitral awards, you do have well-defined processes, pursuant to treaty obligations that you can rely on.

Vivekananda Neelakantan

Thanks, Gregory. Rashi, just to bring you in. And particularly given the fact that you're looking at this quite often from a transactional perspective. The way I look at it, many contracts, at the end of the day, kind of reflect templates that somebody is kind of working off. But nevertheless, it seems to be that multi-tier clauses if I may call them that, just referring to mixed mode clauses if that's the term that has been used. What's your experience with it? Why have they become so popular? Was that always the case? Is that a reflection of temporization of contracts?

Rashi Dhir

Yeah, well, thank you. Thank you, Vivek. Well, my experience is with respect to usually arbitration clauses, although given the importance of them, which it has certainly gained over the years internationally as well in India, you'll find with transactional lawyers, there is a fatigue by the end

of the document, and there is a tendency to just pick up an arbitration clause from a template, because there is an element of a lot of key commercial negotiations that are going on that people don't tend to focus on arbitration clauses.

Off late, I think in India, particularly just adding to what Ila said that more than just preserving the relationship, what is coming out is a certain frustration with the burdening of the courts and the prolonged process that it takes. A lot of justice delayed is in some ways, it's something that costs parties particularly not just a relationship, but there's a cost to the opportunity and cost of capital that beeps in. So, we in most situations, evaluate the multi-tiered dispute resolution clauses. And mediation is something that certainly is becoming more acceptable. It wasn't as prominent as earlier, but now we find parties are more interested in finding alternative ways before they get into Arbitrations and Litigation.

In particular, we find that in crafting all of these clauses, one of the things that is so important, and as I mentioned that there is a fatigue, but it's important to brainstorm, looking at which forum will fit the type of the dispute there is. For example, in case of Construction Contract or Infrastructure Contract, which are long-term contracts, there are many segues, many issues, many milestones, which are very technical in nature, and to be able to go to the courts, where, with due respect to the judges, who are more experts in sort of the judicial process is probably not just a question of long, prolonged process, but it's also a question of, in some ways competency. So going for expert determination is a more viable area.

The other thing you also have to realize is also this the one forum or one mix doesn't fit all types of contracts, particularly in government contracts one of the things that Ila mentioned was that you find, and I may have a slight difference from the view that Ila said, obviously, the parties have a desire to not necessarily, get adversarial to the government in a long-term contract. But one of the things we constantly think about is, is the government really, is the mediation really an effective mechanism for Dispute Resolution with the government, because government's hands, particularly when they're dealing with public assets are, they're constrained, they rather get a Court Order, they rather get an Arbitration Award, than have to settle something.

And settlement is something particularly in Indian context is very important because of all of the potential of tainted decisions being made, the bureaucracy is reluctant to even though they may

understand the merits of the case, and they may find fairness to the process, but they are reluctant to actually get into settlement situation. So, I often find that in government contracts, particularly we had situations with an airport bought contract, where there was an issue about revenues. Arbitration was the clause, we went through Mediation, Mediation was purely a formality, and it prolonged the process.

So, I recommend in case of government contract straight go to arbitration, because obviously, that is more akin to judicial process and is much more comfortable to government counterparties.

Vivekananda Neelakantan

Thanks, Rashi. That's quite interesting. Sapna, can I ask you, then, is there still utility to having multi-tier clauses if, as Rashi says, in many situations, it could well turn out to just be a formality to go through the process. I mean, you also sit as an arbitrator to cases as counsel where this vexed issue of compliance with a multi-tiered dispute resolution clause has come up numerous times and parties are often fighting about whether they've complied or not. And that's the issue that drags on for several months. What's your take on that? I mean, is that something that's a problem we have to live with?

Sapna Jhangiani

So, I think there's a real tension between what's going on at the time that the contract have entered into, and then what happens when a dispute arises. So, at the time that the contract has been entered into goodwill is high, nobody wants a legal dispute, and it seemed to be obviously in everyone's best interest for some talking to take place before any legal proceedings are triggered. And whether that's mediation or high-level discussions. But once a dispute has arisen, things are very different, and are perceived failure to comply with a multi-tiered dispute resolution clause can be used as an opportunity for a jurisdictional objection. In my experience, I've actually seen that it's very useful for there to be high-level discussions between the parties before proceedings are triggered.

I think it's always good to get people talking. And the length of time doesn't have to be that long, so that it doesn't lead to any undue delay. Mediation, I think is a slightly different tool and its

usefulness can depend on the time at which the mediation proceedings take place. And it may not always be effective, it's pre-arbitration. So, I think it's so common in arbitration proceedings now to have jurisdictional objections taken for non-compliance with multi-tiered Dispute Resolution clauses. But there is one mitigating factor at the moment and that's that, in several Common Law Courts now we've seen a distinction being recognized between jurisdiction and admissibility.

We've seen that distinction recognized in Singapore, I understand it was recognized in India in the case of Bharat Sanchar Nigam and Nortel Networks, I understand that it was recognized by the Supreme Court, and in other jurisdictions such as England and Hong Kong, it has been found that compliance with a multi-tiered Dispute Resolution clause goes to the admissibility of a claim rather than to jurisdiction and what that means is that you can't have an application to the court to review that decision. So, there's a lot less opportunity for time to be wasted, when there's been an objection raised, that a multi-tiered Dispute Resolution clause has not been complied with, certainly than I think they're used to be.

Rashi Dhir

Yeah. May I just, Vivek, add to what Sapna and actually it's a very good point, it's something that goes into drafting. One of the things you'd find when you're drafting these clauses is the use of the language and oftentimes jurisdictions, different jurisdictions, have taken a view of the spectrum, reinstitution, multi-tiered Dispute Resolution mechanism either being mandatory or being directive or considering them procedural versus substantive law. And I think, draftsman should really be cognizant of that, particularly in leaving no ambiguity in terms of the intent of the parties to follow the sequence and have a very tight timetable.

Now there could be an adversarial impact to that, which is an unintended consequence that when you have these timetables, it gets into what Gregory was talking about in terms of if you need an interim or an emergency relief, do you then-- how do you manage that process and that's why drafting these particularly sequence, timetabling them, and sequencing them is a very, very important aspect, both in terms of the clarity of the sequence, timetable, as well as the mandatory nature of the pre claim, the admissibility aspect. So that's something I just wanted to mention that

a lot of us don't pay attention to that. But that is so critical and that's what Arbitration Tribunal or a Court would consider in terms of understanding the intent of the parties.

Vivekananda Neelakantan

Thanks, Rashi. And perhaps it's actually a useful segue for us to talk about Arb-Med-Arb clauses, and perhaps Ila I can get your view. Is that the answer? Rashi is talking about having very carefully defined timelines, carefully defined structure to how you have a multi-tiered dispute resolution mechanism work. What's been your experience with using mechanisms such as Arb-Med-Arb? Of course, I think it's also important given the platform we are at, to speak of protocols such as the SIMC, SIMC Arb-Med-Arb protocol. Grateful for your views, Ila.

Ila Kapoor

Thank you, Vivek. So, just one point from Rashi's to take on from there, when we use these multi-tier clauses, now, the Indian courts actually say that in a situation where it's going to be a mere formality, to go through with it, they're not going to insist on it. And very often, by the time the parties, one party has decided that they want to file a notice invoking arbitration, they've already gone through some sort of stages of settlement. It may not be a formal stage where they send out a notice as per the Dispute Resolution clause, but that on its own could be sufficient and you don't really have to go through the empty formality of going through the process, according to the Indian courts, and very often we advise our clients to just not waste that time and to get on with it.

But okay, having said that, in Arb-Med-Arb, so again, something that is not that commonly used in India. We use it very often when we are arbitrating Singapore arbitration cases, under the SIAC, SIMC is something that would be very, very beneficial, I think, in the Indian context, especially as Rashi has pointed out that we have a problem in India of long pending cases. And our cases take right now people want to avoid litigation. They go into arbitration thinking, well, great, we're doing that. But then they're stuck after they get their awards, because we're back in court for enforcement and execution, and we're back to the pendency, dependent on the court. Now, Mediation really offers you the perfect solution, right, because its people have agreed to it, it's a consensual award, there is less likely to be a challenge or an appeal.

So, all of that makes it really the perfect solution for India, when we are in a situation to be actually able to popularize it at some point. My experience with our Arb-Med-Arb have been through the SIMC and they have been two experiences have not resulted in a mediated settlement. But I have been absolutely impressed with the mediators and the process, which has really allowed the parties to do a sort of assessment midway through their proceedings of the merits of their case, get there, go ahead from the higher ups in the headquarters as to where they're willing to settle that. I've seen, how it works with the mediator coming into the room, midway through the proceedings, the breakout rooms, taking the numbers back and forth, I'm sure, Sapna, who must have done this, has a lot more to say.

But I think that it is the one of the most useful techniques we can have in our toolbox as disputes lawyers, is to bring in mediation at some point during the proceeding. I mean, the question of when it is most effective is it pre arbitration or is it after the pleadings, sometimes I've even seen it happen after the entire trial is over and the award is reserved, and one party has cold feet. So, my experience with it has not resulted in a mediated settlement but with, I mean a lot of positive thoughts on how this process can be very useful.

Vivekananda Neelakantan

Thanks, Ila. Sapna, your thoughts.

Sapna Jhangiani

As I think you all know by now, I like statistics. So, let me share some statistics with you. What has the take up been of the SIAC, SIMC protocol? I have it on good authority from the SIMC that there has an average of four to five cases every year. In the past, that was about 20% of SIMC cases. But the caseload at the SIMC has gone up in the last few years, which is great for mediation. So, now it's less than 10% of the total caseload at the SIMC. Second statistic, How many of those cases proceeding under the protocol have been settled? The average settlement rate of those protocol cases is 75%. That's pretty good, I would say. And I think it's consistent with the SIMCs overall settlement rate of 70% to 80%, but also, the general success rate for Mediation globally.

How does it work in practice? I had some cases really, very early on, I thought it was good. I think that there were perhaps a couple of teething issues and in my particular case, you have to pay your first advance of costs to get the case transferred to the tribunal. But of course, when the case gets a tribunal, all they do is stay the proceedings immediately in favor of mediation. So, you've paid that chunk, and then you have to pay for the mediation costs as well. And I think that can be a little bit difficult for clients to accept. Having said that, as a testament to both the SIAC and the SIMC, I think that they have worked very closely together to look at how the advance on costs work so that you get a seamless service, and you feel that what you're paying at the beginning is proportionate to what's being done by both institutions.

Vivekananda Neelakantan

Thanks, Sapna. Just for the uninitiated, you can find the Arb-Med-Arb clause that is suggested by the SIAC and SIMC jointly on their respective websites. And you will also find the Arb-Med-Arb protocol which sets out the procedure that the two institutions follow when they are dealing with an Arb-Med-Arb clause. Very simply put, you commence an arbitration at the SAIC, the arbitration is then stayed as Sapna says once the Tribunal is put in place, and then refer to the SIMC for the parties to attempt mediation for a maximum period of eight weeks. If the parties are able to arrive at a mediated settlement, they can then take that back to the tribunal and request that a consent award be made in the terms of the settlement.

If however there is no mediated settlement, then the parties go back to the arbitration to find it out. And I think what Ila said in particular is crucial, is that the mediation may nevertheless give parties some indication of where the strengths of their cases respectively lie. Gregory, can I ask you a slightly related but different question, just in terms of the success, as Sapna shared with us in terms of the statistics, the number of cases that SIMC is seeing. Do you see this as an impact of COVID in any way, in terms of how parties are looking at dispute resolution on the whole? And the related question to that is, of course, I think COVID has impacted how dispute resolution services have been provided used over the last two years. What's your experience been with that and how has that impacted this arena?

Gregory Vijayendran

Thanks very much, Vivek. So, certainly, there may be correlation. I'm not sure whether there is enough of a deep dive study to confirm that nexus between the effects of the pandemic kind of restrictions that we experienced and the rise of mediation. That said, you did see, and this is, of course, anecdotal, not empirical, a trending where parties were more amenable to consider Mediation or even negotiation or other types of amicable dispute resolution options. Partly because of, I think, the effects of the economy, particularly in terms of smaller companies, the way they were able to weather the blows that they were experiencing as a consequence of the pandemic.

And they wanted a type of speedy resolution. And so, from there, we did see, at least at a practical level, a rise in terms of cases referred to mediation, and, I mean, I would add these points to what Ila and Sapna had also shared with all of us and that is the dimension of specialist's mediators. And in one notable example where I was Counsel and it was from arbitration to mediation, not technically SIAC, but Ad-hoc arbitration going into mediation. We appointed a specialist mediator as a co-mediator and he was able, because of his domain expertise to bring that to bear on the subject matter involved and that played a critical role in terms of resolving the entire matter in the context of mediation, and sometimes that specialization could be offered by a non-lawyer court mediator as well.

The other standout example which I will share for everyone's benefit, is that, I serve as a specialist mediator on the Singapore International Mediation Centre, and together with a senior lawyer in Japan, Yoshi Takatori, we did the first case under the Japan International Mediation Centre, Singapore International Mediation Centre protocol, it was cross border, cross cultural, interesting tensions between Civil Law and Common Law, Indian party on one side, Japanese party on the other heavily loyal. But it was a very collaborative mediation exercise all done online. And we saw that something that was sat down for three days was resolved in two and demonstrated two heads being better than one.

But the second part of your question, I think, surfaces another interesting dimension, and that is the online or virtual mediation processes. As I've shared in other forums, on mediation, as well, I mean, I was skeptic at the start of the pandemic, but whether we could actually be successful with

online mediation because of the need to have chemistry to see that in person dynamic, real-time, which you can't replicate, with a Zoom forum. But to my pleasant surprise, I became, a convert by the time the pandemic was drawing to a close. And the reason is, we saw success after success in terms of the online offerings at the Law Society side, the Law Society Mediation Scheme, which pivoted entirely on the virtual mediation, but I'm sure we can talk more about that in due course.

Vivekananda Neelakantan

Thanks, Gregory.

Rashi Dhir

Vivek, just add to.

Vivekananda Neelakantan

Yes, of course.

Rashi Dhir

So, one of the things that I noticed was that the impact of the pandemic was the willingness of the parties to actually find a solution because of the closure of business and force majeure events. There is a certain level of psychology that was to dispute resolution more than the law, in fact, I feel. And that psychology played out very well because people, this was not I blame you; you blame me game. This was more to do with unprecedented situations out of control, where parties have not done any business for the last two years. So, no one was interested in getting into prolonged resolution mechanisms.

They were looking for a quick solution. And there was a certain element of as I mentioned, psychology, in these mediations and negotiations one of the things that we ought to be very-very-- the success lies with the mediator. One of the things you find is if you don't have the right mediator for the right type of claim, or the right nature of the relationship, you are not going to get

success. I would say, being a lawyer, I guess I can criticize ourselves, lawyers are not necessarily the best mediators so to speak, because we follow a certain judicial process. And also, there is a science behind mediation. At Harvard, when I was doing a negotiation, one of the things, the two professors who have written a book called Win-Win, Getting to say Yes, Gary Uri and Fisher have talked about the concept of BATNA, which is Best Alternative To Negotiated Agreement.

To find the BATNA of both the counterparty as well as the plaintiff and the respondent is an extremely important and a scientific method of finding what's called the ZOPA, which is the Zone of Possible Agreement. And this kind of techniques are very important to be taught to the mediator. So, one of the things I would say is mediation is as good as, it's a cultural aspect, it is an infrastructural element, it's a training element, it's a skill element, that we must train, and India is actually moving in that direction. And I am very optimistic that over time, we're going to have a good infrastructure of resources skilled in solving these problems. So that was just I thought, a good observation.

Vivekananda Neelakantan

Thanks very much, Rashi. In fact, my next question was going to be about India and how the ecosystem has developed in India. When you talk about COVID, in particular, SIAC, SIMC and many other institutions had in place protocols to deal with, the requirements that COVID imposed on all of us. Rashi, Ila, in your view, how is the ecosystem in India kind of developed in terms of mediation, supporting hybrid forms of dispute resolution? I know, Ila, you spoke of some of the decisions from the courts in India. But in terms of some of the softer factors Institutes for training, Institutes to conduct mediation, how is that development, what's been your experience or what you've seen in the market?

Ila Kapoor

So, Vivek, in terms of arbitration and litigation, we saw during COVID, that, there was an exponential boom of suddenly people of a certain age understanding their computers and technology and email, politely to put it that way. And certainly, in terms of arbitration, India, we did everything virtually for two years. And I'm not even talking about the high-value claims, which were being administered by SIAC. But the Ad-hoc claims that were being administered by a retired

judge in some small state in India, he learned to put on the Zoom, and we did the whole thing virtually.

So, in terms of that, it has been an incredible learning curve, even our courts, which have just been able to move over to virtual and in fact, we have found it so useful that we are keeping some of those days virtual in many of our courts, because we find that it's more effective and efficient. Mediation, as I said, is not that common, honestly, in India at this moment and not in commercial business relationships. It is in Family Law and Matrimonial Law. And we do have, so all the big High Courts, for example, Delhi, Bombay will have a mediation centre attached to the High Court.

So, there is the Delhi Mediation Centre, the Bombay one, and they will have their own rules, and they will be court appointed mediation. So, if a suit goes to court, the court might say, this is a case that, I feel like you could settle it, why don't you go to the Mediation Centre. And that is how the bulk of mediations are happening at this point, which are not actually agreed to between the parties before the dispute began, but which are being sent into mediation after they began by courts. As I mentioned, we have the Commercial Courts Act, which actually mandates that for 3-month period, commercial parties have to try and mediate a settlement. And only when that falls apart, can you come back to court.

So that's our experience. And in terms of virtually ODR, we see that there are a lot of platforms that have been set up, especially for ADR resolution, which can be used for Mediation, Arbitration, etcetera. As I said, it's a learning curve. We have a Mediation Council of India that is going to be set up under the new bill, when that finally gets ratified. So, I think we're on the right path. We could maybe push ourselves to get this there a little bit sooner than we would. But that's the pace of things here. So, we'll get there.

Vivekananda Neelakantan

Thanks, Ila. Perhaps now is a good time to move to the second bucket of issues. I'm going to talk about some of the issues that pertain to external counsel and lawyers. I had two questions in mind and I'm going to club them together and request Gregory and Sapna to address them in turn. The first is a more practical issue and I think it's something that all of us face. What really is the motivation for an adversarial dispute resolution lawyer to even consider mediation? Very simply

put, many of us look on that as a practice killer, because it takes away a significant amount of work for disputes lawyers. But second and related to that. What are the skills necessary to be a good mediation lawyer? Are they different from those that are required to be a good litigation lawyer or a good arbitration lawyer? So, I've clubbed them and Gregory, can I request you?

Gregory Vijayendran

Certainly, Vivek. Happy to kick start that portion. Yes, I mean, the joke is, of course, whether ADR is an alarming drop in revenue, or as you described it, a practice killer. I think the enlightened approach, and this is drawing from Singapore's experience, because, we have been doing mediation for more than two-decades-plus, and in many ways, it's caught on and its part and parcel of the culture here. The enlightened view is to take a long-term approach on the matter, particularly with institutional clients. And if they are persuaded that you are thinking about their interests, it's not a question of dragging out the dispute for the sake of generating more fees, but you're acting in their interest to resolve the case as early and as cost effectively as you can.

And if there are avenues that you can resolve the problem, you basically would establish yourself as an effective problem solver, as a trusted adviser, and position yourself very well for the future work. The skill sets that would be involved and that's the other part of what you'd raised, involves lawyers looking at interests and concerns rather than harping on rights, duties, and obligations. And it's important that all Council adopt that approach going into the mediation, I say that as a mediator, I say that as Mediation Counsel, that we need to be on the same page in terms of good faith, candle, the process, the language used in the course of mediation and the outcomes. It's not a court of law. And essentially, in classical mediation, as we know, it is facilitative, not adjudicative.

It is a forum, which allows parties to move beyond the superficial into the deeper interests, needs and concerns in the course of that discourse in mediation, and allows for genuine communication rather than posturing with pretence. And so that is part and parcel of how we need to train particularly our junior lawyers to adopt these various facets of mediation skill sets, as part of the toolbox that Ila described earlier as well. Related to that is the idea of teamwork, collaborative problem solving. As a mediator, one of the key parts of what I do is to invite both counsel teams to solve this problem with me or with my co-mediator and I together, to encourage that type of

mindset. Clearly, if you can do so you would save a bundle of costs for the client you would be able to resolve it in double quick time too.

Vivekananda Neelakantan

Thanks, Gregory. Sapna?

Sapna Jhangiani

So, on the first question, I agree with Gregory. Mediation has a high chance of success. If you do have a successful resolution, you'll have a happy client, and happy clients tend to be repeat clients. So hopefully, that will be the incentive for dispute resolution practitioners to recommend mediation to their clients. And actually, I think that can be done by getting more dispute resolution practitioners involved in mediation. I mean, for those who've experienced an excellent mediation firsthand, it really can be magic to watch, almost a miracle. So that's the first question. In relation to the second question. I think the skills to be a mediation advocate are very different to be an advocate, particularly in very aggressive litigation cultures, I think that it can be difficult for advocates to shift their mindset to mediation advocacy.

And I think that's why we need more mediation advocacy training, and it's something that we're really focusing on in Singapore. My second and final point, is going to sound a little bit contradictory to what I just said, that I conducted some mediation advocacy training recently. And actually, it struck me how fundamentally both types of advocacies are about persuasion. And I think that if you're aware of how different the advocacy is, but the fact that ultimately, it's about persuasion, I think you can be very effective. The differences that you're not trying to persuade a tribunal about the merits of your case, you're trying to persuade the mediator, you're actually having to persuade your client, you're having to persuade your opponent as well.

So, you're persuading on many different levels and you're not persuading about the merits of your case, you're persuading them to buy in to the solutions that you're proposing or that are on the table, or you're persuading them to see the matter from your client's point of view. So, it's actually really, very challenging, which was one of the reasons I love mediation advocacy. I see it more of an art than a science, Rashi, but I think that might just be a semantic disagreement between us.

You are thinking about things like BATNAs, ZOPAs, and the situation is constantly evolving. So, I think it's very challenging, but I think that with a bit of training and a shift in mindset. I think that our litigation, arbitration advocates can be very good at it. But it just needs a bit of a tweak and a little bit of self-awareness about why it's different.

Vivekananda Neelakantan

Fascinating, Sapna. Ila, Rashi, can I ask you the flip side of that question, in terms of how you approach and I'm conscious again, that, both of you are more likely to find yourselves in an international cross border dispute, than you might find yourself in a domestic dispute. How do you go about selecting neutrals in the two situations, whether it's arbitrators or mediators, do the same kinds of considerations apply? What is relevant to you and how you go about picking the right mediator or right arbitrator?

Rashi Dhir

Yeah. Actually, that's a very good question, because we often get caught in the process. So, when we talk about Arb-Med-Arb, it's not just a process, but it's actually an experience in some ways. And what's very important is, in that experience, you must have the right people, as Sapna was mentioning that, before you get to selecting a neutral, it is crucial for you to understand what the nature of the claim is, what is the relationship of the parties. Oftentimes, we don't take the time to understand, what is the nature of the dispute in terms of, is it technical, is it financial, is it business, is it legal, are they questions of law, are they questions of fact.

And I think, one place where it actually having the right people, give you the right outcome has been in more to do with engineering construction contracts, which has lent itself to the expert determination aspect of it, because these are large projects and you find people who have an engineering, their often questions are very technical, particularly as milestones are defined in that sense, or, for that matter in shareholder agreement oftentimes, it's evaluation question, because when you're talking about exercise of an option, or a buyback of the shares, again, it gets into a technicality of valuation or in certain situations, it could also be an issue from an accounting perspective.

So, understanding what the gist and the crux of the dispute is critical for people to brainstorm, and then basis that finding and defining the profile of the mediator. In fact, in drafting the clause is one of the things that I encourage our clients to do is that instead of specifying the name of a mediator / arbitrator, are particularly in the small value arbitrations. You can't afford a 3- arbitrator panel. You tend to go with sole arbitrators and in mediation too, more likely to have a single mediator.

It becomes very important to assess what is the profile that would be apt for the likely dispute that's going to come in. And that's where I think the element of training also comes into play. Although having said that, if there is a, for example, a biomedical claim issue, you ought to understand the experience of the person who's going to come to the table in understanding the factual position of the technicalities there. So that is very-very important in terms of identifying and profiling a mediator beforehand, at the time when you're actually setting the clause.

Ila Kapoor

I'm just and Rashi is of course right that if you are good finding an expert, who's a subject matter expert, and that is the what the claim is, it's a subject matter claim basics, some expertise of construction or valuation, then you bring in the expert. If you're in a situation of Arb-Med-Arb, where the pleadings are out, and really you are fighting about a number, right, you made a claim, the other side has made a number claim. And the question is, where can the parties meet, you may not necessarily need an expert, you need actually another lawyer or a judge. Having said that, I do think that the role of mediator is very different from the role of the arbitrator because arbitrators are usually very poker faced or they should be, and they shouldn't give away what they're thinking etcetera.

Whereas the mediator is going to sort of be like, in my view, a friendly uncle who's going to nudge you along and say, listen, I really think that you should think about this again. Right? Sort of give you some sense that of where you're going and where be because he knows more than you do. He knows information that the other party has shared with him, which he's not supposed to tell you. He has only a limited amount of information he is allowed to share. But there is the sense from the mediator really skilled One of a nudge, nudge, wink-wink, do this, this is in your best interest. So, it's the same kind of people, it's the same profession as Sapna said, it's the

arbitrators, the lawyers, the judges who do that kind of role in mediation, but it's a different skill set, I believe.

Vivekananda Neelakantan

Thanks, Ila. Just to add to what both of you said, I do find that sometimes even when the institution is appointing an arbitrator or a mediator, it is helpful to let the institution have a sense of what you think might be certain useful attributes. Like, Rashi said, even if an agreement doesn't necessarily set that out, once a dispute has arisen, nothing stops you, as counsel or party from requesting or suggesting to the institution that the neutral might benefit from having certain attributes or knowledge of certain matters or particular industry topics.

With that, let me raise a slightly different question from the perspective of the neutrals themselves. And again, this is a way practical kind of issue, in terms of how much should arbitrators be pushing parties towards settlements, settlement discussions or mediations? That is the question, of course, as to when they should be doing that, if at all. But I suppose the first question is, should they be doing that at all? Any of you, who want to share your thoughts?

Gregory Vijayendran

Maybe I'll take a step first. I think there's always this, I think, delicate balance that an arbitrator needs to manage, because, essentially, it's an adjudicative process. And you basically have the issues before you've got the evidence, you've got the submissions, and you've got to make that decision for the purposes of the award that you're going to be issuing. At the same time, I think to be able to suggest and to put an idea to the parties to consider this. I mean, if you're doing it openly, you're doing it even handedly or you're doing it across the board, and really in the interests of the parties.

And in some ways by offering that you're actually going against the interests of the arbitrator himself or herself, then, it's kind of out there in the open. But I think there are limits to how much you can nudge on that, because you don't want to give rise to potential scenario where, because you may come across as being unwilling to decide or potentially misconducting yourself in a sense, it might become grist for the mill in terms of potentially setting aside that award

subsequently or taking issue with the arbitrators conduct. So, there's this balance that you may need to work.

Ila Kapoor

Also, I just want to add to that if I was a party and my arbitrator suddenly suggested we settle it. I would really worry that, what was he suggesting that my claim was really useless, or it could lead to a lot of speculation if my arbitrator suddenly midway through suggested that.

Sapna Jhangiani

Can I just add something? The ICC rules were amended, I think, in 2021, to essentially encourage arbitrators or ask for arbitrators to encourage or facilitate settlement. And that can raise a lot of discussion points. But I can tell you what I have started doing, in my case, the sole arbitrator. Simply asking the parties at the CMC, have you considered mediation? We're looking at the procedural timetable, would you like a mediation window, it's really just planting a seed about whether they have considered settlement. But I'm very clear to say at the same time, that it's my privilege, and it will be my privilege to decide this arbitration for you. But I'm simply asking whether this is something that you have considered at this early stage.

And, I think, and I talk about my own views the benefits of mediation, and that they may want to consider it, but they should not read that as any sign of unwillingness on my part to decide the arbitration see it through to its conclusion, and actually, that seems to have been welcomed so far. Hopefully, that's on the right side of the line, Gregory, and hopefully, Ila, you feel that that wouldn't be something that would if it was done in that way, so I think there's a way to do it and I think that the ICC will change is almost given us all permission as arbitrators, to at least have these conversations.

And I'm not saying we should all go and try and settle these arbitrations that we're deciding. But I think users are saying that they want more dexterity across dispute resolution forms. And I think that it's incumbent on us as arbitrators to help the parties resolve their disputes. So that's certainly the way I have started to see it.

Gregory Vijayendran

If I can add, I couldn't agree more with Sapna on the sort of question of the way to do it. But I think one of the questions that we also need to think about is the when to do it. And sometimes, parties may not have all the necessary evidence before them in order to embark on a meaningful mediation. And in the example, I'd cited earlier with the specialist's mediator, we did that at a fairly advanced stage of the arbitration when witness statements were in documents had been discovered, and so on. So that's a further question.

Sapna Jhangiani

I think that's an excellent point, actually. And I think that's one of the criticisms of the Arb-Med-Arb protocols that actually are mediating a little bit too early, although there has been a lot of success with the protocol. But I suppose if you have that discussion that CMC, you've opened the discussion and your further procedural conferences, you could ask again, is it something you've thought about, you could keep that conversation going and keep the parties thinking about it, you're absolutely right. Mediation can sometimes be more effective or can often be more effective when the dispute has crystallized a little bit way down the proceedings.

Vivekananda Neelakantan

Thank you, my panel members, and I did have about six complicated issues that follow from this. But I'm told that that's about as much time as we have today. But before we close, of course, we do have one question that a gentleman has raised and perhaps I can ask the panel members to weigh in if they wish to. The question is simply whether a letter of intent in a construction contract needs to contain an arbitration clause or a litigation clause or a mediation clause. Any quick thoughts on that before we run out of time? Any one of you?

Rashi Dhir

Yeah, sure. So, the letter of intent actually is a question of the binding nature of it. And there are often letter of intents that are now beginning to have a hybrid mechanism where certain clauses are binding, and others are not, and disputes can arise. And particularly at the letter of intent

stage, I would think mediation would be, we are just starting off your relationship with an intent to continue that you don't want it to be a litigious situation, because the relationship is not going to be formed this is more about conceiving and creating a relationship, rather than preserving it. And the excitement that people have at that stage cannot be mellowed down through an adversarial process.

So, the best forum for that would be the mediation, the multi-tiered mechanism, before you get to a point of becoming adversarial. So, it's like, before the child is born, leaving aside the debate about pro-life and, and otherwise row horses vary, but I think you still want the child to be born. So, you certainly want mediation to be the way forward.

Vivekananda Neelakantan

Thank you, Rashi. With that, I think we should draw this session to a close. I think I'm sure all of my panel members in thanking all of you for taking the time to join us today and also the organizers of the session the SIAC and SIMC, and the MCIA for putting together the India ADR Week 2022. With that, I'll hand over back to Stuti. Thank you.

Stuti Gadodia

Thank you very much, Vivek. I had huge expectations from the session and the session did not disappoint. So, huge thank you from the MCIA. Quick note to all attendees, the transcripts and the video of the session is available at adrweek.in. So, in case you want to go back to some of the points that were discussed, please feel free to access the transcripts on the website and I see that Niti has just posted it on the chat as well. So, I hope you enjoy the rest of the sessions. And I hope you have a great day. Thank you very much, everyone.