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India Arbitration Week 2022
Session: Confronting the expected, embracing the unexpected resolving disputes with PSUs

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SPEAKERS NAMES :

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2. **Kunal Mehta** : Head Legal, JSW Energy
3. **Tine Abraham** : Partner, Trilegal
4. **Venkata Ramana Korrapati** : Vice president, Contract & legal, Tata Projects
5. **Vishrov Mukerjee** : Partner, Trilegal

Abhijeet Sadikale

Good afternoon, everybody. All the panellists have joined us. We are ready to start. My name is Abhijeet Sadikale, I'm a senior associate with the dispute resolution team at Shardul Amarchand Mangaldas. Today, I have the pleasure of introducing our vastly experienced and diverse panel that will be discussing a very interesting topic. The topic for today is very nicely titled, confronting the expected embracing the unexpected, resolving disputes with PSUs. Today's discussion is sponsored by Trilegal. The panel's positions and experience set us up for an engaging discussion over the next hour on the topic that is very relevant to Indian arbitration space. Just as a matter of disclaimer, the views expressed by the panellists are personal and not of the organizations they represent.

To start with the introduction, I will start with Mr. Mishra. Mr. Ajay Kumar Mishra is President contract and claims management, Dilip Buildcon. He has over 33 years of experience in finance, administration and infrastructure matters. Moving on, Mr. Kunal Mehta, is head legal at GSW energy. He has wide experience and has worked with leading law firms including Herbert Smith, Freehills, GSA, Shardul, Amarchand, Mangaldas and Khaitan before joining GSW energy. Ms. Tine Abraham she's a partner at Trilegal in the Delhi office. She specializes in commercial disputes. She regularly represents Indians and multinational clients in institutional and ad hoc arbitrations, and before various courts and tribunals in India. Her expertise includes infrastructure contracts, foreign investment, security issues, shareholder disputes and insolvency proceedings.

Moving on Mr. Venkata Ramana Korrapati, he is Vice President contract and legal, Tata projects. He has over three decades of rich and diverse experience in legal matters involving environmental laws, construction contracts, trademarks, corporate laws, industrial laws, company law, and of course, arbitration. And, finally, Mr. Vishrov Mukerjeee, he will also be moderating this session. He's a partner at Trilegal in the Delhi office. He is also a part of the firm's dispute resolution practice and has diversified experience in regulatory disputes, infrastructure section, infrastructure sector arbitration and commercial litigation. With this, I hand over to Mr. Vishrov Mukerjee, to moderate the session. Thank you.

Vishrov Mukerjee

Thank you, Abhijeet for that wonderful introduction. And good afternoon, everyone. Thanks to everyone who's joined and special thank you to all our panellists for taking time out and attending this and agreeing to speak at this panel. We are--we have a very interesting discussion lined up today on resolving disputes with public sector undertakings. We are all aware of the fact that the government is the biggest litigant in the country. We have a diverse cross section on this panel from someone who's on the business side, we have two lawyer two in-house counsel. And we of course have Tine, who's going to give us the external counsel perspective on some of these disputes. We will be in the course of this panel discussing various issues and challenges that, that arise at various stages.

We'll be addressing the pre dispute stage, the dispute execution stages, and also some strategic inputs and factors that need to be considered when you're litigating against the government or against government companies. And just to start off the proceedings, I would just call upon each panelist to maybe spend a couple of minutes just giving us their introductory thoughts around the kinds of disputes that they're seeing, and some of the issues that they feel are important for the purposes of this panel. So, we'll just start with Mr. Ramana. And so, if you could start and then we'll just go around to the other parties.

Venkata Ramana Korrapati

Good afternoon, everyone. You know, it's privileged to be here, part of this session. I think, to begin with any arbitration proceedings, whether it is public sector or private sector, the parties are already in a contentious position. So that's where you know the issues come. And even a lot of technical issues are raised at various stages and coming to the disputes in the infra space itself, the most important and the biggest disputes pertains to prolongation costs. And in prolongation costs the contentious issue is who's responsible for the delay? I think that is something which is more a fact based one. And the second biggest disputes that could typically come up are the variation claims. Variation claims are more technical in nature. But I would say the largest component of disputes in industrial infrastructure cases would be the prolongation in most disputes.

Tine Abraham

You are on mute.

Abhijeet Sadikale

So, sorry, it's a, it's a litigators habit. Mr. Vishrov, happy to hear from you on some preliminary thoughts on this on this topic for today.

Vishrov Mukerjee

Thank you everyone, for calling me for this session. As my experience and whatever we are doing we are basically, we are working with NHAI, which is one of the largest PSU in terms of expenditure in the road projects. What I feel is that disputes are from misrepresentation, the clause which is least read is the representation and any tender or any agreement. So, misrepresentation, authority says or the PSU says that I'm having all the things under my command, which enable this agreement, it means they should have everything in place for example for forest claim, for example, ROW, that too encumbrance free and **[inaudible 00:06:51]**, between encumbrance free and **[inaudible 00:06:54]**, they take-- for example-- I am only quoting use as an example.

So, record Texas means where you can make the road or construct the-- and it happens ROW happens with the transmission line also, GAIL, also NHAI also NHAI in particular. So, when they make a misrepresentation, and then sanction in two places. Once when they go for the project approval committee to the government, they say that we have 80% of land with them. But when they go on the site, and after signing the agreement, they said that no, we don't have that land, we have that land, but not the full ROW from there, the usually the variation process starts and it is the cause of the delay. So And second, what point what I can understand from these agreements is disclaimers.

So these disclaimers are put there, for example, clause in the NHAI agreement, that rule of Contra Proferentum will not apply. I think that this is not legally enabled also. But what I feel that this is going against us, they will put in the agreement itself rule of Contra Proferentum will apply, whereas that is not a case that you cannot go to the court. So, they could have written this, these

are certain variations. And I feel that the main problem comes from the representation and warranties.

Abhijeet Sadikale

Thank you for that. Kunal. I mean, your experience. And it will be wonderful to also get given that you also have vast experience on the regulatory side of disputes, which, while not strictly arbitration is, you know, is an alternate form, alternate dispute resolution mechanism. That is, so if we can just have your thoughts on, on some of these issues.

Kunal Mehta

Sure. First of all, thank you to Trilegal and MCI for inviting me to this panel. So I would like to sort of start with a generic background that litigation is generally believed to be an unproductive investment, both in terms of time and money. And the ultimate aim should be to not litigate as the first step. But in India, what is happening is generally litigation has become the first step instead of as the last resort, and sort of, which is why the government has a very dubious distinction of being the biggest litigator. I think one of the main reasons for having lots of disputes with the PSUs is that there is a lack of what you can term as a litigative diligence lesson before litigation has to be initiated from a public sector undertaking, I feel there are not enough diligence is done, whether it is a good matter to be litigated or to be arbitrated.

It is sort of, it becomes sort of a indifference to a claim that a private party makes, which is why a PSU would just go in for, for litigation without thinking that whether the dispute can be settled whether they have a good claim or not. So, that sort of litigative diligence is sort of missing, we should be there in the first place. Also, not a lot of efforts are made-- or attempts are made to settle disputes at the beginning, they are sort of just litigation is taken as the as the first step instead of as the last resort. So, there is no sort of accountability in that sense, which is why I think it just sort of in a broader sense is a is the reason for most litigations with PSUs and that sort of I think, is the confronting the expected because this is sort of is has become the norm now.

And, and which is why we are facing so many disputes. Coming to sort of regulatory side also sort of it is similar issues, you see your discounts or you see state governments, any public sector bodies, most of the disputes that come are either payment related or as Mr. Venkata was saying

that they are related with delay or variation in the contracts. So, yes, those are sort of wherever amount, higher amount is involved, it always sort of goes to dispute, because nobody wants to take a call that this amount can be settled, or this amount can be paid to a private party. So, if the amount is high, it is sort of, it is likely to go into dispute. And then for construction contracts, definitely delay and variation are the two main factors, which I also feel leads to litigations.

Abhijeet Sadikale

Thank you, thank you for that Kunal. And Tine is your thoughts on this.

Tine Abraham

I think I will sort of summarize what three of my friends here have said and sort of add to the context for our discussion going forward. I think one common point, which we need to keep in mind is when you're looking at this whole issue about a, you know, commercial dispute involving the state entities or public sector enterprises, it's usually arises in the context-- in two three specific context. And it arises in the context for long-term congestion, whether it is roads, ports, airports, whatever it is. So that's one large bucket where we see litigation, the other large bucket, as Ramana mentioned is in the context of EPC contracts, and it can be in an extremely complex oil and gas project, varying to construction of a two-room school in a village.

So, you have the whole spectrum of disputes that can come up in the construction aspect as well, when you're looking at government contracts. Now, there again, I think, you know, some of the points that came up and said, also add to the context of our discussion, I think there are a few aspects, right. One is the whole aspect of contract management and how that sort of feeds into a potential litigation. Very often there are discussions which happen, there is a suggestion being made, please do this, don't do this. Some of it is often not recorded in, in a contemporaneous manner. And then when we are at a potential dispute stage, or rather, these issues lead to a dispute scenario.

So, I think one of the preliminary aspects is that whole contract management and how much importance we as parties entering into contracts, whether it is with government, or otherwise, into this whole contract management. And the second thing is what Kunal mentioned how do we then make sure that litigation or arbitration was not what was your first port of call, which was that you

try and negotiate the differences, which arise and I think that's equally important as contract management. And the third one is identifying the aspects which are recurring issues of dispute.

And I think that's one of the points which Mr. Ramana also mentioned, which is that you by now, we all know where, what are the areas in which there is consistent amount of disputes arising, you know, how we address it, be it at a policy level, be it at the level of individual contracts, and this can be dealt with right from the stage of waiting till the stage of an arbitration or in a court. So the manner in which these issues are addressed, and there again, there are several commonalities, given that these are, you know, recurring issues. I think, all of this sort of adding to how we deal with contracts when we are in the context of the public sector enterprises and that sort of sets the background for confronting the known or the unknown. It's both at the same time. So I think those would be my initial thoughts and I will look forward to a more engaging discussion with all.

Venkata Ramana Korrapati

I just want to add one aspect of what Mr. Kunal has mentioned, Mr. Kunal has mentioned with regard to the due diligence that has to happen before any dispute is taken due that, you know, to the arbitration or for the appeals. In fact, there is a Niti Ayog office memorandum that is November 2019, office memorandum, which clearly states that the PSUs whenever they're filing any applications to see set aside that award, they have to go to the law officers, seek opinions from the Attorney General, the Solicitor General and then file an appeal. I really don't know whether that happens, or it's only automatically these appeals are filed.

Abhijeet Sadikale

Thank you for that. Now, before we go into the various stages of a dispute, and the issues that are surrounding that. Given the sensitivity that is involved around litigating with public sector undertakings, especially large corporations, Mr. Mishra mentioned NHAI, we have NTPC, which are literally or are virtual monopolies in their particular sector. A key issue is whether to raise a dispute, and if so, when to raise a dispute, and I like to just spend about 5-10 minutes discussing with this panel on what are the considerations that come into deciding when to sort of, you know, pull the trigger? And I'd like to start with you, Mr. Mishra, on what are the factors that you would

ordinarily consider when you decide whether we should go for a dispute? Or we should, you know, just take the hit and, and, and just sit tight

Mr. Ajay Kumar Mishra

Vishrov you also know that this is the toughest question, toughest question in **[inaudible 00:17:15]**, because they are really virtual monopolies, and whatever acumen or the equipment we have, whatever the knowledge we have, whatever the know-hows we are, we only have the infrastructure sectors, they also know where they can go. For example, we are having 60 ongoing at a time in one organization. Perfect. So, in that case, deciding that when to go, when not to go, because there's the same of you see, after some time, this whole dispute resolution process becomes a fact. When the people in the government, they start thinking that this is something personal, I have told you to withdraw, why are you not withdrawing it.

So, these type of things, they crop up being a human being also have such type of things. So, it all depends on your stake. If for example, there is one company who's not going to NHAI, they can take whatever steps they like, but when you are working in an organization, you also know that you will also commit some mistake at point of time, it may happen, because accident can happen anytime. So to how to see that mistake, if they are averse to you, then this is the quantum of the problem, then they will escalate it and put you under observation, some bring you down, and whereas in other cases they may not. So, it is a very fine line of this thing, where to when to start it.

But usually what happens, we lodge our claim, this is our claim, you want to strike it in the bill, no problem. But we do at the at the proper time. Whenever timeline is prescribed in the agreement that within 30 days, you will have to tell to the submit the bill or along with the bill. Usually after the provisional completion or the completion of whatever financial there is that come out by the God's grace, then we submit a claim and usually the process of CCI in some alternate dispute resolution, for example, in NHAI and more there are Mr. Venkata Ramana must be knowing it, because that is again, I would later to that point also. So then whatever amicably is settled, we settled it, on our company's policy. We don't go for much litigation, because it will **[inaudible 00:19:46]** at one point of time or another.

Abhijeet Sadikale

Thank you for that. Mr. Ramana is coming to you and your perspective on-- because in that sense, you are, you know, you're guiding the business on from the legal side. What would you look at as a you know, as the key factor on whether and when to pull the trigger?

Venkata Ramana Korrapati

I think Mr. Ajay has rightly put it you know, there is always a claim that is launched in a timely manner as and when it has to be done. Okay. And then moving on to the arbitration. It's both a business call as well as a legal call that we need to take. From a legal perspective, I don't want, if the contract is yet to be there, you know, is this still one more year for the contract to go on, for the project to go on. I don't want to file multiple prolongation costs to this. That is one aspect that I would like to keep in mind. And the second thing from a business perspective, as Mr. Ajay has rightly put, you know, there may be a situation where you're expecting a completion certificate for one of the projects.

Okay. It's the part that the employer may take a hard stand, you know, if I initiate this arbitration now, there may be some issues or there may be delays in getting the completion certification, or, you know, certain certificates that I'm required to get to show that the project has been substantially completed. These will be the business calls that are to be taken. From a purely legal perspective, I would always want as far as possible, the notice that is given should adhere to the timelines, though we all know the Limitation Act, and that governs in our country, and how the strict line timelines that are contemplated in the contract may not be that relevant in our jurisdiction. But it's always good to have a contemporaneous claim lodged and be there. So that would actually protect you. And you can move the arbitration, the appropriate.

Abhijeet Sadikale

Thank you for that. And just to, you know, take a slight detour on this, Kunal given that, you know, there are a lot of regulatory disputes, and those disputes as of now are more or less restricted to regulatory Commission's just like to hear from the most strategic perspective, your views on you

know, how arbitration can be, can be a measure to resolve these, these disputes. And do you think it's a good idea to bring them in?

Kunal Mehta

Yeah. So, as you rightly pointed out, most of the power sector disputes are sort of taken to commission state Commission's or central commissions, and arbitration is not used as much. Although section I think 79 and 86 of the Electricity Act, it allows that the State Commissions can refer a dispute to arbitration. In fact, in PPS also, you'll see that there are clauses that if it's a tariff related dispute, it can, it will go to the commissions, but if it is a non-tariff related dispute, it will go to arbitration. But more often than not, we have seen that matters relating to sort of dispute between a producer, electricity producer and discount, or going to the State Commission. In fact, there were a few instances, I think, in Gujarat, where the commission had sent matters to arbitration because they said that it is not exactly relating to tariffs, so, it can be sort of decided by an arbitrator.

But there are very few precedents like that, not too much. In fact, the Electricity Amendment Bill that has recently come, that has removed that reference to where State Commissions can send the matter to an arbitration. That subclause has been slightly modified to remove that reference. So, the Government's intention seems to be in the direction that at least in power sector, that the disputes should go to the State Commissions or the Central Commissions, and they are sort of going away from the arbitration. So, in that perspective, I think this bill maybe passed in the winter session, but the way government is thinking it seems that for this particular purpose, at least for this particular sector, arbitration is not supposed to be the preferred method. So that is one.

Abhijeet Sadikale

Thank you for that Kunal. And just, you know, continuing with the theme of the discussion that was there. And there's an important point that Tine mentioned on contract administration, and Tine I'd like you to probably to set the context of the discussion and then we'll hear from the other

panellists. Contract administration and you know, recording what is right and what is wrong, on what has been given whether we vacant access has been given or not? It is expected. It's almost as if the unexpected is expected as far as these issues are concerned. How can we change the expected? What can be done to change from a company's perspective? What measures can be taken to improve contract management and this documentation so that it helps people like you and me when we have to actually go into the dispute? We just would love to hear your views on that.

Tine Abraham

Yeah, I think I was coming more from our experience, where very often, what you're faced with is that, you know that they're the great case, you know, there is extra cost incurred, or there is extension of time. But you unfortunately, don't have enough documentation to support that. I think a few things which I would think is central and critical to dealing with those issues. If there are meetings which happen even if there isn't a minutes of meeting, which was agreed between the parties. First and foremost thing is that if we can, you know, after that meeting, follow it up with a short email by somebody summarizing the five key points, which was discussed, I think, that can go a long way, if the parties were to ever reach the stage of litigation.

I know that, you know, there are some instances where parties find it difficult to put on a letter or that you know, we need the extension of time, because some invoices may or may not get cleared on time if you put it on email. So, I think it is contextual, but to the extent possible, get all of these communications which is verbal in nature recorded in email. The third is I think, progress of the work if, if we are able to regularly record what is the stage of progress, what is delaying it, if it is that there was unseasonal rains for a few days, get that recorded in the manuals and record which is maintained on site. All of these things go a long way, in terms of helping you at a potential dispute case.

Similarly is I mean, you know, when you're dealing with a big situation, obviously, there is limited flexibility, which is available to a party to change the terms of the contract, be that as it may be the case, if there is any alteration or variation, which is coming by virtue of conduct, create a record of that, again. I mean, you know, it is most often the case that variations and alterations, modifications needs to be in writing. But even if there is no extension variation, modification in

writing to a contract. At least the unilateral communication goes a long way in demonstrating that this was the intent of the parties, and that helps significantly during the course of the contract.

The other thing is, you know, in aspects like Bank Guarantee, making sure that sufficient guarantees are maintained, if we don't provide guarantee for a longer period, all of this goes, again, a further long way in limiting the extent of exposure and disputes. So, I think these are the few, you know, thumb rules that parties can always keep in mind. I know, from our experience, we're all realize that it's not always easy to follow through all of it, but maybe keeping some of it in mind for over the course of time as something helpful in the long run, is what I would say.

Abhijeet Sadikale

Thank you for that. And, you know just moving on from this, of course, we're all aware of the expected challenges that we face in either getting things recorded in in the NPR or in the independent engineers report for that matter. And it all ties in very well with some of the things that both Mr. Ramana and Mr. Mishra have said on this entire issue of representations warranties and the information asymmetry that is there in the contractual framework, unfortunately, that is not something that we have learned to address despite several decades of contractual experience that is there in in the country.

But moving on from strategic considerations to the pre dispute process itself. And I understand that, that the moment you go into this, everything becomes very legalistic. Of course, there is a cost to all of this. Delays ultimately have to be compensated by somebody. But coming to you, Mr. Ramana, first. What has been your experience in at that other pre-dispute stage? Is there an attempt to pull out every trick in the book and delay it? And what are the typical tools of trade, if I may call it that in order to prolong the process?

Venkata Ramana Korrapati

See, of course, the mediation bill, and I'm not so sure about how the mediation is going to pan out right now. But the experience so far, whatever is the pre arbitration methodologies that is contemplated in the contracts, whether it is the dispute adjudication board or the conciliation

proceedings that have to take place, they are done very mechanically. For two reasons, I think these are done mechanically by both the parties. One is these are not enforceable, the moment these decisions are not enforceable, it's very difficult for a public sector to honour these PADs or a Pre-Arbitration Decisions. So, from that perspective, the experience so far has been that these are not so fruitful exercises.

And in fact, to take a strategic call, we ensure that the time limit that is contemplated in any of these mechanisms pre-- typically for the DAB, there will be about 50 days or 60 days' time that they have to decide. And if it's not decided, we can go ahead with the next stage of the dispute resolution mechanism. So that's a call we take. Having said that, very recently, one of the public sector undertakings had come up with a notification where they are treating the DAB awards similar to that Arbitral awards. And they're paying 75% of the DAB award against the bank guarantee, subject to it's going to the next stage for arbitration. I think that's a very welcome move, because that gives credibility to the pre-arbitration mechanism. And the parties, the contractor would be really keen, because he can see the colour of money, you know, at the end of the day, he can realize 75%. So that's where we are.

Abhijeet Sadikale

Vishrov, coming to you. What has been your experience, if you can just take a minute on that, in this pre-arbitration process? Is Mediation and Conciliation or even a multi-tier, you know, dispute resolution, Mr. Ramona mentioned that has a DRB are a technical expert, do you think it's working or are there any suggestions to improve that?

Vishrov Mukerjee

Totally agree with Mr. Venkata Ramana. Because see, you will have to understand that from authorised the dispute arise, once you are not satisfied or your, you go to the independent engineer or the authority engineer, or who so is the consultant there. And he denies, either he denies, or he recommends it, then he goes to the authority, the matter goes to the authority. The approval is taken from the chairman level, depending upon the gravity of the subject. So, start the dispute resolution, you're again putting the same thing in front of the same person. The person

cannot take two types of decision in his own file, because he will have to say that whatever earlier was right.

So, this process only consumes time and satisfy as of the court that you have exhausted all the methods available, or the least available to you in the contract. So, these are only for the purpose that you're in, for example, in NHAI project where they say that the mediation will be done in the first case, how he can do it because our fight is with this. So, usually it goes futile. Another thing that I want to emphasize here that has created some Conciliation Community of Independent Experts. See those officers who are there in that CCI, officers who are earlier in the NHAI and how can they resolve the same dispute in which they have themselves written that this is not possible? There are certain cases.

So this process because of person who is doing the thing or who is in dispute resolution process. It should be some someone who is independent of any anything to do with the things, and in the dispute resolution process mentioned in the contract, it starts from the same baskets same independent in India and usually that-- for example, one thing I would like to add here, I think Tine Abraham about that, if we know that these are certain types of problems, we should address it, beauty road concept, it started in 1997 somewhere and it is 35 years and still at that time also ROW was the problem and today ROW is the problem. We could not address a single thing. All the disputes they start from the ROW, 97 also or see you take anything if the utilities has to be shifted somewhere you need to have the ROW, if you want to contract construct the side roads ROW.

So, the basic question is that if we and these are the problems, if we address it, now, road can be constructed in a very less time. Because today all the construction work is so mechanized unless there is some little push, which stops us, customization can be done overnight, one year is more than sufficient. But we should, the contractor or the constructioner should be given free space of access, and everybody can do it, it is not the rebuild can do it **[inaudible 00:36:40]** which can complete the project and these costs are not inbuilt in the tender. Therefore, the litigation is there, and they take it personal because what they say is that **[inaudible 00:36:52]** you just complete, then we will give you the balance. Your machines have not idle, but the planning lies idle. This is the main problem that was being discussed. If we know the problem of some projects, we should address them first. That is not till date also. I have given you one example. That's it.

Abhijeet Sadikale

Thank you for that. And just to pick up the next issue, the whole issue surrounding appointment of arbitrators, neutrality of arbitrators is something that has been up in the air for a while now. There is some clarity on it. But there still continue to be a lot of challenges. Even from a from a regulatory litigation perspective, you end up having, having ex-employees of a particular government company sit and adjudicate on disputes that are pertaining to that particular government or company or entity. So, again, I think we should have changed it to embracing the expected because these are all things that we all are aware of. But Mr. Ramana what is I mean, there are things that are obviously wrong with the system. Your thoughts on, on what can be done to make this better, and whether it will help in making dispute resolution more efficient in this, in this framework?

Venkata Ramana Korrapati

I think, right from the inception, the problem starts when we issue a notice and there's no appointment of arbitrator that happens, it doesn't happen within 30 days. And obviously we are left with no choice but to file an application under level six. We file an application for appointment of an arbitrator. It usually comes up before the High Court. And the law is very clear. The 30 days' time limit is not very strict. And if you've not filed any application before filing the 11 C6 application, if the party appoints that arbitrator, that appointment is valid. But there are many cases and I'm sure most of the partners Tine Abraham and others would be aware of, where I go to the court, and the defaulting party comes before the court and appoints an arbitrator. And the court also readily agrees.

The right that has gone away is again being, you know, the defaulting party is empowered to see that this happens. And the court really agrees and nominates the same arbitrator that the defaulting party has, you know, pointed it out. So the most important thing I would like to say is unless and until the courts strictly enforced this, that discipline will not come in. That's one thing. Second thing is I have seen an incident where, at one of the courts this is just before the Supreme Court has called for all the records of Sec 11 applications pending from all the High Courts. Imagine for 12 months my application was pending. It was not coming up. There's a huge pressure

from the management on me, we are the in-house lawyers. External lawyers, call us and tell it's getting listed.

But the management asked me you can't even get an arbitral tribunal in place within a reasonable time. So, this is where the problem is, I think the court should strictly enforce this 30-day time period, so that you know, the moment the application is filed, you should not hear the defaulting party. That's where I end this as far as appointment is concerned.

Abhijeet Sadikale

Thank you for that. Kunal this, in your thoughts on, on challenges with neutrality of arbitrators or anyone who's sitting in an adjudicatory function? What can be done differently?

Kunal Mehta

Yeah, so I think, at least some part of it, the Supreme Court has held regarding the cases of eligibility of current employees of PSU is becoming the arbitrator. So at least that position has been answered. But still, I think some former, former employees or sort of ex consultant of the PSU is still becoming sort of the arbitrator in a dispute with between a public and a private company, although Supreme Court, I think has an in some sense said that, if you have a list of people from whom you can select arbitrator, that list should be a broad based list, you should not only be all the ex-employees of the PSU, it has to be sort of a wider list, maybe ex-employees have some other PSUs which are not in your sector.

So those are sort of some sort of guidance which Supreme Court has given, which I think should at least that is a step in the right direction, that it is not that the same person is the judge jury and executioner in this case, but there are sort of a wider, broad based group from whom arbitrators can be selected. The other thing is, what are you have sort of three arbitrators and then you hope that it is not a sole arbitrator thing.

Abhijeet Sadikale

Thank you for that Kunal. Tine just coming to you since, we have been told that the outhouse lawyers are not getting section 11 decided expeditiously your tips to get the arbitration started. ASAP if you can just take a minute and, and you know, what needs to be done by clients or by litigants in order to make sure that, they don't face the kind of obstacles that Mr. Ramana was referring to.

Tine Abram

I think, fundamentally, I go back to the contract page again. And I think the starting point is not getting the seat of the arbitration right. Now, the seat of the arbitration means that you know, the High Court which will have jurisdiction will accordingly be decided. Now, some courts, all of us know are a lot more pro arbitration, pro commercial, and wants to dispose of these matters on a priority basis without keeping it, I may not be able to say the same with respect to the same speed with respect to all the courts across the country So I think that's one place where parties can obviously start with which was that, you know, having that clarity on the seat and, and therefore the jurisdiction code which will be there in terms of deciding the section 11 applications as one point.

The second bit is obviously the fact that wherever possible, you have the ability to have a three-member tribunal. Now the minute you have the ability to have a three-member tribunal, you know, whichever party I'm not saying that, you know, be it the government entity or the private party, whoever is invoking the arbitration comes with the comfort and comfort in the process that it is a neutral panel of three members who is there so you start with appointing your nominee. There's another person who will get appointed from the counterparty side and then the presiding who's going to get appointed. So I think as against agreement, a sole arbitrator name means we are following are three member panel, I think there is some advantage in following a three member panel and both of these are at a way before the dispute stages at the time of entering into contracts few aspects that the parties can keep in mind, that is one thing.

Next is obviously I think in terms of choice of arbitrators, how do we incent that a party who's initiating the arbitration? How is that entity making their choice of the arbitrator? Now, sometimes there is an administrative delay and things like that are just a decision not to agree to a particular name or not cooperate with the process. That's, that's the strategic call that a party may take. But

otherwise, in a summer, very often, the appointment process gets delayed, because of the lack of faith in a name that one particular party has I suggested Mr. X's name, the Counterparty is not very happy with Mr. X for whatever reason. Now, being very careful about making your choice of who you would want to nominate, can also I think, go a long way in smoothening out the process for appointment of arbitrators, setting, those would be few tricks of the trade.

Abhijeet Sadikale

Thank you, Tine for that. We have, we have about 15 minutes left. So, being cognizant of the time, in case there are questions, please send them in. We'll try and weave them into, into the discussion. And I know that we have a lot to discuss, but some of the things will now obviously have to be dropped from the agenda. But, one of the issues in the arbitration process itself is the entire issue of evidence. And we are still, in that sense stuck in the traditional notions of leading evidence and cross examination.

Although there has been a certain degree of sophistication, both from the PSU side, as well as from on the private side in terms of getting delay analysis, exploits are now your hot topic and all of that. So, all of these things are still evolving in India. But, Tine just to start off with, with you. If you could just quickly tell us what can be done to simplify this process. And in your experience, whether summary proceedings, or you know proceeding in a summary manner without getting into the cross examination and examination in chief, if you that is something that can work well, in this paradigm.

Tine Abram

So, I think, you know, speeding up the process is something which ties in with the very basic objective of arbitration or alternate dispute resolution process. The starting point is obviously the law itself says that you don't need to follow strict rules of procedure. So there is a lot of autonomy, which is given to the arbitral tribunal. I think there are two issues which sort of arise here and which I think, you know, contributes to the delay and the point Mishra mentioned about, you know, summary proceedings and you know, not recording of evidence all of it. One is given that it's a private proceeding, and it is largely driven by consent of parties. The tries not to have unnecessary witnesses tries to do away with a lot of procedural requirements depends on two aspects.

One, the comfort of the arbitral tribunal in following our summary process, the comfort of the arbitral tribunal in experimenting, I mean, you know, very often we don't feel that, you know, say let's take the question of, you know, experts who are doing our damages, calculation, it is possible that you could do that through a hot topic where both experts are put together, the issues can be thrashed out, which may or may not always be the case that the tribunal or the parties are comfortable with following that process. Similarly, a lot of disputes are that can be decided purely based on the documents and you can avoid going into, you know, oral evidence or affidavits of evidence in these proceedings.

There, again, the comfort of the arbitral, tribunal and comfort of the parties. So, I think it's a gradual process where you need to build in that level of sophistication into the process, which I think comes from all of us in the group who act as counsel, who act as arbitrators, and we're also representatives of parties. I think that comfort that we built in taking that call that I am happy following a summary procedure. I don't want to insist on everything sometimes what bothers counsel about those parties is that what if I don't follow this, am I, you know, giving up one ground for me to challenge the award at a later point in time.

So, I think those concerns obviously comes in the way of the decision making to begin with. So I think that sophistication that can go into the running of the arbitration, which is a responsibility on everyone, the bench, the bar, and the parties will definitely take a long way ahead in terms of dealing with these timeline issues. And I think it's a gradual process. It's not something that can happen overnight. We are definitely seeing changes from what it was 10 years ago. But still, there's a long way to go.

Abhijeet Sadikale

Thank you for that Tine. Mr. Vishrov just your very quick thoughts on how acceptable is this no cross-examination format in your experience with PSUs, and whether it is something that should be insisted upon?

Vishrov Mukerjee

Once more.

Abhijeet Sadikale

So, if you would have.

Vishrov Mukerjee

There was some discretion there.

Abhijeet Sadikale

Sorry. So I am saying that, that in your experience, you know, doing away with this, with this elaborate process of cross examination and examination in chief, given that a lot of the disputes are can be decided purely on the basis of documents. How deceptive have you seen, how receptive is the PSU to an idea or suggestion like this and what can be done better in that context?

Vishrov Mukerjee

See, which of it depends on matter to matter. If the matter requires that somebody is blatantly saying that it is not possible, then it's okay. And authorities that don't have any problem also in arbitration matters. But if it is not required, usually is there the parties who are working going for that Arbitration they are also working in the same field, it is not that something different, but this cross examination and the process of accepting the **[inaudible 00:52:03]** of that they are the things which are to be followed, because there is some center process. So it has to be followed. And it all depends on case-to-case basis.

Coming back to the to transition process, for example, in CCA or other mediation process. **[inaudible 00:52:18]** is now surprisingly, all the awards, but the majority of awards that have been vast, they have again gone to the CCI. In order to get it settled. The award 34, 37 from the High Court Supreme Court everywhere, and again, it has been settled in the CIE in order to just give a close to the matter, interface. Let us decide it on merits or whatever it is. So I'm not very much on the favour of this cross examination and other analytical process. The thing is that whatever it

shouldn't be settled by independent people and the constituent committee or the eight. For example, I will tell you one special example.

In one of the parties is state government, then the matter system, Madhya Pradesh, Madhyastam Adhikraman Adhiniyam 1983. Till date, nobody has gotten even one claim from them. Lots of dues which were due there, no click nothing known as claims. It's just they have given EOT, otherwise, like it is a dead end. You just give paper and forget it. So, in those cases, and you don't have any other way out also, in recent past, there was some judgement that if you have an agreement in the agreement, you have 1996 arbitration, then because the state government was knowing that this was there, even then if they are saying the 1996 arbitration then we should move on.

Again, the Supreme Court has told nothing in government is having their thing go ahead and do that. And this problem exists in four or five states Gujrat, Madhya Pradesh, Chhattisgarh and Bihar, or some other states have also built then I think otherwise there is no way out. As we which you have received so much of litigation paying so huge amounts of fees to the arbitrators and even then you're going to settle the things in the CCI itself. I think that much more has to be done in the dispute region process because there is a saying in Hindi **[Hindi patch 00:54:46]** there is one single place and you will have to fight within itself.

Abhijeet Sadikale

Correct, thank you.

Vishrov Mukerjee

As you see other things will come up.

Abhijeet Sadikale

Thank you for that. So, we are in the, you know, we are in the in the last five minutes. So, the most important part of any dispute is enforcement and execution. So just a couple of minutes from Kunal and Mr. Ramana on their experiences, especially with the entire deposit requirements and whether it is working well or not. And then we'll, we will close out with the final comment from Tine. So, Kunal just over to you, your experience, I mean power sector everyone knows the lack of enforcement challenges but your experience and what can be done to change it?

Kunal Mehta

Yeah, no. So, that is true. You have seen the Andhra discount, example where there is already an high court order, which is where a lot of dues are pending from Andhra discount, then there is sort of Punjab for example, where agreed PPA was changed by or at least was tried to be changed by a bill. So, there are a lot of such issues. In fact, the execution is not that easy. If you just talk about power sector, if there is a order by a state commission, then state commission does not have execution powers also, they have a power under Section 142 of the Electricity Act.

But that can only sort of give a penalty on the officer in charge, or some sort of a criminal action against them, but there is no provision even to execute its own order. So Aptel has a power to execute, but the Commission's does not have. So, so there are challenges at the, for the execution of any of these, at least if I say litigation matters, and all arbitration matters also they end up sort of going into appeal in sort of challenge under 34, 36. So it is not an easy task, it always takes time and sort of you have to fight it up the end to sort of get your money.

Abhijeet Sadikale

Thank you. And Mr. Ramana, over to you I know that this is a pet top, favorite topic for you. So, your views on?

Venkata Ramana Korrapati

Yeah, I think 2015 amendment has been really good amendment, that automatic state concept has gone away. And at least at pro arbitration courts, we are able to get very good relief. There are instances where we got 100% deposit order, and also the release of the money on punishing the bank guarantee. But this is again happens only in you know, very good jurisdictions and some jurisdictions we had difficulty in getting that 50% also, I think another important relief from the public sector perspective is the Niti Ayog office memorandum that came in 2016.

In that acts actually helped us in getting relief. 75% of the word amount is released against the bank guarantee. And there was also an amendment to that earlier, the first initial Niti Ayog memorandum talked about furnishing interest also. But that was waived off subsequently, and the with these two reliefs, we were able to enforce what reasonably well. And again, let's see how the 2021 amendment will take back. This enforcement, which we had quite a successful run of enforcement we had for the last five, six years.

Abhijeet Sadikale

Thank you. Tine?

Tine Abram

I would like a 40 second final word on it. I think one is definitely the enforcement climate in the country has significantly improved domestic awards, foreign awards, whatever it's significantly improved. Codes are really pro enforcement. And to a large extent, they all respect the idea of giving a security if you have to get a steal, and other ways. Also, courts are comfortable proceeding with enforcement in parallel to a pending section 34 Challenge proceeding, which is there. So, I think definitely we've seen a positive change in the last five, seven years. And, and the hope is that that will continue and gives parties the much-needed relief that they've gotten in the arbitration in trans. This is actually transpired into what they were looking for in terms of money. Yeah. So, I think, yeah, it's definitely been a good few year in terms of enforcement of it.

Abhijeet Sadikale

Thank you for that, since Abhijeet is now on screen it time for me to go up. But I would like to thank all the panellists and everyone who's in attendance for listening to us patiently. Thank you very much for taking time out. A big thanks to Niti, MCIA, Abhijeet and the team for having us and a special shout out to Bakul and Veer, who are part of the TRILEGAL team for getting all of this together and making sure that this happens. So thank you, everyone. And it was a great experience and we hope to see you back again next year. Thank you.

Vishrov Mukerjee

Thank you so much.

Abhijeet Sadikale

Thank you Vishrov.

Tine Abram

Thank you everyone.

Kunal Mehta

Thank you.