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Session: Abuse of Process in International Investment Arbitration

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Neeti

Good morning, everybody, and welcome to the fifth day of the India ADR Week and the first session which is being hosted by King and Spalding, on the topic, Abuse of Processes in International Investment Arbitration. We're very glad to have an esteemed panel of speakers. Let me take this to introduce them to you. We have Kenneth Beale, Partner King and Spalding. Luan Tran, Partner King and Spalding. Aseem Chaturvedi, Partner Khaitan and company and Abhileen Chaturvedi from Partner ELP. I'm looking forward to an interesting discussion and hope all of you enjoy it as well. The video and the transcript for this session will be available on the India ADR Week website, which is ADR Week.in. Over to you Ken and all the very best for a good session.

Kenneth Beale

Thank you so much Neeti and it's such a pleasure to be here. I only wish that we were in India doing this but it's a pleasure to be doing this remotely. So, we're talking about Abuse of Process In International Arbitration. And I see that the title of our seminar says Abuse of Processed and Investment Arbitration. I think we're going to talk about this a bit more broadly, we will cover Investment Arbitration, but we're going to cover all forms of arbitration as well, because this is a topic that comes up in arbitration and all of its different forms and manifestations. Let me start with the recent conversation that I have to set the context. I was talking to a former client that had been in arbitration proceedings for over a decade in Western Europe.

I won't name the dispute, but it's a very public dispute that many of the participants in the webinar may have heard of. It lasted, 10 or 11 years, and ultimately resulted in a result that was maybe unsatisfactory to all of the parties. But there were during the years, numerous procedural delays, and issues and potential abuses. And when I was talking to the General Counsel of this former client, they were saying to me, we will never use international arbitration again, we had no idea how susceptible international arbitration is to abuse of process and we will never subject our company and its shareholders to the potential for these abuses ever again, we're taking international arbitration agreements and clauses out of all of our contracts, we're done with it and he also mentioned that they had spent something about $50 to $100 million in legal fees over 10 years, binding these proceedings

That anecdote I have heard from other clients as well, I've heard variations of this and it's interesting, because I can remember 10 or 15 years ago attending conferences and panel discussions like this one, where the focus was very different. Back then it was sort of the celebration of how wonderful and deficient international arbitration is. It was this flexible approach to dispute resolution that allowed the parties to design dispute resolution mechanisms and scenarios that were far more efficient than local courts and made abuses of process harder, or at least that was the theory. And so, I've seen in the last decade or two this interesting shift, from attending conferences, panel discussions that celebrated International Arbitration as a solution to abuse of process to now being on a panel today, where we're talking about the problem of Abuse of Process in International Arbitration.

And I have clients and former clients the like the one that I mentioned, were complaining vehemently about this. So today, I think the issues that we're going to address are threefold. What is an abuse of process and International Arbitration? I have to say the definition is a bit fuzzy to me. You know, it's an abuse of process. In some ways, it's at the use of a procedural right, in a way contradictory to how that right was intended. But beyond that, it's a little bit vague or so what is an abuse of process, are abuse of process in arbitration of problems. A lot of people are talking about it, but is this really a problem that something needs to be done about? And then number three, if this is a problem, what should be done about it? What can we as counsel do about it? What should arbitrators be doing?

What should institutions like DMCIA be doing what should government's legislatively and traditionally be done? worried about that. So that's what we're going to talk about. And just two preparatory remarks before we jump in. One is that when we talk about abuse of process, I think there are two types that we will talk about. One is sort of what I call classic abuses of process and laudable outline, I think in detail what these are, but these are the typical abuses, delaying proceedings, really multiple proceedings, structuring or investments, and so on. And the second category is what Lucy reed in her 2016 Freshfields lecture referred to as abuse of due process challenges. And I think there are relations between these two and overlaps, but they aren't necessarily the same.

So, we're going to talk about both of these and see what might be done. And I'm just going to offer one hypothesis at the outset, which may prove to be wrong or writing to **[inaudible 00:05:56]** Our

user processes an issue and addressing it can be challenging, particularly for arbitrators who are in the best position to address it for a variety of reasons. One is that abuse of process often happens

where there are grey areas in the law that make these abuses possible. But arbitrators often aren't empowered to resolve these grey areas of the law. Number two arbitrators often are afraid of due process challenges, and they don't want to overstep their bounds, they want to be very careful in the actions that they take and therefore, they sometimes indulge abusive behavior to avoid challenges to the ultimate reward. And number three, even if arbitrators didn't want to do something about abuse of process, their toolbox of potential remedies is a bit limited.

So, that's a hypothesis that we can talk about. And with that, let's launch into the discussion. I'm going to step back, we have an amazing panel, and let them do most of the discussion. I'm going to start out before we turn to abuse the process directly. I'd actually like to comment this for just a moment, from the other perspective. And that is, arbitration historically has been seen as a remedy to potential abuses of process and National Court that have long run off. And I wonder, before we jump into abuse, is arbitration still beneficial, at least in some contexts in that way? Is arbitration at times still a solution to abuses of process? So why don't we start Abhileen, I'm going to start with you, maybe you could talk about this and the NBN context, do you think that there's still a role for arbitration to play in terms of overcoming potential abuses and the litigation system?

Abhileen Chaturvedi

Thank you, Ken. From just to begin with, I am firmly of the opinion that arbitration does, to a large extent, at least in the Indian context, help, perhaps prevent the abuse of process which may otherwise be seen in Indian Courts. But I'll put that into perspective. We are an economy which liberalized ourselves sometime in the early 90s. We saw a new arbitration legislation come in the year 1996. And after that, both the legislature and the judiciary have in fact, come up with decisions as well as amendments to the existing law, which has in fact, to a large extent, helped the Commercial Dispute Resolution sphere in India.

And I can totally relate to the fact that a lot of practitioners as well as stakeholders in the Indian context, would thank would be grateful to the fact that the legislature thought of the Arbitration

Conciliation Act 1996, the way and the form that it is in today, we've had some seminal judgments by the Apex code, which have, in fact, fostered the growth of an expeditious and an efficient Commercial Dispute Resolution Process within our country. Judgments like Bhatia International with somewhat allowed the Indian Courts to enter into a sphere of an International Commercial Arbitration, which was seated outside India, it was sought to be rectified by the Balco judgement, which again had certain pitfalls of itself, which was subsequently bettered through legislative changes in the 2015 amendment.

Post that in the last decade at least we have seen a proliferation of arbitrations within the country and more so than ever this is highly used by public sector undertakings, government entities and it's not imaginable, what would have been the situation had these arbitrations not been there or had the arbitration legislation not been there. So, in the Indian context, it has definitely helped a lot. It has streamlined a lot of procedure around a Commercial Dispute Resolution process. It has given the parties the freedom to appoint an arbitrator depending on their subject matter. It has simplified a lot of procedure. I mean, it's not unknown that Indian courts are infamous for being sticklers for procedure arbitration, perhaps better that scenario to a large extent in India.

There is a lot of arbitral institutions, which are coming up in the Indian jurisdiction, which are again help the arbitration jurisprudence a lot. the confidentiality of arbitration is something that, again, a lot of corporations, as well as individuals would have appreciated to a large extent, given the fact that somehow, we have a lot of media trials going on, which effectively will adversely impact the cooperation. So, all these sorts of things have greatly impacted the development of Commercial Dispute Resolution in India. And I can't even begin to imagine what would have been the situation had the arbitration legislation not been there.

Something which has recently come up through the amendments in 2015 and 19 is that there is a defined period of time within which an arbitration has to be completed in India. I don't know how many legislations across the world have something like that. But we did introduce it in our legislation and needless to say that while yes, certain arbitrations have run beyond the legislative period of two years, but most of the arbitrations and most of the arbitrators do look forward to completing the arbitration within that specified period of time. So yes, while there may be abuse of processes within

the arbitration sphere, as well, I would firmly believe that arbitration legislation has helped a lot when it comes to Commercial Dispute Resolution in India.

Kenneth Beale

And Aseem your experience, would you agree that arbitration still has a role to play as a force for good when it comes to process issues? or are you more skeptical?

Aseem Chaturvedi

Thanks, Ken, for that and I completely agree with Abhileen and what he echoed that, arbitration in itself has been quite a speedy, and an efficient manner in which commercial disputes have taken place in India and like Abhileen was rightly pointing out, see, India geographically is a big country. And as it is, we are so overburdened with cases arbitration has done its bit to take that burden away from the courts, and especially in commercial disputes, where some of our courts do not have original jurisdiction even say a multimillion-dollar claim would go before a civil judge in a district court. So, to imagine him being well versed and equipped to handle a situation like that I think arbitration has taken care of those issues.

It has its own pitfalls, which we'll discuss during the period of this presentation. But one thing that I wanted to point out and so far this arbitration is concerned is that you have at least some sense of timelines be it two years, it may extend by about six months one year, but unlike court system where there is no timeline if a client calls me from say from US and asked me how much timeline will a court decision take, I frankly cannot tell him anything, especially costs, I may be able to tell him upfront costs that may be involved. So, what arbitration takes care of is at least you have a definitive cost in mind. You have a definite timeline in mind. So, I would certainly echo with what Abhileen is saying that it has been quite a boon and so far as commercial disputes are concerned.

Kenneth Beale

Luan, I'll give you the last word before we then turn the tables and look at abusive process. Your practice is very global, you practice in the US extensively in Asia and elsewhere. Do you think in

your experience that arbitration can at least times be a force for good? Or are you more skeptical due to the sort of the nature of your practice and geographic footprint?

Luan Tran

Hello and thank you for allowing me to be here. Always good to come back to India, either in person or virtual. International regression is still perceived as more fair than the national courts in two main aspects. The first is neutrality and the second is procedurally equality. On a neutrality, I think the reason which probably best explained the success of International Education is the fear of the hometown advantage. And by that it means that I think, for a foreign party, national courts generally receive us not that neutral.

When they do when they decide to speak between locals and foreigners. It's well known that unfortunately, corruption is present in a number of jurisdictions. And also, it's well known that the independence of the local court is not a luxury in many jurisdictions around the world, therefore, by submitting the dispute to a neutral institution, or international institution that relieved upon the concern about hometown advantage, that's number one. Number two, the quality. I mean, it's well known also without the arbitrator.

One of the grounds to reverse an award challenge and award is the lack of due process, therefore, experienced arbitrators, they pay very much attention to ensuring that the parties would have procedural fairness in the proceedings. Now, that's a good thing. But as you can see in the following conversation, that also could turn out to be an issue when dealing with abuse or process or specifically when we have the inability of the arbitrators to effectively deal with abuses, precisely for the fear being getting reversed in the enforcement stage.

Kenneth Beale

Okay, so now let's, we talked about the positives of international arbitration, which is a good place to start, because we're all practitioners in this line of business. But having done that, why don't we now jump straight into abuse of process when it is, how bad of a problem it is? And what should be done about it? And Luan, maybe I'll start with you again, I think, and these discussions, often, the

participants in the discussion sometimes don't define what they mean by abusive processes what an abusive process is, nor do they sometimes explain why abuses of process are important to talk about.

So, can you start us out by giving us your or definition of abuse of process, and here I'm talking about the first category of classic abuses, supposed to be mostly abusive process, what is an abuse of process? Could you give us some examples of classic abuse of process? And why does it matter? You know, can you challenge an award on this basis? Why should we care?

Luan Tran

I think abuse of process can generally be defined as a conduct that is not per se illegal, but nonetheless can cause significant prejudice to the party against whom it is aim, which undermine a fair and orderly resolution of disputes in international arbitration. So that's like the very general definition. The doctrine of abuse of process is based on the principle very simple principle that every legitimate procedure right must be exercised in good faith. So, you keep hearing the concept of good faith, because of a fairness, which, as I mentioned earlier, is the, it's an advantage perceive advantage of international integration.

So good faith and fairness is very important. Now, let's go straight up to some examples or categories of abuse of process that about 15 years ago in a series of articles by reading, international immigration practitioners, I think, can you mention Lucy Reed, but also the former, the late Professor Emanuel Gaiya, they start to work to write and raise the alarm about the increased problems with abuses in a process international arbitration via a series of very influential articles. So, professor Gaiya, I think I came up with a couple of categories and I'm going to list some of them here but also, I added some of the order categories based on my experience.

The first type of abuse is what we generally define as the conduct of design to secure jurisdiction or protection under Investment Treaties. So those are the kinds of conduct that arise in Investment Arbitrations. So, what we have, for example, you know, oftentimes the parties with some claim will try to restructure their companies so that they can fall under the protection of particularly Investment Treaty. So, in a series of cases, beginning of 2000 pretty cases are against Venezuela, Ukraine, and

Bolivia, each of those governments started to raise the defense of abuse of process my alleging that the claimants in those cases have been properly engaged in corporate restructuring or ownership so that they can benefit from the protection of the relevant VAT involving those countries.

And that set the stage for the abuse of process arguments or claims made in recent years. So, that's one example of a way a party can manipulate the process. Number two is they can also, in this regard, come up with fake evidence of ownership. Again, to fall within the protection of the particular investment treatment the second type of abuse that we see are cases where the same quality have multiple arbitral proceedings to maximize the chance of success, and you will see that often, for example, where you have the same contract, but there are several breaches of the same contract. So, some party would choose to file multiple arbitration, one for each, breach, either they don't like the pattern on the first arbitration, or they try to again maximize the chance of winning, right.

You also see the kind of cases where construction is the place where there are several multiple claims in the same construction projects. Again, the file multiple arbitration, for some reason I said earlier. Related issue, you will also see parties are showing like new arguments that they could have made or stood in a previous arbitration and that actually particular issue has come up recently, in a case involving India fairly high-profile case in which our firm was involved in the arbitration level.

It's the union is a case between Reliance and India and series of POC, some oil projects, where the Government of India has asserted some arguments that, according to the tribunal, that our government should have a certain prior arbitration and under the doctrine of Res judicata, the arbitral tribunal has rejected those new submits these submissions under **[inaudible 00:22:54]**, because they are abuse of process and India went to the UK to challenge that our work on that basis. And about two months ago, the Commercial Court in London has agreed with the arbitrators panel, saying that, yes, what the Government Of India did was an abuse of process, because they raised arguing that they should operate in a prior arbitration.

The third type of abuse of process you can find is a common would file, initial arbitration for purposes on resolving the legitimate dispute, for example, with a file claim just to gain publicity, or to expect some extra pressure on the other side, to run up the cost, and create financial plan to the other side. Also, to avoid, for example, let's say one party is being subjected over legitimate criminal

investigation or regulatory investigation, a particular country that party would in turn file arbitration claim, alleging, this is unfair, and violation of creative protection, those kinds of things could, in some instances, are abuse of process.

So, as you can see, the kind of abuse could be, it's pretty broadly. I think that it's up to the creativity of the lawyers involved. Unfortunately, we see more modern abuses across not only Investment Arbitration, as mentioned, but also in commercial, regular commercial arbitration.

Kenneth Beale

Turning to you now in the NBN context, in your practice, what sort of situations are you seeing that, might be characterized as opportunities for abuse of process? You know, in some respects, I think the sky is the limit there. There are all sorts of permutations that you might think about what have you seen recently?

Aseem Chaturvedi

So can I just pick up from where Luan left see, it's how it's very subjective, what you call abuse of process and secondly, how imaginative your counsel is. So, in my personal experience, arbitration is process one, when you enter the arbitration proceedings, what leads to arbitration is an appointment of an arbitrator. And in 8 out of 10 cases, I am just taking a small anecdotal example is where you have an option to appoint a sole arbitrator by consent. Any respondent who is not interested in taking this proceeding further A will not respond to your notice invoking arbitration.

When the matter goes to court for appointment of an arbitrator, it's already about 30 to 60 days are wasted by the time the party reaches for an appointment, then there you don't appear on the first day take time for notice to be issued, when you come in and raise frivolous objections with regard to the maintainability of the petition, it may be the jurisdiction, it may be, whether the dispute is arbitral or not. While all of us are aware that in the scope of a Section 11 is very, very limited in so far as our act is concerned. But we try all, tricks in the trade to try and even stretch the appointment.

So, if an appointment is taking 6 to 8 months, that in itself is half the battle one in so far as an abuse and delay is concerned. Now the Supreme Court has issued a whip that, pending Section 11 petitioners' appointment have to be decided at least in a year. But this I'm talking about more evolved jurisdictions like Delhi and Mumbai, where you know, courts are sensitive to the process of arbitration. But if you go to more remote locations, where international arbitration isn't that much of litigation is coming in, insofar as the arbitration and the act is concerned. These proceedings itself can take two to three years of getting the arbitrator appointed. So that is also so to say an abuse where you are delaying the process.

The whole objective of speedy justice is lost in so far as the Indian context is concerned. When I'm looking at an international arbitration, a couple of things that come to my mind immediately are Emergency Awards or Emergency Orders which are passed for granting of add interim protections or interim stay. Now, till about very recently, even in India seated arbitration and Emergency Award by an international arbitrator was not strictly enforceable, you needed to again file a Section 9 petition for enforcement of that award. What is the recent paradigm shift has been that India seated arbitration in Amazon judgement has been recognized like an emergency award has been recognized, that can be strictly enforceable under provisions of the Arbitration Act.

But if you look at a foreign seated arbitration, that is still a grey area, so wherever there is, there are grey areas, they are bound to be exploited in an Indian jurisdiction, and like Luan was finding on how imaginative a lawyer can get. You challenge the jurisdiction of the arbitrator you file privilege applications, keep piling one thing or the other. And those are the kinds of things that are what I would call it as an abuse of process because they hit at the very objective of speedy disposal of cases. That's been my personal experience.

Kenneth Beale

Abhileen, I'll pose the same question to you, what have you seen in your practice and are seeing recently that you might characterize them as abuse of process and you know, sort of how serious is this?

Abhileen Chaturvedi

So, I will talk about the conduct of arbitration proceedings in India and how we in the domestic arbitration sphere have experienced the abuse of processes, actually, not just domestic arbitrations, the international arbitrations where there is an Indian party involved and somehow it happens to be an Ad hoc arbitration seated in India. One of the very often and very much practice is the art of Cross Examination where parties go ad nauseam on Cross Examination of witnesses. Now, is that an abuse of process?

Technically, well, the respondent is just trying to get to the truth of things. And the point is that you are also trying to help the tribunal as well as trying to get to the root of things. But there has to be a certain limit. I mean, one of the arbitrations that we conducted our witness was asked 700, in excess of 750 questions. Now, that is just bizarre. I mean, you don't need to go on for more than those many questions. The Tribunal could not say anything, because when a Tribunal says something, it can perhaps become a ground of impartiality or perhaps the lack of procedural equality being given to the respondent.

So that is when it comes to Cross Examination of witnesses in terms of the practice that we've seen, another practice that we've seen is that the claimant will perhaps have a witnesses are 2, the respondent, on the other hand, will have 5 witnesses, 6 witnesses, and they will not just depose on the facts and the evidence in the arbitration, they will perhaps depose on things which will go to the root of constitution of the claimant entity itself. So, they will perhaps question the claimant's constitution itself during the evidence stage of a Dispute Resolution Process.

So, I mean, in the Indian parlance, there is so many more examples of this nature, arbitration almost on the verge of completion, the respondent party comes out with three sets of application, one for enhancement of its counterclaim, the other for producing more documents on record, and the third for recall or witness. Now, the tribunal rejects it. The Counsel for the other side says that this will be a great injustice, this will be tremendously prejudicial to their clients' interests, and the tribunal ultimately gives it. So, while the main arbitration proceedings were closed for hearing these three applications, which are filed with the flagrant of the proceedings, they still need to be heard, we still need to file a reply.

And ultimately, the tribunal rejects it. And the rejection order is then challenged before the District Court who takes that order procedural order as an Arbitration Award, and then stays the entire arbitration proceeding. So, this is a classic example of abuse of new process. And I'm pretty certain that I am not the only one who's experienced it. A lot of practitioners within this geography would have Internationally also, it's not something that is unique to us as Indian lawyers. Internationally, when you look at the Investment Arbitration sphere, one of the treaty cases against Venezuela, there the arbitrator was challenged, I think, more than seven or eight times and the arbitration is still running till date.

So, there are these conflict examples in different spheres and in different geographical locations, the arbitrations which were invoked against the Government of India, some of the arbitrators were challenged because they profess certain views in a conference or in a seminar. I mean, it's hard to imagine that what you and I may express at this particular panel may ultimately be used, perhaps against you to challenge you as an arbitrator in an arbitration that you may currently be on. But these are certain realities of things. And I'll just take a minute more than stress upon the UNCITRAL rules as well UNCITRAL rules in the year 1976, they said that the parties would be given a full opportunity of presenting their case at any stage of the proceedings.

Now, the ingenuity of the lawyers worldwide, perhaps pushed UNCITRAL, to come up with another amendment in 2010, which said that the parties are given a reasonable opportunity of presenting their case at an appropriate stage. So of course, there are these legislative and institutional changes, but to say whether this abuse of processes will just somehow stop because of certain changes. I think our lawyer kind is way more creative and will just come up with way more nuances.

Kenneth Beale

I, mindful of time, I won't give innumerable examples from my own experience of abuses. But I'll tell you one that happened not too long ago, I had a case where the counterparty use every tool imaginable to sort of to abuse process, not because it was in their strategic interest to draw the proceeding out as long as possible. And we finally got to the end of the proceeding when it was time for the tribunal to render its award, or almost time for the Tribunal to render its award time for the

final submissions. And the other part is first started a process of firing and hiring lawyers. So, they would fire their counsel and they would say, we're now unrepresented.

We need several months to find new counsel, new counsel would be appointed then they would say to the arbitral institution now our new counsel indeed several months to read into this complex case to prepare our submissions, and then write about the time that they had read it and guess what new counsel was fired and they needed new time for additional counsel. And when an end was finally put to that. They then turned around and filed bar complaints against the members of the arbitral tribunal. Counsel, parties to the case on the claim that, the arbitration was cited in country X.

And those individuals were not admitted to practice law in country X, which was the seat of arbitration. And there was clearly no requirement that the arbitrators and counsel be lawyers admitted in country X in order to arbitrate a dispute, dramatically see that there. But then they filed the bar challenge, then they wrote to the institution that the tribunal now is conflicted, because the Tribunal has personal animus against them because of the bar challenge, and they should resign. And it created a mess of epic proportions that, many most results. So, it's a classic example of an abuse.

Let me ask the same, I'll pose this question to you just very briefly, and then we'll move on. And that is, are we being somewhat hypocritical talking about this, and when I say we have not talked about **[inaudible 00:36:13]**, but arbitration lawyers more generally, because I have seen arbitration lawyers appear on Saturday panels and complain about abuse of process. And then Monday morning, they show up in a hearing that I'm involved in, and they engage in the worst abuses I've ever seen. So, our members of our profession in some way responsible for this.

Aseem Chaturvedi

Kenneth well, I will, unfortunately, we'll have to agree to this, that, we are to take the blame for the manner in which arbitrations are taking place. And I've seen it in India, I've seen it overseas, that, we really need to have a dedicated arbitration bar. Now it's high time arbitration is no longer a hobby for lawyers, that you will have it from 4.30 in the evening, or on Saturdays or on weekends. And a lot of times what happens is that what could conclude during a weekday is pushed to the evenings

or to push to the weekend. So, you don't have so much man hours really, to try and finish an arbitration.

And the momentum is it gets broken in the whole process, arbitrators, whether in India, arbitrators have a cost list of their own. They're so busy, good arbitrators, you won't get dates plus, if it's a tribunal of three. So, three tribunal members and two lawyers matching five diaries in itself is a huge process. So, I think we have to be blamed, but if I call it abuse, or will I call it a more of unethical practice to say, maybe I will take other views, maybe Abhileen and Luan can pitch in here, I will not call it an abuse. I will really call it more of an unethical practice on our part.

Kenneth Beale

Well, you provided the original definition of abuse, which I think I agree with, would you see a situation like that as an abuse? Because I think there is, that there's quite a grey area, what constitutes an abuse and what is just maybe bad practice, but doesn't rise quite to the level of abuse?

Abhileen Chaturvedi

I think it's in the eyes of the beholder, right, and upon engaging that transactional thing. That's an abuse and vice versa. But I think the deeper question is, lawyers would continue to engage in bad conduct, unless and until there's consequences to the conduct. And what are the consequences you don't sort? I think, in the multibillion-dollar case are hundreds of millions of dollars in dispute, sanction, a couple of million dollars, I don't think it's going to deter this kind of conduct, because so much is stakes by these kind of cases, increasingly weak cases, multiple millions of documents, so on and so on. So, I think that because international arbitration, especially at the high level is still fairly small circle. Well, a lot of people know, I mean, everyone knows.

I think that unless and until there's some kind of consequences, some kind of shaming, the lawyers who engage in this kind of conduct, by publication of, awards, obviously, the treaty cases where our public highlighting this kind of abusive conduct, and articles like the one written by Professor Gaiya and Lucy Reed as long as people continue to, bring to the public, this kind of abuses lawyers, will continue to do it without repercussion. I think the only thing that can set them straight is the fear of

being ostracized by the fellow members of this small circle. And they might get away with that one time but, sometimes we tax them to get call up for that. Appropriately I think would make them think twice about doing that in the future because in a long run, it's definitely not beneficial to perform their practice on a client's.

Kenneth Beale

Let's come back. I think that's an interesting point about the fear of ostracization led to being ostracized. Let's come back to that in just a moment, I'll be doing let me ask you to pick up one a seems example about the sort of dual practice that many lawyers have in India, because I just want to very briefly touch on this concern about abuse of due process challenges that Lucy Reed has talked about in her Freshfields lecture. This I could imagine might be an example of that, if I was a lawyer, and then the with a dual practice, and I had to organize my schedule in a way that maybe wasn't optimal for the arbitration, but I just had to do it, because it's the nature of my practice.

And the arbitrator were to ask me about it, I might respond and say, well, my client has a right to choose their lawyer. And if you force me to appear tomorrow at 10.30 am, when I have a court appearance, that's going to deny due process, and it might, scaring the arbitrary away in the same way that the example that I gave the repeated hiring and firing of lawyers as a tactical matter, the arbitrator made, the argument that was made was one of due process that a client has a right to decide who represents them.

And if we've terminated our lawyers, because we have a difference of opinion, we have a right to counsel or choice, and so we should be given time for that. So, what's your taking? So, seems example is that is that a due process issue? Is that a concern? And maybe more broadly, what are your thoughts about due process and how threats of due process challenges contribute to the potential abuses?

Abhileen Chaturvedi

So, I do to a large extent, I agree with what Aseem has said, in the Indian context, arbitration for a long period of time was after us litigation, so to say, we did a lot of arbitration work, post court work

post court hours during the pandemic, we've had hearings on Sundays and Saturdays, with the arbitrator saying, oh, what will we do on weekends, let's just continue with the hearings. So, there may be a certain positive to that also, that, on a weekend, when otherwise lawyer may not be involved in court work, there is another dispute resolution that's happening on the site.

But having said that, it to a large extent, it can be taken as an abuse of processes well, because of the simple reason that while in larger cities like Bombay, Delhi, Bangalore, maybe Chennai, Hyderabad, lawyers may start doing conducting arbitrations on a weekday during court hours. The trouble is that there is a lot of Commercial Dispute Resolution that happens beyond these cities, and of exponential sums of money of really complex disputes, where the practice is still the same, which would definitely prolong the process.

I mean, if there are a handful of senior lawyers, who will do the sort of practice, and if they are engaged in court work from Monday to Friday, it's highly improbable that they will have the schedule all the time. I mean, they're also human beings. At the end of the day, there are only so many hours in a day, they will find it difficult to spare time for arbitration. And that is where again, we go back to the after-hours litigation practice. In fact, one of the judgments that came I think, three or four years back, which said that seat of arbitration within the country can be in places which didn't have inherent jurisdiction to decide a dispute, that sort of judgement gave impetus to having seats of arbitration in Bombay, Delhi, Bangalore.

But, again, that is harmful for the jurisdictions where otherwise, jurisprudence would have developed for a commercial dispute, but because you're concentrating on these cities, their sort of jurisprudence does not develop. So, while there is much to be said on both the sides, that, having arbitrations conducting arbitrations beyond court hours may, in fact, be complimentary to the fact that there is dispute resolution happening beyond court as well. It somehow, I think, will ultimately reduce time for the process because there is that much more lack of time for the practitioners.

Kenneth Beale

So, I think now, we have talked about what are abuse of process. And we secondly, given some examples that highlight why abuses of process can be problematic. I think that takes us to our third

topic, and I think we have 10 minutes remaining. So, and the 10 minutes from that remain let's solve this issue. Let's fix it and come up with some suggestions of what can be done about abuse of process. Luan, I'll start with you, I think, there are a variety of stakeholders, Counsel, arbitrators, national legislatures and arbitral institutions, maybe starting with counsel, what do you think we as counsel could be doing better in order to minimize these sorts of abuses?

You mentioned potentially putting peer pressure on each other, and ostracizing abusers, maybe there are other solutions, we can draft better procedural orders or transient clauses, what do you think are some possible solutions on the counsel side, and Aseem I'll turn to you next to ask me the same question about arbitrators then Abhileen I'll ask you the same question about institutions.

Luan Tran

I think that when we ask counsel, when we picked arbitrator or select the material, we'll make sure to select those who have a reputation of, have a firm grip on the preceding, and will not tolerate abuses and also have a track record of making tough decisions in this regard.

Aseem Chaturvedi

A couple of suggestions that I had like only picking up from Luan has left, see, supposing it's a Complex Construction Arbitration, pick somebody who is well versed with the topic, not merely a retired judge, who will, may not understand the complexities of what a Construction Arbitration have. So, pick somebody who has domain knowledge, and also has the expertise to understand to cut short the time period which will otherwise be taken by an expert or Cross Examination. The second thing that I can think of is having very, crisp and clear procedural orders, whereby you have strict timelines in terms of filing of applications, cross examinations, inbuilt costs for delay, I think that can help in terms of, structuring an arbitration to prevent abuse, or maybe, it's not prevented, bring the level of abuse down to some notches.

Kenneth Beale

On the institutional front, one of the discussions that I always have when I'm an MDM is how to make MDM more of a hub for international arbitration seated in NDMD, DMCIA, which is hosting this has done a great job of leading that work. And I know you're active with MCIA, what do you think? Now, I should say, feel free to talk about what you think counsel and arbitrators can do as well. But what do you think institutions might be able to do anything to help with this issue?

Luan Tran

I think the first thing is for the stakeholders to have Institutional Arbitration in their arbitration clauses. I think if we have institutional arbitration as a regular practice in our country, a lot of things can get streamlined, your claims will get more conscious because you will have to pay commensurate arbitration fees. Today in Ad-hoc arbitrations, we asked for everything under the sun, we throw the entire kitchen thing and out of a claim for say 100 million, only 10 million, maybe legitimate.

So, if we have institutional arbitrations, people will become more conscious of the claims that they will make and completely resonate with what Aseem said that need to have experts in the field. So. if you have Institutional Arbitration, they will also suggest arbitrators who have the subject matter expertise. And the arbitrators also will be more cautious of the timelines in order to perhaps have more appointments from that institution. So, if they delay the proceedings, maybe the institution may not appoint them in the future. So, all those sorts of things may get a lot more streamlined, if we do have Institutional Arbitration in the country, and a lot of a lesser amount of judicial interference in the arbitration process.

Kenneth Beale

And I will just add, and then there's a question and then there's a question of Q&A which I'll post, but I think there's also a role for some of the exercise of authority by legislatures and courts in terms of setting precedent because often I think it's the point of this now that some of those examples, often abusive process results from grey areas and the law and that is something that often only the state can clarify. There are also many opportunities for abused and for instance, rules regarding a

classic one is service and process where cases are delayed for years because of truly stupid and archaic rules on service of process that somebody should reform.

I guess we could have another panel discussion on service and process rules. But let me pose the queue and one of the questions in the Q&A. And that is, what measures can potentially be taken against parties that forced their counsel to delay and disrupt proceedings. And maybe I'll add a related question to that, which is, if you have a client that comes to you, and is asking you and encouraging you to engage an abusive practices or practices that come close to the line, how do you manage it? So, are there are sanctions or consequences for parties that force their counsel do that? And how can we as counsel manager, I'll open it up to whoever would like to jump in on that?

Luan Tran

I think this is a tough question. But I think is, does come up right in practice as well. I think it's a case by case and also depending on the lawyer environment. If you truly believe that, as counsel, you have a responsibility to the International Christian Community, and advance the cause of arbitration, then, you might want to think twice about engaging this kind of conduct, even if that's what your client wants you to do.

Because again, I mean, after all, it just one client one case and on the other station, so how can you help this profession. So, that's a personal choice, right. And also, depending on what the client exactly the client asked to do, because again, it could be subjective. So that's what I want to come back to what you said earlier, about what the political institution or legislature can do, I think that they can come up with some rules, specific rules allowing or giving the arbitrators the tool, the power to dismiss claims that they consider to be abuse of process.

I've seen so far, the only thing I can come up with so far is the UN Conventional Law of the Sea. As you may know, they have a specific provision allowing the court or tribunal to dismiss a claim on abuse of process at the beginning. So, I cannot get it, they can decide not to proceed with a case to be found or claimed to be abuse of process, things like that can be done at an Institutional State level.

Kenneth Beale

So, I promised Neeti that we will end on time we have three minutes left on the clock, and we have three of you. So, can each of you take one minute? And we'll go around and answer the following two questions. How big of a problem is this? And if you had a magic wand, what would be the one thing if you could do one thing to improve the situation and reduce the abuse of process? So, is this a big problem or not? And what would your top recommendation be? Luan, I'll start with you.

Luan Tran

It takes a **[inaudible 00:53:14]**, I mean, people like to beat up on the arbitrator. But I think it takes the lawyers, takes arbitrator institution to deal with this problem and issue, it is a real problem.

Kenneth Beale

Okay, what it's a big problem, Aseem.

Aseem Chaturvedi

It is a big problem. But I think we've come a long way from how bad things were to people taking in more seriously, and things getting better and in shape. If I had a magic wand, I would really want people to introspect and see how far you can push a proceeding and, hear your client and abuse the process, I think it's for one to stop at a given point, and then start following the process the way it should be. So maybe I would want people to introspect.

Kenneth Beale

And Abhileen, I'll give you the final word, what are your views?

Abhileen Chaturvedi

I am perhaps on the other side of the fence or on the fence over here. I think this is not a problem this will possess; we will continue having more and more definitions of what and what is abuse of process and what is not. But magic wand in the Indian diaspora, at least have begun with Institutional Arbitration that will resolve a lot of things for me, because there will be a predictability in the procedure, the costs, and both the arbitrators and the parties will be conscious of the timelines because everything will have a cost implication or a cross appointment implication from the arbitrator.

Kenneth Beale

And with that, I will just conclude with thank you to the Luan, Aseem, and Abhileen. Thank you very much for participating. It's a privilege for me to participate in discussion with the three of you. So, thank you, and thank you to Neeti and the MCIA as usual, this is fantastically well-organized conference program, and it's been a pleasure to participate and with that we will wrap up I think right on time.

Aseem Chaturvedi

Absolutely. That's how arbitration should be wrapping.

Aseem Chaturvedi

Absolutely. Thank you so much.

Kenneth Beale

Thank you all.