INDIA ADR WEEK DAY 4 – DELHI

SESSION 2

NAVIGATING THE FUTURE OF INTERNATIONAL ARBITRATION IN THE ASIA PACIFIC REGION

10:00 AM To 12:00 AM

Speakers:

Ng Chu Yin, Head of Legal Services, AIAC

Dr. Harald Sippel, Head, Skrine's European Desk

Mrinal Jain, MD & Secretariat, Economic Damages and Valuation Practice

Abinash Barik, Co-Founder & Partner, Finvest Legal

Moderator:

Bhavini Singh, International Case Counsel,AIAC

MEHEK: Now we move on to the panel discussion on Navigating the Future of International Arbitration in the Asia Pacific Region. I would request all the panellists to join us on the dais. I would request our Moderator also to join us on the dais. Our Moderator for the session is Ms. Bhavini Singh. Bhavini is International Case Counsel with AIAC. She is India qualified lawyer specialising in dispute resolution and has completed her LLM from Sciences Po Paris. Bhavini has also represented clients in high value international and domestic arbitrations, mediations and commercial litigation proceedings before various Courts and Tribunals. Our panellists are Ng Chu Yin, she has worked as a QS for about 10 years in Malaysia. She then worked in local claims consultant firm for about 4 years while studying law. After that she worked in a law firm that specialises in construction dispute. She is now the Head of Legal Services with AIAC. Our second panellist is Dr. Harald Sippel. With over 10 years of experience in Asia, he facilitates business dealings in Malaysia and South East Asia region at large. He heads Skrine's European desk. He was admitted to practice in EU Austria and as a foreign lawyer to the Malaysian Bar. We have Mrinal Jain with us. He is the Managing Director, Secretariat,

Economic Damages and Valuation Practice. His primary area of focus is quantification of damages, claims and losses involving complex economic financial and valuation issues in domestic and international arbitration matters, including investment treaty arbitration cases. He is recognised as one of the leading expert witnesses in international arbitration Who's Who Legal in arbitration 2019, 2020, 2021,'22 '23 lists. He heads the firm's India practice and is an economist from St. Stephen's College, Delhi. Our next panellist is Abinash Barik, Co-Founder & Partner, Finvest Legal law firm based in New Delhi, India. He specialises in arbitration, mitigating risks and corporate advisory, investigation and litigation. He has worked in various jurisdictions such as India, UK, Germany and Malaysia, working at law firms, chambers and arbitral institutions. He was previously working as a senior international case Counsel with Asian International Arbitration Centre. Our next panellist is Ajay Thomas. He is an Arbitrator and ADR consultant. Until recently he was inaugural Registrar and Director of legal affairs at Oman Commercial Arbitration Centre. He has over 20 years of experience as Arbitration Administrator, Arbitrator, Advocate and law professor. From 2009 to 2016 he was Director and founding Registrar with London Court of International Arbitration India and also a member of its Board of Directors. Prior to joining LCIA served as Counsel with Singapore International Arbitration Centre and also with Singapore Chamber of Maritime arbitration. He's a member of ICC Commission on Arbitration and ADR Paris, and is immediate past Vice Chairman of ICC Court of Arbitrations India Arbitration group. He also serves as National Correspondent for India to UNCITRAL Cloud system. I welcome all the panellists and can we have a huge round of applause for the panellists and the moderator? I'm looking forward to hear their perspectives. And now I hand over the mic to Bhavini.

BHAVINI SINGH: So as you're aware, the theme of our session is twofold. We are going to focus on discussing the future of international arbitration in the Asia Pacific region, as well as exploring the AIAC rules and Malaysia as a preferred seat of arbitration. As I'm sure you're aware the Asia Pacific Region is emerging as a hub for international commercial arbitration for various reasons, amongst others, including the fact that there has been sustained and significant economic growth in the region. One of the inevitable consequences of such growth is the expansion of businesses across these jurisdictions, which, in turn, of course, results in an increase in the number of disputes from the region as well. Accordingly, my first question is to Mr. Thomas, which is that, Mr. Thomas, what do you think the landscape of international arbitration will be in this region in the future? And how can arbitration centres such as SIAC, AIAC as well as other Centres in India, including, of course, our host, the MCIA, cooperate with each other for their mutual benefit?

AJAY THOMAS: Thank you, Bhavini, I think that's a very interesting question. First of all, let me say that I'm not Tejas Karia. You must have been expecting Tejas Karia to be speaking here. Sorry to disappoint you on that front. Tejas, sadly, could not make it here. So I'm stepping in into the large shoes of Tejas. And I hope I can do justice to that role which has been cast upon me. So when you're talking about the landscape of international arbitration, I think we should start off with truism number one, which is that slowly but surely the centre of gravity of world trade has shifted to Asia and along with that the I believe that the centre of gravity of international dispute resolution, including international arbitration, has also shifted to Asia. And this is perhaps why a few years ago Sundaresh Menon, the current Chief Justice of Singapore in a speech at the [UNCLEAR] Congress in Singapore, said, And I quote, Mr. Menon, "this is the golden age of arbitration and those who practice it are extraordinarily privileged to be able to do so" unquote. So ladies and gentlemen, I think this is the scenario in which or the landscape in which international arbitration finds itself today in this region. And when you're looking at the immediate region to the venue of this conference, that's the larger South Asian region, I believe if you were to just go back rewind a few years ago, and if I were to talk about the largest jury in this region, which is India, there was a time to quote a Supreme Court decision, Guru Nanak, the Guru Nanak case of the Supreme Court, there was a time the manner in which arbitrations were conducted in India, made lawyers laugh and legal philosophers weep. So this was 20 years ago, this was 30 years ago. But if you would have fast forward to today, ladies and gentlemen I believe this region and especially India is one of the most dynamic regions when it comes to international dispute resolution. Not only because the economies of the region are one of the fastest growing. India is one of the fastest growing large economies in the world. And if you were to look at Bangladesh, Bangladesh has got a growth rate even higher than that of India, but it's not as large as economy as India. So it's a very dynamic business environment that we operating in. So, from a landscape perspective, I think it's a flourishing landscape. From an institutional arbitration perspective, ladies and gentlemen, again, I think institutional arbitration is...Thank you. Institutional arbitration is flourishing in this region. In India at last count we had almost 45 arbitral institutions. Lots of new institutions. There is a flagship arbitration institution of the Government of India called the India International Arbitration Centre, which has recently been set up. The Arbitration Act until 2015 was considered to be institution agnostic to quote the words of Justice A P Shah in this 246 report of the Law Commission of India. But today, ladies and gentlemen, the act is no longer institution agnostic. It promotes institutional arbitration, provides for an environment where institutions can flourish and prime. Now, the immediate region. let's look at the landscape for institutional arbitration, the immediate region. Pakistan has a few years ago set up an arbitration centre called the CIICA, the Centre for International Investment and Commercial Arbitration set up in Lahore. The Maldives has the Maldives International

Arbitration Centre. Bangladesh, which is one of the fastest growing economies in this region, has got the Bangladesh International Arbitration Centre. Sri Lanka for many years had a couple of arbitral institutions. But now they have a brand new International Arbitration Centre in Colombo, at the World Trade Centre in Colombo. Afghanistan has a centre for dispute resolution. Bhutan, ladies and gentlemen, does not have an arbitration centre, but I'm giving to understand that the Bhutanese Government is looking at revamping its arbitration law to provide an environment where institutions and arbitration can thrive in the region. So ladies and gentlemen a truism is that truism number two is that the competition when it comes to international arbitration and institutional arbitration is quite intense in this region for the sheer fact that every country worth its salt today wants to establish itself as an arbitration hub of sorts. So it's a very, very competitive, dynamic environment that we are operating in. Now having said that, ladies and gentlemen, while there is competition, at the same time there is scope for tremendous cooperation. And something that people who run institutions should remember is this that the pie is large enough for everybody. And if you were to break down the rules of various arbitral institutions internationally and also in the region. The rules are basically generic rules. There isn't much of a difference in the rules. There are tweaks here and there, but in reality, the DNA of arbitral, the institutional rules are pretty much the same. And I tell you this with 15 years of experience working in institutions and arbitral institutions. So what matters, ladies and gentlemen, in differentiating institutions is the quality of the men and women who man these Centres and the quality and the robustness of the processes that each of these Centres have. So having said that competition is there. Competition is good. It makes institutions provide better services. But at the same time we must remember, people who run institutions that there is tremendous scope for cooperation. How do you cooperate? There can be protocols, for example, which can be developed between institutions to look at things like consolidation. Similar contracts, but which have different arbitral clauses. There can be consolidation protocols between institutions. You can follow the PCA model of cooperation. The Permanent Code of Arbitration , for example, is a model of fantastic cooperation in the field of institutional arbitration, where the PCA actually appoints other institutions as appointing authorities. So, for example, the PCA in UNCITRAL Rules Arbitration wants to appoint an Arbitrator in Kuala Lumpur. The PCA acknowledges the fact that it might not have access to the best exposure and directories of Arbitrators in Malaysia, so it will in turn appoint the AIAC as an appointing authority, and as a matter of fact, when I was running the operations of the LCIA in India, the first case which came to be referred to the LCIA in India, was actually a PCA appointment case where the seat of arbitration was in India under the UNCITRAL Arbitration Rules. So ladies and gentlemen these are ways and means which institutions must cooperate with each other. People running institutions must remember that the pie is large enough for everybody. It's a market which is dominated by ad

hoc arbitration. So that's what you need to remember. Your competition is not the other institutions. Your competition is ad hoc arbitration. Let's look at India, for example, 80% of our market is ad hoc. So institutions should come together in forums like this and promote the virtues of institutional arbitration as a process. And to widen that pie, keep eating on to that ad hoc pie. And then in a few years, you'll realize that your caseloads have increased exponentially. So these are thoughts that I thought I'd share with you on the question that you put to me Bhavini. Thank you.

BHAVINI SINGH: Thank you Mr. Thomas. My next question is to Chu Yin. So international commercial arbitrations in the recent past, in particular have seen the emergence of certain specific features. Two of these of note are summary determination and emergency proceedings. So in your opinion how have arbitration centres in different countries dealt with such issues and specifically, how has the AIAC addressed the issues of summary determination and emergency proceedings?

NG CHU YIN: Thank you, Bhavini. So I will first start with dealing with dealing with the summary determination issues. Just a brief introduction about what summary determination issues in arbitration is. I'm sure everyone here is already well aware. It's an early dismissal procedure. That parties usually raise it at a very early stage in the arbitration. It is mostly raised upon a point of law or point of fact that are manifestly without merits. So when we were drafting, when the AIAC were drafting the latest 2023 Rules, we were actually contemplating whether we should include the summary determination procedures in our rules, because, as you may aware, the UNCITRAL Arbitration Rules, they do not have an express provision to deal with the summary determination. So I would like to go back a bit on the deliberations that UNCITRAL has discussed on whether or not to include such a procedure in the Rules. They have discussed three options. The first option is they don't include any rules in the UNCITRAL Arbitration Rules, but just to include a guidance notes. So the guidance note will serve as a similar purpose because they refer to Article 17(1) and 34(1) where the UNCITRAL Rules recognize the broad discretion of the Tribunal to conduct the proceedings, and also the Arbitrary Tribunal is empowered to award separate awards on different issues at different time. So the second option that the UNCITRAL was considering is to have a simple and generic rules to deal with summary determination, followed by the commentary. And the third option that there were considering is a very detailed rule, step by step procedure, and to fix the timeline. And the UNCITRAL has adopted the first option where they have published the notes to the general rules. But the AIAC has adopted the second option, which we have a simple generic, only two rules on the summary determination. The main reason is because as an institution there is a need for us to determine the cost when in the event that the summary

determination happened to dismiss the whole arbitration proceeding. We have an issue last time in the earlier, earlier days, where we always face the situation when the Tribunal has determined that the arbitration proceeding is terminated. So then the question would be, what would be the cost of the arbitration proceeding? Some of the Tribunals they actually claim for the whole arbitration fees, which is very unfair to the parties because summary determination is just at a very early stage of the proceeding. So that's when the institution like AIAC, we can step in and determine the reasonableness of the cost as well as to justify the time that is spent by the Arbitrator in dealing with the summary determination issue. And the second reason for us to include the summary determination, the rules in our 2023 Rules is because some of the parties or the Tribunal may not be familiar with summary determination power that they have, so by including that rule into our 2023 Rules, it make it clearer to the parties as well as the Tribunal, that they have such a power and they have such a right to refer to the Tribunal. And I'll move on to the next issue, which is emergency proceeding that Bhavini has mentioned.

So the emergency proceeding was firstly adopted by the International Centre for Dispute Resolution, which is known as the ICDR since in 2006. This was very long time ago. Then thereafter there are other institutions which adopted the same proceeding like AIAC, the ICC and the Institute of the Stockholm Chambers of Commerce and SIAC also have a similar emergency arbitration proceeding. And this usually happened before the Arbitral Tribunal is appointed and it deals with a very emergency interim decision that requires emergency action. In the Rules, what is required is that the Centre will appoint within 24 hours when there is such a request for emergency proceeding and then the Emergency Arbitrator will then determine the issue within two weeks from the date of the reference. So the question is, why do we need institution, rather than an ad hoc arbitration to deal with emergency issues? The first point would be in order to appoint an Emergency Arbitrator, it requires consent between both parties. So the issue may arise when one party is urgently needing a decision on an emergency process, but the other party would not be happy with such a request, so there will be a delay in appointing the Arbitrator in this sense. So that's why institution rules would overcome this kind of difficulty in this event. And the next most important reason is also the quality and the qualification of the Emergency Arbitrator. As an institution when a party referred the to an institution on certain issues, on emergency proceeding, for example, they will usually also give the Centre the criteria that they want for an Arbitrator, and then the Respondent will then also give up some of the criteria and with that one we will have the discretion. The Director of the AIAC would have the discretion to then determine a suitable Arbitrator. With this criteria and with someone stepping in impartially to determine the suitable Arbitrator. This would be beneficial to the parties in the proceedings as well.

And yeah, that's my point of view. Thank you, Bhavini.

BHAVINI SINGH: Thank you Chu Yin. My next question is to Professor Harold Sipple. So while we're on the topic of AIAC, could you please explain the infrastructure that is created by the AIAC for the conduct of international commercial arbitration, and also shed light on the nature of services? Since the issues relating to enforcement of awards do arise in various jurisdictions, could you please explain the legal system in Malaysia, as I'm sure the audience would also know to what extent it is compatible with the legal systems of other countries in the Asia Pacific region, as well as India, in particular?

DR. HARALD SIPPEL: I'll be happy to Bhavini. Ladies and gentlemen, you may be wondering what on Earth is this person doing here and that's me? Why is there someone who is clearly not Malaysian, who is supposed to explain to you the advantages of Malaysia, and generally how the AIAC works. It may look very strange and I appreciate that. But please don't look at your phones yet and listen to me for one minute and I believe I'll have you convinced why I have a few things, intelligent things to say about this. Yes, I'm not Malaysian. I'm Austrian. Not even from this continent. I'm from Europe, but I've been living in Malaysia for the last five and a half years and initially I was the AIAC's Head of Legal Services. So I know the institution very well. I now practice in the largest Malaysian law firm. I know the country and the legal system very well. Now on the legal system, sticking to that and as someone who has fallen in love with Malaysia over the last years and sees more and more discontent in the region, by region I mean South Asia, Southeast Asia, overall, with the hefty prices you have to pay when you go to Singapore. I have good news for you because I believe Malaysia is a viable alternative to Singapore. Maybe not in those matters, in those contracts where the stakes are super high because maybe that's when there is less room to try out something else but generally, yes, absolutely. Now, why do I say that? The most important reason, as I see it is that a lot of the Malaysian law actually stems from Indian law. You look at our Contract's Act. And by our I obviously mean Malaysia, not Austria, where I'm from originally, you look at the Malaysian Contracts Act, and it's based on the Indian Contracts Act. So if you have a contract that's governed under Malaysian law, the commercial contract, and you will have to rely on the Contracts Act, and not just the provisions in the contract you will very much feel at home. Decisions by Indian Courts are persuasive in Malaysia. They're not precedents, yes, but they are persuasive. So it really puts you in a highly advantageous position. If you go and have legal proceedings in Malaysia, such as those proceedings that are ancillary to arbitration proceedings. I'm particularly speaking about enforcement and setting aside proceedings. I must admit when I came to Malaysia in early 2018, I had some reservations. Above all, as you may know, there is this stereotype or this prejudice that Malaysia is very relaxed, very slow. Yes, it is true to some extent, I will not hide that. I'm getting very upset with taxi

drivers who often get lost on the way and I tell them, please turn left and then they turn right. I guarantee you it happens almost once a week, but this is not related to legal stuff, right? This is really daily life. The Judiciary is super-efficient. And I am not here to just give you a pep talk. I'll give you a very concrete example why I say so. I often tell my European clients do not necessarily put in an arbitration clause into this particular contract because it may be better to resolve it in Court. First instance, usually six months ,boom, you're done. By that time, probably India will have assigned a Judge, or I don't know, but that's not for me to say. I just hear that the 11th commandment is never litigated in India. But again, that's not for me to say. Now what about the AIAC as such, because I covered the legal framework and the situation you would find yourself in if you had legal proceedings in Malaysia. The AIAC as I see it very viable alternative to the SIAC. I think the institution that a lot of Indian parties rely on. In fact, it seems to me if Indian parties did not rely on the SIAC anymore, they would have to downsize by about 50%. Right? Almost, I think more than half their cases come from Indian parties. Why should you take into consideration the AIAC? Well I believe one consideration that becomes more and more relevant. And we heard it yesterday in Mumbai also, is costs. The Schedule of Fees at the AIAC is very balanced in the sense that yes you pay a price for your Arbitrator, but it's not a super low price. It's an appropriate price. You don't want to go so low that no Arbitrator is interested. But you want to have a reasonable price. The same for the administrative fees. Yes, they are much lower than in other institutions, but they are at a reasonable price. So you know that you get a very good quality of service, but at a lower price. Another point I'd really like to highlight is the AIAC's facilities as such, and I'm again, not just here. So the cost, you can look it up. You simply look into the rules. Those are hard facts. But what about the facilities? You've never been there. And it's difficult for me to sell this to you, so to say, without being specific. Well, two reasons the AIAC has already won several prizes for having the best facilities in the world, not just in the region, but in the world. In fact as the AIAC's Director, professor Sundara Raju mentioned recently at an event in KL, only the Peace Palace in the Hague has larger facilities than the AIAC itself, and you would have hearing rooms, that as I see it having done hearings in both, that do not need to have any concern when matching themselves with Maxwell Chambers in Singapore. But again you get everything at a much lower price. I must say that from a cost perspective, when you move across, I believe that costs become more and more of a concern because when arbitrations used to be a timely, very swift and cheap process, we've seen a change over the last years, now the biggest pushback we see is it's taking too long and it's too expensive. I believe that AIAC is a very viable alternative to address these concerns. So for the next contract, whether you are in- house or whether you are advising your client, do consider the AIAC and if you come to Malysia, I'd be very happy to take you out for lunch or dinner. Thank you.

AJAY THOMAS: With the permission of the Moderator, I just like to add a little bit to what Harold said about the costs. Having had the opportunity of studying, living and working in Singapore, I must say that, from a cost perspective, when you move across the border from Singapore to Malaysia the cost literally halves. So that's something that you need to keep in mind if you're considering Singapore versus Malaysia. Or maybe it's lesser now.

DR. HARALD SIPPEL: It's actually one third by now. The Ringgit has been not really doing well, which is very bad because I receive everything I earn is in Ringgit, but some of the expenses I have are in Euro, so it's very painful at the moment. So this is why I know quite well that it's one third.

BHAVINI SINGH: All right, thank you, Professor Harald and Mr. Thomas. While we are on the subject of cost, I would like to ask Abinash the next question. So the basis for an Arbitrary Tribunal's decision to award costs to the parties has again become a matter of debate, particularly in the context of the conduct of the proceedings. So what do you think about this issue and how do you think that institutional rules can address the issue of the apportionment of costs and the conduct of proceedings?

ABINASH BARIK: Thank you Bhavini. Distinguished panel members, distinguished guests of the dais, ladies and gentlemen. Good morning. Fathers [UNCLEAR] have the exposure shots. I first thank AIAC for inviting me to this event and address the audience during the India ADR Week 2023. And it's actually a pleasure speaking in one forum where we have a gathering of arbitration practitioners, academics and students. Now this issue, which we discussed about the cost of arbitration, we need to look at it from a broader perspective. And when we look at it from the broader perspective, we need to look at it not only from the Arbitral Tribunal's perspective, but also the role of Courts in arbitrary disputes, because finally, whether you will get your costs or not, it depends on the seat of the arbitration or in the alternative, the enforcement jurisdiction. As you all know when parties choose arbitration that option itself is an opt out from the default mechanism of going to national Courts. Now this opting out, however is not for all seasons and all time. The Court plays a critical role in the arbitral process itself, at various stages. And in that context, what we need to know is sometimes the role of the Court is setting the boundaries of the arbitration or second, when the Court supports arbitrations through interim orders or vice versa, recognition of arbitral awards, and of course, at the end, the Court's role in setting aside and enforcement of awards. In that context this relationship between the Courts and the Arbitrary Tribunals has been very pointedly stated in the Book of Redfin and Hunter of International Arbitration, where they described this relationship and I quote “between forced cohabitation and true

partnership" unquote. And in the words of Chief Justice Sundaresh Menon from Singapore he States, quote, "despite arbitration's route in party's choice, a national Court remained the final gatekeepers of the legal fitness of arbitral awards and processes." With that context, when we look at costs of arbitration, we need to understand that the Arbitral Tribunal's authority to allocate costs can be addressed in three factors. The first is the applicable law, the second is the agreement of the parties, and the third is the applicable rule of the arbitration. For today's forum, I would be limiting myself to the AIAC Arbitration Rules for the third part. Now, when we are looking and deciding on cost allocation, we need to understand it's broadly. Two approaches. All right. The first, which most people know the loser pays or costs, follow the event approach. Now this is a very English centric approach under which the losing party compensates the prevailing party or the winning party for the cost that it has incurred. And when you look at the American approach, it states you bear your own costs or pay your own way. And this approach ensures that each party would bear its own legal cost and its proportional share of arbitration costs. Now before I go into what costs are under the AIAC arbitration rules just to give context I'll just quickly refer to factors that Arbitral Tribunals take in very briefly. They look at the relative success of all issues which are presented in the matter. Two they look at party conduct and whether proceedings have been conducted in efficient and cost- effective manner. And third, what are the nature of the cost? And in that way when we look at costs and time efficiency, just to give you context, the 2021 survey of Queen Mary- White and Case it states in one of its findings that 60% of Arbitrators and 51% of in House of Counsels favour limiting of length of written submissions to ensure that arbitrations are cheaper and faster. Just one of those findings. Now let us move to the AIAC Rules that we discussed. When we look at AIAC Rules, if you have them and we start at Rule 18. Rule 18 specifically states that the term cost, as specified in Article 40, shall include the expenses reasonably incurred by AIAC in connection with the arbitration, the administrative fees of AIAC, as well as cost of facilities made by AIAC under Rule 18. And when you're looking at Rule 18, you need to look also at Rule 18(3), which speaks that notwithstanding the above, all Parties and Tribunals have the ability to agree on the fees and expenses with a fee agreement. Before I move to the UNCITRAL part of the rules, we will go to the first part, which states that when you understand AIAC Arbitration Rules, the AIAC Arbitration Rules include in the introductory provisions of Rule 1, which states, the arbitration rules consists of AIAC arbitration rules and Part 2 UNCITRAL Arbitration Rules as revised. And in that context we go from Articles 40 to 42 of the UNCITRAL rules. And here is the crux. Now, what are costs which we discussed? Article 40 term cost includes the fees of Arbitral Tribunal to be stated separately, the reasonable travel expenses, reasonable cost of expert advice, who we have here on my left side out here and other assistance required by the Tribunal. Reasonable travel and other expenses, legal and other costs incurred by parties in

an arbitration to the extent, it's important here, the Arbitral Tribunal determines the amount of such cost is reasonable, and this is where the entire game revolves around. And of course, at the end, any fees that the appointing authority may refer to. And when you're reading in Article 40, before I go into the specific other factors that are very important in this context is Article 42, which discusses allocation of costs. And Article 42 clearly states, the cost of arbitration shall in principle be borne by unsuccessful party or parties. So under AIAC Rule, as we were looking at it, it's the English approach that they are taking into. However, the Arbitral Tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. And we have been going around on this on the circumstances of the case. Before I go to that specific circumstances just to give context to that, I would also refer to Article 9(7) of the IBA Rules of taking evidence in international arbitration which specifically states that it permits the Tribunal to order cost against a party that fails to conduct itself in good faith in taking of evidence. So you have got reasonable conduct, then you've got good faith in taking of evidence. Now, when we move forward as to when these factors are taken forward. You need to understand there are broadly three stages. The first stage is, is that the outset of the proceedings. So during the outside of the arbitrary proceedings, you may have situations with the arbitral Tribunal may be discussing during the first Procedural Order, the first case management, as to how they can control costs, and what are the factors that would be included under costs that we discussed under Article 40 and 42. The second is, during the proceedings, in a way where Arbitral Tribunals issue partial awards in which they take into account and protect the remedies that is there for the parties. And of course, at the end of the proceedings when they render the awards taking into account the final decision on costs of arbitration. Just to end on what are those factors where the reasonableness context needs to be taken into account. First, you need to look at and just to give a timeline, there are just five factors broadly. The first one is agreement of the parties, as you know the very nature of you entering into an arbitration is through that arbitration agreement, be it submission later or the original agreement.

So, whether the costs of the arbitration are in line with the arbitration agreement or the submission agreement, what are the institutional rules as we looked at from 40 to 42 of the UNCITRAL Rules, read with Rule 18 of the AIAC Rules. The second part of it is the Procedural Order. So arbitration commences, Procedural Order number 1 kicks in. What was it that was agreed between the parties on Procedural Order number 1 in relation to costs, whether there will be different submissions as to or hearings as to the cost. Then you have to look at additional guidelines and the applicable law, of course, and also at times culture expectations especially when it's an international arbitration. That's the first part arbitration

agreement. The second part is the relative success and failure of the parties. And that is where it is, how do you generalize that. The third is reasonableness of legal and other costs incurred by the parties. Why? Because it involves two factors, cost with a proportional to the monetary value and the second is costs are proportionate and reasonably incurred. And this is very reasonable is in my experience in one of the matters at the AIAC, we actually had a certain situation where during cost submission, if I may put numbers the Respondents side value if was let's say 2X, the petitioner's value in terms of cost of arbitration was almost 12X, and they were actually justifying it through different submissions. And they were back and forth. And that is where this factor also comes in. The last two factors being the proof of cost, which is submitted by the parties, and how the Tribunal can actually determine based on that proof and how they have determined and allocated those costs. And the last being the improper conduct and bad faith of the parties. And this is very important because when you're looking at improper conduct, it needs to include improper conduct and procedural steps. Improper conduct in conducting and taking of evidence. As for the IBA Evidence Rules, if IBA is opted in. False witness or expert evidences which are not in line with the due process of law, you've got false submissions to the Tribunals. And, of course, lastly, lack of professional courtesy, unsubstantiated fraud allegations and unprofessional behaviour. I think that's from me on the broader context of cost of arbitration. Thanks, Bhavini.

BHAVINI SINGH: Thank you. Abinash. While we're still on theme of costs, I would like to ask the next question to Abinash and Chu Yin. Another much debated topic in relation to monetary allocation is the question of third party funding and whether or not disclosures are important in this. So what are your thoughts about these issues?

NG CHU YIN: Thank you, Bhavini. Just to highlight to everyone here that we have put up the QR code for our Arbitration Rules 2023. So while the panellists are discussing, maybe this would be more helpful if you have the rules on hand that you can refer to. So third party funding is included in Rule 12, of our 2023 Rules. And there are three main reasons that why we decided to include the disclosure of third party funding in our rules. The first issue is that in Malaysia we do not have regulatory to deal with third party funding. So there are other jurisdiction who has such a requirement that impose the obligation on the parties to disclose the party funding. That's why there are differences between the legal system in different countries and hence that's the reason why we include such a clause in the Rules. And the second reason is that the disclosure of the third party funding may be very important for the Arbitrator or the Tribunal to determine whether there is any conflict of interest, because that would in fact, the impartiality or the biases of the Arbitrator, by knowing who is financing the proceeding that would help to ensure that the Arbitrators are free from any undue

influence. And the third reason that we consider is on the part of the enforcement of the arbitration, the award, because some of the jurisdiction they have requirements on the disclosure of the party funding before they can enforce the arbitration award. As such, we have included such rules in our 2020 Rules, just to cater for this situation.

ABINASH BARIK: Thank you Chu Yin. In terms of the rules, I think one of the critical points that we need to address is when it was first included. When I was there between 2019 and 2022, that was the first time that we actually included in the previous version of the Rules, third party funding. And to give more context, in a matter of A versus B, there was a certain allegation where the concerned Arbitrator was challenged. And this specific issue came in where one of the grounds of the challenge was the nondisclosure of third- party funding, which was not there under the 2018 Rules. Just to give you a background on how third party funding disclosure first came about. After the 2021 Rules, the present Rules, which is the 2023 Rules and when you're looking at it, you have to read it from the context of not only the Arbitration Rules, but the UNCITRAL Rules. So Rule 12, which specifically deals with third party funding, it addresses a very interesting point. That the party that is funded by a third party in relation shall disclose the existence of the funding and the identity of the funder. Part 2, 12(2), the declaration shall be repeated along the proceedings until its conclusion, where [UNCLEAR] facts so require, as upon the Tribunal or the AI [UNCLEAR]. And when we are looking at these contexts of disclosure, we need to understand that there are two other grounds- the additional powers of the Arbitral Tribunal to conduct the arbitrary under the AIAC rules. And also you have to look at the powers of the Arbitral Tribunal under the UNCITRAL Rules to conduct arbitration proceedings. And when we look at those things, especially in Article 17, which specifically states the Arbitrator may conduct the arbitration in such matter, so and so [UNCLEAR] and shall conduct proceedings to avoid unnecessary delay and expense and fair and efficient process for resolving the party's dispute. So it is very important that when we are looking at third party funding in that context that due process is always to be followed by the parties and disclosure is maintained.

BHAVINI SINGH: Thank you so much Chu Yin and Abinash . I would now like to ask Mr. Mrinal Jain, what do you think is the role of experts and expert witnesses in ensuring optimal outcomes in arbitration proceedings?

MRINAL JAIN: Thank you, Bhavini. I'm grateful to AIAC [UNCLEAR] Sundar, Raju and MCIA for inviting me for this panel. A very good afternoon to all of you. I noted that my colleague Abinash referred to my name when cost efficiency was being talked about. So I just would like to clarify that what he means is that we, as damages experts are very cost efficient.

We are reasonable as compared to the value addition that we bring onto the table. I hope that's what you meant right. Thank you so much Abinash for endorsing that. So before I begin, I would like to clarify that I'm not a lawyer. I'm an economist. I went to St. Stephen's College in Delhi. So I am Delhiite partly and I'm a financial damages and valuation expert, and our role becomes very critical in arbitrations in terms of substantiating and arriving at a reasonable value of claim to assist the Tribunal members in understanding some of the technical issues in assessment of these claims. So when somebody asks, what's really the role of a damages expert, in simple terms, we quantify damages, claims and losses that could involve complex economic, financial and/ or valuation issues. And we assist the Tribunal. Our overriding duty is towards the Tribunal, regardless of which party appoints us, or even if the Tribunal directly appoints us. So our overriding duty is towards them to assist them in understanding some of these technical issues, providing our opinions very clearly in an unbiased way based on principles and valuation methodologies that are scientifically and globally accepted. Clearly stating out the facts of the case, instructions from our legal Counsels, if we are party appointed, or if we're Tribunal appointed, clearly setting out instructions that have been given to us by the Arbitrators, and then also sending out our conclusions or opinions which the Tribunal is seeking for. Now there are various types of experts and there's an interplay between those experts that can happen in large infrastructure disputes, especially. I have my colleague here who's a delay expert, actually from Singapore. So normally, when you look at infrastructure, large complex construction disputes, there could be issues related to extension of time, and therefore you require delay experts who could do a very detailed delay analysis and assist the Tribunal in arriving at the total number of delay days and also trying to identify those delays are attributable to which party, right? Which is the point of contention in such kind of matters. You then have quantity surveyors who are again, Civil engineers, who would opine on the Bill of Quantities, who would opine or would carry out a forensic review of the underlying supporting documents to substantiate the quantum of liabilities being incurred. And then you have economic damages and valuation experts like me, who would opine on various heads of claims, such as reliance damages, expectation damages, or disgorgement benefits, which are sort of non- compensatory damages, which you often see in cases of infringement of IPR, trademark or breach of non- compete or exclusivity clauses sort of situations. So when you ask about the role of a damages expert, what's important to understand is that while we may be appointed by either of the parties and therefore we are governed by the engagement letters that we sign with the clients. We are governed by the confidentiality clauses in those engagement letters. We basically carry out the damage assessment as per the instructions given to us by our Counsels with an overriding duty towards the Tribunal to provide an independent, unbiased opinion on the subject matter. Clearly

stating out what are the facts of the case, clearly stating out the instructions, the assumptions that we have made, and the conclusions that we have made. Thank you.

BHAVINI SINGH: Thank you, Mr. Mrinal, and in furtherance to this we also see a trend of technical professionals and damages experts and other valuation experts being appointed as Arbitrators as well, in addition to their usual roles. So what do you think, are the advantage and challenges of technical professionals who sit as Arbitrators on panels? And how do you think having a more diverse panel would be better for parties to resolve their disputes?

MRINAL JAIN: Sure, I could only think of advantages of having a very diverse Tribunal. As I said, there are several large, complex infrastructure construction disputes where having a Civil engineer as one of the Arbitrators, would be extremely beneficial, or if it's an extremely complex maritime dispute or a telecom dispute where a telecom or a sector expert, if he or she is one of the Arbitrators, it would be very helpful to get those technical inputs. Of course there are caveats around that. I mean if you're dealing with technical experts, for any technical person to become an Arbitrator, he or she should be empanelled with the AIAC rules, with the AIC procedures. He or she should be very familiar with the legal and procedural aspects of the arbitration, as per the AIAC rules, which AIAC supports is what I understand. The thing is that for these technical experts to come on board as one of the Arbitrators, they should be empanelled. They should be qualified to be appointed as an Arbitrator, and that could be one of the limitations, I would say they would have to go through those procedures and get empanelled. Another practical challenge that I see is usually if it's a sole Arbitrator case I don't think parties would agree to appoint any Arbitrator who would be a non-lawyer. Even if it's a three panel Arbitrator the challenge is which party would agree to give up their choice of appointing lawyer as an Arbitrator versus a technical expert as an Arbitrator. So these are some of the practical issues that I've seen in my professional career as a challenge. As an alternate what I definitely see, a Tribunal appointed expert can be a good option to address some of the issues at the first place why you wanted technical expert as an Arbitrator. So if the Tribunal feels that the party appointed experts have failed to provide an independent, unbiased opinion, they always have an option. And that is again allowed under AIAC rules. They always have an option to appoint a Tribunal appointed expert who would then assist the Tribunal directly in arriving at some of these conclusions on the technical issues. Now, these technical issues could be wide ranging and some of the claims and damages that I've seen in the Asian International Arbitration scenario are either reliance damages or sort of loss of profit cases, some of the wasted costs under reliance damages I've seen have been very complex, there have been overlapping issues of costs. And again, you need a quantity surveyor,

or you need a damages expert who could actually review these underlying thousands of documents could be invoices, Purchase Orders to substantiate the quantum of liability incurred. Again, in alternate, I've seen expectation damages under the principle that if the contract would have been fully performed and the parties would have fulfilled their obligations the parties would have earned certain amount of profits in future, and those profits are lost either because of contractual breaches or wrongful terminations. So you definitely need a valuation expert to arrive at that loss of profit figure, which is calculated as a difference between the counterfactual [UNCLEAR] scenario in the actual scenario. So how robust your counterfactual scenario is whether it's reasonable, reliable, and credible. The Tribunal wants to understand that. It's not easy to project future cash flows managing emanating out of a contract. And that's where experts like us come into the picture, where they help the Tribunal in understanding that this is the counterfactual scenario and in absence of the breaches, but for the breaches, this is how the parties have earned their profits over the remaining life of the contract. And that is where they assist the Tribunals in arriving at a reasonable figure of these loss of profits. So again, what's important is that if the parties fail to appoint one of the Arbitrators as a technical expert, they always have an option under the AIAC Rules to appoint Tribunal appointed expert who could then assist them in arriving at a reasonable figure of the claim. Thank you.

ABINASH BARIK: Just quickly adding on the legal side and this is one banter me and Mrinal had back in Kuala Lumpur. It was a long dinner and a bigger debate with other colleagues in Kuala Lumpur. On this exact point as we were looking at, other alternates to appointment of Arbitrators and following up on what Ajay had said, the pie is really big, just like you've got the fight between ad hoc arbitrations to institutional arbitrations. I think one of the narratives that we need to understand and appreciate is they are Arbitrators. Technical, non-technical. They are Arbitrators. Once you're an Arbitrator, you're appointed. And I think what we need to do generally, from the humble experience that I've had is we need to have more and more qualified and trained Arbitrators to have the bigger pool. And my reason for that is on the basis of client request is because first time efficiency. You won't get dates from the Arbitrators for months. Once it's adjourned for A, B, C reasons, you won't get it. The second is as I was emphasizing under cost is fee agreement. And as we know if you have more options of qualified people, you'll have better bargaining chip for parties to ensure that you can reach reasonable fee agreements. And then of course, have experts from construction sector or from maritime sector who are Arbitrators who would enlarge the pool, ensure there is efficiency and also reduce cost. That's my take. Thanks.

NG CHU YIN: I would like to jump in a little bit on that. I was a quantity surveyor for more than ten years, and then I move on to claim consultancy dealing with the delay. So from I think, from my perspective as a technical professional, last time before I jumped into the law profession, I think the difficulties that we always face is because we only have one side of the view. And that to become an Arbitrator, to oversee everything it would be quite challenging, because one is because of the legal issues that the technical professional may not be as good as the legal professionals. The other side is that the lawyers tend to, I'm sorry, I think a lot of lawyers here, tend to confuse the Tribunal, which a technical professional may not be able to be validly determine the issue, and then for experts like delay experts or quantum experts, I was involved in the arbitration where we are giving our opinion on a delay issue and also a quantum issue like loss and expense. So, the involvement of the whole process is just mainly on when the hearing was conducted, we only involved in the cross examination on these certain issues. So again, it's only very focused on one issue and not the other issues. And these are the challenges that I think. But in the arbitration industry from our experience, the panellists, there are a lot of dual qualification Arbitrators. I can give an example the Director, [UNCLEAR] Sundara, he was architect and then he studied law. And then he was practicing law as well. So with someone have a technical knowledge as well as legal background, that would help to understand the legal issues as well as the technical background as well. So, I think some of them that I know I think from the Singapore is Mr. Chow Kok Fong. He is also a quantity surveyor as well as he has a law degree. So with that specific type of Arbitrators, I believe that this would bring more advantages than disadvantages. Thanks.

BHAVINI SINGH: Thanks Chu Yin. I would now like to quickly invite Mr. Abinash to provide his comments on another trend that we're witnessing in the Asia Pacific region, which is the rise of sports disputes. How do you see this developing in the future, and what shape do you think it will take?

ABINASH BARIK: Thank you for that question Bhavini. I think sports, I think everybody is enjoying sports right now. The Cricket World Cup is the flavour of the month and it's going go on and so on and in different jurisdictions you've got different sports. But I think one of the things having advised people in the sports industry on commercial side and on the dispute side when I was at the AIAC when I was looking at the sports arbitration rules, I think there is actually a dearth and recognition of sports disputes and understanding what are sports disputes. I mean there are institutions that have come up as a dedicated Maritime Arbitration Centres because Maritime is a big sector. So is sports. And what we need to understand is when we look at sports being a sportsperson, I feel proud that AIAC has at least come up as an institution, as a commercial institution with a dedicated arbitration rules, which was launched

in 2023, which is effective 6 October this month. One of the key factors when I was looking at sports arbitration is we need to understand, and I'll quickly wrap up given that paucity of time is you've got the International Olympic Committee, the IOC, and you've got the Code of Arbitration for Sports, which facilitates settlement of any private contention arising between sports activities and the independence of, and facilitates the settlement of any dispute that arises also in relation to sports activities in line with the ICAS statute. Now, when we look at the Asia Pacific region, we need to see before the AIAC there were also certain other developments. So, in terms of Japan they actually constituted a body of the Japan Sports Arbitration Agency JSAA, which provided arbitration and mediation for sports related disputes. So did Korea with a Sports, Korean Sports Arbitration Committee, the KSAC in 2006 for resolution of disputes after the 2002 World Cup, and for the steady growth and facilitation. So we need to understand that these developments have been happening around the world. But they have not actually reached a level where they have become mainstream. Recently in India we also had the development of sports arbitration. Very few people would know. Maybe is in 2021, very recently, just two years back the Sports Arbitration Centre of India has been founded which has been supported and provided by the Ministry of Law and Justice. But what we need to do is ensure that there is more proactiveness. But there is one problem that I see with new institutions which would come up, is they do not have the institutional information experience and background to run an arbitration which is from day zero if you may look at it till the rendering of an award and all the procedural issues that come with it. And I think that is where AIAC did a very smart move, I would rather say is with the 2023 Rules they have also launched a Sectoral Rules with the Sports Arbitration. And just quickly touch upon the only provision that really matters is Rule 1. And in Rule 1, which discusses the scope they've kept it very broad, where they mentioned especially in 1.2, where they say the party's agreement to refer to a sports related dispute under the rules may be contained in the arbitration agreement. And in 1.3 they clarify a sports related dispute submitted under the Rules may relate to any financial or non- financial aspect of the performance or development of any sport, and may include more generally, any activity or matter related or connected to sports. I think this definition of the AIAC, which fundamentally places the scope of sports arbitration with the experience of the institutional experience of procedural rules of the rest of the AIAC Arbitration Rules, I think will become a game changer. And I think in the Asia Pacific region that needs to be promoted actively, especially with the growth of sports and all kinds of sports, including e-gaming, sports. Thank you.

MRINAL JAIN: Abinash, I just want to add one thing here. I've had the privilege of working on few IPL disputes in the country, and what I've realized is the value of damages and claims in such sports arbitrations could be potentially extremely high. And therefore, the stakes that

are involved are very high, and therefore, I fully endorse your view and agree with you that there has to there has to be a requirement for proper administration of such sports related arbitrations because these are huge monies and this is public money that is involved. If you talk about specially IPL and Cricket, look at their brand values. Look at the stakes that are involved in those. And correspondingly, if there are wrongful termination of these franchisee agreements, there are huge loss of profit cases and cost that are involved, so completely agree with you. Thank you.

BHAVINI SINGH: Thank you so much, Mr. Mrinal and Abinash. Lastly a question to the panel as a whole. In addition to arbitration what do you think about the legal landscape of mediation in your respective jurisdictions particularly with reference to the Indian Mediation Act that has been recently passed by Parliament? And in Malaysia with regard to the Mediation Rules launched by the AIAC, as well as the Malaysian Mediation Act?

AJAY THOMAS: Maybe let's start off with the Indian mediation scene. I think we live in very interesting times, perfectly sums up the arbitration, sorry, the mediation scene in India. Mediation as most of you know is not a new concept in India. It's a concept which goes to, which can be traced back to times immemorial to the ancient epics Lord Mahabharat, in Mahabharat you had Lord Krishna acting as a Mediator in the battle of Kurukshetra between the two warring sides. But it is joked often that despite being a Mediator, he could not resolve the disputes between the two warring sides and the war went on. Jokes apart ladies and gentlemen, I think mediation as a concept has had a long history in India. The first codified statute which gave wings to the process of arbitration was the Industrial Disputes Act of 1947, and since then the CPC, the Commercial Courts Act and also the Consumer Protection Act of 2019 have actually endorsed and promoted the use of mediation in disputes. And if I were to share a little bit of statistics, there are statistics which have come out from the National Legal Services Authority for the year '21-'22. And these statistics make for very interesting hearing and reading. India has 464 ADR Centres, of which 397 are functional. There are 570 Mediation Centres, 16,565 Mediators and nearly 53,000 cases were settled through the medium of mediation. So, ladies and gentlemen it is a given, that mediation is an extremely popular method of dispute resolution in India. And I think it's only going to get more popular because in September, September 13, I believe to be precise, the Mediation Act received the assent from the President of India the Mediation Bill received the assent from the President of India, and is now enforced, and I believe this is a watershed moment in the history of mediation and conciliation in India for multiple reasons. One is for the first time this issue of, there was some sort of, there was some sort of confusion in the minds of a lot of people as to what is mediation, what was conciliation. That doesn't exist anymore. Because now the whole process of

conciliation mediation has been fused into this unified process, called mediation. Part 3 of the Indian Arbitration and Conciliation Act does not exist in the statute book anymore, courtesy the Mediation Act. So you have a unified concept called mediation. So I had this doubt for the longest time as to what is this difference between mediation and conciliation. Because Indian statutes alternatively made references to mediation and reconciliation. And if you were to look at the few salient features of this Act, I would say it talks about voluntary pre-mediation pre-litigation mediation enforceability of mediated settlement agreements is I think a fantastic provision of this new Act. It talks about the mediated settlement agreement being final and binding on the parties and being executed as if it were a decree of a Court of law. The Act is very encouraging and promotes the concept of online mediation. So watch this space. The ODR the Online Dispute Resolution space is going to be very active in India in the months and years to come. Also, for the first time you have recognition given to the concept of institutional mediation. Earlier it was said that the Indian Arbitration Act was institutional arbitration agnostic. Now you have the Mediation Act again, which is not agnostic with respect to the institutionalization of mediation. So that's again, I think a takeaway is that it appears that the future of mediation in India is also going to be institutional. And finally, it also talks about the establishment of the Mediation Council of India, which I think will be a step in the right direction because one big lacunae in the field of mediation is the lack of centralized standards for Mediators. I think the establishment of a Mediation Council of India will greatly assist in having standards for Mediators. And I'd like to end with one thought, ladies and gentlemen, which looks at the merger of the roles of a Mediator and Arbitrator. There is a provision in the Indian Arbitration and Conciliation Act, Section 30 there's also similar provision in the International Arbitration Act, Section 17 of the Singapore's International Arbitration Act, which talks about the Arbitrator encouraging the settlement of disputes through the use of mediation. Now, this is something I would want you to just think about it because this is a very little use provision with the Indian Arbitrational Act. It's hardly ever seen where you see an Arbitrator promoting and encouraging the use of mediation to settle disputes. And I think this is something we really need to do when you look at it from an arbitration or a Med-Arb or an Arb-Med perspective, I think this is extremely important to look at this little used provision, Section 30 of the Indian Arbitration and Conciliation Act. And on that note, ladies and gentlemen I'll share my brief comments with a quotation from a gentleman named Paul Jalinas a former chairman of the ICC Commission on Arbitration in ADR. And I quote Paul, he says “in the conscience of every Arbitrator there is a Mediator who is sleep. The only question is, how do you wake him up.” So, ladies and gentlemen, special thought to this for those of you Arbitrators and Mediators in the audience, think about it. How do you wake up the Mediator in every Arbitrator?

BHAVINI SINGH: Thank you so much, Mr. Thomas. We now open the floor to the audience if they have any questions that they would like the panel to answer. Just a second.

AUDIENCE 1: Very good morning to Malaysian delegates from AIAC. I had an opportunity to visit AIAC twice for [UNCLEAR] at Malaysia. I am only concerned about sports arbitration which has been started very recently on 6th October. I have received some mail from AIAC about sports arbitration rules. Sir, I just want to know whether it will be as per the cost or [UNCLEAR] as per the AIAC sports arbitration rules? Because as per the IOC mandate Rule 59 of the IOC, it is mandatory for all the National sports federations, all the [UNCLEAR] to incorporate arbitration clause in their Constitution, and for that purpose in 2010 in IOC, Indian [UNCLEAR] was banned, but later on they have incorporated, but practically it is not there. I'm a Sports Arbitrator Prakash, and I am fighting for the sportspersons in India. Also, the thing is that some of the emergency arbitration fees, which has been put in the rules about 10,000 US dollar. But for the Indian sportsperson I think it will not be possible except the Premier League or something they will be able to pay. But for selection purpose, for their various disputes it will not be possible for the Indian sportsperson. So what is the mandate for the case in sports Arbitration rules for those poor athletes of Indian.. that's my question.

ABINASH BARIK: Thank you for the question. I think I have a very short reply because it's an opt in procedure, so whoever would want to include the AIAC sports arbitration rules, they can include which you rightly pointed through an arbitration clause, the model arbitration clause of the AIAC. So accordingly, then the arbitration would be conducted under the AIAC Sports Arbitration Rules. If not, then of course, you would have other remedies and other rules. So the specific issue where AIAC would come into picture is whether you are inserting an AIAC Sports Arbitration Rules for the AIAC to administer the arbitration and for Arbitrators to be appointed under those rules.

AUDIENCE 1: Only my doubt is that whether it is recognized by OCA , Olympic Council of Asia, like for other things it is recognized by ICAR. But whether this will be recognized by the OCA that arbitration has to be, because in India the cases are lot, people are suffering from last six years in the High Court and Supreme Court. So it should be included with the mandate of the OCA that every petitions, every NOC of the Asian countries should follow these things. That is my concern.

ABINASH BARIK: Yes. I think the AIAC would be in a better perspective because this has just come in October very recently. So, I think we'll have to wait and watch for that.

AUDIENCE 2: My name is Sushil Shankar. This question is for all the panellists, but more specifically for Ajay. Because he just mentioned that it is unfortunate that in the India context the Arbitrators don't resort to mediation. Also and then there was this quotation about waking up the sleeping Mediator in the Arbitrator. Now I understand this is fine in the context of a Med-Arb clause or an Arb-Med clause, whatever, but when the mandate is purely arbitration why should an Arbitrator even think of it? You'll be exceeding your brief, wouldn't you if you go into a domain that you would not be specifically tasked to do?

AJAY THOMAS: I think the simple answer is to, there is an obligation cast upon you by the statute itself. Section 30. It says that it shall not be incompatible with an [UNCLEAR]

AUDIENCE 2: But it doesn't. It's not incompatible. But there is no duty. There's no need to take that extra step.

AJAY THOMAS: No. Explore the option. So if you're looking at this now... ,

AUDIENCE 2: If the parties, what you are saying is if the parties come forward and say that they want to mediate, fine, then the Arbitrator. But there's no need for the Arbitrator to be proactive for mediation when the mandate is not that. That's what I'm saying.

AJAY THOMAS: Sure. So, I think, where do you draw your mandate from? So you draw your mandate from the arbitration agreement and you draw your mandate from the law, the *Lex Arbitri*. So in India and also in Singapore, the *Lex Arbitri*, there is a sort of informal obligation with a consent of the parties to enable, which enables the Arbitrators to encourage the use of mediation, other means to settle disputes. So there are two dimensions to this. One is the dimension where an Arbitrator encourages parties themselves to go and try and settle the dispute. The second dimension is a little more controversial where the Arbitrator himself or herself acts as a Mediator. Now, from a common law perspective, from a common law perspective, this is something a little difficult for us to digest because the question asked is is it ethical? Is it right for an Arbitrator to also be wearing the same hat as a Mediator. For those of us grounded in the common law, this seems like a no-go area, but if you were to look at it from a civil law perspective most civil law countries, you look at Germany, you look at even China, there appears to be absolutely no prohibition under the Courts, their respective Courts for a Mediator, for an Arbitrator to be also acting as a Mediator, and it's very common to do so. I think these are just a few short comments and answers to your query sir.

ABINASH BARIK: Just to add, you need to look at Article 17(1), sir actually, sir. It is an obligation on the Arbitral Tribunal to ensure and explore that they resolve the disputes in the most cost efficient manner. That's it. Thank you

BHAVINI SINGH: All right. Thank you so much, everyone. And I think that we have already exceeded our time. So we thank you again for joining us here today. And I think we can conclude the session here. Thank you so much. Also before that, as we conclude, I also invite Ms. Chu Yin to present a token to our panellists before we leave.

~~~END OF SESSION 2~~~