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2 **INDIA ADR WEEK 2023 – DAY 6 DELHI**

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4 **SESSION 4**

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6 **EVENT HOSTED BY IPBA INTERNATIONAL CONSTRUCTION PROJECTS**  
7 **COMMITTEE**

8  
9 **02:30 PM to 03:30 PM**

10  
11 **Speakers:**

12 Vyapak Desai, Head, International Dispute Resolution, Nishith Desai Associates

13 Naresh Thacker, Partner, Economic Laws Practice

14 Anand Srivastava, Managing Partner, Dentons Link Legal

15 Amit Kapur, Joint Managing Partner, JSA,

16 Ruchika Nyar, General Counsel, Nexus Malls

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18  
19 **VYAPAK DESAI:** Good afternoon, friends. Hello? Yeah. Good afternoon, friends. I think we  
20 are just waiting for people to finish the deserts. Maybe we can wait for maybe a minute or two,  
21 but in the meantime let me give a little basic framework where we are and maybe when I see  
22 few people coming in, I'll also introduce the speakers, but the whole idea of today's session  
23 came about at the Inter Pacific Bar Association meeting and this is the International  
24 Construction Projects Committee at the IPBA. And the discussion in one of the meetings that  
25 we hold every few weeks was that, obviously everyone acknowledges the fact that India is going  
26 through a huge infrastructure development. The need of infrastructure, Real Estate and  
27 construction development in India is, I don't think there is any debate. There are reports after  
28 reports which talks about that India, construction industry in India is going to reach almost  
29 \$1.4 trillion as by 2025. So, we are not far away it's just a year from now, we will be like  
30 construction industry in itself would be a \$1.4 trillion industry. It obviously touches sectors  
31 across. And in one of the reports from Invest India talks about that it works across almost 250  
32 sub-sectors which are linked to the construction industry. So, its tentacles are, in that sense  
33 touching many other industries. So, this 1.4 trillion is just one side of it. But many, many other  
34 industries will touch larger infrastructure, Real Estate and Construction industry is even  
35 bigger. The expected contribution of Construction industry again by one of the reports in  
36 India, says that by 2025, it would be almost 15% of the total GDP. So, which is again a very big  
37 number and at least we don't have the latest data, but in the financial year of 2021-2022 the



1 India's construction sector attracted FBI inflow of more than \$35 billion. So, you can  
2 understand the magnitude of this industry in that sense. And every time, at least when I attend  
3 some of these committee meetings, they talk at a level where we say, look, none of this exists  
4 in India. They are now talking about how FIDIC contracts can be more regionalized how things  
5 can be more streamlined. They are moving from Dispute Adjudication Boards to Mediation,  
6 to even specialized courts and specialized laws in each country. And when they hear the story  
7 of India, they say, "look there is obviously a lot of resistance and things are very different in  
8 India at a very basic level". On the other hand, we keep hearing that "every year forget different  
9 parts of the construction infrastructure industry just the NHAI disputes are in the range of 40-  
10 50 thousand cores. And then they settle at less than 25% of that amount through different  
11 schemes and things like that". So, the magnitude, the numbers don't corroborate to the kind  
12 of efficiency we require in both managing the contracts and thereafter, obviously something  
13 that you cannot avoid or unavoidable issues related to disputes. So that was the context in  
14 which this session discussion came up. And then I suggested, "why don't we do it during the  
15 ADR Week? Because that's right forum". So that's the broad context and we got a stellar panel  
16 to talk about it. I won't go into the detail CVs of each one of them but, to my extreme left is  
17 Anand Shrivastava. He's a managing partner at one of the largest and most successful law  
18 firms in India, Dentons Link Legal and primarily looks at infrastructure and aviation, having  
19 global experience and also studied outside India with several scholarships. Then we have  
20 Ruchika Nyyer. She is part of a group called Nexus Malls. It's a Blackstone supported entity,  
21 and they are looking at several new ways of looking at malls and other infrastructure as part  
22 of that portfolio, including writs. And she is the General Counsel at Nexus Malls. Then we  
23 have Naresh Thacker, again he's one of the most senior practitioner in this industry including  
24 at Economic Law Practices, which is another very prominent law firm based out of India,  
25 having multiple offices across India. And then, of course one of the stalwarts Amit Kapur is a  
26 managing partner at JSA, again looking at many different subsectors and sectors around  
27 infrastructure, including a lot of regulatory issues in that space. So, without going into too  
28 much of detail, I'm sure some of you know them personally as well. So, what we thought that  
29 we will look at this whole discussion in two or three different parts. And straightaway, getting  
30 into the first part of it, where we want to first understand the broadly the Indian construction  
31 sector and it's relevance to the growth of Indian economy. And then how the law and the  
32 regulatory landscape has evolved in maybe last 30-40 years. While we don't have a specific  
33 construction law, we don't have specific Provisions around how to interpret Construction  
34 Contracts and things like that. We still fall back on Contract Act and specific relief fact unlike  
35 many other jurisdictions. But that is one major part that we wanted to look at it from the  
36 progression. How it happened? So may I go straight to Amit on this. And maybe if you can give



1 us a broad overview of last 3-4 decades and how we are heading, next couple of decades as we  
2 see?

3

4 **AMIT KAPUR:** Thank you. Pleasure being with you. Hope we'll keep you awake in the  
5 afternoon. We have some very good luminaries on my left side, so, I hope they keep you  
6 engaged as well. I think Infrastructure, without doubt, is a very critical growth engine for India  
7 today. Vyapak mentioned \$1.4 trillion is the projected investment for the 5 years. Only 25% to  
8 27% is expected from the private sector. The question is, "why?" And the reason is, we have  
9 still a huge hurdle on enforcement of Contracts. And I have a bone to pick for a place, I belong  
10 to. Dispute resolution particularly Arbitration. Most jurisprudence that has come up in the  
11 Law of Contract in the last 15 years has been kept closeted in awards, and we have not been  
12 able to evolve. So, there's a straight question to Neeti, and her colleagues, "why are they not  
13 able to evolve a mechanism where which, while keeping confidentiality of the matter, at least  
14 the ratio and the jurisprudence is out there to cite. Other than an odd case where the same  
15 clause into Arbitration panels....

16

17 **VYAPAK DESAI:** So, Amit proposes, and Neeti, implements it right away. So just one thing,  
18 they just signed an MOU. Sorry you are going to see redacted Awards of MCIA 2024. Well  
19 done. Sorry to interrupt.

20

21 **AMIT KAPUR:** No, we are on a song, then. There we go. All right, so I'll move on my next  
22 question I can ask to a few things.

23

24 **VYAPAK DESAI:** Today if this is the kind of things happening, then better you talk about  
25 India, Pakistan because what you want is happening. That's it. You have the golden hand

26

27 **AMIT KAPUR:** So, there are two or three things which somehow, we have not been able to  
28 disseminate with as much awareness, which is very critical and one such thing is that the Law  
29 of Contract, as it was getting into a position of implement-ability. The Kelkar Committee in  
30 2015 came up with a report to rejuvenate PPP and in that context, fast track dispute resolution  
31 came up. There are various mechanisms that the Government has put in place. But the tragedy  
32 has been that the lament of **1985 O. Chinnappa Reddy, sitting in Dunlap, India, 85 (1)**  
33 **SCC** and the layman of **Justice Gavai 2023 in GMR, Warora** is the same repeated  
34 challenges to already litigated disputes with courts interfering. While arbitration has largely  
35 shown the way there are still trigger-happy opportunities where courts get into it. One such  
36 was the instance in 22, when Justice Gautam Patel in a Division Bench had to interfere in a  
37 matter where the same Arbitration Clause, 2 arbitral panels with conflicting views. So,



1 fortunately, you've got some jurisprudence out. We finally learnt that the same price-  
2 escalation Clause was being looked at differently by two panels and that conflict got resolved.  
3 Matters now in Supreme Court. Hopefully see the light of the day soon. Matter was to be listed  
4 in these months. So, we'll find out. But what I'm emphasizing on is very critical for all of us  
5 who are concerned with dispute resolution. To ensure that the advancement of jurisprudence  
6 does not get locked out, absolute confidentiality must be maintained. No difficulty. But it's our  
7 duty as practitioners to bring that out. Because if you're talking of \$1.4 trillion investment,  
8 you're inviting investment in. We are duty bound to make sure that we don't have challenges  
9 of consistency. That's the heart of the matter. The second area where I think infrastructure has  
10 a very critical role, and I think it's vital and I'll leave it at that, is that the issue of time value of  
11 money. And the fact that infrastructure disputes are a class by themselves, largely construction  
12 focus on infrastructure. The Parliament is recognized both as critical components. Please bear  
13 that in mind, and please ensure that you bring it to the Court every odd before the arbitrators  
14 every time you're there. 2018 the Specific Relief Act has been amended. There is a fast-track  
15 dispute resolution mandated by law. Injunctions must not be granted unless a very specific  
16 reasons given in the order. Disputes must be resolved within one year by special courts.  
17 Arbitral panels going to drift on that for years, because if the Parliament says that for special  
18 courts, surely the panel will also have to be encouraged to look at that. That's a duty that you  
19 and I will carry as Counsel when we go before. Because that's a Parliamentary mandate now.  
20 Second, the issue that arises very critically at the stage of bidding for the Contracts. Now the  
21 dust has settled. **Justice Joseph's Judgment on Sasan Power**, April, on the issue of  
22 disclaimers has clearly made it evident that notwithstanding what you may feel if it's been  
23 disclaimed by the Government and it's a problem, we need to go back and push hard to make  
24 sure they are fairer contracts than what you see. If there's a whole scale disclaimer on  
25 hydrology or geology of a project where you have to construct either a highway by drilling a  
26 tunnel in the mountain or a power project. You have one month or two months to due  
27 diligence. The project takes six years. There is no way that you're going through 30 km in the  
28 heart of the mountain to find out what is the rock classification. You don't have the  
29 hydrological data and if it's all of that is disclaimed and you are supposed to do your diligence.  
30 That diligence is impossible. If in spite of that, you and I go ahead and work with clients and  
31 bid and take the risk they'll have to price the risk if they don't laws well settle now no question  
32 of going back for any prices price scalation or any change in the name of *Force majeure* change  
33 in law. So, 2-3 aspects very critical, which you and I, as practitioners, will have to bear in mind.  
34 The numbers all there for us to see. But to actualize the numbers, we'll have to make sure that  
35 our environment actually attracts investment and preserves the value both for the contractor  
36 and the developer. Because delay comes very costly in India, it comes at 12 and 14% per annum.  
37 It doesn't come at 1 and 2. And then there is compounding on top. So, we need to be very



1 mindful of that because as practitioners, that's the heart of the matter, risk and value are two  
2 sides of the coin that you and I play with. And we must be very vigilant. I will stop here.

3

4 **VYAPAK DESAI:** Sure, sure. Thanks a lot. And I think we have obviously heard the  
5 practitioner's perspective and somewhat little negative and of course some positives. But  
6 maybe if I can bring Ruchika here and particularly from a perspective of the sector and the  
7 economy, and how the growth has contributed to the economy in general? And how do you see  
8 this growing further and what are the aspects that you would like to see as a GC going forward?

9

10 **RUCHIKA NYGAR:** Yeah, thanks Vyapak and thanks to the organizers for inviting me here.  
11 So as Amit said, infrastructure is one of the most important aspect and growth of any economy,  
12 including India and looking at India looking at being a US 5 trillion economy, going forward  
13 in 5 years, I think infrastructure would be paying a lot, and it should also be growing at the  
14 same pace. And as Amit said, PPP models have been there for years where we have seen still  
15 there being delays in the project, the matters being stuck in litigation for years and ultimately  
16 it affects the normal public only. The cost escalation is ultimately it is passed on to the general  
17 public, and we have to bear the brunt till the infrastructure project are stuck in litigation. But  
18 I think recently Government has been doing a lot in this. The Government's focus has been  
19 into infrastructure. As a national infrastructure pipeline and plan had been launched recently  
20 where the Government is looking at putting in a lot of money into the infrastructure projects  
21 by way of various fundings. And also, I think the National Infrastructure Bank, which is to be  
22 incorporated, where they will look at innovative methods of financing for infrastructure  
23 projects, where.... obviously, it is a long-term funding. So, bank funding... we see that there's  
24 always an asset liability mismatch and we are stuck with banks. So therefore, bond markets  
25 need to be developed where long-term financing can be done. And also, innovative methods  
26 of funding may be derivatives can be brought in, and also the insurance sector and pension  
27 funds where they can bring in money for long term basis. I think that would give a lot of boost  
28 to the infrastructure sector.

29

30 **VYAPAK DESAI:** Sure. No, thanks a lot Ruchika and if I go a little further to Naresh here.  
31 So, Naresh, I think we all know that this is innovates huge monster to deal with and the world  
32 has dealt with it in a certain fashion where the contractual layoff land is very clear, it's very  
33 succinct. It's standard templates FIDIC Contracts, NEP Contracts in UK, and there are many,  
34 many such examples. But India has taken a little different path. It's little ad hoc. Sometimes  
35 it's very diluted standard for contracts, and therefore it becomes even more confusing and  
36 complex when it goes to interpretation and disputes. So one, if you can give us an idea why  
37 India is not taking the same path which not that we have to, but then what is the alternative



1 and where we should go? I think idea of this discussion is from a future perspective. What's  
2 the best way forward taking care of India needs?

3

4 **NARESH THACKER:** Thank you, Vyapak. So let me begin by saying that we do have  
5 standard form contracts which are not so standard. That's the starting point of everything. We  
6 talk about standard form contracts. So, you would typically, if you look at any largely as what  
7 Amit has already laid out the land for all of us if you look at 1.4 trillion only 25% is private  
8 sector. Clearly, everything is public sector undertaking. And when you look at public sector  
9 undertaking, one thing which comes through very, very clearly is that despite all of these  
10 companies that you see being whatever Navaratnas, that you talk about or any other public  
11 sector undertaking that you can think of, these are what these are ultimately Government  
12 undertakings. Despite the fact that these are Government undertakings, if you pick up contract  
13 of an NHAI versus an ONGC, the stark difference that you will see in the standardization is  
14 something that as a lawyer on the opposite side. When you are arguing a matter, you come  
15 across and it at times is horrific when you're dealing with these contracts. So, what does  
16 everyone do? Each Government enterprise will have its own sort of a standard form contract.  
17 The starting point could be a FIDIC, for all I know, but everything of the GCC that is not in the  
18 favour of the employer, becomes a PCC where everything, all the burden is shifted, all the  
19 obligations are shifted to the Contractor. Now, is that the best way to go forward? Naturally  
20 no, I don't think that's the best way. Because two or three things happen in that. If you are  
21 going to do what you are going to do, namely let me pick up something as simple as the scope  
22 of the contract. You pick up any contract be it Railways or roads or bridges. What you'll find is  
23 that... and if you were to look at the scope, the scope is so widely defined that you truly do not  
24 know what is or what all is encompassed in that contract that you are dealing with? While the  
25 same contract will also provide for a change order. What are you then fighting for at the end  
26 of the day, is that the question that usually people are fighting over is that the contractor says  
27 this part of the contract that you asked me to do was actually a change order. And the employer  
28 would say, but you look at the scope. In the scope. Everything is written the words used are  
29 what was necessary for the project, what is necessary for the safety of the project. And I'm  
30 facing such an issue right now where the other side is arguing to say that. But this was  
31 necessary for the safety of the Railways. And if it is necessary for the safety of the Railways,  
32 you had to provide it. Therefore, in the catchall Provision of the contract, this is already  
33 covered and I am arguing to say but this.... "How could you use a 'catchall phrase' in the  
34 Contract or the 'catchall Clause' in the Contract to ask me to do something which was entirely  
35 different. Entirely different?" It has nothing to do with, what otherwise I would have been able  
36 to do within this contract. But there you are.... I'm facing this kind of a situation. So therefore,  
37 clearly it all is lopsided. There is no uniformity that you find. The approach, obviously, is to



1 protect as much of the employer as they can. Insofar as even something as simple as the  
2 payment part of it. You have running bills. I think Amit and I were talking the other day when  
3 all of us were having a chat and we are thinking about how to bring this out? But look at the  
4 payment terms in a FIDIC Contract, visa vis what you would have in a contract that you would  
5 typically see at any of these public sector undertakings. In a FIDIC Contract, we all know that  
6 if the contractor remains unpaid for a given point in time, he can seek suspension of the  
7 contract. In fact, he gives a notice to suspend the contract. Now dare any private player in  
8 India seek to suspend the contract. The first thing that will happen is.... and despite the fact,  
9 this is despite the fact that he remains unpaid, there are cash flow issues, so much so that he  
10 can possibly go bankrupt if he's not paid. But can he give a notice of suspension? The answer  
11 would be a straight off, 'no.' Why? Because every contract that you see... a public sector  
12 undertaking contract will have clauses on blacklisting. So, this contract you may fight with the  
13 Government, the next contract you have blacklisted. So, you're not even out there as a player  
14 in the market. So, these are the sort of issues that we continue to grapple with. And this is  
15 something which has continued from the time immemorial, I would say. And up until now and  
16 as Amit rightly put it, even in 2023, there is a lament by the Supreme Court, that nothing has  
17 truly changed. What ought to change and what ought to happen, is that we should.... the time  
18 has come we are now at a stage where like I was again saying, there are two things, which  
19 OECD pointed out just a couple of weeks back, two gaps, in where the economy and how they  
20 economy is progressing. One was infrastructure, the other was logistics. Clearly, both are  
21 interrelated. Clearly, these are both necessary for the purposes of India to grow, to become the  
22 kind of economy that it hopes to become. \$5 trillion economy will not happen on the back of  
23 just some services and manufacturing. Yes, you need services and manufacturing. But let's say  
24 you manufactured then if you're not able to evacuate those goods, what are you going to do  
25 with those goods? Where are you going to store? So, you'll need equal amount of warehouses.  
26 You will need equal amount of manufacturing units. But equally you will need the roads, the  
27 Railways, everything to come up. So, time is ripe when we should move towards standard,  
28 true standard form contracts, namely, the FIDIC, the NEC. Pick what you like and again, you're  
29 right when you said that it did not necessarily.... We need not ape anyone. It's not about aping.  
30 Anyone pick a contract that you believe is right for you and then learn to live with it. Don't  
31 tinker with it to an extent where everything becomes irrelevant in that  
32 standard so called standard form contract.

33

34 **VYAPAK DESAI:** Moving a little further down there. And maybe I'll bring Anand here  
35 because at one end the regulatory and legal landscape, we have heard from Amit. We still don't  
36 have the standard form the way predictability and consistency is required in the infrastructure  
37 sector. So when it comes to infrastructure projects or development projects broadly, and more



1 importantly, it's management of those contracts, right? Can we do something there in sense,  
2 are there precedents from your experience Anand, has any specific subsector implemented  
3 some management principles of those contracts which at least addresses some of these  
4 concerns. Or maybe what's your take, how we should do it?  
5

6 **ANAND SRIVASTAVA:** Thanks, Vyapak. Thanks for having us all here. I think personally,  
7 what I am seeing now is that construction contracts are becoming a smaller piece, and as you  
8 rightly said, Infrastructure Projects has a larger play where we have all the stakeholders bind  
9 to the same arrangement, we have the lenders come in with the substitution piece. We have  
10 the design elements being drafted into the contract. And as Amit sir, pointed out, disclaimers  
11 the site conditions are disclaimed, we were discussing subsurface and surface in the morning  
12 today. And also, what we are seeing is that the Land and Property acquisition of let's say even  
13 a high-speed rail is landing itself in trouble. And basically, when the investor or the developer  
14 comes in, he comes with 70% of this investment being backed by lenders. And the lenders  
15 therefore are also now a stakeholder. It's not a matter of only FIDIC alone. Because the  
16 construction piece comes as a smaller segment of a large interplay of several things coming  
17 together. And these contracts therefore, have to interplay much, much, intensely. Just look at  
18 the new... our whole wish list of bringing high speed rail into the country and making wagon  
19 manufacturing into our country, right? It had 3 large Contracts which do not kind of get into  
20 a plant and machinery procurement standard JCT template. It is so far away from that.  
21 Because the Government is also imagining new ways of financing such transactions. JVIC is  
22 of course, funding the entire high-speed rail, and therefore, these Japanese conditions are  
23 coming in. And that's a big, big.... The other thing is our FIDIC doesn't answer is for example,  
24 we were discussing the Dispute Adjudication Board. It talks of notice of dissatisfaction being  
25 given. But then we have had instances where one party gave a notice of dissatisfaction but did  
26 not initiate arbitration. And everybody was in alerts. Now what to do? I think, what even the  
27 Government needs to know is that the Contract Act itself makes a saving for in Section 1, for  
28 'incident of contract'. And whatever clauses you draft, cannot go in the face of Section 51 to 55,  
29 which provide that if you are in default, you cannot deny compensation, especially where time  
30 is not obvious. Right? And 54 especially provides that if Section 54 of our **Contract Act**  
31 provides that if there is a sequence of activities assigned to each other, then if one party doesn't  
32 perform that part and it's the other party performs its part and is entitled for the  
33 compensation.  
34

35 **VYAPAK DESAI:** The other one gets the advantage.  
36  
37





1 **ANAND SRIVASTAVA:** And 55 provides, if you of course, time is of the essence, and you  
2 maintain time as the essence. But then if you then accept the performance or the late  
3 performance of one party. Then you have to do it by giving notice of your intention not to be  
4 bound by it. And then you can claim these Exclusion Clauses. And on the improvement part of  
5 course, our contracts today also do not provide for the distinction between delay and  
6 disruption, which Amit sir, and Naresh and you must be arguing every day in arbitrations but  
7 delay disruption, overheads and loss of profits are also then not kind of written down well in  
8 our contracts, and FIDIC somehow assumes that the Indian market would be wise enough to  
9 pick them up and be able to kind of maintain its records according to that. Disruption.  
10 obviously, I'm sure for everybody disruption and delay is different. Disruption is basically  
11 when something underperforms and causes accumulation of losses over a period of time. And  
12 there of course we do the critical path analysis. Our contracts do not provide for any analysis  
13 on delay they do not provide for the standard model or Hudson formula, or... the formulas, et  
14 cetera, are all available today. We need to choose what we are trying to kind of, write down.  
15 Contract principles of concurrent delays or sequential delays are not written... You want me to  
16 take the question of improvement now or later?

17

18 **VYAPAK DESAI:** Yeah. Maybe you can just quickly touch upon it.

19

20 **ANAND SRIVASTAVA:** Of course, one important point where our contracts remain silent  
21 is whether program is a part of the contract, which is the contractor's wish and program is not  
22 a part of the contract, which is the employer's wish. Normally, what happens is if you were to  
23 draft a harmonious contract, you would have more like an alliance where the program records  
24 on a moving basis. What we call the timescale model of it's called the Line slice model of  
25 programming where you kind of ensure that you have a real time program which incorporates  
26 all the events of all the stakeholders, whether it is the authority, the local authority, the lenders,  
27 delaying, disbursements or ground conditions as Amit sir, was pointing out, and the program  
28 becomes more live and everybody kind of works to that. But that doesn't happen. Mostly our  
29 contracts, as Naresh was pointing out, are employer friendly and program is kept out. The float  
30 or the extra time that is provided in the program is left to the contractor to manage and that  
31 becomes a big risk. So therefore, what we can do is ensure that in our contracts, we provide  
32 for record keeping. So the golden triangle which is basically, which proves the cause and effect  
33 of any to keep the meetings of the site the employer, the contractor, the lenders, the engineer  
34 inside the day worksheets, for example, are important tools for our disputes and accelerating  
35 them. Keep the Scott Schedules, going from the beginning. I think the sites, the contracts  
36 managers should provide for Scott Schedules right from the beginning. We need to have  
37 provisions where we appoint the DAB early or Dispute Avoidance Board, whatever call it. They



1 are extremely helpful. In fact, we had Dr. Fletcher in the afternoon today and the London  
2 Olympics were happened because the DAB had 17-member panel, which was formed to ensure  
3 that the London City was able to do everything on time for the Olympics and it's one of the  
4 largest project which was ever done. And lastly, the contracts need to provide for early  
5 warnings rather than claim cost later. So, one very smart thing that contracts also provide  
6 nowadays NEC is a very good example. Good model. Very few people understand it, but NEC  
7 gives the comfort, it's slightly ahead of FIDIC in a positive contract environment, especially  
8 from the early Warnings principles. So, I think, that would be....

9

10 **VYAPAK DESAI:** Correct. So, I think that obviously all of this is available while we are still  
11 far from using some of these methods.

12

13 **ANAND SRIVASTAVA:** So, one more interface management so flight allocation, how  
14 people move around. I think that's also to be provided in the program itself

15

16 **NARESH THACKER:** I'll just give one very, very quick example from what you know... what  
17 Anand has spoken; one is obviously of the interface management. But before I go there,  
18 another example that I must give of a recent matter where we were discussing issues around  
19 land being handed over. So, what happened was that we were in a Railways project. And we  
20 were obviously Railways project in the sense that one understands it's not a linear project it  
21 can never be linear whether road or Railways can never be linear. It always goes through a  
22 mountain or a Valley. And therefore, there are various issues that are required to be dealt with.  
23 Now, we were told that. Okay. We've handed over a land to you. So, what typically would  
24 happen was they would pick land they would give us, let's say 600 meters of land. Then a  
25 kilometre of land is not available thereafter. Another kilometre is available, 5 km not available.  
26 So, as contractors, we said, "It's impossible to build. How can you?... this is.... One, not linear.  
27 Two, how do you expect me to align? There's no alignment. Alignment. I need to make the  
28 alignment, and I can't have the alignment if I do not have contiguous parcel of land. I'm not  
29 telling you that you have to give me the whole entire 45-50 kilometre of land that you are  
30 supposed to give me at one go, but at least give me sufficient workspace. That was the whole  
31 ask. Well, it never happened. The contract went on and then at the end of the day we obviously  
32 put in our claim. And when we put in a claim, this was really the argument which was given.  
33 And they have.... And I don't know how, but they have an expert up there saying that, but you  
34 had the parcel of land. The 600 meters was available. You had another kilometre over there.  
35 Why couldn't you build? And then it was all a matter of joining the pieces together. So, this is  
36 not Lego land that we are playing. This is live contracting....

37



1 **VYAPAK DESAI:** That is happening...

2

3 **NARESH THACKER:** .... Which happens. The other issue, which arose in the same contract,  
4 was that obviously we are making this railway line, there are high tension wires, which are they  
5 obviously need to be relocated from a safety perspective. Even while we are working, you need  
6 to relocate that. Obviously, this high-tension wire had nothing to do with us. It was not even a  
7 part in that sense, a scope of the contract, as we were as we read it. But there were other  
8 agencies at work around that path. So, the interface issue came up over there and the Clause  
9 which was up there was read and all. But interface... you are the Contractor. You were the  
10 main Contractor. It said something like “the main contractor will take care. We will provide  
11 you all the help. We facilitate.” So, we said, “you must be joking to think that as the main  
12 contractor in the entire 45km, I would be able to predict.” ... and importantly the two-month  
13 period that Amit spoke about. That was about the time that we had to look at the surface and  
14 sub-surface area. without the land being made available to us, we were told that even the  
15 subsurface is your responsibility and the Disclaimer was given. Now, in those situations when  
16 you're working and you're arguing. And this is where another issue comes to the floor. That  
17 you are before a Tribunal, maybe of retired judges, and they aren't able to understand what  
18 you are asking for? Because when you tell them it is impossible to have the alignment made  
19 the way they are asking it to be done, that you cannot have these broken pieces of land parcel.  
20 How do you.... And it becomes so... you start realizing a lot of things. It is not just these issues  
21 within the contract. It's also about the fact and rightly as Anand has put it, there is no dispute  
22 avoidance methodology which is provided. Even if it is provided, it is redundant. People don't  
23 utilize it. It is only meant for as we understand in India, time pass. Beyond that, nothing else.  
24 Everything is left to the end of the, end of the contract, in an arbitration. And the Arbitration...  
25 there are people who are Manning the arbitration, to understand what we are talking.

26

27 **VYAPAK DESAI:** So, we have obviously seen the problems because of that, right? I think  
28 2019 or something, if I remember the numbers, some more than 200 cases and some 75,000  
29 crore disputes against NHAI. I don't know what's the situation today? And DAB is not working,  
30 the contract management is not happening. So, may be Ruchika, from your perspective, you  
31 are the industry we can enjoy this session for days together. But do you think now with the  
32 mediation and even internationally, there is a lot of discussion around mediation in  
33 Construction Contract particularly, of course, it goes through the progression of DAB and  
34 other mechanisms. But from an industry, ... I'll ask to deal with some of these issues. What's  
35 your take on it? Because ultimately, we need to resolve this dispute.

36



1 **RUCHIKA NYGAR:** Yeah, sure. I think mediation as a process and defining it is fine. But  
2 the issue is the intention. Even though it's an informal way of resolving. Rather, people think  
3 that it is like some person has to win or lose. But what I feel is it's a resolution where a third  
4 party is basically a neutral person who's deciding for you. But then because it's not a formalized  
5 thing, people, even though they may agree in a mediation, a particular thing, but they can go  
6 back because there's no sanctity to it. And ultimately, it leads to an Arbitration. So, the basic  
7 is that what is the intent of the party? If they seriously want to avoid long run litigation, I  
8 understand that mediation can be a very good means of resolving, provided that people have  
9 intention and they stick to what has been decided and what has been agreed under the  
10 mediation.

11  
12 **VYAPAK DESAI:** Sure. No. I think Government is obviously trying its own ways. Ministry  
13 of Finance came with *Vivaad to Vishwas-1* and then 2 and I don't know how many versions  
14 would come and then NHAI came up with SAROD. Then there are other suggestions also. So  
15 maybe if I can bring Amit with his experience and expertise on all of this, do you think this is  
16 working? Do you think we need something else what? What is that 'something else?' I think  
17 we all know the problem.

18  
19 **AMIT KAPUR:** What's working is the last two points made because Pakistan lost two wickets  
20 in the last two overs. But what can work even better there's a second wish list which is 'run  
21 away' and it is run out. So, anyway, I put it to you. Yeah, the location is there. Why don't we  
22 consider MCIA and ICADR having come together, so many of us around? Coming out with the  
23 Best Practices Guide on Risk Allocation and mitigation. Compare FIDIC with NEC with the  
24 three or four key Indian models, because unless Government will come with their models as  
25 they feel appropriate. So, when you had 75,000 crores plus, I worked on that committee,  
26 worked with the MCIA, took it back to the Government, what did we get? They said against  
27 arbitral awards will reach 75% of the money. But you'll give a bank guarantee for it. So here I  
28 am getting the money that I am entitled to. And now I'm paying margin money for that money  
29 too, nobody took it. It was just eye wash. So, it doesn't work. Unless from the industry we come  
30 together and bring out... as practitioners.... forget the industry for the moment, I understand  
31 there are concerns about the industry taking it up because off late it's frowned upon for  
32 particular... But as a body of professionals, why can't we put out there and say that, "these are  
33 the five or seven risks which are coming in the way." And unless you are able to tackle it, it'll  
34 remain a pipe dream. It will be on the books. You will continue with 20-25% private sector and  
35 the investments will not come through. Because India is, I believe and this Government is  
36 quite determined to move forward and we have made for us whether you look at the judgment  
37 in **Energy Watchdog case** where we are the only common law jurisdiction in the world,



1 where change in law now which is expropriation in other words, is a ground for institution.  
 2 You settle, people have got compensated, things are done industrial. Every time the regulator  
 3 or the State authority has been reluctant, they've been wrapped on the numbers, whether it  
 4 was **Indira Banerjee in MSEB sale, whether it was GMR with Gavai. It was Sanjay**  
 5 **Kaul pulling up or it was Rajasthan.** Various States. Ultimately, the money got paid when  
 6 the chief Secretary was named in a contempt petition and the Supreme Court said, "if you don't  
 7 cuff up by 31st March, please come here, we'll send you on." Money came, but unfortunately,  
 8 they don't need to go that far. It's not necessary. So, all I'm saying is that rather than wait for  
 9 those instances if we could come up with some suggestions. After all, Kelkar Committee took  
 10 that forward, the amendment came. There may be a reason for us to look at more positive,  
 11 constructive solutions like the ones that Anand and all the other colleagues Naresh and  
 12 Ruchika offered. I think there is a reason for us to move forward. So, if you look at the model  
 13 that we've followed. And **Energy Watchdog** is one classic case where I was deeply involved.  
 14 And the problem was that you had every possible public interest issue and political economy  
 15 issue against you. Four and a half years, the compensation came through. But the other side,  
 16 which is a very sad element. 1995. I still remember Nathpa Jhakri Hydroelectric Project. The  
 17 Government chose the site for constructing a coffer dam to divert water from River Satlej to  
 18 build a dam and to tunnel 30 km in the mountain gave you the two months. By the time the  
 19 contractors came to the site, the left bank of the mountain had collapsed. The rubble in the  
 20 river was higher than the dam that was built. Indian Navy had to take 18 months. Contractors  
 21 were liable for paying 3 crores a day of delay, no liability on the grant. Did anybody even bother  
 22 to think what was the loss to the country for 1500 electricity being denied for three or four  
 23 years? No. Can we go back and say that you have to be a fairer proposition, have something  
 24 there which is going to bite and solve for both sides, so that there's expediency on top. 30% to  
 25 40% of every bill was retained. So, from a contractor, you suddenly became a financier and  
 26 equity holder without having any equity. Now that's a hell of a baggage to carry on your  
 27 shoulders. So that 75,000 crores comes in the way of anything else. Your flip on contracts on  
 28 TOTs is a reality, all of us. So, all I'm suggesting is that we all know the problems. We also  
 29 perhaps have ideas or solutions. Can we put it out to them as MCI and IPBA and why not?  
 30 I'm happy to volunteer if the forum takes it.

31

32 **VYAPAK DESAI:** Yeah. I think that's a great suggestion. Maybe we'll follow up with you on  
 33 that. Absolutely. But Anand, if you have any thoughts on with all the issues related to right  
 34 from law to contracts to contract management. But with all this happening in terms of  
 35 managing disputes, I don't know if Naresh or Anand, do you want to add a couple of....?

36



1 **AMIT KAPUR:** You talk about capacity. Because that's the biggest problem we sign contracts  
2 and forget about it.

3

4 **ANAND SRIVASTAVA:** I think one model which has worked at least in one project is Tamil  
5 Nadu is alliancing, where the risk and reward is shared equally amongst all the stakeholders  
6 and Tata housing did that project in record time. Clients Contracts are contracts where  
7 everybody puts their reward at stake and forms a committee which is common and they work  
8 through the project together, mitigating all the assets and all the liabilities are.... as I said,  
9 Early Warning Systems are there and they imagine it. Because in the end, the lenders interest  
10 is the most significant, while the Government is granting the land or the ambition to construct,  
11 it is the lenders whose money is playing. And it is in the end, public money. Whether it is  
12 coming from Japan as a loan or it is coming from our own bank. And therefore, the lenders  
13 need to have a bigger say as we kind of move forward. Because it is very late in the day when  
14 the lenders are called to the party. When it's either a suspension or a termination scenario  
15 when they are, they first come to know that the project is going through trouble. Cost overrun  
16 guarantees are normally funded by entirely the developer or the contractor as you like it. And  
17 the project cost is taken as the least of three. All these things basically make any project very  
18 risky. And mostly the way I'm sure all of us know developers fund it, is by inflating the costs  
19 and building equity into the financing. So, one of the things which Amit sir, was discussing in  
20 the morning is to kind of see that we have this concept of incomplete contracts where  
21 everybody kind of continues to work through. We can't imagine all the risks that are coming  
22 in, and therefore more like what mining contracts do, where we have a nimble or more  
23 dynamic kind of arrangement where we kind of keep moving the contract pieces to ensure that  
24 the ultimate objective, the end result is where we are working towards.

25

26 **VYAPAK DESAI:** So, while, we are talking about suggestion and comments, with all the new  
27 permission with all the speakers, can I bring in the audience here?

28

29 **AMIT KAPUR:** I'll just add just one word here.

30

31 **VYAPAK DESAI:** Please.

32

33 **AMIT KAPUR:** I think at the heart of infrastructure is the fact that some public asset, some  
34 public facility is made available to private sector for the purpose of developing what is for the  
35 consumption of the economy. If that's true, Article 39 (B) and (C) should inform. It should be  
36 mandated by law, all decisions by all Tribunals, all gods, all policymakers. Unfortunately, most  
37 decisions are made from their individual vantage point without worrying about what's the



1 impact of the economy. And that is the problem. So that specifically that amendment it's  
2 instructed to read it. I was involved in it. So, I understand.

3

4 **NARESH THACKER:** Before that commence, if I can just take that thought forward and  
5 there are two thoughts on which I just wanted to take this forward. We are talking about an...  
6 absolutely right. It's the lenders money which comes in. And Amit, you made the point that  
7 ultimately what is going to be built is for the nation, is for the public. In both ways, we suffer.  
8 Because obviously the lenders money which is coming in. There is no funder which wants to  
9 come into India and put money in an infrastructure which is being developed which is very  
10 unlike what happens outside the country. Here the funder, if at all he or she's coming in, they  
11 are looking at built projects which they can take over. So, everything which is being funded is  
12 being funded on account and through public money. If that is so, one of the questions that we  
13 need to ask ourselves is that should it now, is it now not the time? And this is what the  
14 Government needs to ask, that every lender should have.... it's like an independent Director  
15 on the board of a company. Why not have someone from.... and you are interested in this. Your  
16 money, you've lent it. There is hardly any contract management, which actually happens in a  
17 contract in India. So should a lender not have a person overseeing the contract from beginning  
18 until the end? Because it is ultimately public money which is stuck in it.

19

20 **VYAPAK DESAI:** Yes, sir.

21

22 **ANAND SRIVASTAVA:** We have the independent engineer and the lender is engineer. But  
23 they are failed institutions.

24

25 **NARESH THACKER:** They become a failed institution....

26

27 **VYAPAK DESAI:** Yeah. Please.

28

29 **AUDIENCE 1:** So, picking up the thread from where Amit left it, one of the that suggestion  
30 of really doing a kind of a paper or research study.... one of the pointers would be really coming  
31 out with an assessment of what ultimately, let us pick up 200 public projects. See what was L-  
32 1, or H-1, as the case may be and do an analysis as to how much was the ultimate amount paid  
33 by the Government? No by the Government. Of course, public money is an element which is  
34 built into that. But how much was the money which was ultimately paid by you and me through  
35 the Government for that project? So that's an assessment which could be the basis. And of  
36 course, you can't do away with L-1, because it has contours which unmanageable corruption,



1 et cetera, et cetera. But that is something which can be very helpful as a case study and then  
2 taking it through a formal body and then coming onto the report.

3

4 **VYAPAK DESAI:** Sure. Your thoughts because you are listening from ....

5

6 **AMIT KAPUR:** May I just add to that? And then, of course, the nuance that I would like to  
7 add is, don't just do what the Government paid? Please consider what the citizen ended up  
8 paying, because what the citizen did not get because the Government sat on a decision.  
9 Unfortunately, what we forget is India, the cost, the time value of money now are part of  
10 legislation and IBC is completely ignored. I mean **Mahadeo Savlaram 1995**, big lemon by  
11 Supreme Court. One house in expansion of the road in Pune delayed the project by 24 years.  
12 Can you imagine what the capital cost was? Who's paying for it?

13

14 **VYAPAK DESAI:** So, I don't know if anybody has any other thoughts....

15

16 **ANAND SRIVASTAVA:** I may want to just bring one more suggestion since we are on this...  
17 So, lenders evaluate every project that happens before it is bid out. So, in European, and in  
18 Latin America, what we are seeing in construction and infrastructure development projects, is  
19 that when you bid, you have to submit with your bid, a bank's evaluation of the financial case,  
20 the banking case. And that kind of gives so much credibility to what the bids are. Because  
21 obviously, on an L-1, bidding scenario, people run towards bringing the value down. But if you  
22 were to kind of, get the lenders to play the role of evaluation of the bid when it is filed, right?  
23 Just take the big example of this Ahmedabad Road project which GMR bid, GMR made the  
24 price point of GMR per kilometre was Rs120 lower than the other bidder. In the end, Kishingar  
25 Ahmedabad.... GMR actually gave back. Because it couldn't be done at .... You know, L&T was  
26 at the other extreme, and KNR which was supposed to be one of the better bidders, was the  
27 opposite. So, I think, one suggestion which maybe can be adopted by the Government is get  
28 the lenders to do the basic work and evaluate.

29

30 **VYAPAK DESAI:** Any other questions or comments from the, I think you guys also came up  
31 with a very strong report. At least on the Indian construction industry.

32

33

34 **AUDIENCE 2:** Thanks for that, it's really interesting talk. Slightly depressing, I was just going  
35 to say I want to understand about the NEC contract and we've had...

36

37 **VYAPAK DESAI:** Can you also introduce for the best of the audience.





1

2 **AUDIENCE 2:** My name is David Goodman from Croll. I've been doing construction for  
3 about 20 years. NEC is a great contract. Every Government Contract in the UK insists that it  
4 has to be under the NEC. But the power of it is you need both parties to absolutely buy into it.  
5 So you need the Government to sign up to use the NEC, and it will never work if it's a one sided  
6 contract like most contracts. But it really is. It's very admired, heavily. And it's all about  
7 keeping constant records up to date, so that everyone knows exactly where you stand? And I  
8 just wondered whether you thought? Do you think the Government would be willing to take  
9 on that kind of contract, it feels like they don't feel that they would?

10

11 **AMIT KAPUR:** I think that's where we'll have to push. Government is very happy where they  
12 are because people are still bidding and taking contracts with all their experience. So, an  
13 informed opinion coming from the industry bodies, even if pulling out all the jurisprudence  
14 that's come to show the risk from a lender's point of view, from an investor's point of view and  
15 by the way while I have great concern about lenders, but lenders are often on the Boards of  
16 those companies, but sit quietly and they ought to go off for the beaches, for and take the  
17 cheques. It's their fiduciary duty to come up on it on their own. They don't need to be invited  
18 to a party for it. There's a problem there.

19

20 **NARESH THACKER:** Also, in 2016 there was a committee of... Cabinet Committee on  
21 Economic Affairs, which had actually suggested that FIDIC should become the norm. But it is  
22 never seen the light of the day. I mean, it's biting the dust even now. So, you're right, David. I  
23 think is the Government actually willing to push the button and say that this is how the  
24 contracting ought to happen. Most times it is obviously to the advantage of the Government  
25 not to do anything. And it's to the advantage of the Government companies not to do anything  
26 because they don't want to pay. I mean, that's the bottom line. And in every contract that is  
27 what it comes down to, how much are you willing to pay for.... what you're getting. And largely  
28 what you'll find is that these contracts are known as lump sum contracts. Actually, they are  
29 not lump sum contracts. The very fact that there is a change Order and a variation, which is in  
30 built into the contract. Does mean that there is an over and above that is required to be paid if  
31 there is any variation that the Government would ask for. In fact, I happened to just finish a  
32 matter where the argument which was pandered about was that oh, but I asked for a variation  
33 and there is a Clause. But there is also Clause which says that "I will not give you anything over  
34 and above." So, there was no profit element that you would get. On the other hand, if the  
35 Government was to get anything, there was a 15% markup which was built in. So, you can  
36 imagine the kind of inequities that we are dealing with over here.

37



1 **VYAPAK DESAI:** Sure.

2

3 **ANAND SRIVASTAVA:** I would agree that NEC is a very good template because it has a  
4 very good subcontract network contracts which are available and you can easily adopt it. And  
5 it can work across sectors, especially the main contract and the subcontracts, they work...

6

7 **AMIT KAPUR:** The bidders and the industry has to come back and force the Government.

8

9 **DAVID:** I know. I think if it's Clause 10 of the NEC that says, Mutual trust and understanding.

10

11 **VYAPAK DESAI:** Any last words Ruchika? Because I think we are all talking about the  
12 problems. But I think obviously, we are talking because the industry is going through this. So,  
13 from a lens of the industry, I think you would possibly have seen what are the cascading effects  
14 for what we are discussing?

15

16 **RUCHIKA NYGAR:** One of the points, which I wanted to point out was that we are talking  
17 about increased cost in these matters, where litigations are there. I think we are also seeing a  
18 lot of public risk litigations being filed and some of them are really frivolous. So, to give an  
19 example in GMR, when we were doing the Go Air Project, there was some petition filed in the  
20 Green Tribunal, and there was a stay given. And ultimately, when we reached the Supreme  
21 Court, it was dismissed. But during this whole process, almost two years were lost and the  
22 matter was just dismissed with very no cost at all. So, in cases where even the public comes up  
23 with such litigations, I think there has to be exemplary caused by the courts to at least desist  
24 the people from filing such frivolous petitions, because of which the matters are delayed and  
25 ultimately the construction affects.

26

27 **VYAPAK DESAI:** Thank you. At least our watch says Time's up just now. So, I think we are  
28 coming to the close of our session. Post this, I think there is a closing ceremony of the whole  
29 ADR week. We are having an honourable Justice from the Supreme Court and if I'm not wrong  
30 Tushar Mehta, Solicitor General is going to be here. So, hang on for a few minutes, but let me  
31 in the meantime, thank the panel unless they have any final words, I think thanks a lot for  
32 giving both the legal and a general perspective. But more importantly their experience on some  
33 of the real time projects that have gone through the problems. And in spite and despite of all  
34 that, I think we do have solutions. I think so many of them came up from the both sides from  
35 the dais and from the participants. And I think while we have a solution. It's a question of how  
36 do we execute and go forward. So, with that hope and silver lining, may I request a round of  
37 applause for our panel and more importantly, a round of applause for the participants to hang



1 on. It's 96 for 2, so hopefully the 3rd wicket will go before they reach 100. That's the wish we'll  
2 ask Amit to make before he gets up.

3

4 **NARESH THACKER:** I have a statement in between. I must admit, in between, I did check.  
5 Rizwan was almost out on one delivery. You checked as well, Amit?

6

7 **VYAPAK DESAI:** So, thank you, everyone. I think just hang on for a minute. I don't know if  
8 Madhukeshwar and Neeti... are the guest is here for the closing ceremony. Maybe. ..if you can  
9 check. Anyway. Thank you, thank you.

10

11

12

~~~**END OF SESSION 4**~~~