INDIA ADR WEEKDAY 1: BANGALORE

SESSION 1

Arbitration of Shareholder Disputes

12:30 PM To 02:00 PM IST

Moderator – Manasa Sundarraman, Counsel, Trilegal

Speakers:

Arun Kumar, Senior Advocate

Mohammed Shameer, Disputes Partner, Trilegal

Prasad Subramanyan, Director & Head Legal, Matrix Partners

HOST: A very good afternoon to one and all present here, and welcome to the India ADR Week 2024. We have the first session by Trilegal on Arbitration of Shareholder Disputes. I would like to invite on stage the speakers for the session. Ms. Manasa Sundarraman from Trilegal, Mr. Arun Kumar, Senior Advocate, Mr. Mohammed Shameer from Trilegal and Mr. Prasad Subramanyan from Matrix Partners.

MANASA SUNDARRAMAN: A very good afternoon. I welcome all to the first inaugural session of the India ADR Week in Bangalore today. And in today's session, we are diving straight into a very contentious, a very critical topic the Arbitration of Shareholder Disputes. Now in India, we see in an evolving business landscape and the rise of startups. With this, shareholder relationships are becoming more intricate and leading to an increased likelihood of disputes. Safeguarding minority rights, ensuring good corporate governance and maintaining business continuity during conflicts are hot topics that are on the minds of everyone who are involved in these disputes. In this context, the ability of a business or for that matter a shareholder to effectively manage and resolve these disputes is becoming vital. In today's session, we will delve into the arbitration in the context of shareholder disputes, examine key legal frameworks, best practices, and, of course, our favourite part, everyone's anecdotes and learnings from those incidents. Our esteemed panel of experts include those who are doing such arbitrations every day - Senior advocate, Mr. Arun Kumar and Mr. Mohammed Shameer. We also have someone who is a user of Arbitration, General Counsel, Mr. Prasad Subramanyan. I'll just give a brief introduction to our panellists today. Sorry, before that, an introduction to myself. I'm Manasa Sundarraman. I am a counsel in Trilegal. And now moving on to my panellists. Mr. Arun Kumar is a Senior Advocate practicing primarily in the Karnataka High Court. He's the Founding Partner of Crest Law, a leading law firm in Bangalore. Prior to setting up Crest Law, he was an equity partner at Dua Associates. He has over decades of experience in handling complex commercial disputes before various fora.

Mohammed Shameer is a Partner at Trilegal specializing in arbitration, commercial dispute resolution and white collar crimes. Over the years, Shameer has represented a diverse array of clients in shareholder disputes, helping them navigate contentious situations ranging from breaches of shareholder agreements to governance challenges. As his colleague, I have witnessed Shameer being an arguing counsel on several occasions and handle complex arbitrations arising from various types of commercial agreements, infrastructure projects and public utilities.

And, of course we have Prasad who's the Director and Head of Legal at Z47, formerly known as Matrix Partners India. Prasad has over a decade of experience in the PEVC sector. In his current role, Prasad oversees all legal and regulatory aspects of the fund operations like fund formation, investment facilitation, dispute resolution and strategic exits. Prasad was previously in private practice where he represented key players like SoftBank and Peak and also several high growth startups like Daily Hunt and Bombay Shaving Company. Prasad is known for his multidimensional approach and engaging deeply with investors, founders and portfolio companies. And therefore, he has helped build a transformative business beyond the traditional role of a legal counsel. We are grateful for this panel, and we're grateful for all the insights and perspectives that they have to offer. Please, let's engage freely. Let's get started.

So, our first overview would be on Shareholder Disputes itself. Sir, Arun sir just in your vast experience in your legal career, do you see a difference in the kind of shareholder disputes, an evolution from what it was in the nineties to what it is today.

ARUN KUMAR: Good morning, Manasa. Thank you very much. Thank you all for coming here. To answer your question, Manasa, yes, I think we have seen a shift in litigation or in the nature of disputes. It may not essentially be so much about the content of it, but it is about who the parties are and you see a shift in the power paradigms between minority shareholders, and majority shareholders, et cetera, in a company. So if I was to briefly take you through a few areas of disputes, to briefly take you through a few areas that have been a source of contention not only now, but even in the past I will summarize them in this way. Firstly maybe with regard to a controlling interest in the company. There've always been disputes relating to vesting control of the company, voting rights in the company. When I say voting rights, it essentially means that on a particular... Maybe it was relating to a particular dispute, a particular meeting. These kind of disputes have always been there. Then you have disputes relating to board composition. You have disputes relating to appointment of Directors. These have also held the fray for quite some time. Then we've had disputes with regard to dividend, profit distribution. So, these are not something that is new. Similarly, you have stock valuation, share transfer. Then you have issues relating to oppression and mismanagement more particularly with, we'll come to that I think at some point of time with the NCLT and others. Then cases of plain and simple, fraud, breach of fiduciary duties, directors' relationships, and so on. Yes, and you also have issues like attempts to take over a company, you have mergers and acquisitions related disputes, issues relating to valuation of shares, issues relating to whether the swap ratio is good, not good, whether somebody is being short changed on it. So all of these things have existed for a long, long time.

But I think the fundamental difference is, if we go back several years and maybe go back to not so several years when I started practice, et cetera, we would see disputes with regard to all of these various issues. But in all of them, the controlling interest in the company was, they really had the upper hand. They called the shots. But with passage of time now with people like Prasad and all coming into this fray, the minority shareholder, et cetera, is not such a helpless voice that is not being heard. Today they have considerable amount of clout even though they don't necessarily hold majority interest. The discussion with regard to how much shareholding, what needs to be, what are the items on which there's an affirmative vote, and all of these have assumed a lot of significance over the years. Today, I think we are at a situation where people invest in companies and then the original promoters are now trying to push back to say, no-no, I need to have a greater say in these companies. So, just as our society, the economic relationships in our society, et cetera, have changed, the nature and mode of these disputes have also changed, and we have seen a swing from one to the other. I hope that answers your question.

MANASA SUNDARRAMAN: It does. Actually it raises us a lot more questions because especially, because you pointed to Prasad and said, people like Prasad have come in. So, Prasad, I wanted to understand because now sir has listed a series, a long list of potential disputes. So now I don't know if that makes you jittery. But what kind of disputes are you generally watching out for, say, at the time of entering at the time of, say, the investment? Is there something that you always say this may be a dispute in the future or something that you have to watch out for?

PRASAD SUBRAMANYAM: I mean, I think it does make you jittery on one hand, but also it increases the type of duty that you have to your LPs, your investors, when you look at investing in a company. I think some of these issues are sort of foreseeable upfront and in other places less so, that you need to sort of monitor for as you continue to sort of build your relationship with your portfolio company. One type of issue that we sort of are very cognizant of these days is in particular, the type of attention we pay to due diligence. Due diligence in all forms, really. Earlier, it used to be that you do like a very basic financial due diligence. You do, like, maybe a red flag legal due diligence, but more and more due diligence is taken from in ways that go beyond this sort of traditional sort of oversight. You do things like forensic due diligences. You do background checks, you do reference checks with founders across the board. Typically, when there's an issue before, there may be an issue after and that's something that you look out for and those are sort of manifested and then sort of presented in the investment documentation that you sign up to. The representation and warranties that you get

from them, the indemnity, that sort of backs all of it. And, of course, how they react to Dispute Resolution clauses. Because from our point of view when we come in, we want the Dispute Resolution clause to be as strong as possible, as enforceable as possible, as easy to sort of bring into effect as possible. But if there's a lot of resistance to it, that typically is a sign of a potential issue down the road and whether you need to be more careful.

I think the second type of issue that we start tracking and we keep an eye out for is how portfolio companies follow through on their obligations that they sign up to in Shareholder's Agreement. So, for example we ask for a litany of information rights. These information rights typically are harbingers of how a portfolio company or a founder is going to behave down the line. Is financial reporting on time? Is financial reporting accurate? Are there issues with financial reporting that start coming up? And typically, if we see those kind of issues sort of start to pop up, then you sort of have to be ready for what comes next. So, yeah, I think some of these issues you can see coming, and in some other instances you really can't, and in those situations is when we call up Arun sir and pray to God.

MANASA SUNDARRAMAN: So you say, you have these litany of rights, which you are making ironclad rock solid. But what is the tendency? Do you see PE investors more particularly, because we are in Bangalore, I think that's a relevant conversation to be had. Do you see them being more aggressive, more eager to enforce their rights? Is there a tendency one way or the other?

PRASAD SUBRAMANYAM: I don't think any investor is eager to get into a dispute. We're very dispute averse as a community and as a counterparty, mostly because in the environment that is prevalent today cash is very easily available if you're raising funds as a sort of high growth, doing well, sort of startup. So you want to come across as founder-friendly as possible. So, our bias is against getting into a conflict. But we also owe our fiduciary duties to our investors. We owe our fiduciary duty to the community at large. So I would say, very much reluctant do gooders, I would say, the positioning that we'd like to be present in.

MANASA SUNDARRAMAN: But is there a tipping point?

PRASAD SUBRAMANYAM: There is a tipping point. I think there is a tipping point.

MANASA SUNDARRAMAN: What is the tipping point?

PRASAD SUBRAMANYAM: I think when value created and malicious intent sort of start to manifest themselves very openly and when we start getting asked questions on whether we are managing money for our investors in the right way, I think that's the real tipping point. Part of it is again, like I said, an increased focus on corporate governance and wanting to do things the right way. And that's always been a focus for the investor community. But now taking action is something that's also seen as a core part of that fiduciary duty we fulfil. So, I think that tipping point starts happening when you start seeing sort of your money gets squandered where there's no transparency, where there's no engagement and I think that started happening over the last, I want to say, a couple of years when a lot of sort of money flowed in and not a lot of money flowed out. I think that's really the tipping point, I'd say.

MANASA SUNDARRAMAN: So, that's interesting because it also ties in with our discussion of how to resolve these disputes. So, Shameer, he did say that the tipping point is when money is squandered away and there are corporate governance lapses. How does this tie in with, say, India's position on the arbitrability of shareholder disputes? Do you think it's a tenable position today, to say that these disputes may have to go to NCLT rather than be arbitrated? What kind of disputes? And do you think this position is tenable actually?

MOHAMMED SHAMEER: I think when you look at the question of what kind of Shareholder Disputes are arbitrable, there's a legal geeky side to it and then there is a practical side. On the geeky side, I think you'll have to just look at a fundamental level to understand whether a shareholder dispute is arbitrable, look at three judgments of the Supreme Court. One is, of course, ***Booz and Allen***, which all of us as disputes practitioners know at the back of our hands. Second is the decision of the Supreme Court in ***Ayyasami***, which, of course, dealt with the issue of arbitrability of fraud, but also touched upon certain issues other issues of arbitrability that become relevant. And third is, of course, ***Vidya Drolia*** which delineates the powers of the Section 8 court and a Section 11 court. Now, put these three things together. What you get is, of course, the first argument that a Shareholder's Dispute concerning a right in rem... right *in personam* is arbitrable, and a right *in rem* is not arbitrable. And the second thing you, of course arrive at is any dispute that is to be tried mandatorily by a) statutory appointed Tribunal will necessarily have to go out of the fold of arbitration and b) tried exclusively before such Tribunal. Now, I think in ***Ayyasami***, what the Supreme Court says is the test is to determine whether that dispute would, in the absence of an arbitration clause, be it try-able before a civil court. And if the answer is no, as a natural implication, such a dispute is also not arbitrable. Now, this is the geeky side of it, of course. Now, on the practical side, what does this mean? It basically means that most of the nature of disputes that Arun sir was talking about, which is essentially disputes relating to oppression and mismanagement under

Section 241 and 242 of the Companies Act automatically go out of the fold of arbitrations because those necessarily have to be tried before the NCLT.

Second is, of course, issues relating to winding up of a company, reduction of share capital. Within the context of Shareholder Disputes, if anybody is creative enough to mount an argument that serious allegations of fraud are involved, and the protective guidelines laid down in ***Ayyasami*** essentially kick in and take such a shareholder dispute out of the fold of arbitration. Especially, I think, one of the most typical scenarios where we see Shareholder Disputes not becoming arbitrable is in a mergers and acquisition transaction where creditors may have a claim against the company in the context of a particular transaction. I mean on the practical side of it you see, these are the kind of disputes that tend to be non-arbitrable. Now, if I have to sum up, I think where we arrive at eventually is a situation, which is pure and simple. A breach of a Shareholder Agreement and nothing more is what would be arbitrable in the Indian context. Anything that would remotely even touch upon a public law element or any dispute that specifically falls within the domain of the NCLT easily falls out of the purview of arbitration. So I think we are in that sense far more restrictive in our application of arbitration as a concept to shareholder disposals.

MANASA SUNDARRAMAN: So that leaves the NCLT as perhaps the default forum. Would you say that?

MOHAMMED SHAMEER: For a majority of the disputes, I would think so, because if you really think about it in a shareholder's context from a minority shareholders point of view, where you may not want to put yourself through the rigor of an arbitration, the costs of an arbitration to sort of style your petition as one for oppression and mismanagement and file it before the NCLT becomes more practical and also a cost effective solution. So also, if you talk about a reduction of a share capital situation, which again, approvals of the NCLT are required under Section 160 if I'm not mistaken. So also if you talk about situations where an action off the board as being *ultra vires*, the Articles of Association is being challenged. I think there are some convincing arguments to be made that this is not a shareholder dispute and necessarily has to be tried before the NCLT. So, I think I agree with you that the Indian context is geared more towards NCLT being the preferred forum as against arbitration being the preferred forum for shareholder disputes.

MANASA SUNDARRAMAN: Arun. Sir, this is perhaps a consequence of how the law is structured. But do you think commercially or in your experience, do clients find NCLT

sophisticated enough to understand the intricacies of these disputes, or is it just another we will get an interim relief and then see?

ARUN KUMAR: Yes, I agree with what Shameer is saying and your preface to the question. The NCLT does play a very significant role. When we're talking about Shareholder Disputes, you're talking about disputes that arrive *qua* contract, contract between two parties. So that's a place where two people by and large, on par, have agreed to certain terms, and they wish to agitate an issue arising from that agreement that is something that is capable of being arbitrated. But when you talk about rights like minority rights or here is a person who says there is a contract, but that particular clause is oppressive to me, you may still have a remedy in the NCLT. So therefore, the NCLT is definitely a forum where minority rights Shareholder Disputes, the realm of... see in a bipartite contract where an arbitration is set in motion, the arbitrator is bound by the terms of the contract. He can't go beyond the realm of what has been agreed. Now, the NCLT is not, it does not have these limitations. NCLT can pass orders which it feels is the best in the to do justice to parties, which is most equitable and fair. So, from all these perspectives, I think NCLT definitely is the fundamental forum for shareholder disputes. And is it equipped to handle this? Unfortunately, no. See, we started with, I think, way back in '91, we start, the company onboards a certain issue. We took them out of the realm of High Courts and Civil Courts, et cetera where, inter se, ownership rights, et cetera were being agitated or it's the Company Law right that was being agitated in the High Court. We formed the Company Law Boards at that point of time. The problem with the Company Law Boards were a little far, and there were very few and far in between. So if you had a dispute in Bangalore you had no option but to go to Madras. You would have one bench hearing in this matter and all of these things. So come 2016, we now have the NCLTs virtually at least in every state capital. So more number of NCLTs. But has it really translated into effective adjudication of shareholders disputes? Probably not.

MANASA SUNDARRAMAN: Do you see them as IBC forums?

ARUN KUMAR: Yes, the addition of the IBC jurisdiction on the NCLT has probably given the NCLT a soft way out of doing those matters more than going into contentious shareholders disputes, probably because of the inherent limitation in the kind of appointments that are made to the NCLT. If you don't bring on board people who have the expertise to handle these matters who don't understand the difference, the issue of what is the right of first refusal and in what context it is being done, what is the paradigm of that business, it's very difficult to come to those conclusions. So we've had occasions where lawyers who were representing clients before the Railway Claims Tribunal are thoughts fit to hold positions in the NCLT. That

quite begs the question, because there is a problem if you don't appoint people who are competent enough to deal with these situations to a forum like the NCLT, then shareholder disputes suffer. So, yes, I think more than the framework and structure it is the systemic problem of how we appoint them and what are the qualifications that are on the basis of which appointments are tested, their suitability and adaptability, their ability to handle some of these issues have to be looked at. If they are overlooked then the NCLT suffers, adjudication of shareholder disputes suffer. And I suppose the larger picture of who are looking at investments into Bangalore, into any part of the country and the ability to take recourse to resolve and...

MANASA SUNDARRAMAN: Doing business.

ARUN KUMAR: Everything.

MANASA SUNDARRAMAN: So Prasad, on that, here you have like we mentioned, a powerful forum but maybe glitchy. And then there's arbitration, which will understand, say, commercial sensitivities of your dispute, which will understand the swiftness that is needed. Does it matter to you? And what are the factors that you keep in mind when you approach a dispute situation where you say, okay, I will approach the NCLT for this, or will I think it's better to stick to arbitration? What are the factors playing in your head?

PRASAD SUBRAMANYAM: I think ultimately it comes down to what perspective we approach it from. In most instances it's more likely to be the case that we as investors are going to be the aggrieved party. And in those instances we ideally want swift, effective and sort of, I guess, practical outcomes to be delivered to us as soon as possible. And in that context, honestly, the NCLT is not the preferred forum of choice. You don't know when you're going to get your outcomes. You don't know whether those outcomes will be the type that you'd want because the adjudicator is not a person who understands the intricacies of complex shareholder mechanisms, complex shareholder agreements that have been negotiated multiple times and complex fact patterns. So, I think if I had to draw an equivalent to it, I think today for example, Delaware Law and Delaware Courts are renowned for their ability and their ability to sort of manage shareholder disputes, to be able to understand the intricacies of corporate law and to be able to provide outcomes that are effective, and that makes your choice of forum, your choice of setting up in a particular jurisdiction. All of that sort of pulls you to Delaware Law and Delaware Courts if you're doing it in the US, and we do have investments in the US, so we do look at it that way. But when you set up in India, you'll have questions asked on hey, we're renegotiating these rights. Some of them are sort of grey rights. Will we be able to enforce them? And that answer is not so clear today. Yeah, I would say anything that

really gives you the outcome that you want, and in this particular case, if the outcome that you want is you want your remedy to be provided to you at the earliest, then you'd want to go through arbitration. But that's not really up to us anymore and that's a real point of contention.

MANASA SUNDARRAMAN: And if you ask any practitioner, I think what we would tell you is that NCLT is really just the first stop. Then you go to NCLAT and then the Supreme Court and it's a gamble at all level.

PRASAD SUBRAMANYAM: Yeah.

MANASA SUNDARRAMAN: So in that sense, maybe the preference for arbitration is perfectly justified. But then we still see, Sir Arun sir, that there are instances where people try and evade the arbitration agreement, and there's this concept of dressing up petitions. So what are the ways or what is the reason why someone would dress up a petition? And second, how do you dress up a petition? What are the bells and whistles that you can add to make it outside the arbitration agreement?

ARUN KUMAR: See, Prasad, very carefully said, it's a matter of perspective and didn't give you that perspective. There are instances when the investor wants to drag out a litigation. So it is really dependent on the objectives that a person intends to achieve at that point of time. So, I think it is fair to say that a person who wants to drag out an issue is more suited in our present system. Okay?

MANASA SUNDARRAMAN: Okay.

ARUN KUMAR: You will come down to adjudication at some stage and all that, but the scales are very heavily in favour of a person who wants to drag it out. So it is in that context that if you want a quicker, faster relief, et cetera, that you have a difficulty. Now one of the reasons why you would prefer going to an NCLT in a dispute, is I think the most lucrative of it is to get some kind of an interim relief to prevent one person or the other from taking some effective, important step that one person intends to do. Irrespective of whether it is right or wrong, whether it's good or bad. So it is that interim relief that people look at. So, very often petitions are dressed up so that you can get these interim reliefs from NCLT. I don't think these petitions are dressed up for an ultimate final relief because you will stand exposed in that long run. So it is dressed up for the short run. So when you talk about dressing up petitions, you're essentially saying you need to bring them within the ambit of oppression and mismanagement.

MANASA SUNDARRAMAN: Yes.

ARUN KUMAR: So the petition needs to necessarily point out as to this is, although it may be a straightforward dispute on contract between two parties, one would say no, this involves larger interest. There's no question of a minority. There's a public law element to it. So these are the factors that you're going to build into that petition to try and, try and get some interim relief. So that's what we call a dressed up petition where the essence of the petition is really a shareholder dispute which has an arbitration clause or which has another mechanism...

MANASA SUNDARRAMAN: So, parties may drag this also? Other parties not, has not...

PRASAD SUBRAMANYAM: Yes. See, most of these cases, what happens is I don't think it's in the interest of the person even who initiates that petition to get more people into the dispute. The issue really is to seek that particular forum, to somehow regulate to the jurisdiction of that authority and then say, now, you need to interfere in this way or the other. By its very nature, the jurisdiction under the Company's Act oppression, mismanagement, et cetera, there is an element of public interest. So, people who are not parties to the contract are necessarily ones who will also be interested, who will be affected by orders that are passed there and so on. But I think that plays a little smaller role in my opinion on the question of why you dress up a petition? It's more to do with if there is actually public interest, if there's actually larger shareholder interest, it's then less of a dressed-up petition. It's probably there is more merit in the petition than what we would call dressed-up petition. Well, point us to how to dress-up a petition, I think the ingenuity in this room will provide you with NFL more...

MANASA SUNDARRAMAN: What does the other side do? Let's not admit to dressing-up petition.

PRASAD SUBRAMANYAM: Yes.

MANASA SUNDARRAMAN: But this situation is a very uniquely Indian perspective today. We also had Shivani Sanghi on the panel. Unfortunately, she couldn't make it. But one thing that she had observed in my conversation with her is that it is not the same in Singapore or it's not the same in England where claims of unfair prejudice are not per se non-arbitrable in England or Singapore. I just want to understand from you, Shameer, do you ever see India getting to that point or is this something that we'd have to live with for the next, say, decade two decades? Do you see an investor like Prasad when he's says, okay, maybe there's going to

be a dispute in ten years, do you see the arbitration regime expanding to accommodate more types of dispute?

MOHAMMED SHAMEER: I think the fundamental challenge when you compare, I'm not saying one jurisdiction is better than the other. I'm just commenting on the approach, which is if you see approaches in foreign jurisdictions the tendency is to stick to the principle that you should always favour the interpretation that furthers the cause of arbitration rather than defeat it. So anytime you're faced with any interpretative exercise, you have to stick to an approach that furthers the cause of arbitration. But I think if we see a couple of judgments that have come out in the Indian context, particularly on shareholder's disputes, I think the tendency in India has been the other way round which is to favour an interpretation that would otherwise defeat the cause of arbitration. So, I think that's really where the heart of the problem is which is the difference in the approach, which is moment a litigant goes to court and styles his petition, his/her petition as one for oppression and mismanagement, the tendency is to say that this is a dispute that would squarely be covered by the Companies Act and would automatically go out of the fold of arbitration.

So, I mean, in terms of do we see that a greater fold of kind of disputes under Shareholders Agreements going to Arbitral Tribunals rather than NCLT, I think there is a lot of ground for us to cover before that happens, for sure. I think the first step will be maybe to consider some amendments to the Companies Act. Case in point can be possibly what the SEBI has done with investor related disputes within its own domain, where it has set up a specialized mechanism for online dispute resolutions within the SEBI framework. And maybe a lesser tendency, maybe, to apply Section 430 of the Companies Act to sort of push it to a pedestal to say even something that is remotely within the purview of the Companies Act will not, in any scenario, be within the purview of an arbitration. So I think the first step will, of course, be to consider some sort of...

MANASA SUNDARRAMAN: Okay, we can say at least respecting if this is arbitrable in another jurisdiction, right? Would you say that is something that...

MOHAMMED SHAMEER: See, again, I think to respect whether something is arbitrable in another jurisdiction, you have to first start adopting pro-arbitration approaches to each of these disputes. Only when the approach and the mindset changes into a pro-arbitration approach maybe we'll see a greater fold of disputes coming into arbitration. Otherwise, I think we will have those small category of pure and simple of what Arun Sir was also saying, pure and simple breach of shareholder agreement and maybe enforcement of rights strictly under

the shareholders agreement and nothing more. Those are the kind of disputes you will land up seeing in arbitrations, and I think majority of the disputes will continue before the NCLT.

MANASA SUNDARRAMAN: And Arun Sir has...

ARUN KUMAR: Maybe I have a slightly conservative view there. As I mentioned earlier, that the shareholders' dispute is really constrained within the realm of that contract. If you want a relief which is wider, an arbitrator is incapable of giving that to you. So when you seek relief, which has larger ramifications, you want to rearrange the method of shareholding or you seek some other reliefs which are outside the purview of the shareholders' agreement, then a forum like NCLT is the only forum that can give it to you because (a) it is not constrained by the parties to the agreement (b) the arbitrator or the adjudicator goes outside and beyond the scope of contract between two parties to look at the larger interest vis-a-vis company. So, from all these perspectives, do I see all those going into a shareholders dispute today? No, I don't. But what is the remedy for it? I don't think the remedy is to say that all these disputes also should land up in because, for example, a minority shareholder, if you are a minority shareholder in a company your rights, there may be several contracts that have been entered into. There will be the articles and there will be various clauses. But even within that realm, it can be oppressive of you. And now, if you seek a relief, or, let's say, quite the contrary, you deliberately make out a contract which is in such a way that it will tend to be oppressive to the minority, then the minority will have no say, we'll have no recourse, because that's the realm of the contract. But the NCLT provides, or the Company Law jurisdiction provides a larger remedy. Now, should that go into arbitrations? In my opinion, no, I don't think that should go into arbitration. But should it remain in the present state in which it is? I don't think so too. But we need a more robust forum for adjudication of these things, something where they're capable of trying different competing issues and deciding cases quickly. I suppose that's important.

MANASA SUNDARRAMAN: I think the current state of affairs is more get an interim relief and go for a negotiated settlement. We rarely see shareholder disputes being adjudicated, I would say, till the very end. So perhaps like you said. Sorry?

MOHAMMED SHAMEER: I think that's what Arun sir was also saying, that it's the perspective with which you are going to the NCLT. Anybody who dresses up a petition for filing something before the NCLT is perhaps not in it for the long run. The question is about getting interim relief. And I think from Prasad's point of view, practically what we also see is from an investor's point of view I've invested money. There is a default, and I need to get my money

out as soon as possible. So I think from that point of view, arbitration, of course, given its efficiencies and the particular kind of attention that the dispute will get arbitration from an investor, I'm not making a general state statement and of course, Prasad is more qualified to make that statement. But from an investor's point of view, I think arbitrations are more preferable given the speed, the efficiency, et cetera. From a shareholder point of view, who's committed the default and needs to pay up the tendencies to dress up the petition and file it before the NCLT so that that person can just buy some more time. Can buy time and sort of figure out a way around that default.

MANASA SUNDARRAMAN: Just contest the arbitration on jurisdiction grounds.

ARUN KUMAR: Sometimes the choice of jurisdiction also is oppressive. So, you also have litigation which are trying to thwart this exercise of jurisdiction in a far off distant place where one of the parties is not able to compete. Anyway but you...

MANASA SUNDARRAMAN: Could you give us the elaborate on that, maybe as an example?

ARUN KUMAR: Yeah for example, if you say that the contract between the parties will be subject to arbitration, let's say in Delaware, then it necessarily means that it necessarily requires one of the parties to be able to sustain a litigation in Delaware. Now if the person A is incapable of traveling, finding suitable lawyers, meeting cost of litigation, being able to fight a litigation in a distant place, definitely oppressive. So then you are looking at dressed up petitions. But having said that, I mean today we are speaking today at this India ADR Week. Alternate Dispute Resolution, the expression Alternate Dispute Resolution while there's so many good things about it, I think the most terrible thing about it is the fact that you drive people to litigation, people who have gone into litigation, they're in litigation for the last four years, five years, maybe ten years. And then you tell them that listen, now you've, seen how long this has taken. You better settle. It is not worth your while to agitate your rights. You ought to be resolving it. So you are now pushing him against an argument that your case is going to take so much more longer to be adjudicated that you must take something lesser. While we ought to have attempted to prevent them to come to court, but once they come to court, they must get what they should get. It's a very sad state when you say that sorry, my system is unable to give you that relief. So take something.

MANASA SUNDARRAMAN: So, systemic flaws are actually driving substantive rights?

ARUN KUMAR: Yes.

MANASA SUNDARRAMAN: Now, actually, one of the things which we've all arrived at is that it is a system now on interim reliefs? What are the interim relief that we typically see? Maybe we can just take a representative, a shareholder like from where Prasad is from, being PE investor. What are the kind of interim reliefs that you seek in any dispute? I know it differs, but what are the typical and most often what are the...?

PRASAD SUBRAMANYAM: I mean, in most instances, you're just trying to prevent more damage from occurring. So you're trying to make sure that either if, let's say, money is being siphoned off, stop the money from being siphoned off. In some instances where actions are being taken that would further sort of prejudice your rights in the company, you want to stop those from occurring either by causing Board Rights to be preserved, Board Rights to be honoured, fiduciary duties to be fulfilled in a particular way. I would say in most instances always the rule of thumb is position is nine-tenths of the law. So try to get possession over whatever you need to have and move from there. Really, I don't think there is any rocket science to it beyond a point.

MANASA SUNDARRAMAN: Shameer, what have you to say?

MOHAMMED SHAMEER: I think I'll just maybe mirror what Prasad is saying and put it in this way which is, I think, the prime consideration from an investor's point of view is preservation of value, preservation of assets that tomorrow, let us say in an arbitration scenario you do get an enforceable award against a target company, have sufficient assets in hand which can subsequently be utilized for the purpose of executing that award and I think in a larger scheme of things it's some attempt to sort of maintain some sort of a status quo, and I think this holds true of both the investor and the target company, which is from the investor's point of view status quo as far as the value of the investment goes. And from a shareholder's point of view status quo maybe as regard certain actions that are being initiated by the investor to recover money, to reconstitute Boards, to modify the value of the shareholding. I mean, these are the kind of some typical examples, but. I think more or less it revolves around trying to maintain some sort of status quo.

ARUN KUMAR: And again, they're not giving you the other perspective. So, there is a perspective of one person who is wanting who's supposed to give a move from either his directorship or a decision is to be taken. You want to prevent that from happening. I agree with Shameer that the object is status quo, but at the same time you're essentially trying to prevent

somebody from taking some positive step, or in some cases appoint a third person observer or supplant the board. Doesn't happen often but...

MANASA SUNDARRAMAN: Extreme cases.

ARUN KUMAR: Yes.

MANASA SUNDARRAMAN: But, I mean, in arbitration, what we normally see is just in terms of, say, final reliefs, right? What you were talking about is having sufficient assets for money. Now, that might be true, say, from an investor point of view from someone who's saying only the PE kind of thing. But just looking at the broader spectrum of shareholder disputes, what are the kind of, say, final, innovative final reliefs or what... Is there something beyond the traditional buyout? Is there something that we'll have to account for which an Arbitral Tribunal could be equipped and is that why we're saying arbitration is perhaps not the forum. These kind of reliefs don't fall in an arbitration setting. What are the type of final reliefs that you could think of?

MOHAMMED SHAMEER: See, I think it just comes down to again what Arun Sir was saying which is an arbitral tribunal within the four corners of the contract, has its own limitations around the kind of reliefs that can be granted. So any relief that you see in a typical breach and enforcement of a contract situation is the kind of final reliefs that we see in the context of shareholder disputes as well, which is your typical restitution, specific performance injunctions. I mean these are generally the kind of reliefs that you would obviously see before an arbitral tribunal. Of course, again, borrowing from what Arun, sir, was saying, the similar kind of reliefs that you would see before an NCLT maybe would be vastly different because the scope and ambit of the powers is much larger. The kind of inquiries that the NCLT can get into is quite different from the kind of inquiries that an arbitral tribunal had to restrict itself. But I think before an arbitral tribunal, of course, the kind of final reliefs we would see is the kind of final reliefs that you would see in any other arbitration concerning breach and enforcement of a contract. It wouldn't be any different.

PRASAD SUBRAMANYAM: I just have a counter to offer to Arun, sir. Mostly from the point of view that, at least in India, in the type of forums that we have and the expertise that the adjudicators bring to the table, especially in a non-arbitral scenario, is that the type of sophistication and awareness of Corporate Law, and in particular the commercial realities that you're trying to bring as results, it's easier to argue for status quo than to really ask them to pass an order that's proactive in nature and to say that look doing XYZ will increase value or

preserve value or be for the benefit of all parties involved. That sophistication is lacking is my sense on whether that's our courts or whether that's the NCLT. I think that's the difference, right? I would say when we look at Delaware as a jurisdiction, we often hear about the fact that the court got into the commercial realities of why a particular decision was taken. They appointed their own experts to understand what the outcomes would reflect, whether a particular issuance is fair. Is it happening at fair market value. Like this often becomes a very adjudicated sort of provisioning, what is fair market value. And a judge in India today will 100% not understand what a discounted free cash flow method for valuation is. And in that situation, being able to justify that, say, an issuance should happen at, say, X price is almost next to impossible. So, what you can say is don't do anything. It's easier to say don't do anything than to say, do this and this is the right thing to do, and be able to get the results that you want out of those situations.

I think that's where I feel like if we are able to bridge that gap on some level. I think today, for example, on IP laws, from what I've heard from the fraternity that if you go to Delhi High Court, the chances of you being able to get a nuanced technical outcome is much higher than it was before. If that kind of a development can happen and that exists in arbitration, right? You can bring subject matter experts. Your Tribunal will consist of people who will understand. But that is missing, and I think that makes it very difficult to actually proactively argue for relief that is outside just saying, just don't do anything.

ARUN KUMAR: I kind of agree with you on many fronts there, Prasad. But that last illustration that you gave of the Delhi High Court and its IP reputation I think is a classic instance because it is not necessary that every judge should know all the nuances of your business. If they did, they'll probably be doing what you're doing. So, that's not really required. Because in every case the judge and the lawyer, and everybody learns new things and there are new perspectives that are placed before the court. But the issue is about a proactive court system where a) it essentially now, why the difference between Delhi and let us say any other court. Why is it that people go to Delhi? The same system, the same set of laws, you have a different set of people and a different mindset that is driving it. Now, this is what is missing in the Company Law Board too. So that's the perspective that I was saying that probably it's the manner in which we have equipped the Company Law Board that is the problem, less about any other bigger systemic issues. With regard to people finding shortcuts because of their, what do you call, what do you say without for their shortcomings, probably true. But that's also a systemic issue which needs to be addressed quickly.

MANASA SUNDARRAMAN: Since we're talking about systemic issues and the same set of people working magic in one place and not able to, what is the perception in terms of say different seats? We are in India ADR Week. So Shameer and Prasad, this is a question for you both because Shameer I know when, now we see as, even as a disputes team in a law firm there is a certain degree of advisory that we do at the time of investment in terms of where to how to structure your Dispute Resolution clause. So I know increasingly we favour institutional arbitration. That's almost a no-brainer now. But in terms of seat, I think there's still some back and forth. Can you throw light on what is this back and forth and what is say, your preference of what you've seen the counterparties sort of prefer?

ARUN KUMAR: If I can add a question to them.

MANASA SUNDARRAMAN: Yes.

ARUN KUMAR: Now that we spoke about the issues with regard to the courts and way it's equipped, I think the same contract question would be asked about our arbitrations in India. Are they better equipped? Are they driven better? Are they being manned by more people who show more competence and drive towards getting things done? Is that a difference is an added question that I will add to what Manasa said?

PRASAD SUBRAMANYAM: I mean the perception is certainly better now. I think in general the system for arbitration and I guess the ecosystem for arbitration actually is much better than it was before. But your ability to get the final outcome on it is still very challenged. I think that sort of dictates., ultimately, system could be all that it is. But if your outcome isn't, where you want it to be, that becomes a point of... that becomes a sore point, I would say. To answer Manasa's question, I think really in an ideal world the trend is today to keep it to Singapore and try to go through SIAC for the most part, simply because there's a pathway and there are some precedents that we can follow and I would say there's a knack in the system to be able to go through Singapore. Of course, that gets challenged all the time. Company counsels, our counterparties on the other side are equally adept because Arun Sir has said twice now that I've not given the other perspective, are equally sort of astute in their foresight on what they want out of a dispute resolution clause. They'll try to shift it to India in most instances, and we have been, I would say, for the most part if ideally, would we want it to be Singapore and we would want to go all the way through SIAC, then yes. But more and more, we're getting comfortable with doing it in India and doing it through institutional arbitration in India, through MCIA, through some of the other institutions that are out there. So we've grown much more comfortable with it. And I would say today if a counterparty were to ask for

it, it would be a serious consideration, except in maybe very-very limited instances. Like if it's a very global business, we think that the reach could be, dispute could occur anywhere around the world, then maybe it would be a different point of view. But it's an India business, India company, your enforcement action will ultimately bring you back to India. So you have to be practical about how you look at it.

MANASA SUNDARRAMAN: And Shameer, what do you say?

MOHAMMED SHAMEER: Yeah, I think it's what Prasad saying, the tendency, of course, appears to be Singapore. I think also from the perspective of, if you talk about it a couple of years ago in the context of a shareholder dispute, there are not so many alternatives available to Singapore and SIAC as the seat of arbitration. It is only in the recent past that we are seeing institutions in India stepping into the fore as far as arbitrations are concerned. I think there is also a practical reality to why Singapore continues to be the preferred jurisdiction for arbitration of these kind of disputes which is Singapore tends to apply the same kind of yardsticks when it comes to the question of arbitrability both at the pre-award stage and at the post-award stage. And I think, surprisingly in the Indian context there is a bit of a difference which is, of course, with ***Vidya Drolia*** in India, the question of arbitrability has considerably narrowed down, but that's not so very true still under Section 34 stage, when you're looking at a challenge to an arbitral award. So in India, you'll end up dabbling with two different yardsticks to the question of arbitrability at the pre-award and the post-awards stage, whereas it's a little more stable in Singapore in the sense that the yardsticks continue to be the same. That the tests that Singaporean Courts apply at a pre-arbitration stage to determine the question of arbitrability are the very same tests that they apply at a Section 34 stage as well. So I think both from a practical point of view, which is that Singapore and SIAC tried and tested. We've seen it in the past. It's worked. Therefore, let's stick to something that's tried and tested, rather than experimenting with something new, especially given the nature of investments that organizations like Prasad's look at when they look at arbitration of shareholder disputes. And second, I think from a legal standpoint, which is the landscape is a little more stable. So in that sense I think Singapore continues to be the preferred destination. Now just to also answer Arun sir's question, which is, are we seeing a difference here In India. In terms of the quality of arbitrations, I think I would definitely say yes. But the problem again remains what happens to the award once that arbitral tribunal renders the decision which is we still have to go through that complex web of uncertainties of the Indian judicial process till that award is successfully executed. And I think lastly going by what Prasad was saying, of course, there is also a need to be pragmatic about it because you might get an award from the SIAC in Singapore, but you will have to ultimately bring that award to enforce it in India where

you again get caught in the same complexities anyway. So, I think there is definitely some merit in being practical as well.

MANASA SUNDARRAMAN: Yeah, and a dogged preference for Singapore will result in an Anupam Mittal kind of scenario, where there is finally you're just stuck in a limbo between the two jurisdictions. So, I do understand being pragmatic about it. I think we are running short of time. So one final question. Okay, so if India, then what are the kind of arbitration must haves that you look for in the rules or in the procedure and...

PRASAD SUBRAMANYAM: I think ultimately it's just, at least for investors, it's certain. I think, to be able to deliver the outcome that you want cost is, I would say, for at least speaking for PVC investors, is not always top of mind because if we've gotten to a stage where we're litigating then, more often than not, the value involved is substantial. So, the cost is...

MANASA SUNDARRAMAN: Just a side note, before this panel I think Prasad was saying, I'm going to talk about disputes, but I hope I never have to get there. So, it is all, in the large part, I mean, in a hypothetical kind of situation.

PRASAD SUBRAMANYAM: Yeah, that's what we're seeing today, right? I mean, some of these disputes that are out there, and thankfully, my organization is not one of them, is they sort of do talk about companies that were valued in billions of dollars. You don't see it when a company is valued in like tens of crores. Because the cost benefit analysis just doesn't pan out. You're much better off, probably writing off the investment or pursuing a different course of action. So I'd say first and foremost, so cost is almost never a point of discussion. More than likely it is just efficacy of relief really? So if that's clear, if that sort of, that system is present, and then you're able to execute on whatever outcomes you get from the arbitration process. And that's what we are really looking for. I don't think there's a lot more to it.

MANASA SUNDARRAMAN: Thank you. Any closing thoughts, Arun Sir?

ARUN KUMAR: From what you've heard both of them say, I think my own surmise is that Singapore is a preferred destination (a) because it's not because of the institution or the rules that it provides you with. It's not about the procedural aspects of the arbitration. I think it's about the professionalism that arbitrators bring to the table in adjudicating a dispute. And having done that, speed at which you can come back and you have certainty in outcomes, and you will be able to enforce it. So, if people prefer to go to arbitration at SIAC or in any other forum, the reason they're doing it is because (a) they circumvent your entire 34 process. You

don't want a five year, six year delay in considering whether the arbitration award is right, wrong, et cetera. So, that seems to be a huge takeaway from what the two of them have said. So therefore, they would directly come in at the enforcement stage, bring a foreign award and try and have it, enforced directly. Yes, it's not free of problems, as you pointed out, but that seems to be the preference. So, it is not that....

MANASA SUNDARRAMAN: But they're still okay with the Section 9 kind of forum being here. I mean, because they don't have the emergency arbitration that's directly enforceable. But they're still okay with that?

ARUN KUMAR: Correct. Because Section 9 proceedings typically don't take too much time. And today, with commercial courts where you have far better judges, and they're able to decide cases much more quickly at least in the Bangalore experience, I think you have a significant advantage as far as Section 9 petitions are concerned.

MANASA SUNDARRAMAN: So I think that's instructive when we talk about the quality of adjudication at NCLT versus the quality of adjudication in CA Section 9.

ARUN KUMAR: I think sometime back one of them mentioned that I think everything is okay with arbitration in India. I am not so sure I agree with that. I think there needs to be a greater level of professionalism that arbitrators in particular have to bring to the table. Many arbitrations are conducted like retirement exercises leisurely and with many of them come into arbitrations. Many arbitrators come into arbitrations without having read their papers. I can't understand how that will qualify as any level of professionalism. So in the choice of arbitrators, in the professionalism that needs to be inculcated into arbitration, all of this is crucial. But, you know there is, in our court system and in our society at large there is a method of propagating the existing system. If you go to the High Court to appoint an arbitrator, they will prefer a retired arbitrator, a retired judge of the court or retired District Judge, and who will bring in the same ethos that he's been used to. So, a judge who has 300 cases in front of him in the city civil court, he's not going to read his papers when he's coming to court. He will come to court and then learn about the case and read it. And then when matters are argued, he will read it along with them and so on, so forth. So that's not the professionalism in and up that needs to be brought into an arbitration. So if you continue to run the arbitration, also like you ran the systems in court, you have a problem. So that, I think, is another takeaway apart from, of course, how we deal with 34 and so on and so forth. But I think both systems are robust.

MANASA SUNDARRAMAN: But do you see that changing, sir? Because I see at least at the bar now we have an arbitration bar specifically. Would you see it perhaps change in the next decade, I would say just put a long...

ARUN KUMAR: I think so. I think with more and more younger people that you see in this room becoming arbitrators, et cetera, you will see that change.

MANASA SUNDARRAMAN: There needs to be a change from the arbitrator's side, mostly.

ARUN KUMAR: It has to be changed all over. I think systemically, I think we need to tell ourselves that this is not how this whole process of arbitration is to be done. That we need to bring in some professionalism, dynamism. We need to have things run at a quicker pace. We need to make sure that we get to outcomes quickly. When fees are fixed on the basis of sitting fees, you tend to have more sittings than...

MANASA SUNDARRAMAN: I have seen sittings for filing statement of admission denial. So, the first question is, why do we even have that?

ARUN KUMAR: I completely agree. For drafting of issues or one person has requested an adjournment. We will meet today to decide on whether it should be adjourned or not? I think there needs to be a change in thought process. I don't think it is NCLT versus arbitration. I think both systems need to exist. Maybe at some point of time we will see a convergence of it. But whether the convergence will be in arbitration or will be in a form of a semiformal process, I'm not sure at this point of time. But both of them needs to get driven by a great deal of professionalism and an approach to try and give reliefs to people like Prasad, when they come with that perspective.

MANASA SUNDARRAMAN: People like Prasad has been thrown around a fair bit...

PRASAD SUBRAMANYAM: I feel like I should reemphasize the fact that I hope I never find myself in this situation. I think actually, I'll add that other perspective in terms of how we look at it is, really a lot of emphasis goes in our system on not getting to that stage is monitoring early intervention. And some of this is really alternate dispute resolution in different ways. You reach out to the founder, you have conversations offline. You see the problem coming well, before it actually becomes an issue. So I think really, when we get to the place we ideally want to be able to get the outcome as soon as possible. And really, whatever gets us that outcome is really what's going to drive the decision making.

ARUN KUMAR: If I can just add. I think sometime back, Prasad also mentioned cost factor. I think the fact that nobody wants to go into litigation. Unfortunately, today it's because of the system, but it's actually a good thing that people don't want to go into litigation. At the drop of a hat you're not running into litigation is a very good thing. So there must be a deterrent in to get into litigation also. So I am not one who believes that cost is a huge factor that has resulted in whether people go to court, not go to court. If people are not going to court because of cost factors, it's because it is a resolvable issue. If it is not a resolvable issue, they will end up going to court whether you're a 1 billion company or a 1 crore company. You will still end up and it is not that cost across board here is uniformly high. We have a band of professionals who render services at different price points. So that's not an issue. I don't think the cost is the factor in determining it, but cost should be a deterrent for sure. And it's a welcome deterrent according to me. After all, it should be part of the cost in the proceedings. So the person who loses is the one who should be the most apprehensive about the costs in the proceedings.

MANASA SUNDARRAMAN: So thank you. That's for now. Should we open the floor to questions? Any questions? I know we are heading out for lunch in like sometime. Maybe just a couple of minutes for questions, if any? Okay.

AUDIENCE: Thank you. My question is posed to Arun sir. Do you think judiciary also can play a role in strengthening the system of the arbitration in India? Like, for example, sir, isn't it about time in High Court to constitute a separate roster bench for arbitration, and similarly in civil courts as well as the commercial court just to deal with 34 or 37 or Section 11, for that matter? Throughout the day, sit on these subject matters and decide on cases.

ARUN KUMAR: Yes, I fully agree with you. I mean, it's not just setting up matters for arbitration. For example, we have the commercial bench on the commercial. All appeals from commercial courts come to the commercial appellate division. We don't have one. I mean, we have a roaster saying all commercial matters will come to so and so judge. But what was the intent? Why did you set up a forum or the commercial court picked, cherry picked good judges, sent them there, found out jurisdiction, all these commercial disputes, sent it to them. They're turning out judgments in six months and eight months today. If those courts can work at that pace, then it comes back to the High Court where it is back along with all the other hundreds and thousands of cases pending before the High Court. A) Not only that, you don't have a separate roaster judge or a Commercial Appellate Division for the High Court. We don't have that, at least we don't have that in Bangalore today. Nor do we have they made any attempt to find judges who have the aptitude for these kind of matters and appoint them to that particular

bench. So it's not just having a bench. The bench also needs to be equipped. The bench needs to be driven, as we were saying. Yes, so in that sense I think sometime back I did mention that we have an ethos which we continue to percolate in all these forums, and that's one of them.

MANASA SUNDARRAMAN: Okay, no more questions then it looks like. Thank you all. Thank you Arun Sir, thank you Shameer, thank you Prasad. This was a very instructive session and I had fun. So I hope this was informative and enriching for all of you. Thank you.

ARUN KUMAR: Thank you, Manasa.

~~~END OF SESSION 1~~~