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INDIA ADR WEEKDAY 2: MUMBAI

SESSION 1

Beyond Boundaries: Rethinking Arbitration and Mediation as Complementary Process

08:30 AM To 10:00 AM IST

Moderator – Raj Panchmatia, Partner, Khaitan & Co

Speakers:

Gopal Menghani, General Counsel, Mahindra Holidays and Resorts India Limited

Kushal Gandhi, Partner, CMS Cameron McKenna Nabarro Olswang LLP

Chakrapani Misra, Partner, Khaitan & Co

Jyoti Kapadia Maheshwari, Group General Counsel - Vice President, Hitachi Payment Services Pvt Limited

HOST: Thank you. We'll now be starting with the first session of the day by Khaitan & Co on, 'Beyond Boundaries: Rethinking arbitration and mediation as a complementary process'. I would like to invite on, stage, the panellists for the session, Mr. Raj Panchmatia from Khaitan & Co. Mr. Gopal Menghani, General Counsel at Mahindra Holidays and Resorts India Limited. Mr. Kushal Gandhi, Partner at CMS. Mr. Chakrapani Misra, partner at Khaitan & Co. And Ms. Jyoti Kapadia Maheshwari, Group General Counsel and Vice President at Hitachi Payment Services Limited. Thank you.

RAJ PANCHMATIA: Good morning, everyone and thank you for being here in the morning for the first session. What a great opening we had from Justice Pitale today. I think he's already set the stage rolling and we are grateful to him that he also mentioned our topic, which was the first topic on mediation and arbitration and I think that gave us a lot more to think about and a lot more to talk about. So, some of the questions are going to be out of syllabus today. But before I start on a topic which is, 'Beyond Boundaries: Rethinking arbitration in mediation is a complementary process'. I would fail in my duty if I were not to introduce my panellists before us today. So on my left I have Gopal Meghani, Chief Legal Officer at Mahindra Holidays and Resorts India Limited. He joined Mahindra Holidays in August 2022. He's in accomplished legal professional with over 35 years of experience in legal domain. His extensive career spans diverse sectors include petroleum, petrochemicals, telecom, real estate and amongst others. Gopal has notable roles as esteemed... has held notable roles in esteemed organization. He was listed as a top rated General Counsel in India in the GC Power list published in 2018. Notably, he contributed significantly to Reliance and Lodha Group of companies. He joined Mahindra Holidays Resorts India Limited recently, two years ago and his last served as a President Legal at Lodha Group of companies. We also have with us, Jyoti Maheshwari on my far left. She's a Group General Counsel and Senior Vice President at Hitachi Payment Services Limited. She has over two decades of experience in M&A project finance and general corporate, recently has been instrumentally in acquisition of cash business of writers business services by Hitachi payment services. Aside from having the above experience, Jyoti has an extensive experience in the fintech market, including digital payment market. Her current role in compasses, risk and compliance in the payment space.

I also have with me Kushal Gandhi. Kushal is a Partner with CMS in London. He's an experienced litigation and international arbitration practitioner. He's also an active member of CMS India Desk. Kushal regularly assists clients in navigating complex issues, including cross border disputes. He also helps develop risk mitigation strategies and to obtain

emergency relief from courts and Tribunals. Kushal is recognized as a next generation partner by Legal 500 in two categories, international arbitration and banking and litigation.

I also have my partner from Khaitan & Co. Mr. Chakrapani Misra is a Partner in dispute resolution practice of the firm. He's based in Mumbai with over three decades of experience in the field. He specializes in commercial disputes, resolution. He's ranked by Chambers and Partners Asia law legal 500 on a regular basis. Chakrapani is a certified mediator and a member of the Specialist Mediation mediator panel of Singapore International Mediation Centre, and he regularly presides as a mediator on various corporate commercial disputes.

Now, when we talk about this topic which is a very relevant topic in today's day and age, as we see a lot of people now feel that can we first resolved the matter before we go and launch ourselves into full-fledged disputes or full-fledged litigation. In today's day and age where we see corporate commercial transactions on a regular basis, cross border transactions happening almost daily. I think, finding alternate methods of dispute resolution is key. Now, whether should there be alternate, whether should they be complementary to each other, whether they should run in parallel to each other are some of the questions which always come in mind. To my mind, I think these are all options that can be exercised parallelly. I don't think you need to wait for one to get over the other. Everything has its own ways to deal with things. You may be able to start a mediation as Justice Pitale also pointed out, move into an arbitration if you require. At any instances where you feel that if you get a mediated settlement, enforcing, maybe a challenge, go into arbitration, take it as a consent award and then enforce it. So there are ways in which you can move things and move ahead. I think I would first like Kushal to ask you a question that is, should we at all be pitching arbitration and mediation as two distinct and unique processes against each other? Is it correct to do so at all? And should we not rather discuss arbitration and mediation rather than arbitration versus mediation? And can we not have the best of both worlds?

KUSHAL GANDHI: Thanks, Raj. Yeah, look, I certainly think that mediation and arbitration should not be seen as mutually exclusive. If anything, I think mediation is not a process at all. In my mind, mediation is a tool that fits across the entire set of proceedings. I think arbitration and litigation are probably mutually exclusive. Those are the processes for the dispute, and mediation sits across both of them in a lot of respects. I think mediation as we've heard from Mr. Pitale, can be a very effective tool in problem solving. Because one of the benefits of mediation is, you're not straitjacketed by submissions. You're not straitjacketed by what the tribunal or the judge has to find and the principles by which they have to find, a mediator has flexibility of coming to a commercial solution to the problem question.

Obviously, each mediator has different techniques and they will use whatever tools they have available, but it's about problem solving. Which is why I think it would be wrong to say that if you mediate, you can't arbitrate. Or if you arbitrate, you mustn't mediate. And I'm sure we've come on to discuss the timing of it all as well. And I think we heard Justice Pitale talk about Med Arb and Arb Med, and I think those are issues we'll come on to talk as well. But again, it's that idea that you need to do it in steps, for example or once you've done mediation, only then you must do arbitration or once you've done arbitration, only then must you do mediation. Again I think it would be helpful for people not to think of it in such a sort of structured restricted way. I think mediation is one of those things where actually, if you allow it to flow it works much better.

RAJ PANCHMATIA: I think I quite agree with you. And maybe it's for MCIA to consider whether they also need to incorporate something like a Med Arb Med Clause or Arb Med Arb Clauses into their framework and maybe also come up with the mediation rules within itself. Because I do quite agree and see the point of Justice Pitale when he said that an arbitrator should avoid being a mediator. Or if you're a mediator, then to go and say that I'll be the arbitrator. I think that's avoidable for sure because that can carry certain amount of prejudices or certain amount of information which were confidential when discussed in a mediation process which should not otherwise be taken to arbitration. But will let MCIA decide whether they want to consider this option or not. Gopal as an In-House Counsel, would you prefer using arbitration or mediation or use a hybrid structure? What are the considerations for choosing these options? What happens when a commercial transactions come to you? Do you recommend these things often?

GOPAL MENGHANI: Thank you, Raj, for asking this question. I think this is usual conundrum that General Counsel really goes through whenever the company or the corporation faces these kind of issues. I think the endeavour on the part of every General Counsel is, firstly to find out a way to resolve. I would not say even mediation. Even before getting into the mediation, there is a lot of effort that goes in to have a lot of communication with the other side. Try and resolve whatever or flesh out whatever the issues that are common, which can be resolved. There could be certain issues which may not be resolvable and I think at that stage as a General Counsel it all depends how communicative the parties are with each other. If there is a good communication between the parties, I think the both parties would definitely go for Med and then thereafter Arb, because at mediation level lot of things get fleshed out, get sorted out, and only the contentious issues can be taken up for arbitration. But sometimes the parties do take up posture and try to invoke arbitration. Maybe during the course of arbitration, in the middle of the arbitration, then they decide that, okay, that's not

much of an issue between the parties. Let's see if we can work this out and bring in a third party who can mediate the issues between us. And I'll share, of course, personally, I have been through this kind of scenario where we were having a very highly contested arbitration with our contractor. With a long term relationship. Very highly contested claims, counterclaims of hundreds and thousands of crores being made against each other. It went on for nearly one and a half, two years, where the arbitrators also insisted, please sit down. Probably you might be able to find some solution if you all sit together. Now as things would really happen we needed the services of the contractor for some other part. So, we sat down, we had a meeting with a third party mediator. All the claims, counterclaims were withdrawn. We went on with the new kind of a contract. We worked out at hand. So therefore, it could be an Arb-Med or Med-Arb, again, go back to arbitration and get a formal decree from the arbitrators. I think, it all depends on the scenario that you are in. What suits a particular scenario may not be applicable to the other one. But nevertheless, I think Kushal also rightly said and Raj also confers every attempt must be made to resolve the disputes. If it is not possible between the parties, try and see there is a communication, good communication between the other parties, and there's a good mediation and therefore appoint a good mediator who can really help see us what are the flaws in our issues and get it sorted out. So that's one.

RAJ PANCHMATIA: Thank you Gopal. Jyoti, if I may, as an In-House Counsel, what do you think are the kinds of cases that you would want to refer to Arb-Med-Arb or Med-Arb-Med? What are the kind of matters which you think are easily referable to them?

JYOTI KAPADIA MAHESHWARI: Thanks for that. So the kind of cases which we can refer to Med-Arb is somewhere where you're comfortable, you know that these things can be resolved. The disputes between two parties can be resolved is something where you can refer to Med-Arb. But when it comes to referring a matter this should not be considered by one party that let's go for Med, then an Arb and let's try to prolong the process that is one which is being, in fact, prevalent nowadays where people do not want to reach a consensus or where people want to just prolong it for delay in payments. So that's where this process has been misused. In fact, mediation should be used for only where a party is comfortable with each other. When we know that this can be resolved, that when a third party or a person can get in and just solve this.

Arb-Med again, if we go into arbitration and then, as Gopal put in, you can reach for a mediation when again, you realize that there are parties which are comfortable with each other and can reach a mediation process. But if there is an arbitration and then an award is passed then you can mediate on the award with regard to your compensation. But again, this will

defunct the entire process of an arbitration because arbitrator spends that kind of time, gives an award, which is usually binding on both the parties. Then the mediation process is something which will defunct the entire arbitration process, is my thinking.

RAJ PANCHMATIA: As you know, that mediation is more of a facilitation process where mediator only facilitates. He doesn't decide for you. He doesn't give you a verdict. It only helps parties to arrive at a consensual agreement on a particular issues as compared to what the mediator....to compared to what an arbitrator would probably do and decide, or adjudicate upon our dispute. So, in that sense, we would have a little bit of a demarcation in what a mediator can do and what an arbitrator can do. But we take your point as to what you suggested. And in the finance industry, in the finance sector from where you come from. I'm sure, you must be seeing far more of these arbitrations and mediations playing out. Any experiences that you would want to share?

JYOTI KAPADIA MAHESHWARI: Absolutely. Honestly, as a Japanese company, we'd like to more mediate than to go into arbitration or litigation, for that matter. So as my own experience we try to mediate between two parties, we would want to settle the matter there itself. But there are certain cases where it lead to arbitration, but it's just a general mindset, since we are on boundaries and we're talking about diversity. People do not want to at least external Japanese company or companies coming from outside do not want to litigate into India. So that's where the arbitration process is something which, there is a second option which, as a company, we would want to explore.

RAJ PANCHMATIA: But with the, with the amendments to the Arbitration Act and the arbitrations progressing as quickly as they are now I'm sure the international companies like yours would be getting far more confidence in going and selecting arbitrators?

JYOTI KAPADIA MAHESHWARI: Absolutely.

RAJ PANCHMATIA: Of course, I'm not saying that everything is otherwise hunky dory. There are issues with enforcements challenges which are always there. But I think as a process, the arbitration process has started to move much faster. And I think we are seeing awards coming out in 18 months fairly regularly, 18 to 24 months. Complicated matters, yes, which may take some time, but by and large, we do see arbitration awards coming out quickly. That brings me to you, Chakrapani. Arbitration clauses will always be part of most commercial transactions in mediation clauses, less so. As such, how do you evaluate when there is a strategic advantage to propose a mediation as compared to an arbitration, to your clients and

to the counterparties? And similarly, is what is the situation would you propose to have both mediation and arbitration to your clients?

CHAKRAPANI MISRA: Thank you, Raj, for that question and for very generous introduction. Good morning, everyone. Grateful that you all turned up early morning, cutting your beauty sleep. So, thank you. Coming to the question, I wanted to start with a very live example. And my co-panellists have already made my job a lot easier by delineating where what should be recommended. I'll give you a live example. We just concluded an arbitration and it did have mediation clause before the arbitration proceeded. And heavily contested matter, very high stakes. When the Tribunal was constituted, the Tribunal, first thing, tried to tell to the parties, would you consider mediation. Answer was a firm no from both sides. No, we are not mediating. Well, pleadings started, everything went as per the schedule, and then we were at points of determination, closed, and we were at the conference where we were deciding the dates of hearing. The Presiding Arbitrator very casually asked, would you all like to consider mediation, and the answer was very different. It was not that vehement, no. 'We may think about it', and other side says, 'okay in case my learned friends clients are interested we can explore that'. Cut to next two months we had mediation before another mediator. We had a settlement. We went back to the arbitral tribunal, we have an award. So, this is how it panned out. Now, the inner part of the story that I can tell you why it happened. Because once pleadings were completed, both sides knew their position. So, from that very high horse where parties were coming from, thinking that they had a very strong case they suddenly realized that it won't be that easy to prove their points or claim or counterclaim will not go through as smoothly. So that's where mediation came in.

So, to answer your question, it will depend -on what kind of posturing a client is doing. And already my co-panellists made the point that mediation can settle the tone. At least it settled down the issues on which parties can arbitrate. So, in that sense, mediation comes in handy if you propose mediation first before you go to arbitration. Having said that it also is in certain cases important that you go through the arbitration process like what the example I gave. At that stage, nobody was interested in mediation but few months down the line, parties came along. So, there is no fixed course that I can propose today that in these cases you can have mediation first and arbitration later. But it is like these kind of things will have to be tested.

Another point that comes to my mind is that when you are talking about mediation as a starter of dispute resolution, it is more on consent of both the parties. So, you cannot possibly unilaterally propose that we would have mediation first. It has to be consent. Even if it is put in a clause of Med-Arb-Med situation, the mediation part will only be a formality. So, unless

there is an intent, and that intent in my practical experience for last so many decades it comes in when there is a running relationship. What Gopal was mentioning, that there is a relationship or there is a need to continue business. Probably in those situations, mediation will work first. It will work very well because parties at the back of their minds, they are thinking, we need to close this and move on. So, in those situations, Med-Arb-Med works well. In other situation, Arb-Med-Arb may work well. Because then issues are crystallized and party then review their position they may probably want to change their strategy and rather than being aggressive, be conciliation. So that's what I feel.

RAJ PANCHMATIA: I think it's very important what you say, some of these points resonate with a lot of us who do mediations on a regular basis. But Kushal, I will come back to you on a very interesting point which always is a very Catch-22 situation for lawyers. When do you recommend mediation to your clients? Because the client when he comes to you he is already so charged up. He is wanting to fight. He is saying that he has wronged me, I want to give it back to him. Is that a good time to tell him, come on, let's settle? Is he going to listen to you or he's come up with a mindset that I want to first fight? He has accused me of something, I'm going to give it back to him. Is that the right time to suggest mediation or is it somewhere down the line suggests mediation? So, at what point in time, Kushal, would you prefer to recommend to your clients that it's time to go for mediation and what are the other strategies around it?

KUSHAL GANDHI: Thanks, Raj, I completely agree. I think when parties are in that dispute phase, emotions are inevitably high. Even if you're acting for an institution or a corporate. The individuals that are responsible for that particular book of business feel a particular amount of emotion and passion around it. And that needs to be managed because I think sometimes if you suggest, maybe you should just settle it. Clients sort of think you're not up for a fight either. And they sort of think, well, maybe you're not the right person to be dealing with this, and that's not because you don't have the skills, but it's because they feel that you are not on the same emotional journey with them on that. So that is definitely a challenge. But I think on the counter to that is, we all have a professional obligation to act in our client's best interests. General Counsels have an obligation to act in their clients best interests, which is institution. And something that is always driving everything that we're doing, right? And I sort of think that I often say this to clients, which is I'm like, there is no shame in proposing a settlement meeting. I don't think it reveals any weakness in your position that to suggest a sort of settlement. It's the way it's positioned, I guess. And the way it comes across but sometimes you have to write for the jury. We write our letters, not for the other side lawyers, but for their stakeholders and for their boards. Read and actually have a think about it. I think something positioned around costs, which is that it would be in both parties interests to avoid costs is a

good way, I think, to position it, because I think the one thing I find certainly with mediations and settlement. The one thing that becomes a barrier is if costs have become too high. If either party has a lot of high sunken costs, that becomes the barrier to settlement. So actually, that is a good reason, I think, and a good anchor point to say before we are going to invest a lot of money in the next phase of a case, whether that's, we're going to go from pre-action correspondence to preparing pleadings. That's a good anchor point to sort of take stock and say that actually, hang on a minute. Do we want to serve? Because if you're the Claimant, for example, and you're, going to take the step of issuing your claim. The other side will want to file its defence before it wants to meet you because they will not want to be on the back foot either. I think those anchor points in cases are a good point to sort of think about it.

I think the other thing around mediation, where I think mediation works better is once both sides have a bit of an understanding of each party's position in case. Take the example that Chakrapani was giving around when a party's pleadings are closed and that's when sort of mediation work. And I think that's natural because I think it gives parties a better indication of what the case is and what they need to answer. It gives them a better ability to go and assess the merits of their own position. It gives each party more to go back to their stakeholders and undertake their own merits analysis at that stage. Because I think when you fire off the first letter a merit analysis is quite difficult to do really properly. You want to invest a bit of time. So, I think if you do a mediation too early you actually might burn that tool. But again, this is a phase that a lot of mediators use, and I think it's quite right is there is no failed mediation. We heard people, they say this as well, which is, I think, even if you come out of a mediation and you haven't settled the case. What it sometimes does is, it narrows the issues in dispute. It focuses the mind a bit. The next mediation you have or the next meeting you have you've taken a step forward. So, I think those are things that people should bear in mind like I say, I don't think there is a single rule that works, but for me, the one thing that I sort of think about is each time I'm moving from a phase in a case, that's when I want to really think about, is this the right time to sort of mediate.

RAJ PANCHMATIA: Very interesting. I think in my experience, there have been three different stages where you can recommend mediation. And what I have always found useful is...So first is, of course, when the client comes to you. That's your first phase of suggesting mediation, but more often than not, clients not willing to listen to you at that point in time to talk about mediation because they are very charged up. They don't want to settle. They want to kind of go ahead and fight and see where it takes you further. The second stage which I regularly see is once the pleadings are complete. And once the pleadings are complete people know by and large, what their positions are pleaded positions. So, where they stand on

mediation? Do they want to resolve it? Do they want to consider discussion settlement? Is it a good time? Once both parties have opened up their cards. And the third and the most effective time that when I see people are actually considering to sit down and talk is when they have to file their witness statements. And when you're talking about filing witness statements, that means you're going to put in senior people into the witness box. And not many senior people want to go into the witness box. That's the time I feel that's the most effective way to get this resolved. Because not many senior officers want to sit into the witness box and get cross examined by the other side and some of these questions are very difficult to answer. And many a times I've seen that senior officers will say let's talk. To my mind, these are the three different phases in which I have seen most effectively being used. Chakrapani you have a...

CHAKRAPANI MISRA: I just wanted to convey that I totally agree. And also, one more added problem that clients face is that sometimes those witnesses are no longer around. Because in a corporate structure, they may have moved on, they may have gone somewhere, they may have relocated. So that's the exact point that third stage comes, so. You are absolutely right.

RAJ PANCHMATIA: I think you make a very valid point that witnesses may not be around to prove your case.

GOPAL MENGHANI: I would like to say that when the arguments are closed, then the court is adjourned for verdict. At that point in time probably both the parties know on merit. Where do they stand? Maybe that might also be the good time.

RAJ PANCHMATIA: Fair enough. It's another fourth phase where you can definitely consider dissolving the matter. Now let me come to you Gopal. Legal and policy reforms, as existing frameworks in India regard mediation and arbitration. You know both. Is it conducive to go for a hybrid process or should you consider mediation only or arbitration only?

GOPAL MENGHANI: As things stand, I think there need to be some processes statutorily that need to come in, which would determine or regulate both the processes or make it easy, conducive or mediation and arbitration process, to move on simultaneously or seamlessly. There should be an ability for the parties to, maybe within the same institution, move from arbitration to mediation and back to arbitration or other way around. Just to expedite the process, threshing out the common issues that can be resolved at the mediation stage and just go to the arbitration with a very minute issue that needs discussion. So, on a statutory front, I think while the Mediation Act is in place, I think little more might be needed. Even I would

encourage even the MCIA also to come up with mediation chapter from their perspective so that the parties can seamlessly move between arbitration and mediation processes. Lay down the rules and regulations which the parties are agreeable to and take it forward from there.

RAJ PANCHMATIA: Chakrapani, I'll probably ask you a little more controversial question, to which Justice Pitale also alluded to. And that's regarding the recent government notification by the Ministry of Finance notification, which has come out saying that the public contracts over ten crores should not have an arbitration clause anymore and should be mediated instead. Any thoughts? Because I know there are multiple representations already made to the Ministry of Finance. Now there are two writ petitions which are pending in the Delhi High Court. But any thoughts?

CHAKRAPANI MISRA: How much time do I have?

RAJ PANCHMATIA: Floor is yours.

CHAKRAPANI MISRA: No, I was with keenness, I was listening to the honourable judge and I was like okay, this needs to be talked about. And I don't know, I felt very strongly about it, and these are my personal views. Not to be associated with anything. When we talk about moving into the next era of arbitration, when we talk about maybe doing arbitration in India, the Government talks about doing ease of business in India. And the Government that is the biggest and largest litigant in the country, comes up with a directive to it's all departments saying henceforth for anything above 1.2 million, we will not be doing arbitration. How does that sound? The sound of it itself sounds bad. It doesn't make any sense. And so, anyway to take a step back, this was 3rd June Directive which has come from Ministry of Finance given to all Ministries and all government departments, all PSUs and all government companies saying that in a sense, arbitration has failed because we don't have a level playing field. The awards come and what judge was alluding to that lot of money gets blocked because awards have come and we have to deposit money before we go in 34 and the funds remain locked for some time. Arbitrators are not always impartial, I'll come back to that. So, these are the grounds on which you say that, henceforth we won't do arbitration and we will do mediation. Well, nothing wrong with the intent of doing mediation. I'm making myself clear. I'm a mediator myself, and I always tell everybody who cares to listen, please do mediation. But mediation in itself is not an entire process that can resolve your dispute. As Kushal was mentioning it's probably a facilitator. And what happens now? Let's go a step further that okay, henceforth, we will do only mediation in high stake disputes. Very good. Please. Now, when you do mediation and mediation fails, because mediation is not compelled, mediator cannot

compel parties to come to a settlement. So, the other side does not agree, mediation fails. Where do you go? You go to the court system. For the very system which is already burdened with so many cases. It's already reeling under the pressure of the backlog of matters. You go back to the system and stand in the queue for 15 years. How does that work? So, by promoting mediation, you cannot take away arbitration. They can go hand in hand. And this circular does disservice to both mediation and arbitration. Arbitration, of course obviously it's not recommended in the agreements going forward. Mediation also, because the number of failed mediation will again give a bad flavour to the mediation itself. Then it will be told tomorrow that the process does not work. Government did so many mediations and all mediations have failed. Great. So, one more system flaw. So, all in all, I don't know what the intent of this was. I feel this kind of circular must go. And if this voice reaches, and I think many as rightly pointed out, I think the arbitration bar has written a long representation, giving reasons why it should not happen. Likewise, many other bodies have written there are petition pending. I think they should go. The possible way could be that you recommend Med-Arb, that's okay, you try mediation or dispute adjudication boards and PSUs. They work fine. You can have that. But don't take away arbitration. So, my view strictly is this has to go, happy to discuss questions. Thank you.

RAJ PANCHMATIA: I think as a member of the executive committee of the Arbitration Bar of India, I can tell you that we have taken this as a strong issue and taken it up with the Finance Ministry. There have also been at least two writ predictions that are now pending in the Delhi High Court challenging this notification because I think to the root of it, if you see, if we're going to go back to say and say that, okay all the government contracts or all the contracts about ten crores, we will not go into arbitration but we'll go into mediation, and failing mediation, will go back to court, where are we heading today? Government is the largest litigant in the country. If you're going to go back to a situation where you are going to go back and get stuck in court the entire process of arbitration is defeated. The arbitration was brought in to quicken the process. There's so many contractor disputes. There's so many infrastructure disputes. You can't have the blocking the courts roasters. You need an alternate mechanism. I'm not saying that judges are not capable to decide these issues. Of course, they are capable. But there are some technical issues in infrastructure arbitrations. For instance, there are so many infrastructure arbitrations and technical issues. Will the courts have the wherewithal or the time, all the patients to listen to these matters? Will there be ability to bring expert witnesses, expert evidences, and explain to the court what the technicalities are all about in your arbitration?

So, I think it is...we hear ministers, judges, all speaking in one voice, that India has to be the hub of arbitration and international arbitration. We all want to make India as a preferred seat of arbitration. At the same time, in the same breath, we see a notification coming out in discouraging arbitration, saying no arbitrations. I think somewhere there has to be some correction overall. Maybe the government may come out with a clarification notifications as to what can be done or maybe whittle down some provisions of this notification. It will be important for the Government to do that.

Jyoti, let me ask you this. In your experience, have you seen parties use guerrilla tactics in mediation such as using it to waste time, delay the mediation process? Or many times because there's a commercial call fact, now it's mandatory to go before mediation. Some people just go there to delay. Some people just use it as a tick box approach. What, in your experience or what would you think is the right way to go about doing it?

JYOTI KAPADIA MAHESHWARI: Thanks Raj. So first, let's discuss what guerrilla tactics is, basically it's more of delaying the process. What happens in such processes is when the parties are on deliberation, they delay in providing certain documentation. They delay in coming onto the table to discuss the kind of settlement, they would want to. They would go back to their Boards to discuss this. So, there are a couple of ways to delay the entire process and then fail mediation, actually. So, when they want to mediate, they have to sit across decide on mediation as Chakrapani put in, it's easier to sit on the table, mediate, and if things don't go well, then you can arbitrate. Or maybe then when parties end up in arbitration, and then they realize that there is mediation, which is possible. But again, when they end up in mediation there are times when they just want to delay the process by not providing certain kind of documentation. They don't provide the kind of information required, and then they just try to delay the entire process, which defuncts the entire process of Med-Arb, or Arb-Med, whatever, it can proceed or... So, that's when... and as a GC, I would like to put that, that as a GC, it's very imperative to take care of costs.

So, when we try to come across people and try to settle the matter it is frustrating with these guerrilla tactics, with these delay in processes when parties just want to dilly dally and specially take their own sweet time to not process payments or not process any kind of, not come to consensus. We don't know then what way they want to go and settle the matter.

RAJ PANCHMATIA: Gopal, your thoughts.

GOPAL MENGHANI: Just want to add, it's my personal experience where I was appointed as a mediator in a family dispute. It's not a corporate level, but in a family dispute I was a mediator. It went on for quite some time. The agreements were drawn up, all the issues were sorted out. And at the very last moment, one of the parties said that I'm dropping the mediation. I wish to now go ahead with arbitration. I know it's not so good. I don't know how to tackle such a scenario. Maybe some kind of legislation should bring in which really gives recognition. The efforts that are made by the mediator and also made available because the mediation proceeding cannot be made available in an arbitration proceedings. So, I have really no answer to it right now, but these things do happen and it just frustrates the process.

RAJ PANCHMATIA: I think guerrilla tactics in mediation or arbitrations are very, very common. And I'll tell you what Justice Pitale was referring to or alluding to. Similar instances have been happening very regularly in the recent past. I'll tell you one of my experiences while I was sitting as an arbitrator. I did receive a letter from one of the parties asking me that if you proceed further with the arbitration, we'll file a criminal complaint against. You now these are the kind of things that do happen in real life, right? And you have to deal with them. How do you deal with them is a big question. Because when somebody's threatening you with a criminal action, and in India, you know, once a criminal action starts against you as an arbitrator for no fault of yours, it can lead you to a very complicated position. Keep defending those proceedings. So, you have to deal with it very carefully and navigate these kind of things very carefully. Kushal, I'll come to you for a question. What does it take to be an all-round lawyer in a disputes team? Do you require an extra set of skills to be say an arbitration lawyer or to be a mediation Counsel?

KUSHAL GANDHI: Raj, I'm saying this from my experience of working with you, obviously as an all-rounder lawyer and I think some of these things that we're talking about are practitioner driven. And actually, we heard the challenge to the notification and Justice Pitale alluding to this, which is, is this coming from a place of practitioners not behaving in a particular way. But that has led to this particular outcome. So, I think there is an element of taking ownership as a practitioner as well of what is happening at the policy side and actually being prepared to drive change amongst the community. We talk about guerrilla tactic. So, there are some cases that are obviously suitable for them and then needed. But there are some lawyers that probably deploy them as a natural instinct on every single case. So, it's actually trying to make that difference when it's needed, when it's not needed. Where the policy is coming from? And actually, government can do its best and policymakers can do their best pass legislation. But as lawyers we always look for what we can do to achieve the best outcome.

And that sometimes does mean pushing the boundaries on the legislation as well. So, it's some of those things that I think that I think are part of what we do in our toolbox.

I think the other thing is what I see effective lawyers on the other side is where actually they are solutions oriented, and they build a rapport with the other side. So, there is a channel of communication that opens up with the lawyers that allows actually for settlements to take place for the mediation to be a bit more professional and friendly. We don't need to be adversarial with each other at a personal level. Because at the end of the day, case is the case, and we're all professional. And I think I find counsel on the other side that do that, actually get more respect not just from their own client, but also from my client sometimes. Because it's a bit like, hang on a minute. But we don't need to be petty about certain things. And look, they're rising above it. And you find arbitrators and judges respect that as well.

So, I think some of those things are quite important to be able to sort of deliver the right outcome, and I think it's...The thing that I always constantly have to remind myself, which is as much as a disputes lawyer, I think a dispute is an end for clients, disputes are a means to an end. It's not their business to be in disputes. No one likes really. It's taking up so much management time, taking up so much cost. You know the point you made about witnesses, not wanting to be in the witness box, nor that sort of stuff as well. So, at the end of the day, it's there because there's an actual problem that's arisen, and it's about finding a solution to that problem and getting stakeholders on board is a key part of what we do as well, I think, is being able to bring internal stakeholders on board, helping General Counsels to be able to get their board to buy into the strategy and come to the sort of same page that you need them to be on to be able to deliver the best outcome. I think all of that is quite critical. It's not just about the submissions. And it's quite easy, I think, as a disputes lawyer, to just get drawn into the detail to go into right into the weeds and just be like, actually, I'm going to focus on this really amazing legal point I've got and I'm going to build all the facts around it. That's a natural instinct I think to do that, but it's actually getting into that 30,000ft helicopter and saying, actually what I want to do is, I want to get the best outcome. And how do I do that? Doesn't have to be by focusing on this really difficult legal point. It can actually be something quite left field.

CHAKRAPANI MISRA: If I may add? I agree with all the points that you make. I was only going to add to that in context of mediation counsel. When you are doing your counselling or you are advising, as helping a party in mediation your role is very different from when you are in an arbitration. So, in mediation, as a mediation counsel you always have to take a backseat. Try and facilitate as much as you can the mediation process because parties have already come

to the table. They are already sitting across and trying to mediate. So as a Counsel, if you can facilitate that, you will achieve your end goal. So just wanted to add that.

RAJ PANCHMATIA: I think that is helpful. One suggestion is for Neeti that's coming again and again is to consider Arb Med Arb for MCIA and see if she can come up with the rules on mediation as well. I just wanted to ask you one more question Chakrapani. Is India ready for this? Culture and social factors such as for institutionalizing the hybrid process of Arb Med Arb. Do you see India ready? We see it in Singapore very regularly. We see in various other parts. But do you think India is ready for it?

CHAKRAPANI MISRA: Absolutely. Because we do. We use these processes when we go abroad where very clients are going out and using these Med-Arb-Med situations or Arb-Med-Arb. So why not here? And suggestion is already gone, so right.

RAJ PANCHMATIA: So, I think Neeti has taken all the notes. She's very stressed.

CHAKRAPANI MISRA: She has taken all the notes. We are ready for it. As a culture, we are ready. And more so now the disputes have got so complex and commercial expedition, commercial expediency demands that we resolve our dispute. So, whether we use Med Arb Med, Arb Med Arb or conciliation or just expert determination. We are ready for all of it.

RAJ PANCHMATIA: Okay, so I have got the hint from Neeti. I take two questions from the audience. If anybody has any questions any questions? Yeah, please.

AUDIENCE: [INAUDIBLE].. A lot of friends who are having as lawyers, what we do with this or it may be an even in our staff we have these vendors who are the regular vendors for very long years, and, you know, they are the small vendors in that contract, you have this application where there is any payment issue, those vendors directly send your application and it goes to the team who is feeling in your brain to them. And it was then a big breakup like I did that I said, they come to the house saying that there's an arbitration notice. Now we have to file the reply... but as an innovative council in the company, you know that it is something that can be resolved. By a mediation, even if the clause is not. Then how do you reverse patients of understanding taking understand the team who's involved in the transaction to go for a yeah **[INAUDIBLE]**

JYOTI KAPADIA MAHESHWARI: yeah, I'll take it. So, in fact these kind of cases keep on coming on a daily basis, I would rather say not even weekly or something. So, this comes on a

daily basis to us. We in fact, as I stated earlier also, being a Japanese company, we usually go in for mediation processes only and we try to settle it firstly, at our level, at the company level. So, a team who gets these notices, gets frustrated, no doubt about it. But along with that, when they come to our team, what we do is we start we'll ask them as a user team to connect with that person to check whether the fault is. We stopped making payments, then we need to check where is it fault at our end. But if we can sit on the table. Call them to office, connect with them, ask them what is the problem and where we can solve it, it is better. Otherwise, we would rather go in for a mediation process, then go in for our arbitration, because that is more of a lengthier process than a mediation. If we can just sit on the table, have some coffee and connect with those is much easier than long drawn arbitration process as well.

CHAKRAPANI MISRA: Two quick bullet points for you. One is that in your agreement, you can probably put one liner before arbitration that there can be mediated settlement. And two is that have an informal meeting, as Jothi mentioned. So, these two things will sort of have your problem.

RAJ PANCHMATIA: Okay, I think we've completely run out of time. Thank you all for listening to us so patiently. And early in the morning. I'm sure you have a well-deserved coffee now but sorry, you have no coffee. Now I've just been told you have no coffee. Sorry. I'm sorry about that but please join me in thanking the panel with such an exciting views that we got from all of them today. Thank you. Thank you

~~~END OF SESSION 1~~~