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INDIA ADR WEEKDAY 2: MUMBAI

SESSION 2

Guerrilla tactics in Indian arbitration

10:00 AM To 12:00 PM IST

Moderator:

Kunal Vyas, Partner, Gandhi Law Associates

Speakers:

Justice (Retd.) Mr. Akil Kureshi, Former Chief Justice Rajasthan High Court & Former Chief Justice Tripura High Court

Ravi Kadam, Senior Advocate, Former AG of the State of Maharashtra

Dr. Rishab Gupta, Advocate, Bombay High Court & Barrister, Twenty Essex

Rashna Mistry, General Counsel, TATA Projects

Scheherazade Dubash, Senior Practice Development Lawyer (International Arbitration), Pinsent Masons LLP

Shiv Sharan Kaushik, Sr. Vice President Contracts, Kalpataru Projects International Ltd.

HOST: Can I request everyone to please take the seats? We'll be starting with the next session very soon. The next session is hosted by Gandhi Law Associates on Guerrilla tactics in Indian arbitration. I would like to invite on stage the panellists and the speakers for this session. We have Mr. Kunal Vyas, Partner at Gandhi Law Associates, who will be moderating the session. We have Justice Akul Kureshi, former Chief Justice of Rajasthan High Court and former Chief Justice of Tripura High Court. We have Mr. Rishab Gupta, Advocate at Bombay High Court and Barrister at Twenty Essex. Ms. Rashna Mistry is the General Counsel, Tata Projects. Mr. Shiv Sharan Kaushik, Senior Vice President, contracts, Kalpataru Projects International Limited and Miss Scheherazade Dubash Senior Practice Development lawyer, international arbitrations at Pinsent Masons.

KUNAL VYAS: Wishing everyone a very good morning. We are elated to hosting this session. I am Kunal Vyas. I'm a Partner at Gandhi Law Associates. I would firstly like to congratulate MCIA on organizing this event so well. We have attended the sessions yesterday and they were fantastic, on such different topics we got views of different panellists and I congratulate MCIA for this. The topic that we have for our discussion today is Guerrilla tactics in arbitration. We see these tactics, or maybe we call them tactics right now, but they're possibly strategies when we are discussing them with clients. I talk from a lawyer's perspective their strategies to either delay in arbitration or rendered infructuous, increase cost of the other side. It could be anything. This, frankly, to tire the other side. These are the tactics which are usually employed.

These tactics have two potential consequences. One is delay in adjudication of the proceedings, rendering of an award. Second is increase in cost. These tactics as we see are employed at every stage of arbitration, from the contracting stage to appointment of an arbitrator. During the arbitration and post award till it is enforced and you see the colour of money. These tactics are employed and a lot of arbitrations lose their way. I am very happy to have a panel, such a distinguished panel to discuss a topic which is so intense and which we see every day in front of us. I would quickly introduce the panel, which frankly needs no introduction.

Justice Kureshi, on my immediate left, has been a Judge at the Gujarat High Court and Bombay High Court. He has been a Chief Justice at Tripura and Rajasthan High Courts. Mr. Ravi Kadam, Senior Advocate and former Advocate General State of Maharashtra, Dr. Rishab Gupta, who is an independent counsel at Bombay in Barrister Twenty Essex, Ms. Rashna Mistry, who is a General Counsel at Tata Projects. Scheherazade Dubash, who is a Senior Practice Development Lawyer, international arbitration at Pinsent Masons LLB and Mr. Shiv Kaushik, who is a Senior Vice President at Kalpataru Projects International Limited. We have a panel covering all aspects. These people come from different walks of life. Justice Kureshi

may be able to give an arbitrator's point of view on the topic that we discuss. Mr. Kadam and Rishab would be able to give a lawyer's perspective and we have in-house counsels who will be able to give the client perspective on the issue. I would not take further time and request Mr. Kureshi to start. Thank you.

JUSTICE AKIL KURESHI: Very good morning, everybody. It's lovely audience, great panel. I was a judge of the High Court for nearly 18 years, to be precise 18 years. There is one thing I would like to share, which nobody will tell you. They say when I was a judge, they said, there are three stages in a judge's career. For the first five years, the judge thinks he's always wrong. For the next five years he thinks he's always right. And in the last five years, he does not care whether he's right or wrong. But I realized after retirement, there is a fourth stage, where others don't care whether you are right or wrong. So thank you, Kunal. Thank you Gandhi Law Associates for inviting me.

Very interesting topic. I'll try to bring in the arbitrator's perspective to this issue. As we all know, my friends, in the year 1990, early 1990s, the Indian economy was opened, integrating into the world economy. Need was felt immediately to bring in arbitration law to keep in pace with such developments. 1940 Act had lost its charm, lost its significance. 1996 Act was framed. And we thought that expansion of trade and industry in India will keep pace. The arbitration law will keep pace with the expansion of trade and industry because we wanted to provide a robust and efficient dispute resolution mechanism. While the India's economic growth and story is before all of us. We thought, 1996, the arbitration scene has arrived in India but this expectation of will arrive into the tense of has arrived has been more challenging than what we initially thought. There are many reasons for this. Court delays, of course, are the prime reasons, but guerrilla tactics applied is one of the many major reason on which I would like to present a few thoughts. It is therefore, I feel that we should focus on making our domestic arbitration system robust and efficient before we can tell the world that India is prepared for the international arbitration scene. Why guerrilla tactics? See, guerrilla tactics is not a domestic or an indigenous issue. It's applied world over. Well, it has a greater propensity. You get a potential to succeed greater propensity to succeed because of peculiar reasons for delays being the prime reasons. What are the different aspects of guerrilla tactics? How do we deal with them? And how, as an arbitrator I try to protect the litigation from that is what I would like to present before all of you.

Four of five typical guerrilla tactics which I have encountered are, number one, ask for ask for endless long adjournments. Two, raise frivolous challenges to the impartiality or the jurisdiction of the arbitrator. Three, seek anti arbitration injunction by, for example filing a

suit on the same subject matter involving the same people but throwing in a few more people and then tell the arbiter that look a parallel proceeding this pending, non-signatories are part of that litigation before the civil court, you cannot deal with and therefore, stay your hands off. And lastly, and that's where most nuanced areas thrive is to keep challenging at interim stages. An Interim Order is passed by the arbitrator, raise a frivolous challenge, invite an order and challenge it.

Take a purely hypothetical situation sometimes I encounter in real life also is that a person has invited an order and entering stage application is rejected. Writ petition is filed before it because it is not an appealable order. The writ petition is withdrawn. Then a challenge is made before the court under Section 37. Now, as an arbitrator, I know it's a frivolous challenge. But I have a list in the litigation. I have passed an order. Though my training tells me that no appeal lies, and therefore it is a frivolous appeal. When he comes back to me and said, sir, I have filed an appeal, sir, for you, do not proceed here till the appeal is decided. What are my options? So these are some of the issues as an arbitrator, I very often encounter. What are my tactics for that? And I'm sharing my trade secret, so it's a confidential information. Please do not use against me if you appear as an arbitrator before me. One, make full disclosures. When in doubt, disclose. Don't let anything unknown to the parties so that later on they can say that look, this element you did not disclose and therefore we do not want to go ahead with you. Most important. Two, It's always possible for an arbitrator with some experience to anticipate trouble. You can see the trajectory where it is going. Be very careful. Don't pass a single order without reasons. Grant adjournment. Don't grant adjournment. Shorter adjournment. Refuse a request, anything you do. Give brief reasons that will protect your order for all times to come.

Insofar as the interim challenges and approach the courts is concerned, I make sure that I do not trap myself by agreeing to wait for the outcome of the proceedings. That can be dangerous. The simple reason that the courts are so flooded with litigation. Particularly when the person approaching the court as a writ petitioner or as an appellant is not interested in fast tracking the proceedings. It is possible to consume lot of time. Even Sub-section 3, of Section 8, has a clear mandate that arbitration should go on irrespective of the pending challenges. I make it very clear that look, I passed an order. You may have reasonable time to have it tested, but the arbitration is not going to start before that. Arbitration is not going to be delayed on account of this. Because if I agree to wait for the outcome of the litigation, that's a death trap for the arbitration. And in the process, as I said, even if I know that the litigation is frivolous, even if I know that the appeal is not maintainable, I cannot say on the record, because one, I'm not called upon to. Two, I cannot show my bias against my own order. Let the court decide it. Court may agree. Court may not agree. Most cases may be very clear, some may not be. All therefore

I do is give a polite reply that look subject to outcome of the pending litigation let us go on with this.

Mostly, no irreversible damage or harm would be done. In any case, any order at my height may pass, any proceedings which may happen hereafter will always be subject to the ultimate challenges and the court order that may be passed. Now one peculiar aspect is here that Bombay, Delhi have original jurisdictions and therefore many challenges go directly to High Courts. Other jurisdictions like Gujarat, Rajasthan, other courts where they do not have original jurisdiction in the High Courts, the challenges go to the District Courts. And that itself sometimes bring in different nuances and different way of dealing with it. But all said and done, as I said, look, we must put our best foot forward. This guerrilla tactics will come in different shades from being unfair, giving the documents at the last moment, to unethical. Not providing the documents, to download illegal document tempering. But we have to provide for all these things and just remember one thing what are the terms they use for this tactics? Guerrilla tactic. Holding the siege over the litigation or the case is falling in no man's land. You know what is common between all three phrases? That they are all war-time phrases. As long as we treat commercial litigation as a war, this is going to go on. And this is going to happen. All we can do is try to provide for it, try to protect it. And ensure that the litigation sees the light of the day. Friends, many eminent speakers are waiting. I would not take any further time. In any case, they say, the first rule of public speaking is that you stop when people ask, why did he stop? Rather than they start asking, why is he not stopping. *Badey gaur se sun raha tha zamana, hum hi so gaye dastan sunaatey, sunaatey*. Thank you so much.

KUNAL VYAS: Thank you. Thank you so much, Justice Kureshi. It was, frankly enlightening for us to hear an arbitrator's point of view on when these tactics go on. As lawyers, we feel whether or not the Tribunal is appreciating the difficulty that a lawyer is facing on the other side. But we are very glad to hear your view, sir. Thank you so much for it. I would request Mr. Kadam to now share his views. Thank you, sir.

RAVI KADAM: You know, under protocol, Devang knows and Your Lordship also knows, the most important person Justice Kureshi here could speak last, because if he speaks first, then there's very little that you can say. And therefore, protocol is rightly devised that the senior most person in the meeting speaks last. It's a tough act to follow, but since it's fallen for me to do so, I will try that. Justice Kureshi started with saying that we had the 1940 Act, which, as he rightly said, had become redundant, outlived its utility, was not in time with what is happening...was happening then. In the 90s, we had signed various international protocols, and therefore one of our obligations was to bring in new laws and the Arbitration Act 1996 was

a consequence, really, of parliament and Government deciding that we need to comply with international obligations and bring in a law which is consistent with the Arbitration Law International. Unfortunately in the process of doing that, and I think it's now pretty well accepted that we made a law very fast and hastily brought about the Arbitration Act 1996. The result was that, and we've seen that in the last almost 30 years, almost every section, subsection and subclause, every proviso to every section has been analysed threadbare and now analysed threadbare, not just by the High Courts, by the Supreme Court also. Society and business, because these laws are meant mostly for people who are in business, corporate, trade, et cetera. They don't wait. They are not static, they are very dynamic. And the dynamics of business has changed so dramatically, even from forget 1940, which is almost 100 years ago, and even the 1996 Act needs a serious relook. And I'm sure Devang must be part of the process in which all the these relook is going on.

The phrase guerrilla tactics can cut both ways. Justice Kureshi said that guerilla tactics are by people who want to delay because that's correct. That's one of the very common understanding of guerilla tactics is that you want to delay an arbitration, you don't want the consequences of an award which has been properly brought about to be visited upon you. You don't have the resources or for whatever good or bad reason. But guerilla tactics can be the other way round also. It didn't matter which most of you may know which was ***Anupam Mittal's case*** in which I thought, let's see, Anupam Mittal broadly, I'll tell you the facts. The matter is still at large in NCLAT and in the High Court in UP. Anupam Mittal had a company which had this popular website called Shaadi.com. Most of you know that. And he had investors, foreign investors in that business, who had a clause under which he was obliged to do an IPO at the laps of a particular period of time. And if he didn't do it, then they were free to sell their equity to outsiders and thereby give them a chance to get into the company. So Mittal obviously didn't want that, and he filed a 241, 242 operation and mismanagement petition before the NCLT. As a first strike anticipating that they would do. Now, the contract between him and the had arbitration had a SIAC arbitration provision. So he went as a first try. So his first guerrilla tactic, I could say, is to go to the NCLT and say, this is the disputes between me and my investor, disputes which arise under Section 241, 242, they are acting oppressively and therefore restrain them from acting, contrary to my understanding of the agreement.

India being India, courts being courts, our system being the system it is, he didn't get a hearing immediately, but he served the papers. Within 12 days the investor moved the Singapore High Court. On the 13th day, he got an injunction or an anti-suit injunction restraining him from proceeding with the matter in the NCLTs. So that was the second guerilla tactic. So, they countered his strike with another strike, restraining him from proceeding with his 241 and 242

petition in the NCLT. Mittal being advised by Bombay lawyers or Indian lawyers, did a third guerrilla tactic. What he did was he went to the Bombay High Court and sought an anti, anti-suit injunction against the order of the Singapore High Court restraining the enforcement of that order in India. And after some hearing the single judge of the Bombay High Court granted an injunction.

In the meanwhile, he had also appealed the Singapore injunction, which had been dismissed. The Singapore High Court said in appeal that we don't know how long the Bombay High Court will take to decide this interlocutory injunction. We can't wait for it. Then it's faster, much, much faster than here. So they said that the delay that will take place in India because by the time the IE was filed and it was heard, there were about seven, eight, nine months delay, which we feel other otherwise, it's pretty fast, but by international arbitration standards, it wasn't. They said, we can't wait. We are, therefore going to ask the arbitral tribunal to convene and proceed. So after that order was passed, the Bombay High Court granted an injunction saying that they shouldn't have commented on the Bombay High Court and the way in which matters are heard here because we have large volume of cases and we hear matters in turn. Anyway, the anti-anti suit injunction which has been granted in India. The arbitral tribunal there decided that we are going to proceed with the arbitration. So that was natural because they said that there's no injunction on the Tribunal. There's only an injunction or enforcing the anti-suit injunction in India as an anti-anti-suit injunction had been granted here, so they said, we'll proceed.

So then Mittal moved the NCLT in the 241 petition for an injunction on the arbitral tribunal from proceeding. That was the fourth or fifth guerrilla tactic in the same manner. And he got an injunction from the NCLT Bombay, restraining the arbitral tribunal on the evening before at 11:00 p.m. at night, the order was uploaded next day morning in Singapore it's already, I think, two and a half hours difference, time difference or whatever it is. I think it's two and a half hours. So, the next morning at 10:00 in the morning the arbitral tribunal wants to convene in Singapore. At night they uploaded the order, staying that Tribunal from proceeding.

What I wanted to... the reason for saying this is that guerilla tactics is a phrase which may have a kind of negative connotation, but sometimes a first strike or even a pre-emptive strike is necessary to enforce your rights as per your understanding of what you are rights are. It's not always that if you look at it from the point of view of the investor, the move in India, right from the filing of the 241 petition because obviously that was filed to pre-empt the arbitration was a guerilla tactic and an unfair one from their point of view because they said that these are shareholder disputes. They are not disputes which should be covered by 241, 242 at all.

From his point of view in spite of having filed at 241 petition within eight days or 10-12 days, they got an injunction in Singapore. So that was unfair in a guerrilla tactic and an abusive process, according to him. And then so on and so forth all these tactics took place. Therefore, my view is, and I think we should consider is that there are basic guerrilla tactics which are definitely have a negative connotation as Justice Kureshi rightly said, frivolous challenges, adjournments sought unnecessarily, it challenges that every interim stage for every direction made you bring it up to the High Court, single judge DB, Supreme Court. And there are guerilla tactics which, are like the guerilla tactics of Shivaji, which was also a guerrilla, but which are positive and take cases forward and lead to proper and greater justice than the guerilla tactics as we understand them. Because if you will look at it as something which is stopping what is a contractually agreed process. I appreciate that, but sometimes there may be a case where you feel that this is not the forum where I can agitate my grievance. I have something which falls dehors or outside the arbitration agreement. And if this arbitrators decide the issue then my rights will be prejudiced.

I leave you with this thought that the arbitrators can't wait for the courts to decide. We always say that and we find an arbitration the arbitrators rightly tell us that we will adjourn your matter for two weeks, four weeks or whatever it is. You go and get an injunction otherwise we are going to proceed. That's the correct approach. And, in fact, even courts have said that. I remember there are a couple of judgments of Justice Gavai, where he said that when an appeal is filed, the court should not proceed for a few days for a week, ten days. But if you don't get an injunction, the mere filing of a challenge can be... should not be countenance, and you must then proceed with the matter. I think that's where we are. The challenges which we are facing today because of various tactics adopted is one aspect but an overhaul of the act is something which is really required because we are almost 30 years down the line. And 30 years is enough time to come out with a new code altogether. Thank you.

KUNAL VYAS: Thank you, Mr. Kadam. We firstly want to thank you for appreciating the kind of efforts that we put in while playing such tactics. Thank you so much, sir. Over to Mr. Rishab Gupta.

DR. RISHAB GUPTA: Hi. Mr. Kadam said that he had a tough act because he had to follow Justice Kureshi. I have an even tougher act because I have to follow him and Justice Kureshi now. That, and because I'm followed by two General Counsellors who actually are the real victims of these so called guerilla tactics. I'll keep my remarks very short. What Kunal asked me to focus on was effectively what happens after the arbitration has ended. So, you've heard

from Justice Kureshi, what happened during the course of the arbitration. You heard from Mr. Kadam about anti-suit injunctions, anti-arbitration injunctions. What Kunal asked me to talk about was largely the fact that now you have an arbitration award. What happens thereafter and what kind of tactics may be relevant there? And just for a second before I get into that obviously that's the key, isn't it? Because no one is engaging in an arbitration for the love of arbitration, no one is doing it to create jurisprudence. Everyone and again with focus on the general counsels here, you're doing it for money that's what it is ultimately for.

Ultimately, to have that money in your bank. And unfortunately, I feel to some extent, there's a lot of focus, the entire Arbitration Act is obviously focused on the process of the arbitration. Gets you till the arbitration award, has a few provisions on what might happen to set aside an enforcement. But there's very little focus generally speaking in discussions and on jurisprudence as well as to precisely reinforcement stage of the arbitration award. Very often when I was in a law firm clients would ask, how long does an arbitration take in India? And you can sort of give answers by looking at the Arbitration Act, say, well, it used to take much longer. The Arbitration act has been amended. Now it takes less. Statutory 24 months or whatever. But no one then has it as the guess as to how long it will take to actually get the money to get the arbitration award enforced. Because that takes forever. And frankly, at least in my experience, and I'm conscious that those on the panel have much more experience than me. I have been involved in very few cases where having won the arbitration award, it has been successfully enforcing the entirety of the arbitration award has, in fact been collected on. So that's still a rarity in the Indian context, of course. Rashna and Shiv if you have a different view, I'd love to hear on that as well. So that's just one point on that.

Just coming to what precisely happens. So you've got your arbitration award. Of course, there's a life to challenge. Now that right is sacrosanct. No one should take it away. But I just want to make one observation on that. Before I started practicing in India, I used to practice abroad and I see some of my ex-colleagues here. I used to be in the arbitration segment of that law firm. We used to genuinely think that we'll start the arbitration by filing the request for arbitration. We'll finish the arbitration, and that would be the end of it. No one was necessarily thinking that after that they would get challenged in the English Courts and the New York Courts to set aside the arbitration award, and another several years would be spent in courts. Because the assumption was that parties would comply with the arbitration, most commercial parties would comply. On the other hand, in the Indian context, unfortunately, the assumption is almost always the opposite, that there will be a set aside application. And therefore, in that sense, while it's not a guerrilla tactic at all, like, to be Mr. Kadam put it that it's not necessarily something which is wrong, but it has become so much a part of our general way of looking at

arbitration law and looking at how court practice is, that we don't question that ultimately arbitration awards are supposed to be complied with, and Section 34 applications are not necessary to be filed each time there's an arbitration award. And of course, things can be done in the context of courts to limit that.

So, for example, one thing which the Indian court system doesn't really have. On paper, it has but in reality doesn't, is the cost juris prude. In other jurisdictions, one reason why you would not file a frivolous Section 34 is because you're conscious of the cost consequences of that. You file, its bad Section 34 equivalent to set aside application, you lose, you have to pay the other side's actual cost. In the Indian context, that almost never happens. When the section, when the act was amended in 2015, timelines were added for how long Section 34 could take. Those were very quickly effectively struck down as being considered directory and not mandatory. So that's one part of it that that unfortunately, it's not really a guerilla tactic as much from the party standpoint, but something which, at least from a legislative standpoint and from a court's standpoint perhaps could be looked into further to discourage the practice of assuming that every time you lose, an arbitration of Section 34 must follow. That's just point number one.

Point number two is, of course, for good mercy after the amendments, the law that existed prior, which was at the filing of the 34 itself, would lead to stay on execution, that has been changed. And, of course, the practice and a very helpful practice of award debtors having to deposit monies in the court has been developed. But again, I'm happy to hear if you have any views on that. At least in my experience as a counsel, I haven't seen that necessarily work very well each time. Monies may or may not get deposited. They may or may not be satisfactory in terms of the amount. And of course, money in the court is not money in your pocket, right? So whether or not you're able to then withdraw it from the court, how long it would take, what interest it could carry, what kind of security needs to be provided, those questions are still at large and a lot of litigation tends to happen around those what may appear trivial, what may appear to be subsidiary questions, but tend to be very important questions, because those are the questions which would ultimately mean that as opposed to just having a paper award you have some money in the bank. So that's just the second point.

Third point is, of course that even after you've gone through this entire route of setting aside the arbitration award, which may involve going to the single judge, the division bench. The Supreme Court spent several years in courts. And you now have the arbitration award, which has gone through the entire challenge procedure, and you've been successful, you should at that point, hope and assume that you'll get money, but you may not get it at that point as well,

because that's when the real execution starts. And by then the award debtor has had at least seven, eight years of having litigated against, you knowing that he or she may potentially lose, and therefore, having made himself judgment proof. By judgment proof, I basically mean having moved his or her assets out in such a way that you can't easily attach them. And that's where, of course, the real guerrilla tactics of the award debtors come in. Now is not enough time to talk about that. That would be a separate session altogether. But at least from my experience what I've seen parties do more effectively and increasingly, I think that's happening more so than in the past, is to start thinking about those things well in advance. For example, at least in large value disputes, it's not uncommon for parties to engage asset traces very early on in the process, you snap out what the assets of your debtors are. Today look further and see that if there are movement in those assets while the set aside petition is pending, make applications to injunct that.

Our courts quotes typically don't give worldwide freezing orders. But, for example, English Courts do so. Our courts also tend to not be that helpful when it comes to the discovery process. But if you see the US Courts it is very common to get third party subpoenas. It's common to get 1782 applications and so on and so forth. So that's the other part. That ultimately from the award debtors side unfortunately, the system allows a lot of different avenues to delay enforcement and potentially escape enforcement altogether. And for a party, especially a party that's well resourced, there are ways in which you can try and address it, and there are, of course, lots of different tools available to try and do that. I think I'll stop here because there's a Q and A session that follows as well, but thank you very much.

KUNAL VYAS: Thank you, Rishab. Rashna, please share your views.

RASHNA MISTRY: And I have even a tougher task after three eminent panellists. But I'll give it a shot. So I'll give a perspective from the in-house General Counsel on the topic of the government's tactics in relation to arbitrations in India. What I say comes with all the disclaimer clauses which are deemed to have been read and accepted by each and every one of you. So, with this happy note, I shall say that as we all know government is the biggest litigator in India. It generally never pays under the contract or under the service that is provided to the government and the client that is the in-house GC has to advise on invoking the arbitration clause under the contract which generally is not institutionalized, and it's an ad hoc arbitration.

So our first step would be to give the invocation notice of the arbitrator. Where we appoint the arbitrator and we have to just sit tight and wait for 30 Days for them to appoint. Good luck if

they appoint. If they don't, then we have to move Section 11, go to court and seek the appointment. Depends which court you go. If it's a good court, you'll get it in six months to a year. Otherwise, good luck. And as a GC, we have to explain that to our in-house team, the MD, the Board, and it is a tough task for us. So luckily, in a year or so the arbitrators get appointed, and the two arbitrators decide on the presiding. Then the fun begins where the arbitration proceedings starts, if they ever start, because then the government has to file its statement of defence which keeps increasing adjournments, different tactics to delay. And finally, when they file it is quite an amazing piece of art, which we have to decipher and break down.

Ultimately the intention of the government is never to pay. So instead of filing a defence, they also generally file a counter claim, which may be three or four times a claim amount to frustrate and try and show that you were the bad guys. And in fact, I am the one who suffered. So instead of fighting our claim, we are also defending a counter claim. So that adds to the GC's problems of a double whammy, and explain this to the board, the MD. So at the second stage again we face this. Also, they keep asking us on costs, legal cost and timeline. We try and give guestimates or estimates and we put the word best guestimates which keeps moving with time and with senior counsellors or expert witnesses or trying to defend the counter claims and things like that. Now, once the proceedings stage is over the fun begins waiting for the award. If it's within the time, good luck. But generally it's not within the time. And both parties mutually have to approach court for Extension of Time by six, which again requires another extension because, sorry to say, arbitrators do take time after such a long preceding stage that they need to recollect and write down the award.

So happily we get the award after, say three, four years I mean, I heard Rishab saying seven, but I don't want to be mean by saying seven, so let's say five years. My budgets have gone for a toss, my timelines have gone for a toss. Now I get the award, which is just a paper decree. 99% of the time, we don't get our money. I mean, we don't see the light in the tunnel. I would say money in the tunnel. We have to file the execution petition. For that again we have to wait for three months and try and negotiate and settle. Go to the government and say, let's settle. For every hundred, they would offer us $0.10 or $0.20, which is unacceptable because we've spent so much time, money, effort, and we want to see the at least 50% to 60% of that award amount. But of course, government can never settle and hence again it goes into the execution petition. As soon as we file the execution petition Section 34 is filed by the government invariably, whether they are strong or weak. Sorry to say, but courts tend to club the execution petition and the Section 34 and have the hearings in Section 34 rather than hearing the execution. If there's no stage, money will draw. I've only had one instance in the Bombay High Court, where deposited the full money and I was allowed to withdraw full money. Other than

that, if the client, that there's a government client gets covered under the Niti Aayog Circular they pay 75% up upfront and the balance is after the appeal stage.

So, Section 34 in court may take any number of years. I have no guesses for that. So then I go back to my board and MD and have no time estimates or whether or whatever time estimates I give may shift either early or later. Then comes our government making statements that India is the place for investment. All the foreign people come to India, invest and look at our arbitration. We are improving. Then in June comes a notification or sort of guideline to the government don't do arbitration. Go for arbitration if the claim is below 10 crore. If it's above, don't go. Go to court or do mediation? How is government going to mediate and settle when it can't settle even on an award? So, in short, they don't want the arbitration. They want us to be frustrated. Go to court. And as we all know court, I don't think we will see it in our lifetime. I may retire before any case gets resolved. So on this happy note, I will end and pass it on to the next panellist. Thank you.

KUNAL VYAS: Thank you. Thank you so much, Rashna. We understand it is difficult for you to respond to the Board. It is equally difficult for us to respond to you a day prior. Over to Scheherazade Dubash. Thank you.

SCHEHERAZADE DUBASH: Good morning, everyone. Since each of my co-panellists are vying for who's got the most difficult job today, I think it's fair to say that it's probably me because we're talking about a panel that's discussing guerrilla tactics in Indian arbitration which is appropriate since it's India ADR Week, and I'm not going to touch upon anything Indian whatsoever. But let's not lose all hope. We are in a conference where we're meant to be exchanging ideas, and we were certainly seeing a movement in terms of Indian arbitration, and so I think one of the beginning thoughts that I have is to say that when it comes to the imagination of parties and litigants who want to be innovative or difficult, they are universal, whether they're in India or elsewhere.

But let's be sombre for a moment and think about the purpose of international arbitration. It's meant to be efficient, if not cost efficient. And guerrilla tactics have the opposite impact on both time and cost efficiencies in arbitration. So what I wanted to begin with, really, is by talking about in the international sense, some of the reasons why we see this from the party representatives. So let's remember that in an international arbitration, your party representatives on both sides are rarely going to be from the same jurisdiction. You may have one that is from a civil law jurisdiction, say an Egyptian or a Persian practitioner who will have a very different understanding on rules of preserving evidence than the counterparty or their

counsel on the other side, who may be from a common law jurisdiction. And again within common law jurisdictions using, say, for example, the UK and the US, for example, there will be differences in terms of what is acceptable, in terms of preparing witnesses for an arbitration. To add to that complexity, there is no Universal Code of Conduct or Bar Rules or Solicitor Regulatory Rules that prevent counsel in international arbitration from not partaking in guerrilla tactics on account of the client.

So let's see what the users of arbitration are saying internationally. And we have two users on our panel today. But I really like data as a means of letting us know what people are saying and data is often best correlated through surveys. And bear with me a minute, because there is a very well-known university called Queen Mary University of London, which is well regarded for its international arbitration curriculum. And one of the things it does outside of teaching budding arbitration lawyers is that it carries out surveys where the Respondents to it are users of arbitration, and ask them what they are considering to be the biggest downfalls and how they would like to see that change. And consistently in 2018, in 2019 and in 2021 for different surveys carried out on different parts of international arbitration, that same university found some staggering results from their users, all of which said that essentially the lack of robust sanctions being exercised by the Tribunal was perhaps one of the weakest parts of international arbitration. And if they were to see anything change in various arbitration rules of institutions, it was to give more case management powers to the Tribunal, including robust sanction powers to combat party tactics and behaviour that are essentially guerrilla tactics.

So, what does this say? This says the obvious in that users, apart from the one on the other side that wants to obstruct or sabotage an arbitration really wanted to be an efficient process and are giving that duty to institutions and to what I like to call "the guardians of the arbitration proceedings", which are the arbitrators. So what are the arbitrators doing about it? So, in international arbitrations, there are various rules, soft guidelines and national legislation that govern the powers of an arbitrator or the discretionary powers of an arbitrator. In terms of soft guidelines, they're obviously not mandatory, and they can be incorporated by reference in the arbitration agreement or thereafter by the parties. And the IBA are a very good example of them because they have various guidelines. So they have guidelines on party representation, they have guidelines on taking on evidence and each of those guidelines addresses essentially guerrilla tactics and the fact that they should be avoided. And if they aren't avoided, then that should be taken into consideration by the Tribunal as the conduct of the parties which will have cost implications. The CIArb guidelines, or rather the Chartered Institute of Arbitrators, has similar ones.

But then let's turn to the rules. Some of the most famous international arbitration rules, the most robust of which, on this point is the LCIA's 2020 Rules includes provisions to this effect, and I will read out what Rule 14 says or maybe I won't, just to save you and in the interest of time. But essentially. It says that on the conduct of proceedings Arbitral Tribunals are given wide discretionary powers to ensure that proceedings are efficient and expeditious and it places an explicit duty on parties to act in good faith for fair, efficient and expeditious conduct of the arbitration. The ICC Rule says something similar, and the SIAC Rules are a bit softer in their approach. But they do give Tribunals the discretion to take into account a conduct when apportioning costs. But I was also very pleased to see that the MCIA Draft Rules of 2024 include similar provisions and they include a robust framework to ensure efficiency of proceedings is not compromised and empower the Tribunal to impose sanctions as it deems appropriate. So, I started off by saying I'm not going to be talking about anything India related, but here we are, and that's rule, Draft Rule 27.7 for those who are interested.

So, now we know that arbitrators have the discretionary power to control or to resist guerrilla tactics by parties and their representatives. But how is that power exercised? Or how should it be exercised? So arbitrators have a very difficult duty of balancing the efficiency of an arbitration proceeding and also the due process and effectively party autonomy. So one of the things that I've seen in arbitrations that I've been involved in are where the arbitrators are bold enough to say from the very outset and by the outset, I mean the case management conference or the preliminary conference. This is the conduct that's going to be expected of the parties and to say that if it's not adhered by then they intend on using the discretionary power that they have been given by the rules and by national legislation or the law of the seat to essentially exercise their power to impose cost awards or interim cost awards, because let's not forget arbitrary rules also give them or some arbitrators also rules give them the power to issue cost awards at any stage of the proceedings and not only towards the end. So, I find that quite interesting. The other thing to bear in mind is it's not enough, obviously to just say that to the parties. It needs to be documented. And the way it's documented is in your Procedural Order No. 1. So these are some very basic but effective ways that tribunals essentially relate to parties and their representatives, what they expect and what they want to tolerate.

I'll end really by talking very briefly about how courts can help. And I talked about what Tribunals can do and what arbitrators can do, but courts have a very important duty as well especially when they're, and we talked about anti suit injunctions earlier on in this panel. There was a very interesting case that came, or three cases that came before the English Courts where essentially, it arose out of an agreement that was entered into between RusChem and Linde for an EPC contract. And Linde suspended work because the Russian invasion of Ukraine and

said it can't continue and so RusChem then called upon the performance on demand bonds, and with the three banks refused to pay because they said they are unable to pay because of the sanctions. So RusChem then, despite there being an arbitration agreement in each of those bonds, went to the Russian courts for relief. And, of course, the Russian courts have jurisdiction, according to abusive legislation that came out after the sanctions were imposed.

The English Courts were not the seat of arbitration. The seat of arbitration was Paris, but the governing law of those bonds was English Law. And so the English courts, taking that into consideration, thought that they do have the necessary jurisdiction to prevent those Russian proceedings from continuing because other otherwise, justice will not be served. So I will stop there just for you to think about the extent that Tribunals and courts can exercise their jurisdiction and their discretion to ensure that arbitration remains effective. Thank you very much.

KUNAL VYAS: Thank you, Scheherazade. Mr. Kaushik, I request you to share your views now.

SHIV SHARAN KAUSHIK: Good morning, everyone. And I thank Gandhi Associates and International Centre for organizing this event and having this panel which has already shared their views and not much is left to say. But being from the Claimant side, I always have something to add always and to make a new claim. From my experience, I like to share how the guerilla tactics have been faced by concession companies or quantity companies or the Claimant as such and how they have also evolved. Client have also evolved to sharpen their tactics. So I'll start by, as Kunal has said, that they start from the very inception of the contract only, so in the inception of contract, they put clauses like arbitrator has to be appointed by the MD of the company. They put clauses like the listing of initial final binding. But with the passage of time, judgments have come and also clients have realised that it's not going to work. Then they came up with a no claim certificate. Once you are signing the final bill, either you sign the no claim certificate or you will not get the money and that also has been overcome subsequently because court said this is under duress and all that.

Now latest tactics that we have to find a solution to that is a very latest one. I'll share with this forum. One of the PSU, what they have started is that they appoint a conciliator unilaterally, and he's a conciliator now both of you are sitting here. He'll pass a conciliatory award under these terms. So that is a new tactic that we are yet to find a solution to that. And certainly we'll see how we can find a solution. But it is always a pressure from the client on the Claimant that

we should not pursue the arbitration. And even if we pursue the arbitration already members have shared. I'd just like to add two, three more point to that.

One point is that, when I started lodging claims and participating in the arbitration the concept of leading evidence by way of witnesses was very less prevalent, so CPC was not applicable. People were very much relying on the documentary proof, and parties have changed the correspondence at the material time, so that is the basis of coming to a conclusion based on the argument by the parties. But now mandatorily it has become practice that evidence has to be led. And unfortunately, sometimes it takes a very long time to conclude the evidence. There's no end to that. There's no procedures set for that. And arbitrators are also sometimes helpless to control the counsels. I can share few of the arbitrations, the questions have exceeded 500-700. Keep on asking the questions, 20 hearings are passed like that. It's a really pain to the Claimant because he wants to see the end of the litigation, but that is always adding to this. Second topic already Justice Kureshi, in his title in the very initial part that filing frivolous applications and saying that this jurisdiction doesn't is not there under 16 or 14. Taking him to the court. So I will not touch on that.

But another tactics, which is that they file documents at any stage of the arbitration. The pleadings have been filed, cross has been going on. They come up with a bunch of documents along with a witness. So these documents are also to be taken on record. Even the arguments have concluded. Data submission getting filed. At that point of time they bring additional documents. If Tribunal may please hear us again. So it is never ending. So these kind of procedural issues already my other colleagues has touched the procedural part that has yet to evolve in India, I think the solution can be the institutional arbitration, wherein strict rules are framed for parties to conduct themselves unlike the ad hoc arbitration where the arbitrators are also sometimes constrained to enforce their will. And they are also sometimes helpless. We find that in ad hoc arbitration. If the institutional arbitration bound by certain procedural rules based on the international standards and certainly will make a long way to have a very fruitful arbitration and the guerrilla tactics also can be then managed in a much better way. I conclude here only, so thanks, Kunal. Thank you very much.

KUNAL VYAS: Thank you. Thank you, everyone. We don't really have time for the question association, but just two or three questions that I had and then something from the audience very quickly. First to, this is for Justice Kureshi. These frivolous applications being filed and taking time, of course, at every stage, every order being appealed. Could cost be act as a deterrent even in the arbitration stage, rejecting Section 16 now Rishab saying that 34 is a normal phenomenon in India. Every arbitral award turns into a 34. We are often seeing now

that there is always a Section 16 in arbitration. So is cost going to act as a deterrent from the arbitrator while rejecting a 16? So this has consumed a lot of time. What usually happens is I file a Section 17 for interim measure. There is immediately a Section 16 from the other side with a request that the position is settled, that unless there is jurisdiction Tribunal can proceed with interim hearings. This completely derails the Section 17 hearing. Could cost act as a deterrent?

JUSTICE AKIL KURESHI: Kunal, cost is a slightly tricky part. Okay. Because at interim stage, I have to be very clear that. It was a frivolous application. Rejecting application is one part. Holding it on record that was frivolous is another part. Right? And second element is that unless I'm very, very clear. I mean, the final stage that the defence was frivolous and that his delayed the proceedings, heavy cost can be an impediment in a weaker party to defend properly all right? So cost, yes, can be imposed. Cost can be considered, but I'm not in favour of heavy costs just to demoralize or to stop challenges, but at an appropriate stage if I come to the conclusion that clearly a frivolous approach to derail the proceedings, probably cost could be one of the cause. Thank you.

KUNAL VYAS: Thank you. So one follow up question, sir and this is to the entire panel. Should there be a limit on the number of extensions that can be granted by a court to an arbitrator to pass an award? Parties can only grant six months. But then there is an endless...

RASHNA MISTRY: Absolutely agree, but it becomes very difficult to object because it has to be mutual consent and if I don't accept the Tribunal is, the mandate of the Tribunal expires and you start again. And you start again, so might as well just take the pain and bite the bullet and accept and carry on with it. Sorry to say that that's how...

KUNAL VYAS: You listed your agony really well. In one last question, sir. Seeing this position being developed with the judgment of the Supreme Court in 2018 in the ***Duro Fuelguera*** case that if there are separate agreements, separate arbitration references will have to be made. They are now seeing that even in regular course of business. Even in purchase orders, there are arbitration clauses. Now two parties are dealing there are 10 purchase orders exchanged between them. And there are 10 disputes, therefore, essentially a single dispute of non-payment or of quality of product. But should there be ten references, what it does is, firstly, there will be 10 Statement of Claims, 10 defences, 10 awards, essentially, and it multiplies the cost. Should this require reconsideration if the disputes are identical?

RAVI KADAM: You need a statutory power. Because the arbitrators can do it. So only a court can do it. So if you have a statutory provision for clubbing or consolidating multiple disputes between the same parties into one. The court has a power to consolidate claims into one, into a single...once you break up one suit into multiple suits, similar power... if you give to a court qua arbitration it might may help.

KUNAL VYAS: Thank you so much.

DR. RISHAB GUPTA: Kunal, just one thing I'll add to what Mr. Kadam said, or, alternatively, do institutional arbitration. Because the institute always has the ability to do it and through [no audio]...Tribunal would have the power to do it. One problem that we also have in the Indian context is that we do too much ad hoc arbitration which then means that lots of those additional innovations which come through institutional rules are not available. So Mr. Kadam's point that the arbitration act has not been amended for so long. Some of the need for that amendment goes down if you have institutional arbitration, because the institutions are like the MCIA, for example, are updating their Rules on a regular basis.

KUNAL VYAS: Thank you. Thanks so much Rishab. Are there any questions from the audience? Please.

AUDIENCE: I'm Sushil Shankar. A point that I wanted to make was that guerrilla tactics are possible only where the system allows it and so where it is dissuaded some of you might be knowing that in the SIAC just to challenge the Tribunal, you have to pay upfront a fee of $8,000 which makes parties think twice before they do it. And coming to the Indian context, it sometimes appears that the courts themselves believe that all is fair in love and war and arbitration. And what I have in mind here is there are certain sections of the Indian Arbitration Act which are non-appealable under 37. And there are creative parties that bypass this by going in for rich jurisdiction. So, for example I got a Section 8 petition which was allowed and we were happy that we got it and we were getting ready for arbitration. And then the other side very creatively filed a writ, and one year later, the arbitration is not even commenced. So this is one guerilla tactic that I've seen. What you have to say about this? And is there any solution for this? Court shouldn't have allowed it, but they have.

DR. RISHAB GUPTA: Yeah. I mean, typically, at least in my experience, writ won't lie against these kinds of things, Then they have been allowed, they're generally discouraged for such things. I don't know what the specific facts of your case were, but the short point should be that writ for these kinds of things should not be permitted.

AUDIENCE: Should not be, I agree, but it has. And it was very well reasoned order also.

DR. RISHAB GUPTA: No, it should not ideally happen.

JUSTICE AKIL KURESHI: If you see the trend of the Indian Supreme Court and in Global 3, Cox & Kings 1, and now Cox & Kings 2. They are leaving more and more things to the arbitrators. So there is a huge shift, pro arbitration approach, Indian courts are in exit. But then there are cases and cases and courts and courts.

AUDIENCE: No, I won't name the High Court. Thank you.

KUNAL VYAS: Thank you so much. Anyone else? Yes, please.

AUDIENCE: So we have 15 minutes for it to become afternoon. So good morning, everybody. Respected Tribunal members. I am Aditi Prasad, a maturity research at Il Lindor and being a student of Queen Mary university of London International arbitration surveys are of my primordial interest because I'm currently doing my PhD on MSME industry of resolution. So my question is to Ms. S. Dubash. I'm sorry for my limited understanding, ma'am. I could not pronounce your first name. So you talked about 2018 survey and 2021 survey. 2018 survey, which was conducted by Paul Friedlin and Scarborough's Professor Buckley. He was my professor then. It's more focused on the evolution of international commercial arbitration as a practice, and it talks more about the dispute resolution policy that the nations should have in order to achieve tactical advantage with respect to seat and unfortunately India is the least preferred seat as for the 2018 survey. When we come and talk about 2021 survey, which was conducted by Maria Fano and again, Professor Ms. Telus, they talked about the new nuances post the pandemic inflection which can be espoused in international commercial arbitration.

Now, yesterday, while attending the Tribunal Secretary program I came across admissibility, relevance, weight and materiality. I have only one question. What could be the plausible difference in relevance and materiality which may tend to procrastinate the arbitral proceedings explicitly in the name of confidentiality, which is twofold. (A), with public at large and (B), with the claims to the opposite party?

KUNAL VYAS: It's an elaborate question. Neeti is constantly signalling me we are out of time. Please keep it short

SCHEHERAZADE DUBASH: Well, I'm going to keep it very short, in fact, because I think it is a very interesting question, but I think the point is I'm unable to answer your question one because the survey deals with various number of questions that go to a large pool of Respondents and when we're talking about statistics, we're talking about what percentage of those Respondents are the users of arbitration. So we have to restrict ourselves to understanding in the context of what I was talking about it's the end client. It's the users who are talking about the inefficiencies. Confidentiality is a completely different...

AUDIENCE: [INAUDIBLE]

SCHEHERAZADE DUBASH: I think it's a longer conversation But the networking break in the interest of time. but very happy to take it up with you after.

KUNAL VYAS: Thank you. I would just like to thank all my panel members, thank you so much for coming. We had a very good session here. Thank you. Thank you so much.

~~~END OF SESSION 2~~~