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INDIA ADR WEEKDAY 2: MUMBAI

SESSION 4

Focus on The Client: In-House Counsel's Role and Expectations from the Arbitral Process

02:00 PM To 04:00 PM IST

Moderator:

Sharmistha Chakrabarti, Counsel, International Arbitration, Skadden Arps

Speakers:

Sidharth Sharma, General Counsel, TATA Sons

Rajagopal Venkatakrishnan, Senior Vice President - Legal, Reliance Industries Ltd

Ashok Kumar, General Counsel, ArcelorMittal Nippon Steel India Ltd.

Joyjyoti Misra, Group General Counsel, Gameskraft

L. Viswanathan, Partner, Cyril Amarchand Mangaldas

HOST: The next session is hosted by Skadden on Focus on the client in In-House Counsel's role and expectations from the arbitral process. On the panel, we have Ms Sharmishta Chakrabarti, Counsel, international arbitration at Skadden. She will be moderating the session. Siddharth Sharma, General Counsel at Tata Sons. Mr. Rajagopal Venkatakrishnan, Senior Vice President - Legal, Reliance Industries Ltd. Mr. L. Viswanathan, Partner, Cyril Amarchand Mangaldas. Mr. Ashok Kumar, General Counsel, ArcelorMittal Nippon Steel India Ltd. Mr. Joyjyoti Misra, Group General Counsel, at Gameskraft.

SHARMISTHA CHAKRABARTI: All right, well, thank you, everyone, for making the time to attend this panel, and in particular, I want to extend a very special thank you to my panellists. Who've taken time out of their incredibly busy schedule to come and give us their intimate perspective of the arbitration process. Now, the people who are sitting on this stage, really, they do not need any introduction but it would be remiss of me in my role as a moderator today if I didn't say a few words about each of them. So I'll start with Sidharth, who's sitting right here. Actually, Mr. Sidharth Sharma, I'm presuming to use a first name basis with him because we go way back to college. And even though I'm calling you Mr. Sidharth, I really look up to Sidharth as a mentor. And his impressive trajectory makes me and really everyone at NUJS. So incredibly proud of being from that college. Sidharth is currently the General Counsel at Tata Sons, and if I'm not mistaken, he's the youngest person to have come into that room. As Sidharth sits today in Bombay House, it's really a hallowed place. A place where Mr. Nani Palkhiwala sat. And I must say that I think his legacy is his good hands.

Moving then next, right next to Sidharth is Mr. Rajagopal Venkatakrishnan. Now. Mr. Venkatakrishnan has experience for over three decades in the legal field. He started as a very young litigator in the Madras High Court and soon after he transitioned in-house and has worked at a number of different companies over a number of different sectors including hospitality, real estate and manufacturing roles. Now, Mr. Venkatakrishnan today is Senior Vice President, legal at Reliance Industries. Reliance needs no introduction. And clearly you understand how important his role is. He manages more than 100 in-house lawyers and oversees the Group's legal initiatives. He has a particularly unique advantage point sitting at the head of Reliance's legal structure to see really a bird's eye view of high value disputes in this country. And given today's topic, we are really grateful to have him here. Sir, we're incredibly honoured. Thank you.

Right next to Mr. Venkatakrishnan is Mr. L. Viswanathan. Mr. Viswanathan as well, brings more than three decades of experience, and today he's bringing the role, which is the complementary role of outside counsel because the panel is about In-House Counsel. So, I thought it would be fitting that he sits in the centre and gets questions from his clients on either side. As a senior partner at Cyril Amarchand Mangaldas, Mr. Viswanathan has extensive experience on the transactional side and also related commercial disputes arising out of transactions. In his career, he has witnessed first-hand, actually, I should rephrase myself. He has been a participant in some of the most landmark matters that have shaped Indian corporate history. I'll just give you one example and that's an example of the restructuring and the settlement of the Dabhol Power Project Plant in Maharashtra in the 1990s. And for those of us who are history buffs as am I, the Dabhol project out of that sprung nine Indian investment treaty cases, nine of them out of one single investment and I don't need to say anything else.

Right next to Mr. Viswanathan is Mr. Ashok Kumar P. Now, Ashok, I am calling you Ashok, I hope that's all right? Unlike most of us who we start first at a law firm or we start in litigation. He very quickly knew where he was going, and he started off as In-House Counsel, and it was a very wise choice. Today he has decades of experience in India's leading steel and power companies and is currently the General Counsel of ArcelorMittal Nippon Steel. Ashok has been nominated to the top hundred GC power list and he was named as one of the best leading lawyers in 2022.

And lastly, but not the least, is Mr. Joyjyoti Misra. Joyjyoti or Joy is the Group General Counsel of Gameskraft, which is one of India's largest gaming houses. Prior to that he was at Uber, where he was the General Counsel of South Asia. He was also a partner at Khaitan. I don't think I need to say anything else about his legal career. Let me tell you another interesting fact. Joy is also an NUJS's alum, and I don't know if this is very well known to the group here. But Joy and Sidharth were classmates, and they were teammates in the first Indian team to have won the Willem C. Vis arbitration competition in Vienna. In fact, even before I went to college, I read about that in the newspapers, and that influenced my decision to actually go to NUJS. One more fact the very first oral argument that I've ever done was in a mock moot court competition where joy was the judge. So, with that, we've now transitioned Joy, really, from mock arbitration sorry. Would you like to say something?

ASHOK KUMAR: Yeah. Just to add, since you mentioned about they're both from the same college. Myself and Mr. Venkatakrishnan are also in the same college, of course he is senior to me in the college.

SHARMISTHA CHAKRABARTI: Wonderful. So, this is really a table of bringing old and new and relationships together. But moving on from college and moving on from mock arbitrations and moot court, today we're in the real world, where we are real participants in commercial arbitrations, and that's what I would like to explore today. I'd like to explore how people like myself, your service providers can really give you a better experience? And like to really understand from your perspective what are the expectations that you have from the arbitration process? So, let's kick off the real discussion then, and let's start at the very beginning in the life cycle of a dispute. Even before we get to arbitration when an agreement is being negotiated, there's a critical choice that needs to be made. Are you going to include in that agreement an arbitration clause, or do you prefer to go to litigation? And so perhaps I'll invite one of the most senior members on the panel, Mr. Venkatakrishnan to comment. Sir, what motivates you to choose arbitration in your agreement?

RAJAGOPAL VENKATAKRISHNAN: So clearly arbitration as a process is very well recognized over the last few decades, et cetera. And therefore, as an alternate dispute resolution, it has become a must as far as all contracts. And it, obviously provides a non-protocol based resolution mechanism when it comes to disputes. So first of all, it's very confidential and therefore it does not lead to any speculations in the market, et cetera. And second of all that is restricted to that particular dispute, and therefore any outcome may not sort of impact other similar disputes within the organization, et cetera. So as a mechanism it has now become a very salient feature of almost all corporate commercial contracts across all spectrum. And therefore, it's not any longer a choice. It is a part of the whole process itself. Now whether it must be institution driven arbitration or it should be ad hoc arbitration, et cetera it depends on the nature of the contract and the mechanics of the contract and where the services are provided and where the services are received, etc., and whether international parties are involved, etc, etc. But most domestic contracts from our perspective is ad hoc arbitration only, and we have the standard governing laws and things like that.

International, of course we do see Act most of the times and LCIA most of the times, etc. But having said that, I must confess from Reliance perspective we hardly do disputes. I don't know in my understanding in the last 40 years Reliance would have invested close to about $150 to $160 million in various businesses, et cetera. All homegrown businesses with multiple international partnerships, et cetera. So, we have a lot of strategic partners we have a lot of strategic investors, and we also have some of the largest financial investors having invested in our company, sovereign built funds, private equity, etc. But we have zero disputes in that sense. And therefore, these are all this is the fact in reality. But having said that, we do a lot of

precursor research in terms of what to agree and what not to agree when it comes to dispute resolution mechanism, et cetera. But in our own experience, I don't know whether my panel members or all of you will agree, in a true dispute scenario if it is settled it is found or it is resolved outside the scope of a contract only, It is not settled from and out of the terms of the contract. Contract is what it is and our experience has been reasonably good from that perspective. I will come to some of the inefficiencies in the arbitration process that we have interfaced both directly as well as indirectly, etc. But that is the long and short of where we are as far as arbitration is concerned.

SHARMISTHA CHAKRABARTI: Thank you, sir. I think the moral of the story here is even though arbitration clauses are included in your contracts. They're rarely invoked. Hearing that makes my heart sink.

RAJAGOPAL VENKATAKRISHNAN: Yes.

SHARMISTHA CHAKRABARTI: But at the same time sometimes the beauty of a dispute resolution process is if you can arrest the dispute before it actually goes into a full-fledged arbitration. But now perhaps we can ask Joy, what's your perspective.

JOYJYOTI MISRA: We do include arbitration clauses in most of our agreements. Now, having said that is it always the automatic choice? I would say no. There are cases where, strategically, I would choose not to have an arbitration clause and would want the matter if there is a dispute, to get into the courts, and that's a very strategic, deliberate choice. But leaving that aside, yes, we will normally choose arbitration. The reason I'll choose it, I think it's already been well articulated and confidentiality is a big part of it. For our domestic contracts it's generally been ad hoc, and I'm sure we'll debate and discuss as to why it has generally been that and not institutional, but for international contracts that we've been getting into it's been institutional arbitration almost all throughout. Again, in terms of the process is it always better and I'll throw it out controversially, I don't think if it's happening in India it's not necessarily always faster, better, efficient.

SHARMISTHA CHAKRABARTI: My two quick reaction to that. One, even though I am an arbitration practitioner there is certainly benefits sometimes going to court. Confidentiality is a benefit, but it can also arrest you, it can prevent you and sometimes you do want the dispute in the public domain. So that, I think, is a good reason to go to court and not to go to arbitration. But the second thing that I found very interesting, both you and Mr. Venkatakrishnan mentioned is that in domestic contracts you include ad hoc arbitration

clauses. As an international practitioner, that is something we never do. We always have an institution administering. So, question for any of the panellists, when you have an ad hoc arbitration, who is setting the procedural rules? Who's setting the stage and the rules of the game?

RAJAGOPAL VENKATAKRISHNAN: To be honest, in Reliance scheme of things, we only call the shots.

SHARMISTHA CHAKRABARTI: That's why there are no disputes.

RAJAGOPAL VENKATAKRISHNAN: Whatever contracts we do domestically it's basically we buy or we provide. Right? So therefore, in that scheme of things, we have standard template, templates for arbitration, etc., etc. But what we outside the scope of a contract what we have done is we have an excellent state coordination organization. For example, we are present across country. For every single state we have state coordination system where there will be a senior wise guy executive, ex-administrative services who understands the commercial principles from business perspective from what it takes to solve a problem, et cetera, et cetera. And then there is this conservative finance organization, which wants to save every dime and send on every single situation, et cetera, who sort of handles etc. So, we have more than informal in-house mediation and continuation process. We pretty much solve almost all for commercial disputes before it becomes a contractual dispute in that sense.

So, therefore even there most of it doesn't go into the disputes arena but even if we have arbitration clause in some of these issues matters, et cetera they are usually taken to courts. For example, in most of our suppliers and service providers can be what we call as MSMEs, MSMEs medium, small and medium industries, et cetera. Even if you have an arbitration clause in the contracts with them there are courts and Tribunals which handles their cases, and they have their own dispute resolution mechanism to solve some of those problems, etc. So, in our experience, in the last maybe in my tenure so far, et cetera, we handled some of this dispute through the MSME Tribunals on a separate arbitration process with them as well.

SHARMISTHA CHAKRABARTI: That's really interesting. Thank you so much. Now let's pivot a little bit. So, we have an arbitration clause we've already agreed. Our arbitration is sometimes good. Sometimes maybe not good. But let's say you do agree to have an arbitration clause in your agreement. Now, from a timing perspective, when you think a dispute is about to brew, or maybe when you're even writing the agreement do you conduct, and I'll ask

Sidharth this question, do you conduct a process at the outset of different scenarios that may arise out of the contract and analyse how a dispute may arise under a contract?

SIDHARTH SHARMA: Yes, so we do not every time but it depends on the stakes, what kind of contract. Is it a long term contract? The value of the contract. Do you know the party counterparty well? There are certain contracts and some parties that, you know, you know that it will work itself out. No matter what you write ultimately, when the contracts are implemented. At a commercial plane on a daily basis nobody reads the contract and implements the contract. Especially I've seen in joint venture. Nobody reads the joint venture agreement after it is signed. So, all the fight, all the markup that happens after it is signed, when the JV starts it's a different ballgame. But in such contracts and I can talk from my personal experience, as a personal perspective, because I was earlier my professional career was mostly in disputes. I feel that contract drafting is largely a game of leverage. Both parties are trying to keep the maximum leverage for themselves. Each party is trying to draft a clause to what is perfect for them but that never happens. Both sides have to come and find a middle path. Meet somewhere. And that is when you will close an agreement. You'll close a transaction. Now, in that case I feel, and we do, and I do some scenario mappings that what are the three four things that are most critical for you. Those three, four things you want very clearly, strongly written in the contract, but there are many other things that you would want to have, but you may not get because you may not have that kind of leverage.

Other party has greater leverage than you, and then you try to do an assessment or a stress test of the contract that if it were to go, or if things were to go south, if the other side is acting in bad faith, what is my exposure? If it gets into dispute that, okay, I can't get a very strongly worded indemnity. That I would have loved to have but can I get something else? Can I live with some words?. And if you talk to a disputes lawyer, and you bring that perspective then perhaps a minor tweak somewhere which will not be very prominent. And the other side may accept it, and you may use that tomorrow in a scenario to your advantage. In the arbitration clause you must think whether you should reserve your right to approach Indian courts for interim protection, when you must exclude it expressly. Right? So, all those I think scenario mapping helps. And if you do a stress test of your contract before you sign, from disputes perspective then surprises reduce, I feel. It also helps me, as a General Counsel to do expectation management. You can tell your commercial team that on these three things we are fully covered. But on these aspects it's a balance. Okay, you may not get. You have a clause which says that unlimited liability, but you know that you can't sue them. You can't quantify the losses, so you have to live with certain scenarios and you can articulate it to your management, so that everybody is on the same page.

And then you finally take the call, which is our role. External lawyers will always give you a markup that have this, but you have to close the agreement, and then you have to take that call. So good to have and must have provisions. This analysis I think we should do and at least I try to do it and it helps. And lastly, I would say that now, in this role I don't look forward to disputes and arbitration. So, if you do this analysis beforehand, and if you can mitigate the chances of disputes maybe consult a senior counsel who can tell you that if it were to go to court, how court will look at this clause. Sometimes what we draft and how those clauses are read in courts are completely different, so it helps a lot it helps a lot.

SHARMISTHA CHAKRABARTI: And in this process, Sidharth, how much of this do you do internally? And how much of this do you farm out to an external counsel, like myself, for example?

SIDHARTH SHARMA: Yes, so externally internally it depends on the experience that you have internally but you will reach out to your external advisors on the deal. And while a transaction team is working the draft will have an arbitration clause, but many a times I have seen that when I ask the transaction lawyer that so is it okay from all sides. So, they'll say if you want we can bring our disputes partner on the deal. And I say, please do. Because ultimately, if all these 60,000 words or 70 pages that we are writing if it goes into dispute, how will it play out? So, I do consult and I even go to a senior lawyer if I want to brainstorm or just double check the opinion that I am forming.

SHARMISTHA CHAKRABARTI: So then perhaps Mr. Viswanathan and you do both transactions and you do disputes arising out of transactions. When you're negotiating the dispute do you foresee that this deal might give rise to a dispute in the future? Is that something that you can see when you're negotiating the deal?

L. VISWANATHAN: Yeah depends on the nature of the deal and what you're trying to do. So, if it's a multiparty deal, then there's definitely scope to think through what can go wrong, but some of the deals have a regular lifecycle, right? If it's a supply contract, you know what can go wrong. If it is an M&A or a divestment deal, what are the areas which can go for a dispute. So, you build in all the protections based on how a typical sort of deal will play itself out. Where it gets complicated is sort of things which are unique things which are new when you're doing things for the first time. And even those get into dispute as well. So, I think, to be honest, I don't think we do that much of scenario planning in the deal making stage, because if it's a conventional or an M&A deal, as an M&A. What can sort of go wrong there? But you

build in all the protections limitation of liability. You choose the right forum, have the right inclusions and exclusions but I think one thing which I'm seeing playing out quite a bit is multi-party deals, particularly investment deals. Nobody knows you people are paying a lot of value for a number of companies and you have different rounds of investments. Things go into various stages, but nobody is able to take charge when there is a problem. I think that's something we as an ecosystem have not thought through, this is an outside in perspective. I think those kind of deals need to be thought through very differently because the value is in the build phase of a company in the future, and if something goes wrong what you can solve is recourse against a credible counterparty. But that's not always the case. Particularly when you're dealing with business failures, you have a huge problem because the legal system is not going to give you the answer there. So, I think that's, the challenge. When I look at front page, what are the major disputes? A lot of them are trying to deal with business failures through legal recourse, which is not the answer. You do more of the scenario planning at the dispute stage. But there you should be clear what are the inherent limitations. If you're trying to solve business failures through arbitration or courts. Not happening. So, you've got to sort of take that call, and I think that's where outside counsel can help, because you can bring in a particular level of objectivity and maybe someone who's now done the deal can be more open and frank about what's gone wrong. Some international clients have this sort of policy. They do take up an independent assessment on what has gone wrong so that you're not coloured by what's gone into the sort of deal making. So, I think there's significant scope to improve, but I think it's about the deal construct first. If the fundamental deal constructed is not good, I think there's not much we can do later.

SHARMISTHA CHAKRABARTI: Joy, what about you?

JOYJYOTI MISRA: So fully echo. And one perspective that I'd like to bring in over here is I was trained as a deal lawyer, right? I was an M&A lawyer before. Now, whenever you're an M&A lawyer you are paid to get the deal done okay? If you look at a contract from the eyes of just a disputes lawyer, no deal in this country will ever get done. Okay, I've had the misfortune sometimes having a disputes lawyer on the other side with a counterparty, for whatever reason, used her or him those are painful transactions. Now, having said that, do we as M&A lawyers not try to think of the risks? I think we do. Where I think we all lack and this is probably something that all Indian law firms, et cetera, can do is, I don't think our transaction lawyers are trained enough to understand disputes and disputes clauses and how they might work. Like even today, I will find drafts coming from great firms in a domestic transaction which would say, that the governing law is Indian Law without any reference to its conflicts of laws policies. And I don't know what that means and why should it be there? That's because people

don't teach what is conflicts of laws and where it is relevant and where it is not. So, the risk is if your dispute resolution clause just becomes a boilerplate with no thought given to it then it's a problem. But as a transactions lawyer also, otherwise I think it's your duty to kind of think through where things could generally go wrong. And I echo Sidharth, I think when we are in-house it's also a job to probably tell the board and appraise the board that here are the places where we are taking a call, will live with it. Here are the places we can manage. And here's a do this scenario, so let's all be on the same page and move with it. And rightly, I mean no one opens a contract unless there's a dispute. So, you just think about it a little bit while you do it.

SHARMISTHA CHAKRABARTI: It's like a prenup. You never look at it until, like, a divorce is about to happen. but on that morbid note side, just on your point about an copy paste dispute resolution clauses. This is a clause for external counsel. One thing that we regularly do at Skadden is our transactional team, and this has happened over the years. It's not happened overnight will give us the contract and we ask for it in advance. It's not something you can look at in half an hour and say, oh, yes, it's okay. If you're asking me to do that, I'm not doing my job. But that's something where the negotiation, the transactional team and the disputes team need to work hand-in-hand to draft that.

JOYJYOTI MISRA: Sorry to jump in, I think. And I wear the hat off when I was on the other side of the table. I think there is some amount of responsibility that falls on us, as In-House Counsels as well, because often what used to happen is that the client will tell you, you just get it done, no, I don't want to pay another round of hourly rates for some disputes guys to come in and take a look. So, I think it also falls on us to say that, no, I want it done just like Sidharth said. And I think it's a good practice. Get it done.

SHARMISTHA CHAKRABARTI: Very good. So, we'll keep on this topic of best practices. And Joy, I'll ask you the question. What kind of mechanisms and here I'm thinking about procedural mechanisms, you put into place to make sure, in case you are in a dispute arbitration scenario, that you're streamlining the arbitration?

JOYJYOTI MISRA: So, I mean, very few. I think one, very concrete one that at least I always try to follow is, try not to be too innovative when you're trying to draft the arbitration clause, especially an international one. You've chosen an institution. They're all great. They have their standard clause predominantly on their websites. Do not tinker with it to the extent possible. Okay, take it. Plug it in. I think that's one because you don't want ambiguity tomorrow as to whether you agreed to arbitrate or not. And believe me or not, there are several contracts where such wordings are still found, right? That's number one.

Number two is when you are doing a little bit of tinkering and everybody wants not to go into disputes and would want a mediation or senior folks will meet and do those kind of clauses are found put a timeline to it. Otherwise, it's very common to see open ended so called conciliation a And mediation clauses. So, no one knows how long the CEOs will take to resolve it. First it will go to senior manager, then to VP, then to CEO. Five years have passed. Right? And you've not been able to trigger anything. So, I think those few housekeeping rules is one that we do it. Then be prudent about your choice of seat. Which one you want? Why do you want it? More relevant if you're choosing ad hoc sometimes. So those are, I would say, at least top three, four things that I will always keep.

SHARMISTHA CHAKRABARTI: So, Joy, you're really speaking my language here. So, I do this training internally about drafting arbitration clauses. And the one thing that you mentioned about when you call tiered clauses, where you have negotiations first. Never say meet in good faith until such time as dispute is resolved because when does that end? When do the negotiations end? Have clear time limits and then on the institutional rules. If you are going to tinker with them, make sure you know how that works. But very often it's very good if you just say the LCIA Rules or the SIAC Rules will apply because the institutions have thought about the scenarios that will come up, they will deal with it. There are some exceptions to that. When, for example, so you were mentioning multi- party disputes, a huge problem that you often have in multiparty disputes is who's going to be on which side of the deal? Will you be a Claimant or will you be a Respondent? And in scenarios like that, when you have a multiparty contract, there is some benefit in providing language to make sure you know how interests are aligned and you sometimes do not know that going out, who's going to be on what side of the deal, so it's their tricky. But I am not the panellist here, so let me not take away. Ashok, what about you? What do you like seeing in your arbitration clauses and in your arbitrations?

ASHOK KUMAR: I think as far as we are concerned, as an organization. The arbitration clause will vary from transaction to transaction, of course. And we do have a standard set of clauses for our routine supply contracts. But the arbitration clause or the dispute resolution clause would be totally different in M&A kind of contract, right? And it will be different in your contract with your vendors. But now we see standardization of these clauses. We don't see much of negotiation in dispute resolution clauses now a days. We have closed around $5 billion worth of contracts in the last three years, and it's all institutional arbitration. The discussion can be in international contracts what is the institution that we are agreeing to be

the seat, be it the governing law, etc. But generally, we see not much of dispute in agreeing to the dispute resolution mechanism itself.

Me personally, don't see arbitration favourably in domestic scenarios. It always comes up as a precursor to litigation. Once you complete the arbitration process, then the litigation begins. Yeah? But in international disputes, of course, arbitration is more preferred option for us and there the cost is determined and in domestic arbitration, time is a factor. In international arbitration, cost is a factor.

SHARMISTHA CHAKRABARTI: That's, you know, on costs. That's something when I'm advising Indian clients I keep in mind that the cost of the institute, that can also be significant. An ICC arbitration can be considerably more expensive than a SIAC arbitration, but I'm curious for any of the panellists. What institutes are you appointing nominating in your causes these days?

ASHOK KUMAR: Just maybe to continue there. So, we generally prefer for domestic not saying just because Neeti is walking in. So MCIA has been our preferred for domestic arbitration and international arbitration we prefer SIAC. And of course, depending upon the negotiation, sometimes we for LCIA or ICC, but preferably we go for SIAC.

SHARMISTHA CHAKRABARTI: And in terms of seat, where you have an international contract, where are you seating your arbitrations?

ASHOK KUMAR: Nowadays we are seeing a trend where the parties are agreeable to have seat in India with SIAC arbitration Rules and governing law being Singapore and having seat in India. But that is little tricky. To again what Joy has mentioned about, right? Ousting Indian jurisdiction and what are all the role of Indian course in interim measures. So those things has to be carefully drafted in those clauses.

SHARMISTHA CHAKRABARTI: That's very interesting. So, your counterparty in these cases are the Indian counterparties or they're non-Indian counterparties?

ASHOK KUMAR: See, we ourselves the organization I come from, it's a joint venture entity. So, it is joint venture between European and Japanese entity. So sometimes the counterparties when they are Europeans it depends upon the comfort level they have with the parent organization of ours. So, if they have an experience in India and if they are comfortable with

the rules of the arbitration which we are choosing, then I don't see the reluctance for them to agree to India.

SHARMISTHA CHAKRABARTI: I'm listening to that and I'm thinking to myself, as somebody who's experienced enforcement proceedings in India over now more than a decade concerning a couple of arbitrations. Effectively what you're having is you're signing up to a SIAC arbitration. You'll get the arbitration done fast, but then you might be in an enforcement fight in the Indian courts with a foreign counterparty in the Indian courts. All right, very good. To my mind, that seems inefficient. But I guess there may be inefficiencies. There may be efficiencies, but let's think about more ways of thinking about ways to have an efficient arbitration process And Ashok, you were already talking about this. But what I'd like to dig in more is more into the day-to-day of a dispute or a day-to-day of your so called relationships with your outside counsel. When I work with clients I get a sense of what they want and what they need. There are some clients who want weekly update calls. They want to see very early drafts of documents. They want to comment on it. And then there are other clients who will check in periodically. Let us drive, and they only come to us when they need themselves to report to their board. So, I'd like to understand from you, Ashok. Setting aside the legal searches like when you're working with outside counsel, what are the best practices that you like to?

ASHOK KUMAR: See it again, depends. Right? It varies from the complexity in nature and value of the dispute. In high value disputes and arbitration, definitely we would like to have a periodic updates. We would even like to have the internal notes, get the internal notes better from the external lawyers before we present to the management of the board, but in the regular ones we don't go there. So, it varies but in general we as an organization we are fine to use the external lawyers to the extent we can, but of course we'll be mindful of the cost.

SHARMISTHA CHAKRABARTI: So Sidharth, I can ask you to comment?

SIDHARTH SHARMA: See arbitration, especially international commercial arbitration are very, I think the in house team, the management has to be very, very involved. The last big one that I was involved in, not in this role, but I can tell you, this is not a single week or even a day when the management or the senior management or in-house team would not be involved. And it starts from day one, where I would expect, and I think I can speak for all the in-house lawyers on the panel is that the first thing we expect from our external counsel is to there's a lot of clutter. I see in every transaction, every dispute you'll have 40 volumes, but ultimately every transaction has two, three, four points. Similarly, every dispute has one or two core legal

issues. So, the first thing I look or the help that I need is to simplify how the complex issues can be simplified and presented. Then, of course, once the arbitration starts, you have your roadmap. You will have procedural orders and you know how it will proceed for next one or two years. Regular updates of course.

In arbitration, another thing that is very important is drafting. Unlike court pleadings in India, where it's largely oral advocacy in arbitration, you can be tied. You can be...you are accountable to the words that you have written. You can be pinned down there and you have to be very careful in what you write. So how the statement of claim or defence or whatever, whichever side you're on, the drafting simple, crisp drafting is very, very important. And there again, the involvement of in-house team I would like to be very involved because ultimately you have to sign off. And third is, of course, the guidance. And again, I think it should happen in very, very initial stages of the dispute that when you identify your witnesses. Again, that's very crucial. Who from...there could be four potential witnesses. Who can... Who could depose?. Maybe the person who had first-hand knowledge has left the organization gone. If you want to depose only on the basis of the document. So, identification of witness and preparation of witness statement. Again, I feel that it's a very mutually collaborative process between the in-house team and the external lawyers.

SHARMISTHA CHAKRABARTI: On your comment about drafting one of my mentors at my firm, the way he explains it to me is when you draft, it should be drafting that a five year old can read and understand. Complicated English is not good. Drafting has to be simple, to the point.

SIDHARTH SHARMA: And short sentences. We, lawyers have this, we can make a whole paragraph for one sentence, hereby thereby. And I can tell you I won't name him, may his soul rest in peace. One of very senior judges and a very celebrated judgment of the Supreme Court. And I'm really looking forward to that judgment. And when the judgment came out, I started reading. The first full stop was in the 14th line. And so, I think that is...so crisp drafting, and I've seen in international arbitration. At least your Statement of Claim should read like a story, actually, especially in memorial style of submission where you are giving everything in one go. How you weave in your witness statement into a Statement of Claim and even the case laws, everything it should read like a story.

SHARMISTHA CHAKRABARTI: And going back to where you started is when you start a dispute, there's a lot of clutter. There's so many facts. From that fact you need to weave that story as Sidharth said, and tell that story in a very persuasive way. The other point that I'll note

and then, sorry, Ashok, perhaps you will jump in is when you're crafting the story at the Statement of Claim stage, there's this art to how much of detail you should put in and how much detail you should leave out. Because you still don't know what the other side is going to say and you still don't know what you want to say at the end, say at the end. So again, it comes back to being crisp, knowing what your core points are at the beginning, but allowing yourself enough room to not be tied to the words that you've said, oh, I said this in my request for arbitration, but actually, that was a bad idea. I need to change my story. That is the perfect place when, if you're a witness, you will be cross examined. That's very interesting, Mr. Sharma, you said this two years ago. Your story has changed. There you go. Your witness testimony is demolished. But sorry, Ashok, you wanted to jump in.

ASHOK KUMAR: No. So, the approach is slightly different when you are defendant in the arbitration.

SHARMISTHA CHAKRABARTI: Yes.

ASHOK KUMAR: Right? So here the biggest exercise that you undergo as an In-House Counsel is collation of the documents. Right? As Sidharth also mentioned, many times we face a scenario where there are eleven people are not there and the documents are not available. And when you have, you have a dump of 100, 200 GBs of data. So nowadays we see involvement of experts, and this is where maybe AI can bring a change. So why as you or Sidharth mentioned about. Right? So, what needs to go in even at the stage of a counterclaim or reply to the claim. So, in that we face a challenge, more so in organizations like us who have come in through an IPC process. So, we have taken over a company which went through a process now we are incumbent. The entire system is new, the people are new. So, in high value critical litigation this is a huge challenge we face.

SHARMISTHA CHAKRABARTI: And in particular in this hypothetical, are you inheriting a case from a company that you've acquired through the insolvency process and so you don't have control over the documents?

ASHOK KUMAR: See, fortunately, IBC says that all your past claims extinguished. Right? But it is easier said than that so the goods are still grappling with this issue despite judgments on either side. So, we do face those issues, and it becomes complicated when we are facing a huge claim in an arbitration process. The regular court proceedings, you can restrict it to the legal arguments, but in an arbitration proceedings it's not just the court draft as Siddharth mentioned. So here the documentation is very critical. So, this is a bigger challenge.

SHARMISTHA CHAKRABARTI: Please.

RAJAGOPAL VENKATAKRISHNAN: I think holistically, you should look at two different stages. What is the leverage you have at the time of executing the contract? I would say there's very limited scope because parties are more or less friendly when they want to do the deal, and one person will always want the deal to happen, and he is willing to compromise to whatever extent that is required to be done very easily receiving end at that particular point in time. So therefore, contract is what it is. If somebody says that he will not sell to anybody without the prior consent, etc., etc., in a case like investment, etc., etc. There are a lot of one sided clauses that can potentially be accepted without towing or knowing well that there is a maximum leverage one has in a corporate commercial, especially in M&A transaction. It's a totally different story if it is intellectual property contract. If you buy some standard essential patent and you want some derivatives to be owned by you, etc., etc. there it's very intellectual. It can be sort of taken to its logical conclusion in where the contract itself. Not many things can be provided in the contract at the state of entering into the contract.

Now, when a dispute happens actually speaking as a client I want the arbitration process to be completely overhauled. For example, if an international arbitration is look at three aspects, okay, what is arbitration? At the end of the day, it must be focusing on dispute resolution, and it must be done in an expeditious manner and it must be cost effective. Honestly in this group you tell me whether it satisfies any of these three applications. It doesn't. None. There are institutional arbitrators where awards are not passed out for three years and there are institutional arbitrations, which has costed in excess of $50 million. And there are, at least in my knowledge, five, six different cases where post the institutional arbitration, I'm sorry to say one of the party has gone bankrupt. And neither the...first of all, I think Fali Nariman, in one of his forewords to a book, had mentioned, ‘arbitration includes conciliation as a part, the act itself provides for it, but conciliation is completely forgotten’. Arbitration is also more adversarial. In fact, it's more adversarial than a litigation. So actually, speaking arbitration I don't think is meant for interpreting contracts. Arbitration is meant for finding resolution whether it's from and out of the terms of the contract or outside the scope of the contract it depends on the process. There are a lot of innovations that can be done. For example, in any corporate, commercial M&A transaction, there will be lot of third party stakeholders. Like, for example, there may be some regulators, there may be some financial lenders and there may be some third party experts. If the underlying facet and the most important requirement is making that organization as a going concern at the end of resolution, and one of the parties

can be compensated through damages etc., that must be the fundamental aspect of it. Not adversarial. See, everybody, we are trained to look at an adversarial.

And so, I'm sure most of you will not like my statement, I think arbitration, when it started as a concept envisage non-lawyers to be part of the system. That is the most important thing that has been brought into the system itself. Actually speaking some of the largest private disputes, I don't want to name people, largest private disputes in this country are resolved by non-lawyers. Some of the largest private disputes they are resolved by non-lawyers. I mean, they bring in some semblance of what needs to be done, which is a fair and just solution amidst the stuff, etc., etc. For example, any corporate commercial contract, Siddharth, you tell me when you do a deal you want a [UNCLEAR] user. It starts there, right? When that fellow wants billion dollar investment, he will sign with his left hand, and tomorrow, when it comes to a situation where he is cornered and you are not able to help him, or you don't want to help him, then what happens? It's a stalemate. So, I think the underlying factor in resolution process will be something like should be something like this. I mean, I don't think it's established as yet. But there is this Singapore International Commercial Court. I don't know any of you most of know it, etc. Singapore International Commercial Court is not arbitration, it is a court driven system but a lot of countries who have signed bilateral treaties to enforce the judgment in their respective countries, et cetera. India, incidentally, is a party to it. It is a court driven, this one. They have a panel of judges from England Malaysia, Singapore, even India. Justice Sikri is one of the panel, etc., etc. And to my mind if you actually sort of, I don't know whether it's implemented beautifully, I hear some good news, but the problem. There's a big problem there.

The problem is, you know what clients like us Tatas or Reliance, etc. I don't think we will sign it because that damned thing provides a lot of certainty. If we have a case if you have a good case if you have a good case, you will definitely win. If you have a bad case, you will definitely lose. So, if you have a bad case it is supposed to engineer a proposition for settlement. But people like us, I don't know if I tell okay. It's very fair, just etc., etc. Maybe I'll be thrown out. That's the bottom line. But hybrid I'm a little serious here because for good order's sake state the disclaimer here. These are all my personal views.

SIDHARTH SHARMA: You do not represent the views of your organization?

RAJAGOPAL VENKATAKRISHNAN: No. I'm doing it passionately because I used to work with a previous organization. We did two rounds of arbitration. At the beginning of the arbitration, we were $3 billion worth. At the end of the arbitration, it was bankrupt and we

were imposed a fine of about $7 million put towards cost, et cetera, which we were not able to pay. We were not able to pay. Incidentally, Ashok was also associated with the company earlier. So, what I'm trying to say is somewhere down the line we are losing the fundamental objectives. Something has to be done. I don't think one side's pitfall solution is there, and it will never be there also. But I think the solution is not at the stage of finalizing the contract. The solution is only there in the arbitration process, and then when I say arbitration process obviously all institutions of arbitration process are non-protocol driven. So therefore, there is a lot of innovations that is potentially possible. I think there is a lot of brainstorming that is required to be done in order to chase that to its logical end. And at the end of the day, if the fundamental structure of the business is to allow that company or that client to go through as a growing concern, the other party should be only given damages as compensation, et cetera, et cetera. That should be the starting point of the dispute itself. If you lose track and if you start thinking...nobody knows what injunction can do. And if you say somebody can't run a business and in today's scenario, people cannot survive for more than a month also and that is the case. I'm sorry if I digressed a lot of it, but this is the essence of it.

SHARMISTHA CHAKRABARTI: Yeah. Now, I think all the problems that you've highlighted of the arbitration process is well recognized even within the arbitration community. and as you mentioned, we're also trying to come up with innovations to help mitigate some of those issues. For example, time constraints. Now, you'll see most institutions have adopted expedited procedures. And another innovation which I personally like to use in my cases is this concept of early determination of predicate place. So, you first decide as Sidharth said, what are the key issues? Get a decision on those issues. And once you've done that, sometimes it's not necessary to then go into a complicated discovery process a complicated damages phase because the answer could be a yes or no. Under the contract, yes is there liability? If the answer is yes, then go on to the damages base. If the answer is no. That is the end of the story. And you saved your company money. I've saved my client money and the dispute is resolved much faster. But we can keep discussing this. One thing that I think came out from your discussions and you mentioned at the beginning as well is, Reliance rarely gets into disputes and I would now actually ask Mr. Viswanathan as a trusted advisor how do you make sure your client is able to reach that kind of a resolution of a dispute or a settlement even before or perhaps while the fight is going on. As a litigator, I'm always wanting to fight the good fight, but I also have a duty to tell myself at certain points in time, like okay, you know what, this is a good point, we have leverage. You should now try to settle the matter. What's your take on settlement?

L. VISWANATHAN: That's one of the most important things an external council can do is to tell the client exactly where they stand. They may not like it, but so be it. I think that's what is valued most by clients, and we do that quite often. No need to overstate the case, no need to understand the case, but just tell them exactly where they stand. I think the objectivity which an external counsel can bring to that, who has the confidence of the client to start with can really give the clients a proper assessment of what are the options. Is it worth their while to spend the next sort of couple of years doing all of this or find a commercial solution? Several instances where we have got to settlements with our counterparties because of we telling the client this is it. And I'm sure they will also be told where they stand. So, it's just about finding the right balance. So, I think giving an objective assessment of bad things is very important.

SHARMISTHA CHAKRABARTI: And when you're... sorry Ashok, please go ahead.

ASHOK KUMAR: No, just. I want to second what he's saying. So as GCs and as In-House Counsels, we do pre assessment of the issues, right? This is very critical step, and I think most of the good organization does this on important issues invariably. The pre-assessment involves the external lawyers, and then we take a call, depending upon that. So ultimately, it all boils down to cost benefit analysis. Sometimes knowing fully well that you don't have a good case still, you may not want to close the issue. You want to drag it and you want to force them to settle at a certain point. But those are all exceptional circumstances and exceptional scenarios. But otherwise in general, we do have a pre-assessment process and the decision to litigate or to settle or to continue with the project is taken on basis of that.

SHARMISTHA CHAKRABARTI: Yeah. And when you go to your board, because you are answerable to your boards, what helps you. Is it helpful if outside counsel prepares a risk assessment for you to present to your board because you're...sorry go ahead.

ASHOK KUMAR: Of course, it will be challenged. Right? So, it's not that the assessment provided with the external lawyer will be agreeable to the in-house team or the GC. Right? Similarly, the assessment which is approved or which is done by the GC will be acceptable to the management. So, at every state, we have to challenge it. And once we are convinced and we are able to convince the management, then whatever position we are taking will be finalized.

JOYJYOTI MISRA: So, my answer always to this is, "it depends". Right? There are certain kinds of matters where I think we can take the call and we know that people would be happy with that particular call and I don't need to get a separate validation as to whether we should

settle or not. But there are going to be certain matters which are going to be, (a) either tricky or (b) where you think that there's going to be emotions are running high. While you may have been objective, there may be certain teams, et cetera, who were let's, say, the payments of that particular contract or dispute or whatever it is, and they feel very strongly about it. They don't want to really settle because they think we have to show these guys that we were right. Those are sometimes the time when you do bring in the external counsel a little bit a note to the board and basically say that we're not just talking in thin air. Think through this. Let's calm down. It's probably for the better sometimes. I would advise a settlement, even if it's a slam dunk case for me, right? Simply because it's probably not worth the time and effort for me to go through the process to actually get that, whatever I will get at the end of the day it's far, far better for me to settle somewhere in between and get this matter done and dusted. With like for me, I hardly have commercial disputes. Most of where I'm spending, eye watering amounts on counsels are either regulatory or tax disputes. Now there I have no choice but to litigate, essentially.

SHARMISTHA CHAKRABARTI: I've had the pleasure of asking these fine gentlemen all of these questions, but I'm conscious that there may be questions from the audience, and we have such a preeminent panel. So, I have a little time, not too much and I am looking at Neeti, who's giving me a nod. So, any questions from the audience? Can we get our mic, please, so that she can...

AUDIENCE: Good afternoon. As a student of law, my question would be first, you are the [INAUDIBLE], sir I found your insights more beautiful as a student normally international mission. And thank you for bringing up the rest of the fact that as a large business, you're dealing with small businesses as well, MSMEs, that is the misery of a million, which is generally overlooked, and it's a celebrated cacophony of the circus. But the truth still stays that yes we have an abstruse or rather legislation, MSMED Act 2006, that deals with a whole entire process of conciliation followed by arbitration, which precisely what you discussed but unfortunately, when you look into section 19 of the MSMED Act 2006, it says that even if the large businesses that are dealing with those small enterprises, MSME enterprises, which are nearly 63 million in our country. As of now, as we talk. They have to submit 75% of the total arbitral award that has been given, either by the conciliator as an order or the arbitrator. Unfortunately, anybody who drafts a dispute resolution strategy specifically very popular in the large businesses, they would like to avoid this. And it has been contested time and now, in course of the sessions that ran through today that we must have risks that must be squished. But as somebody from the legal team or In-House Counsel of a company or an external

counsel, I want to know what are the factors and who all are the stakeholders that are involved in deciding these managerial perspectives of dispute resolution?

RAJAGOPAL VENKATAKRISHNAN: If I'm right, I'm not too sure about the final one. When it comes to this small MSMEs, et cetera notwithstanding whatever you have as part of your contract, even if it is totally one sided or sole arbitrator, that kind of clauses, et cetera. At the end of the day courts have come down and held, notwithstanding this MSMEs, they have the right to go to MSME Court and MSME court they have their own arbitration mechanism facilitation, et cetera. That concept is there. That is number one. So therefore, whatever you provide is of no consequence from that MSME's perspective. In fact, it goes to the extent where I, as a buyer of service, can't go to MSME, but whereas you only can go. You can go with a claim. I cannot go with a counterclaim or I can at most defend the claim is the consequence, and as you rightly pointed out, there is an element of upfront from deposit, et cetera, et cetera. In a way, I think it's a just solution because a lot of people like us at the end of the day. Okay, let me be very candid here. See, our business is in a situation where we are in a great zone. We all need each other. A contractor, for example, let's say in my business, my digital business, we have something like 300,000 plus kilometres of optic fibre across the country okay, so there will be some, I don't know, one contractor will probably do about 50 km of cable, so you can do the math. There are so many contractors who are doing this job on a day in and day out basis across the country. And 1 km of optic fibre cable can cost you anywhere between 20 lakh to 30 lakh rupees et cetera, et cetera. So, it's not small money in that sense in contract value perspective. So, in all these cases, even before he wants to go to MSME et cetera, et cetera, there is a resolution mechanism. Where the dispute will come? The dispute will probably be on some SLAs and some no failure at all.

And I remember reading one case in Jammu. Some fellow instead of 1.6 meters he had put it as 1.4 meters. So, there was a big dispute about that. Some 40-50 lakh rupees was the dispute. I went and settled it, et cetera. Et cetera. What I'm trying to say is the MSME kind of alternate system, et cetera is something more favourable to the vendors, and to that extent they are given the benefit of an expeditious solution, et cetera, et cetera. And organizations like ours we are not like...we do this project today, and we are going to walk out tomorrow. We are there in that system forever we are talking. When I joined when I started telecom, we started with 2G. Now we're talking about AI on all of that stuff, et cetera, et cetera. 6G and all is going to come, et cetera, et cetera, constantly. There will be a lot of innovations and stuff like that, so we all need each other. So that's why... this applies to my strategic partners also. You talk about some of the biggest multinationals. They have invested with us, and we also do some strategic ventures with them. So, whatever we write in the contract is not of majorly important is what my

opinion is. So, as I said these two different stages is very, very critical. One state at the time of executing the contract, there the parties will have limited leverage or one party will have more leverage than the other.

AUDIENCE: Obviously because it is a large business.

RAJAGOPAL VENKATAKRISHNAN: Yeah, and obviously because that follow is fine with the left hand. No, they told he wants the contract. He wants the PC will sign whatever you want, but at the end of the day I also can't use him like small change. I also need him. He's. A local guy, and he's the one who is going to deliver the stuff etc., etc. So, by and large, most corporations, at least in my experience, in ten years with Reliance we have always promoted fair settlements. Not that we don't have disputes. We have disputes. At any point in time, there will be some 600, 700 crores worth of no disputes across the country, involving multiple contractors etc. and service providers, et cetera. And it's our job to promote fair settlements in terms of...That's why increasingly I'm sort of trying to promote conciliation, mediation, expertise in-house need not necessarily be legal.

AUDIENCE: So, sir, when you say this does it mean that your company, as of now, does not have an in-house dispute resolution mechanisms? Specifically, for the MSME contrast that we're dealing with.

RAJAGOPAL VENKATAKRISHNAN: It's very ad hoc. The business guy and the CFOs, et cetera, will directly deal with the person on a case to case basis, understand the claims on merits, et cetera and what exactly it takes to measure what it needs to be done to resolve the dispute, et cetera. And it's done. But it's not like...we have MSME review every two weeks, three weeks, et cetera, et cetera, from a legalistic perspective. There will be some business commercial perspective. Definitely. 100%, they will do a review of all claims every week or every fortnight, et cetera, all that will be there, but it won't even come to legal.

SHARMISTHA CHAKRABARTI: I just want to say thank you so much for the question and thank you so much for the answers. As Neeti is pointing out to me, there's tea and coffee outside. So, I don't want to interrupt you from your tea and coffee. I just want to say one last thank you, please to all my panellists for coming here and the takeaway that I'm getting from this entire dispute situation, this dispute panel is disputes are best avoided and so if you are external counsel, guide your clients to try and come up with clauses that will work if you need to pull the trigger but the better solution is not to pull the trigger if you can avoid it.

So, with that, I'd like to say thank you, and please do join us for tea and coffee.

SIDHARTH SHARMA: I would like to thank you, Sharmistha, on behalf of all of us, for moderating so efficiently and beautifully this panel. Thank you for having us. And thanks to all of you. Thank you.

~~~END OF SESSION 4~~~