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INDIA ADR WEEKDAY 5: DELHI

SESSION 1

8:30 AM To 10:00 AM IST

Welcome remarks:

Hon'ble Justice L. Nageshwar Rao, Former Judge, Supreme Court of India; International Arbitrator, 39 Essex Chambers

Moderator:

Divij Kumar, Partner, IndusLaw

Speakers:

Avimukt Dar, Founding Partner, IndusLaw

CV Raghu, General Counsel, Motherson Group

Shujath Bin Ali, Global General Counsel and Chief Compliance Officer, Re Sustainability Limited

Priyanka Walesha, Head-Legal, Yum Brands!

Mayank Mishra, Partner, IndusLaw

HOST: A very good morning to everyone and welcome to the India ADR Week 2024, Day-2 in Delhi. May I request everyone to please take their seats. We'll be starting with our first session soon. The first session of the day is by IndusLaw, on Times is the Essence of Arbitration - Remedies India Needs to Undertake. May I invite on stage the panellists for this session. Honourable Justice L Nageshwar Rao, Former judge, Supreme Court of India. Mr. Divij Kumar, Partner at IndusLaw. Mr. Avimukt Dar, Founding Partner at IndusLaw, Mr. C.V Raghu, General Counsel at Motherson Group, Mr. Shujath Bin Ali, Global General Counsel and Chief Compliance Officer at Re-Sustainability Limited, Ms. Priyanka Walesha, Head legal at Yum Brands, and Mr. Mayank Mishra, partner at Indus Law.

DIVIJ KUMAR: Good morning, everyone. It's an early morning session, and it's good that all of us are now here back. I'm sure you would have enjoyed your coffee as well. I'm thrilled to welcome all of you in this early morning session and I hope all of you are feeling refreshed and are ready to dive in into an exciting lineup of discussion and insights we'll be exploring. The topic is "Time is the Essence of Arbitration - Remedies India Needs to Undertake." We have a fantastic panel of speakers who are eager to share their expertise spark a conversation, and this is a great opportunity not only to learn from their experience, but also to connect with our fellow attendees and share our own perspectives as well.

So now, just starting with the topic as you're all aware, India is one of the economic successes in development stories, and is one of the fastest growing major economies in the world. With its immense and growing population, consumer market and young labour force India continues to be a priority for foreign investors. Now, at the same time we must be prepared to have a robust and effective dispute adjudication system in place to match the ever increasing economic activities in order to comply with such growth... Sorry, complement such growth. Timely resolution of disputes coupled with enforcement has become the need of the hour.

Having said that, we are honoured to have Justice Nageshwar Rao amongst us, and I'm sure all of us gathered here, are intrigued to hear his views points on this topic. While he needs no introduction, but if I may just be brief, Justice Nageshwar Rao was elevated to the Supreme Court in 2016, subsequent to which he served a term of six years as a judge and authored nearly 250 judgments. He was the 7th person to be directly elevated to the Supreme Court from the Bar. During his tenure, Justice Rao was pivotal in shaping Indian law with his notable judgments on commercial laws, personal liberty and social security for marginalized communities in Indian society. He played a fundamental role in structuring of Tribunals and

revamping the criminal judicial system, tackling the issues of expediency of trials and appeals. Justice Rao has been an Arbitrator in several international as well as domestic arbitrations, demonstrating his extensive experience in the field of, in various fields, actually, from construction, oil and gas, energy and the list goes on. Sir, may I request, if you can give your opening remarks and commence the session. Thank you so much.

JUSTICE NAGESHWAR RAO: Thank you. Good morning, ladies and gentlemen. It's quite a challenge to speak to 15 people early morning at 08:00. I know it's difficult for people to attend conferences at 08:00. There's going to be a very good discussion on the maladies of arbitration in this country. I can give you my viewpoint as an arbitrator and not as a judge. For the past almost two and a half years I've been into arbitration, and within the short time that I have about 10 to 15 minutes, I'll share my views about the importance of time in arbitration and the problems that we are facing and the remedies. Looking at arbitration as a whole from an arbitrator's perspective, I find that all the stakeholders in arbitration are responsible for the present state of affairs, where time is not the essence of arbitration. We all know that there are delays, right from stage one, where Parties decide that they have to invoke an arbitration clause. There is a problem because Parties in India, most of the times do not agree on appointment of arbitrators. And in accordance with the provisions of the Act, they will have to go to the court. And when you go to the court by filing applications under Section 11(vi), you would see that there is at least a time of one to two years for appointment of an arbitrator, in spite of an order passed by the Supreme Court saying that all 11(vi) applications have to be decided within twelve months. I know of High Courts, apart from Bombay and Delhi, almost all the High Courts there are applications under 11(vi), pending for two to three years. I don't know if some courts where they're spending more than three years. What is the reason for this? The reason for such applications being pending is that these applications are 11(vi) are kept by Chief Justices of the High Courts to pass orders and Chief Justice invariably have Division Benches, Special Benches to deal with more important matters and on a Friday afternoon, the Chief Justice decides to take up 11(vi) applications. Sometimes the Chief Justice is busy with administrative matters, and he might be able to decide one or two cases and look at what is happening with cases pending in hundreds. And if the Chief Justice is going to take one or two cases. One Chief Justice of the Bombay High Court told me the moment he took oath in Bombay, he found that there were so many 11(vi) applications that were pending. So he allotted this 11(vi) applications to his colleagues. One of them was the Chief Justice of India when he was in Bombay Court. And the other was [UNCLEAR] Court. He said within six months, all applications were disposed of. Why doesn't that happen in the other High Courts? It's very easy for the Chief Justice to think that these applications should be decided not only by him, but by other colleagues judges also. There's no point in my saying why Chief Justice

keeps these applications to himself. But there's another way of looking at it. It's not only applications being sent to judges, but also to institutions. We have a provision in Section 11, that the High Court can designate an institution, and the institution can appoint arbitrators. There's great criticism in this country as to why only retired judges are appointed as arbitrators and why not lawyers. That's a fact. We give lectures outside in conferences, saying that, oh, this is an old boys club only. Arbitrators are like judges, and nobody else is given an opportunity. But when it comes to appointments, why is it the judges are giving work only to retired judges? Work has to be given to lawyers also.

Yesterday I was speaking to a senior lawyer who said, that he got an arbitration. All right, but it's only a sum of a few crores. Only then they just think about lawyers. Otherwise, all big matters go to retired judges only. So, this is something which has to change, which has to necessarily change in international arbitrations. You would see the retired judges of the Supreme Court of India being party nominated arbitrators and you have young barristers, kings counsel and even lawyers practicing in Supreme Court, heading the panels of arbitrators and nobody takes offense, and then they work with people. But why doesn't that happen in this country? There is a need for a mindset to be changed for those persons who are responsible for appointment of arbitrators under 11(vi).

So one, I would say that institutionalization is the answer to most of the problems. I'll tell you about the other problems for conducting an arbitration as well as what happens after that. How is it that institutions can help? When there are allegations against arbitrators that there is a delay on their part, in completing arbitrations, after appointments are made, you would see that in spite of Section 29 A, where there is a time limit that is fixed for completion of pleadings, which is six months and for completion of the arbitration with an 18 months, which doesn't normally happen. Why is it that it's not happening? Can you only find the Arbitrator guilty of the delay in conducting arbitrations? My own experience has been that it's not the Arbitrators who are only responsible for the delay, might be a few of my colleagues can be guilty of this, but it is mostly the Counsel, who are appearing in the arbitrations, who are responsible for the delay. In spite of our telling Counsel to start with, that we are not going to give extensions invariably there are going to be requests for extensions, for completion of pleadings. I have seen handling about 50 arbitrations till now. Very few cases where pleadings are completed within six months. Something or the other will come up some time is sought for extension and thereafter, what happens during hearings. Senior counsel appear before the arbitrators. They want hearings only in the afternoons after they complete work in court or otherwise they want to work only on Saturdays and Sundays. So, you have an Arbitration Bar.

I was speaking to the members of the Arbitration Bar. I said, you have established an Arbitration Bar already. Are you going to change the culture of lawyers in taking arbitration seriously and as a profession and not an activity which is ancillary to the litigation activity which they are more interested in? Unless... There's no point in speaking on platforms. Everybody comes and then speaks, saying that, oh, Arbitration Bar already. Are you going to change the culture of lawyers in taking arbitration seriously and as a profession and not an activity which is ancillary to the litigation activity which they are more interested in unless there's no point in speaking on platforms. Everybody comes and then speaks, saying that, oh, we have been doing very well for the past ten years. What are we doing? I don't think we have improved in the past ten years.

Cross examination. Cross examination is a farce in arbitrations. Most of the arbitrations are decided on documentary evidence. We rarely refer to cross examinations. Cross examinations go on for days together, in spite of transcription being there. I saw one arbitration where there were 1500 questions that were asked. You keep on reading and then ultimately you find there's nothing to refer to in the 1500 questions. So this is a source of income for the lawyers, I understand. But otherwise, isn't this delaying arbitration? And you have an international arbitration where a lawyer goes and then appears before a panel, they're given a week's time for completion of cross examination as well as hearing. They fall in line, they complete everything within one week. The same lawyer comes to India, and then he takes about five months to complete his arguments. I keep asking them, you are an international lawyer, you appear in international arbitration, would you do the same thing there? So, where is the fault? The fault is in the culture.

And when I spoke about arbitrators, when we spoke about lawyers, I should tell you the main problem lies in the culture of a client. I am speaking this because I also see on the panel, I was just looking back, there are people from industry here, and you have a law firm here. If you want to speak very frankly, most of the clients like in litigation, they would be searching for arbitrators who would write an award in their favour. To start with, they say if you're looking at some international arbitration, like an investor state arbitration, you would like to find out what the arbitrator has done, what is his past, what is this history. That's all right. There's absolutely no problem in that. Even when you're in court, when you're going before a judge you keep talking about a judge being pro-state. You talk about the philosophy. There's nothing wrong. But if you are searching for a pliable arbitrator, that's wrong, and that's what exactly is happening. I think law firms should resist from appointing people whom they find inefficient, but they succumb to the pressures from a client in appointing arbitrators who are neither efficient nor competent. That's the only way you can change the system. Otherwise, this will

go on. We'll keep speaking and ultimately you would see, even after ten years we would be what we are today or what we were about 40 years back.

I've been traveling elsewhere to speak in panels. India is a favourite punchbag. India is spoken as a jurisdiction where you should learn, either in Singapore or in London or in Seoul or any other place, what not to do in arbitration. This has been happening for the past so many years. It hasn't stopped. So, why is it that when we have such efficient counsel as well as very, very good arbitrators in this country, why is it that we are not able to improve? The main problem is the delay, which is, time definitely is the essence of contract. When you're talking of efficiency, efficiency is not only in cost, but efficiency in time also. If all of us decide that we will not only speak, but also try to change ourselves and then ensure that arbitrations are conducted within the time limits that are set out in 29A, I think definitely we can achieve something. There would be some change. In spite of the courts trying to tell the arbitrators and counsel when they go for extension of six months, in most of the cases, there are applications filed not only once, twice, thrice for extension. So, 18 months becomes another 18 months or 24 months, more than that. That's not what the 29A is there for. So, after the award is passed, the problems for time is that court interference is there in 34.

Somebody from Hyderabad came to me and then he was speaking to me. He told me that he has an arbitration in SIAC. I asked him, is it an international arbitration? He said, no. Even the other party is from Hyderabad. But both of them decided that they will get the dispute resolved in accordance with the SIAC Rules in Singapore. I told him why? You have Mumbai International Arbitration Centre. You have a local Hyderabad Arbitration Centre. So why did you not go to that? The problem is not with the arbitration centre. The problem is after the award, interference of courts. Whereas if I go to SIAC, get an award, then I come here only for enforcement of the award, the interference with the courts would be much lesser. That is one problem in this country. Interference at Section 34. So, an application under Section 34 is filed in Delhi, Bombay, Chennai or Calcutta in the High Court where there is original jurisdiction. But in other parts of the country, an application under 34 is filed in a district court. And the district judge, though, is handling commercial matters. He would be having almost all other jurisdictions, which he has to take care of, because as session judge, he has to take care of 20 PS cases, he has to take care of POCSO cases. There are so many other cases which he has to hear. And is there any expertise insofar as district, it is a concern, none. They're all supposed to go and then get trained in the judicial academy, but only about 10- 15 percent of those judges are trained. So, they would be dealing with a 34 like an appeal and dependency of an application file under 34, on an average about five years in a district court. Thereafter, you have a Section 37, which goes to the High Court, another four or five years, then to the Supreme

Court. I've seen that there is a change in the Supreme Court where SLP is filed against the orders which are passed under Section 34 are not normally interfered with, even at the admission stage. They're dismissed. That's a very good sign. But how do we find a solution to this? There are various suggestions that are coming from different quarters, though they are not part of the recommendation, you have some sort of an appellate court which shares only applications under Section 34 against the orders or awards passed by the arbitral tribunal. For each zone, the four states or five states put to made by the TK Vishwanathan Committee.

One is that it should be only the High Courts who deal with Section 34 applications. That would reduce the delays in applications under 34 in the district court. Number two, there's another suggestion that in the country, there is broadly a division of four, south, north, east and west. So you have some sort of an appellate court which shares only applications under Section 34 against the orders or awards passed by the Arbitral Tribunal for each zone i.e. the four states or five states put together, or even seven, eight states put together. That will cut delays.

See, we are not Singapore. We need not follow what Singapore does. Singapore is hardly the size of Hyderabad. So, the problems of India are completely different when you compare to the smaller countries. You have 720 districts. You have 147 crore people. And then there are so many disputes. Especially on the arbitration side, you see thousands and thousands of disputes coming. This only speaks of our economy doing very well. Ice of the entire world are in India. So, unless we change ourselves, only people from outside would benefit. So, we would not be benefiting. So, how do we do that? So, we would have to promote institutions, for what all I spoke about, which are facts and how would the institutions help in the appointment. If institution is asked to make some appointments, they would appoint from panel of judges, lawyers and people who are technicians, and then you would get the best of the arbitrators in the panel. Instead of only retired judges being appointed by judges in court. And that too, is there any method in that madness? No. Is there any roster? No. So, at least you have an institution who knows who will be good for a dispute, and then they'll appoint the best person. And in conduct of arbitrations, the institutions would ensure that this disclosure from the arbitrators about the number of arbitrations they have. Right now, disclosure is not happening. Let me be very frank, ladies and gentlemen. Most of us don't disclose the actual number of cases that we are dealing. There's no control, there's no regulation. If there is an institution, institution will at least ensure that the declaration is made properly and thereafter timelines.

The institution would definitely prescribe timelines, they will be monitoring and supervising the conduct of the arbitration itself. So at least you are sure that things will fall in place and

then the award would be passed within time. And then thereafter, scrutiny of the award. If the institution is scrutinizing the award it would ensure that the award is like an ICC or an SIAC award. And where, if you send the award to court, the interference by court would be lesser than what it is happening now. You can't stop a litigant in this country who has an award against him from not going to the court under 34. You can take it for granted that any award is challenged on all sorts of grounds, but it is for the courts now to ensure that there will be no merit reviews and arbitral awards have to be treated in the manner in which the Act provides for. The Act says that you should not interfere except on grounds of public policy, which is again restricted by the judgments of the Supreme Court. So, all this would happen with the help of the institutions and unless we promote institutions, it is very, very difficult for us to ensure that arbitrations would be conducted within the time.

But what is stopping us from promoting institutions? You have a Mumbai International Arbitration Centre, which is conducting this conference. It's been doing so well. For the past ten years, a lot of development in how SIAC administration is there, how they conduct their arbitrations. But why is it that it is not promoted? Why is it that Indian clients go to Singapore? So, there should be a change of mindset. I was speaking in Singapore recently and then I was asked a question. If you are given a magic wand, what would you do to change the arbitration landscape in India? I said, change the culture. Culture of whom? I said that it is actually the consumers of arbitration who have to change first. The consumers of arbitration should think that they want the best arbitrator, impartial and honest arbitrator, not a pliable arbitrator.

And number two, the law firms. They have to change their mindset. They should not keep running to London in Singapore for every matter. They should ask people who come to them, even at the initial stage of a contract being entered into, let's say, MCIA clause. I have belief in MCIA. So, let them conduct the arbitration properly. And thereafter the lawyers, the lawyers have to take this arbitration as a profession and not as an ancillary activity, as I said.

And the last, arbitrators. There should be introspection amongst arbitrators. This is not a money spinning activity, which we are accused of, and this is not correct also. The allegation might not be right. I might have a different perspective sitting in the court, but after you retire, your perspective will change. Not all arbitrators are bad. Most of the arbitrators are doing their job in the best manner which they can. A 5000 crore arbitration fetches about 30 lakh rupees as fees to an arbitrator. Because here in this kind country, public sector undertakings insist that the fee should be only Fourth Schedule. How can you accuse an arbitrator for extortion of money? There are a number of arbitrators who are doing their job, so don't generalize. But again, I say there is an introspection that is required from the arbitrators. There should be self-

regulation because all of us operate in silos. We don't have any regulation. That is the reason why I said institutions.

So, having said all this, I have great hope in youngsters who have taken to arbitrations as a full time activity in this country. I've been seeing, not only in this country, outside this country, Indian young lawyers are doing extremely well. And the change should come from them. Please promote institutions, which is the only answer for finding remedies for the problems that we have in time being there since of arbitration. Thank you.

DIVIJ KUMAR: Thank you, sir. Obviously, there's a lot to learn from your rich experience and you are absolutely correct. There's a requirement for introspection as well, so certain important takeaways.

Starting off with the delays, then the designation of designate institutions, appointment of judges who's responsible at the client's request or the recommendation of the lawyers or directly coming from the court. And delays, rightly said by sir, delay is not just the fault of the arbitrator. It is actually all of us collectively who are probably responsible for this and being part of the system. Now, before I start the Q&A round, I thought I'd introduce our distinguished panellists here.

Starting off with Mr. CV Raghu. Mr. CV Raghu was the Group General Counsel of Motherson Group and drove its legal, secretarial, regulatory compliance and governance process across the globe while he is demitted office to pursue his profession and other passions in life, he continues to support the group as a Group Legal Advisor in a non-exclusive consultative and advisory capacity. Apart from the Motherson Group, he provides advisory service to various other companies and serves as an independent director on the board of various companies.

We also have Priyanka Walesha here. She is the Head Legal of Yum Brands! She's an in-house Counsel and she has hands on professional experience in setting up and handling legal and compliance function with the board management requirements of the corporate. As a part of the corporate and business leader leadership team provides strategic inputs for facilitating business growth in complex regulatory environments, improving legal process, and leading policy advocacy efforts.

We also have Shujath Bin Ali. He's the Global General Counsel and Chief Compliance Officer Re-sustainability Limited, and he serves as the global sorry... This is one of the KKR companies, I believe and he was awarded with one of India's finest in-house counsel's

recognition by the Indian Corporate Council Association supported by the Ministry of Commerce, Ministry of Law and Justice, Government of India and also named as one of the top hundred general Counsels in India by the Regal 500, dot in year 2016.

We also have Mr. Avimukt Dar, who is our Founding Partner at IndusLaw. He advises and represents clients across a range of business laws and regulations. He held domestic investments, data protection, ecommerce to fintech across practice areas. He is represented clients in M&A and P transactions, as well as commercial and corporate matters and regulatory controversies, including competition law, data protection.

We also have Mayank Mishra. He's a partner in the disputes team at IndusLaw, and he has over two decades of experience. He's advised and acted for various Indian and foreign business investors, public sectors, enterprises and financial institutions in variety of disputes.

To start off the session, we have a very interesting point. We are quite blessed to actually have two major panellists who have actually seen the 1940 Act and then subsequently and the enactment of the 1996 Act and followed by the amendments that have taken place, the 15, 19 and 21. Starting off with if I may, sir, in your experience, can you share with us that as to how the arbitration regime from 1940 to 1996 and subsequently with the amendments, it has evolved over this long period. And how effective is the current arbitration regime, if I may?

JUSTICE NAGESHWAR RAO: I'll speak from here. 1996 Act, which was brought in on the UNCITRAL Model Law brought in sea changes in comparison to the Arbitration Act of 1940. I do not know whether all of you are aware of this. Pakistan still has the 1940 Act. Recently, they are trying to amend the 1940 Act to bring in 1996. 1940 Act was really a serious problem because the grounds for interference of an arbitral award were very wide. Misconduct of an Arbitrator under Section 30 and 33 and the award passed by the Arbitrator was to be made a rule of court for implementation, which means that it needed an extra matter of the court on their work. You can't even think about it. Youngsters who are here would be thinking, it is so strange that you need to go to court and then get the award made rule of the court. That itself would take a very long period of time. 1996, Amendment that was made was, as I said sea change to the 1940 Act. We were all very happy when the 1996 Act came into force. We thought that this is the remedy for all the problems that were being faced earlier insofar as commercial arbitrations are concerned, but in the working of the 1996 Act for a long number of years, we found that the ground reality was that there was no change. And judicial pronouncements should start with the Red public policy in a very wide manner. Thereby giving handle to the court to interfere in all awards. So, it took the recommendations made by the Law Commission

by Justice Shah, the Expert Committee by Justice Sri Krishna and the Supreme Court played a very important and pivotal role in interpreting the provisions of the 1996 Act, to mean that the court should not normally interfere with the awards passed by the Arbitral Tribunal. And with the amendments that have been brought in 2015, 2019 and 2021, the 1996 Act is very robust now. There's absolutely nothing wrong in the 1996 Act in comparison to the other Arbitration Acts in the other countries. It's only the question of people understanding it and implementing it properly where the problem arises. And the Supreme Court's several judgments have said so. The law is very clear. It's only a question of implementing the law. That is a problem. So the 1996 Act, you cannot have more complaints about it now, especially when the government is all the time looking for reforms of the Arbitration Law and with the recommendations that are made by the TK Vishwanathan Committee. I went through it twice or thrice. All of them are very good recommendations. Once they are also brought into the realm of this 1996 Act, the 1996 Act should do very well.

DIVIJ KUMAR: Thank you, sir. Mr. Raghu, you have been with the companies and they advise them for the longest of time. And what has your experience been, if I may ask?

CV RAGHU: Thank you good morning, everyone thank you. Delighted to be on this panel. And it's an honour to sit with Justice Nageshwar Rao and other fellow colleagues. Before we get into the specific of arbitration and implementation, I think there are some fundamentals, and this is something I have been thinking for the last three and a half decades when I've been on the side of the industry, what is ADR? It is Alternate Dispute Resolution, right? If the alternate dispute resolution mechanism shadows the judicial process of dispute resolution, then it's no more alternate. I don't know whether I'm making sense or not. The reason why arbitration, mediation, all these things started is because judicial system has its own process and what are the kind of matter that should go to arbitration. Arbitrations are typically commercial disputes. They don't need legal philosophies to be defined. You know that two Parties that are at a commercial dispute should be disposed expeditiously. But what has happened, as Justice Nageshwar Rao was saying, that even appointment of arbitrators take two years. At the end of the day, please realize, the industry does not like a time consuming litigation process. Arbitration has become like another dispute. Go into the High Court or go into any of the courts. Why should the company be spending? At the end of the day, industry looks at it very differently. It's a bottom line issue. For a matter, say there's a matter of 100 crores, if I have to settle at 80-90 crores, I would rather settle it rather than spend another five crores on dispute, and that will take me two years. I have other means to earn that money rather than getting to this long run dispute. So, first and foremost, as Justice mentioned, cultural change has to happen.

Please, culturally don't see this as another litigation process. It is not a litigation process, it is an expeditious method to resolve commercial dispute. I don't think in arbitration, people come about constitutional law, right? That doesn't get into, that goes to the courts. What goes before the arbitration are disputes, and these are commercial disputes. And I just beg to differ, sir, one small thing, that the arbitrator should not just be limited to judges and lawyers. Today is an expanding world. You have technically sound people. Why can't a CEO who has run a company for 30 years, be an arbitrator, because that guy knows exactly what hurts the business. And you can always have interns below him or some legal people who can write the awards. But for the dispute resolution part, you have to have expeditious disposal. Otherwise, the faith in this whole system will go because arbitration failed. Now we are talking about mediation right now. Tomorrow we'll talk about something else, but at the end of the day, it's old wine in new bottles. That's it. Nothing is changing. And I'm saying this with all humility, in that industry, today the speed at which the industry is moving and we become, what, the third or fourth largest economy. If this has to become the largest economy, somewhere we ... will also have to play a very significant role in an arbitration matter. If you go and give an arbitrator 5000 pages of submissions in the pleadings, what do you expect the arbitrator to do? Yes, will the arbitrator read 5000 pages somewhere? Somewhere we are losing the woods for the trees. And it might sound cliched, I worked all my life with the belief of zero litigation. Zero litigation. In fact, in my last company that is observed, we have zero litigation. Motherson, which operates in 42 markets. 42 markets. I used to manage 248 companies around the globe and we are very exclusive. We are into M&A and all of that, but our litigation is zero. The reason why we have followed that principle is only because of this. Because if you get into litigation, unless a regulator is taking us to litigation, that's a different issue, but we have commercially not litigated at all. And that's the trend that will happen if we don't. We have to be relevant to the industry. If you are not relevant to the industry, the industry will move away. How many IT disputes come between IT? They don't resolve it themselves. They don't get into any arbitration because they know that good money for bad money, right? I'm not, for one, saying that arbitration should not be there. What I'm trying to say is that the essence of time, the essence of the outcome, the integrity of the arbitrators, the ability to understand the commercial disputes, all these things play a very significant role, too. You must have the trust of the industry if they have to come to arbitration, and I'm glad that with institutions like MCIA and others, I think we must build something so that the trust of the industry is there.

DIVIJ KUMAR: Thank you, sir. There is a lot of talk around cultural change. And at the same time, if I may, with the opening of the global economy in India, we have a lot of different

industry set up, so which has obviously increased the complexities in the litigation as well. We now have this, we are in the age wherein we also have specialist lawyers. Firms are being sought for their specialization. Be it in the oil and gas industry or the construction industry. Tech is something in another space. So now, while we have these specialist lawyers and the focus is on from the institutions that are in a position to provide such specialists and arbitrators on the ad hoc front. We have not seen that change wherein we are seeing that the parties are recommending a judge. So, to what extent, if not while institution is the case, but if not that case, if appointment by the courts as well, or for that matter by the parties, what would your recommendation be? This is Shujath and Priyanka both, I would request your views on this.

PRIYANKA WALESHA: So, warm good morning to all the panellists and the audience. Thank you for being there, early morning. So, I would like to say that if not institutional and you're saying that the appointment of the arbitrators, with the advent of the amendments being in place and still being a big challenge, in terms of even for the appointment of the arbitrator. And even if the award has been granted, it's half marathon won because enforcement is another big challenge. With the amendments in the law, I think the major challenge that right now we are facing with the arbitrator and the sole appointment of the Arbitrators. Even we have the three main requirements are the expertise of the arbitrator, the impartiality and the time. As Justice Rao clearly mentioned that it is always considered as a secondary profession, and they do not consider it as a primary profession. They always consider that as this is a secondary profession for them. So, the major challenge lies in where the arbitrators themselves will try to take this as a primary profession and then I think the shift will be. Because at times there have been situations and why there's been a shift to the institutional arbitration is, because they are more streamlined in terms of the following of the rules, which does not happen when it comes to an Arbitrator appointed by the Parties, the timelines being followed and probably the expertise as well. Considering the niche requirements in the disputes that are required to be handled and rightly pointed out by Mr. Raghu as well, that it's important to understand as to we are not trying to litigate this matter. The aim is having an Alternative Dispute Mechanism and not have a whole litigation experience. The aim is to save the time. So, are we trying to achieve that? Are we being able to achieve that? If not, then we have to understand that there has to be a shift, a thorough thought of shift in terms of as to how the whole arbitrator profession has been taken up. Also in terms of how the Parties are pursuing that, because it is not only an arbitrator's responsibility to ensure the timelines, but also, as we know, that the number of questions that come across in the cross, which anyways, prolongs the whole procedures. So, we need to understand as Parties, when we are appointing the Counsels or when we are appearing in front of the

arbitrator that are we looking up for the resolution, or are we looking at the prolonged litigation process, another process wherein we are just prolonging it. And the cost, because most of the organizations now are trying to move back from our arbitrations, considering it's not cost effective.

So, I think we need to find out a way where we are utilizing the arbitration, the Alternative Dispute Resolution mechanisms in a combination method as well. A lot of organizations are using now, Med-Arb. It's called as Med-Arb. So, the aim should be not to achieve the half run marathon wherein the whistle is blown and is still running, but the aim should be to understand as to the amendment that has been bought up in the Arbitration Act. Are we being able to use that to our advantageous position or not. Simply seeking out the exceptions in terms of the timelines is only going to prolong the whole procedure.

SHUJATH BIN ALI: I think definitely as practice note, we at our organization are forcing to put the institutional arbitration clauses in various jurisdiction and whether SIAC or MCIA and wherever, because that is something. What we're trying to work with business and put the arbitration issues in arbitration clauses definitely. But I definitely have some of the thoughts with respect to the whole issues around more practice notes. We come from a company where we have close to 100 sites across, a lot of power projects and mostly the waste management projects, which means a lot of contracts with the government principal corporations. And some of them are all pre-2019, so carry a lot of legacy issues. So, all the points what Justice Rao mentioned there at this point of time, we have a couple of issues wherein I couldn't appoint an arbitrator, since last two years and Section 34 related matters. Quite a few are there, more than three years, no resolution, 37 of issues are there for two years. We got some deposits in the courts already, but I couldn't get a single rupee out of the deposit, simply because of some procedural issue of the name change and all, and it went to the Supreme Court and again, from Supreme Court to back to High Court and back to the Execution Court. So as we speak, I have money in the court, but it's not with me. So we have some of those issues as well, and where everything is all good, but where the government doesn't want to pay, they go to Supreme Court for SLP. Somehow they get lucky and the money is stuck. So there are a lot of issues, and if everything is there, well, and of course, on enforcement aspect, I think that is the big challenge you're facing. So, as a General Counsel, I have a quarterly dashboard which I need to present to the board. That is a big terror factor for me because they have completely remembered all the timelines of the cases and all. And the challenge for me to demonstrate the progress and demonstrate how much cash we realize, because ultimately the aspect is okay, how much cash we are realizing. So, in fact, some of the KRs are linked to the realization of the cash, and you can imagine the plight. So, all in all, I think there is a mixed reaction, right?

And as I speak to some of my colleagues in other companies in terms of general counsels and even law firms, right? Right now, I see a mixed and a divided view wherein some of the general counsels feel, I think we possibly not want to have an arbitration clause at all. That's the kind of discussion what we keep hearing. Last week from a timeline standpoint and also from the cost standpoint as well. So, I think these are some of the live experiences. And as a legal profession, we really have two different. At the same time there has been some good experiences as well because we work across India and some of the jurisdiction, we've been quite lucky and more so the luck factor really worked where the other parties, a private party with parties, the government party, we definitely faced lot of challenges.

DIVIJ KUMAR: So, good to hear that all is not bad as well.

SHUJATH BIN ALI: All is not bad.

DIVIJ KUMAR: So, Avimukt, if I may, you have worn both hats. You started as a litigation counsel, and now you wear the transaction lawyer hat as well. So generally, Mayank and I, we would come into a dispute when it's actually risen post the drafting and execution stage and everything of the agreement. So when the agreement is being drafted, how would you advise as to what the client should be mindful of considering all these delays and these problems that we are hearing so much? Mind you, it's a good option to even pitch here, keeping in mind the problems that they have just shared.

AVIMUKT DAR: Thank you very much. In fact, you were kind enough to not mention my name when you talked about 1940 arbitration. But when it did start out, there were still a few cases. I never had the pleasure of initiating a 1940 arbitration, but they were explained. I completely agree with Justice Rao that it used to be a horror at that time, especially for young lawyers, to have this concept of a rule of court and the way umpire used to sit in the arbitration, and the whole structure was very different. It was very English in that sense, because even today there are a lot of arbitrations where the court is involved, like GAFTA arbitrations. Because of the desire for certainty, the litigants actually prefer the best of both worlds. They do want a court conference because they don't want a situation where there is no decisional practice or precedence among themselves. From a drafting perspective, one of the things that I have become a bit shy of, is conciliation. Now, traditionally, a lot of complex agreements, especially Shareholder Agreements, have conciliation clauses, I realized that those are maybe better suited for certain kinds of transactions, such as projects or construction contracts, but a lot of contracts, you're going to rush to Section 9, very fast. If you're going to rush to Section 9, if that's the anticipation. It becomes a bit messy to expect litigants to get into a mediation

process or the typical process you see, where in fact, as Mr. Raghu mentioned, you often have CEOs sit down as the first point of contact and to a conciliation. But unfortunately, because of the Section 9 pressure that you have in lot of arbitration, you want to get entry model from the court. So you cannot really start that gentleman or gentle person structure. The other thing which is very important is Institutional Arbitration. That cannot be emphasized enough before in the ***Amazon Future*** dispute but for SIAC and but for Emergency Arbitration, that entire there's a saying in Hindi, that the buffalo would have gone into the bottom, right? Of course, it was a great credit to the Indian judiciary, especially the Supreme Court, to uphold that Emergency Arbitration. But if they had not had institutional arbitration, if it was ad hoc, forget about it you would be doing appointments of arbitrators. So one cannot emphasize the need for institutional arbitration. In fact, a lot of people ask that. If it's Mumbai centre, does it mean it's Mumbai. But, hey, we are in Delhi, so the important thing is just like SIAC, if you succeed as a centre for arbitration, I think litigants from all across the country we'll be choosing the Mumbai Centre as set institution, which is there. So these are, I think two aspects which my learnings as a corporate lawyer have been that focus on institutional arbitration, do not focus so much on aspects of conciliation, unless, of course, you have strong bargaining power. Then you want that, right? So these are the two things. Finally, from an overall contract drafting perspective, I think Justice Rao also mentioned this and Mr. Raghu also mentioned this, there is a genuine trend to move away from arbitrators who are retired judges and draftsmen should be respectful of that trend and not make things over technical. It is very important. In fact, we are seeing more formulas being used, in lot of agreements, because the idea is that maybe a legal mind may not be very good at mathematics. It's a stereotype. But a person who is an Engineer might understand what the Parties intended. So, when you say consensus *ad idem* the meaning of that should change over the coming decade as you have more lay arbitrators, as you have a more technical experts. So plain English is, I think, a must in drafting.

DIVIJ KUMAR: Thank you, Avimukt. Something very interesting that I just observed in the answers of the panellists. One was that Priyanka was quite keen on conciliation also being given as an option and mediation was consideration as well, and Avimukt, you're believing in that it has to be seen on a case to case basis. In 2022, we had this direction from the Ministry of Power that the PSUs, they have to now, it was a very interesting direction that they have to opt for conciliation or they have to give an option of a conciliation or arbitration. In the event the parties decide for conciliation, and if the conciliation is not so successful, the arbitration mechanism is closed for them and they are reverted back to the court. Now out of fear, once the conciliation process starts, obviously nobody would want to go back because obviously there is a lot of backlog. So obviously there have been progress in the conciliation. So, Mayank, if I may, would you feel that this, because this is so far limited to the PSUs and that too in the

hydro sector. But would you feel that there is room for expansion and extending this to other sectors, maybe starting off with the government because they are the biggest litigants, and then subsequently moving forward with the private parties.

MAYANK MISHRA: Okay, thanks for the question, but I don't think I'll be well placed to comment on what the government thinks. But offering this as a mediation, as a commercial mediation or conciliation as a re-litigation thing is now there to stay, whether we like it or not. And I think it is a good thing because given all the problems we have been discussing inciting during the discussions, I think as business houses, everybody would agree that they would want to give a proper, genuine shot at resolving issues before going on that long battle. And the need, actually, is to have maybe more structured approach to these discussions, rather than just having a casual position exchange. But actually looking for solution is something which is hoped will change with the Mediation Bill coming into force and other things being enforced. So, the trend is to actually provide for truly alternative solution which, as Mr. Raghu said, a mediation or conciliation can offer. But is it a solution really in a hardened, contentious situation? I don't think so. Because Parties, by the time, they make up their mind or they approach lawyers, mostly in India, they have made up their mind that a litigation and an interim order is a negotiating tool, right? So, I think it has to be a mix of both. There can't be a one-size-fits-all solution, that for every dispute, whether mediation, conciliation will work or not, but of course, as an option, it has to be there. And as some of the institutions, some of the more so-called mature jurisdictions for resolving commercial disputes. They do deploy these tools, Med-Arb, Arb-Med-Arb and things like that.

DIVIJ KUMAR: I'm conscious of the time because it's ticking in front of me. So I just put an open question to all of you. Follows from what Justice Nageshwar said in his opening remarks, one legislative change if you had the power to do that. One legislative change that, if you could make, what would it be to ensure that we have this speedy mechanism actually being an effective mechanism? Sir, I'll start with the industry leaders and we come back to sir.

CV RAGHU: Let me tell you before I answer your question, why do we litigate? There's a question to the audience. Nine out of ten times, we've litigate because we want to delay the process. When there's a dispute written, parties, both the parties actually know who is on the wrong side. We have to be really fooling ourselves. If we don't know that, we know that. But we still go for litigation. Why? Because we exploit the time consumed for the litigation and whoever is in a better financial scenario is able to sustain and the guy who's slightly weaker will succumb. That's the strategy typically people use. And if I had one legislative change, I would want to put exemplary punishment for artificial litigation or for frivolous litigation. I

have not seen people who misuse the process of law being really punished. The day you punish one party, look at what is happening in the CCI. CCI started award in big penalties. The industry is coming on track, completely. Industries spend days and days to make sure if they are doing a transaction, it is well within the boundary lines of competition commission. Why? Exemplary punishments. And I would go one step forward, that if such litigations are being initiated, frivolously whether it's the small party or it's invariably the more powerful are the people who are trying to do this, who misuse the process of law. So, you make the Directors liable. You made the CEO liable. The fear of law has to be there, that don't misuse the law. That will reduce substantially I can assure you, because I have heard so many times people tell me, what will the dad do if I don't pay? That's not the way businesses are run and I'm keeping my comment purely to the commercial side. I'm not getting into that because I represent the industry. So if you have committed to pay some money and if the person has done the job, you better pay it. By delaying the payment, you are happy that he'll go to litigation and three years later he'll succeed. He may fail, he may die. You are trying to complete the process of law. And extraordinary punishments have to be a factor whether it's arbitration leading anywhere. Otherwise, the rule of law the fear of law has to be there. If that's not there, this will continue. Tomorrow from arbitration you'll go to mediation, you'll go to something else we'll keep developing different mechanisms, but we'll never solve the problem. Thank you.

DIVIJ KUMAR: You actually have experience in multiple jurisdictions. Is this something that we can probably learn from other jurisdictions?

SHUJATH BIN ALI: Section 34, specifically on the patent illegality, because that is one aspect on which challenges a lot and potentially a power to modify the award in a very exceptional cases, because today, what's happening. a two transaction, if you compare one with a normal jurisdiction, they can actually go for appeal. And in another situation where you got a bad award you can't modify and go back, see the timeline the whole dispute takes. So that is, again, a contentious issue. But that is one aspect, and overall with respect to the timelines, real strong enforcement. We have those provisions, but it's not enforced, as you know.

PRIYANKA WALESHA: I think the biggest challenge and I'll go back to the topic for the day, which was the time is of the essence. We have tried to have timelines in terms of in what time you need to close or have the resolution of the matter, but actual problem starts once you even have the award. Does your award, is it only a paper tiger or it is absolutely enforceable? So, if it is not enforceable and there are no timelines to the enforcement of the awards, the litigant is still suffering. So, even if the award is in place, if you're not able to put across the timelines for the enforcement of the award. If you're not able to put a cross, the penalties, if

the timelines are being extended, and to what reasons are those being extended. We are still not achieving the Alternative Dispute Resolution, so we need to get a little more stringent in terms of the timelines as to what exceptions are we along. And in case of those exceptions are allowed, what are the criticality of those exceptions? Unfortunately, right now I would say the big problem is that even after achieving the award, we are not able to enforce this, enforce the same. Although I would recreate one of the judgments by the Supreme Court wherein they have held one of the award being led by the SIAC and whether it have been put in for the urgent enforcement of the international award, but we are still, we have partially achieved the target, what we're trying to achieve by the alternative dispute mechanism.

DIVIJ KUMAR: Avimukt?

AVIMUKT DAR: I think the Legislature has been very active in this field and as Justice Rao very nicely put it, if you compare to our neighbour to the west, because there are no votes. There's no pressure, no populism behind arbitration law. A lot of legislatures are not as active as ours. So first, credit to successive governments that they have focused on this. I think a lot of reform has already happened. There is a push from Parliament to make it time bound. There's a push not to have automatic stays, in terms of challenges. So, I think, just picking on what Priyanka said as well as what Justice Rao said earlier, we need to now rethink the process of challenge and the appellate process connected with challenge. If that part can be sold that will go a long way, because invariably, complex arbitrations do take time. That is the reality. And I think most litigants appreciate that the arbitration itself will take time. What they do not appreciate is, the point from A to B. When will the money hit my bank account? That is where they get really frustrated. The steps thereafter after the award. So I think I love the idea of zone Appellate Courts. I think that that is fantastic. It'll require a lot of rethinking of a system. Indeed, Justice Rao compared US, India with Singapore, and indeed the US has circuit courts for the similar reason that they have these zones made out, of course, for their, not for arbitration purposes, but generally so we should rethink that. It will maybe go a long way to solving things beyond arbitration as well.

MAYANK MISHRA: So, I think, these points have covered in sense what change you can bring. So one, of course, is the post-award situation enforcement. If there can be a parallel mechanism to enforce, only earmarked, people who have suffered and award their accounts and can't have a free run because we know, you get an award. A party knows who's going to lose, and they do take and deploy measures by which they can evade the world. So, I think there could be something on the legislative side. Maybe we can have parallel mechanism or a special mechanism, as we have post about becoming a decree for the purposes of execution.

Maybe prioritize that. That could be one. But coming back to the topic, I think there are endless 29A's, which is the extension time application, which are things filed, although that in some cases, maybe we can be partly guilty of it. I may have moved four to five, fifth extension because the Tribunal insisted on that. So, if there could be a legislative end to a timeline. We can't have endless arbitrations and just. There is a need, just to make an application, and in most cases, High Courts will allow it. So there has to be an end to that process. You can't have arbitrations running for five or six years. So these are the two things. Yeah.

DIVIJ KUMAR: Completely understandable.

CV RAGHU: So if I may, because what I just add small, little my recollection and please correct me, I may be wrong, but Singapore International Arbitration Centre allows you maximum three adjournments. If you want the fourth adjournment, there's a price. There's a price you have to pay. $5,000 or $10,000 to your.... If you are extending the time beyond, then you pay for a price you put an exemplary price. If there's a genuine reason for the business to extend the time, let them pay the cost for that. At least then there has to be some mechanism by which it should not be seen that somebody's trying to delay the process by using the process of law. That's the limited point.

PRIYANKA WALESHA: I agree with Mr. Raghu, because unless and until you put an exemplary deterrence cost across it and unfortunately, this is how India operates, I would say, world operates rather. Right? So unless and until you put across that, there will not be a curb. So along with another measures that need to be bought in place in reference to the exception or the extension of the timelines, I think this is the necessity of the hour.

AVIMUKT DAR: And I just wanted to say one thing on this. I think in large arbitrations what I've noticed is, Parties happily spend money because especially defendants, right? Because they have a lot to lose if it is time bound. What we also need, and this is the threat we are getting also from the panel that Section 34 has become too much like an appellate mechanism. If it is truly ADR, as Mr. Raghu said, arbitrators should be free, should be fearless. So even the CPC, as you know, has provisions where the judges are also empowered. But of course, a district judge is bound by appellate mechanism, then nobody wants strictures against them. But arbitration is one such mechanism where you have, say, retired judges, you have people who are not actually going up a career poll, so they should be free to be fearless. And the judge hearing in Section 34 should protect that fearlessness. So, for example, you can close the rights, rather than cost, you just say that. Okay, fine, you're taking too many adjournments. I'm going to close your defence, so that should be then respected. And you should not get into

public policy and natural justice at that point. If the parties chose this, they wanted like if you go to a village Panchayat to resolve your dispute, right, you wouldn't expect the Panch to now say, okay, fine, I'll come next Monday. Next Monday? They might actually get failed, this on you.

CV RAGHU: And in the US at least, I've seen corporate governance documents of various companies. In the US, if you pay any money which is not in the normal clause of business, whether it's by way of penalty, levy or anything, you have to make it corporate disclosure. And the share markets hits you very badly, if you are seen not to be compliant with the law, the shareholders in the stock market. So US companies are mortally scared of delaying when it comes to arbitration. I have contested a few of them in various international arbitration. Three dates. By the third date, the whole battery will be there, filing all the necessary papers. And they will not, because otherwise in the Corporate Governance Report, they have to mention that they paid $5,000 as a payment, and that is not seen very kindly by the stock market. Last point...

DIVIJ KUMAR: So sorry, because the time is up. If I may, I just want one last thing, answer from Justice Rao. Because sir, what we have seen is that what I do understand, and my takeaway is that while we have had these amendments and they have been effective to a large extent in comparison to what we were, but rightly pointed out by you now, there is actually, we have to take up the ownership and there has to be that cultural shift. Now, is there a possibility to enforce that cultural change through some legislative mechanism. If I may ask, if that is one thing you could change, what would you do, sir?

JUSTICE NAGESHWAR RAO: As I have already said, that there's nothing wrong with the law.

DIVIJ KUMAR: Yes, sir.

JUSTICE NAGESHWAR RAO: And there's no single amendment that can be made to change things, and then bring our time to be there. Since I like the perspectives of the other speakers in India, we have this habit of being governed by the stick. So, unless you show the stick, people don't listen to you. So, there was a perspective that exemplary cost should be imposed for adjournments. There is a provision in the Arbitration Act for imposition of cost, but I've rarely seen costs being imposed for unreasonable extensions or even the conduct of lawyers in trying to prolong the arbitral proceedings. I think we should be a little more stricter. I was speaking to an international arbitrator, and I was telling him, the same counsel who

appeared in international arbitrations behaved differently when they come to domestic arbitrations. And he told me, it's all because of you arbitrators. I said, how are we responsible? Then he said, you are very soft, you want to be nice to people because you want to get repeat appointments. This is what I was told. I think there is a culture even amongst judges also where in courts, we don't impose cost. Only a few people are very strict in imposition of cost. Most of us take it easy. I think that translates into arbitrations also. It is time. It is time that everybody should realize that any adjournment comes with a cost. And there should be imposition of huge costs. And I like what Avimukt Dar said, because I've been facing this. He said you need fearless arbitrators. You need an environment where arbitrators are fearless.

Let me tell you the perspective of arbitrators. It's exactly like a judge. When I was a judge, I used to hear my colleagues speak about what people would say if there's a judgment against the government? Then activists will come forward and then say, this law is writing judgments in fair of the government, because he wants an appointment after retirement. If you write a judgment against the government, people would say that they have taken money from the client. That's exactly what is happening in arbitration. There are arbitrations which involve huge amounts of money where Public Sector Undertakings are there. We have that fear when we decide matters. And in this atmosphere of fear, it will be very difficult to be impartial. And this is a culture which has to be, which has to change. I said, from all quarters, all stakeholders are responsible for the situation because it's very easy to make allegations against people like judges, like arbitrators, whether it's a retired judge or whether it is a technocrat, whether it is a lawyer. He'll be at the receiving end of what is going to be said, with this fear to be very difficult to be impartial. Coming back to the question that you asked, the law is perfect. You compare the Indian law, our Arbitration Act with the English Arbitration Act, or even the Singapore International Arbitration Act, the similar provisions are there. There's nothing that is lacking in the law and whatever is not there any of the, as Dar was saying, there government is very active in reforms. Commissions or committees are being appointed, they're making recommendations, and then law is being changed. It's actually not the law that's the problem. It's our mind that is a problem. Our mind means arbitrators, counsel as well as the consumers.

DIVIJ KUMAR: Thank you so much. I'm conscious that we have overshot the time and that's the irony, keeping in mind the topic. But be that as it may, I'm sure all of you have really enjoyed this session. And I would really like to thank you our distinguished panellists for your time that they have given us.

~~~END OF SESSION 1~~~