TERES

INDIA ADR WEEKDAY 5: DELHI

SESSION 2

Bridging the gap: domestic arbitrations and international arbitrations

10:30 AM To 12:00 AM IST

Moderator:

James Nicholson, Senior Managing Director, FTI Consulting

Speakers:

Justice (Retd) Sanjay Kishan Kaul, Former Judge, Supreme Court of India

Aditya Jalan, Partner, AZB & Partners

Binsy Susan, Partner, Shardul Amarchand & Mangaldas & Co

Ketan Gaur, Partner, Trilegal

Gaurav Pachnanda, Senior Advocate at the Supreme Court of India

HOST: Can I request everyone to please take their seats? We'll be starting with the next session soon. The next session is by FTI Consulting on bridging the gap, domestic arbitrations and international arbitrations. On the panel, we have Mr. James Nicholson, Senior Managing Director, FDI Consulting, as the moderator for the session. We have Justice Sanjay Kishan Kaul, former Judge of the Supreme Court of India. Mr. Aditya Jalan, Partner at AZB & Partners. Ms. Binsy Susan, Partner at Shardul Amarchand & Mangaldas. Mr. Ketan Gaur, Partner, Trilegal and Mr Gaurav Pachnanda, Senior Advocate.

JAMES NICHOLSON: Thank you very much. Good morning, everyone, and welcome to this panel on Bridging the Gap between Domestic Indian Arbitration and International Arbitration. My name is James Nicholson. I act as an Expert Witness on Damages with FTI Consulting. I'm based in Singapore and work primarily across the Asia region. Thank you all for prioritizing being with us here today. And thank you to my wonderful panel, who I will introduce briefly before we get into the substance of today.

So firstly, Justice Kaul, We're very honoured that Justice Kaul has joined us today. He retired as a Judge of the Supreme Court of India in 2023 after nearly seven years on that court and authoring some 170 judgments. Justice Kaul previously served as Chief Justice of the Madras High Court and the Punjab and Haryana High Court over a 22 year career as a judge, which was preceded by 17 years practicing on the commercial, civil and company side of the Delhi High Court and before the Supreme Court of India. Since his retirement as a judge, Justice Kaul has been nominated by parties appointed by the Delhi High Court and the Supreme Court of India as sole arbitrator. In several arbitrations, domestic and international, and he's also given evidence on Indian law as an expert witness in England and in the United States. And I, given my background, was pleased to see that Justice Kaul also has a degree in Economics.

Moving further to the left, Aditya Jalan is a Partner with AZB's office here in Delhi with industry resolution and his practice includes commercial disputes, domestic and international arbitration, regulatory investigations, and white collar crime defence for a wide range of public and private sector clients. To his left, Binsy Susan focuses on corporate and commercial litigation and arbitration from the Delhi office of Shardul Amarchand Mangaldas. Having started her career as a transactions lawyer, Binsy has a particular interest in issues of data privacy protection and cybersecurity for social media companies. Binsy was among her many accolades, named Litigator of the Year, India and Middle East by Asia Legal Business Women in Law Awards last year

To her left, Ketan Gaur is a Partner with Trilegal also based here in Delhi. He practices across arbitration, general commercial litigation, insolvency and bankruptcy and white collar crime litigation. And Ketan is also registered as a foreign lawyer in Singapore with rights to appear before the SICC and a Singapore Court of Appeal. And last but not least Gaurav Pachnanda is a Senior Advocate, here in India with a practice before the Supreme Court of India and other courts and Tribunals, focused mainly on commercial and corporate litigation including domestic and international arbitration. Gaurav is also a barrister in England and Wales based out of Fountain Court Chambers in London, where he engages in similar work, often with a multi-jurisdictional component. And Gaurav is also a foreign registered lawyer at the SICC garage, sits as an arbitrator, acts as lead counsel and has given expert evidence on Indian law and international arbitrations.

And I couldn't think of a better panel to address this issue of bridging the gap between domestic arbitrations and international arbitrations. Is there a gap? Where does that gap consist of? Should that gap be closed? How could that gap, if it exists? These are fascinating questions, and I'm very grateful to my panel for the time they've put into preparing this panel and being with us all today. So with all that, I'll move to our first question, which is a question for Justice Kaul. Parties often lean towards safe choices by appointing arbitrators they know or who have been appointed frequently. How can we break that cycle, partly with the aim of getting more diversity among arbitrators and underrepresented arbitrators, giving them a fair chance to be appointed? And are there things that domestic arbitration can learn from international practices in this context?

JUSTICE SANJAY KISHAN KAUL: Good morning. So I think there can be no caveat with the proposition that an arbitration is only as good as the Tribunal, educating it and Gary Born has noted, and in my view, rightly so, that the arbitral process and its procedure are at the heart of conduct of any arbitration proceedings. To a large extent, the tone of the arbitration or selection of those manning the Tribunal assume great significance. Now arbitration has emerged as a preferred mode of dispute resolution for commercial disputes and, of course, the liberty to the Parties to choose the decision maker who should educate the dispute. But then the person being chosen should not be like my guy in that sense. It should be based on consideration of his impartiality, independence and specified policy consideration, especially taking into consideration his expertise in the subject because they may be even within the commercial side, there may be different aspects which need expertise, and there are arbitrators who specialize in certain fields.

On the diversity aspect, in 2012, a survey by Queens Mary University of London found that 92% of the practitioners who responded preferred some role in selection of their wing on the arbitrators. Reason is not difficult to discover that the ability to participate in choosing arbitrators gives the commercial Parties a degree of certainty and predictability of the arbitration proceedings. Increasing the diversity may be governed by some of the procedures. I would say that by an agreement of the parties, in the case of an ad hoc arbitration, in the case of a three membered, ad hoc arbitration, the appointment to the presiding arbitrator falls within the domain of the co-arbitrators. It can be by arbitral institutions. It can be by professional institutions and trade associations like the Grain and Feed Trade Association or the appointment by courts as the seat of arbitration.

To great degree, at least insofar as the ad hoc arbitrations are concerned, the Parties are likely than not, to elect arbitrators who are already established and considerations to appointment would be whether he's efficient. What is the past report on his handling? How quickly they handle it, and the ability to get into a contractual interpretation. On the other hand, appointment by institutions and courts of seats of arbitration as elite, where a push can be given towards a more diversity of appointment. Lately, the Supreme Court of India has appointed practitioners as arbitrators in international commercial arbitrations. Mr. Gourab Banerji, a Senior Advocate, was appointed in a dispute by the Supreme Court and the Supreme Court also appointed an accomplished lady lawyer as a sole arbitrator in an international dispute. If you're looking to the issue of women representation, this marked shift from practice of appointing retired judges in arbitrators, to my mind, is solitary. Personally, I have sat in Delhi High Court on both the arbitration appointment jurisdiction and the appellate jurisdiction and I used to make it a point that wherever, at least the stakes are not huge and party, they agreed to a point from younger lawyers to senior advocates. Because I've never believed it's a preserver, only the retired judges to be appointed as arbitrators. That's the international practice also. So in domestic arbitration that could be incorporated. I found that there's no dearth of capable young counsels who have dealt with handling these commercial disputes. Some of them, I'm quite aware, are handling as many as 8-10 arbitrators already, and they've grown with them. So as they handle arbitration, they grow with it.

Similar shift in appointment has taken place under Section 11, where at least in the Delhi High Court we just had a discussion and Ketan is telling me the number of points are very, very large. They can be up to, 20 a day almost, because there are three benches dealing with arbitrations. Recently came across a report of this cross institutional task force of gender diversity in arbitrator appointments and proceedings. And the committee chaired by the venerate ***Carolyn Lamb and White case*** comprising women practitioners in the field of

arbitration across jurisdiction, highlighted the challenge of a more diverse appointment structure. The report unfortunately starts by noting that the 2016 survey by International law firms concluded that most Respondents state that gender diversity was either not that important or not important at all. Report also makes a profound observation on diversity may be necessary also to void the risk of having a decision tainted by cognitive or unconscious bias and grounding. A more inclusive pool of moderators to draw from and willingness of parties to appoint them would thus be better.

Let's take an example. This is also more important in case of, say, an investment arbitration, where the roster of arbitration to choose from is even narrower. And thus, it exacerbates the problem of double hatting. The counsel acting as an arbitrator and counsel at different arbitration, which may have a similar issue while sitting in arbitration and may have unconscious bias is something which may slip into such a situation. It's not to cast an aspersion on his independence, but this is the possibility. I am saying that in the short term we would see a positive shift in the arbitrator appointments being made, including domestic levels and internationally. From my own experience, I can say, I was a nominee arbitrator in International Commercial Arbitration and a lady QC was appointed by the other party, and it came to a presiding arbitrator. We mutually agreed to draw a list of the practitioners and judges as well, from varying nationalities, including relatively younger women practitioners, but we could not get down to the choice of women practitioners somehow. But taking this into account, I feel this diversity will take a little more time to pan it out. But it is necessary so that it is spread out as arbitration work course. In some countries, I would say in this process, I found that we were picking up people in that list, even from countries, say Ukraine, from Singapore, from China, and as a Supreme Court judge appointing arbitrators, we made a conscious effort, I would say where there were two countries in world who tried to pick up a person from a third country. Thank you.

JAMES NICHOLSON: Thank you, Justice Kaul. And Gaurav, just expanding further on that issue of women in arbitration, the community of arbitrators often can seem quite male dominated. Are there things that the community can do and that women in arbitration can do to help break into that community?

GAURAV PACHNANDA: Thank you, James. As by way of a background, there are two trends that we need to acknowledge. One, of course, is that when it comes to the number of women sitting as arbitrators in international arbitration, and the number of women sitting as arbitrators in domestic arbitration, there is a significant gap. I wouldn't have the exact numbers, but based on my experience, I can quite conclusively make a statement that you are

more likely to find a good woman arbitrator sitting as an arbitrator in a high value dispute more often, and it is still an upcoming trend in domestic arbitrations. The other trend is that even the process of bridging this gap internationally is moving much faster than the process is moving in domestic arbitration. Now, both of these might be a result of conscious efforts, but both of these might also be a result of some inherent shortcomings in the arbitration ecosystem. My own view is that we need to look at this gap, particularly when we want to bridge the gap between domestic arbitration and international arbitration for these two trends. We need to look at this from two perspectives. The first perspective is the perspective of what is the state of our legal profession generally, as of today. And the state of our legal profession, in a domestic context, is still such that women are much more present in all limbs of the ecosystem than they were before. But there is a lot more that is to be done. There is scope for greater accommodation. There is scope for greater overcoming of biases, institutional biases in the domestic arbitration setup. It is a process of constant engagement, and the domestic arbitration set up and then the legal profession generally in domestic arbitration. They are all subsets of our society, and this is a long drawn process. We require patients time for that to catch up. But that does not mean that short term efforts should be lost sight of, and I think short term efforts are significant and I personally think that they can broadly be divided into three steps or three prongs.

First, of course, is acknowledgment. Acknowledgment of the trend that we are not doing enough that is being done internationally and acknowledgment that there is need for fairer representation for women.

Second is to nurture your talent. There are increasingly a significant number of commercial practitioners from amongst women who are respected, do very good quality work. But I am not sure whether very many of them would have started thinking about the next stage in their professional development, which is preparing to sit as an arbitrator. So that is the commercial bar generally needs to nurture that talent, professionals at that level need to help each other to nurture that talent from amongst the commercial bar.

And third, of course, is appointment and to some extent, there should be a conscious effort to make sure that more and more women are appointed to give fairer representation for those who could potentially be very good arbitrators, but don't feel confident enough to sit immediately. They should look for appointments as Tribunal secretaries for the first two cases and then think seriously about exploring appointments as arbitrators. And I think women who are in positions of significance in the commercial bar should help women to the extent that they can.

BINSY SUSAN: James, being the only woman on the panel, can I quickly chime in. On the first issue of widening the pool of arbitrators, while I think there's obviously a much wider pool of arbitrators today than there were seven years ago, eight years ago, I think what's lacking is a concerted effort towards training arbitrators. And while we have very highly trained judges, a lot of commercial lawyers sitting in law firms and at the bar are not trained to be arbitrators, and really, there is a gap to be bridged in terms of the international practices followed in international arbitrations and domestic arbitrations. The CIArb, of course, trains a number of arbitrators globally. Singapore, a number of years ago made its own SIAC up to create that wide pool of trained arbitrators. I think, given the scale that we have of arbitrations in our country, it's something that we should think of to put in place legislatively, create a body that will train arbitrators. On the issue of women representation, I must say that it seemed to say that while there are issues of bias, always, of course, as Justice Kaul mentioned, now, we have a number of appointments of women lawyers, even coming from the Supreme Court globally, MCIA, even in India and NCAC. They follow this system of rotation of appointment of women arbitrators. At least every third arbitrator is a woman arbitrator. Perhaps even courts could adapt that to make sure that it's more balanced in the future. But I think there needs to be, there is a lot of onus on institutions to make sure that that happens but equally as Gaurav said there is also a lot of onus on the law firms who are mostly, or the lawyers who are pointing arbitrators to push that through.

JUSTICE SANJAY KISHAN KAUL: Incidentally, yesterday the Supreme Court has passed a model on representation of women in Bar Association in Delhi asking them to adopt a norm so that there is a greater representation. I'm only on the representation aspect and for judicial appointments across the country, I've been. The number now by merit, with no reservation, is gone beyond one-third in a place like Delhi where I did a selection. It was 78% women at that time. So the changeover is taking place, needs to be a little faster.

JAMES NICHOLSON: Seems some very positive moves there and looking at how the representation of women as arbitrators has evolved internationally in the last ten years shows that a lot can be done because a lot has changed internationally. So, hopefully India can follow in that direction. So an important topic, but we'll move on to the next topic which is advocacy, written advocacy versus oral hearings. And Ketan, do you think written advocacy can make domestic arbitration proceedings more time and cost efficient? And what benefits and challenges do you see? And perhaps for those of us who are less familiar with domestic Indian practice you could start with a word about how advocacy is currently done in India?

KETAN GAUR: Sure. In domestic arbitrations, based on experience, arbitrations can, final hearings can sometimes go on for... you can have 14 days, 15 days of oral advocacy after trial which is conducted. And typically, to get dates from arbitrators, you'll be given dates in slots of either two days or three days or four days. And to get those slots can be a fairly time consuming process. You have a lot of adjournment requests that are often made. And we've seen just finally, hearings going on for a period of anywhere between six months to twelve months where parties will take in domestic arbitrations to conclude the final hearings. So, there is a lot of benefit that one could potentially make if we limit the time spent on oral advocacy in final hearings and move to a pattern of Britain advocacy, a whole host of benefits which I'll, of course, deal with, and like you said the question itself answers it. It's time and cost. It's cost efficient as well. You'll be saving on fees of counsel, which not many of us here would be happy with, but arbitrator's fees, per sitting charges, charges towards lodging, travel, transcription, evidence, there's a lot of cost saving that will also take place. And based on some surveys that we've seen in the domestic market as well, there is an overwhelming response towards moving towards written advocacy and moving away from final hearings and oral advocacy in arbitrations now.

Now, looking at ways in which these final hearings and oral advocacy can be dispensed with situations, there are some in-bridge mechanisms which are there in institutional rules, the MCIA as well, where if you can opt in for an expedited procedure, if the team threshold meets the requirement. But it would still require Parties to opt in for it. It's still the exception, not the rule. So while these mechanisms are there in institutional setups, the majority of arbitrations in India are domestic arbitrations and we haven't really seen... In my experience, I haven't come across a domestic arbitration where we've dealt away with oral advocacy and final hearings and there's a lot of concentration by counsel and arbitrators towards final hearing matters where you rely on the last few days to ensure that you've made your point across. You're also ensuring that the arbitrators would make their notes in the last few days if they missed something in trial, and specifically because of the time between the trial and the final hearing. You'd also want to keep refreshing the mind of the arbitrators who are very busy in India as to what's transpired during the trial and the final hearing. So there is that gap there, and that needs to be certainly bridged.

We've seen in international arbitrations where, irrespective of the claim amount, the Tribunal will perhaps dispense with the requirement of having a final hearing. The trial itself is compressed to maybe three or four days, depending on the number of witnesses, and that's really unheard of in the domestic circles where you'll have one witness who will be clocking them in for three to four days. That's routine because of also the manner in which questions

are put, not having means to have live transcription services because parties have not opted in for it and recording of evidence becomes very slow. These are all measures that one could, of course have there. The other benefit would, of course, be that parties would be able to focus on their pleadings in a far more efficient manner, to have more detailed pleadings, to have more relaxed times to file pleadings and written submissions, document disclosures for instance. Parties can spend a lot more time towards those aspects on procedural requirements and move away from the requirement to have a detailed cross examination where everything on the witness statement or every statement made by a particular witness has to be questioned by counsel and allowed by arbitrators. That comes with a few challenges in India, particularly in the context of natural justice challenges in set aside proceedings. And it is fairly common for parties to take those objections in a set aside and to do away with that to show why in the circumstances no advocacy was dispensed with, would be required to be shown to the judge who's hearing your application. Because like I said, that is the rule, to have a rule to have oral advocacy and not the exception. The other thing is to have a clear waiver of parties when dispensing with the requirement of having oral advocacy or final hearings and moving away to and moving towards written advocacy and written submissions. We've seen this play out in some situations in favour, particularly to dispense with the requirement of, particularly dispensed with the set aside ground in the 34 in the High Courts here.

And lastly it should be made clear that, if at all, there are any clarifications or questions that either parties or the arbitrators have, for those aspects, if at all required, an oral hearing can take place. Can take place virtually to save time, it needn't be physical, and these are sort of some steps which can be taken to do away with the challenge. Do away with the problems that will arise out of the challenges dealing with dispensing with the requirement to have oral advocacy.

JAMES NICHOLSON: Thank you. And the way that would be an agreement between the parties not to challenge, preventing them from challenging in court, the procedure.

KETAN GAUR: That's right. Or having that waiver recorded as part of a procedural order in the arbitration.

JAMES NICHOLSON: Yeah, thank you. And Gaurav back to you. In international arbitration, the parties often submit very organized, detailed written arguments. They can also be quite long at times. Are there things that the domestic Indian arbitration can learn from those international practices?

GAURAV PACHNANDA: Yes, of course. As Ketan was mentioning, I think first of all, as a general trend in domestic arbitration, you do not see the same kind of reliance on written advocacy as you should. Of course, my personal view is that oral advocacy is overrated when it comes to commercial disputes. Written advocacy is a very powerful tool of distillation of your case, post-trial, and then placing it in the most efficient manner for consideration. It's resorted to not as frequently as I would expect it to be in domestic arbitration as well as commercial dispute resolution in courts in commercial trials. If I was to give some general tips, I don't think I'm perhaps not perhaps the best person to give those tips, but if I was to give some advice to my colleagues who have decided that they are going to focus mainly on written advocacy for a post-trial hearing, the first thing that I would suggest is focus on simplicity. Our style of advocacy generally is unnecessarily verbose. We rely a lot on technical terms. I think simplicity is one of the most powerful tools of written advocacy, and simplicity requires a lot of conscious effort.

Second, is brevity. To be brief in what you write, and I don't remember who said this, but somebody started writing a long letter. I think it was Shaw who wrote a long letter and said, I'm very sorry for writing this long letter because I didn't have enough time to write a short one. Brevity also requires a lot of effort, but it assists the Tribunal no end, because the job of the Tribunal is to sift through all the irrelevant facts, deliver irrelevant developments and come to the meat of the matter. In a complex commercial trial, it requires a lot of time and lot of effort to sift through tons of documents, and if assistance can be provided in that exercise that is valuable.

Third, I think... simplicity, brevity, and the third, I think, would be distillation. I think analysis and distillation is the most important tool of successful written advocacy. And I would say the process of distillation would involve first, thinking. A lot of written advocacy that I see in domestic tribunals is a cut and paste of the pleadings and cut and paste of applications and replies that have been submitted during the stage of the trial. But when you're coming to written advocacy for the purpose of final hearing, it requires a lot of thinking and analysis to then be able to focus only on point that are winning points that are of significance and be ready to throw in the bin, points that have lost significance post-trial. The second, I think most important process of distillation is to pre-empt the other side's case to the extent possible, and deal with it in written advocacy. The best scenario would be that a Tribunal would ask the question, and you're able to see that the answer is in the next sentence of what you're reading. So I think pre-empting is also a very important tool that would make written advocacy very efficient.

And perhaps the fourth point would be not to waste paper on explaining the other side's case. I see that very often that one party, that is trying to put forward its case, spends a lot of time in explaining the other side's skills, and I think that leads to a lot of, increases the length of written submissions. Those are tools that can be relied upon to make efficient written submissions. The most important practice that I think that can be followed in written submissions is that, to the extent possible we have, a lot of us think that we will have a practice of developing our case during oral submissions and then following it up with a written submission. But I think preparing a pre-hearing written submission is the best exercise for preparing for the oral hearing because then the oral hearing would be very focused, very limited. And if the Tribunal or a judge has read your written submissions, the deed is done. You've put your best case forward. In shorter hearings even if you don't have time for detailed written submissions, use of short skeletal submissions prehearing is a very good idea. It's a very good idea. Thank you.

JAMES NICHOLSON: Thank you very much. Yes?

BINSY SUSAN: So, I think my favourite point, of course, is to identify what the winning points are. Because by the time you're at the end of the trial, you should know what your winning points are. But in the Indian context everyone has FOMO, right? They feel that if they give up that point, then it's going to come and bite them at the stage of enforcement and it's a waiver, and a lot of public sector undertakings won't be willing to do that. Right? So it's a very difficult call to take as to how to balance those winning points and where you're waiving something because you haven't.

GAURAV PACHNANDA: In a good commercial case that is the role of the lead counsel, and he or she should be able to take those calls.

ADITYA JALAN: I'm sorry. If I may, as lead counsel, the difficulty's also sometimes not your counsels or briefing counsels, but the client itself because the client normally does not care about either brevity or how much time does he take written advocacy or oral advocacy. What he wants to do is, at the end of the day, he wants you to take all arguments that are available so that at the end of the day, he wins the case. So I believe clients also need to have that faith in their lead counsel, the team of counsels that you can let go of certain points, and it's not going to negatively impact your case.

GAURAV PACHNANDA: At the cost of taking more time than I should have taken I'll give you one example. In the rules of professional ethics applicable to barristers in England, it is

professional misconduct if you argue a point which you believe doesn't have good chances of success. That is the extent of obligation imposed on the counsel. That is putting forward a case and imagine if in India we had that rule, or even if it was not a written rule, an unwritten rule that it is not proper for a counsel who's making submissions to waste the time on court on matters which he knows *ex facie* have no chances of success, on points that have no chances of success. It requires a little bit of change of culture, I think.

JUSTICE SANJAY KISHAN KAUL: Actually, the task is more difficult for an arbitrator as compared to a judge, because all said and done, judge after a stage can ask you to shut up which doesn't happen in an arbitration because I've realized the situation in a short time. You have to be far more lenient in what you do, but yet I think the arbitrator can control the proceedings and the arbitrator has done his groundwork and controls the proceedings, the task would become simpler.

JAMES NICHOLSON: Thank you. Very interesting ideas there. And to continue on the theme of efficiency but from quite a different angle. Binsy, you've done a lot of work in the tech space, so this is a good question for you around the use of AI and technology. Can those tools make domestic arbitrations more cost than time effective? And are there things again that can be learned from international practice?

BINSY SUSAN: Yeah, I think the answer to that is an emphatic yes, of course. And I think technology is here and it is pervaded all aspects of our life, and there is just so much efficiency that can be brought about by use of technology. And obviously a lot of good work is already being done, and this is something that's, I think, talked about fairly in all conferences these days. I think it's something that we have started to change about how we run our arbitrations. And thanks to COVID, of course, we've had virtual hearings. We now have our own transcription companies, which are Indian companies, and I think that's brought down the price levels significantly and those are all very good things. But if I were to critically evaluate, in terms of time, what an efficiency, what are the big stages where we could deploy technology to make it more efficient? I think it would be the stage of discovery and disclosure. Very surprisingly, I think discovery and disclosure still takes a very, very long time in domestic arbitrations and even if parties follow the Redfern Format, the process of just responding to that goes on there are supplementary schedules and there are hearings, and arbitrators tend to spend a lot of time on discovery and disclosure. So I think that is a stage where we can effectively deploy a lot of technology. There are of course, a lot of e-discovery platforms internationally, which I think we use a fair bit in a lot of other practice areas, like white collar for instance. It's just not used as much in discovery and disclosure platforms like Relativity

and Nova. I think these are very, very good platforms for people to disclose documents. We should also put a certain amount of onus on them, because in India, everybody wants to hold back. And there is, unfortunately, that culture of holding back relevant documents on the basis of confidentiality or privilege and all of that. The beauty of these platforms is that even if something is confidential and privileged, a party has the onus of putting it out there and flagging or tagging it as privileged and confidential, which would mean that the arbitrators, it would be only for the arbitrator's eyes, and he would have the ability to quickly determine whether or not it is in fact privileged and whether disclosure should be denied.

I think use of e-discovery platforms will significantly simplify the process and actually dilute a lot of these tactics, which are followed by parties to resist discovery and disclosure. Of course, there is that larger issue of, is this a very intrusive style of discovery and whether India is ready for that. But even if we were to use this in a modified form, I think we will have great learning. The other area where I think, again, we've started to make some progress, and I think we can benefit greatly from other players coming to the market as transcription because traditionally trial has of course taken a very, very long time. It's not unheard of for trials to go on for months, sometimes six, seven months spread over several years. We have TERES now doing some extraordinary work. But I think it's telling that in a country as large as India, where we have so many arbitrations, we still have only one or two such players, and I hope that changes in the coming few years, and we have a lot more players in the market.

The third, I think, is something which law firms can use. And again, I think a lot of law firms are now adopting AI in a lot of document management, document processing, drafting, proof reading, contract, compare, there are a number of tools. I mean, SAM, for instance, uses Glittera and Luminance which are extraordinary. They're very, very useful. And I know a lot of other international offerings also follow it. I think we should use that more and more and it will cut down the time that is taken for document review, which is the other heavy piece in arbitration. So I think, obviously, some good work is being done, but a lot more can be done and technology can be put to good use.

JAMES NICHOLSON: Excellent, it's good to talk about what's happening with AI now, rather than what might be happening in the future which doesn't always come as quickly as this promise. So that's all very interesting,

GAURAV PACHNANDA: But as Binsy has been, she said now in India is yesterday in the rest of the world.

JAMES NICHOLSON: There are risks. So what are the risks? What are the hurdles to further adoption of AI in dispute, in India particularly?

ADITYA JALAN: So, I believe more hurdles than risks because AI yesterday is a topic in conferences for sure but gradually it's also becoming a reality. And the biggest example of AI becoming a reality is what happened earlier this week. Earlier this week the Supreme Court of Singapore has issued its first ever guidelines on use of AI. Now, the guidelines don't only recognize the fact that you can use AI in Supreme Court of Singapore, but it also identifies the risks with AI. Importantly it has a guideline which defines what AI is. Now, loosely speaking, AI is not all technology, not all advancement is AI. It's very interesting to read how the guidelines are defining what AI is, and I'm going to actually do that.

So the guidelines of the Supreme Court of Singapore identify AI refers to technology, set to be able to perform tasks that require intelligence. These tasks include reasoning, problem solving, learning, and planning. For the avoidance of doubt, it does not include technology which merely corrects spelling or grammar and does not generate content based on prompts. So it sort of today reduces what people understand AI to be. And Mr. Pachnanda, you're, right. What possibly is today internationally will be tomorrow in India. So India also needs to recognize how to use these AIs more accurately, identifying its risks, identifying the hurdles that are there. If I am to go with the 'A' theme of Alternate Dispute Resolution, ADR and AI. The three A's that I believe one should keep in mind when talking about risks or hurdles in AI it's Adept, Allow and then Adopt. I believe AI today is still pretty young. In 2023, there were two lawyers in New York who were sanctioned for having used AI to come up with judgments that never existed. It is the fault of those lawyers that they used those AI generated judgments without doing a fact check or a reality check. It is equally the fault of AI for not recognizing that these are fake judgments and producing it for use in courts. So I believe there is a distance that needs to be travelled by all AI tools in order for it to be able to be used either in court proceedings or in arbitrations by either practitioners or by arbitrators.

Yes, Binsy is absolutely right when she says that there is immense amount of use case for AI. And again, James, mentions that let's talk about how AI is today and not what it can become tomorrow because that's just guesswork. But in order for it to be able to be used with a factor of trust and confidence by Arbitrators, by practitioners, or by clients it has to be more adept.

Second, is Allow. There actually needs to be a legislative recognition for AI to be allowed, especially in international arbitrations and domestic arbitrations because you do not want issues such as natural justice, unfair play, bias to creep in as challenges because an arbitral

award is a work product, partially or fully of AI, either by use through arbitrators or by practitioners. Also, as more and more arbitrations in India start getting an international flavour, one needs to recognize that different jurisdictions across the globe may have different limits of recognizing AI. So until there's a balance of that it could be an issue of fair play as well, where for example, one country which is technologically most sound and is willing to adopt AI more emphatically, allows its lawyers and arbitrators to use AI. But the enforcing court or lawyers in another jurisdiction are not permitted to use AI because their country does not recognize it. So that's why being allowed is equally important.

And of course, after that, it is to Adopt. While there may be a possibility that tomorrow you have a judgment where all the data is fed into an AI tool, and the AI comes out with a judgment that is fair and considering all algorithms, but I think that's a little bit too in the future. I believe the first use case is where practitioners and arbitrators adopt AI as an assistive tool and as an assistive tool, it may have a lot of case benefit. For example, we recently have EPC Contractors internationally who've reached out to us discussing how AI can be used in their standard form contracts to see mitigation of risks, to identify which clauses are more risk prone in disputes. Because at the end of the day, EPC contracts we see a general trend of disputes, how it happens. So they want to identify what is the trend? Which are the more riskier clauses, and how can those clauses be tighter? I believe this is a very important use case where industries identify what in international practice can be used in order to tomorrow have lesser disputes? Because dispute avoidance is equally important as dispute resolution and if AI can be used to avoid certain style of disputes, I believe that's going to be very beneficial and we can fight over the real things and not over procedural aspects and mundane issues which really are being fought only because lawyers can make more money over it and clients are not really interested with it. Goldman Sachs has in fact, come out with some statistics where it has identified that approximately 25% of all tasks that are currently being doing can be shifted or done by AI. They also say that when it comes to the legal industry, the numbers rake up to 44% instead of 25%, in general. The worry is, are any of us losing our jobs? I don't think so. If we can adopt an adept technology in our use, I believe there will be at a time when there are going to be two kinds of people. One who've ignored AI and the others who've adopted it and advanced with AI. And once these hurdles are crossed, I believe AI is going to be what transcription is today or what e-discovery platforms are today, is the AI for tomorrow. Thank you.

BINSY SUSAN: I really like that point Aditya, on how AI can be more better used in certain kind of disputes. And when we sit down and talk about AI being... So, one is AI being a tool, right, in dispute resolution. And the other use of AI is as the decider itself as the person making the decisions. And we think we get very nervous when we talk about this on this issue because

we believe there's no legislative framework today. It could potentially be hit by public policy at the stage of enforcement, et cetera. But what we do not realize is that there is a great deal of acceptance already in our systems. Amazon, for instance, your regular complain that you raise on Amazon for a faulty product for over 15 years is being resolved through AI, right? Your regular social media platforms, when a complaint is made that there is, for instance, or maybe, for instance, sexual imagery or something. When someone flags it, it's AI that takes it down. So there is, I think, a great deal of use of AI, even today without worrying about use of AI in complex disputes, where you know that a judge has to evaluate complex evidence and, you know, apply his mind and AI can't replace that. But it's here and now I think, we should accept that.

KETAN GAUR: For example, case management. Just understanding what timelines should be given in a particular kind of dispute. While an arbitrator spends a lot of time trying to understand what the parties needs are based on his experience. And AI with the right data fed in and there being a repository of the correct data, can identify that in certain kinds of cases, the procedural timeline that is required is of a certain nature. And that could possibly be the first draft of our PO 2s and 3s. And PO 3s that we see, which the party can discuss and practically decide on whether it works in their case or not.

SUJATH BIN ALI: And perhaps Justice Kaul can also come in here, where we've seen over the last, especially post pandemic steps that the courts have taken in India, including there are several AI platforms currently which are pitching to Indian courts for case management techniques. We move to an e-filing system. Most judges are now very comfortable with technology. So even Indian judges and Indian courts have taken a step in that right direction. So matters of public policy, for instance.

JUSTICE SANJAY KISHAN KAUL: The effort, courts are a little different, I would say you have that authority behind you, so it's easier to cut time periods. I used to put a note saying that nobody will file as an option more than four pages. You have to seek a permission. If there is a fifth page, I have to take it out and give it back to the lawyers. You can't do it in... That's the challenge.

JAMES NICHOLSON: Thanks, everyone. Very interesting on AI. We're moving towards case management techniques. I'll be interested in your thoughts on guerrilla tactics, and I understand that, particularly in ad hoc arbitration.

JAMES NICHOLSON: I think in India, one often sees guerilla tactics, including late filings, dumping of huge numbers of documents flouting procedural rules, et cetera. Do you see that to the same extent in international arbitration? And are there ways to prevent that that domestic can learn from international?

BINSY SUSAN: I think it'd be fair to say that guerilla tactics are adopted world over, and I've seen more guerilla tactics being adopted in Brazil, for instance, than I've ever seen in India. So I think people are the same everywhere. The question is, how prevalent is it in our country? And I think traditionally, a lot of us have adopted a lot of guerilla tactics and had to fight them because parties, which is used to filing documents very late in the day, introducing evidence very late in the day. A lot of that has gone down again. I think arbitrators are beginning to take a more strict view but all arbitrators are worried about giving a party an opportunity to file that last document, to bring in that affidavit of evidence last minute because they believe the arbitrator or what is ultimately going to be challenged if they do not allow it. I think there are other ways, and that's a valid legitimate concern. I think there are other ways to control or limit such tactics. One of the big differences between how domestic arbitration and international arbitration are run is that domestic arbitrations offer staggered timeline where, when the first procedural hearing takes place, the Tribunal will say, let's set timelines till the pleadings are over, and then let's come back and then talk about the rest, right? As you all know, in international arbitrations that almost never happens. There is always an end date for final hearings and everyone works backwards. I think that is a practice we must adopt because even allowing for a very healthy float, if parties know that there is an end date where trial will go on and final hearing will take place, all tactics must be adjusted within that float. Right? And I think that change will bring about a lot in efficiency also there must be right at the beginning with procedural hearings are held clear consequences for certain actions, right? For instance, if there are repeated adjournments, if hearings are discharged last minute most arbitrators in India today are so kind that they wouldn't even ask for their hearing fees, sitting fees, if their hearings cancelled one day before. And I think we must give up some kindness. There should be consequences for that hearing being called off last minute, and if parties know that upfront their costs are imposed. For instance, they know it is thought often by parties, that cost will never be imposed in arbitrations. And I think ICC and MCIA act through their procedural rules have effectively implemented some discipline by imposition of costs, for instance. So clear procedural timelines, clear procedural rules, consequences for action and making all of that clear upfront will perhaps control a lot of these tactics.

JAMES NICHOLSON: Thank you. And is that in control of the parties and the counsel and the arbitrators or does it need legislative or other enablement?

BINSY SUSAN: I think there can certainly be procedural guidelines that can be issued by the legislature. There can be, like, draft guidelines regarding procedure, evidence taking which can be included as a part of the legislation. But the reason why ad hoc arbitrations are attractive is because it affords party's flexibility. So this is very much within the domain of parties to agree and for the arbitrators to discuss with the parties upfront and put in a procedural order.

JAMES NICHOLSON: Thank you.

KETAN GAUR: So, if I can just add on it. A very important point, Binsy makes here that the idea is also not only India versus abroad, but also domestic versus institution because in domestic arbitrations mostly ad hoc arbitrations really speaking, there is no rule because the Evidence Act strictly does not apply. There are no institutional rules. The IBA guidelines don't necessarily apply and each Arbitral Tribunal identifies to the extent it wants to use a rule of evidence. Now, it would then depend on who your arbitrators are. And Justice Kaul possibly can throw more light on it that if one Tribunal decides it in a particular manner as to what the evidentiary rules are, or how much the evidence, act or rules apply. The other Tribunal could definitely take it to the other end or the other end of the spectrum, which results in inconsistencies. And therefore, possibly an institutional guidance on it will really help, bring about more consistency in one way or the other.

JUSTICE SANJAY KISHAN KAUL: The arbitrator actually has to go to the parties. It can't be an absolutely neutral approach. You may not have the power of the judge but you have to go to the party. I think a very, very interesting thing with Binsy said was we must see the deadline and work. I think that's the issue which is there. If we do that and don't look at it as an endless exercise, then we can possibly control.

JAMES NICHOLSON: Thank you, Justice Kaul. I'll turn to you now on the drafting of arbitral awards. So, international arbitration institutions often provide a well-established drafting guidelines are there. Things that domestic arbitration can benefit from standardization seen in tools such as the IBA Toolkit for award drafting and the CIA guidelines.

JUSTICE SANJAY KISHAN KAUL: So something which Gaurav said, I have great love for brevity. I feel that it is far more difficult to say something whether orally, briefly, or in writing briefly, because you have to think before you speak. And I followed that as a judge's practice. I have said that I've commented judicially that orders should be briefed by court, so that the

appellate courts should be able to understand it better. The same applies to an award in any case which has to go to court. So we have to look to a scenario where we avoid products kind of a scenario and repetitive in nature. Now, the proceedings the way they are done also, when you're talking about synopsis and things being filed, they also get products. And to my mind, one of the crucial issues for purposes of curtailing all this is when you settle the points, which are for determination if those are carefully settled. So in suits used to say that issues are very important in settling. Similarly points for determination are very important. What often I have seen in the short time is people make each claim into some kind of an issue, you give some 30 issues. Now, with those 30 issues, you have to address submissions on those 30 issues, and you have to write an award on those 30 issues. Actually, there are no 30 issues, they are claims. So it's important to curtail the manner in which the proceedings go from the stage of settlement of the principles which are there and if we can do that, I think it will curtail evidence. If the evidence, oral evidence, is curtailed in the session because you're confined to that, then the award will be more structured. I would say I have seen many awards. A lot of the local awards are being structured now. They are trying to do that. I have seen some of the younger arbitrators do so, and I'm very happy at it. I must say I've read it, that the lawyers are more conscious of it, I think in doing so, we as judges sometimes tend to be verbose, I think. And the idea is not to expound what you know, but the idea is to decide the list between the parties. If we keep that factor in mind, I think the whole trend will be there. Question is whether should we prescribe any methodology? I don't know how can you. How easy is to prescribe? How will you write something? I mean, ultimately, there's an innovativeness in writing an award. It's like an author. I've always felt that when you write something, you are like an author and how briefly you write it depends on how much you have control of it. Standardization of arbitral award would also avoid some degree of when it comes to reinforcement, but that will depend on the headings and how you structure it rather than doing. So if you can find it to the structured case of what you are deciding I am sure the product would be something. Recently, Supreme Court has 20th September seems to have laid down in OPG Power Generation case, an attempt in laying down guidelines to protect arbitrator awards where reasons appear to be insufficient or inadequate. But coupled with documents cited in the underlying reasoning of the discountable and intangible court should not interfere with such award. So what they've said you have to look at what is there it's not that everything must be founded to the nth level to do so, so I personally feel this is very important. It's a whole sequence have clear points and determination, have submissions curtailed slowly by going into that area and write an award confined to that and not to everything else.

JAMES NICHOLSON: Thank you. Thank you very much. Moving on to another topic, "Discovery versus Disclosure". One of the biggest time blocks in domestic arbitrations is

around Discovery and Disclosure, and we touched on this already. Ketan are there other things that can be done to make that process more efficient?

KETAN GAUR: Yeah, I think people have spoken about e-discovery and AI and other tools, but we must remember and as Binsy also said, there's nothing codified in India currently. It's not common for parties or arbitrators to resort to the IBA Rules also, for that matter of fact. Resultantly you will fall back to the CPC between the Indian Civil Procedure Court, which dates as far back as 1908 and look at procedures for disclosure, discovery and interrogatories. So, ad hoc arbitration, in particular, flexibility does need to be given to parties and the tribunal to adopt. Something that's a lot more time and cost efficient adopting Redfern Schedule to have timely disclosures and to bring in a concept of cost like Binsy said, would be a few factors that one could have to move a lot faster. So, I think a lot of these aspects, people have already spoken much already on what one could potentially do, and these are really pretty much it to have a sense of flexibility while also dealing with consequences of non-compliance.

BINSY SUSAN: We should also stop having detailed hearings for discovery disclosure. I don't think it's done anywhere, world over. It is something that arbitrators can decide based on the filing of the Redfern and the documents and the pleadings. It's something that wastes too much time.

JAMES NICHOLSON: Yeah, thanks. And Aditya, with e-discovery, we can get a tremendous volume of material are there processes for managing that volume so that the efforts involve time and costs, remain fair and proportionate?

ADITYA JALAN: Of course. Again, Binsy already mentioned a few platforms that provide excellent assistance for e-discovery. The good part is you can use these platforms for carving out what you want for all parties to see. You can also create flags which are confidential and for decision of the arbitrators as to whether the other side should have the right to look at these documents or it should be more confidential for the eyes of the arbitrator only. The one biggest problem of e-discovery is the problem of plenty. Now, with most arbitrations having documents which are filed in e-form, it's easy for parties to actually do a data dump on the other party. And a concept which was very popular in US earlier, where as a part of the discovery object, you give them so much material that the relevant is buried in the irrelevant. And in that 50,000 pages the 200 important pages take ages for the parties to actually discover. Interestingly, now there are tools, AI tools and other technologies which parties can use to filter through these concepts much easier.

BINSY SUSAN: De-duplication.

ADITYA JALAN: Where deduplication, as she rightly says. The other problem, of course, is to identify deep fakes, which is again, very important in a e-discovery process, which has become very easy right now. But I believe as long as a system of e-discovery is still forthcoming, it's still easier than if you had to do it in a physical disclosure process because it saves time, it saves cost and well, it is better for the environment.

BINSY SUSAN: Also, these platforms now have predictive coding. Right? So based on the review of documents by the other side and they're flagging or whether something's relevant or not relevant. You could use those codes to then run a search on the remaining data term. So you can significantly reduce the volume of data that a party has to see films.

JUSTICE SANJAY KISHAN KAUL: We used to see films. We used to dump, in the US also, dump a lot of material.

BINSY SUSAN: Very, very effective.

JUSTICE SANJAY KISHAN KAUL: James, may I ask you, is there a difference in how lost quantification is approached is difference in Indian arbitration and international arbitration, if you would like to help, and how that can be of assistance in the Indian outreach.

JAMES NICHOLSON: Thank you for the question. And I'm reverting to my usual role of answering questions from the lawyers rather than asking them. I think I prefer asking the questions, actually. So maybe I chose the wrong career. I've been doing that for long. My experience is much more in international arbitration, but I've spoken with a number of you in the room and done a little research. My wonderful India damages team have helped me with a bit of research. So I hope I'm not treading on any toes or upsetting anyone with the comments. But if I do, please forgive me. I'm just trying to relay facts as I've understood them from that research and I'll try to speak for all experts.

My own expertise is in valuation of damages but of course, there are other types of experts in construction and technical matters and so forth. So, I'll start with the use of experts in AI, and I think that use can be characterized in a few ways. So firstly, party appointed experts are widely used, and they have been for many years. And I think it's important that they happen for many years across a wide range of matters. Because as a result, arbitrators and counsel have quite a wide and deep experience of working with experts and with the kinds of issues

that tend to come up again and again, be it on a lost profit case on an investment treaty case or a construction delay matter or what have you. And there are people like me and like the other experts in the room who have a lot of experience in working in this context and of trying to distil their expertise and their insights into ways that are digestible for Tribunals and for counsel and parties. Also, particular tools have become well accepted. So a classic example is the use of Discounted Cash Flow Analysis, which is a very classic valuation method. It's the go to valuation method in finance and business. It's the tool that many of us who do value reach for when we want to value a business or project, but it's taken some time to become generally accepted as a method for valuation in international arbitration. It is, I think, now pretty widely accepted, but that was not so true 15 years ago when I started giving evidence in these sorts of matters. Associated with all of that, there's soft law on the use of international experts in IA. There's some IBA rule. The IBA rules on the taking of evidence have two sections on the use of experts. The CIO has a protocol as well. Norms have arisen as to the style and contents of reports. And particularly there's an expectation that expert witnesses will tend towards objectivity and independence. It's difficult when your party appointed and party paid to be fully objective and independence, however hard you try, but there's a tendency towards that. And Tribunals will criticize experts who diverge from that which helps focus the mind on experts who attempted to stray in the direction of their client's wishes.

So, contrasting that with India, I think, from what I understand, the use of experts in domestic arbitration is much less developed. It's a newer feature. I'm encouraged to see some nods on this side of the table. If I see frowns, I'll diverge. So not been used as much as a result the experience of arbitrators, of counsel of working with experts, at least those arbitrators and counsel who don't have a wide international practice. It's not as deep that there's less familiarity with the issues, the discounted cash flow analysis. For example, I understand is less generally accepted in domestic arbitration in India, with a tendency towards looking at more cost based measures of loss. So what are the wasted costs rather than what are the profits that have been lost? I understand there's fewer norms as to how expert reports are written, which I presume means that they are not always as helpful as they could be for the decision makers. That some of the standard tools for soliciting expert evidence used in international arbitration are not used as widely in domestic. So, although expert reports are written in all contexts in international arbitration, very often an expert will give a presentation at the beginning of their evidence for 30 minutes with PowerPoint slides explaining their views. And I understand that's less common domestically. And also witness conferencing or hot tubbing is quite often used in international arbitration. I understand not so much domestically. And I also understand that there's more of an expectation that experts will wear, will be less independent

in domestic Indian arbitration and that arbitrators are perhaps less willing to criticize experts for doing that.

So, those are the differences, I think just listening to all of this, it sounds like it's just a question of evolution that India started a bit later in using expert evidence, perhaps because of the way that arbitration has grown so quickly and the economy has grown so quickly in India. It's just come to it slightly later and these issues are partly issues of just familiarity among all involved in the ecosystem with how expert's evidence can be used. I think if we just look at the rest of the world, there will be more and more use of expert evidence. Parties will see the value in that and once one party appoints an expert, the other party typically appoints an expert so you so you get more use of experts. I think if one wants to accelerate the use and the efficient and effective use of experts in domestic Indian arbitration, there are several things come to mind. I'm sure there are others, but explicitly adopting the soft floor, such as the IBA rules in procedural orders might be one area of getting everybody aligned around. Okay. What are we trying to do here with the experts. I hesitate with the second one. But if tribunals can be a little stronger in criticizing experts who don't follow the independence and objectivity that I think would help because that does focus the mind of experts. Of course, that means Tribunals need their confidence to do that. They need to make sure they understand the issues, so that they are right, correct, when they are criticizing because nobody wants to criticize falsely. And then another thing I wonder is whether there's a room for experts of all types to offer more training for counsel and potentially tribunals on how to work with experts, what's useful for us and also on some of the key concepts in valuation and construction disputes and other areas. The same thing forcefully could go for experts without significant experience. There are institutions in other parts of the world, such as the Academy of Experts in Singapore. They've just set up the Asia Pacific Institute of Experts that seeks to train individuals wanting to be experts in what that involves, how to do it. How to be effective, independent and so forth. I'm not aware if there's a similar body in India, but that's another.

JUSTICE SANJAY KISHAN KAUL: No.

JAMES NICHOLSON: No. Okay good

ADITYA JALAN: and actually it is the Institute of Chartered Accounts of India who believe, at least for everything, finance, they are the experts, but not the real kind, which you're talking about.

JAMES NICHOLSON: And then, of course, parties have a role as well. They choose the arbitrators, they choose the counsel. They can veer towards parties, counsel and arbitrators and experts who understand how to get the most out of the use of experts in arbitration. I think I'm back to asking the question. Now there's a red screen in front of me that says time's up. Do we have time for a couple of questions or are we really timed up? Okay, one question is fine. I think I heard so, yes. Okay, gentlemen, one at front, one at the end. I think a microphone is coming.

SUSHIL SHANKAR: Sushil Shankar, here. First, a disclaimer. I have nothing against women. In fact, personally, I prefer women to men. But coming to your discussions about the differences between international arbitration and domestic arbitrations and the number of women acting as arbitrators in the domain arbitrations. You spoke about the courts needing to do more, about the institutions needing to do more, and also about more training being given by CIArb and things like that. But there's one thing that you did not discuss which, in my opinion is a big omission and that you didn't talk about the parties. When you consider that the cornerstone of arbitration is party autonomy, what if the parties themselves are more comfortable with men as arbitrators? That's the problem.

BINSY SUSAN: Yeah, and at the end of the day, the arbitration is happening because of them.

JUSTICE SANJAY KISHAN KAUL: That's why we said, I said that it's really an institutional operations where the nomination is by the institution.

SUSHIL SHANKAR: That possibly it can play a better the majority of arbitrations in the domestic context are ad hoc if I'm [UNCLEAR].

GAURAV PACHNANDA: I think one of the reasons why parties might prefer a male over a female arbitrator is...

SUSHIL SHANKAR: I'm not saying that they do.

GAURAV PACHNANDA: But if they do, then we have to respect that. Inherent in that very proposition is a statement of a certain bias. I do not understand why choosing a professional, anything other than merit should be the primary consideration of a party, and I would not understand why a party would say, I want a male arbitrator instead of a female arbitrator. That's number one. And number two, although party autonomy matters a lot in arbitration,

but if you take it to another extreme, parties would want arbitrators that they can speak to during the course of the arbitration. But you wouldn't allow that, would you? The role of counsel is to bring about greater sanity and greater balance in the process of appointment of arbitrators. And I think as long as the arbitrator who's being appointed is a competent woman professional, the parties should have no sane reason to overrule it.

BINSY SUSAN: In fact, one of the things that's being discussed globally now and considered by institutions is that whenever parties want the institution to appoint an arbitrator, they circulate a blind CV without the names or the gender set out in there, only with the qualifications which would only reflect on the merits of the candidate that has been considered. So full party autonomy. The party is considering whether this arbitrator is fit for the job without and eliminating that bias, that would creep in just because the arbitrator is a woman. And I mean, those are the things that are being discussed, but I think would be aware today because of the problems that you flagged? Very far from it. Because perhaps clients themselves would not be agreeable to it. But these are good ways to fix the bias that exists in our system.

JUSTICE SANJAY KISHAN KAUL: Let's look at a parameter for mediation. For example the gender female mediators play very, very important role and parties have had no issue involved in mediation, so I know this. There'll be never a problem.

BINSY SUSAN: I think we are instinctively good dispute resolvers, right? From home to office, I think we are instinctively better at it.

JAMES NICHOLSON: Okay. Was there one more question? Okay. Thank you. Nishi. Please join me in thanking this wonderful panel for the reviews and thank you all for joining us today.

~~~END OF SESSION 2~~~