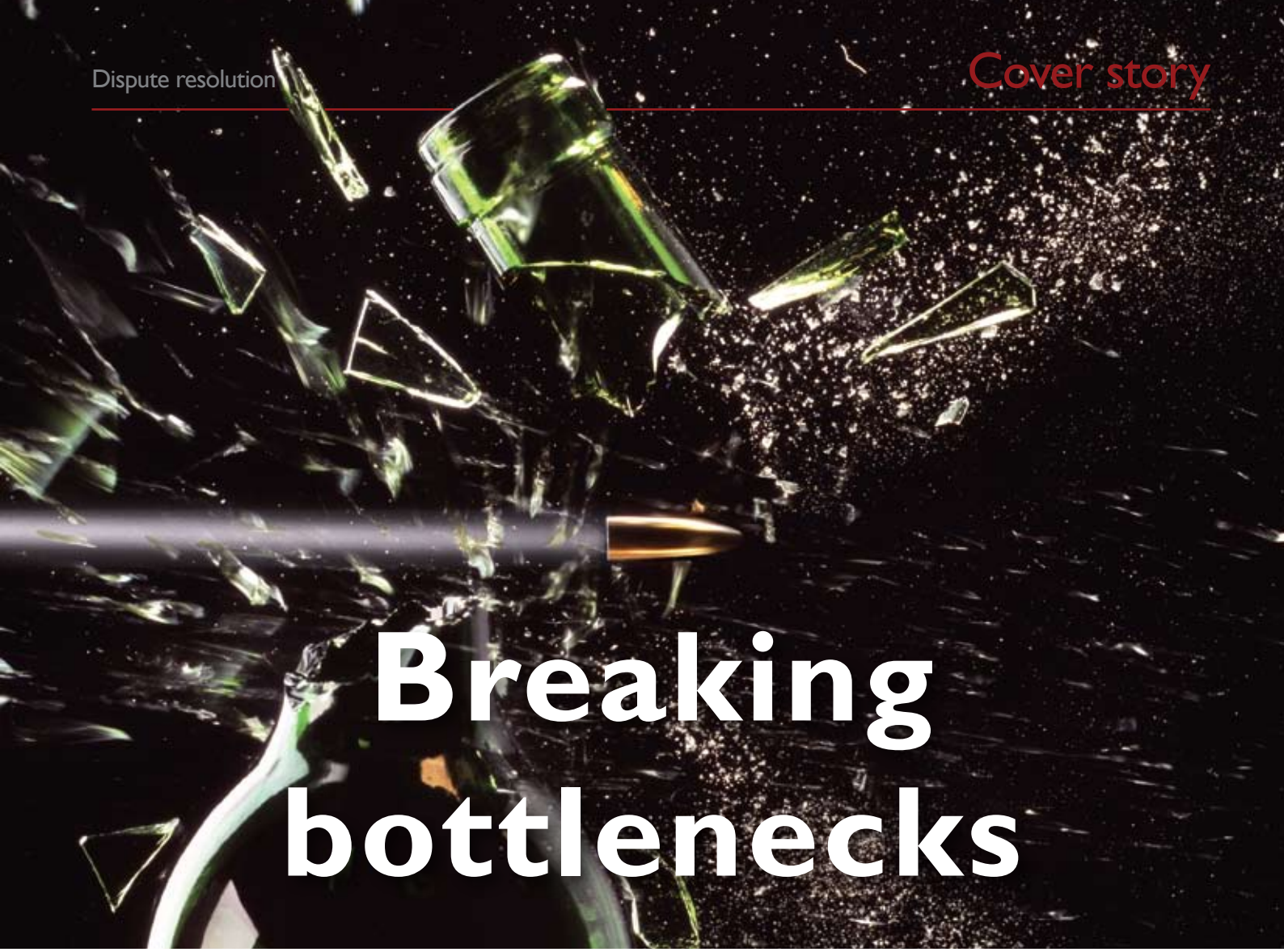

Breaking bottlenecks

Can disputes in India be resolved without getting bogged down in drawn-out court cases or troublesome arbitrations?

Rebecca Abraham chairs an online roundtable to find out

India Business Law Journal recently held an online roundtable to find out how companies doing business in India can break the bottlenecks that often stymie the dispute resolution process. The panellists were: PM Devaiah, partner and general counsel of Everstone Capital Advisors; Anirudh Krishnan, founding partner of Chennai-based AK Law Chambers; Laila Ollapally, founder of the Bangalore-based Centre for Advanced Mediation Practice; and Rajinder Sharma, general counsel of Flipkart. Edited excerpts of the wide-ranging discussions follow:

With companies routinely looking to bypass the Indian courts, should India's low ranking for enforcement of contracts (in the World Bank's ease of doing business rankings) matter to investors?

PM Devaiah: Investors increasingly feel that while they can invest in India, when it comes to enforcing contracts with promoters they end up either on the wrong side of the law or being dragged to a wrong forum for resolution of a dispute – with civil cases becoming criminal cases or the lower judiciary not able to appreciate and understand the complexity of modern-day agreements.

So yes, investors are very concerned about the whole dispute resolution mechanism available in this country, closely followed by the enforceability of their contracts.

Increasingly there is a temptation to have the dispute resolution mechanism moved out of the territorial jurisdiction of India. This is a half solution because we have seen that local players can subvert an international arbitration.

This mix of subterfuge, court delays and a very slow arbitral process in India puts investors into an area of serious discomfort.

Rajinder Sharma: I have a different perspective. Litigation in India is still the best way to resolve and adjudicate a dispute. It is also the best way forward if you strategize and do not fear the backlash and your resilience is high.

Resolving a dispute through mediation and arbitration is the best way of going forward in the commercial world only if the courts do not interfere and parties act in good faith and in a bona fide manner. When there is an unresolvable dispute, then mediation or arbitration also tends to become partisan. In such a situation whatever mechanism one tries will be confrontationist, be it here in India or outside.

Practitioner's perspective

Arbitration clauses: do's and don'ts

Be specific when drafting an arbitration clause, says Chan Leng Sun, SC, at Baker & McKenzie

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Chan Leng Sun, SC

Drafting a valid arbitration clause is not rocket science. Many arbitral institutions offer sample model clauses – short but effective clauses incorporating their rules – on their websites. However, problems arise when those negotiating the contract get adventurous.

This brief guide sets out five do's and five don'ts for drafting arbitration clauses, assuming it is your chosen method for dispute resolution.

Do's: (a) Do commit to arbitration: As everything springs from the parties' agreement, your arbitration clause must commit parties to arbitration in imperative language. It can stipulate: "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be determined by arbitration …"

(b) Specify the place of the arbitration: The arbitration law of the jurisdiction specified will govern the arbitration, and will also be deemed as the place where the award is made. In countries with federal systems, it is preferable that the city is specified. The place or juridical seat of the arbitration will remain unchanged even when the physical venue of an arbitral meeting or hearing is shifted to another place.

(c) Specify the governing law of the contract: The substantive law governing the rights and obligations of the parties is independent of the seat and the arbitration law and not to be confused with it. The governing law of the contract should be stipulated, whether as part of the arbitration clause or in a separate provision.

(d) Pick an arbitration institution: Where it is not stipulated that the arbitration shall be in accordance with an institution's rules (such as ICC Rules, SIAC Rules or ICDR Rules), the arbitration is ad hoc. In such arbitrations, the essential default rules are provided by the arbitration law of the seat of arbitration, supplemented by such procedure as the tribunal might direct. In international arbitrations, parties typically pick an arbitral institution, but the rules of an institution do not have the status of law. They are the contractually agreed procedural rules of the arbitration.

(e) Specify the language of the arbitration: Anglophiles often assume that any arbitration in an English-worded contract will be conducted in English. That is not a safe assumption to make in cross-border transactions involving companies or countries that operate in different languages. It is prudent to expressly state that the language of the arbitration shall be English. One could choose another language, but this may limit the choice of arbitrators and counsel. It may also require the arbitration records to be translated when enforcing the award.

Don'ts: (a) Do not cut and paste without checking for consistency. Arbitration clauses are sometimes inserted into a boilerplate contract without checking if the contract contains other dispute resolution clauses. If the contract contains both a court jurisdiction clause and an arbitration clause, there will be uncertainty over whether a dispute should proceed to litigation or to arbitration.

(b) Do not stipulate a governing law that is different from the law of the seat of arbitration. Some clauses provide for arbitration in one place while adding that the arbitration law of another place shall apply. For instance, "arbitration in London in accordance with the Indian Arbitration and Conciliation Act, 1996". Such clauses create conflict between the stipulated statute and the local arbitration law. There is no need to mention the law of the arbitration at all in the clause. The arbitration law of the seat will apply automatically.

(c) Do not mix and match arbitration rules and arbitration institutions. Over-creative clauses that go down this route often result in long battles between the parties as to their initial intentions and whether an award arrived at is even enforceable.

(d) Do not be overly prescriptive on the qualifications of the arbitrator. If it is important that the arbitrators are versed in the subject of the contract, be precise on the qualifications required. If not, potential arbitrators may be challenged on whether they are "experienced in IT" or "experts in the sugar trade". At the same time, do not overprescribe. If your clause requires the arbitrator to be fluent in Finnish, have a postgraduate degree in computer science and be an expert on international trade, you may have difficulty finding someone who fits that description and is qualified to conduct arbitration.

(e) Describe the arbitral institution correctly. Clauses sometimes name a non-existent arbitral institution or an institution that might be a trade federation that does not administer arbitrations. Get the name of the arbitral institution right.

A sample arbitration clause can read as follows: "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be determined by arbitration in [city] in accordance with [the intended institutional rules] in force at the commencement of the arbitration. The number of arbitrators shall be […] The language of arbitration shall be English. This contract is governed by [...] law. "

As this is a brief guide, I will end with the biggest "do" of all. Seek professional advice when drafting a clause that is relevant to your situation.

Chan Leng Sun, SC, is the global head of international arbitration at Baker & McKenzie.

> This mix of subterfuge, court delays and a very slow arbitral process in India, puts investors into an area of serious discomfort
>
> PM Devaiah
> Partner and General Counsel
> Everstone Capital Advisors

Anirudh Krishnan: Why do investors still come to India? Because the ease of doing business and benefits of doing business are two different things. If they find it difficult to do business, but if the returns are high, it may still be worth their while to come to India. By now everyone recognizes that there are going to be delays in the Indian judicial process. The focus therefore is on getting some kind of interim relief or finding some trigger to bring the other side to the negotiating table. If you are looking at fighting the case in the courts the focus is not just on the merits of the case, but at looking at how can you get your matter heard the fastest.

Let me give you an example: I recently represented a leading American company in a matter against an Indian heavyweight, who had gone to a tiny district court and got an interim order restraining a London arbitration from going ahead. Instead of taking the traditional route of fighting the litigation at the district court level, we jumped straight to the high court to set a time line, went back to the district court with the time line, got the district court to adhere to the time line and then went back to the high court after succeeding in the district court.

We again put pressure on the high court – they knew we were about to go to the Supreme Court – which then took up the matter out of turn. As a result, two levels of litigation are now complete in six months and we have succeeded. The opposite party has just filed an SLP [special leave petition] and the matter is to be taken up by the Supreme Court any time now.

I think it's about finding innovative mechanisms to get your litigation moving, rather than merely waiting for a hearing on merits. This is very different to the approach in England – where I have practised for some time at Clifford Chance. There the focus is solely on the merits. In India 50% is about the merits and 50% is about getting the fastest opportunity to present your case on the merits.

The delays in the courts: Is this what prompts parties to seek out mediation?

Laila Ollapally: Initially parties come to mediation because they are alarmed by the delays in the courts. But when they come and when they participate in the process of mediation they are amazed by what the process can do, how comfortable, how creative and how quick the process of mediation is. The justice of mediation is very much experienced by the parties when they go through it.

Are delays in India's courts inevitable? Will matters improve when commercial courts become a reality?

Rajinder Sharma: Commercial courts will ease a lot of the jams in the court and make big improvements in the way in commercial disputes are being handled.

I believe in the Indian court system more than in the arbitration system or any other alternate dispute resolution systems.

Ad hoc arbitration does not work. I call it the retired judges' pension plan because if you go to a court they will appoint a retired judge. Institutional arbitration will perhaps make a difference, but on the whole I don't think arbitration is a good way for resolving a dispute in India.

Anirudh Krishnan: I am quite hopeful about the commercial courts and the commercial divisions of high courts bill [Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015]. We would have specialized judges and also have stringent timelines. There would also be cost implications, which is important as it will provide a disincentive to frivolous litigation.

Today a cantankerous party would rather drag the other party all the way to the Supreme Court, because in all probability there would be no cost implications and no disincentive for abusing the judicial process. The commercial divisions of high courts bill will create a system of incentives and disincentives by which a party would rather comply with the law because it creates a system where punishment for non-compliance is very high.

What is important is to also have judges who can implement the law. This will require a larger systemic change, as today there is a huge disincentive to becoming a

> It's about finding innovative mechanisms to get your litigation moving, rather than merely waiting for a hearing on merits
>
> Anirudh Krishnan
> Founding Partner
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PM Devaiah: It's quite common to bash the Indian judiciary. I fully agree with what Rajinder says that our judiciary is not that bad. Sometimes the counsel-on-record and the litigants themselves want delays as it's in their interest to drag the matter forever. When people talk of delays in the courts such issues never get addressed. It's a cultural issue if you ask me, and that needs to be kept in mind when we accuse the judiciary of delays.

Do delays similarly plague mediation efforts?

Laila Ollapally: Parties typically come into mediation with more honesty. When parties want delays it is because there is an unfulfilled need, which they are not able to address. But when you bring all the core parties who are involved in a dispute to the same table, with a neutral third party to facilitate the communication, to enhance the information flow and think of creative options, a majority of disputes resolve.

The business of business is business not litigation. Most of them want to resolve and move on. The world over it is recognized that mediation does very well for commercial disputes.

The criminalization of civil disputes: a menace or a useful tool?

Rajinder Sharma: I believe there are two ways of looking at it. Every company that enters into a relationship is looking to build and grow the relationship, not to kill or undermine the relationship, which has been built with so much painstaking effort. So when a dispute surfaces we should think of some method to bring parties back to the table. This is where we sometimes use criminal jurisprudence. This is because the Indian civil system is little bit slow and the criminal system is more efficient. I remember in 1986 we used criminal jurisprudence to recover the money from our conversion agent when I was in Tata Steel. It works sometimes, I would say it works most of the time, but not when you are at the receiving end.

PM Devaiah: I have been on the receiving side of this and I think to paint a civil dispute as a criminal dispute and knock on the doors of the wrong court is an abuse of process of law.

> The business of business is business not litigation … mediation does very well for commercial disputes
>
> Laila Ollapally
> Founder
> Centre for Advanced Mediation Practice

Unfortunately, as Rajinder says, it could act as a good handle and mechanism to extract a deal or two, but the downside is when the complainant starts using the police to harass the so-called accused then matters can spin out of control. When the person on the receiving side is a foreign investor it paints an extremely bad picture of this country because it typically doesn't happen in other jurisdictions.

Recently I tried to replicate this entire experience in Singapore. I approached a senior counsel in Singapore and tried to file a criminal complaint there, but he wouldn't accept it. So I tried a second counsel who also refused to oblige saying it was not a criminal case. You will not get that kind of a response in India, where if you go to a counsel he will most likely oblige. This too is a cultural issue. It's an abuse of process law issue and I think we shouldn't encourage that approach.

Rajinder Sharma: Criminal jurisprudence is not to be used as a normal route, but rather it is an exceptional measure that is used to get the party back to the table in a commercial dispute.

What you typically do is to try mediation, try conciliation and finally you get into litigation mode when all the other avenues have been exhausted and all the neutrality and camaraderie among parties has come to an end.

The options are either to get the parties back to the table or fight for the smallest of things that are there on the table. So when you use the criminal jurisprudence you will surely get something out of it. In a transaction you can have disputes over several things, such as representations and warranties and various obligations basically covenanted/built on trust. This will automatically give you a handle to use criminal jurisprudence.

Laila Ollapally: Having mediated several hundred cases, I have seen that many of the cases take on a criminal flavour. I feel this is because of

Live action: The panellists debate strategies for speeding up dispute resolution. Top row: *India Business Law Journal*'s Rebecca Abraham, PM Devaiah, Anirudh Krishnan. Bottom row: Laila Ollapally, Rajinder Sharma.

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an overreliance on an adversarial system. When people are in an adversarial system they need to hit hard and they do everything to hit hard.

I see the criminalization of criminal disputes in two situations: one when they use it as a strategy; and two when they cannot understand the other's perspective. When there is a dispute, the informational barriers are plenty. Parties are not able to understand the others' perspectives and motives, therefore you impute criminality.

A non-adversarial system for settling disputes in India, how would that work?

Anirudh Krishnan: We are heading towards a non-adversarial system for settlement of disputes. The ultimate result of implementing the legislative changes being proposed to the Arbitration and Conciliation Act and the commercial divisions of high courts bill will be an increase in mediation.

Today the primary roadblock to mediation is that the party that has the upper hand abuses the legal process by dragging the dispute for years. Therefore as far as that party is concerned they are not willing to consent to a settlement because they know they have the upper hand, but if we have a system wherein you are going to see results in one or one and a half years, coupled with costs, a party that is in the wrong will rather try and mediate and enter settlement. I see all these amendments culminating in mediation and non-adversarial dispute resolution.

The panellists

PM Devaiah is a partner and general counsel of Everstone Capital Advisors, an India and Southeast Asia-focused private equity firm. Prior to joining Everstone in 2007, he was general counsel for ICICI Ventures.

Anirudh Krishnan is the founding partner of Chennai-based AK Law Chambers and a chief editor of Justice RS Bachawat's *Law of Arbitration and Conciliation*. He was on an expert panel set up by the Law Commission of India to study the proposed amendments to the Arbitration and Conciliation Act and was a consultant to the Law Commission for its report on the commercial divisions of high courts bill and its analysis of the 2015 draft model Indian bilateral investment treaty.

Laila Ollapally is the founder of the Centre for Advanced Mediation Practice, a Bangalore-based private mediation initiative. She is the founding coordinator of the Bangalore Mediation Centre, which was set up in 2007 under the aegis of Karnataka High Court.

Rajinder Sharma is general counsel and head of legal at Flipkart, one of India's leading e-commerce companies. Before moving to Flipkart on 1 September, he was vice president and general counsel for Southwest Asia at Samsung. He has also been general counsel at DuPont India.

> I would say [using criminal jurisprudence] works most of the time, but not when you are at the receiving end
> Rajinder Sharma
> General Counsel
> Flipkart

Rajinder Sharma: I am less hopeful. There was a change brought into the courts about adjournments, etc., in the Civil Procedure Code. Did it work? No, and nothing has changed. So a change in the legislation or the commercial courts bill, will it end the misery of parties? I sincerely believe it will not.

The only way forward is to have the intentions of the parties from the very beginning very clearly laid out. As Laila said, the business of the business is to do business. If that can be kept in mind then change will happen.

I say, bring parties back to the table by whatever means possible, by motivational means, persuasion, or if it is in a penalizing way. Use whatever jurisprudence you want, bring the parties back to the table and you will have a resolution faster.

Laila Ollappally: Our judges handle 100 to 200 cases per day. How can they dispose of these cases? I can with confidence tell you that with good mediators almost 70% to 80% of the disputes can be resolved. This will leave the judges enough time to dispose of cases effectively and quickly, while also respecting the disputes for what they are.

PM Devaiah: The advantage of moving cases to mediation is that in today's complex world you can choose a mediator who has the relevant skill set.

Laila Ollapally: You are right. The mediation is good when the mediator has the right skill set and expertise. But in a mediation the mediator is a process expert, who humanizes the situation, makes the parties feel comfortable to communicate, improves information, helps the experts to increase information, brings about creative options. So number one is process expertise, number two is subject expertise. Mediation is an amazingly rich forum and when used it can be used to resolve the most complex disputes.

Unfortunately we don't have the legislative backing for mediation. Right now we are piggybacking on the Arbitration and Conciliation Act. The commercial world will embrace mediation more if there is legislative recognition for mediation. ■