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TRANSCRIPT OF THE INTERVIEW WITH MR ABHIJNAN JHA

Editor's Note: Abhijnan Jha is a partner in the dispute resolution team at AZB & Partners, Delhi. He graduated from the National University of Juridical Sciences, Kolkata (India) in 2013 and holds a Master of Laws (LL.M.) degree from the University of Cambridge. He has previously represented IHH Healthcare Bhd in arbitration and arbitration-related proceedings before Indian courts. He has also represented Amazon in its dispute with Future Retail Limited, and Axis Bank in its dispute with Jaypee Infratech Limited. He was recently mentioned as a 'Recommended Lawyer' for Dispute Resolution: Litigation and Dispute Resolution: Arbitration in the Legal 500 Asia Pacific. He is also an Advocate-on-Record at the Supreme Court of India.

Editorial Board (EB): What motivations led you to take up arbitration and dispute resolution as your practice area?

Abhijnan Jha (AJ): I will give you a bit of history: While I have not been very interested in arbitration specifically, I have been very interested in litigation and dispute resolution as a concept. I was very interested in being in courts because, ultimately, that was the idea of being a lawyer for me. When I was in law school, I was very clear that the only thing I wanted to do was disputes. Of course, I did my internships in a range of areas. Interestingly, I also got a job as a public M&A lawyer. But, I was also very clear that ultimately, I wanted to do dispute resolution because I thought that the application of mind was the highest in this area.

Every matter is new, every matter has its own complexity, from the most insignificant ones to high stake matters, and you have a chance to convince a judge. This whole process is challenging, which gives me an intellectual high.

Arbitration is hyped and glamourous while the Indian court system is slightly frustrating. I am sure many of you know that already. Arbitration is prefered because you have a defined timeline, a dedicated tribunal waiting to hear your case, rather than a judge hearing 60 to 70 matters in a day.

For young lawyers like us, we have far more opportunities in appearing before arbitration tribunals than courts. I have, in fact, done cross-examination in arbitral proceedings. So, I think arbitration is far more egalitarian and intellectually enriching for young lawyers.

EB: As you said, you got a job as a public M&A lawyer and then you switched to disputes.

How was that transition for you?

AJ: Again, I will give you a little bit of background. My last internship was with Amarchand Mangaldas and Suresh A Shroff (AMSS, which has now split into two firms). So, I interned under the public M&A team at AMSS, Mumbai. Public M&A teams did work pertaining to Mergers and Accusation related to public companies, as the name suggests, so you get a lot of SEBI takeover code work, which is exciting stuff, and I got a pre-placement offer from AMSS. I was scheduled to join that team, and I did not join that team because AMSS had a rotation program. So, you could work with three teams on a rotation policy. I chose disputes first because I wanted to try it out and figure out whether I wanted to do it there or somewhere else. I tried disputes and I loved it – I have been doing disputes ever since!

EB: Can you tell us about your LL.M. at Cambridge University?

AJ: I worked at AMSS for two years till 2015, then I did my LL.M. I did my LL.M. because a 5year program at an Indian law school is very good, but if you get a chance to study at a world-class institution like Oxford, Cambridge, Columbia, Harvard, etc., it is a once in a lifetime opportunity. It's just one year out of the many years of your career. I would recommend that anyone who has the chance to do it, of course, subject to monetary considerations, must do it. And that has nothing to do with job opportunities abroad, you should not do it just for that, you should do it for the experience. The 9-10 months I spent there were phenomenal because I could study subjects which I could never have studied at NUJS. Subjects like equity and restitution were all very cutting-edge subjects that help me even now. The art of reading judgments is something that I learnt at Cambridge. That's something that always has stayed with me, and I am very grateful for that experience.

So, that is one aspect of it, and the other aspect is that when you are studying abroad, you meet people from different parts of the world, you stay friends with some of them throughout your life, and that is something that can't be matched. Your horizons expand, you get to see the world, and nothing beats that. It is something that I strongly recommend doing if you have the chance. So, people do it right after college or do it after working for one to two years. I think it is more ideal to do it after working for one to two years because you have good work experience in India. When you go to do your degree, some colleges and scholarships insist that you have work experience, and that's why I think that it is good to have one or two years of experience and then go for your masters. Also, after working for two to three years, you get to know how the law is working in an

Indian firm / independent practice and how it is abroad, this will help you better in making an informed decision as to where you want to work.

EB: You have worked for several tech giants including Facebook and Amazon. What are the hurdles that you faced while working with them and how did you overcome them?

AJ: This is an interesting question. I don't think there was any hurdle as such. I wouldn't call it a hurdle, I would call this a challenge. So, when you work with big clients like Amazon or Facebook, you have to work with multiple teams involved and the challenge is you have to work with everyone and get the right work product for the client. Especially in litigation, where everything is time bound and you have to get drafts and filings ready in record time by working with different law firms.

I will give you an example here, we were filing a petition for one of these clients once, and we had to work with two law firms in India and two law firms in the United States at the same time. We were drafting a pleading on a google doc which was simultaneously being reviewed and revised by three law firms across the world. That is something that we managed to do because we had to be patient and accommodative of everyone and that is something that we all have to learn because you cannot just be a team player in your own team, but you have to be a team player across teams. This is one of the advantages of doing moot courts and debates in your college because this will help you in working in a team in a law firm; because trust me, you will not do matters on your own but have to be working in a team. This experience that you will have while preparing for your moots will help you in preparing for that. Being a team player will be a critical consideration for progression in your career. That was the challenge we had and we overcame it and were enriched by the experience of working with teams around the world on these big mandates.

EB: We read an article that you authored, called "In-house Legal Counsels and the Legal Privileges in Commercial Arbitration in India". Here, you placed the argument that even in-house legal counsels need to have attorney-client privileges during arbitration proceedings. What do you think is the practical implication of this extension?

AJ: I will give you an example – whenever a dispute is about to arise before a company reaches out to an external counsel, a company takes feedback from their internal in-house legal counsel. This is actual legal advice and legal strategy. That legal strategy is being given by in-house counsel and their in-house teams before the advocates, as you call them, under the Evidence Act, come into the picture. If you have a strict rule that only advocates or external counsel who are practising

should have that privilege, then these companies are at a big disadvantage because the in-house team can't give strategy and all of these strategies have to be disclosed in a trial if they don't have the privilege. Therefore, it is only fair that the rule is extended. In fact, across the world, it is being extended to in-house counsel, even in the two major jurisdictions of the United States and the United Kingdom.

In India, the situation is slightly grey; there is a recent judgement of the Supreme court in *Reliance Industries v. SEBI*, but again, the Supreme Court leaves that question open. Practically speaking, you don't want to create an artificial distinction between the in-house counsel and external counsel in matters of legal strategy, and you don't want to bar the inhouse legal counsel from giving legal strategic advice. The only way they can give that strategic advice properly is when they are protected.

EB: As lawyers, one of our main features is having an opinion on everything, or disagreeing and agreeing with certain aspects. So is there any major case or ratio that you have dealt with, or that has been recently passed which you disagree with?

AJ: This might become a very long conversation, but I will keep it short. So, I will tell you something that I dealt with. It is the Judgment of the Supreme Court in the Jaypee case, and whether certain properties mortgaged to Banks qualify as preferential transactions under the IBC. So, we did the case from the NCLT, to the NCLAT, and ultimately to the Supreme Court. We lost at the NCLT, we won at the NCLAT, and we lost at the Supreme Court. So, it was a bit of a roller coaster for us. It isn't proper for me to say that the Judgment of the Supreme Court is wrong, but I don't agree with it entirely, because I think a provision, which says that vested property rights should be taken away because of a certain transaction, has to be construed very strictly. That is the law that we are all familiar with. In this case, I think the statutory provisions were sort of interpreted liberally and our case was that we were not preferential transaction because we were not covered under the statute, that is we didn't come within the language of the statute, but that was not accepted by the Supreme Court.

That is one aspect and the second aspect is in the same case, we were arguing that we were the financial creditors of the company. I will just explain why we were saying that we were financial creditors. So nature of this transaction was that company A borrowed money from the bank, and Company B, which is a subsidiary of company A gave a mortgage to the bank saying that if company A cannot pay back the money to us, then we can sell off the property that Company B mortgaged to us. We said this transaction is nothing but a guarantee because Company B by giving the mortgage to us, pretty much guarantees the payment obligation of company A.

The Supreme Court did not agree with that. The Supreme Court said that this is not a guarantee, because the mortgage deed says that it is a mortgage deed, it is not a deed of guarantee and there is no covenant to pay, there was no obligation to pay.

We have written some articles on this and you will find a fair amount of literature on this judgment. This is a February 2020 judgement of the Supreme Court with the title *Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited* and we were representing Axis bank. So, this is a very interesting case and the first of its kind in dealing with the issues that were dealt with. It may not just be me who did not agree with it, but then again, that is how it is, we have to wait for a subsequent Supreme Court bench to hopefully take a different view.

EB: How did you manage to prepare for the AOR exam along with the hectic work schedule, and what would be your advice to an aspirant who is preparing for this exam?

AJ: So, I will answer your first question, I worked very hard in terms of doing both. I was preparing for the AOR exam at the same time as doing the Amazon Future Retail case. So, I had the trial in the arbitration in November 2021 and the exam in December 2021

It is important to have a plan. The exam is divided into four parts, there are four papers. One is drafting, one is leading cases, one is ethics, and finally, Supreme Court practice and procedure. There are four papers that are there on four consecutive days, so you do not get time to prepare. So, what you do is that you read the cases in advance, we had 65 cases, which started, in fact, from Keshvananda Bharati and ended with the RBI Crypto judgement. What I did was I read the cases in advance and I made my notes on those cases, so that for me, the last 10-15 days were about revision. So that was easy, and Supreme Court practice and procedure, again, I had made my notes earlier and I kept doing it, sort of, took out five-six hours or seven hours a week and made my notes. So that finally when it came to crunch time in December, all I had to do was revise my notes at least. For some papers, I actually did not study at all. Like drafting, there is not much you can study, you just have to practice your drafting, and for ethics, I did not study much, so I just sort of studied for the last 2-3 days and I gave the paper.

So, it is very hard if you are doing these kinds of matters and preparing for the exam and I have seen many people who are otherwise quite brilliant, not having the time and this is not an easy exam in that sense. You have to treat this as an University exam, and only ten to twenty percent of people actually pass. At the same time, if you have a plan, if you make your notes and if you have a study plan, like you would when you were in college, it is not that difficult to do well. For us, unfortunately, we may not sort of relate to this as much. This is because after seven years of practice, it becomes a little difficult to have a study plan. But, if you can do it, then I think it is not

a problem, and finally, please focus on your handwriting after leaving law school, we started typing more than writing and that is something that has always been a problem with me, I have terrible handwriting, so I have always been scared that no one would read my paper.

But these are the things you need to take care of. You treat it seriously, if you take out time for it, if you have a plan, you will do well. If you do not have that, it gets a little difficult. But, if you have that plan in place and have a timetable, have a study plan, then it is fine. Then I don't think it is an issue.

EB: So, in the Jaypee judgment, with regards to the mortgage deed, balancing the principles of corporate veil and consolidation of group entities, like you have in the IBC. So, these two principles have always been contradictory in nature and the court has to balance them on a factual basis for every case. So, my question is, for instance, in the Videocon Judgment, they grouped almost 11 of 13 entities, which were quite spread out and quite remote subsidiaries on the basis of self-sustainability of the firm, they said that if your firm is not self-sustainable an dependent on the parent company, you can consolidate it. How far do you think this principle can be applied to Jaypee, and as a legal precedent, can it be a great application for future basis?

AJ: I think Videocon was with respect to group insolvency, wasn't it? You see for group insolvency, the test would be slightly different. You would not want a separate insolvency procedure for the other companies because really, it is one company, which is why there is only one decision-making centre, which is why you would want all of them to be part of the same pool in the insolvency process. That is I think a little separate from the issues in the Jaypee matter because if the Supreme Court was to say that this is a subsidiary company and therefore, it would not have its property to a Scheduled Commercial Bank and this is a financial transaction and I am not some third party, I am a Scheduled Commercial Bank and Axis was one of the banks.

Now, as you know, lifting the corporate veil happens in two situations. One is when the statute provides for it, and second in the case of fraud. Firstly, the statute does not provide for it. The IBC does not provide for it, and secondly, the Supreme Court did not delve into the question of whether there was a fraud. In fact, it was the opposite of fraud. It was a financial transaction which was entered into with open eyes. It was disclosed to the public. No one raised an issue at that point of time and I know why they didn't, because the IBC had not come into the picture. All of these transactions actually predated the IBC and of course, there you would then ask the question of whether the IBC can apply, the Supreme Court also answered that question. But, staying on the

topic of lifting the corporate veil, neither of these two situations arose in Jaypee; the statue didn't provide for anything, there was no fraud, so how would you lift the corporate veil?

So, I think that's completely separate from the Videocon group issue, because there, as you correctly put it, ultimately what you have to decide is – which is the decision-making centre and do you want to have insolvency proceedings for thirteen separate companies, and you wouldn't because it is really one decision-making centre in one company which has several subsidiaries. So there, tests will be very different here when you're taking away my property right. Mortgage is a property right. I have given thousands of crores of rupees for which the only security I have is some land that they have given me. If you are taking away the land, then I am terribly prejudiced. Therefore, the test for that has to be very high and the test for lifting the corporate veil in this situation can only be these two –either your statute provides for it, which it doesn't or there is not, which there is.

EB: India, as a country, is yet to go a long way to becoming an international arbitration hub. What do you think are the challenges we currently face and how can we raise public confidence in the dispute resolution process, in light of the dispute centre in Mumbai doing considerably well now, along with Delhi and Bangalore.

AJ: I will answer this on two levels, one as a young arbitration and dispute resolution lawyer and second, from my own experience in the last two years. So, generally speaking, I think India has come a long way from the judgments of Bhatia and Venture Global. Nowadays, in most cases, you will find extensive support to arbitration. Courts usually take a hands-off approach for arbitration, which means that any suit that is filed which has an arbitration agreement, more often than not, court will refer the matter to arbitration.

Courts are quite clear when they want to grant interim relief and courts also generally, are very supportive of enforcing arbitral awards, both seated in India and outside. That has been the situation over the last few years, and some high courts are leading the way in this regard, mostly the Delhi High Court. The Delhi High Court is perhaps the leading High Court in India as a commercial court and as giving support to the arbitration process. Therefore, I think one aspect of it is that we have come a long way, but the second aspect is based on my practical experience, for example, which is taking the Amazon case. Since I have done it, I can tell you, the Amazon case gives you both hope and some despair at the same time. In August last year, Justice Nariman passed his judgment on recognizing emergency arbitration in the Amazon case. What does that mean? That means that in an Indian seated arbitration, you do not need to go to a Section 9 Court.

You do not need to go to let's say the Delhi High Court, or the Bombay High Court, or the Madras High Court for getting instant relief.

You can have a designated arbitrator appointed within 24 hours of sending a notice of arbitration, giving you interim relief within 48 hours of his/her appointment or let us say within five days of his/her appointment. This is unheard of in India. The arbitrator can be a Singapore court judge or the arbitrator can be a retired English court judge, so anyone can be an arbitrator. So, you are getting world-class adjudication in India-seated arbitrations and whenever that order is passed by this emergency arbitrator, it is instantaneously enforceable in an Indian court. If you use it properly, your section 9 applications are going to come down. Why would you even want to go to a section 9 court when you can just do your emergency arbitration? Because ultimately, that is why you wanted arbitration right? Because you do not want to go to court. So, why would you even want to go to court when you have an arbitration or arbitral process which will support this and a court system which will support orders passed by the emergency arbitrator. Therefore, I think the Amazon future judgment of August of last year was, and I think in the years to come, is going to be perhaps the most significant judgment in promoting India-seated arbitrations.

The despair is that in the same case, in January of this year, the Delhi High Court injuncted the arbitration proceedings because of some order that the competition commission passed, injuncting an international commercial arbitration by the high court in 2022, which makes terrible headlines. So, therefore, I hope it is a one off case, I hope it is not something that is repeated and at the same time, I think in terms of raising public confidence, I think Indian courts are doing that. The judgment of Justice Nariman is a great step in instilling public confidence, and if we go down this path, I think we are pretty much on our way to becoming a well-regarded jurisdiction.

I think a practical consideration is that we need to give arbitration matters more priority in terms of time, not allow for adjournments and be very clear on the timelines. Once you have an award, enforcing the award should not be delayed and when I say enforcing the award, you should have money in the bank in six months. I mean, I can get all the orders I want. I can win all the arguments I want, but if my client is not getting paid after getting an arbitral award, it is terribly frustrating, because in arbitration, the awards comes after 2 years and then you are sort of caught in enforcement proceedings. The other side will keep on filing applications and try to delay and frustrate the proceedings. Therefore, it sort of becomes excruciating. So, there I think the courts perhaps may need to be more aware of the timelines and that is the only thing that perhaps we need to work on to ensure that things are not sort of, kept pending.

So, these are the things that I think perhaps we can work on. But otherwise, I think we are well on our way to becoming a well regarded jurisdiction.

EB: According to you, what are some of the key skills that one must hone to become a proficient dispute resolution lawyer?

AJ: I think the first skill that you must have, I do not know if it is a skill or if it is an attribute, or a characteristic. So, the first is that you must be hungry; you must be very hungry for work, you must be very driven for work. This is not a skill, as much as an issue of attitude. Only driven people and hungry people are going to do well, that is a fact. You know, you can have all the talent in the world but that will not count for anything if are not hungry, if you are not driven. It does not really matter whether you are a dispute resolution lawyer, or before any practice in the area of law, you have to be very driven.

Second, you have to be very well-read. You have to stay updated with all the developments in law. This profession is such that we have to convince all the time, both High Court and Supreme Court, certainly the Supreme Court. What I do as a practice is that, every morning, I open the Supreme Court website. I look at the latest judgements that have come out and whatever is applicable to the area of my practice, I read them and I encourage and ask people in my team to read them because unless you do reading, you do not know what the latest position of the law is, your advice to your client is not updated. The worst thing that you can do is giving wrong advice, because you can be a very good lawyer but you are known by the work that you do and if your last work was wrong, then you are not much of a good lawyer. So, being well-read is a very important aspect.

Third, you have to question everything and this is very important for disputes. You have to know that there is always adversity to litigation. So, while you are pushing your side's case, you have to know – what are the questions that may come from the other side, what are the questions that the judge may ask? How would you answer those questions? Whether you are ultimately arguing the matter, or senior counsels are arguing the matter is irrelevant. Even while briefing, many senior counsels, they appreciate this when you tell them that – sir, these are the 4-5 questions that may

come from the judge, for these are the issues that may be raised by the other side and we have the answers ready, because then if the judge asks those questions in court and you're prepared to answer them, you're through, and that's the level of preparation you need. So, we have to question everything and be thoroughly prepared. This really has to do with the first thing that I spoke about being driven, there are no shortcuts. You have to work very, very hard. You have to work as hard as is humanly possible.

Lastly, remember to do the best for your client. It is something that you must always remember – that your job is to push your client's case as hard as humanly possible and let the judge decide.

I think the last thing is that at least in dispute resolution, we do speak a lot, so your speaking skills are important. The way you articulate things is important and these things come with experience. Some of you may already have it in terms of the moots and the debates that you do.