TRANSCRIPT OF MR. FALI S. NARIMAN'S SPEECH AT THE INAUGURAL SESSION OF:
2023 UNCITRAL SOUTH ASIA CONFERENCE
HELD AT THE SUSHMA SWARAJ BHAWAN, CHANAKYAPURI, NEW DELHI
- 14-16, SEPTEMBER, 2023
CO-HOSTED BY: UNCITRAL, MINISTRY OF EXTERNAL AFFAIRS, UNCCI

Chief Justice of India;
Hon'ble Minister of State for External Affairs;
Secretary of UNCITRAL;
Attorney-General for India;
Ladies and Gentlemen;

Thank you Madame Secretary for the update on the UNCITRAL Countries and the ISDS reforms – the information will be most useful for participants and attendees in the one and a half days that follow.

As for the Chief Justice, I am privileged to have known him for many many years. I have been an admirer of his ability to do several important things well at one and the same time! – As Kipling used to put it, he fills:

> **"the unforgiving minute with 60 seconds worth of distance run".**

He is great example for us all – young and

old practitioners of law and of arbitration, mediation and conciliation.

As to what I have to say, I take my cue from an American who was awarded the Nobel Prize for Physics[1] way back in 1961.

In his acceptance speech in Oslo he had said (and I quote):

> **"*understanding a subject means reducing it to a freshman's level of simplicity*".**

The subjects that are to be discussed tomorrow and on the half day thereafter are not simple at all. They are complex, ranging from – Regional Perspectives on UNCITRAL to Reforms in Investor–State Dispute Settlement with a manifold range of sub-topics.

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[1] **Richard Feynman (1918-1988) was an American theoretical physicist, known for his work in the path integral formulation of quantum mechanics, the theory of quantum electrodynamics, the physics of the superfluidity of supercooled liquid helium, as well as his work in particle physics for which he proposed the parton model. For his contributions to the development of quantum electrodynamics, Feynman received the Nobel Prize in Physics in 1965 jointly with Julian Schwinger and Shin'ichirō Tomonaga.**

Permit me then to make a few frank comments from the point of view of a "freshman".

In most professions the possibility of occasional error is frankly admitted and even guarded against.

More so, in Court systems – which provide for a succession of appeals.

But the practice of International Commercial Arbitration prevalent for many decades now;

– and the practice of International Investment Arbitration (a more recent phenomenon);

continues on the questionable assumption that, an International Arbitral Tribunal is hardly ever wrong.

This is because of that supreme sense of complacency that pervades international commercial arbitration and its myriad manifestations including investment treaty arbitration, as well as conciliation.
This supreme sense of complacency got

exemplified in a remark made in pre-world war II years by a former Lord Chief Justice of England.

At a Lord Mayor's Banquet, given in his honour in London way back in the year 1936, Lord Chief Justice Hewart had said – somewhat pompously:

> **"*His Majesty's judges are supremely satisfied with the almost universal admiration in which they are held*".**

Substitute "International arbitrators" for "His Majesty's Judges" and you will get the current view of International Arbitrators on Arbitrations and Arbitrators!

David Pannick – Lord Pannick (who had argued the BREXIT case in England's Supreme Court – before all of its eleven Judges) had written a book titled JUDGES.

In the book, after quoting Lord Hewart, he said that it is difficult to believe that "the universal admiration" His Lordship spoke about reflected the true feelings of many of the customers of Lord Hewart's own Court!

Likewise, I am of the view that the users of International Commercial Arbitration as well the users of International Investment Arbitration around the world are not exactly euphoric about awards handed down by international arbitrators from time to time.

The reason of course is that though judges are fallible, and do often admit it,

Arbitrators are not less fallible, but they simply won't admit it!

We practising lawyers have our favourite stories of questionable Court decisions.

And we keep unfolding them – though (frankly) never in front of the Judges for fear of offending them!

Professor Goodhart was Editor of the Law Quarterly Review in England for fifty long years.
When he retired Lord Diplock (a Law Lord) wrote a commemorative piece about him.

He wrote that he always thought that Professor Goodhart was on his side, because

whenever his own (i.e. Diplock's) judgment was commented on by Goodhart in the LQR the remarks were always prefaced with the words: "with greatest respect".

And Diplock said to himself: "Ah, this is great. This must be because we both went to the same University".

But he was wrong.

Only later – much later – Lord Diplock realised that Goodhart had let it be known how he had learned: how to sugar-coat a bitter pi11 (i.e. how-to-criticise-a-decision-without–appearing-to-be-offensive).

He learnt it from the great jurist Sir Fredrick Pollock [of Pollock and Mulla fame] – Pollock had said:

- **If you are doubtful whether the judicial reasoning in a given case is wholly unassailable you preface your comment on the decision with the words: "*with respect*";**

- **If the decision is obviously wrong you substitute it "*with great respect*";**

- **But if it is one of those decision that have to be seen to be believed, then the formula is "*with the greatest respect*"!**

So it is with arbitral awards in international commercial arbitration and international investment arbitration.

You have known (and I have known) of arbitral awards, some of which have to be seen to be believed.

But of course, we never admit that such awards are ever *mine*. They are never mine, and they are never *yours* – they are always someone else's!

India's experience in International Commercial Arbitration started early way back in the 1920s.

It was haphazard because we in India had no enacted law on International Commercial Arbitration.

It was UNCITRAL that helped to remedy this – The Afro-Asian Legal Consultative Committee (AALCC) was – responsible for the initiation of a study by UNCITRAL that led to the formulation of the Model Law.

The study of the Secretariat of the AALCC had indicated that the rules of then existing arbitral institutions were heavily weighted against the interests of the developing countries.

AALCC was the catalyst for the formulation of the 1985 UNCITRAL Model Law (it is now amongst the great of show pieces of UNCITRAL).

After the UN General Assembly adopted the UNCITRAL Model Law in October 1985,
The UN resolution recommended Nation States

around the world to enact legislation according its terms.

India's Arbitration and Conciliation Act, was passed in 1996 and it contained for the first time a definition of International Commercial Arbitration.

At the time it was enacted in 1996 Act, the Act broadly conformed to the UNCITRAL Model Law, 1985.

But with a series of subsequent amendments made thereafter by Amendment Act No.3 of 2016 and Amending Act No.33 of 2019 - as well as some court decisions - the 1996 Act "went-off-the-rails" – and there came into existence far too many conflicting judgments – on different provisions of the Act: all of which are yet to be reviewed by larger Benches of India's Supreme Court!

Ultimately in June this year - June 2023 - the Government of India constituted an Expert Committee to reconsider the provisions of the Arbitration and Conciliation Act, 1996 – and

to advise whether there should be a modification of the existing law.

The Committee has since made its Report. At the moment it is confidential – because because the Government of India is considering the Report and will give its considered view on it sometime at the end of the year.

Meanwhile I am sorry to tell you that Arbitration Law in India is in a somewhat chronic State of animated suspension – which is a pity.

The problem is that when after years (not months, but years) of confabulation and discussion that had taken place in the formulation of the Model Law, the majority of Nation States around the world chose not to adopt it in its entirely but enacted national laws with different variations and alterations.

Thus far 87 nation-States have fashioned their laws on the Model Law <u>adapting</u> but not

adopting the UNCITRAL Model law.

The exceptions are only viz. Canada (the Federal Law of Canada); and the international commercial arbitration law of Australia, and of Hong Kong.[2]

A major problem remains: viz. the current system of challenge under applicable arbitral rules or ad hoc practices – and even under India's 1996 Act – for challenging the independence and impartiality of the Arbitrator or of a Chairman of the Arbitral Tribunal – it is heavily loaded in favour of the arbitrator challenged.

My own experience has been that it is just not possible to get rid of an appointed arbitrator or Chairman of an Arbitral Tribunal when there is some reliable information in the possession of the challenging party which for want of proof cannot be established in a Court of law, and therefore cannot be revealed!

Under the present dispensation there has to

[2] **www.un.org/uncitral/en/uncitral-texts/arbitration/1985modellaw-arbitration-status.html**

be disclosed some good reason (not suspicion) that the person already appointed is not likely to be impartial which is an uphill, almost impossible task.

However ICSID has pointed the way - challenges to appointed arbitrators under the ICSID Regime have been far more successful in recent years than they were in the past.

In several recent cases, challenges to the independence of arbitrators under the ICSID Regime have been successful by applying not the established standard of high probability of bias but of a much lower standard of reasonable doubt.

This has helped restore some degree of accountability in the Investor-State Arbitration system (or the ICSID Regime).

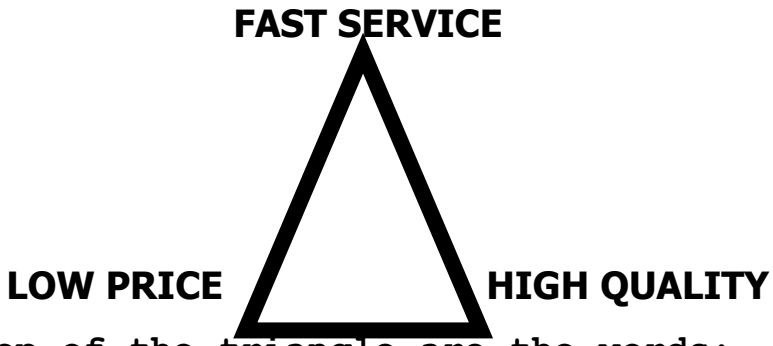
We definitely need more calls for greater accountability of arbitrators in International Commercial Arbitration and in Investor-State Arbitrations.

Besides all this since an award rendered by an International Investment Arbitral Tribunal is final and binding, and because recourse against it on "merits" is presently not available in national Courts of law either under the New York Convention or under UNCITRAL or even under ICSID, there is need for provision being made in the Bilateral Investment Treaty itself for an internal Appeal, or at least an agreed internal mechanism for the Tribunal itself to review its own Award at the instance of a party aggrieved, not only for the correction of patent errors, but even for the correction of errors that are not so obvious or patent.
After all arbitrators – like Judges – are human, and they can err – as they often do.

In International Commercial Arbitration the greatest problem today is that a quick, not so – expensive and yet expert resolution of the dispute is difficult – almost impossible something earnestly to be wished for.

About which there is a story: the story is not mine – it is a story that my good friend Professor Emeritus William Park of Boston University likes to tell, and this is how it goes:

> **"There is a sign in the window of a shoe-repair shop in downtown Boston.**
>
> **It is run by a Greek Immigrant who is fed up with customer complaints.**
>
> **So he puts up a sign in a <u>triangle</u> connecting three expressions:**



At the top of the triangle are the words: FAST SERVICE;

and at the BOTTOM of the triangle at two ends of the triangle are the words LOW PRICE and HIGH QUALITY.

And underneath is the all-important instruction: PICK ANY TWO.

Because all three together – fast service, low price and high quality – at the present moment are simply unattainable in international commercial arbitration and in international investment arbitration.

I sincerely hope that your discussion tomorrow and the half-day to follow will result in finding some solution to this conundrum.

And I wish you all a very pleasant and rewarding conference.

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