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## **India Arbitration Week 2022**

### **Session: Perception of an expert's role in India and the UK**

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#### **SPEAKERS NAMES:**

1. **David Goodman** : Managing Director, Kroll
2. **Dinesh Pardasani** : Partner, DSK Legal
3. **Dhirendra Negi** : Partner, J Sagar Associates
4. **Mark Gordon** : Managing Director, Kroll
5. **Lomesh Nidumuri** : Partner, Cyril Amarchand Mangaldas

## David Goodman

Good morning. Good afternoon. Good evening to everyone. Thank you for joining our session on the role of the experts in the UK and in India. I'm going to quickly introduce the panel before we start our discussion. First of all, my name is David Goodman. I'm a former partner of Blackrock Expert Services. I'm now a Managing Director at Kroll. I'm a Civil Engineer and delay experts and I've been appointed on various disputes as a delay expert on major construction projects across the globe. Next, I'm going to introduce Mark Gordon.

Mark is also a Managing Director at Kroll, and he's the leader internationally of our quantum business. Mark's an internationally recognized quantum expert. He has over 30 years' experience in the industry, and he's been appointed over 70 times as a quantum expert again, across the globe on major projects. Next, Dinesh Pardasani from DSK Legal. Dinesh is enlisted in the Legal Power list 2021 as one of the top 100 lawyers by Forbes India. He's ranked to the Litigation Star by Construction Benchmark Litigation Asia Pacific.

He's ranked to the leading lawyer by Legal Era Leading Lawyers rankings 2022. He's ranked as a distinguished practitioner by Asia law and ranked as a recommended lawyer for dispute resolution by legal 500 Asia Pacific, so great to have Dinesh on board. Next, we've got Lomesh Nidumuri from Cyril Amarchand Mangaldas or CAM as we call it. Lomesh is Head of Disputes for the practice for South India and he's based out of their Bangalore office. He's part of CAMs group that focuses on international arbitration.

He's acted as lead counsel in several arbitrations, and he also acts as an arbitrator, involved in several initiatives to improve the arbitration regime in India, which is one of the subjects we'll be talking about and he's also keen academic. Lastly, I'm very pleased to introduce Dharendra Negi from JSA. He's been a partner since 2002. He's also been in the dispute market for almost 30 years, and his focus is on commercial and construction arbitrations. Dharendra has almost over 20 years' experience, sorry, in handling arbitrations and construction disputes in highways, hydro, thermal, urban, infrastructure, route and metro projects, as well as oil and gas.

So, I think we've got a superb panel of guests that we're going to be talking about, really the role of the expert, myself and Mark will give our perception of the expert from the UK background. We're

then going to talk about how experts are perceived internationally, and then we're going to move on to how we think experts are perceived and the development of the expert market in India. So, I think to start with, I'm just going to hand over to Mark and just ask Mark to give a brief introduction as to the role of the expert, what we actually bring to the table in a construction dispute. So, I hand it over to you, Mark.

### **Mark Gordon**

Thanks, David, and welcome everyone. An expert, as probably one who's listening knows, is appointed to assist the tribunal or the court upon a complex technical matter which is beyond this everyday knowledge. In doing that, there's two cornerstones to the role of the expert. Number one, you must assist the tribunal, and number two, you must be impartial. Now, notwithstanding the natural tension that arises from the fact that the expert is paid by one of those parties. They nevertheless need to work on that and comply with these two cornerstones of their appointment, and in doing that, they must obviously be sufficiently expertise to answer the question has been asked.

They must review all the facts and do a thorough analysis of the evidence. They must be able to provide clear and concise reports and analyze the evidence. They should clearly state the documents rely upon and any assumptions. They should openly engage in the expert process and attempt to narrow the issues. Be prepared to change their mind if persuaded by the opposing party, and obviously answer any questions openly and honestly, under cross-examination. There's a lot of other requirements go with this. But I think they're the two cornerstones and they're the general obligations that fit with that, David?

### **David Goodman**

Thanks, Mark, and I just add, I think, as I said, myself and Mark have been experts for over 20 years and that really is the cornerstone of how we undertake our work and from a UK perspective, there's lots of case law, and there's lots of judgments, and what you do find is, judges will write, when they write their judgments, they give a little extract about how they found the factual witnesses, and also how they found the experts to be, whether they found them to be helpful, etc., and that for us is very important, because that is the guide of how we should undertake our role. And I was just going to

hand it over to the floor, and maybe start with Dinesh and just ask, do you see that as, is there anything you'd like to add from your point of view as seeing the role of the expert and how you feel the role of the expert is utilized?

**Dinesh Pardasani**

Thank you, David, and good afternoon to all of you. I think you and Mark have put very well the role of an expert, but from my perspective as a lawyer, considering these construction disputes are quite complex and quite voluminous. I think the experts bring in their expertise to bring out the analysis, which I think lawyers and the clients will not be able to bring with that professionalism and with that expertise, and therefore experts role become very important to present in a manner that satisfies arbitral tribunal or the court so that they get confidence in what client or lawyers are saying. So, I think it's a very critical role that experts play whether it is technical, or it is delay or disruption, or it is quantum. So, I think role cannot be undermined and I think you have put it rightly, nothing much to add from my side.

**David Goodman**

Okay, excellent, and I was just going to ask the same question to Lomesh, what are his common view of the role of an expert.

**Lomesh Nidumuri**

Yeah. Thanks so much, David and Mark, and I agree with what Dinesh has said, since we are talking about the role of an expert. I mean, I also did some analysis on this, and I realize that coming from the Indian jurisdiction, a lot of the role of an expert is actually scripted way back in 3rd Century BC itself. There is a famous, a teacher, cum philosopher, cum academic called Chanakya, who wrote the Arthashastra, and he gives certain guidelines to the King on how he needs to govern the kingdom, and also certain kinds of guidelines on how an expert can be brought into adjudication of certain disputes, which I thought was very fascinating.

And there, Mark and David, if I may add, the role of an expert was largely to do with the duty to the King or the Judge to who the evidence has been given, and I think that notion over a period of time

has kind of watered down. In fact, we studied some of the privy council judgments just prior to India got Independence, some 1940 judgments, where some of the Privy Council judgments have held that experts should not be brought into disputes, because it's the judges role to actually look into the law of the land, and to also appreciate evidence, and then come up with their judgments because at that particular point of time, on religious matters you would get some profit or you would get some priests coming and giving evidence on matters, which involves religious practices, and certain other evidences as well, which was thronged upon by the era before 1947, which the Court said it's the courts job to do it.

And of course, through post 1947, we've had several statutes in India itself, which permitted expert evidence. But then I think the role of an expert to be very honest with you, if I can just categories it into two heads. One is domestic arbitration and international arbitration, and domestic arbitration also, the slightly large complex disputes and then not so complex disputes. In the not so complex domestic disputes, we do not see experts being appointed that often, because I think there's a certain misconception on who is an expert in the first place.

And should an expert be brought in the first place. Secondly, insofar as large-scale domestic arbitrations are concerned, but we're seeing that only on a limited scale, but largely insofar as international arbitrations and slightly more complex arbitrations, we are seeing the trend of a lot of experts coming in. But then again, the role vis-à-vis the arbitral tribunal, versus whether they're appointed by the party, and therefore, they're a hired gun. I think that is something that still work in progress and a lot needs to be achieved in this regard. I'll just stop here and get the others' views as well.

### **David Goodman**

Thank you, Lomesh, that was very interesting. I'll just hand over to Dharendra, just to add his view, if you've got anything to add **[Inaudible 00:10:32]** to the role of expert to me.

### **Dhirendra Negi**

Thank you, David. I'll be very brief. Firstly, I agree with what all the panelists have said just now. There is no doubt about it. But just to add one point to what Mark said, the role of the expert is, in

my view, critical to assist the tribunal or the court, but here I'm talking mostly from the perspective of the tribunal. We must understand, we need all the stakeholders, be the lawyers, the arbitrators or clients, that there are a variety of businesses now. There are probably millions of businesses. Now a lawyer or an arbitrator cannot be expected to know everything about each kind of business, right?

So, disputes occur in various situations, in various kind of businesses, business transactions, and there has to be somebody, there has to be somebody to inform, to educate, and to tell the people, the lawyers, the arbitrators, what are the nuances, what are the technicalities, what are the issues which concern a commercial transaction in that particular business. Be it a construction dispute, or be it a commodities supply dispute, but there has to be somebody, and that's where the expert steps in and that's where he imparts his knowledge, his experience, his expertise, so that the tribunal can take an informed view of that particular issue, which is there before the tribunal.

So that's why I have no doubt the role of the expert is very critical, and I will probably, I'll add it later. So far as India is concerned, we are gradually, but to a good extent, now accepting the role of the experts and their evidence in arbitrations. So, I think it's a good shade, and I will come back.

### **David Goodman**

Excellent. Thank you, everyone, for your thoughts on that point. I was just going to move on to looking more internationally and speaking for myself and Mark, and I know Mark will add to it, but we work on lots of disputes across the globe. And we see the perception of an expert varies depending on the jurisdiction you're in. And also, as I said, our overarching role is really to the tribunal. Our job is to make complex issues clearer and also help the tribunal resolve the disputes. And we take that obviously very seriously. And I was talking to Mark earlier, and we were talking about our international experience.

I've recently had a case in South Africa, where the other sides expert was employed by the company that he was representing, and he did not see that as a conflict. He'd been employed by the company for 20 plus years, and then was representing them as an independent expert and we found that very hard to take. But he was questioned on it, and he couldn't see why that was a problem. And maybe that's because as I said, we've developed our understanding over many years, and maybe that it

just hasn't filtered through to possibly to other jurisdictions. And I wondered if Mark wanted to add on just on internationally what are you finding when we think of the role of the expert?

### **Mark Gordon**

Yes, David. Internationally it's quite variable. As you rightly say, David, you've had an experience in South Africa. I've got an experience at the moment in the Middle East on a major international airport involves some quite complex technical arguments. And quite interestingly, the client is that to go to the industry and find the best-in-class experts. So, they find 3 or 4 experts who are the top of their game and world-class designers, engineers of airports, but never been an expert before. And it's similar with emerging economies where you haven't got an industry where you got regular trained experts.

You don't want to be an expert's, but at least familiar with the process and how to do it. Then they've really struggled. These people are the best in their game. Their CV are beyond reproach, but nevertheless, they don't know how to write a report, they don't know how to deal with a joint statement, they don't know how to deal with opposing experts, they're not familiar with cross examination, they're not familiar with the rigor that their report will be put through.

So, it's some there's an agitation there with some disciplines in some markets, whereby you haven't got people who have got both the industry experience and the experience of being an expert, which I think is ideal. You have got the experience, but you haven't got the expertise, the expert experience, I think you need a mixture of the two. I think there's always a challenge with either a discipline that's not a well-trodden path, it's fairly unique in terms of its disputes, you bring someone out of industry, or an emerging market where you haven't got, if you like, a regular marketplace in which that discipline can develop.

### **David Goodman**

Thank you, Mark. And I think I've just wondered if I pass to Dhirendra, again, talking of international experience, whether you've identified any issues in arbitration that you've come across, where you think actually, the expert is not what you would perceive an expert to be or positive views.

## **Dhirendra Negi**

See, Mark, I will just take forward from where you left regarding your experience in South Africa. In my experience, sometimes independence can be a subjective topic, what one person may think is independent expert may not be for some other person. Right? Because, that it also depends upon the person who is going to receive the information from the expert. Like, for example, if there is an arbitrator, see he's, ultimately, he's the person or the tribunal panel. They are the persons who is going to decide whether the expert is an independent or not.

And I think there are no preset rules as to who's an independent person. But I have noticed in experience, and it sometimes works in very subtle ways, that the Tribunal may not expect or accept a person as an expert. So there, the person, the arbitrators, the decision makers, it also depends upon their background, their nationality, their background, their culture, from where they are studied, etc. All these factors, especially in international commercial arbitrations, I've noticed that that plays, that does play a role as firstly, their background, and secondly, their experiences in acting as arbitrators as to how they perceive a person as an independent expert.

And it's not, there is no benchmark or a common test, I've noticed that. So, there are arbitrators who hold experts contemptuously. Really. They hold an expert as for no reason at all, just because you're an expert and an arbitrator thinks, I'm an expert in this field, who are you to tell me? So there, that's what has been my experience. And it's been quite varied. So, I don't want to point out a very particular reason, but I have noticed there is something vary, that you need to be very careful as to before whom you're producing your expert. There's some background that needs to be done on that. That's all I have.

## **David Goodman**

That's very good. Dinesh, I'm going to ask you the same question. The view, whether you've seen any different views internationally with your work, in arbitration, whether you've seen the role of the expert vary?



## **Dinesh Pardasani**

No, I think I would agree with Dhirendra, because it's a very, just by calling a person an independent expert will not make him independent. Of course, the independent experts do give certificates. And that is for granted that, yes, they are independent. But I think it all depends upon because independent would mean that, look, I have never met a party, or I've not met the other party. But I think that's not the criteria. The criteria is more whether what you're presenting in your report, what your qualification is, what your experience has been, why we've been brought in an arbitration, how you have presented your report, methodology, whether you are consulting with the tribunal or whether you are there to assist the tribunal.

So, I think those things will actually determine your independence, your impartiality, with which you are coming before the tribunal to assist the tribunal in coming to a conclusion or a determination. I think that's the key to everything. Just by calling it an independence I think will not give anything because I would say that, to give an example, even arbitrators give an undertaking under Section 12 of the Indian Arbitration Act that they are independent and impartial, and that is sufficient for them. But I think it's a step more for the experts, by giving an undertaking is not sufficient.

They have to still discharge the owners to the arbitral tribunal that what their analysis is based on the documents, which I've given it to the other party, arbitral tribunal. So, I think those are the parameters if met, I think the true independence will come. So, I've seen largely internationally or even in India, I have not come across this African experience that you had. So far so good with me.

## **David Goodman**

Excellent. Thank you. And I'll finally ask the same question to Lomesh. Just your experience internationally, and whether you've seen any varying expert requirements.

## **Lomesh Nidumuri**

Yeah. Thanks, David. I think in terms of my personal international experience, dealing with experts, has been slightly different from dealing with the Indian experts. I'll be very candid about this. I think the reason largely is that the notion of who an expert is, is very-very different and accepted very

differently in India, compared to what it is accepted internationally. In India typically the trend is changing, no doubt, but as of now, experts are perceived to be an extension of the party itself. So, they are called as a party witness.

So, they're expected to toe the line of the party itself. And if the deposition goes here and there, then that's something that the expert is largely thrown under the bus and the parties are not very happy with it. Whereas internationally, my experience has been that there's a lot more sensitization that the experts largely over duty to the tribunal. And I have found that at least there is a conscious attempt that is being made to adhere to that principle. But having said that, the fundamentals of an expert report remain the same, whether it is domestic or internationally.

I have seen with all due respect, expert reports getting demolished in cross-examination, simply because the experts have not been able to withstand the cross-examination, like what Mark was also making a point earlier, that it's very-very important for the expert to be really perceived as an expert, and to also be able to withstand the trial. That's baptism by fire, right? So that's where the truth really comes out. And if you're able to sort of hold your ground and hold to your opinion that you have said, while at the same time, not kind of mitigating the duty that you have to the tribunal. I think that is the role of a perfect expert, which fundamentals remain the same whether it is domestic or international.

### **David Goodman**

Yeah, excellent. Thank you, Lomesh. So, I think that's quite a point you touched on there is the whole cross examination of experts, and that you can be a very good expert, and you can have a very strong report, but the test under cross examination is a different test, where you're felt to be under huge pressure. And whether, and, again, I was talking with Mark about this earlier, is cross examination, what is the purpose of it, if you've written a very good report, it's independent, it's factually correct.

And then you have a barrister or KC, basically trying to belittle you. I've had cases where they start with your CV, and they start question you on the background of your CV and going through projects one by one, and that I don't really see the benefit of that. That's all part of the theatre of cross

examination. And I think Mark had an experience in, I think he was saying in Norway, where they took a slightly different approach, which is quite interesting.

### **Mark Gordon**

Yeah, there's a few different experiences you pick up along the way. In Norway, they had a different experience whereby there's no cross-examination, as an inquisitorial arbitration rather an adversarial one. So, the parties with their experts sat in front of the arbitrator, and the arbitrator asked his own questions. And therefore, the benefit of that, obviously, is the questions are very focused as to what the arbitrator wants to ask, and you don't get waylaid by what the opposing counsel or lawyer wants to ask you.

You don't get asked about your CV, etc., the challenge with that, obviously, is that the object needs to be right up to speed with your report and the issues. Because you tend to find the questions aren't very, or certainly my experience was the questions weren't researching. They're more about understanding your report than challenging it. So you really need a good arbitrator who's right on top of the documents when you get to that stage. There are other things I think that you sort of pick up that work or help towards the independent so have an expert.

For example, you sometimes get experts that are instructed to come together before reports are written and they need to engage in perhaps place a joint statement before anything's put in writing by way of a report and what that does is it avoids people taking positions, because when someone takes a position and signs a report to it. It's harder for them to change their mind because it's gone public and everyone's relying upon it.

So, I find from an expert perspective, that works well, if you've already narrowed the issues, and then you just do a report on the issues that he can't agree. Lawyers perhaps aren't so keen, because they're a bit out of control at that point, and clients don't really know what he might be agreeing to in that process. The other thing is really just things like PowerPoint Presentations and arbitrations in the hearing itself, an expert might produce the report, we see this quite regularly, that's really complex, it's difficult to get your head around, and it can hide a multitude of sins.

I think it helps, if you have a good PowerPoint presentation during the tribunal June hearing, perhaps the start prior to cross examination that helps focus the mind succinctly, summarizes the party's positions. And then hot tubbing where both experts are put before the tribunal and ask questions that there will at the end, and it usually engenders a debate between them an end. It tends to flush out the merits, the respective arguments. So, I definitely think there are processes that can be adopted that would help. I mean, there's never, nothing's ever perfect, but there are certainly processes out there that could assist in arriving at the right answer and flushing out if you like experts who perhaps haven't done gone through due process.

### **David Goodman**

Thanks, Mark. I think just to add to that, I've got a recent experience where we were instructed by the tribunal, both sides, experts to issue without prejudice version of our reports to start with. We exchanged those and then you could see where both parts, where we were both coming from, and we could help narrow the issues in disputes. And I thought that was a really good process, some because otherwise, you have an exchange of reports. And straightaway, there's 101 things to deal with. Some of it's just noise, some of it's unnecessary, and it wastes both time and money, which are both, important commodities in arbitration. And with that prejudice it was quite a good way of just saying, look, you guys get together, have a look at what you're both thinking, and then finalize your reports, once you've seen where the other party is coming from, and I thought that was a very good process, I'd like to see that process kind of more.

### **Dinesh Pardasani**

It's a good idea and I think it's very cost-effective, and also saves a lot of time for parties. And I did try doing it in India, with the government as a counterparty, and I completely failed, because they did not agree to it. So, I think that's a challenge sometimes when you're dealing with government, where you can't expect them to be reasonable and understand the objective that will save a lot of time for both parties, and also cost as well. So, I think it all depends upon matter to matter where you can fly this, I think it's the best way of doing it.

**David Goodman**

So, I want to refer to him, Dhirendra, did you have something to add?

**Dhirendra Negi**

I agree with what Dinesh have said, concerning on totally seeing it totally from the perspective of Indian arbitrations, domestic arbitrations. I've never seen experts agreeing on anything, right? And sometimes tribunals even don't care whether they should be exchanging reports or doing hot tubing's, because it is assumed that if there are two experts they will never agree. So, rest is left to the lawyers and their cross-examination etc., So, the process goes on as usual. So, there is no innovation as such in trying to adopt better techniques or better practices.

**Lomesh Nidumuri**

Yes, sorry, I just want to make two quick points here, just to take off on what Mark said earlier on hot tubing of experts. In fact, our Delhi High Court in 2017 in the Micromax judgment, in fact, the judge took an opportunity to actually lead on guidelines on the hot-tubbing of experts itself, and actually advise parties and the Delhi High Court to come up with a mechanism by which parties would resort to hot-tubbing of experts a lot more, which I think was a very welcome move. That was actually a judgement where there was a settlement. So, the judge really had no business to get into all of this.

But I think just from jurisprudential point of view, the judge wanted to put it out there, that hot tubing of experts is something that needs to be done, particularly for patent disputes and other kinds of disputes that's something that is aspirational but that's still work in progress. The second thing that I wanted to point out is from the Legislative space in our country itself, there is no real guidelines on what a role of an expert should be and that is something that needs to change. You have the IBA guidelines, which Article 5, which essentially says that what the role of an expert should be, and that the fact that they have to be largely independent and impartial.

And they have a duty to the tribunal. In India, in fact we have the India Arbitration Forum, which has come up with certain guidelines and perhaps it is one of the most progressive guidelines in which

they have actually laid down as to how, when an expert is appointed by a party, the party has to make sure that they have absolutely no role in the making of the report, other than just giving inputs to the expert. And the moment that inputs are given, they literally have to wash their hands off and let the expert frame the report. So, I think it's very important to understand all of this from the Legislative space and how the developments are taking place as well.

**Dinesh Pardasani**

Just one last point on this, David, if you allow me.

**David Goodman**

Absolutely.

**Dinesh Pardasani**

So, I think now the tribunals have started imposing costs on the party who is lost, and therefore the cost of lawyers and consultants and expert being imposed on the party was lost, I think that might have some implication on understanding the importance of doing it together and coming only with the disputed issues before the tribunal. So, maybe that cause imposition, which has started implementing in India on a very, I think, good note, positive direction. So, I think that might helping people understanding in saving cost of the other side and making it more efficient.

**David Goodman**

Thank you. [inaudible 00:31:59] carry on. Sorry,

**Dhirendra Negi**

Just to add one practical point to what Dinesh has said. See, most of the time, the arbitrators come to the hearings with a clean slate. In the sense, nobody has any idea what the dispute is about. So, to expect a kind of a direction from the tribunal that, why don't the parties come together and try to

resolve at least whatever you can before you come to us. That kind of direction or that kind of guidance from the Tribunal is also very difficult to find, or to even expect from the tribunal.

**David Goodman**

Thank you. Just one other side point when Dhirendra you were talking about you've never seen experts agree anything. I wondered if anyone had experience of a jointly appointed expert, because if there's a dispute in these both parties, rather than have each party provide their own expert, have you seen it where there is a single expert resolving the dispute or helping to resolve the dispute?

**Dhirendra Negi**

Only under the orders of the tribunal, not by agreement.

**David Goodman**

Yeah, absolutely. And I just wondered if that was something that in the future dispute resolution. I've always thought it was a good idea. If you have the same as a delay expert, if you have the same set of facts and the same issues. In reality, you should come up with the same answer, but obviously, that doesn't often happen. Okay.

**Dinesh Pardasani**

David, I came across in fact, in one of my arbitrations, I have filed an application where I have sought directions from the tribunal that they should appoint a common expert to value something which tribunal was quite inclined, they have kept the application pending. And I think after some evidence goes, they will be appointing one. So, it is not that tribunal is not inclined, when they see value in it, because even their life is difficult when they are two experts giving their report on the same issue. So, I think they are also happy to have one common tribunal appointed expert who can carry out this.

**David Goodman**

Yeah. Mark, I was going to ask you.

**Mark Gordon**

Yeah. I've been appointed by the tribunal before. I think the chart makes absolute sense, isn't it? You have an expert appointment and then the tribunal relies upon that. The challenge for the parties is once they see the report to the extent is like it, they want to understand whether it's legitimate or not. So, they end up appointing their own experts to assist with cross examination and to interrogate the report because often part of it they don't accept or on the face of it, they don't accept. So, what happens in reality is you have too behind in the wings experts just commenting and throwing stones, if you like on the tribunal appointed expert. Now, the party appointed experts got some more merit perhaps because the parties engaged, and they actively were involved in the selection process of that independent expert.

But still, I think, I tend to find that the clients and the legal teams don't prefer that process because it feels out of control. They haven't, they can't see a draft report, they can't talk with their witnesses, they can't create witness statements around the arguments, etc. A lot of what we do is on the delay and the quantum requires gap, filling in the evidence with witness statements, etc. Now, until the parties know what those gaps are, and they usually know it through seeing draft reports etc. And then they develop witness statements around them. And they fill the gaps by witness evidence, some extent, and if you don't see any of that coming, then it does leave a bit of a vacuum and clients and the legal team tend to not be too keen on that process.

**Dinesh Pardasani**

You can blame lawyers to some extent.

**Dhirendra Negi**

No, Dinesh, I'll disagree. It's more than the lawyers. It's the clients who were very apprehensive, because that's a very risky proposition of having a person appointed by a tribunal. Then there are a



lot of questions arise, what if she doesn't like what Mark has pointed out? So there is a lot of apprehension beforehand, as to what if those points are not covered? What if he says something like this? So, it's very risky thing, and things like **[Inaudible 00:36:38]** I don't want to agree to that.

### **Dinesh Pardasani**

There are pros and cons to it. Of course, it all depends upon as lawyers say facts and circumstances of case.

### **David Goodman**

Yeah. So, it's a kind of a long way off before we get to that, I think that point of jointly appointed experts. It's a pipe dream that I kind of, that I had that I thought it would be that one day, but maybe not. I was just going to move on to we've spoken about kind of myself and Mark's understanding of an expert role from the guidance of English law. And the other I think the other important point is the case are written up, as I said, and experts have written about, and it can be career ending in the UK, at least, where someone is written up by the judge to be seen, as an unhelpful expert, a bias expert, and there have been those cases, and there have been careers that have ended, unfortunately, that way. I just wondered, going back to India. Again, I know we've touched on it, but maybe starting with Lomesh. The perception generally of an expert in India, is it what you'd expect to see internationally or is it something different or is it changing?

### **Lomesh Nidumuri**

Thanks, David. I think the last part of your question I've already touched upon earlier in some of my points. But just to give you a practical kind of an insight. Around 2014 or 2015, that's when I think there was a lot of interest on expert services in the Indian arbitration space, a lot of firms took interest. We obviously got a lot of pitches, they would make their pitch saying that we could come into pose on your behalf, etc., But you would not believe it between 2015 to 2018 most of the experts who we spoke to said that they will give their report but they will not come and stand the test of trial, which was quite interesting at that time, but I know that a lot of them have changed their model now.

Because their perception of just giving a report was just to give a report to the party and the same cannot be used in the arbitral tribunal or in any court of law. In fact, they will put that in one of the qualifications as well. But that I think the perception itself has changed since perhaps 2017 or 2018, where parties also have realized, and the experts also have realized from their end, that they indeed have to come and depose before the tribunal, because a report that is not tested to through trial is not a report at all.

I mean, it cannot be relied on under Indian law, or under the Evidence Act, the person who's making the report really has to come to the tribunal. So, I think that perception, I think both from the parties and from the experts has changed over the last few years from what I see. So, in all the pitch documents that I see today, one of the first things they say is that they are willing to come and depose before the tribunal and they talk about their expertise before the various arbitral tribunals where they come and given evidence. The other point, sorry.

### **David Goodman**

Sorry, Lomesh. I was just going to ask why is that, why do you think they did not want to testify?

### **Lomesh Nidumuri**

I have no idea, David. But that's exactly what the position was. But I'm glad that the position has changed now. A lot of those expert services have changed their model now and they have realized that they need to step in and give those reports. Otherwise, a lot of these perceived expert services were only giving reports and really not taking it to the tribunal. So, I think that's the mind shift, change that has happened. The second point that I wanted to make is the mindset shift is changing insofar as parties are concerned. But I think it needs to change to a larger extent.

Today, if you look at a lot of the domestic arbitrations, I think experts are perceived to be somebody we should go to as a last resort. And in fact, there's a lot of circumspection to say whether we should go for an expert report or not, because they do not want to upset the deposition that's already on record, you would not want an expert to come and say something different from what your parties have also said, and three, I think a lot of parties believe that they themselves have in house expertise, and they don't require the assistance of experts outside.

This, of course, depends on the nature of the industry. Some industries are extremely complex, for instance, the construction industry and certain other industries, where it's an obvious choice that you need to get experts. But I think there are a lot of other areas, for instance, certain other areas where the parties may believe that you do not require the services of an expert and you can make do with having some kind of an in-house expert who can come and depose.

And they will obviously think about the costs. Because the cost of an expert is perceived to be exorbitant. And sometimes it's perceived to be something that is not required at all. But as I told you earlier, David, I'm an eternal optimist. I've seen how the arbitration regime has changed in our country. And I've seen how the perception also has changed in our country. And I do believe that if there is competence, if there is knowledge, and if there is credibility of an expert witness, I think the parties are a lot more receptive now to engage the services of an expert. And I do believe that that is going to be the future of arbitrations in our country.

### **David Goodman**

Thanks, Lomesh. Before I pass on, I just want to touch on one point you made, and it's something that we see quite often is the late appointment of experts. The Statement of Claim has already gone in, they've already made their position. And then they decide, actually, we need to voice this up with an expert report. And that's kind of my worst nightmare, because they've already decided what their case is. And it's very hard to, unless it's very obvious, it's very hard to come in late in the day and try and give that independent view on what's already been said, once they've kind of set their marker down.

We do see that, when it's so late in the day, and we always recommend, again, easier said than done, but early engagement with experts. So, we can look at what you think your case is, where we think your true position is, and really take it from there. And we try to avoid that phone call and someone we've heard that the other side of that serve expert reports, we haven't got an expert, can you come on board, and that's kind of, that's normally a thanks, but no thanks from our point of view. I'll pass on the same to Dhirendra, if you wanted to add just to game what we've been talking about the perception of experts in the Indian market.

## Dhirendra Negi

David, there is a historical perspective to this. The role of the experts in Indian disputes **[inaudible 00:43:52]** arbitrations. See earlier, we'll say like it's 30-40 years back, experts meant experts in criminal trial, mostly. Like your handwriting expert, your expert that you need in the criminal trial. So that what was perceived to be an expert. And plus, we have one provision in our Evidence Act Section 45. It lays down like who's an expert. So, everything was seen from the perspective of that section. And it is still seen from that perspective to a very large extent as to what is written in Section 45. But over the period of years as what Lomesh has said things have started to change.

Clients have started to understand that, yes, we need somebody external, somebody who's really an expert, not somebody who's in-house, not somebody who's just because he's worked in industry doesn't mean that he's been he has become an expert. The difficulty that I see is that the, how well, they are accepted by the tribunals, is the question, which is of more importance. Obviously, the clients have grown, the lawyers have grown, in their attitude, in their perceptions. But there I feel there's a lot more to be done for baking the experts to the people where they're really required, and which are the tribal members.

So, I think if that's one aspect, where we all need to really work on, and it comes in different shapes this subtle or inherent opposition to an expert, it comes in various ways. That may not be expressed to the office. Yes, I've faced very express opposition by one particular tribunal, when I said in my list of witnesses, when I mentioned there is an quantum expert. He said I don't believe in this expert. So, the question is why? Because since you appointed him, he can't be independent. So don't tell me he's an expert. So, I will literally argue, fight, and give all kinds of concessions to bring the report on record. Sometimes it becomes that bad.

I think that it is asked all stakeholders, this need for more awareness and awareness in the sense more education as to what value an expert brings on the table. I think that is what is required for so far as the Indian market is concerned. So, unless that message goes through, and the importance of having an expert still be wondering.

**Mark Gordon**

It's an interesting point, Dhirendra, I wonder to what extent you think it might change going forward. India has massive plans for infrastructure growth, etc., which will inevitably lead to foreign and foreign investment, international investment on a huge scale. Do you not think to the extent they will expect international and accepted forms of arbitration process?

**Dhirendra Negi**

Yeah. Not there. A lot depends upon what kind of tribunal you have. See, if it is a tribunal of having votes, Indians as well as foreigners, then it's still fine. If it is entirely a domestic tribunal, there may be difficulties there. Because see, ultimately, they also, arbitrators has also realized that it is beyond them. If you take our construction delay case of construction, it is so difficult to understand how the delay actually happened, what are the delay events and what were their effects, and how does that translate into costs. It is so difficult to understand.

**Mark Gordon**

Of course.

**David Goodman**

I was just going to pass it on to Dinesh. To really, I think we've moved on to where do we think this is going in India? We're as a business Kroll, we're very keen, we've now developed a team in India, we see the arbitration market changing, as Mark was saying, the infrastructure in the pipeline so to speak is huge. So, how do you see the market developing maybe over the next 5 to 10 years?

**Dinesh Pardasani**

I think I would say 5 and 10 years is the span where there will be radical change. In fact, change has already happened. And examples like Dhirendra mentioned, I think, are very few now. The judges are understanding the importance of delay analyst and they understand that it is not lawyer's job, it is the experts who have to present this. So, I have no doubts that, like in an international market,

where quantum and delay or even technical knowledge, you need to bring an expert, I think that has become need of the hour. But of course, I say that it is very important for lawyers to strategize and be more focused, that where expertise is required.

They cannot be bringing expertise for everything. So, I think that is an important task that is put on lawyers to decide. But I have no doubt that it is important. So, I think it is also important. I would like to go to the previous question about credibility. I think I would compare experts as lawyers like when we go in argue in court, and when any judge sees that a lawyer is trying to mislead or is not putting the correct position of law before him. He will carry that and will obviously share it with other judges as well. So, your reputation carries faster than you think. You might think that look you are trying to mislead a court in a court room and the other courts will not get to know, that's not the case.

They discuss, over the lunch table, who was a lawyer who was misleading. So, I think that carries before the arbitral tribunal also. And the moment as you say, that the credibility goes down. Believe me that these arbitrators also discuss these issues between themselves. So, I think credibility is very important and I'm sure organizations like Kroll and other international experts who are coming in India as are very of this. And they do bring that credibility, which we all respect. So, I think I see a lot of potential for the experts in India.

### **Dhirendra Negi**

Yeah. I fully agree with what Dinesh has said, there is a tremendous potential for experts in India, because you see, the number of arbitrations that we have here, just the volume of this, even if you are able to catch a minor fraction of that market that will still be huge. But the only thing is, like I said earlier, sensitizing people about it, making them aware, and then the acceptability, then like they just hinted at something, experts should also walk the talk, right? Being independent, because if there is one expert, who has tried to be smart in an arbitration proceeding and played around with the arbitrator. See, arbitrator then says, these experts are like this only. So he loses faith in the process. So, there is some responsibility lies with the experts also, so that they carry the independence the most important thing.

## **David Goodman**

Absolutely. And that they, absolutely, and that's what we live by. But in any industry, you always there's always a rotten egg, that kind of tries to taint it for everyone else. But we live by that. And as I said, I've seen careers ended on that basis. And as Dinesh was saying, everyone talks, even though arbitration is a private process, everyone talks because that's what happens, and you hear all sorts of stories. But I was going to hand over to Lomesh just too we've got a few minutes left. So, Lomesh, if you wanted to give you a view on where you think we're heading.

## **Lomesh Nidumuri**

I think India is poised to even in terms of economy, it's poised to be the 3<sup>rd</sup> largest economy in the next 5 years. These are all studies done by international organizations, the economy is expected to increase to more than USD 5 trillion in the next 5 years or so. There is obviously a lot of traction that's happening in the Indian market. India is perceived to have handled inflation a lot better than a lot of countries in Europe, and perhaps even the US as well, the way they handle the supply chain, and how they've kept the inflation low. So, there's a lot of positivity around India and which is precisely the reason why we're speaking here on this forum today, right, because there's a lot of enthusiasm and hope with the Indian market.

And I do believe that the great things are in store insofar as Indian market is concerned, and also the role of experts. But at the same time, I do believe that, as I told you, it's always the fundamentals that are very, very important. It's always important that an expert who comes in is perceived as an expert, because I have seen cross examinations where on the first day the witness said XYZ. And on the second day, he said ABC, then we went back to a strategy room, and we decided on the third day, we decided to confront the witness and say, look, you said ABC the first day and then XYZ the next day, what is your exact answer, you will not believe it, one witness took one hour to answer that particular question because the witness was clearly caught out.

And that is where I think knowledge of the report, your credibility, and that really comes in handy. And of course, your independence. I think if these fundamentals are set right, insofar as an expert is concerned, things are going to be right. And the last point, as I told you, and just to touch upon what Dharendra also mentioned, is this whole, the perception game, and also the knowledge of that

needs to be disseminated to the parties. There's a lot of we have the India Arbitration Forum, which is basically a bunch of arbitration practitioners who have come together to change and improve the arbitration landscape in the country.

And I can tell you, there are a lot of likeminded arbitration practitioners in the country, who mean well for the betterment of the arbitration community itself and the arbitration legislation. So, we do petition, the government when it is required, we hold seminars when it is required, and to whatever small extent we do help change the perception that the counsels themselves may have about the role of experts, for instance, and also what the parties may have. So, I think this is an ongoing process. I would say still at a nascent stage, we are definitely better than what we were in 2015 for sure. It's an ongoing process. But as I told you, it's a wonderful future that we have going forward.

### **David Goodman**

Excellent. I think we're almost time to wrap up. So, Mark, do you have any last words on, I know that we're both very keen to develop the Kroll offering in India, and bring what we think our skills are as independent experts, I wondered if you wanted to add anything?

### **Mark Gordon**

Well, just really picking up on what Lomesh was earlier pointing out that the challenges of an expert who doesn't really understand his duties, it's important that they be adequately trained, but I think there's a short-term sort of feeling, they've got to support their client. And that says, a fundamental misconception, because our poor expert will lead to significant wasted costs, it will mean that the legal team may change their strategy if they knew what the truth was. There'll be business uncertainty to the client.

And occasionally, that can lead to a risk to the business, in principle they can, I've seen businesses go under as a consequence of an unexpected decision or change or realization of what the truth is. So, I think it's an education thing as well, and I think perhaps, I'm sure, the legal team can help in that in educating the experts as to what their role is, and what's expected of them. But it's an exciting future ahead.



**David Goodman**

Excellent. And I think just might final point is that we as Mark said, we take the role very seriously, because normally there are millions of dollars at stake and you have to get to the truth, because otherwise, there's lots of wasted time and lots of wasted money, and people's careers and everything. So, it really is, we do take it very seriously. Dhirendra, yes. Well, I think we've got about two minutes left. So, if you want to do quickly.

**Dhirendra Negi**

I just want to add one thing, it'll also make the job of lawyers quite easy, if we have experts like you. So, the lawyers doesn't, then would need to go through those 1000s and 1000s of pages of documents to crystallize the issues and instead whereas a person with your expertise could finish the job in a few days or maybe a couple of days. So, the amount of time and costs it saves for the client also would realize the value for everybody and understand the issue and decide to come to a decision on that issue. It also helps them.

**David Goodman**

I think we're all on the same page. Dinesh, did you want to have any last words?

**Dinesh Pardasani**

I think all positive, good discussion with you. I think all I would say considering Kroll has already set up the office in India, which is half the job accomplished. I think what I would expect, and I have faced some problems is that in Indian context, the contractors are not too professional in maintaining documents. There are projects which get completed, where even base line schedule has not been submitted. So, I think the experts have to be flexible enough to accept the Indian records and provide delay analysis. And of course, fees is always an issue. And I understand your perspective also, client's perspective also. So, I think some sort of hybrid model where you take Indian consultants also along and along with foreign consultants provide a more of a hybrid and a more cost-efficient structure that sort.

**David Goodman**

I think, Lomesh, it leaves you with the very last word.

**Lomesh Kiran Nidumuri**

**[Inaudible 00:59:01]** much to add now. So, I just believe that the future was excellent, and the attitude of the arbitration community is also going to change over a period of time. It's only a question of time, that they realize as what Mark said that experts are largely there to with the duty that they owe to the tribunal, and not really the client.

**David Goodman**

Yeah, excellent. And I think that brings us, we finished on time, so there's no delay, so there's no dispute. So, thank you all for joining. I found that really, really interesting. I hope all the people that tuned in also found it interesting. And as we've all agreed, I think the future of arbitration in India is exciting. And I look forward to seeing you all soon.

**Mark Gordon**

Thanks everyone.

**David Goodman**

Thank you.