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## **India Arbitration Week 2022**

### **Session: The What, Why, How & When of maintaining records for an arbitration – the whole nine yards**

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#### **SPEAKERS NAMES:**

1. **Chakrapani Misra** : Partner, Khaitan & Co
2. **Raj Panchmatia** : Partner, Khaitan & Co (Moderator)
3. **Rajendra Mishra** : GC Indian Hotels Company Limited
4. **Smitha Menon** : Partner, Wong Partnership
5. **Vineet Vij** : GC Tech Mahindra



## **Juhi Gupta**

Welcome to the 4th day of the India ADR Week, and the first session for today. All the panelists have joined us, and we are now ready to start. My name is Juhi Gupta. I'm a Principal Associate with the Dispute Resolution team at Shardul Amarchand Mangaldas & Co. Today I have the pleasure of introducing our vastly experienced and diverse panel, that will be discussing a very interesting topic, which is, the What, Why, How and When of maintaining records for an arbitration - the whole nine yards. This session is sponsored by Khaitan & Co., and we have a very distinguished panel to discuss this important and interesting topic.

To start with the introductions, we have with us Mr. Chakrapani Misra, Partner, Dispute Resolution at Khaitan & Co, Mumbai. He has more than two and a half decades of experience in commercial dispute resolution and has been regularly ranked as a leading lawyer in the field of dispute resolution.

We also have Mr. Raj Panchmatia again a partner in the Dispute Resolution team at Khaitan & Co, who is also moderating the session. Mr. Panchmatia handles matter in both domestic and international fora. He's also been appointed on the SIAC panel of arbitrators and is on the HKIAC list of arbitrators. He's also on the panel of SIMC, is a India specialist mediator and a Singapore International Mediation Institute accredited mediator.

We then have Mr. Rajendra Misra, General Counsel at Indian Hotels Company Limited. He has more than 24 years of experience in the legal field, and extensive experience in various fields including IPR, competition law, litigation management, corporate law, among many others. He has previously served as the in-house legal counsel of several leading corporations, including Hindustan Unilever Limited and ITC Limited.

We have Ms. Smitha Menon, Partner at Wong Partnership. She heads the firm's restructuring and insolvency practice, and is a Partner in the International Arbitration, India and special situations advisory practices. Ms. Menon is on the Shanghai Arbitration Commission's panel of arbitrators, ICC Commission on Arbitration and ADR and the Board of Singapore and is a Fellow of Insolvency Practitioners' Association of Singapore.

We have Mr. Vineet Vij, GC Tech Mahindra, who has over 25 years of experience in legal, secretarial, regulatory, risk and compliance, corporate and public affairs in leading IT, Engineering, banking and Non-Banking Financial Companies. He has served recently as the Senior Vice President, Legal Commercial Regulatory Compliance and Public Affairs at HCL Technologies Limited for over 11 years.



So, we have an extremely stellar panel and with these introductions, I will hand over to Mr. Panchmatia, to make his introductory remarks and proceed with the session. Thank you.

### **Raj Panchmatia**

Thank you, Juhi, for the kind introduction. Thank you MCIA for organizing this. Thank you to all panelists, for taking our time for doing this session early in the morning. Thank you, all the guests, everybody in the audience for joining us. As you know, arbitration itself is quite daunting, and to maintain records is extremely important, and if you don't have records in place for arbitration, you know the kinds of complications it can create during the arbitration, in the evidence, and which eventually impact the results of arbitration.

So, it's extremely important that we maintain contemporaneous records prior to the arbitration, just before when the disputes are started to brew between the parties, or even prior, even in the stage when the documentations were being entered into, the negotiations that were being conducted, it's very important that parties maintain that record. It cannot be stressed, how important this issue is, and very often it's overlooked. Therefore today, we'll explore in brief, What, Why, How and When of maintaining records for arbitration, and we will hopefully provide some practical guidance and practical tips, from some of the best GCs that we have around, the international lawyers and my partner Chakrapani Misra.

So, without taking way too much of a time on introduction, I'm going to start with my first question to Mr. Misra. Chakrapani, as a lawyer, when somebody comes to you, and you are helping them strategize the disputes, while strategizing to invoke an arbitration, what documents, records are considered most relevant?

### **Chakrapani Misra**

Thank you, Raj, and good morning, everyone. It's an absolute pleasure, and it's my good fortune to be on this panel, with very distinguished colleagues, and good morning to everyone who has joined, thank you. Coming to the question, we do face this difficulty, when we start strategizing for a matter, namely that the client comes and says that, look, there is this dispute, story is told, notes are taken, but when it comes to actual documentation, the standard response that comes in, no worries, we will provide it to you please go ahead. And that's where the actual challenge begins. And then we begin to talk about it, okay, maybe put in a list for you. And then actually, the list follows.



And I'm going to share that list with you, because I think the practical experience will help better than just theorizing it. So, the primary list that we provide, and we expect a client to have, before a matter is conceptualized and put before the tribunal, is the chain of documents. The first set of contracts that you had in a transaction, or the first set of documents that established the relationship, which is going under dispute. So, those are your primary documents, you start with your contract, you start with any amendments to that, you start with any modification done post that, which are agreed upon by the parties.

Those are your primary documents, which you need to have. The secondary to that would be, the corollary would be, to have all the documents which are related to the transaction, which may be your set of letters, which may be minutes of the meetings, which may be notes taken and agreed upon by the parties, and those are the secondary documents which come back to support the main dispute. Now, why are documents important? Because if we look from arbitrator's perspective, ultimately an arbitrator is going to get to the facts, on the basis primarily of documents and then of course, secondary evidence and witness' statements, etc., can come.

So, the most important, the most key thing here is maintaining the documents. Now, what happens if we don't have those documents in place? Problem arises because your very foundation may go wrong, you may end up with presenting a case which is not sustainable. That is before filing your case, once you have filed the case, then the problem arises that if you are going to be examined on evidence, again, it may not be substantiated. Similarly, if you're going to confront a witness with a document, which is incomplete or which is not properly recorded, it may lead to very disastrous consequences.

So, the answer to your question, as to what documents are required is in a short word, everything related to the transaction. If I have to attempt a list, it will be what I said earlier, the chain of agreements, amendments, letters, memorandums and minutes of the meetings and any correspondence related to the transaction, your electronic records, as well as any videograph records, which are legitimately obtained and which are not tampered. So, this is in a nutshell, what we need in order to have a successful dispute.

## **Raj Panchmatia**

Thank you, Chakrapani. I think this is very helpful, because it sets the context for our next question and it also sets the context for our entire webinar. Because what are the important documents that you need to maintain is very, very critical in any arbitration. Now, once you've identified the documents, Vineet, as a big organization like yours, what would you say are the best practices to



maintain and store these documents and records? Both in physical form and in electronic form, because in today's day and age, things are moving to electronic records. So, what would be the best practices to store this documentation, either in physical or electronic form, your thoughts?

### **Vineet Vij**

So, good morning, and it's a pleasure to be here. And thank you for having us all and put us all together, so thank you so much Raj. And I'm going to pick up from where Chakrapani just left. He says, they draw out a list. As an external firm, when we go to, a list is drawn out, sent to the client, and there is where our worry starts, how do we satisfy with all the documents that are being sought for, because in our understanding, and having worked closely with business, we feel these four, five documents are good enough to win us the case, be it in litigation or be it in arbitration.

So, the first reaction is to say, do we really need all of this? But yes, that's the lighter side of it. But going back to the, the serious part is the fact that, and rather let me just step back on how we've moved between physical and electronic, and then I can come back on the best practices, etc. So, to me, I think the contracts are getting written online, we have moved to that system now, especially post COVID, 100%, but even pre-COVID and with the digitization push at the government level, etc.

So, I think we are into a phase that we are talking of electronic e-contracts, smart contracts, we have not reached really, but I think we are all in the journey and I think this COVID, as we said, has expedited the whole story. I mean, as a small example, we are creating contracts on a daily basis, we want the Blink-its and the Big Baskets to deliver in say 15 minutes, and then we want the dispute or the issues that arise also to be kind of resolved in the next, 15 minutes, and so on. So, I think, and which is really getting facilitated through, I would say through IT technologies, digitization, and so on, and so forth.

So, that being the background, I think it's important that, be it somebody who wants to litigate tomorrow or could be an aggrieved party, but maintenance of records, for all purposes is prime. We've had a good system or I think the corporations built a great system around physical record keeping, there were times that, you will put, for example, I mean, just as an example, if you were bidding for a say a tender or a government project, so, it would all start with the initial meetings that would happen, the minutes of the meetings, to RFPs, the bids submitted to corrigenda issued, to clarifications got.

So, all that we put together, I mean, that happened in the physical phase, so as to call it simply. But having moved to the electronic phase, where we are now talking of everything being digitized, and



correctly so, because, there are environmental issues around paper, and many other aspects also, and then you have the ease of doing it very fast, quickly, and retrieving, reaching to the point that you want to very quickly so, electronic has its own advantages, so, therefore, we moved to a system of electronic maintenance of records.

So, I think, and then you also have the SEBIs, and the Companies Act and Ministry of Finance, etc., having those frameworks to support, and the IT Act, of course. So, as an organization, what we really do is to a fact that, as an example, when I conceive a contract, or even the discussion was to start in, we put, or we create files, we give them unique numbers, and there is a caveat to this also, which I will come subsequently, but an ID gets created, and from that ID perspective, starts the whole journey of the transaction.

And the teams come in, the emails get mapped, and all of that gets to be put together and then it follows with the contracting phase where and coincidentally, we have moved to a system where we don't do any manual contracting, as an organization. So, what we really do is, our contracting also happens online, so I would redline, there will be versions control, etc., and the same version, etc., would go to the customer and come back and so on and so forth. So, there is a whole singular place or a common place, where all the records are getting stored.

The problem, however, comes is the fact that there will be post award of the contract, when it gets into communications, variation of contracts, so to say, by communications and by, certain actions taken, expressly impliedly, etc. So, that's a piece which gets kind of missed, and I think that's very important from an arbitration standpoint also. I think what we've done is, we've created a system of one putting it into a common place as an organization, the information's are encrypted, the mailboxes are protected, backup taken and, for all the big projects, we create files with IDs.

So, I think we try to put it at a common place, all of it together and keep it all there. So, and fortunately, whether you do a contract in online form, or these click wraps and so on and so forth, all of that anyways is available, electronically. So, it's how you put them together, and how you then maintain the integrity, in the sense that it's not tampered with, or it's not lost through corruption and technological changes, etc. So, I think there is this whole effort which goes into it, I can go on and maybe talk a lot about technology also. But I think that broadly is what we do and then from a best practice perspective, very quickly, I think it's about, firstly, security and reliability, I think that's very important. So, how do we get these records which are created, are put into place where they're secure and reliably, put together.

I think, how do we structure index and categorize, to me is another pillar and I think the best practices from a domestic and international standpoint can be relevant. So, I think, how we see that, just like the physical part of it is properly structured, indexed and categorized for easy getting to it, and then maybe retrieving it. We also have this system about information asset registrar, so that you can use it for maybe a risk analysis and other perspectives also, but I think, review and audit is something that is part and parcel.

And the last, or maybe the penultimate would be, retention policies and timeframes. I think we have these frameworks and legislations and guidelines; I think we'll have more detailed people to talk on it. But then I think it's all about that, and how do we ensure that, there is no alteration, export of this data and the data itself or the records are not compromised. So, a best practice around that, in terms of our learning, etc., are a couple of things that we also practice from a standpoint of the best practices, or the key pillars in terms of record creation and record maintenance for eventual, arbitration or litigation if God forbid, it was to happen.

### **Raj Panchmatia**

Thank you, Vineet, this was very helpful to see as an organisation, what efforts do you all take and what are the practices that you follow to store the records, maintain the records, because bigger organisations have a lot of attrition as well and when they have attrition, you tend to lose the documents when somebody leaves, and you don't know what their mailbox contained. So, it becomes very difficult, but the way you mentioned that you have a centralised data collection process, where you collect everyone's data, in that sense, related to a particular matter, which can help in a big way to meet the challenges.

### **Vineet Vij**

Sorry to interrupt, but I think we also, as a multi jurisdiction organisation, have our learnings from this e-discovery in the US, and I think we've taken those as best practices and we put that all together, so just to kind of supplement.

### **Raj Panchmatia**

No, that's very helpful. I think it's always good to learn from best practices across the world, and implement them in the organization, because that's something that helps you to grow. Smitha, I think some of the very important points made by Chakrapani and Vineet on what are the records, how important it is to store them, what are the best practices.

Now, having said that, what is the ideal timeframe for the parties, for them to preserve information records, like how long? What is the timeframe before, during the documentation process, during the arbitration process, post arbitration? What is the timeframe that you look at when you are looking at someone or advising someone that you must have the records?

### **Smitha Menon**

So, I'll give the most irritating answer that lawyers love to give and that's it depends. So, the timeframe is really informed by what is your document retention obligation, and this varies from jurisdiction to jurisdiction. As a starting point, there are discovery or document production obligations in arbitration, they will either be in the jurisdictions means statute, or it will be in the arbitration rules. And I think it's widely accepted and certain courts, including the Singapore Courts have made it clear, that an obligation to disclose extends to an obligation to retain. In other words, not destroying documents, which might have a possibility of being disclosed.

So, I think that's really the source of the document retention obligation. So, your timeframe has to be such that you comply with that obligation to disclose, and the most common rules that are used in arbitration would be the International Bar Association rules on taking evidence, so the IBA rules 2020, or the IBA Rules on Party Representation, 2013. The letter really applies to lawyers, and it's usually often overlooked, so I thought I would highlight that, because one of the things that lawyers should take note of is guideline 12 under the IBA Representation Rules, which requires a party representative to inform the client of the need to preserve documents from deletion, which might otherwise be in accordance with the document retention policy.

So, something Vineet said earlier, made me think of this, because he said that, oh, we do have a carefully thought of document retention policy, and that actually suits the organization's commercial needs, but as a lawyer, you have an additional obligation. I mean, if the IBA rules apply for your arbitration, the first thing you must do is ask your client, what is your document retention policy? If it's two years, one year, four years, six months, it varies from organisation to organisation and if you know that, that's inconsistent with what you need, if you're planning for an arbitration that's going to come to hearing in a year, two years down the road, you have an obligation pursuant to guideline 12 to advise your client of this.

So, that's something that's often overlooked, so I thought it'd be good to highlight that. Now, I think everyone knows why you must comply with the obligation because if you don't, then you're pleading can be struck out, adverse inferences can be drawn against you, so these are all the reasons why



you need to have a good timeframe. And to answer your question, sorry for the roundabout introduction to frame the point, but to answer your question, how far back do we go? I think a conservative measure would be following your statutory limitation period. In Singapore, it's fairly long, it's six years for breach of contract claims. I believe, under the Indian Limitation Act, it's three years, but I'm sure Chakrapani would, and Raj could correct me if I'm wrong.

So, that would be a safe period of time, before an arbitration, to think how long to keep your records. Another approach would be the duration of the commercial relationship. So, for example, if you or an MNC or a large organization, you would have one sort of Master Agreement, and then you'll have the cause of the relationship, individual or minor contracts that execute each transaction or each sale. And you would want to cover the period of the Master Agreement or the Master License, because then you can rely on things like cost of delaying, later on in the arbitration to buttress your case. So, all the things, it's not captured by clear contracts or documents, and you want to run all these collateral agreement type arguments, you would need things like oh, look at their conduct, this is how they've been doing it all this while.

So, the duration of the overall project would be another measure, and the last factor that I would add, which I had learnt the hard way, for client arbitrations over the years, is when your employees or Key Management People leave your client's organisation, that is when you must sit down that individual, if he's the key person handling the commercial transaction, sit him down and obtain a very simple witness statement documenting the key aspects of how the transaction was handled. And giving an account of any hiccups that could have arisen, that can later on arise in the arbitration. So, for example, if it's construction of a building and you know there's going to be liquidated damages claims later on for delays, or accidents or something that may have happened, slight breaches or warranties that you're not exactly complying with, you would want to get that statement from that person now, before he leaves.

Once an employee is gone, they're under no obligation to give evidence for you, and getting a subpoena, it just makes it more hostile to the person giving evidence. So, it's good to sit the employee down when they're leaving, we can all part of the amicable exit to hi, could you just give us a witness statement, put in a good word for you can use this as a reference for your next job, so on so forth, when times are good, extract as much information as you can. One of the things I saw, which turned out to be very useful, was an organisation, which was quite aggressive, they took the employees WhatsApp chat history, because that employee had was the key person dealing with his counterpart on the other side, the counterparty of the contract.

And that WhatsApp chat history turned out to be so important because his counterpart had left the counterparties organisation. And so, during the arbitration hearing, the only evidence for the other side actually came from our side. And so, it was really good, because you could control the narrative a lot more greatly. I'll stop there, in case Chakrapani has anything he wants to add on how much earlier before the dispute to store documents?

**Chakrapani Misra**

Raj, with your permission?

**Raj Panchmatia**

Please go ahead.

**Chakrapani Misra**

So, Smitha you made two very good points. One is that the internal policy of an organization may not be what is required for a dispute and in India, it's three years yes, but also one point to be borne in mind is that under income tax obligations, we are supposed to keep the documents for seven years.

So, probably it would be good to take the outer limit rather than take the inner limit. So that was one, and also your second point I just cannot resist the temptation of commenting as to how useful this witness statement, or a statement by a key employee leaving the organization can be.

It has been a lifesaver and many disputes and as you rightly mentioned, there are situations where the key person on the other side is not there. So, you have your whole construct, and you can probably construct your whole defense, or your case based on that. So, very, very useful, thank you.

**Raj Panchmatia**

Thank you, I think these were very important points, and I'm sure the audience will keep a note of these, because these are very, very critical when it comes to looking at and leading evidence in arbitration. Rajendra, when I now come to you, you've seen the documents that are required to be maintained, you've heard about the best practices to follow, you've seen the timeframe. I think the biggest challenge is always how to retain these records.

So, what are your thoughts, what problems are generally faced in record retention? And if you've had any personal experiences that you will want to share?

### **Rajendra Mishra**

So, thank you Raj, for having me here, and kudos to MCIA and Khaitan for organising this webinar on a subject which is extremely unusual, but at the same time, very important and very topical. So, kudos for that, because at the end of the day, what is a litigation, what is an arbitration without evidence? If you don't have evidence, there is no litigation. So, it's an extremely important aspect of the whole matter, but something which is a challenge and something where, many a times you don't speak about this, but there are important learnings over here.

It is of course a problem which is faced by many organizations, record retention, and especially large companies, large organizations, multi locational with many people, many employees who change over the years. So, these problems with regard to record retention, are quite frequent in such organizations. For example, absence of relevant people, now from personal experience, if you ask me, I have handled the issues, which date back to 30 years, 40 years, and the people who have handled transactions have long gone, either they have superannuated or they have quit, or they have been transferred, and they are no longer responsible for what they did at that point of time.

Absence of personal knowledge is another issue because people are gone. Absence of records and information therefore, the people who have handled the information 40 years ago, where are those records, where are those files? I've had experience where, sometimes when those old issues come up, we've had to hunt for files and documents in multiple locations, some of which, of course, Raj knows our travails over a period of time. In my belief, the luckiest lawyer, the luckiest in-house counsel is somebody, who probably doesn't have a litigation. But then most of us have had luck.

So, the second luckiest probably is somebody, in whose case a litigation arises closer to the date of the transaction. So, within a year or two years, consider yourself very lucky, but my experience shows that the lack of in-house counsel is extremely hard, very hard luck. Issues arise 10 years later, 20 years later, 30 years later, and where do you go, so it's extremely important to have a system and glad that Vineet, Smitha, Chakrapani talked about the importance of this issue and what kind of system that could be developed. Problems arise because also today, we are no longer in the cold physical file era. We are in the modern office era, paperless offices, that itself poses a great challenge because you look around your offices, you don't find papers and you don't find old papers.

Offices have become modern sleek, but paperless. So, papers are missing papers are not available, not easily available, have been destroyed over a period of time and last, but not the least, is the challenge of the digital era itself. Where today, people work on laptops and on computers, different laptops and different computers for different people. So, unless you have a system in place, your documents and reports will be all over and therefore, when it comes to the crunch, when there is a litigation, you might be having to hunt all over to get the documents and get your evidence together. That is where having a system is something, which is extremely, extremely important, because then you will be able to track and use the evidence, which is relevant at the relevant point of time.

And there, something that Vineet talked about is extremely important, having a central repository. Maybe, in the digital era, earlier times, we used to have files. Create your files, have your contracts, have your correspondence, all of it together. Today in the digital area, the way I look at it is the digital era, you can import a lot of practices into the digital era from the past, create those kinds of digital libraries and digital folders, where you could have all of your documents together. Use some of the technology, you have a contract management tool available, you have IT management tools available today, so use all of that, create digital libraries, create scanned documents, if older documents, or even today when many of us do contracts, which are not digital, scan them and keep those copies together, so that's how I would put it, Raj.

### **Raj Panchmatia**

Thank you, Rajendra, I think it was very helpful to know the challenges that actually you face, when you need to retain these documents and ensure that the documents are there, so that when it comes to arbitration, we don't falter. But Chakrapani, I just wanted to come back to you on this issue a little bit more. While we have seen the challenges that we face in retaining documents and retention of documents in today's day and age. In spite we are going to a digital world. What could be the problems that you would see if the documents were inadequate, or you'd say they were not properly maintained? What are the issues that you will face in arbitration, maybe before, during, what are the implications of inadequate or improperly maintained record or an incomplete recording in arbitration?

### **Chakrapani Misra**

So, as I'm listening to the views, and before this jury very kindly introduced me, saying that two and a half decades experience, it took me back to one of those early days when I was co-counselling for an arbitration, and I was led by a very eminent senior. The client was German, a very big corporate, facing a copyright challenge here and we were trying to see how we can help him in a couple of

commercial breaches and in my usual enthusiasm, I have read the papers, I was ready, so I told the client, yes, don't worry, we will start drafting and we will be absolutely ready to file things within no time. And my senior had this look on his face, it's like, you may want to take a step back. And it so happened that when we started going deeper into the matter, the entire records were kept in Germany in Frankfurt.

We were told that okay, if you want this then this, and this is a huge storeroom somewhere off Frankfurt, and you will have to go and find it. So, I was on the next plane, again thinking that I'll be able to do it in a maybe a day or day and a half time and I'll be back and everything else will be fine. It took me one week to take out the relevant papers, because the records are just dumped, very nicely dumped, I must say because they were catalogued, they were kept, but everything was there. Now you need to find out what is relevant for that dispute.

So, that's the first thing that you will face, or anybody would face if records are incomplete and one is proceeding for an arbitration or a suit. It will delay the matter. That's the first challenge we face because unless you have your documents in place, unless you have things what you need for foundation of the case, you will be delaying the matter. So, that's one thing, that is the challenge that we face when documents are not in order or available.

The second thing that happens is that, if you come to know that certain document is not there, or it's a court record or some other public record, where you can get a certified copy, if you come to know that early, you can ask for it. Otherwise, it may take again forever, and set you back for by a while. So, the challenge that we face is delay, before filing. When you file it with inadequate records, or on the assumption or incomplete record, the case is likely to suffer very badly, because the other side will call it out, so that's the challenge when proceedings start.

As it progresses, your evidence, if it is an incomplete document, more often than not, and all of us those who do arbitration will agree, that an arbitral tribunal may refuse to look at a document, which is incomplete. So, that's another thing that may be a huge setback. Likewise, as I mentioned earlier, if we are confronting a witness with a document, and that document is incomplete, it can lead to disastrous consequences, because instead of getting an advantage in confrontation, you may actually end up losing something, because incorrect inferences may be drawn.

So, these are the challenges that we will face if documents are incomplete and that's what happens in some of the cases. And then last point that I wanted to talk about is, that secondary evidence may not be as helpful as the main document itself. So again, that's something that must be borne in mind. Over to you.

## **Raj Panchmatia**

Thanks, Chakrapani, I think very important points, and very relevant in today's day and age. That brings me to you Vineet, today as you rightly said, we are in the digital era and all documents, contracts are now being considered signed digitally, they're maintained digitally, so how does one maintain and preserve smart contracts? Are there any specific tools methodology that one must keep in mind while dealing with such contracts?

## **Vineet Vij**

So, I think Raj, you rightly put it, and Rajendra, you rightly put an important problem when it goes to organisations, particularly, people leaving and KMPs or key personnel leaving, etc. So, I think that brings to you, what is the kind of system you want to put into place when it comes to e-contracts and what comes to my mind is, and that's how we do it, and as I stated. From a contracting perspective, there are enough tools available in the market, the CLMs of the world. There are multiple vendors, national, domestic, and international who are providing those tools, platforms, etc. So, I think that is one structure that to my mind, organisations or the legal departments of the organisations, must put into place, so that from the opportunity starting to conclusion, in fact, the signing also happens through DocuSign's, and Adobe's and others of the world now, so it's all electronic if you ask me. So, the entire chains there, it's all preserved, it's all online. It's not just available for litigation, but it's available for even reference purposes.

So, I think, how do you put into place this tool, or a structure is something to my mind, very important. So, that's the first piece I would say. As legal departments, I would say, and in-house, I think it's a pain area, especially when, you are being asked to litigate or defend a litigation, and there are no enough papers to back it up, etc. So, I think what also comes into play, this litigation management tool, I think a lot of larger organisations have already installed such tools and systems in place and in fact, they interact with law firms over these platforms now.

So, there are common folders, there are shared points, where the entire data is dumped, whatever is attached is properly indexed or put up there and therefore, it's easily retrievable. So, to my mind, those are two things that are important. I mentioned about this e-discovery and a lot of times we are asked questions about communications etc., which would have been post award of contract and could be relevant from a litigation standpoint. So, I think we don't have those tools, etc., but I've seen some of the law firms use tools, softwares like relativity and so on, where you extract with relevant keywords, etc., from a case perspective.



So, for example, in a recent matter, we had our Managing Director and Chairman's email being sought, in a proceeding to supplement a claim or to, I'm not getting into all those details. So, we pulled out the email boxes, because they're all encrypted and lying there. So, we ensure that S7 and above email boxes, because they can lead you to win or lose situations to my mind and prove a claim that somebody is bringing against you. So, what we did was, and what we normally do is, we put them together, then that data segregation happens, because not all data can be given out.

I think that is where the law firms also bring that expertise and knowledge, we in house may not have that competency, so as to say, but I think the tool does the trick. And to my mind, these are some of the tools, technologies, which really can come forward and maybe, we as IT platform company can maybe offer these services also. So, I'm making a sales pitch as well, on a lighter note, but what I'm trying to say is, these tools and technologies can do wonders. I know, Rajendra, you rightly mentioned about the risks and the fallouts, especially from a data privacy, and data protection and perspectives like how secure is this electronic data?

So that's a different question, I don't think that's the topic, but I think that also is another area, but to my mind, these are some of the places that I can really talk about, in terms of how you preserve through tools, technologies, and ensure that you have a good fightable, or you have the evidence to support your claim or to negate opposite party's claims, so I think that's my point.

### **Raj Panchmatia**

Thank you. It's very helpful. Rajendra, that brings me to you, given the fast-growing digital era, how does one train its employees, while dealing with preserving digital and physical records, especially sensitive financial information.

### **Rajendra Mishra**

That's an extremely important aspect, and like I mentioned earlier, it's important to develop a system, to have a process to retain information and records for later use, have it in a systematic manner where it can be retrieved. So, a document archiving system and a digital document archival system today is the need of the hour. I think one important aspect of this is to maintain all relevant documents starting from contracts, including correspondence, in one digital file. And having it at, let's say, in a cloud location, on a drive which can be accessed by the relevant people. That is a system that ought to be there, as sort of a replication of the physical file that we used to maintain in the past.

Again, keeping in mind, the fact that people change over a period of time, maintaining backups is another extremely important aspect. This is today and going forward, but what about the past, what about 30 years ago? So, I think another important aspect is digitizing the old reports wherever possible, old contracts, old deeds and anything which is relevant, which is, either likely to get into a litigation, or something contentious, it would be important to digitize those old records. And of course, if the data is sensitive, confidential, then in certain cases, you could have password protected files.

That having been said, having that kind of a system, it's important to train the people also to utilize the system, to use the system because, lawyers, by their very nature are a bit, technology and lawyers don't go well together is what time has shown, unfortunately. If one looks into the future, that is no longer going to be possible, and I think the earlier the community adapts the better it is. So, training the people to use this system and use it effectively, and archive in a very systematic and a regular manner is something that is extremely, extremely important.

Now you train your current workforce, what about people who join in the future, and so what I think is that as part of the induction program for the function, this is an important training that should be built in, because when you have new joiners, not only do they come in and know the people and know what kind of work you do, but also what kind of systems and processes you have in place. For example, like Vineet mentioned, if you have a contract management software, a document management system, how to use it, use it effectively and use it consistently, is something which is very important, and that training can happen for new joiners at the induction itself.

My experience also shows that over a period of time, while you implement the system, it is used; beyond a certain period of time, a certain complacency may set in and therefore periodic checks is something, which is important to ensure that the system is going and if there are any hiccups in the system, you look into that and plug those holes. Another important fact is spreading the awareness about the sensitivity, so you mentioned about sensitive financial information, awareness about the sensitivity, more often than not legal departments of organisations deal with data, reports and information, which is very sensitive in nature, it is confidential in nature.

So, to have that sensitivity, as to how to deal with them, keep the information confidential and you could limit access on a need-to-know basis, to people who may be involved in the particular transaction, people who may be involved in that particular litigation. So, all of that, I think, is something, which can be utilized as training, so that the system, which is developed, keeps going and keeps delivering in the future?



## **Raj Panchmatia**

I think this is very helpful Rajendra, these steps are extremely helpful for any organisation to know how to train their in-house people, to maintain these records and all. Now, I'm mindful of the time, we don't have much time on our hand. But there's a very important question that I wanted to pick your brains on, Smitha and Chakrapani and maybe Smitha, you can go first on this is, sometimes you get you get some documents, which probably have not been obtained legally. Sometimes you have an illegally obtained document, that you have in your hand, sometimes that information is there. Now, how do arbitrators look at illegally obtained documents or information? And are they admissible in evidence?

## **Smitha Menon**

Okay, I'll go first. So generally, yes they are admissible. I mean, most arbitration rules or statutes do confer on the arbitrator, very broad discretion to decide on admissibility as well as weight. So even if they are admissible, very little weight may be accorded to it. So, there's two issues, both admissibility and weight. One you must consider when you're dealing with illegally obtained evidence. Specifically, in relation to evidence that's been obtained illegally, the 2020 IBA rules do address this head on - article 9.3 provides that a tribunal may, if a party requests or on its own motion, exclude any evidence that's been obtained illegally, and sometimes tribunals do that. But what you see more often, is usually tribunal shutting out illegally procured evidence by relying on other grounds, rather than the fact that was procured illegally.

So, for example, again, the IBA Rules 9.2, which most arbitration lawyers are familiar with, it sets up a whole slew of grounds on which a tribunal must exclude the evidence. So, these include where the commercial or technical confidentiality, which is compelling, institutional sensitivity, so this will include evidence that's been classified as secret by a government or public, international institution. And the next one, which is the most commonly used one, is where the tribunal feels that when you take into account procedural economy, proportionality, fairness, and equality, and it's so compelling that it's been unequal unfair, they can shut it out. So, that usually tends to be the ground that I feel tribunals use when they don't want to make a finding that, oh, this is illegally procured. They'll just say, look, it's unfair and what usually buttresses this, is the general duty of good faith under international arbitration, and also codified in certain rules like the UNCITRAL rules.

So, for example, if the party itself is complicit in procuring the legal documents, then that would be a breach of good faith. And another factor that would be taken into account, is whether to admit or whether to accord weight, is whether the evidence is widely and freely available to the public. I mean, this we have seen a lot. I'll give you two very interesting examples. One is Caratube vs Kazakhstan, It was a case where Kazakh Government documents were posted on a website, and that was relied on by Caratube in the arbitration, they tried to have it admitted. And the tribunal allowed it on the basis that look, I mean, yes they were illegally obtained, but they're already publicly available, and were not privileged, so that's one consideration that is usually taken into account.

Another example where this idea of it being publicly available already in the public domain, is weighing on arbitrator's mind, is where it's the Dominicana Renovables tribunal. In that case, recordings of conversations were made, without the parties knowing and so they argued, look, there's lack of transparency, there's bad faith, but the tribunal didn't rule on the legality of the recording, instead, they said, look, the conversation itself was not confidential or private and so there's no need to exclude it from evidence, so some examples on this public domain idea.

### **Raj Panchmatia**

Chakrapani, do you think it's the same for the domestic scene in India, any thoughts, quick thoughts on that?

### **Chakrapani Misra**

I was going to say that this topic is so interesting, that it could take one full day and Smitha was mentioning those lovely cases, and it's very intriguing and those are very interesting as well. Indian perspective very quickly, in a nutshell, is that we don't shut out any evidence, whether it is court or whether it is arbitrator. And for arbitration, it is for obvious reasons, because arbitrator has much lesser powers to gather more evidence and gather more documentation, so it's not shut out, it is welcome in that sense, unless it is perpetrating illegality.

So, if it is illegally obtained, or it is available in public domain and obtained by a party, it's fine, but if party itself has been an accomplice, then that may not be allowed. Barring that as a very broad rule, it's fine, it's admissible, the fruit of the poisonous tree concept does not apply. However, tribunal, as Smitha rightly pointed out, tribunal finds a way to deal with such situations and counters it by some other reasoning. So, that's what it is. That's in a nutshell, the position in India.

**Raj Panchmatia**

Thank you, Chakrapani, and Smitha for that.

**Vineet Vij**

If you allow me to add, I think we've created two prejudices in two arbitrations, domestic, introducing WhatsApp audios, videos at a much later stage, which were taken on record. We've seen publicly available, I'm not saying illegally procured, but closer to that, etc., taken on record and, you know, creating the difference and bringing the difference, so I think, to that extent, arbitration is a great place to be in, if you're really wanting a resolution.

**Raj Panchmatia**

No, absolutely. I think it's very important to have these answers in place. Smitha, there is one audience question, which I thought if I can quickly ask you, that way, there are quite a few, but probably I will take the first one that came in, because we are running out of time. The others we can, I will definitely respond in writing. The first probably that's coming from Salil Datte is, can DocuSign or Adobe sign be considered as a valid digitally signed document for arbitral tribunal to rely on? Very briefly your thoughts?

**Smitha Menon**

Yes. A very brief, yes.

**Raj Panchmatia**

Okay. So, I think we will respond to all the questions that have come in, and we will definitely respond to each one of them. But some of the key takeaways from this session so far have been of course, there's a lot more to talk about it, but considering the time that we have, some of the key things is that yes, it's very, very critical that you maintain your documents so well. Ensure that when the employees are leaving with then the documents are taken into custody. Maybe, if possible, take a witness statement of an employee who's going to leave. Train the in-house employees, as much as possible, to maintain documents and maintain records. Chakrapani has already told you the kinds of document that we need to preserve, so I think, all in all, it's a very important thing that you have these documents in place you have sufficient backups, data is available, somebody is even available to thereafter, prove a document if it is required to.

So, you will have to maintain these documents very, very carefully. If we don't maintain records carefully, then we will suffer in the arbitration, the adverse inferences will be drawn on the documents and the evidence that's not properly led, so it's important that we are able to maintain these documents, keep things in place, so that you don't suffer in arbitration. Of course, as Smitha rightly said, the timeframe of maintaining this documentation, is also equally important. So, I think these are the things that we need to keep in mind.

I once again, thank MCIA for organising this ADR Week, we are very grateful for participating in this session and I would thank all the attendees and viewers who joined us for the session as well. And all my panelists for agreeing to do this session with me. Juhi, I'll take it, I pass this on to you.

**Juhi Gupta**

And thank you, Raj. I agree. It was a really fruitful and very engaging session. The only thing to add is that all the sessions of the ADR Week, including this one, is being recorded and transcribed. So, that will be available on the ADR Week's dedicated website. So, all the viewers and attendees can also access the recordings and transcriptions, that's it.

**Rajendra Mishra**

Thank you, everyone.

**Chakrapani Misra**

Thank you so much.

**Smitha Menon**

Thank you.

**Vineet Vij**

Thank you.