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India Arbitration Week 2022
Session: International Arbitration for young practitioners – experiences from across Civil and Common Law

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Niati

Hi everyone, welcome to the session of India ADR Week with all of our young superstars. Let me just wait for a couple of minutes, maybe a minute or two for more participants to join. Okay, so I think we can start now. Welcome again to the session of India ADR Week. Today we are discussing with all of our young practitioners about International Arbitration and their experiences across Civil and Common Law. Today, this session will be commenced by introductory remarks by Tejus.

Then, Tejus will request Savani as the moderator to take over the discussion. Tejus is the Regional Director, South Asia at the ICC. Savani is a Partner at Samvad Partners in Bombay. As speakers in the session are Rishabh Jogani, who is a Partner at MRP advisory in Dubai, Mayuri Tiwari, who is a Partner Khaitan & Co. in Bangalore, and Akhil Chaudhary, who is a deputy counsel at the ICC. Thanks, everyone for joining this session, and I'll hand over to Tejus.

Tejus Chauhan

Thanks, Niati. Hi, everyone. Now, we're at the task of the morning and afternoon now, so it's a pleasure to have all of you joining today. Thank you for tuning in. This week was long and interesting, and I've been seeing several intriguing and interesting topics that were being discussed all over and when we had to decide ours, it was rather challenging to come up with something as interesting and perhaps not being repeated.

Now, with that in mind, the idea to discuss a topic, which is experiences from across Common and Civil Law is something that we felt that practitioners are likely to experience during an International Arbitration and this is also something which came from our own experience at the ICC, with the nationality of the arbitrator, where we had 99 nationalities last year, the parties, which came from 145 countries or the governing laws. It's always been interesting to note how these practices right from the initiation of the Arbitration and request to the final arguments differ.

Now, knowing well that this is not my role today to discuss this, I would like to welcome our moderator and speakers, we have an extremely diverse set of practitioners, sharing their experiences, all of

whom I can count as friends, who will be introduced by our moderator Savani today, thank you speakers for taking the time. Now, conscious of the time in hand, I would also not like to take much of the substantive discussions, much of the time from the substantive discussions and would just like to thank MCIA for inviting the ICC to be a part of the India ADR Week, specially Neeti for the invitation again this year.

Now, something that I need to do and please allow me to waive the ICC flag here for all those aged 40 and under please do join the ICC AF network, which is free and requires an online registration. And for everyone, please mark your calendars and join us in person for the 5th ICC and Arbitration Day on the 9th of December in Delhi. Well, thank you so much, once again for spending your lunch time with us and we hope that you find this discussion insightful and interesting and without further ado allow me to hand this over to Savani.

Savani Gupte

Thank you so much Niati and thank you so much Tejus for the very kind introduction, both of you. It's my pleasure today to moderate this session. And like you said, it's really nice to be amongst people whom I think we can call as friends as well, and peers in this International Arbitration space. So today, where we are having a session on International Arbitration for young practitioners, and experiences from across Civil and Common Law jurisdiction. Now in the course of the next hour, we hope to touch upon some of the more practical nuances of International Arbitration from the perspective of young practitioners, and particularly examining whether such aspects do differ from across civil and Common Law traditions.

We spoke to the speakers, and they're happy to take questions as we go along, so if anyone has questions, you can place it in the Q&A box, which is I think down below the screen. Now, when we talk about International Arbitration, right, we often talk about a lot of general legal principles or technical legal principles, there are conversations about seat versus venue, governing law, arbitration agreement.

The powers of the arbitrator and so on and so forth. And however, we often overlook one very important and practical aspect that one acquires in terms of experience as you go along and that is, what is the practical aspects? What is the journey of an arbitration, especially from the perspective of a young arbitration practitioner? So maybe Mayuri let me ask you and begin with you and ask you, you begin with any anecdote or key learning that you know, you may have experienced very early on as a practitioner of International Arbitration.

Mayuri Tiwari

Thanks, Savani and Thanks Tejus, ICC and MCIA for having me here. Apologize in advance for this nasal voice down with a little cough, but anecdote, Savani, I think, International Arbitration, it's my passion, arbitration is a passion, so I think there is no single anecdote, but what I would like to discuss on a very short span here is my experiences and of my journey, how I've become an International Arbitration practitioner and the learnings that I've learned from my mentors from my seniors, and what I have sort of inculcated, and I think that helps my journey.

So broadly, I'd like to divide this in four topics, the first one being the main difference between International Arbitration and general commercial litigation / the way domestic arbitration is done is the focus on written advocacy. Unlike any other arbitration, International Arbitration focuses specifically on written advocacy, you need a scenario where your case is well thought through, its structured, you're thinking through the facts of your case, how are you going to present it right up front, who is going to be your experts.

Even though, even if it is a simple pleading style without a memorial style, you have to think about those aspects right up front. I would think if it's an anecdote written advocacy counts for 80% of your advocacy. It is not a scenario where you can have a pleading that is turned around overnight and have a person go and argue it and win the case on that. It's a very well thought of case that you need to present right from the beginning, right from the request for arbitration, all the way until your final argument. So, that's the shift in mindset that I'd like to point out in the first instance.

The second really is strategy, so again, in International Arbitration, unlike any other scenario, where you have the comfort of asking for more number of hearings, you have the comfort of reaching out to the arbitrators, fixing, sort of telephony conferences, and sort of arguing the case, etc, International Arbitration is often going to have one final hearing towards the end, or if it is an interim relief application at that stage or an emergency arbitration as the case may be.

But you're not going to have the liberty or the luxury of going through 5, 7 days of hearings, or, again and again, going before the arbitrator. In such a scenario, to add value to your clients, you need to think about strategies right up front. I can speak from my experience some of the most difficult arbitrations, where we have defended claims, over 200 million USD, we've been able to get the other side on the settlement table because of well-crafted strategy right from the beginning and that comes in and it's relevant for ICC and MCIA being here that comes in when you know your rules really well and how you can use those rules to apply to your case.

Is your case one where you can pressurize the other side with say for instance, a security for cost application, or a security for claim application, have the or has the other side quantified the claim well, can you at any stage, think about a strikethrough, for instance. These are the pressure tactics that you can, in International Arbitration, bring in at the relevant time. Strategize your case and help add value and really see through the case in a way that one, you're litigating a case which goes till the end, or if there is a scenario where this is just a simple ego battle, which is coming.

Actually, understand if you can get the other side on the negotiation table. I've had a scenario where most of my cases go into settlement, but often as a national arbitration practitioner that's not a great thing, because we don't get to do the advocacy, but it's great for the clients that's where you build that connect with your clients, and that's where you get your repeat clients. So, always think about strategy upfront, don't go into the arbitration blindly without thinking through what's the end game for you and the client.

The third, and the most important aspect is discovery, in International Arbitration and that'll be something which we'll discuss with Akhil later on, but even after your pleadings are presented, the discovery stages is extremely important, you need to sufficiently, so let's put together your case

based on the documents that have been present and we're going to discuss the differences between Common and Civil Law in the session on Discovery. And finally, it's the oral advocacy piece, which is the most important thing.

While written, that's something which you develop over the period, oral advocacy, if I have one anecdote for the young practitioner, it is all about preparation, you've got to be the most prepared person in the room, you have to think through, you need to have your structure. For young practitioners, if you are being second chair or third chair, for instance, your value would come in by knowing the documents at the back of your hand.

Do not discount that know every document, know what's happening, because that's when you can add value in a cross examination when your senior is leading you. For young practitioners who are starting their own advocacy journey or have your scripts ready. Know what is the kind of admissions that you want to have. I can tell you from my experience, when I did my first cross examination where I let the fact witnesses, which was not too long ago, I rewrote my script five times each time when I wrote rewrote it, I will ask one of my colleagues, some of them being here to do a mock with me not happy with a rehash it.

I don't mean to say I'm just talking from my own experience. This is not something which everybody needs to apply. But all I want to point out is that hard work pays having that structure pays and then when you know your documents, you're able to present a wholesome case. It did help me in my first arbitration, and I felt that I was more prepared while doing that cross examination. And finally, more, just conclude this remember that your turn would come I feel like as in International Arbitration, often we all youngsters get a little disgruntled, but when will I get my opportunity, be the first one to put your hand up, ask for it, say, and that doesn't come with, okay, just asking for it.

Be prepared with your documents have your senior needs to trust in you to know those documents, to know that you will give him that effort to actually sort of do that advocacy. So, start with a small redirect, start with a small sort of opening or closing at a small aspect and slowly you will go through that journey, so that's been my experience in terms of becoming an International Arbitration practitioner and things that youngsters can think about.

Savani Gupte

Thanks, Mayuri, I think that was very insightful and Mayuri, I think you made one very important point right at the beginning, where you mentioned the importance of written advocacy, right? Because very often in coming from practicing in India, we do focus a lot on arguments that can be done at the oral stage, so that we'll argue this later, whether it's because of the way our court systems were, because most of us practitioners do both court work and arbitrations, but I do tend to agree with you that there is a lot of importance on written advocacy, which sometimes is missed when young practitioners are coming in just because of what we normally see around us in terms of courts, etc. where you say, this point, we'll deal with it at the argument stage, etc.

You don't make a base for it, your oral advocacy is not going to be able to basically overcome that, so thanks a lot. Preparation is also something I think that was very important that you mentioned, and I think that's the key even if someone's sitting in your second chair, like you mentioned, your turn will come. It's a matter of being really, really prepared for you all for whatever stage of the arbitration you're at. Maybe with that, Rishabh, we could maybe see if you have experienced in India as well as now in UAE. Do you have any tips for young practitioners? And maybe also do you see a bit of a difference or not, in the practice of International Arbitration while you were here in India now in UAE?

Rishabh Jogani

Well, Thanks, Savani. Given how amazing Mayuri's answer was, I think tips are not enough because she's covered everything. But one thing she does say, I wish I agree, Mayuri and I have worked together. Preparation is key, Mayuri and I have been second chair or third chair together. Long ago, I think one of my first cases and I must say, knowing the case file fully is crucial. Because if you are the junior most person in the room, trust me, you are the most important one, because everyone will turn to you, saying where is, I currently do arbitrations what some of them are billion dollars up.

And it is impossible for one person to know everything that is true. But to be the one person knowing everything, or at least having an idea of where to look, you are going to rise up the ranks, you're going to be there, right. Focus on everything, you will be sitting next to the lead counsel, irrespective of how junior you are just because you are prepared, you know the fight, that's one. And yes, you know, although I have moved to Dubai, and I am doing a practice in this region, there is not much of a difference in approaches, because of one reason that most of the cases I do back and did back in India and your what ICC cases, but I do see that there is a difference in approach of opposing counsel.

I am seeing that is a massive difference and basically, it's written advocacy. In India, most of us do not bother and I mean, and unfortunately, we think we can cover it in oral argument because we don't write it in our we don't need to write it, you think you can do a surprise attack that doesn't work international, it simply does not work. I got out of trial, weeks ago from an arbitration, where I think halfway, half the questions from the tribunal were only can you tell us where exactly in the bundle, is this needed? Or when pleading is this? Or they just wanted to know, the pleaded case? It was all there. It just they wanted to be sure that it was all there.

So yes, that's a big difference you see it in court, you have theatrics, and people screaming and shouting and trying to get orders that does not work in trial, that does not work in an International Arbitration, if you're going to scream and shout is not going to help, that's the other thing. And you know, the biggest difference, I think, is that it's a mix, because the bias is such a melting pot. It's a mix of different cultures in different approaches. So, I think there is not one arbitration and where my opposing counsel is from the same jurisdiction. So, that's more than 10 of them, and I am seeing 10 different countries and 10 different styles. So, you got to prepare for, I don't know, surprise that in that sense, that's it for me.

Savani Gupte

Thanks, Rishabh, I think that you say that theatrics is not something, which is of course appreciated after your International Arbitration that is it. I think that's important for young practitioners to know, right? That I mean, when we're conducting International Arbitrations, it's not a suit scenario, it's not

something where you're going to pull off some surprise attack, like you said, it has to be well thought out, it has to be strategic and it's something that it requires again, coming down to a lot of preparation. Now, after discussing these general aspects, maybe we want to touch upon certain procedural aspects of how an arbitration is conducted. Now, we all know that, primarily, your civil and Common Law traditions have very different approach towards arbitrations.

And that is something, which I think you, as a young practitioner, sometimes can be quite jarring the difference if you come from a Civil Law background, or for instance, when I had to face something in relation to Civil Law, because we come from a Common Law background, it's quite different because we're used to this complete adversarial process, which is the basis of Common Law, while Civil Law is quite different. Now Akhil with your experience, which spans across jurisdictions, right. How do you see, do you think it matters, firstly, whether International Arbitration or a particular arbitration is more Common Law, Civil Law oriented or centric, and how do the two differ in terms of your broad process?

Akhil Unnam

Thanks, Savani, it's an interesting question because when you're approaching arbitration, you should be very careful, especially in International Arbitration, you should be very careful on what approach you take right from the start of how you sub in the pleadings, tell how you conduct yourself with the hearing. The reason being, everything in is on who is sitting in the tribunal? Is it a German trained lawyer? Is it a French trained lawyer? Or is it an English retired judge? Everything hinges on that and how what you're presenting is received by the tribunal? Which brings me connects me to what I'm going to say next is. The traditions in Common Law and Civil Law differ on four main aspects

The first is in the beginning of the case, how are the case is initiated, which is the pleading style, which is commonly seen in the Common Law as in we present the bare facts of the case and then we reserve the evidence the detailed legal arguments for later, as opposed to a Civil Law train lawyer, opening up the entire facts of the case with the evidence, and also the detailed legal arguments, at the starting of the proceedings. Now, this according to the Civil Law tradition, to then

this is an all-in fairness, so that the other side will get to know exactly what you're talking about, and the tribunal also knows exactly what the case is about.

And then this will lead towards efficiency in presenting for the other side so that they can open up their briefs accordingly. In Common Law to us that's something unheard of, because we tend to open as necessary that is to say that there is analogy in manufacturing, let's say phones, you only ordered the raw materials as and when necessary for that particular day, nothing more, nothing less that's what we tend to do in Common Law. However, that may or may not work depending on how the tribunal is, but interestingly, there is a converge in the style of pleadings these days. Most of the practitioners are converging on the institution standards.

Now, what do I mean by that? I mean, when you're initiating an arbitration, let's say with the ICC, all you need to do is you need to comply with the requirements of article four of the ICC rules, which are setting out the bare details of the parties involved. A very brief statement on the facts, it's not necessarily that you open up the legal details, we do not need five statements of witness statements at this stage. We only need the contract to relying on and the arbitration agreement, and that's all.

And when the respondent is answering to that request, they only need to comply with the requirements of Article 5, which again, is limited to the scope of responding to claim and request and then adding on to any counter claims if necessary. The reason being all you need to present at the initial stage is just enough for the tribunal to understand what the case is about and if it is an ICC arbitration draft just enough for them to draft the terms of reference, because at this stage of terms of reference, or at the stage of the first procedural meeting, then the tribunal and the parties discuss among themselves and decide what procedural direction the arbitration will take, is it a memorial style? Is it a pleading style?

What is it, what does a timetable look like? And if you open up with a 200-page statement of claim in the beginning, you've wasted not only your resources, but also your clients time, so you should know exactly what direction the arbitration may take. The second one is document production. This is a key phase, where the traditions vastly differ. In Common Law, now US is an anomaly because there is a wide discovery as in, everything under the sun needs to be opened up and there will be

boxes of documents, in your conference rooms, depending on then you fish through them trying to understand what's relevant.

But usually in Common Law jurisdictions, if a party asked for production of a document, let's say you have an unsigned contract, and you know that the other side has that sign, you can request for a copy of that. In Common Law tradition, the approach is, if the other side has it, why not ask him to reproduce it. However, in Civil Law tradition, you need to provide reason on why you exactly need it and how it will serve your case. Now, again, the traditions are converging here, they're converging onto the broadly accepted IBA guidelines and now it's almost every day that I see that almost every other arbitration has the red font schedule as in you ask the put in what the document you need, why do you need it and other side response, and the tribunal decides.

This seems to be commonly used across the board. The next one is how documents are used? Now what do I mean by that? I have I've read a funny analogy somewhere, someone said that a Common Law judge or an arbitrator will not accept that the sun has risen unless someone has testified under oath that he has actually seen sun has risen, even though you can see the sun has risen outside, that goes to say that every document and everything you produce in the Common Law tradition needs to be authenticated, you need to prove that this is actually authentic under oath.

No such thing exists under Civil Law tradition, everything is accepted to be true unless otherwise set, so by the other side. Now, in arbitration, we do see parties notarizing documents or producing a certificate of authenticity. Now, this is appreciated in some situations, depending on what the document is, but it is not a necessity anymore, that the tribunals request for this, it really depends on what the procedural rules are decided at the beginning of the case.

This takes me to the last point, which is witnesses. Now, we cannot imagine a case without cross examination and Civil Law lawyers cannot imagine how you can actually trust someone's words, when the CEO of the company is being asked to give witness in support of the company. How can you really think that person will be anything, but being supporting their client? That's the approach of the Civil Law. And the answer, Common Law escape is that's why we're cross examining them in the first place to bring out the truth, but they should be very careful here.

If you go to the extreme and cross examine or try to be a hero, trying to make the witness cry or feel very uncomfortable, you will do the same with the arbitrators, you will be alienating them and they will find it extremely distasteful and you will even told off in the hearing that you should stop doing that and let the witness answer or the cross examination will come to an end. Now, the answer to this in arbitrations is, usually the procedural rules are restricted on the timelines on you have 15 minutes to cross; you have 10 minutes to cross and there's also no requirement for direct examination in that sense, unless specifically agreed.

Now, the last interesting one is how the traditions view experts. Now in Common Law tradition, it's normal for us for each side to have their own expert, and then both of them will present their views. However, what if inevitably, the first experts say X and the other experts says Y, how will the tribunal decide? No, you would the answer is you can determine you can of course, appointed expert, but do what end? However, the costs will stop here. Who parties are bearing the costs and inevitably, in the Common Law traditions, usually it's the tribunal or the judge will appoint the expert to give an independent opinion.

Now, again, usually there are procedural ways in how arbitration has addressed the hot dubbing of experts or the joint report by the experts, which will bring out what points expert exactly agree on where they actually differ, if they differ, what's the reasoning? This will help the tribunals when they draft the award, and while scrutinizing the awards, this is something which we have seen works pretty well, especially in construction cases where sometimes delay or variations differ, change everything based on what an expert said.

Savani Gupte

I think Mayuri, you'd like to pitch in here with your thoughts as well?

Mayuri Tiwari

Yes, absolutely. So, I think Akhil pointed out the differences in terms of Common Law and Civil Law approach, very succinctly on all those topics. But the point that I wanted to make here is because we're discussing here, International Arbitration. International Arbitration as I see it has become and is more and more becoming transnational. And all the evolutions or the new things that are happening in International Arbitration are sort of converging into transnational approach. One of the first and biggest was the IBA rules of taking of evidence.

Now if you go to the IBA rules on digital evidence, it sorts of touches upon everything that Akhil sort of discussed. How were experts produced? How does document disclosure work? What is your pleading going to have? How does the party appoint experts work? How does sort of independent expert's work? So, you'll see that more and more while there is a difference between Common Law and Civil Law approach and taking of evidence or the manner in which an arbitration is conducted, that is primary, that's why it's called the Magna Carta of any arbitration, that if say, for instance, the parties have not agreed. International Arbitration tribunals often incorporate IBA rules of taking of evidence.

So, it's very important for young practitioners to be acquainted with it. It's important to because we're doing this in India, it's important to sort of go out for in terms of discovery step out of our thought processes of inspection. Unlike, so we like magically said, we've been, colleagues, right? I could never understand why would we have to go and inspect the documents in someone else's office, when we're doing discovery in India? And I would break my head, like, why are you doing this? Why are we wasting so much time?

That's not how it works in International Arbitration, you follow the IBA rules. You do what Akhil pointed out a proper red font schedule. You follow the main concepts of is the document in your possession, yes, or no? Is it relevant to your case? And is it material to the outcome? Interestingly, while parties even though the IBA rules and this is this comes from my experience, in one of my experiences, which I can point out here. We had a New York seated arbitration; it was related to a sort of a BPO. Industry, the documents involved was over 110k when we got a software, we sort of

removed all the duplicates, post that through the entire course of the arbitration, 2 1/2 years, until the hearing, we had applications after applications from the New York attorney to inspect our servers. We were eight servers spread across the country, some of them are even in question.

And time and again, the tussle that happened was, as International Arbitration practitioners, we pointed out that this is not relevant, this is not material to the case. The other side hasn't pointed out how inspection of all those servers is relevant to their case. So, it's once you start doing national arbitration, that is a very important thing you need to go through the IBA guidelines, you need to learn, you need to really see what is mentioned there. Look at the commentaries, there are a lot of commentaries written by great sort of dossiers of arbitration, how sort of IBA rules and work on different instances? What can independent experts do, for instance, Savani?

We have seen situations where parties often just draft up and you have it signed by experts. That's not how it works in International Arbitration, even though they might be giving a quantification claim for your case, they are independent, they're going to do their own analysis. So, I think most of those comes with experience, but I think as a starting point of International Arbitration is sort of converging on both the Common Law and Civil Law traditions.

Savani Gupte

That’s really helpful in terms of trying to understand, what is the difference and also somewhere trying to bifurcate or break the shackles of what we as a practitioner in terms of a domestic whether it is your evidence act here in India, it's extremely important, like you said, for practitioners to be quite well versed with the IBA rules of evidence. I think Rishabh, you had any similar thoughts in terms of the differences between the two and maybe there's a very interesting question if either you, or any of the other band members would like to take this out.

So Montek asked the question, and I'm just going to read it out for everyone's benefit that procedural aspects are one thing, of course, in terms of the difference in the two traditional systems, but what about any substantive differences? Whether importance in reliance may be given what is the importance of weightage that may be given to evidence to witness evidence, in particular expert

evidence? Does it have the same weightage of in, both these systems, whether it is you're following a Common Law approach, or a Civil Law approach?

And does any of that guide you what did the arbitration practices well? And maybe I could just add one more factor here, what about judicial proceedings? Is it the same in terms of both the systems? So, anyone if I think Rishabh, if you could go first and anyone else would like to pitch in as well?

Rishabh Jogani

Sure. Thanks, Savani. In Montek's question, actually, is part of what I wanted to discuss the importance of expert evidence. In a Civil Law system, I at least have seen that the importance to given to experts is far more than that you will see with Common Law practitioners. Civil systems, memorial style, especially, is heavily dependent on the expert's view, so if your experts take a position, which as Mayuri says, and which is not independent whether the lawyer has drafted, he's not going to survive cross examination.

And we actually had that happen a few weeks ago in an arbitration where the expert had drafted. I don't think he had drafted an expert report where he quoted from a particular witness testimony. The only fun part was the witness never said anything. I think he'd looked at an old draft and been given an old draft and that was deleted in the final versions. We cross examine the witness. He said he didn't know anything about it, then when we confront the expert, it's all out because he's completely blank. So, what Mayuri says is important is given to expert evidence, yes, the whole case very often in a civil system will rest on the expert's evidence, the tribunal looks at it very, very seriously.

But given that it is viewed so seriously, if you're not going to let your expert be truly independent, you are bringing the death knell for your case, because everything rests on his testimony and if it goes out, everything goes with it. That's and sorry, what was the second question was a little long, sorry. Savani, your second question?

Savani Gupte

The second one and I mean, it's open for everyone to take. Is there any difference in the weightage on proceedings on judicial proceedings?

Rishabh Jogani

Well, at least I'm given that I'm practicing in Dubai, very often there's not in the Civil Law system, you only look at an interpretation very often off the code, if you find something great most of the times, I have not used one, and it's not very common. Common Law, of course, is like how it is back home in India, very different, of course, we could hear from the others as well.

Savani Gupte

Yeah, I think Mayuri we'd like to hear as well, in terms of I mean, of course, any thoughts on this, and particularly with reference to proceedings and you see a very different approach taken by Civil Law, say, arbitrators, who are from a Civil Law background or Common Law background?

Mayuri Tiwari

Yeah, I comment on the precedent part, but before that, I wanted to comment on Montek's question, I think he's pointed out a very important difference. We've been discussing procedural aspect, but substantively between Common Law and Civil Law traditions, there is a difference in terms of reliance, there is a difference in terms of how much reliance, how a Civil Law arbitrator or arbitrator from a Civil Law background versus a Common Law background, for instance, in the Civil Law approach, it has to be for especially an expert, it's important to make ensure that everything that you're saying is documentary backed up, you cannot have a situation where you have presented a particular thing and at times cross examination, you're making a comment saying that, okay, I believe this to be true, based on my experience, it often doesn't work, you have to sort of back it up.

I had a situation where I had a Common Law seat, but I had a Civil Law arbitrator. There was a clash and we had to make sure that our experts ensure that everything was documentarily backed up, that's extremely important and that's where substantively things change. The same applies to importance, what is the importance given? A Common Law approach or sort of arbitrators who are from a Common Law background, where it's a Common Law seat, etc., they're going to be okay with a scenario where you have sort of presented a case where the sort of your fact witnesses presented their experience, and you're bringing them before the sort of the arbitration and you're asking them to give sort of testimony, they're going to be okay with sort of providing firsthand testimony.

It doesn't happen in Civil Law, you they will rely on while cross examining you will have to refer to a particular document, you'll have to refer to what they're saying in their witness statement and say, do you still maintain this? Based on this particular question, I'm going to cross examine you and try to see if there is any difference. So, procedurally, I think there is a convergence, but substantively, everybody somewhere is sort of bound by their own legal teachings and the backgrounds that they come from and as an International Arbitration practitioner, and as a counsel to your client.

It is important for you to become acquainted with that both to ensure that your experts case is presented correctly, but also to point out to your fact witnesses the difference in approach that you might be taking, so that's the comment on that and as far as precedent is concerned, Savani, there is a hell lot of difference in terms if nothing works in India, for instance, or even in London, it's very common for us to in an International Arbitration seated in Mumbai for instance, it will be very common for us to present case from a Singapore Hight Court or from a London Court, English High Court, for instance, to sort of discuss that particular proposition, it doesn't happen in Civil Law.

What they want to look at is what is the agreement say? What is the interpretation and if there is a commentary on that particular section, which confirms the position and how you're applying to the facts and the law, that's what they're interested in. If there is a very, very specific pointed case law, you could present to it, but they don't care for it in Civil Law. In Common Law, it's very easy, it's very natural for us all to come up with residents and include precedents, that usually doesn't happen. So again, they're the different slides.

So, while you may be having a transnational approach in your procedures, you need to look at those differences while presenting your case. In your closing arguments, if you are before a Civil Law arbitrator avoid having a situation on the previous slide sending them 10 cases don't do that. Provide an outline 10 days in advance. This is the outline which I'm going to present in my final closings. These are the cases the cases are present provided to you in advance, they could appreciate that much more. I think those are my thoughts.

Savani Gupte

I think that it is very useful to know Mayuri, because again, when you come from a traditional Common Law background, it is one of the first go to principles of research, right, that you have copious amounts of what are the kinds of precedents that you have? And I think this is extremely important to know, for young practitioners who are getting into the system as to where do you need to draw the line depending on what the what your arbitration? What it is? Whether it is your tribunal is from a Common Law background? And what are the rules that are generally going to be applied for the arbitration?

And maybe before we move on to the next topic? Just one follow-up question on that, is have any of you seen any practical difficulties where you would have a tribunal, which is from a mixed background? Because right were discussing about when the it's a Civil Law, and everyone comes with their baggage of how they've probably done there years of even if you're an international law practitioner, you're from Germany, you ask them that mindset, and vice versa, if you're from London or India, you have that your notion of justice is quite deep rooted in the kind of traditional systems that you come from. So, have any of you had any experience where it's either created confusion or maybe you've adopted good parts of both?

Akhil Unnam

I can take that first. Yes, this is very, very common, actually given the increasing number of civil arbitrators sitting on Common Law seated cases, it's very common for this confusion. And just to wrap up everything that was said, in Civil Law traditions, there is no way given to a witness statement

unless there is a document corroborating it, so simply put, document is king in Civil Law traditions. But then again, there is no such thing as presidents. Now coming over to this, the civil arbitrators find it extremely difficult to accept that they are bound by something that was decided in a completely different case.

That said here, when we get a draft award for scrutiny when the courts scrutinize it, this is one of the differences that we encounter about very commonly. And then we point this out to the arbitrators, and then in a very nice way, of course, the court cannot interfere with the substantial decision, but assessing what the place of arbitration is. And if we can guess where the award will be enforced, and how the courts of that of that jurisdiction will look at the decision they can hear. We then bring that over to the arbitrators notice to see if they can add more reasoning on why they don't feel that precedent is binding or why they feel that it has no value in the situation. And that the same thing carries over to other traditions as well. We are very conscious of this and then we bring this to the tribunals notice very often in the scrutiny process.

Savani Gupte

Exactly, Akhil that's where, one of the value additions of an institution, I guess, is to try to reconcile that. I think Mayuri you had some thoughts on that as well. You're on mute, Mayuri.

Mayuri Tiwari

I had a question for Akhil, given that even if I had a background as a case manager, Akhil when you do your constitution, do you think about this distinction? I mean, I'll answer the question in terms of the problem that I faced, but it seems for instance, high value arbitration, seated in a place like Paris, right? Where, which you have more Civil Law arbitrators having a Civil Law, governing law. Do you sort of think about it as a case manager while you're doing your constitution? I mean, just as a thinking, if you can throw some light on that?

Akhil Unnam

Yes, of course, when the institution is invited to appoint an arbitrator, we do see what are the profiles that were already proposed by the parties. We also see who the counsels are, which city they are from, what the seat of arbitration is, what the nationalities of the parties are, what is the applicable law, and then we come to the reason decision on why certain nationality of the arbitrator is necessary.

Then again, it's not just that we appoint someone, because it's convenient time zone, or it's because they're independent of arbitration, there's a lot of thought goes into it, like, for example, if a sole arbitrator is to be appointed in a case and the parties were not able to agree, but they have discussed before on different names, we then look at all the names involved to see if the parties have consensus on a profile. For example, if they want someone extremely senior with a background on a certain subject matter, or someone located in a place, we then try to respect the party's wishes as much as possible.

Mayuri Tiwari

No, I meant it both from the point of view that would you have, like for complex case, three-member tribunal, would you like, Savani asked, would you have a situation where you would have a Civil Law background and a Common Law background? I mean, you can choose to not answer that, but I was just wondering, is that a consideration, in terms of appointment of arbitrators?

Akhil Unnam

Of course, but then again, that consideration flows from what the place of arbitration is and what the applicable law is. And we will see if Swiss law applies to a situation, they will see if there is any arbitrator in the panel, who's actually proficient in Swiss law. To be able to decide on the dispute, or if valid, typical seat of arbitration is there, we need to see if there is any arbitrator who knows the differences and typicality is in that jurisdiction well.

Mayuri Tiwari

That's amazing. Yes, Savani, I think we have not had any issue of conflict, because like I said, it's such you have a situation where even if you can they come from different backgrounds, and that's I wanted to get Akhil thoughts before. Even in BIT arbitrations, I've seen that scenario arise where you have a Common Law arbitrator and a Civil Law arbitrator and the chair maybe, either, but often given that the rules is so the procedural rules are so set out and the manner in which the arbitration has to be conducted so set out, aware that is reliance on documents, that's clear. How did that fortunately, will work? That's clear.

When can you present your proceedings? When can you not? How would you present your cross examination etc. Those things are close that doesn't cause the confusion, of course, at the time of cross examination or final hearing, you will have to think about those distinctions to ensure that you are sufficiently effective both for the civil arbitrator as well as a Common Law arbitrator. So like Rishabh said, you can't have theatrics, you need the entire panel to respect you, you need to be slow, you need to have the count of the party that you're sort of cross examining. They need to be at peace. You have to be someone who the arbitrator on the other side respect so. So, those kinds of soft things, of course, you have to take care of, but in terms of sort of running the arbitration unnecessarily, I at least haven't faced sort of confusion in terms of the procedure.

Savani Gupte

That's quite helpful, Akhil and Mayuri, I think before we move on, there's an interesting question from Rohan and we're digressing a bit, but I think it's quite important and since this is focused on young practitioners. He asks, is an LLM in arbitration crucial for a career in International Arbitration. What are the barriers, thoughts on that?

Akhil Unnam

I don't know if my thoughts will be controversial, but I think it's crucial. The reason is simple because there are so many practitioners, so many people doing a master's given a choice for firms or

institutions to choose from someone who did the masters or not. More often than not the choice could be very simple. Just for that reason, you should always go the extra step and we try to differentiate yourself and masters unfortunately has become sort of a norm for someone to have.

Rishabh Jogani

I'd like to add to that. Just a master's is not really what would be important, but a good masters, don't do one for the sake because that's adding new value. You must do a good one from reputed college, institution. Don't waste time and money pursuing an program where you are not going to learn anything or is not going to add value. Keep that in mind, so.

Mayuri Tiwari

Yeah, I think the panel has consensus on. In fact, my experience is slightly different from Akhil and Rishabh, for me at the time that I did my masters or at least started thinking about it, a master's in top law firms in India was sort of scoffed upon like, why would you do a masters? Why would you lose those years though the strategy, partnership, etc., but for me, it was a shift and at that point, you couldn't shift from **[Inaudible 00:50:46]** directly to International Arbitration.

So, for me a master, LLM gave me that footing to get into that International Arbitration community, so it was almost like, that's how I began the career. So very, very crucial and like Jogani said, I can't emphasize more. Do it well, do it when you're sure about the fact that you want to do arbitration. Don't do it just because everybody else is doing it and sort of that's the course and do it in a field that you want to do it, be it arbitration, be it investment treaty be sort of white collar, etc. So that's a definite yes, I think from the whole panel.

Savani Gupte

I think Akhil view it wasn't controversial at all. I think we have consensus on the panel on that one. Mayuri manually you use spoke about and we spoke about while talking about evidence, we spoke about the IBA rules of taking evidence. And I think, especially since we've spoken about this

Common Law, Civil Law distinction, the conversation wouldn't be complete without speaking about the Prague rules.

The inception of the Prague rules primarily was to sort of overcome the difficulties or sort of whether it's in terms of delays or the adversarial system, so as to see which was underpinned in the IBA rules, which initially, it wasn't really meant to be only taking from the Common Law background, but it's been perceived as such. So, Akhil, do you have any thoughts on whether it's met? The Prague was a have they managed to address this this concern, this question, and what is the kind of difference you see in terms of whether it's in terms of the IBA guidelines, and the IBA rules and the Prague rules?

Akhil Unnam

I was hoping to just give a view on the just a summary of the Prague rules and I'll give my views, but okay, I have to. Yeah, but Prague rules, as you said, Savani, it has come out as the relief, as a magic bullet against the procedural paranoia. In reality, does it really do that? But before I answer that, I want to give a quick summary of what Prague rules say. Prague rules, seek to provide more power to the tribunals. What do I mean by that? It seeks to provide a wide range of powers as on power with what National Court judge has, as in the Tribunal can force parties to document only arbitration.

Now, the arbitral tribunal still can do that, without the Prague rules, provided it's an expedited procedures case and institutional rules, then the tribunal can force that. But they can act as an amiable composite, that means they can act as a mediator, they can try to resolve the dispute between the parties instead of deciding this could shock a lot of people include, it has shocked me, but apparently, this is a provision in the rules. It seeks to it can it empowers tribunals to remove all the document production phase entirely from the arbitration altogether.

It provides, now this is a bit more controversial, it provides why case management powers to the tribunal, and it also empowers the tribunals to provide preliminary views on the issues involved in the arbitration. So, as it will serve as a reality check to the parties and maybe they'll go and settle the dispute if they know what the tribunal will eventually decide. Now, will they actually work? Does

it actually cure? I personally do not think so. The answer is arbitration works and arbitration has been successful because it is in the end, it is a private form of justice and it only something like that only works and can only work if it is done in the strict confines of rules, laws of the place of arbitration, or internationally accepted rules like IBA guidelines.

If the tribunals are empowered to remove evidence from the record or are forced parties to document only arbitration only, if that is that happens in Indian seated arbitration. I'm not sure if the award will survive the scrutiny of the courts. That's why I don't think the Prague rules are an answer that I'm conscious of time I'm keeping my remarks very short, but those are my views, and happy to share if they are the views from the panel's.

Savani Gupte

Thanks, Akhil for quite a candid view about this, but I do appreciate the answer. There's one aspect, before we close, and maybe we can take up a couple of questions. One aspect since we've spoken about the recent trends that I'd like to that's upon, is emergency arbitration and while I'm mindful when I say recent in the International Arbitration space, I think I'm talking about 10 years or so, but still recent enough.

Rishabh, maybe if you could touch upon what are your thoughts on this entire concept of emergency arbitration, you do see jurisdictions and institutional arbitration, institutional rules. We know of course, the major rules have immediately amended the rules to provide for this, but do you think that it's actually helpful people are going in for emergency arbitrations? And do you think that laws across jurisdictions since the standard here has experienced across various jurisdictions you think they've been quick to amend their national laws as well? We, of course, know that India hasn't, in terms of, any parliamentary law, but what are your thoughts on that?

Rishabh Jogani

Well, that's an interesting one actually Savani. My view is an emergency arbitration is far better than going to a local court, because very often, a lot of jurisdictions, it's a flip of a coin. So, you could

definitely bank on an emergency arbitrator. The problem is really enforceability. For example, the UAE has no guidance on emergency arbitration, so when you don't know better, I mean, I've not come across any case where no one was seeming sought to be enforced, people would just rather go by court and get an order, because it's quicker.

That being said, I think jurisdictions should encourage it, because at the end of the day, it's getting stuff out of courts, and to the arbitrators and that's really what party autonomy is right to, if you can go to arbitration, why can't you seek interim relief from the arbitrators. But a lot of jurisdictions don't have great laws to support it very often especially in cases, which I do, which is construction arbitration, there are bank guarantees important. So, banks will really not care if you get an arbitrator sort of, in the Middle East, because they need a court order to really comply. So, that's one major difference, I've seen just as.

Savani Gupte

Thanks Rishabh, I think that's quite helpful. So, of course emergency arbitration is a conversation that's being had in the international forum for a while, and specifically in India in the past 5 or 6 years or so and, yes, impossibility is something that increase, that's a problem that is faced, but you're quite right that in terms of the time of the manner in which you can actually get that relief, as opposed to going to a domestic court. I got a couple of interesting questions that are being put up. So, Mayuri, I think you had some views on this as well? Or would you just?

Mayuri Tiwari

I think we're running out of time. I just had one point that I agree with Jogani and it's good to see that Jogani's changed his view over two years, I have noticed that, and he's come on this side of pro-emergency arbitration. But I think in my practice, I've sort of moved legend to the centre that there are scenarios in which, or Section 9 will be way more effective than emergency arbitration, it's case to case if you're going to have that invocation of bank guarantee, go for your Section 9. If you are going to have a situation with ship arrest, where the sort of the goods sort of commodities are sort of perishable, a Section 9 would work better than emergency arbitration.

Emergency arbitration really works well, where there is a larger strategy in place where you have a little bit of time, you have that 15 days to a month to sort of get that release, but if it is immediate, where it is actually emergent, I think courts would work better. That's those are the only scenarios. I'm happy to take the questions.

Savani Gupte

Yeah, I think we're slightly running against time, but maybe if we have another two or three minutes, I think one question if we can maybe just sum it up is, which is quite interesting is would you personally as a practitioner, welcome having a non-lawyer arbitrator on tribunal, I think that's quite an interesting question. Can you if anyone would like to take that up?

Akhil Unnam

Yes, I've actually seen a non-lawyer sitting on the tribunal without disclosing any details, it's an all-Indian Arbitration. Yes, sometimes it helps provides more efficiency because if the non-lawyer sitting on the panel has a certain subject matter, expertise, that could come in handy. However, there's always a danger that the parties do not want someone like that sitting on the panel. For this reason, being they may have upset for you already, which could go against a party's case, but sometimes it can be helpful, yes.

Savani Gupte

Thanks, thanks for those thought Akhil, so I'm quite mindful that I think we're one minute beyond the schedule. But there are some questions maybe if the panelists would like to maybe answer them, we can type them out, or we can get back or if you'd like to sum up in a minute or so. Mayuri, would you like to take it?

Mayuri Tiwari

Yeah, we can quickly take up the questions. I didn't like Montek question on specialization. I think specialization in my view is key. Specialization, not just the fact that you're a dispute resolution lawyer. It's important to have court litigation as well as arbitration, but it's important to specialize and dedicate that time. If you're going to be running around between courts and arbitration, you won't be able to do justice and I'm seeing the next trend of specialization, when just being an arbitration practitioner is not sufficient.

You're seeing that person who started specializing in within that within construction arbitration in say, for instance, as a question on cryptocurrency, on smart contracts on sports arbitration, for instance, you see that they are the ones who sort of going getting those mandates, so it's a choice. If you want that variety, you live for that variety, you die for that variety, go, be a generalist, it works for you, great. But I think in today's world where you're getting great lawyers out of great good universities, specialization is the key.

Savani Gupte

Thank you so much Mayuri. I think we're quite out of time, but thank you so much, everyone for your wonderful insights with each person's different practice area comes some sort of diverse thoughts, and maybe Tejus if you'd like to like to give some closing remarks on this, but it was true. It was interesting and I'd say not just for young practitioners, it was very interesting for me as well. So, I hope our audience liked, like our session do. Quite a lot of learnings in terms of and takeaways from each person's experience.

Tejus Chauhan

Well, thank you so much. I'm very conscious of the time because the next panel has to also start but thank you so much for joining in today everyone and thank you so much, the speaker's moderator for taking the time to address this. I hope to see you in person, everyone have a good day, Thanks Neeti and thanks MCIA, thanks Niati.