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Session: Arbitration is as good as the Arbitral Tribunal Myth or Reality?

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Sudhanshu Roy

I'm just going to give it a few more seconds to allow more participants to join before we begin. Okay, hi everyone. My name is Sudhanshu Roy, and I am an associate at Foley Hoag in Washington DC. I'm associated with the Young MCIA, and it is my pleasure and honor to welcome you for this session, which has a very experienced and distinguished list of panel members. The topic for today's session is Arbitration is as good as the arbitral tribunal myth or reality. As I said, we have a very distinguished panel.

On the panel today we have Francis Xavier, the Regional Head of dispute resolution at Rajah & Tann. Mark Mangan, partner at Dechert, Professor Nasiruddeen Mohammad, the editor of the TIAC Journal of International Dispute Settlement. Mr. Rajeev Choubey, the group General Counsel of Dalmia Bharat Group, Ms. Shilpa Sharma vice president legal, legal of Inox Leisure and finally moderating this session, we are in the very capable hands of Mr. Nusrat Hassan, Co-Managing Partner of Link Legal. So, with that being said, I would leave it in the hands of Nusrat to take this forward. Thank you very much.

Nusrat Hassan

Thank you for the introduction. Sudhanshu. Welcome, ladies and gentlemen. It is an absolute pleasure to be here, moderating this stellar panelist. And I think I am sure by the end of it, you all would have enjoyed the session. And we become a bit more wiser hearing these terrific panelists. So let me start as Sudhanshu mentioned, the topic today is a very important topic, whether Arbitration is as good as the arbitral tribunal, a myth, or reality. anybody, any one of us who have used the Arbitration process for settling a dispute, the first thing we realize at the end of it, we realize how important and what a difference it can make, when we have the right tribunal.

Not only we end up doing the arbitration more efficiently, we end up saving money, we also at the end of the day, end up with a judgement which one of the parties will always be unhappy, but at least that all the issues have been well considered. And dealt with and I think therefore, this topic

holds a real-life importance. Now, I guess let me start by taking a quote from the book of two International Arbitrators we all know Alan Redfern and Martin Hunter. So, they asserted that once a decision to refer a dispute to Arbitration has been made, nothing is more important than choosing the Arbitral Tribunal. It is a choice which is important not only for the parties to the particular dispute, but also for the reputation and standing of the Arbitral process itself.

This quote in itself provides-- ends up stating what we're all trying to today find out how important is it for an arbitral tribunal to be good or rather excellent. So, with that, I will dive into the session straightaway because you would want to hear from the esteemed panelists what they think and how do they would advise people to, to run the process and what would be their views on this issue. So, let me start with you Rajeev with the first question and, and ask you how important is a good Arbitral Tribunal? And what does it bring to the table?

Rajeev Choubey

I think Nusrat as, as you rightly said in your preliminary remarks, that when we start the arbitration or when we end the arbitration, I think we all look at that, what kind of tribunal it was, and before we start, I think selection of right tribunal, whether it is ad-hoc arbitration, or whether it's Institutional Arbitration, and I would think that it's more relevant, I would say in the case of ad hoc arbitration, because parties, chose their-- generally if it's a three panel arbitration, so, you nominate your own arbitrator and there is a chairman of the tribunal, or unless there is a sole arbitrator.

So, I would actually like to, go back to Hindi proverb, which I will explain for the benefit of others in the Hindi jurisprudence, it is the punch, it is called punch, the arbitrator. Punch has been given the connotation of God, Punchparmeshwara, Parmeshwara is nothing but God. So, the tribunal or the arbitrator has been given importance as to that of the God, he or you know, he or she is so important, as per our own jurisprudence or the Hindi jurisprudence. So, person to whom we choose has to be, you know, it is very important to have the right kind of tribunal and when we say good Arbitral Tribunal, basically what we are looking at, you know, if I'm-- I represent a company and if I have a dispute.

What I look as the first criteria is, the person or the tribunal who is representing has to be very high on integrity, in the sense, and the law today also provides, the schedule is there which says that you have to declare and-- give a declaration of Independence, avoid any kind of conflicting situation, that's very important, because if the tribunal doesn't have integrity, then rest of the things cannot follow. That's point number one, and from integrity and independence and conflict of, conflict of interest situation flows, you know, that it has we talk about an impartial award, so, that impartiality flows from the integrity of the tribunal.

Second, what we look, I would typically look for anybody will look at the tribunal is that it has to be quick and effective resolution, why do we go for arbitration, there is when we do business or even in our personal life, there are disputes, which we all bound to face, and if we are not able to resolve the dispute, we go somebody, you know, rather than approaching a court of law, we approach for a quick redressal of the dispute.

So, what we are looking is quick, effective resolution, and that is very important, especially in the Indian context, because we all know, the kind of time it takes, you know, on an average four to five years, you know, till the law came, saying that the tribunal has to complete the arbitration in 12 months prior to that there was no time limit, and I've seen, you know, and I will not only blame the tribunal, we lawyers and even the parties to the dispute has been equally responsible.

So, but coming back to the tribunal, it has to be quick and effective resolution. And then the next aspect which I look after is that the tribunal has to be very patient understanding of the parties to have very fair kind of conduct in terms of conducting the proceedings. The next bucket, which I would look forward is to the process, you know, the procedure. Because we don't—if we are not approaching a court of law and we are approaching a tribunal, the tribunal should not be governed by, you know, a lot of unnecessary procedure, which is typically followed in a court in terms of the Civil Procedure Code and other you know, internationally, whatever is jurisdiction.

So, it has to be effective, it has to be less procedural, more focused on resolving the dispute. And one more aspect, which is very critical is the tribunal has to maintain confidentiality, and this is more so relevant if we are looking at an ad hoc arbitration. And one very key aspect which I missed is, before they start the arbitration proceedings, they should encourage the parties to

explore a settlement, either, you know, because ultimately the end objective is the dispute should get settled.

So, even if-- before they start, if they can advice the party that why don't you-- we can give you some time, say another 15, 20 days, and if you can sit across the table and mediate, I think the Arbitration in the Indian context, even the Arbitration Conciliation Act also, promotes kind of Mediation and Conciliation between the parties. So, I have seen many Arbitrators before getting into the dispute, encouraging the parties to kind of go for settlement, or and they have been very kind to say that if any way if the tribunal can facilitate the parties to come at a settlement, we will be very glad. So, Nusrat, I'll stop here. These are my initial comments.

Nusrat Hassan

Thank you, Rajeev. I'll jump to you Shilpa. Rajeev, describe the arbitrator as a Punch Parmeshwara. What are the special characteristics you would look at, as for when you're appointing an arbitrator, which you think is necessary to ultimately have a successful Arbitration process?

Shilpa Sharma

Thanks, Nusrat. So, I think firstly, well the most desired characteristics that we need to consider while nominating the Arbitrator is competency, intelligence, diligence, availability, experience in Arbitration, linguistic abilities and knowledge of that particular field of law. Now, let me just start firstly, with the knowledge and expertise in many cases, the facts, there are in technical nature, which needs understanding of a particular field.

Now, the Arbitral Tribunal should have obviously the knowledge and understanding of the law, Arbitration Law, it has to understand the practice and procedure. But along with that, it should also have necessary knowledge and understanding of that subject matter, which is really one of the most important things. Secondly, obviously availability, the Arbitrator should devote his necessary time and attention to remain available throughout the proceedings and ensure speedy and efficient conduct of an Arbitration.

Thirdly, Arbitrators' nationality is also important. So, suppose the parties are from different nationalities, the Arbitral Institutions like Dubai International Arbitration Centre, they often direct that a Sole Arbitrator or Chairman of the Tribunal, it cannot have the same nationality of the parties. This is because there should not be any biases, obviously, I mean, if the parties decide otherwise, they can always agree to it, and they can do that by just giving the same in writing.

Now what happens in 3-member tribunal, the party appointed tribunals may have the same nationality as the party. If an Arbitrator, of the same nationality is flexible, actually, because at least one member of the tribunal will have a good understanding of its culture, business practices, and customs of the country where the party is from. Then, I think the fourth one would be strong management skills. There is a flexibility in the process of Arbitration, which is of primary advantage.

But if it is not managed properly, then it can lead to lingering disagreements between the parties, which will cause unnecessary delays and unnecessary cost. So, to ensure that the Arbitral process is efficient and cost effective, the parties should have a strong Arbitrator, who is capable of managing the people as well as the process. While vetting a candidate, in respect of management skills, certain things should be considered, whether the candidate has good judicial demeanor, if he's familiar with the arbitration process, and of course, if he's comfortable dealing in different cultures, legal systems and tensions, which run high during these disputes.

Yeah, I must also mention that the Chartered Institute of Arbitrators have introduced the international practice guidelines on interviews for prospective Arbitrators. This lays down some important factors while selecting and interviewing the arbitrator. Now, these include his past experience, his attitude, his conduct, his availability, his estimated timings and length of hearings, and in ad hoc arbitrations is fees, which are either they are reasonable, or they are applicable as per rules. So, I think these are the things that I can think about. And to conclude, I would just say to be or not to be that is a question. So let the Arbitrator decide that.

Nusrat Hassan

Okay. But I think this is great points. You know, and I think I hope the Arbitrators are listening, because both of them are General Counsels and have a large influence in appointing the Arbitrators. So, I guess this is a good place to pick up the points. So yep, next question is to you, Mark. I'm going to just change the track, you know that this is a question which is often asked is a good tribunal expected to ensure an award, which is enforceable and reasoned? I mean, is that, is that necessary? I mean, normally the layperson would probably be yes. But what's your view overall on this subject?

Mark Mangan

Thank you, Nusrat. And since it's a Friday night, perhaps I should just answer that question with one word. Yes. But perhaps before I elaborate on that, let me just quickly say thank you to Neeti Sachdeva for the invitation for me to speak this evening. It's a pleasure to be involved in the last session of India, ADR week, and I wish everyone a pleasant evening and weekend from Singapore. So, I've already answered the question, with one word, it is yes. Let me just break that down a little bit. There are two parts to your question. The first is whether they have to render an enforceable award and the second is whether it needs to be reasoned. Let me deal with the second part first.

Yes, they have to render a reasoned award, ordinarily. And that requirement is prescribed expressly in the MCIA rules in rule 30.7 - An arbitral tribunal has to render an award in writing and reasoned unless the parties otherwise agree. So, it's interesting that the MCIA rules do allow tribunals to render unreasoned awards, provided that is expressly agreed by the parties as an expression of their autonomy when running an Arbitration. The second part of your question is slightly more difficult, which is, does the tribunal have to render an enforceable award? One can answer that quite simply because that is the essence of the function of an Arbitral Tribunal.

That is the raison d'être, for a tribunal being in existence is of course, to render a decision that the parties can rely upon, which usually means one that they can enforce. So yes, they do have to render an enforceable award as a matter of principle. But Nusrat, I think your question really

ultimately goes to whether or not it is a-- this is a principle that parties can rely upon in the pursuit of potentially causes of action or arguments in relation to an award. You know, does this duty to render an enforceable award somehow impose additional obligations on a tribunal or provide further ammunition to a party to challenge a decision after one has been rendered?

And I think the answer to that question is No. Arbitral Tribunals have a range of duties that are imposed upon them under the terms of the contract, the institutional rules, and the applicable law. They have to respect natural justice, the party's agreements international public policy, they have to be impartial and independent. And under the MCIA rules, they have to render a reasoned award. All of that is something that they have to do, in an effort to render an enforceable award. But I don't think this obligation to do so, somehow adds an additional obligation beyond those that you can find in the sources that I've mentioned, the contract, the applicable rules, and the applicable law.

And many arbitral institutions the MCIA included, have catch-all provisions within their rules, in particular I invite you to look at rule 36.3 of the MCIA rules, which says that the various participants in the Arbitration shall act in the spirit of these rules, and shall make every reasonable effort to ensure the fair expeditious and economical conclusion of the arbitration and the enforceability of any award. I refer to this just a moment ago, as a catch-all provision, it falls at the end of the rules, many other institutions follow the same approach. There's the SIAC rules here in Singapore, do the same, and indeed, that the language that we see in the MCIA rules is very similar to what we see in the SIAC rules.

I don't think it's intended to be anything other than a catch-all, it is a broad general obligation, and one of only using reasonable efforts. It is not an absolute obligation on the tribunal to render an enforceable award, just one to endeavour to do so. So, as a consequence, I don't think for instance, a claim can be pursued against a tribunal merely for rendering an unenforceable award. If it was an absolute obligation, Nusrat, if that rule 36.3 of the MCIA rules, for instance, was changed to say the tribunal must render an award. That might beg the question, can you bring some sort of claim against the tribunal, for instance, for wasted costs, if they fail to discharge that function? And the answer is No.

And that answer is supported by the MCIA rules themselves. Rule 34.1, of course, has a general exclusion of liability for tribunals, including if they render an unenforceable award. That's not to say claims can never be pursued against Arbitrators, they can, and we have seen some instances of that. But that would usually require something much more than simply rendering an unenforceable award, such as bad faith or corruption in the discharge of their functions. So, I hope that provides a principled answer, and one that has some nuances as well.

Nusrat Hassan

Thank you, Mark. That was, that was put very succinctly to this complex question. Thank you very much. That was very helpful. I think let me come to you, Dr. Mohammed. You being part of an Arbitral Institution, one of the leading arbitral institutions in the world. How, how much does training help in creating good arbitrators? And how much does Arbitral Institution can-- I think you are you on mute? Yes, you're on mute.

Dr. Professor Nasiruddeen Mohammed

Okay. Thank you very much, Nusrat. Good morning. Good afternoon. Good evening. I think the simple answer is to say yes, undoubtedly, the institutions have a role in the training of arbitrators, and I will add the including counsel in general, right. But maybe let us start by looking at the role of institutions. Traditionally, we normally think of institutions as simply centers for appointing arbitrators and administrating arbitration. So training is not something which is traditionally considered as part of the role of the institutions. But for an effective arbitration or for a good arbitration to be conducted, knowledge of the participants is undoubtedly helpful.

So, the arbitrators need to be knowledgeable, and it is in the best interest of the arbitration centers to ensure that knowledgeable arbitrators are the ones that are really presiding over arbitrations, because we all have a responsibility to the, to the participants and to the community or to arbitration as an institution, in its totality. So, if we look at it carefully, we will see that I think Chartered Institute of Arbitration, London, is actually the Pioneer here when it comes to training. They have trained a lot of arbitrators, counsel, expats and what have you, right. But Chartered Institute is obviously not like Arbitration Centers.

So, this is one point which I want to add that, like what we have started now in TIAC, which is Tashkent International Arbitration Centre, is to ensure that this type of training is being administered, so that our arbitrators will be knowledgeable, not just knowledgeable in law, about arbitration process, but including soft skills. Because at times, we often make this type of mistake to think that, okay, all that we need is legal training. But that's not the case. When it comes to arbitration, you'll realize there are a lot of subtle points or knowledge, which are very important time management, and what have you and my colleagues here can really attest to that, having presided over many arbitrations.

So, the institutions have now started to look into this. Prior to TIAC, we know in Dubai International Arbitration Centre, there are a lot of trainings been offered to arbitrators targeting young 40s, right. So that they can, lots of trainings like how to draft an effective arbitration award, how to identify applicable law and what have you. But just to add the, to the point, which I think Mr. Sharma mentioned at the beginning, when you look at the various skills needed, if you look at our, if we can say the consumers here, so let's look at the experts. The experts are in the need of training, those that are coming to testify before the tribunal either as **[inaudible 00:24:15]** experts in construction disputes, or financial expert and what have you.

So, the center's really need to double up in order to ensure that the Arbitration as a whole is effective, and knowledge is very critical. And just to add one point, you know, if you, I mean, I'm sure my colleagues here would attest to that as well. Because if you preside over arbitration, or if you participate in any either as counsel, you will come to realize that in, I mean, there are lots of issues that are typically local to the seats where the Arbitration are taking place. So local knowledge is very important. We know Dubai was quiet, I would use the word notorious, before arbitrators or counsel getting confused at times with certain interpretations.

So that what makes like knowledge very important in terms of what is really the attitude of the courts? How does the court interpret the role of experts, method of gathering evidence, method of testifying, all these are very important. Just to share with you I am in one of the Arbitrations, we conducted, I remember the first time in Dubai, we had a situation where we have an expert who

is willing to, and this is an expert witness. And the question was okay, he said, I want to affirm, I don't want to swear to oath, because I don't believe in anything.

And, the local law was, you know, we have to apply UAE law and the tribunal, was divided. So, that what makes really knowledge important, more particularly the institutions, because if this is an Institutional Arbitration, unless the institutions would ensure that parties been nominated as Arbitrators are very much knowledgeable about these nuances, and they can easily accommodate, or they can handle it timeously, thank you very much.

Nusrat Hassan

Thank you, Professor. Let me come to you, Francis. I think with your wide experience, this is a question that comes up pretty often. What in your experience the appointment of technical professionals from, you know, diverse professional background as Arbitrators, and whether a tribunal which constitutes only, who are non-lawyers, let us say, but they are experts versus a mix of that. What do you, what in your view in your wide experience, is maybe a good tribunal?

Francis Xavier

Now, I think practically everyone on this panel, and most of the audience will be aware that generally, when you look at Arbitrations, generally during the procedural stage, and during the hearing stage, many, many technical issues of procedure and mixed issues of procedure and substance will come up, right. How do you deal with privileged documents? You know, how do you deal with the weight of evidence? You know, when you're weighing them, if somebody dies, all of a sudden, after filing this evidence. I just come off a 7-day Arbitration and two of the witnesses died mid-way, strange in this COVID days, you know, how do you conduct effective hot topic witness conferencing?

Now, I think there are in the market, a number of non-lawyers who are adept at most of these issues, because they've gone through training and experience and have become very familiar, but by and large, it's still a case that most-- it's the legally trained ones who are adept this by and large, right. So, I think that's the first consideration. The second consideration is just because

you're legally trained, does not also mean that you're technically capable. If you're dealing with a specific industry construction. If you've never done a construction charge, you've always been a property lawyer, you're not going to cut it in a construction dispute, right?

You won't even know the jargon being used, IP disputes, Cryptocurrency disputes. So, you also need the industry experience. Even if you're legally trained, or you're fairly adept at legal mechanisms and devices, then, of course, you may have other professionals may actually be able to lend weight accounting, if it's a very complex accounting type. You know, we usually use experts, but some, sometimes having someone on the tribunal is helpful. And I think the last thing I'm going to say is years of experience, so it's just not a matter of whether you know how many years you've been in shipping, how many years you've been practicing as a lawyer, but it's also how many years you've, you know, cut your teeth as an Arbitrator.

Right. And so that, that, I think, is the mix of things. It's a very crowded marketplace. It's not-- the Arbitrator club is no longer club, you have a large number of entrants. And I think sometimes, you know, somebody in the shoes of Shilpa will find it difficult to choose Arbitrators because your choice is so wide, you've got so many Arbitral Institutions, you've got so many names, and the opponent will spring up all kinds of names and you know, many of them you haven't heard before. So, but I think this in terms of expertise, I think these are the fundamental things. One of the things is that, so I'm in an arbitration or just come off at the heart of it is Lao law.

So, we have two party nominated arbitrators who are common law lawyers. And then you have a Civil Law, ICC appointed a Civil Law lawyer as a precedent, which turned out to be a huge blessing, because Lao law is little known, unlike French, German Japanese law in the even in the Civil Law world. And to unwind the intricacies of how Lao law looks at it, in his work, you know, various codified and precedent-based approaches. A Civil Law mind on the tribunal really helped to bring focus on a Civil Law approach, which the common law Arbitrators were not familiar with. So, I think a lot goes into the mix, and one really needs to navigate it carefully. Thank you Nusrat. Back to you.

Nusrat Hassan

Thank you, Francis. That was very helpful. Coming back to you, Professor. How far should the tribunal be aware that ultimately Arbitration, you know, should they be aware that the Arbitration is as good as the laws governing it? I mean, what's your view as an institution?

Dr. Professor Nasiruddeen Mohammed

Thank you very much Mr. Nusrat. I mean, generally, just like what Francis mentioned, I think I will build from there because that explicitly answers the question. Because if we look at it, let's say in the last 10 years, I mean, looking at the just to dig back into the history. If we look at the intellectual activities in the Arbitration community, it is largely influenced by guidelines, right? We have so many soft laws, largely developed by IBA, and ICC, maybe rules dealing with evidence, conflict of interest, and what have you, and also other contributions from AAA.

Now, these rules have helped a lot or this soft laws. Just like the example that I started with, I remember one of the deliberations whether tribunal one was saying, okay, since parties have opted to use, I be a guideline on taking evidence, then it doesn't really matter whether you should insist whether that the less arbitrary, insist that somebody must swear to an oath before giving testimony, right. So, this is one good example where you can see the role of these soft laws in terms of helping the tribunal, so the starting point is to say yes, undoubtedly, the government law is great, and is very important.

But we also need these soft law instruments, to complement the Conduct of Arbitration. We know that, that there could be some resistance at times more, particularly when we're dealing with uninformed parties. Because when we talk of Arbitration, I don't think we should assume that everything is fine, is fine. Let's say the parties are knowledgeable. The counsel are great. The Tribunal is excellent, no, we should also think about Arbitration, which is not a classical one, right? Because it happens a lot. I come from developing country, and I can tell you a lot, parties may say, okay, we just want to go into Arbitration.

But the composition may not be that sophisticated. The counsel may just be general litigation counsel. So, like little knowledge about Arbitration. So, if you look at this, you're likely to have some resistance to these soft laws or to the application. And if you happen to be an Arbitrator, in that type of cycle, you'd really struggled, struggle to convince your colleagues that let us go into this even let's say during the initial meetings. So, we have a lot to do here in terms of creating awareness that we need to understand that these instruments are very important. They've been tested, they've been trusted over time.

And they are largely developed by the experts in the industry. And we all have an overall responsibility to ensure that our environment is really neat. And that's why we need this kind of instruments. They help a lot. So, to come back to the question, Mr. Nusrat, I would say yes, the governing law is great, but we need to do more. And I would go by the answer that really soft law helps a lot in terms of accommodating this and more importantly to conclude this point. Now, we're moving into many things. Artificial Intelligence, Metaverse. So, the technology is redefining the entire field. So, our soft law also needs to be revamped to take into account these technological advancements. Thank you.

Nusrat Hassan

Thank you, Professor. Coming back to you, Francis. What in your experience? How far do you think in effective case management? decides whether it is a good tribunal or a bad tribunal? Or let's say non effective, I wouldn't say a bad tribunal. But a non-effective, how much does it matter? I mean, you've done large Arbitrations, you've done, I'm sure when you were younger, I mean, you're still very young Francis. In your early days, let me redefine in the, even does it matter, it's a large matter, or is it a small matter how much a case management can, define how the process or how effective the Arbitration is ultimately?

Francis Xavier

Right. Nusrat, I think, I think all of us, like I said, everyone in the panel knows this. Arbitration has three **[inaudible 00:36:06]**, right. One of it is, the very nature of Arbitration is you can set the standard of what if it, you can say that there was lack of natural justice. And so, there is, what has

been termed due process paranoia. So, you have a 15-day Arbitration fix the year ahead, two days before the Arbitration is due to start one party sends you a medical report saying, from some, some doctor from some part of the world, saying that the lead counsel and assistant counsel have, landed up with mysterious diseases, and they're not able to travel, right.

And so, you can't go on, it becomes very hard. So, there is a whole plethora of techniques like that which, our counsel have perfected, to make life very difficult for the tribunal to forge ahead, because then there will be the accusation that the tribunal did not afford me a due time to prepare my case or attempt to the case. Next to that you have the second point, which is Arbitrators are not like judges, the judges can actually send you to jail. You know, judges can bang heads together, both counsel and sparks of wisdom will fly out. Arbitrators can't do that, right.

And the third related thing is, when you're, when you're a professional Arbitrator, you want to present a firm, fair, objective, but a reasonably friendly and approachable face. You don't want to start shouting at counsel during the hearing, you don't want to be unreasonable. A judge would have no such qualms, right. The judge will say you get it done in two days, I don't care what your problem is, right. So, with that, you find that you do have a big problem now, in Arbitrations all across the world survey after survey says, someone like Rajeev and Shilpa are concerned about time delays, cost escalation, and there's a perception, you Arbitrators, you counsel are all charging by the hour.

So, you, do you really have an incentive to make sure that the time spent is used optimally. And then, that's on the part of the Arbitrators, then you have the tactics of the combatants, right, the guerrilla tactics, which I've alluded to, so really, at the end of the day, it goes to the cuts of it. Nusrat, as you said, and I think a number of people, Professor. Mohammad, Rajeev spoke about it, both Mark and Shilpa touched on it. At the core of it, the duty of the Arbitrators is to keep a firm shorthand, and sometimes it's not easy, but I think you need to be brave. You can't be too polite. You can't be too accommodating, because then the time and costs will just go to pots, back to you Nusrat.

Nusrat Hassan

Thank you, Francis. Thank you. That was, very well put. Mark, over to you. How much does the council can contribute? How much value does he add in making the tribunal efficient?

Mark Mangan

I think counsel.

Nusrat Hassan

Mark, could you hear me?

Mark Mangan

Yes. Can you hear me? Hello, can you hear me? Yes. So, counsel, I think can make a meaningful contribution to the efficiency of an Arbitration. Before I elaborate on that, I might just try to synthesize a comment in response to what Francis said. Which is that when it comes to tribunals and case management, the conduct of a case I think it's sometimes said that a tribunal can do two or three things they can render, a fast decision, a correct decision, or one that's cost effective. And often they have to choose two of those three, getting all three is very hard, fast, correct, cost effective.

And the parties in their function as counsel with, and with their counsel can work with the tribunal at the case management phase to work out which two of those three they wish to emphasize in order to align the process with their objectives, because they shouldn't be complaining about, for instance, a decision that's not fully reasoned if they've imposed an unreasonably short timeframe on the tribunal.

If it's a highly complex case, that requires considerable thought, and the parties themselves have spent a long time developing their cases, I don't think it's necessarily reasonable to impose a

really short timeframe on the tribunal of weeks or even a couple of months, sometimes more time is needed, if they want a decision that's going to be accurate and correct and consistent with that expectation. So, I think the parties can work with the tribunal in trying to align expectations. And then throughout the case, I think, quite apart from that counsel should remain focused on the core elements of a dispute.

I think often we can all get tempted to fall for the bait presented by an opposing counsel and engage in peripheral debates that frustrate Arbitrators and annoy clients in the sense that they then have to pay for the consequences of, those debates. And so, counsel, as much as possible, should try to remain focused on, on the core issues, and avoid distractions throughout so that the process will be efficient.

Nusrat Hassan

Thank you, Mark. Thank you. I think that's very relevant. Rajeev, let me jump over to you. What should be the obligations of a tribunal? In ensuring good Arbitration proceedings? I think we, it's a lot of people have said, the panelists have said a lot of things. But what in your view? I think your, your views are, arming for me now, is it always makes us more aware, what expecting things are.

Rajeev Choubey

I see as, in house and representing a business house, I think what we are interested is that it should not be a paper award, which is not capable of being executed, right. And when I. So, in my view, what we are looking at is that the award should be an accurate award in the sense, whatever issues have been framed, the tribunal addresses those and resolves those, and should not get into, something which is not being referred to. That's point number one. The second, and that goes with, what we call it as a very reasoned award. Sometimes I've seen, tribunals awarding damages, but not giving enough reasoning that in the Indian context, it leads to, again, awards being challenged, under 34, and 37, and then goes up to Supreme Court.

This isn't the Indian context. So, I think, as long as our word is very reasoned, the grounds for intervention in the Indian, in the Indian context under Section 34 is very, very limited, the law is changed now. And gone are the days when, courts used to rewrite awards. So, if, in my experience in whatever I have seen reason awards, has, it has been dismissed under 34, or under 37. And the disputes finally get resolved. So, that's very, very important. And, and I think that's, one of the key things.

The second thing, as I think everybody has touched, that it should be a very fair award, in terms of, fairness and, and so I think these are a couple of things which comes to my mind, I think rest of the aspects has already been touched upon by other panelists in terms of the efficiency, the cost effectiveness, and stuff like that, as, somebody who represents in house and business I think, we are interested in an award which can be enforced and we ultimately get what we, expect. So, I will stop here, Nusrat, I think in the interest of time.

Nusrat Hassan

Thank you. Thank you, Rajeev. I think we all can come to a common conclusion that, appointment of the right Arbitrator for the disputes cannot be overemphasized. And I think that is one of the basic aspects in order to, in order to have and have to end up having a start off good Arbitration process. We are almost, we have another 10 minutes, I think we will open it to the floor for Q&A. Sudhanshu, do we have, I don't see anything on the chat. But do we have? We are happy to take any questions.

Sudhanshu Roy

I, yeah, I don't see anything on the chat either. So, I mean, yeah, we have a significant number of participants. So, if any of them have any questions, they should feel free to either operate on the chat or speak up. Your chance to speak is now.

Rajeev Choubey

There is, there is one in the Q&A, from Mr. Kishor Dere, he says, can there be an instance where parties want to delay Arbitration?

Rajeev Choubey

So Nusrat, if you're fine, I can take this?

Nusrat Hassan

Please, please take it go ahead, Rajeev.

Rajeev Choubey

See, in my experience, sometimes when a respondent, so assuming I've initiated the Arbitration, the opposite side uses all tactics. And I think Francis touched that point that, getting a medical report saying that I've got some disease. So, I think the respondent, most of the times, deploy all kinds of tactics to delay the Arbitration. And in fact, I have a totally different experience where we got the award, the money was deposited under 34. In appeal in the High Court, in 37, I wanted to withdraw the money by giving a bank guarantee even that they were not willing to do, so I think the whole mindset of the opposite party, even if they know that there is no merit is to delay. That's, that's the unfortunate part.

Nusrat Hassan

Yeah.

Shilpa Sharma

So, I would like to add over here, Nusrat, if it is, okay?

Nusrat Hassan

Yes, please go ahead.

Shilpa Sharma

Because, we are on the other side, being in companies. So usually, I've seen that most of these, Arbitrations or, these issue start, because of ego issues, majorly, and then those, long tactics happen that, the other part, one party doesn't come, then, there's a delay, a lot of delay, then 34, 37, then sometimes Section 8, so many things happen, and that there's a lot of delay in the entire process is just because, you want to harass the other party or something like that. So, this is what usually happens.

Rajeev Choubey

No, Shilpa just to, just to add to what you said, sometimes the CFO doesn't want to write the check. So, he says, as in house counsel, delay, stretch it as much you can, and when you have to receive the money, he will say, this is only a paper give, where is the money well known, depending upon the situation, you have to play there. So, I think, but that genuinely should not be allowed. And that is where I think the role of the tribunal becomes very, very important that how much discipline they are enforcing.

And I think in the overall interest of an effective Arbitration, I think it is very important for the parties, which I keep telling my team, that before you file an Arbitration, initiate, even, invoke the Arbitration, your Statement of Claim if you are the claimant should be ready. It should not happen, that the timelines have been frozen.

And then you start looking for the documents because the biggest challenge in my experience has been that getting documents because there's a legal function, you are dependent upon your business guys to get the documents, and then you will be struggling for documents. So, I think if you want an effective Arbitration, first get your document, first get your claim in place and then invoke that will save time and money in the interest of all.

Nusrat Hassan

So, there's a follow up question from Kishor Dere, maybe Mark or Francis, you can take it how to make Arbitration Tribunal bold and assertive. I think Mark.

Francis Xavier

I just said something and then, basically, I think you need, you need to have an Arbitrator who is firm and experience, so if one party doesn't pay the part of the share of the deposits, how do you go about, making them take on their fair share, so you need to be knowledgeable, but beyond that, I think you just need to have that confidence, in being firm and fair, because you don't like in the case of the person who puts up a last minute medical trip, you need to say, right, this Arbitration is fixed for eight days, we will perhaps start, if, on the fourth of on the second week or slightly later, but for me to reconvene, I order hereby order for that person if you have good grounds to undergo an independent medical examination. Right. And so, you need to be firm, you need to do what is right. You can't be a Mr. Good guy and be friendly with everyone and be the best pals. Over to you, Mark.

Mark Mangan

Thank you, Francis. I would just add that I think the ability to achieve this is in the hands of the parties, perhaps even more so than the tribunal in the sense that the parties get to choose the tribunal. So, the question is how to make the tribunal bold and assertive? And the answer is, when you are choosing your Arbitrator, that should be an important quality that you look for. As Shilpa earlier talked about the different qualities and that includes soft skills. And that was, that a part of that would be working with Co Arbitrators, but also the confidence that Francis was just talking about the boldness that, that's premised in the question, to be able to discharge the function efficiently.

Now, we as counsel, we know, Arbitrators who are no nuance, have a no nuance approach in the way they conduct Arbitrations, we could come up with a shortlist pretty quickly of those that we

know from experience, that have this perform. And equally, one can if you're a respondent, looking to delay things as Rajeev indicated that sometimes CFOs request, which is true, you can also identify Arbitrators that in a slow, that are too busy. You can choose a wing Arbitrator, someone who actually has a lot of cases as chairman, knowing that they're not going to have much time for the hearing, or for the rendering of the award.

So, you know that the game can be played at both ends. So as a claimant probably who wants a tribunal to be bold and assertive, that's very much starts with your selection of the Arbitrator, your wing Arbitrator, and then how you manage to manipulate the process for the appointment of the chairperson, to ensure that that quality is uppermost in the selection process.

Nusrat Hassan

Thank you, Mark, thank you that.

Rajeev Choubey

And Nusrat, if I may add, I think the biggest challenge which I have seen in the Indian experience is to know all the parties agreeing to a date, that is the biggest challenge, because sometimes Arbitrators are not available, if it is a 3-member tribunal, you are gone, then you have opposite side lawyers, then you have senior counsels. Very, very difficult to reconcile. And the worst part is that sometimes the hearings in the Indian context, you are there for just an hour, which is very different from what I have seen internationally. So, I think India has Arbitration has a long way to go, long, long way to go.

Mark Mangan

And that applies Rajeev in many jurisdictions where you can choose Arbitrators that, are too busy, that are over trading, if you are a respondent that wants to things to go slow. But then there are some Arbitrators that are very busy. And I'm happy to give names offline, that are very precise and efficient and have a no nuance approach. And they really clamped down hard on delaying tactics. And there's some that do that really impressively, almost like a judge that they sort of

they're confident enough and experienced enough to give a little whack to the parties. When it, when they're losing focus on the core issues. And you can take that into account when you choose your panel.

Rajeev Choubey

Yeah, absolutely. I think in India, the other challenge is that many of the lawyers who are Arbitration Practitioners are also litigation lawyers before going to High Courts and other Civil Courts. So, they tend to be available only after four in the evening, or only on Saturdays. So that makes, the job more difficult. So, I think as India as a, as a jurisdiction, has to develop specialized lawyers who are fully dedicated to Arbitration, and we are seeing that trend now, slowly, I would like to.

Nusrat Hassan

Rajeev that's good news. Yeah, a lot of that is changing also in India, I think the 15th Amendment, with the time limitations, the time bound Arbitrations, a lot has changed. We've seen much absolute data Arbitrations might be sufficiently.

Rajeev Choubey

Because that will, Nusrat improve. I think government is also aware of this. And that's why I think in terms of ease of doing business ranking, I think there's a lot of effort in terms of institutionalizing the whole Arbitration process.

Nusrat Hassan

And also, I must add, because CIRB is a supporting organization, I've been the secretary, and also having the privilege of having Francis, who has been the past president of the CIRB, which is an institute which, dedicates itself to training of an accrediting Arbitrator. So, I think people who are on this platform, please look that up crb.org. And it is a not-for-profit chartered organization, and it has a branch in India across the world over 18,000 members. And it's probably one of the

institute's which focuses on educating and training Arbitrators and has been doing a wonderful job across various jurisdiction. So yes, sorry, I could have had to do this, the 2-minute thing for CIRB because it's doing wonderful work. So do look it up.

And I think it really adds, excellent credentials, which exist in any case, but yeah, I do look it up. And it's great. But before I end the session, it's another minute, I would like to thank all the panelists. Thank you very much, Francis, Mark, for taking the time out at a very short notice. Thank you, Professor. Great job, Rajeev, and Shilpa, thank you for all, help me understand how difficult it is to be available at this short notice, I thank Neeti, MCIA and TIAC for, contributing in this beautiful, terrific session. I hope people have found this useful. But please, you can get us, get in touch with us offline. And we would be more than happy to answer any questions. Thank you very much.

Francis Xavier

Nusrat, on behalf of the panelists, we want to thank you for your very helpful outline.

Rajeev Choubey

Correct. I think very well conducted session Nusrat and thanks to Neeti for pulling us into this and it was really very interesting discussion. And thank you all.

Dr. Professor Nasiruddin Mohammed

And to Sudhanshu too.

Shilpa Sharma

Thank you, Sudhanshu.

Rajeev Choubey

Wish you all a very happy weekend.

Mark Mangan

Bye, everyone. Thank you.

Mark Mangan

Same here.

Nusrat Hassan

Have a lovely weekend. Thank you.