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INDIA ADR WEEK 2023 DAY 3 - MUMBAI

**MANAGING EXPERT EVIDENCE IN INTERNATIONAL ARBITRATION: TIPS
AND TACTICS**

SESSION 1

8:00 AM To 10:00 AM

Speakers:

Ishani Vora, Senior Director, Economic and Financial Consulting, FTI Consulting
Neeti Sachdeva, Registrar & Secretary General, MCI
Ben Giaretta, Head of Dispute Resolution, Fox Williams
Vikas Mahendra, Partner, Keystone Partners & Convenor, IAF
Shreya Jain, Principal Associate, Shardul Amarchand Mangaldas

ISHANI VORA: Good morning. Welcome to a discussion on managing expert evidence, tips and best practices. I am Ishani Vora, Senior Director with FTI Consulting and a Damages Quantum Expert. With me today I have a group of stellar panellists with diverse backgrounds to give us a well-rounded insight on this extremely relevant topic. Our panellists need no introduction, so I'll try to keep this very quick. I'll start with Shreya. Shreya is a Principal Associate in the international arbitration practice at Shardul Amarchand Mangaldas in Mumbai. Shreya's experience includes International Commercial and Investment Treaty Arbitrations with major international arbitration rules like ICC, SIAC, LCIA, UNCITRAL, ICSID etc. in sectors such as energy, finance, commodities, construction, public utilities, consumer products and insurance. Previously she worked in the International Arbitration Practice at Cooley LLP in New York. She is an active member of various international arbitration organizations and currently serves as the India Co-Chair of Young ITA and a regional representative at the LCIA's young international Arbitration Group, along with an assistant Editor of the Kluwer Arbitration Blog. Welcome Shreya.

Next I'll go to Vikas. Vikas is a partner in the arbitration practice at Keystone Partners with experience handling domestic and international commercial arbitrations. conducted under



1 the ICC, SIAC, LCIA and QICCA Rules, among others. He specializes in infra and technology
2 related disputes. Before joining Keystone, Vikas worked over six years in the arbitration team,
3 at Herbert Smith, London, Paris and Singapore offices. Vikas is a member of the Chartered
4 Institute of Arbitrators and a part of the panel or list of arbitrators at institutions such as LCIA,
5 SIAC, HKIAC, eBRAM and IIAC, among others. Vikas is also a Convener of the India
6 Arbitration Forum and an advisor to the Centre for Online Resolution of Disputes and TERES
7 an Arbitration Technology and Transcription service provider. You can see their transcription
8 live actually. Welcome Vikas.

9
10 Next I'll go to Ben. Ben is the Head of Dispute Resolution at Fox Williams LLP in London. He
11 has been working in international arbitration for over 20 years as Counsel and Arbitrator. He's
12 a Chartered Arbitrator and a member of the Global Board of Trustees of the Chartered Institute
13 of Arbitrators. He is also on the Board of Directors of London International Disputes Week
14 and on the Advisory Board of the London Chamber of Arbitration and Mediation. Currently
15 based in London, Ben was based in Singapore for seven years, and he has extensive experience
16 of India related arbitration seated in Singapore. In fact, he's currently working on two matters
17 seated in Singapore, but India related. He has been recognized by Who's Who Legal as a
18 thought leader and a global leader and a leading individual by Legal 500. Welcome Ben.

19
20 And last, but absolutely not the least, we have Neeti who is a Secretary General and Registrar
21 at MCIA. Previously Neeti worked with top tier law firms like Trilegal and ELP and with the
22 International Arbitration Department of Freshfields in their Paris office. Neeti also worked
23 with LCIA India as its first Deputy Registrar. She's an office bearer at the IV Arbitration
24 Committee and regularly sits as an arbitrator. Welcome Neeti.

25
26 **NEETI SACHDEVA:** Thank you so much.

27
28 **ISHANI VORA:** Okay. I'm just very conscious of time, so I will jump into the topics we want
29 to cover. I just want to spend a few seconds to talk about housekeeping. We'll do a few
30 questions with the panellists. And then we'll open the floor to the audience. We are expecting
31 our Chief Guest, Honourable Justice Dangre to give her address at around 9:30, so we'll try
32 to wrap up by then. So getting into it, the dictionary defines an expert as a person with special
33 knowledge, skill, or training in something. In the context of disputes, experts or expert
34 witnesses come in variety of forms. So depending on the context of an arbitration. you could
35 have experts who specialize in industries for example technology, infrastructure or oil and gas,
36 etc., or you could have skill experts like valuation experts, accountants, technical experts, delay
37 experts, etc. Such experts can offer evidence or analysis, which helps with facts and breaches



1 and assessing damages. So all the aspects of an arbitration from law, fact and then final
2 outcome and commercial arbitrations. For example, some of the questions put to experts like
3 me, who specialize in damages are valuation of shares, businesses, loss/profits, analysing
4 costs, effect of values of patent and IP infringement, and effect of disruption delays. The use
5 of expert witnesses in international arbitration has been on the rise over the years, at least in
6 the context of international arbitration. I'll now move on to the panel, and I'll stop talking. I'll
7 first go to Neeti since you are here. Okay. Can I ask you an opening question? What do you
8 think has been the role of experts, and how have you seen it evolve over the years, both in
9 international arbitration and to the extent you have seen it in domestic but in India? Thank
10 you.

11

12 **NEETI SACHDEVA:** Thank you, Ishani. I think I should thank FTI because this is the first
13 time that somebody's invited me to speak at the India ADR Week. So I was very excited. I said,
14 Ishani, I'll definitely take it because otherwise you're always on the other side organizing it
15 and left it happily on Madhukeshwar to take care of these 2 hours. So thank you on that. I
16 think the evolving role of experts as I see is that it's evolving, but it's very slow paced. One
17 would like to see it more. I always compare it to, akin to institutional arbitration in India,
18 which is evolving but is again very, very slow paced. Of course, experts play a very crucial role
19 in an arbitration. And I think none of us in this room can deny that fact. But there is a
20 reluctance, a hesitant, always to get them in at the right time. I think there's also a couple of
21 things involved with that right. I distinguish it in two ways. One is to say that where the
22 evolving role of experts is coming, you divide on the basis of what the claim is and how
23 sophisticated your client is. So if you have a very small value claims, you will hardly see an
24 expert coming in. And sometimes a large value claims as well, if the client is not very
25 sophisticated or doesn't want to listen to the lawyers, which sometimes they don't, then you
26 don't see experts coming in at the right time. Timing of the experts is what I think is evolving.
27 We always saw that you would have an experts who would come in at the fag end of after the
28 pleadings have been filed, and you're now in the stage of filing your witness statements, expert
29 statements. And then you will just call up an expert and say, this is what I filed. That is my
30 statement of claim and defences. Can you just help us with that? I think that is what I have
31 seen more, at least in my experience, that is evolving, that while the parties are drafting the
32 claims itself that they get approached to.... They approach the experts much more in that.

33

34 **ISHANI VORA:** I think I absolutely agree with that. The experience we have had is very
35 similar. When we started, we used to only do work right at the time when the reports are due
36 in like a few weeks. And now we see a lot of lawyers, counsel, parties approach us even as early
37 as when they are looking for funding, for example. And that's a great change. I think that has



1 definitely benefited at least the matters we have worked on. Thanks for that Neeti. Ben can I
2 come to you now and ask you, when you're looking for experts, what are the qualities you look
3 for? And how much emphasis do you place, say for example on geographic familiarity or
4 industry familiarity, as opposed to expertise in the work itself?

5
6 **BEN GIARETTA:** Thank you much and good morning everyone. Thank you very much for
7 coming at this early hour. Let's start by saying that, of course, as we all know, there's not just
8 one expert in the International Commission Arbitration. There actually four experts and in
9 many ways the most important expert is the person within the client. I mean if you're working
10 on for example, a road project or a construction project, that client will have engineers in
11 house. Those engineers would have worked in a project for five years or whatever. They will
12 know it inside out. They will be extraordinarily experts in the matter. Then a second expert is
13 actually the lawyers. Lawyers become expert in the matter as you move along. They're
14 becoming expert in a very small way. I worked in a matter for about five years, which is all
15 about a telecommunication satellite. And the dispute was about the thrusters on this
16 telecommunication satellite and the thrust is essential in space. I can tell you because I'm an
17 expert, in terms of positioning the satellites to get in the right position. And for a while I knew
18 after working in the case for five years, I knew everything that there is to know about thrusters,
19 and in particular the fuel, nozzle, intra-thruster. I knew nothing about the rest of the satellite.
20 I couldn't tell you what it did. I couldn't tell you how it got there. I knew an awful lot about this
21 fuel line into the thrusters. The third expert in international arbitration are the arbitrators and
22 the arbitrators are the ones ultimately who you want to become the experts. Who you want
23 them to know what these thrust is about. You want them to know the expertise at the end of
24 the day. And then you get to the fourth experts, who are the testifying experts. And that's who
25 we're talking about here. That's what one normally refers to when you refer to experts. And
26 this testimonial expert has their role in many ways is to perform the shift from expert number
27 one to expert number two or three. They are there to help take that knowledge from the in
28 house person to the lawyers to the arbitrators and explain in clear terms what's going on. And
29 of course, we go to people like that because they are regarded as perhaps a little less expert
30 than the in-house person, but a little more independent. And to get back to your question,
31 we're looking for someone who's able to perform that role, who is able to come in and explain
32 this clearly, who's able to educate and who's able to work with lawyers because we're not just
33 talking about performing... giving evidence on one day at the end of arbitration but actually
34 talking about sitting down with lawyers over a period of months or even years to explain what's
35 going on. And then at the end of that process to give evidence. So we're looking for someone
36 quite a rare set of skills, actually, to be able to come in with that knowledge of many years of
37 working in the particular sector, but also to be able to explain and educate and convey the



1 truth of what's going on to these other people and to educate them. And in terms of
2 geographical expertise, well again, it depends on what we're talking about. The satellite case I
3 referred to, there are only two places in the world where you can go to for satellite expertise.
4 And we had to go to these people who were ex-NASA and they're all now in Bethesda on the
5 outskirts of Washington. It seems to me that that's the only place in the world where you could
6 find satellite experts. And the Americans, of course, are incredibly anxious about the release
7 of the technology, so you have to sign all sorts of documents and sign up to ITA and everything
8 else. It is really difficult. On the other hand if we're talking about commercial expertise. Sorry
9 I can't say expertise. To be honest, a lot of people across the world are doing that these days.
10 It's a very expert people across the world. So there's a lot of choice there. So it's really driven
11 by what choice, what sector you're talking about and what choice there is. And I don't have a
12 problem with working with experts all over the world. I worked with an expert in time zone
13 which has been 12 hours away from me. So, I don't have a problem with that, but obviously it
14 is better to have someone more local because that's a bit more convenient. I don't know if that
15 answered your question at all, but those are my thoughts.

16

17 **ISHANI VORA:** It does, it does. Thanks Ben. I think absolutely agree. We are, in fact, doing
18 a matter where we have seven different expert reports and they all have ten different expertise.
19 And it's very interesting to see that there's so much that happens in the same case. And there's
20 so many pieces that experts can actually fill and come together and come up with an answer
21 which is independent still, founded in expertise and skills that comes from outside. So I
22 absolutely agree that it can be of many different shapes and forms.

23 Vikas I will come to you now. In your experience and since you are a practitioner also an
24 arbitrator, and you have been an expert witness yourself for legal matters, how do you think
25 the perception and relevance of experts to an arbitration differ from each of those
26 perspectives?

27

28 **VIKAS MAHENDRA:** Thank you Ishani. Certainly when you wear different hats, you're
29 looking at an expert in multiple different ways. And I think Ben's given you a good insight as
30 to what say a lawyer would expect and what an expert is required to do in the context of a legal
31 case. I don't think I'll repeat that much. From an arbitrator's perspective I think there's a
32 couple of different broad themes that they want an expert to tick. They want them to be
33 independent, and they want them to be competent. And neither of which is always a given.
34 Independence tends to be slightly harder to displace because I think given the very inherent
35 nature of arbitration and that it's confidential, past engagements of experts tend not to be
36 known. Unlike arbitrators, where there's an active requirement of disclosure, there is no such
37 binding requirement for experts. So unless there's something glaringly obvious that comes out,



1 it tends to be a little difficult to displace independence. And certainly as a lawyer cross
2 examining an expert, unless I really, really know that that's something that I can win, I don't
3 quite venture down that path. But if, for whatever reason during the course of the process the
4 Tribunal feels that a person's not independent, you've lost them. Like, no matter what you say
5 thereafter, it becomes really hard to come back from it. So it's one of those extremely hard to
6 displace but if it does get to that point, then it's fatal. But I think where a lot of the experts'
7 relevance and their role comes is actually in their competence, and competence can be
8 established in two ways. One is with an extremely long CV with a series of credentials or what
9 I find most useful is how they've approached the problem in that particular case. So we've seen
10 experts where they come in with excellent credentials like degrees and alphabets that you've
11 not heard of being attached to their names, but ultimately their work product doesn't speak.
12 So really then that CV becomes irrelevant. CV is a good starting point because in any cross
13 examination you'd probably as a lawyer start with trying to establish, do you have relevant
14 sector specific experience. Do you have relevant experience in the kind of things you're talking
15 about. But that's really maybe 2% of the time spent on their cross examination. The bulk of it
16 therefore, comes down to the methodology they've adopted, how robust it is. And I
17 think almost as important or more important is the data set that they work on and how robust
18 that data set is. And almost all of the cross examinations that I've done, where we've been able
19 to discredit the expert, it's been on that either that they've not taken sufficient knowledge,
20 sufficient data to come to the conclusion that they have or that the methodology that they've
21 adopted is not robust enough or is not stress tested well enough. So really, I think from the
22 Tribunal's point of view, that is where I focus on the most and where people fail that test you
23 sort of discredit what it is that they have to say. Coming from the expert's standpoint and
24 actually there's someone in the room yesterday who'd appointed me. And in that case, I really
25 saw from an expert's lens how my testimony was taken, to how my opposing expert's testimony
26 was taken. And I think there the difference was very clear in terms of one, it was a two page
27 report versus a 50 page report. And I'm not saying more is necessarily better, but I think you
28 need to meet the requirements of what it is that is being asked of you. And as an expert, the
29 more you try and avoid a question that's being asked, the more you try to explain that in an
30 indirect fashion, the more obvious it becomes that you are not aligned with what ultimately
31 your outcome is going to be. So the more long winded and explanation the less likely that you
32 come across as being believable. So I think brevity is important. But brevity, coupled with
33 proper identification of sources. So whatever you're saying, and in fact, I was having this
34 conversation very recently with another colleague. Every single line that in an expert report
35 you write must be backed up by something. And for me the less it is on my experience, my
36 industry knowledge, the better it is. The more you're able to tie that experience with XYZ
37 source, ABC document, or some protocol, or some text, I think the better and more credible



1 your report will be. So really it's about making that report robust and making it more
2 believable. I think that's really been my experience.

3

4 **ISHANI VORA:** That's excellent Vikas. I think I agree with every single thing, especially the
5 last point you made on everything in the report is either sourced to something independent or
6 an instruction that counsel have or could backing for. A lot of the times we see that we do work
7 with instructions, but they are not founded in any evidence from the counsel's side also. And
8 then that's where we have problem. And even the other point you made about brevity, I think
9 it is so difficult to explain complicated issues in very simple terms. And I think that's a very big
10 input that an expert can bring to the process. Before I move to Shreya I want to come back to
11 Ben. I think because you also have experience obviously as the arbitrator and counsel, do you
12 have anything to add to what Vikas said when it comes to looking at it from two different
13 perspectives?

14

15 **BEN GIARETTA:** No. Vikas has answered the question very, very well. I think, yes, an expert
16 is not there to argue the case, but the expert is there to assist the Tribunal and to educate the
17 Tribunal, as I've already said. And it very much turns off a Tribunal if the expert is just being
18 the advocate and trying to win you over because it's like a red mist comes over them. And you
19 think, well, what's the point of listening to this person, if they're just going to argue something
20 badly. I'd much rather listen to the advocate. He knows what's going on and can argue the case
21 better. You're there to actually tell me what... how you build this thing, how you do the analysis
22 on this thing. And the arbitrators recognize that they have a big gap in their knowledge and
23 the experts are there to fill that gap. They're not there to persuade you, the right or wrong of
24 the case is that's your job. They are there to help you to grapple with these pretty complex
25 problems that maybe you may be facing. So yes, an advocate expert is really the wrong thing
26 to have.

27

28 **ISHANI VORA:** I completely agree on that. Moving to Shreya. So Shreya, I know you do a
29 lot of investment arbitration and shareholder disputes. And I also know that you've used
30 experts from a lot of different domains. How do you find management of expert evidence
31 different when you use to take example a quantum expert versus say a delay expert or a
32 technical expert? And does it matter what the industry is for example, over the type of issue at
33 hand is or what is the type of dispute itself? Is it investment versus shareholder versus
34 something else?

35

36 **SHREYA JAIN:** Thanks Ishani, that's a great question and a lot of things within it. So I'll try
37 to sort of answer each of them. I broadly would categorize expert evidence into three buckets.



1 One would be sort of your legal expert just on the law. Second, would be a purely technical
2 expert on things like satellites or say, concrete, which is something I've worked with before.
3 And third is an expert who is sort of looking at a lot of factual documents as well, but also
4 bringing in his own domain knowledge and condensing it into that field. So a classic example
5 is delay, where you're looking at how the project is progressing. Looking at a lot of extensions
6 of time. How sort of at each level what was happening on the project, which is a lot of facts.
7 But then also bringing your own knowledge of delay analysis and condensing it. And I think in
8 a way that's what quantum experts do as well. Of course, you're bringing in knowledge of
9 valuation techniques. But then you're also looking at facts. For example, of the company's cash
10 flows and things like that. Each of them of course have their own nuances. But at least in my
11 experience I found that from a management perspective, there are a few techniques which
12 work in making expert evidence efficient across all these buckets. And I can give a couple of
13 examples where this seems to have worked very well for the case, but in some cases where it
14 wasn't done, the expert evidence became difficult to manage. So the two things which I find
15 where expert evidence has been efficiently managed is where the decision on how to manage
16 expert evidence has been taken early on in the case, preferably in the first procedural
17 conference or in the first procedural order, and that comes out in two ways. One is when expert
18 evidence would be submitted and what order would it be submitted in. And the second is
19 scoping of issues. So is it possible at every stage or as early as possible to really list down areas
20 of agreement and areas of disagreement? And second list down a list of common questions the
21 experts would be considering. Because the more you can streamline this process with a list of
22 questions, a list of agreement or disagreement upfront, the easier it becomes for the expert
23 report to become more readable for the Tribunal and the parties, because then you know that
24 these are the five areas we agree on, and therefore you may not even need expert evidence on
25 it. But these are the five areas we disagree on and this is how we disagree. We often see that in
26 delay reports quite clearly because effectively you're looking at, I mean you may be looking at
27 75% of agreed facts and 25% areas where you disagree. But where I think that becomes harder,
28 and perhaps Vikas can speak to that as well, is say a legal expert where you may have questions
29 you agree on, but ultimately, how you analyse those questions or what tests you think that law
30 provides for those questions is going to be difficult. So you can't really agree necessarily on too
31 many sub-issues. You may be able to agree on the broader issues or questions. But I do think
32 both scoping and timing are great ways to man for a Tribunal, perhaps to try to manage expert
33 evidence early on. I will give an example here of a recent case where we worked with a technical
34 expert on... he was a forensic expert and who had to sort of give his opinion on whether there
35 were data breaches in the IP infrastructure. And in that case the Tribunal appointed its own
36 expert, and I know we might touch upon Tribunal appointed experts, but it all happened sort
37 of very spontaneously. It wasn't something we decided at the start of the case. It sort of



1 happened almost one and a half years into the case. By that time, there was already a lot of
2 documentary evidence. There wasn't sort of clear... no party was very clear on whether they
3 are going to have a chance to oppose or reply to that Tribunal appointed expert. So in a way
4 we had say in January, a Tribunal appointed expert related Procedural Order. At that time we
5 just knew that there would be an expert appointed, and we were asked to share costs. But what
6 happens in such cases often is that if a Respondent wishes to be difficult, the Claimant has to
7 end up bearing the entire cost. So then, it was an additional expert to bear the cost on. And
8 both parties, of course wanted to submit reply expert reports because they weren't happy with
9 some portions of the Tribunal appointed expert. So, I just feel like in that case, it was a classic
10 lesson of how some of the confusion and the cost related issues could have been avoided if we
11 had just agreed on a procedure early on or as soon sort of, if not the first procedural order,
12 maybe by the time you file the Statement of Claim, you know whether you are going to need
13 expert evidence. So, I think that timing and scoping are both sort of techniques which can
14 help narrow down and manage expert evidence efficiently in all categories of experts. I know
15 you briefly also mentioned about whether it makes a difference, the industry makes a
16 difference. In my experience of course industry can bring its own nuances to selection of
17 experts or the nature of expert report. But I don't think I have found that it makes a big
18 difference to the proper procedures or processes internally to manage expert evidence. An
19 example of where it made a difference to selection of experts, it was very interesting. We were
20 doing a case during COVID, where I think all of you know, there was a huge shot in sort of
21 prices of commodities and we had to find an expert who could opine on how... I mean what
22 was the trend in which the price of commodities which are used to make a bar of steel arose.
23 Now that's something where knowledge of quantum does help. But of course, industry
24 knowledge of that field and what is sort of the trend in iron ore prices or the trend in oil prices,
25 those industry, that industry knowledge was actually very important to us because the other
26 side's expert was trying to make the point that all of this happened but it was not because of
27 COVID. It was because of some other causes. And therefore knowledge of the industry and
28 how similar things have happened, say ten years ago, or 20 years ago, became a crucial part of
29 the expert evidence. So, I think it's specific to your dispute. It's not necessary that in every kind
30 of dispute, the industry brings in a lot to the expert report. That's been my experience. I would
31 love to hear the panellists' views on whether they have found industry or geography making a
32 big difference because at least in the cases I have done, it wasn't that relevant a factor.

33

34 **NEETI SACHDEVA:** Very interestingly I'm reminded of it, that we had actually a matter
35 which came in from the Bombay High Court... no, from the Delhi High Court where the parties
36 had applied to the court to have MCLA appoint an expert in a matter because the parties
37 couldn't agree on an expert, which was a very technical thing of finding somebody who knows



1 how the financial management of a hotel works, running of the business. And the party
2 involved was such that it was so litigious that they probably had exhausted all the experts in
3 the field. Right? So I think that's where institutions also can come into play. And I can tell you,
4 Ishani, it was a great difficulty for us to find that expert. We finally did and the matter then
5 went on for it. But that was one classic example we saw that how the evolving role and where
6 the courts are now being approached to probably appoint or get an arbit... an expert appointed
7 in a particular matter.

8

9 **ISHANI VORA:** I think it comes back to the point of how specialized the expertise is that
10 you're looking for. And something Ben said that there can be questions which are routinely
11 addressed by experts and you have a lot of options and then the questions that are so specific.
12 It's very difficult to find those experts. We've been trying to find for almost a few months
13 experts in welding and process flow design and we found people, but not exactly what our
14 client wants.

15

16 **NEETI SACHDEVA:** Do you want to apply to MCIA to help you find?

17

18 **ISHANI VORA:** Sure. I'll definitely take that up and I'll take that offline with you. But before
19 I move on, did you... Shreya asked a question in case if you guys had anything to add on to
20 geography/industry being relevant.

21

22 **NEETI SACHDEVA:** I think what I have seen in my personal experience is that, not so much
23 as geography, but industry does make a difference. I think the acceptability of having experts
24 in the field of construction infrastructure is way higher and you see them being used a lot more
25 than probably what would you see them in your shareholder dispute maybe or
26 commodity disputes maybe sometimes as well. So I know Shreya you may have had a different
27 experience, but at least my experience has been that industries have now evolved to whether
28 they have an expert or not to have an expert.

29

30 **BEN GIARETTA:** Yeah, I agree with that. I mean geography is less important. I mean
31 geography can be important at a practical level in terms of having your meetings with the
32 expert. But overall, it doesn't make a lot of difference. But the industry knowledge can make a
33 difference. Particularly obviously there are some expertise where industry knowledge is
34 essential, like the satellite example I gave earlier. But when we're talking about, for example a
35 quantum expert who's looking at the accounts of a company, then if that person also has very
36 deep knowledge of the particular industry, that can be very, very useful. Of course on the other
37 hand, if they're other factors involved in terms of choosing that particular expert, maybe that



1 expert isn't able to educate the Tribunal in the way I've just described earlier, isn't able to
2 present a hearing in the way I described earlier. So maybe those factors would override their
3 industry knowledge but the perfect package would be someone who has very deep industry
4 experience on top of their knowledge or the economic analysis and presentations of the
5 Tribunal at the hour.

6

7 **ISHANI VORA:** I actually want to come to a different point that Shreya made, and that was
8 about having the timing and scoping done right at the beginning. We actually had a matter
9 which went on for four years. Three years into it there was a liability hearing and our client
10 basically lost that. And they spent 3 years writing.... We spent 3 years writing three reports,
11 reply reports, etc., which is all basically not required. And at that time, although of course we
12 had task but we did think that if the liability, for example, the piece could have been carved
13 out earlier, given how dependent the expert evidence was on some of the factual points, they
14 would have really saved a lot of time and money on that process, the expert process. So
15 completely agree on that. Actually, Neeti I'll come back to you and on a point that Shreya made
16 which is about Tribunal appointed experts. So have you seen? How often do you see Tribunal
17 appointed experts? I mean we just spoke about examples, but any other examples that you
18 have and is it different say when it comes to domestic versus international cases? And what is
19 your experience in managing them? Do you see a difference in managing experts which are
20 appointed by the Tribunal versus parties?

21

22 **NEETI SACHDEVA:** I'm going to answer it in two hats. Right? I'll wear my MCIA hat, and
23 then I'll just talk about generally what my experience has been. MCIA now is doing almost 80
24 matters. I don't think we've seen ever a single matter where a Tribunal is appointed an expert.
25 But I think what's increasingly becoming important to Ishani is that where the parties now feel
26 that if it's a three member Tribunal, can we just not have an expert as a member of the
27 Tribunal itself. I do not know, I don't have an answer whether it is good to have... can you
28 actually substitute one for the other? Maybe in certain cases, may not be in certain cases. Right.
29 Going to my personal experience we had this matter I was doing when I was the counsel in a
30 matter which was the construction of a hydropower plant. And I can tell you we spent almost
31 about three months between the parties to decide who the Tribunal would be because, of
32 course, the Claimants we were the Respondents, the Claimant nominated a retired judge not
33 a surprise. And then we told our clients that this was such a technical matter on the
34 construction aspect of it that having an expert as a Tribunal would indeed make a difference.
35 But you know how if it's two Indian parties, I mean, this is actually an international party, but
36 still, they had an Indian subsidiary as well, which was involved into all of it. And they were
37 like, no, we have a retired judge on the other side. We have to have a retired judge nominee,



1 as a Respondent as well. Right? So we had this back and forth and all. But I think somehow
2 we as counsel prevailed over the parties and we said that no, we're going to take the chance
3 and let's see. Lo and behold, the presiding arbitrator is a retired judge as well. You can well
4 imagine the sleepless nights I had from the clients that we really wanted it to have this. But as
5 the matter actually progressed, and we realized the issues were narrowed down purely on the
6 material to be used in the construction, how the construction actually was done, whether it
7 was done to what the architects and other experts that provided designs for and we could see
8 that the two judges were actually just alluding to the expert to tell them that how it is doing
9 and if they understand it. I mean, as a Counsel, it took us almost eight months and my first
10 experience of driving to a hydro power plant and the enormity of it. And we couldn't have got
11 the Tribunal to do the same, right? So for us to explain them all of that was much more difficult.
12 But having an expert as a Tribunal member did help. So coming back to your question to say
13 that. Do you see Tribunal appointed experts? I don't think so. Not in domestic arbitration yet
14 in my experience. Tribunal themselves being experts. Yes, that's increasingly happening, for
15 sure. Parties appointing it. I think we still dealt with it that it's slowly increasing. According to
16 me, industry makes a difference. Management of them I would like to believe that if it's a
17 Tribunal appointed expert. I think managing them also would become a bit more easier. It's a
18 trust factor, which is rather unfortunate, which comes in that you have an expert appointed by
19 a Claimant vis-a-vis an expert appointed by the Respondent and the issue that they're dealing
20 with, how much can you hash them out? Hot tubbing and all of that to you use it. But I think
21 management of Tribunal appointed expert is always easier and of course cost effective.

22
23 **VIKAS MAHENDRA:** Ishani can I, can I give a counterpoint? I think it's only healthy that
24 there's a disagreement. There's actually two points there. I want to have a slight refinement or
25 difference of view on experts as Tribunal members. I think in the example you gave is a good
26 example where there would be a great member because their technical knowledge was relevant
27 and there I don't think they had to do a lot of work to understand or to come to a conclusion
28 of what is happening because they already have that knowledge. But I think where I might
29 have some difficulties. Let's say there's a delay expert or a quantum expert on the Tribunal,
30 because the whole point of a delay expert is the amount of work they do. I work in the
31 construction sector. So I know the amount of work that they put in, and it is only after that
32 they've put in that element of work in that case, on that fact situation that they're able to
33 understand what the causality is exception. So in that case I'd be very hesitant to have a delay
34 expert as a Tribunal, because then if they come to a conclusion based on we know Tribunal
35 doesn't spend as much time as experts would on the case because they are given a more
36 crystallized set of documents, whereas an expert can query documents, have a conversation
37 with you which a Tribunal doesn't have the ability to do, I would be very reluctant to have that



1 kind of an expert as a Tribunal member, because then I don't know what they're thinking. I
2 cannot cross examine them. I cannot confront them. So for me, in delay in quantum, I think
3 I'd be a little wary, but technical expertise I fully agree with you. On a Tribunal appointed
4 expert. What I wanted to say was very recently, when I was acting as an arbitrator, I rejected
5 an application for a Tribunal appointed expert and I'll tell you a couple of reasons why I did
6 that. In that case, the Respondent hadn't paid the surprise-surprise, the fees of the Tribunal.
7 The Claimant was bearing everything. And the Respondent wanted the expert appointed
8 because they wanted the expert to prove their case. And then we sort of came down and said,
9 is there a reason why you cannot appoint your expert and come and give us that testimony for
10 the Claimant to discredit or challenge or whatever. And why is it that the Claimant must bear
11 the expense of doing that? Why shouldn't you? The other factor was and I think it's a point
12 that Shreya alluded to, was I'm acutely aware that if there's a Tribunal appointed expert who
13 comes in and if you want to displace what they have said or you want to challenge what they've
14 said, you invariably find yourself needing another expert to do that because you somehow feel
15 that if there's an expert who said something, if me as a lawyer, says no, that's wrong, or there's
16 something wrong with the foundation, the methodology, you as a Tribunal, won't buy it. But
17 if there is an expert in the field who comes and says no I have more grey hair, I have more
18 experience in this field. I have greater research. You might believe them a little bit better. So I
19 am instinctively very wary of Tribunal appointed experts for that reason. And in terms of
20 managing them also, I think it's a double edged sword the way I see it, because with a party
21 appointed expert, I think you can be a lot more free in your correspondence, communication,
22 requesting documents. But with a Tribunal appointed expert, almost always you want to feel
23 like you need to agree with the Respondent, what documents to give, what sort of information
24 that the expert is relying on, etc. That I think makes the management of the process a lot
25 harder. And if I am giving documents I'm likely passing it through an expert internally to figure
26 out what's the impact of it before giving it to a Tribunal appointed expert. So I think even from
27 a cost perspective, maybe on the surface, it might feel like it's one expert versus two that each
28 party is appointed. But maybe in the back end, we are relying on experts to just ensure we are
29 not feeding information which might fundamentally ruin my case.

30

31 **SHREYA JAIN:** I will just add one point. Yesterday when I was just reading up a little bit
32 before the session, I came across a very interesting proposal about an expert team. So, in
33 Tribunal appointed experts also to address I think some of the concerns you mentioned Vikas,
34 there is a proposal where the Tribunal appoints a team of experts, which is where one party
35 nominates an expert, the other party nominates its expert, and then they select a third expert.
36 And that's a scenario where then the party would not submit their own expert reports because
37 they would have faith that this team sort of has their representation, and has selected a chair



1 who they think is a good expert as well. So I don't know if we'll ever move to having three
2 experts appointed by Tribunal, where we don't even have one as Neeti said, sometimes.

3

4 **NEETI SACHDEVA:**that also talk about how the cross examination will be taken is the
5 Chairman's responsible to be cross examined by both the sides?

6

7 **SHREYA JAIN:** It did point out that as a question. It didn't answer it.

8

9 **ISHANI VORA:** Thanks all. That is quite interesting. Actually our experience has been
10 similar to what Vikas said. We have been appointed as Tribunal appointed experts and it has
11 been a nightmare in terms of trust from both sides. We just don't get documents, we don't get
12 information. We definitely know it's being passed through some expert internally before it
13 comes to us and it doesn't talk to each other when you look at both sides and what they're
14 putting forward. And it's extremely hard to work with parties when you are appointed by the
15 Tribunal. But that's just been our experience in the one case where we have been appointed by
16 the Tribunal. Okay, I will come to you Ben now. And just on the process further, I wanted to
17 ask you what should be the extent of the involvement of counsel in preparation of experts and
18 expert reports? And how do you achieve the balance between briefing on facts and instructions
19 versus maintaining independence?

20

21 **BEN GIARETTA:** Well, it comes down to the point about the independence the expert has
22 and the degree to which they seem to be arguing a case. On the one hand it would be perfect
23 for the experts to give their report to the lawyers when the lawyers completely rewrite it so that
24 if it's the case or rather so that it is presented in the right way to the Tribunal. But that runs
25 enormous risk in the sense that the expert may not really grasp why it's being presented that
26 way. It may differ from the expert's viewpoint on the matter. It may also mean that lawyers
27 may misunderstand what they're doing as well. So, it does come with enormous risk. So instead
28 of doing that, you have to spend a lot of time with the experts to explain everything. Explain
29 the point of view of the client. But that also comes with enormous risk, because the more time
30 you spend in the room with an expert, the more likely they're going to be influence and whether
31 overtly or subtly to present their expertise in a particular way. And that then undermines their
32 independence. So you always get into a Catch 22 situation because you want the expert to be
33 closely aligned with the case, but not so closely aligned that they damage their own
34 independence. So it's really hard, actually and it depends on the individual expert. It depends
35 on the dispute. It depends on the level of expertise required. We've got to talk about expert
36 companies. Do you want me to do that? I mean, as you all know, the landscape has changed in
37 dispute resolution. We now have companies like FTI who are expert companies usually carved



1 out of the big accountancy firms for independence reasons but actually have developed a level
2 of expertise in every sense. A sense of knowledge, subject matter expertise, but also expertise
3 in the dispute resolution process. And they have raised the game in terms of the way they
4 approach a case, the way they prepare for case, the way they present the case. One might say
5 perhaps from the client point of view, they also raised the prices because it's true that expert
6 companies are rather more expert in negotiating their own fees than a professor in a
7 University. But be that as it may it has changed the landscape in a way that experts approach
8 arbitration these days.

9

10 **ISHANI VORA:** Thanks Ben. Very interesting especially on the first part. Before I move on.
11 I just want to welcome our Chief Guest Honourable Justice Dangre. Thank you so much for
12 being with us. And we wait to hear from you very soon ma'am.

13

14 **JUSTICE DANGRE:** Should I start?

15

16 **ISHANI VORA:** No. We have a few minutes before we can close. Thank you.

17

18 **JUSTICE DANGRE:** Please continue.

19

20 **ISHANI VORA:** Thank you. Thank you ma'am. So I will move to Shreya, and I'll come to the
21 crux of the topic on the part where we say tips and best practices. Can you point us to some
22 tips and strategies that you apply when you're dealing with expert evidence, both on your side
23 and when you're cross examining say experts on the other side and what has your experience
24 been?

25

26 **SHREYA JAIN:** That's a Pandora's box I think, but coming to sort of I would go more on tips
27 rather than tricks. I think that's more on what I can speak to. Let's divide it into expert report
28 stage and then second the cross examination stage. At the expert report stage, I think some of
29 the points which some of the panellists have already covered, sort of being spending more time
30 on making the methodology robust, putting every sentence as something that's backed by
31 documents and really spending more time on that part of the report than setting out say your
32 experiences and things like that because ultimately the other side would also have that and
33 nothing is going to sort of ring on that. I think the part where... the times where we have
34 worked with sort of very good experts or more experienced experts, that's where the counsel's
35 job becomes very easy because all of that is a given. It's where we work with, say, less
36 experienced experts is where we need to make sure that the expert report is solid. It's backed
37 by documents and really think of what can be asked to that expert during cross examination



1 at the time of drafting the report itself. One other place where we've seen some
2 contentiousness is where an expert was not instructed or a quantum expert was not instructed
3 to opine on the other expert's methodology. So, for example if the other expert has used X
4 methodology and you've used Y, they have only given their quantum figure on Y, but not
5 engaged with X at all. If you adopt X, then what would be the figure? That can play out in two
6 ways. In one of the... in one sort of early cases I did in my current firm, the Tribunal actually
7 faced an issue where he wanted to understand how much would the quantum be if the other
8 side's expert agreed with our methodology. Unfortunately, after two rounds of expert reports,
9 there was none. And when at the close of the hearing, the Tribunal asked that question the
10 expert said candidly that I was not instructed to opine on it. If you'd like, I could do it now.
11 And then we were faced with a situation where we wanted another round of expert reports
12 after the hearing ends. At that stage, we were successful in excluding that application because
13 immediately after the hearing, the other side applied to say that we'd like to give no expert
14 evidence. And that would have really meant another round of hearing. So we were successful
15 in defeating it. But I'm not sure that would happen in every case, especially where that expert
16 evidence is crucial for the Tribunal's determination. So I think that from the expert report
17 front. From a cross examination perspective, I think the experts, at least the way we see it are
18 sort of masters of their field, right. And therefore it's not from a counsel's perspective. It's not
19 like cross examining a factual witness. Of course, there's a lot more deference. You are the one
20 who has to sort of master the material and try to point out flaws in the way the expert evidence
21 is presented or try to make it easier for the Tribunal to understand why the disagreement
22 should be in your favour. So I think from a counsel's perspective the technique would be
23 slightly different from a factual expert. And interestingly, one of the cross examinations I had
24 done involved legal experts in one of the African legal countries, African legal regimes. And
25 the biggest challenge for me was because that country was the *sui generis* system of law. So
26 this common law and civil law in that regime. The biggest challenge for me as a common lawyer
27 is to sort of get over fundamental concepts of each of those regimes and then understand how
28 they have been adopted in that country's regime. And one place where we felt our legal expert
29 did a better job was that he took the time to explain to the Tribunal how those elements merge
30 together because the Tribunal is also not coming from the same legal regime. And I think that's
31 something I appreciated from our experts in preparation. But I think the Tribunal appreciated
32 that a lot more because the expert report and his testimony sort of was very helpful
33 in understanding the basics, even if that didn't necessarily go into the four questions they had
34 to answer. But I think that laid out the lay of the land for them very helpfully. So I always think
35 the expert of course, I mean as Ben said their role is to be independent but they are ultimately
36 there to help the Tribunal understand technical issues, and the more they can do that, the
37 better they would be for everybody.



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ISHANI VORA: I think the point about specific questions is very relevant. We've written reports where we were instructed to not answer a question. We were asked to answer four specific questions that the Tribunal and the parties wanted to focus on and that's all our report was. So, it was actually a question and answer report and that really helped them because then we were not talking about things that nobody was interested in. And it really helped the Tribunal to focus on those issues, and the order was actually excellent when it came to talking about expert evidence. Before I move on, because I know that this is a crux of the topic, did anyone else want to talk about any tips or strategies or best practices? Thanks Neeti.

VIKAS MAHENDRA: Sorry. The only small thing I will add is I think it's very important that an expert report is reasonable. The more an expert report is fully aligned with what one party is arguing without questioning, I think when I said independence is a key factor this is one very real way independence can be destroyed. So I think reasonableness is very important. Conceding at the right time is also very important, particularly in cross examination. The more you are very adamant with your position, the less you come across as being reasonable, the less you come across as being believable. So I think those two are things I would add to what Shreya has already said.

ISHANI VORA: Thanks Vikas. They are excellent points. So I come back you Vikas. So you have worked both on domestic and international matters. They are the key differences when it comes to using expert evidence in both of them? And any specific observations including benefits or roadblocks that you faced?

VIKAS MAHENDRA: I think the use of experts is certainly a lot more in international arbitration than it is in domestic arbitration. And I think that trend is changing and I don't think there's a historic reason to that. I think it's just been the experience of parties. There's been some reluctance on part of existing arbitrators to look at experts because they look at them from the lens of it's a party appointed expert. Maybe they're inherently biased, etc. But I think there are now more seasoned arbitrators who are seeing through it. Who're now analysing the report and looking at the merits of it to check if it's biased and one sided rather than start with that assumption. But I think that's the trend we've seen.

ISHANI VORA: Okay. I just have my last question to Neeti, but I do invite all the panellists to give some closing remarks, if at all, they want to add to what Neeti says. So I just want to ask you Neeti, what can the entire legal community involved in the dispute resolution field do to make India ready for expert evidence effectively, and what do you think is currently lacking?



1 And then on the flip side, what can experts do to make themselves a part of the growing India
2 market as a hub for arbitration?

3

4 **NEETI SACHDEVA:** Thanks Ishani. I have to wear my MCIA hat and see that I have to finish
5 it on time because institutions have to make sure that you finish on time. So I'll give you just
6 quick five things. I think first is events and webinars and sessions like this are very helpful
7 because I think revisiting the issue again and again is also very important. Second is educating
8 the clients, educating the lawyers as well. Educating the Arbitral Tribunals. I think it's all
9 required as a part of it that we need to do that. Third, I always compare it to institutional
10 arbitration. And I'm sorry that I can't just leave that hat out even if I want to. I think we
11 institution can help you a lot as well that we could maintain a list of experts and divide them
12 in sector wise so that parties have an easy access to when they would want to have an expert
13 appointed. Fourth, collaborate. I think experts need to collaborate amongst themselves to
14 build in that culture as well. I mean, this is something again I wear for my institutional
15 arbitration hat. We say that institutions collaborate because we want to bring in the culture of
16 institutional arbitration. It is not one expert against the other expert or against the third
17 expert. It's about the acceptability of the experts. And my last and the fifth point is that you
18 can become a little more reasonably priced to increase the acceptability. Indian market is...

19

20 **ISHANI VORA:** I am looking away now.

21

22 **NEETI SACHDEVA:** Indian market is a bit more price sensitive and I think to get that in-
23 road it could probably help to horses for courses as they say. You can't do what you do in
24 London to get it in India and say it's going to work.

25

26 **BEN GIARETTA:** I can't follow on price. Lawyers are equally guilty of that. I think just one
27 point, actually which is you said the legal community, I think we should be talking about the
28 dispute resolution community, of which experts are also part. And I think lawyers should be
29 so arrogant in as to experts should be kept at arm's length . But we should also embrace each
30 other if you like, literally. Metaphorically, not literally. And recognize that we are engaged in a
31 common endeavour, which is the resolution of the client's disputes. And it's showing that cases
32 are presented in the best way to Tribunals. So the more involvement of experts in events like
33 this, the better, I think. And the more we as lawyers engage and attend expert events the better
34 I think.

35



1 **ISHANI VORA:** We are just conscious of time, so we won't be opening the floor for questions,
2 but we will all be around if there are any questions at all. I now invite Vyapak to please
3 introduce Justice Dangre. Thanks, everyone.

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~~~**END OF SESSION 1**~~~

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