INDIA ADR WEEK 2023 DAY 3 - MUMBAI

SESSION 5

PLEADING DAMAGES IN INTERNATIONAL ARBITRATION-WHAT DO TRIBUNALS LIKE TO SEE?

5:00 PM To 6:00 PM

Speakers:

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Amit Bansal, Partner, Financial Advisory, Deloitte Touche Tohmatsu India LLP

Sneha Jaisingh, Partner, Bharucha & Partners

Steven Lim, Arbitrator and Barrister, 39 Essex Chambers

Vyapak Desai, Head, International Dispute Resolution, Nishith Desai Associates

HOST: As moderator today we have Vyapak Desai who is Head of International Dispute Resolution, Nishith Desai here in Mumbai. We also have with us Alok Das who is a Director at Kroll. Mr. Amit Bansal, who's a Partner and Financial Advisor at Deloitte. Ms. Sneha Jaisingh, who's a partner at Bharucha and Partners also here in Mumbai and all the way from Singapore, Mr. Steven Lim, Arbitrator and Barrister at 39 Essex Chambers. Thank you to all of you for being here today. And may I ask the speakers and the moderator to please take their places at the podium and I pass over the mic then to you. Thank you

VYAPAK DESAI: So, good afternoon, friends. It's been a pleasure to be part of this India ADR Week and thanks to MCIA that India is celebrating a week full of Arbitration and Dispute Resolution. I think with 50 million cases around, I'm sure some of this time that we are spending on strategic initiatives that we as a group and we as an ecosystem around dispute resolution takes it's going to benefit overall business, economy and the country because this is a backbone. If we can't give access to justice, then I think we are not doing our job, right? So, coming to the topic straight away, the topic that we are going to discuss today is 'pleading Damages In International Arbitration'. What do Tribunals like to see at the end of the day? We all know why people fight in some sense, right? I think at the end of the day, it's all about the money, because we are talking about commercial arbitration in general and damages is possibly the most important and maximum thought about issue in any arbitration. But what

people forget in the process of the anxiety around the dispute is that there is a lot of focus on the facts, a lot of focus on the breach, there is a lot of focus on the cause of action, but sometimes we focus on the real outcome, what you are fighting for is either missed out or not given enough priority. So that's the reason why possibly we have this topic as to what do Tribunals like to see as part of the pleadings in reference to the damages in an international arbitration. So when you see the topic, I think the most important character in this whole title is the Tribunal. And what we have done is not that we are going to do a role play in that sense but we have at least allocated certain roles to each of the speaker. So first and the most important as the title suggests that what do Tribunals like to see? I think we have none other than Steven Lim. He is an arbitrator and barrister. He has over 100 appointments as presiding sole and co-arbitrator and emergency arbitrator seated in Singapore, England, US, India, South Korea, Thailand, and Vietnam so one can obviously expect a very categoric and very informative view as to what Tribunals like to see so far as damages is concerned, considering his expertise and experience. The extensive experience that he is having as arbitrator and barrister. Of course in his previous avatar he has done a lot of work as a counsel in several different firms in Singapore. Next we have Sneha Jaisingh. She is a senior litigator with one of the very prominent and successful law firms in India, Bharucha and Partners, and she has represented parties across various foras in High Court, Supreme Court and arbitrations before SIAC, LCIA and other institutions. Let me tell you she is a formidable defendant. We do work against each other sometimes and it is not an easy task. So, she would be playing the role of a counsel, and trying to analyse, based on the expert evidence and the views of the expert as to how those portions of the expert evidence can be pleaded in form of pleadings and obviously cross examined at the time when things go into trial.

And then the two most important people would be the experts themselves. Because when it comes to damages and valuations, earlier I think few years back, at least in India, the trend was as I told you, we will spend a lot of time on when did the breach occur and what is the cause of action and what are the facts, and suddenly say okay, we are claiming 100 crores of damages or something like that and get our financial CFO or somebody to say that yes this was the cost and this was the profit and this is the loss and something like that. But things have gone much beyond that. We have now experts like Alok and Amit sitting here. So Amit is a Partner with Forensic & Dispute Services with Deloitte and has an extensive experience in over 18 commercial dispute engagements requiring expert intervention in computation of claims, expert assessment of counterclaims, delay analysis in construction projects, forensic audit and so on and so forth. So he is obviously coming with a lot of experience on the expert's side. And so is Alok who is a Director with Kroll and leads the Construction Disputes Practice in India for them. He is a Civil Engineer so he is, while Amit brings experience through his Electrical

Engineer background and MBA, while Alok brings his Civil Engineering background and post-graduation in Construction Management.

So the way we want to proceed is we have two different scenarios that we have built up. The first scenario is on the commercial dispute side, and I'll just narrate it very quickly, and then we'll get the speakers to come and provide their views. So the first scenario on the commercial dispute side goes as follows. So there is a matter in consideration, is a dispute between an IT services company let's call it ABC and erstwhile promoters of a company let's call it at XYZ. The primary reason for this acquisition was the target business along with the key customer accounts and one of the key customer accounts were more than 95% of the business. And in Jan 2017 ABC, the company entered into the SPA with the promoters XYZ and its founders or rather the company XYZ and its founders for the acquisition. The co-founders were also working as part of the amalgamated business of ABC after the amalgamation with XYZ. And it was a staggered payment post the two milestone payments were done. The performance milestone so far as the amalgamated company was missed by some margin and one of the co-founders reached out to the customer on one to one basis to seek revision, citing potential under achievement of the milestone for the next year. And such under-achievement will have financial ramification on the co-founders. Customers viewed such a request as a violation of its ethics policy and terminated its contract with the company. Following the termination, the client withheld the fourth milestone payment and other additional payments under the SPA and then client invoked arbitration, seeking refund of purchase consideration, pay to date and also the loss of business valuation arising on account of the termination of the contract. So that's the broad scenario. So maybe I'll bring Amit here and give his perspective that, this is a typical scenario and how he would possibly approach a scenario like this when you are helping the counsels to give that expert report in furtherance of pleadings for damages.

AMIT BANSAL: In this specific situation without getting into the legal aspects of it, purely from a commercial perspective, from a computation perspective, the key facts which will be critical from an expert consideration perspective would be, when we are talking of termination of contract. And I'm assuming the case also talks of that one of the co-founders reached out to the client, and the termination was on account of that. I'm assuming there is enough evidence which is legally proving that bit. I'm not getting into it from an expert perspective. I'm restricting my comments more from a computational perspective. If that is assumed to be correct then clearly what I would look at it is, in terms of what were the revenue prior to the termination and what is the impact which the termination has had in terms of the post termination. That is the real impact from a financial perspective. Now to convert that into, like you spoke of two or three things. One is refund of whatever compensation was. The second

thing was a lot of profits and the third thing which I recall that you spoke about is I think loss of valuation.

VYAPAK DESAI: Correct.

AMIT BANSAL: Now this is a very classic situation when we are talking claiming refund of the compensation which we have paid for the acquisition and also claiming loss of valuation and the loss of profits. As an expert, I will view this as an overlapping claim. Now all three cannot be claimed. Now I will look at what the legal arguments are. Now, if the legal argument support the situation where from a financial and economic theory perspective all situations are different. One is the loss of an opportunity, the second is a wasted cost. The compensation which has been paid is a wasted cost. Then we are talking of loss of profit which is a loss of an opportunity. And loss of valuation is actually the damage. Now what is the theory which is supported by the legal arguments, I will go by that and I will choose one of the three because it cannot be all three it has to be one of the three.

VYAPAK DESAI: So maybe Sneha, if I can bring you here what will you advise or at least request your expert. If let's say Amit was your expert, which of the theories in such a scenario, of course, facts can vary in many, many different ways. But let's assume few things here and have your views as a counsel?

SNEHA JAISINGH: I think typically as you said in claims in international arbitration [INAUDIBLE] so before I address these specific fact situations that experts sort of laid down, certain universal principles because I think it is important in the course of international arbitration where you possibly have a substantive law that is different, procedural law, that is different and Tribunals who may be used to certain different laws. So I think it's important to understand what are universally acceptable principles of damage is first. And there are a few principles that are universally that is number one when we talk about damages, we talk about compensation being awarded to put a Claimant back in the same position as he would as it been if it wasn't for the breach. So it is not a better position. It is a but-for principle. The second is that the damages that you claim must either arise naturally, that is, in the usual course of things because of the breach or something that you sort of reasonably contemplated at the time when you entered into the contract if there was a breach. And the third principle is, what did you do to mitigate the losses as a consequence of this breach. Coming now to the fact situation and to quote a very common refrain that lawyers say that it all depends on the fact of the case and that is actually true. In Amit's case like he said, it does seem to be some level of double counting or triple counting as he mentioned. Because really typically, loss of profits

and loss of opportunities are two sides of the same coin. So I would position it, if I was working with Amit on the case, to see, where is it that I would get the best outcome. So that may not necessarily be the best number, but it may be what is best attracted for the Tribunal. What is the most attractive principle for the Tribunal? And that typically is, in my experience, at least something that a Tribunal can understand. Something that is again very reasonable. It goes down to again the three fundamental principles that I mentioned. It has to be something that when a breach occurs, you would think that this is something that very naturally would be a consequence of the breach or something that would otherwise be party... something that parties contemplated when entering into the contract. And while pleading it again it would be pleaded very simply. We all hear these concepts and valuations, and we go into number and number of pages but I think for the pleadings it has to be put very precisely, very simply and don't just put in the number, put in the analysis what your case is, because I think that's very important for a Tribunal to understand and then back that up with the documents in the course of evidence.

VYAPAK DESAI: Sure, so Steven will you allow the refund of purchase consideration? Will you allow a loss of profit or a loss of valuation? And in either of these three cases, what kind of pleadings you would typically expect if you are keen or looking at the facts you are more inclined to pass that award.

STEVEN LIM: To answer your question, the first thing you asked me is what would I allow. The first thing I'll turn around though, and say, what does the party want. The whole thing is driven by what is your what is your claim and what is your case? So, I agree with seeing how the first thing is you've got to be very clear to the tribunal, what is the claim you're bringing what is the legal basis and principle in which you are bringing this claim. And then once that is established, then comes the question of presenting your damages. Whatever quantification you put forward has to be based on a particular legal principle. You could possibly have alternatives. You could say one alternative is I want to claim reliance loss. I would say so, this is the loss I've had and you want to recover what you pay. That's possibly one legal analysis. The other legal analysis maybe you want to recover the expectation costs. And Amit was right, you can't claim everything at the same time. So you set up your case first. What is the case? What is the legal principle for this, so that the Tribunal can understand what it is you're trying to claim. If you just put in the evaluations, but you haven't explained your case properly, then the Tribunal will be at a bit of a loss. What is it you're trying to claim? And one thing that will irritate the Tribunal is they are trying to figure out what your case is. Because it is the party's duty, counsel's duty to explain to the Tribunal what the case is. They don't make the Tribunal trying to figure it out for you. That's when you lose the Tribunal. The other thing I would agree

with what Sneha said is, presenting the case simply, as simply as you can. The Tribunal is not an expert in this valuation. So what we want to understand is something that we can grasp easily and it is then the counsel and expert's job to try and present this as clearly as possible. Once you put your legal analysis there, what your claim is, what legal basis is for it, and you start presenting the numbers. Explain how you build this up in as simple a way as possible so that the Tribunal can follow you. One overarching point about pleading your case, whether its damages or a anything, is that the simpler you can make it, the easier it is for the Tribunal to understand it, the more the tribunal is going to follow you. And again if Tribunal has to try and figure out what you're saying and make it out for you, that's when you're going to lose the Tribunal.

VYAPAK DESAI: Sure. Thanks a lot. And we'll obviously come back on some of these points in a little more general discussion. But to bring Alok in the picture because he's feeling out of place in that sense. So he's a construction dispute expert and the scenario that he is involved in for delay and damages analysis is, a standard dispute that we see this day is a Metro Rail Project. I think every city has one which has been built by, let's say a leading EPC contractor. The dispute is between the owner and the EPC contractor and it's let's say neutral, not MCIA, but an ICC arbitration. The owner has submitted a statement of claim for 600 crores in damages because the contractor didn't finish the project, and there was a delay of almost 400 days. And the contractor has engaged an expert to assess the extension claim and associated cost and damages and the standard factual scenario would be, owner has delayed in handing over the site. There is a change in subsoil conditions, there is a change in design. There was breakdowns of tunnel, boring machine. There was a strike and some of the common elements why such projects get delayed. So in those scenarios, Alok, when you come into the picture, what's the kind of evidence or what's the kind of report that you typically provide or at least help the clients to create to make those kind of claims?

ALOK DAS: Thank you Vyapak. Good evening, everyone. And thank you for having us here. First of all, I would like to start with an international construction dispute arbitrations, what Tribunals like to see because that's what the topic says. So when it comes to expert witness reports usually in the Tribunals expect the report to be an independent product of the expert uninfluenced by the pressures of the litigation. It should be objective. It should provide an objective unbiased opinions on matters within their expertise, and they should not assume the role of an advocate. They should consider all material facts including even those which detract from their opinions. When the question falls outside their area of expertise, they should clearly mention it in the report. And in case, after producing a report, the expert changes its view then it should be communicated to all parties. So in the given scenario, the contractor is expecting

a delay and a damage expert report. So when it comes to delay analysis, some of the things that the Tribunals like to see is that the expert report should clearly define the critical path of the project. And when it's a critical path what I mean is that it is usually the longest sequence of the activities in a project which if delayed below the completion date of the project. The report should identify all the delay disruption and acceleration events. And one of the key important things and this is what a lot of times we see the reports are missing that is the causal relationship between the delay disruption and acceleration events and the critical path, because a lot of times the contractor will submit a report where the period of the delay has been quantified and the delay events are listed. But the causal relationship between the events and the period of delay is not established. Similarly, when it comes to damage, quantification there are basically two categories of cost. One is the time related cost, and second is the other heads of claims which do not have any impact on that because of the delay. So when it comes to time related cost, the Tribunals like to see that there is a correlation between these heads of claims and the delay analysis report. Some of the components of a time related cost can be increase in the site management cost because of the delays, general plan, tools, expenditure, renewal of insurance bonds, et cetera or inflationary cost of resources, materials etc. The non-time related cost elements can be heads of plans such as delay payment interest charges or termination cost. And then there is a third category of claims, which is called disruption claims, a loss of productivity. So because of reduction in the productivity of the work, there can be an impact on the time as well as the cost. The disruptions may occur because of the resequencing of the works or because of the weather condition, material shortages, et cetera.

So, as a principle when it comes to computation of the cost claims and presenting the claims, I will echo to what Sneha said, that the claim should not be made for anything other than what actually done. Time actually taken up or loss of expenses actually suffered. Because a lot of times we see that claims are being submitted on a global basis but supporting evidence is not there or the correlation between the claims and the documentation is missing. But there are certain other heads of claims where the details of the actual costs are not required to be produced. Like as Amit said, it can be loss of profit or opportunity claims or claims because of unabsorbed head office overheads which are on the basis of certain standard formulas. But when it comes to presenting the damages claims, what the exports needs to work closely with their legal counsel because in order to present a claim, they need to understand what are the provisions given in the contract, under which category you want to submit a claim. Suppose I'm giving you example because of a delay there was idling of the labour and machinery then whether you claim it as a prolongation cost claim or a disruption claim, because disruption occurred. Similarly, because of the delay there can be, the work has now been executed in a period which is beyond the planned duration where the cost of materials or hiring of

machinery has increased. So there is an inflationary cost so whether it is a prolongation cost delay or disruption claim. And whether you can claim both an idling cost as well as the inflation. So therefore, it becomes very important to check what are the provisions given in the contract. And as Steve was saying that the claim is clearly defined, that what the Claimant is trying to claim and under which category. So, I would like to pause there.

VYAPAK DESAI: Yeah, sure. And maybe, I don't know if Amit has any response?

AMIT BANSAL: I would just like to add. I think more often than not there is lack of proper documentation to support the claim. We are talking of prolongation. We are talking of extension. But the underlying evidence will be only that I have incurred this cost. Now, merely because you have spent something more on diesel, that doesn't necessarily mean that that becomes an admissible claim. That you spent more on diesel, it was only on account of that delay event or the disruption event that becomes critical. And that is more often than not, we find that that is the documentation, that is the evidence which is missing. And we do have a tough time trying to deal with the clients in terms of yes, you may have incurred the cost, but there is no correlation between the event and the cost incurred. And it is, that is where it becomes extremely critical, one, to prepare the claim in a robust manner, and then be able to show that to the Tribunal like, yes, these are all which were linked to that specific delay for which the claim is being made.

VYAPAK DESAI: Sure. If there are two experts from the panel, we can't get them out of the room, right? I think Sneha just wait for a minute, but yeah Alok.

ALOK DAS: So one of the common issues that I'm talking from a construction dispute perspective, is that when it comes to claiming the idling of the labour or the machinery charges, a lot of times we see that as Amit was saying that the time shifts are missing. So if someone wants to claim the idling labour cost the time shift should be able to show that although the labour were there on the project but whether the [UNCLEAR]. Similarly, when it comes to claiming the idling charges of machinery, one needs to show that my machineries were there but these many hours they were not able to function. So those kinds of documentation is missing.

VYAPAK DESAI: Sure. So Sneha, if I can get you here, I think in India, most of the construction disputes are also in a way, fought as contractual disputes. And good part is or bad part is that we don't have a proper construction law in that sense or independent construction

law developed in that sense. And we still look at time claims as restraint of legal proceedings and things like that right? Strict timelines to be adhered when claims are to be made. So in such a scenario what kind of pleadings that you would possibly see so that the Tribunals are more inclined from an Indian perspective and then maybe you can also give an international perspective as to what it would be different if it is more of an international Tribunal?

SNEHA JAISINGH: I think again this is the case that sort of Alok presented to us, it's again a case of concurrent delays and disruption claims. So, a lot would really turn on the interpretation of the provisions in the contract relating to Extension Time, the liquidated damages clauses, and what the delay clauses are. Typically, at least in India, Tribunals tend to look at the resultant impact of the delay event. So, what are the surrounding circumstances? What is the impact of prior events? What is the status of the work it cites? What was the correspondence and contemporaneous communication between the parties. And then they sort of base their decision based on that testimony or the impact of the delays? There has been cases, so the Delhi High Court has held, for example that because delay was caused by both parties, an employer was not entitled to liquidated damages and the contractor was not entitled to get additional costs. But in the international perspective, I think there are two approaches. One is the Malmaison approach, which is that if there are two concurrent causes of delay, one which is a relevant event, but it is beyond the control of the contractor. So, for example, bad weather and the other is say for example, just shortage of labour, then I think the contractor would then be entitled to an extension of time because of the relevant event, which is the bad weather. Irrespective of the concurrent effect of the fact that there was shortage of labour. Exactly. But you also have, and this Malmaison approach has interestingly been I think upheld by the UK, but also distinguished by some UK courts. You also have the apportionment approach where there is an apportionment of delay depending on the owner or the contractor's culpability. So I think again that is typically what Indian courts also tend to follow is what is the overall impact, how much of it can be apportioned to whom. And I think their pleadings also become very important in each case. But it's very important when you're pleading in construction contracts, there are two, three points. One is what Amit said, is that the documentation to support it. Yes, that's very, very important. So I think that's a step even prior to pleadings, because a lot of construction contracts it's ultimately being run by the guys who are on site, who are not lawyers, who are not experts. So they don't necessarily communicate the way we would like them to communicate. But it is important in that correspondence or in your progress reports for the contract to bring in those delays so that there is a basis for a claim later. In the pleadings equally, I think it's not enough just to say that there was a shortage of labour. You have to demonstrate what is the consequence of that shortage of labour. How many days of delay did it result in? Were there any other factors that

were concurrent? Why those are not relevant? Again, it boils down to the same principles that I mentioned that ensure that it's simple, clear, precise for the Tribunal. Particularly in construction contracts, they also tend to be very, very heavy, document wise. So, I think it's also important to structure pleadings in a particular manner, to ensure that you have.. you can structure them. Explain concepts. So explain what the construction is about. Why certain things for example, a particular machine was relevant, why it was so important. Because that's how that would lay the foundation of the actual construction. Equally again, explain the detailed process that is required. It sort of enumerates the delays. Explain why. It's not enough like I said to just say there was a delay, or this was not the cause. Explain it properly. Explain the time period. That's what Tribunals do like to see.

VYAPAK DESAI: So, Steven, we have heard you on generally on the contractual dispute, but construction disputes are a little different in terms of how you look at the pleadings, and more particularly from an international perspective. I know India does a little bit of a mixed pleadings, and they don't do it strictly different pleadings when it comes to contractual versus construction disputes. But if we stick to construction disputes and international practice if you can give your perspective what you would like to see?

STEVEN LIM: You're right, there is some difference or something peculiar about construction disputes that counsel and parties need to be aware of which is that in construction this tremendous amount of facts and figures that Tribunal needs to understand. Especially in the case where like we have a scenario here where it's a question of delay you're claiming extension of time, money. There's a lot of dates that become important and a lot of figures that the Tribunal needs to get its head around. So, the key thing here and Sneha had touched upon this, you need to tell your story to the Tribunal. You need to bring the Tribunal through the timeline of what happened in this construction project. Again, in as clear and simple way as possible. So that the Tribunal understands the factual background, what happened in the course of the construction. Why was it delayed. What happened that was not according to schedule? And importantly as well relates how these facts tie to the claim that you're trying to bring. That's the point Amit made, you need to explain these are the facts that happen and these facts support the claim that the Claimant is advancing or the defence that the Respondent is putting up in that context. So in construction that's very important. Get across to the Tribunal the story. This is one of the difficulties with construction cases that there's so much facts and figures. So much detail that sometimes the Tribunal gets lost. Because you, the parties, the Claimants, the Respondents have not put the case as clearly as possible. The less work you make the Tribunal do, the more you're going to convince the Tribunal. Then turning to the question of the expert report, Alok touch on this when he began this presentation, that

it's important yes, for the expert report to be independent, not to be an advocate. So the more you can come across as being independent, the better it is. Alok also mentioned it is important for you to be balanced and that is very important. Because the more balanced it is, the more persuasive it is. That's where you're going to show to the Tribunal that you're not just going to present one case. You are here to explain to the Tribunal in a technical area, what the correct position should be. And the more balance you come out with you show, if you point out both what are the points that are in favour of the parties that appointed you, but also those that are against and how that all balances out to meet a certain conclusion, that is going to be a lot more persuasive. In this area, in particular, in construction when you're talking about, why a project was delayed and was responsible for the delay the Tribunal unless construction professionals, engineers, architects, Tribunal is not going to understand this issue. So how is it going to make a determination between two rival reports. And quite often you will find that the report will take quite different and divergent views. What ultimately will persuade the Tribunal is that the report that comes across as more credible, the more persuasive, coherent and reasonable. These are the things that I would look at as a non-expert in that technical field Tribunal Member when the Tribunal are trying to understand and make a determination between two rival reports, that look, which is the one that's coherent. Which is the one that comes across as having taken into account the whole case, and presents in that with that coherence, one that's credible, that's persuasive and reasonableness plays a part. The more reasonable you are, the more likely it is for the Tribunal to think, and this is a point that Sneha made that the more likely it is you think, yes this comes across as reasonable. This is something that the Tribunal finds easier to accept. That comes all together, the question of coherence. You put all these together. You come across as a coherent report which is persuasive to the Tribunal. At the end of the day, it is a question of who is the one who is more credible and persuasive.

VYAPAK DESAI: Sure. So, I think before the panel takes away all the time of this session, let me bring the audience in as well. If there's a question, or even you want to contradict one of the panel members with your views, maybe one or two in between and then we'll go back to the panel. Please. You can introduce yourself before asking.

AUDIENCE 1: My self Hrushikesh Pawar, from HCC. So, we are appointing the delay experts by the parties or by the Tribunals also. But do you feel there is a need of a standard course guideline so that the experts should follow that. If there is no guidelines or protocols, then both the parties appoint different expert. There will be definitely the two results will be there.

VYAPAK DESAI: However independent they are. Do you need protocols or do you need..?

AUDIENCE 1: Because in India we have seen people are using the SCL Protocol, but there is always a question mark on the acceptance of SCL Protocol.

ALOK DAS: So as you said that in India, most of the experts use SCL Protocol and SCL Protocol lists out the best practices that should be followed. It's not prescriptive in nature. It's a guidance that one can follow if they wish to. But when it comes to delay analysis, there are certain methodologies of delay analysis mentioned there depending upon in which situation what is the status of the project. If the project is ongoing, where the project has not yet finished, they usually adopt one of the prospective form of delay analysis. And where the project is already completed, there you adopt one of the retrospective form of delay analysis. And of course, sometimes the expert's view might vary because they may adopt different methodologies and therefore they arrive at a different conclusion. Does that answer your question?

AMIT BANSAL: I will just like to add to what Alok said. See, this is a very relevant point. In any situation, you are going to different experts, they will have different views. And one of the key reasons for two different views is that because they are presented with two different set of facts. Because they are party appointment experts. The party presents to them the facts which are more favourable to them, and they may end up not sharing or hiding those facts. That could ultimately have an impact on the views that the expert will take. If the same set of facts are presented to any expert, the difference in view will not be significant. It will be within a tolerable range, okay? There will be certain contentious things where the methodology or some of the other aspects may make a difference. But if the same set of fact are presented to any expert, the view is not going to be significantly different.

VYAPAK DESAI: Okay. Any other participant may like to comment or question? Please.

AUDIENCE 2: My name is Ankit Jain, I practice with P&L Offices. What Ms. Jaisingh indicated at the start was regarding the compensation regarding damages.

VYAPAK DESAI: Contractual. Yeah.

AUDIENCE 2: One would be the claim that you, the loss you might have faced and all. One would be a predetermined amount. And third part is where I was interested in is regarding mitigation of losses. What have you done? So I wanted to understand how would be the strictness of proof, on the burden of proof on the Claimant to show at the time of claim whether

what are the steps taken. So, like Mr. Bansal indicated that if you are idling labour and you have to present timesheets or so, so would we also have to show that these were the opportunities that we had to adjust the labour somewhere else and would the burden of proof at the time of claim lie on us, or only it may be at the stage of rebuttal?

SNEHA JAISINGH: That's a really good question because yes parties do need to mitigate losses, but typically the standard is not extremely high. Especially in India they don't sort of emphasize on how much you need to mitigate. But for example, if there was an idling claim and you could have deployed that labour elsewhere in the contract itself. So, if supposing there was front that was not open in a particular spot, but there was a front available elsewhere that you could have moved and worked, again that would depend on what the contract says. But typically construction contracts would have these provisions where you can move around and move to another place. But yes, it is then important for you to demonstrate that you did move there or why you couldn't move there, because it was too far, or it was not efficient for you to do so.

AMIT BANSAL: So, I just like to add or kind of draw up on one of the matters which we worked on. It was an ICC arbitration, and this was a case where international suppliers supplying the rolling mill and it had a contract with one of the Indian manufacturers. And for some reason Indian manufacturer did not go ahead with the project. So, the rolling mill project never went ahead. But because rolling mill, because the nature of the project, they had already done a lot of preparatory work in terms of doing the designs, getting putting all the orders in place for getting all the stuff together. So by the time the contract got terminated, the sum cost itself was a few million euros. Post termination when they actually, and I acted as an expert in that matter in terms of computation of their claim. And what they had actually done, the client had actually done that they had actually used the material somewhere else. To the extent, they were in a position to use in comparable mills, which required the same kind of product. And when we presented the claim, we actually reduced all of it and we showed that this is something which has been done. And the Tribunal looked at it very, very favourable that this, whereas the other side said see, this is a material which they could have already, they could have always used in some other project, hence there is no claim. But it was presented in a manner that see, whatever could have been mitigated, I mitigated by using that in other places. To the extent what was something very specialized and customized that's my vested cost and that should be admissible.

VYAPAK DESAI: Any, one more question before we go back to the panel? Or any thoughts or contradictions? Please.

AUDIENCE 3: In terms of presenting the claims, the experts actually believe that they should be engaged before the claim statement is made or should they be engaged after they've had the opportunity of understanding the counterclaim or the reply so the...

VYAPAK DESAI: Fact pattern and everything is clear on the....

AUDIENCE 3: What is ideally the position that the experts would actually advise?

ALOK DAS: My view is that export should always be engaged much before the statement of the claim is prepared or submitted. Because after the statement of the claim is submitted, and if the expert view differs from what is stated in the statement of claim, then it becomes very difficult to submit an expert report, because it is actually contradicting your stand that you have taken in the statement of the claims. I mean that is my view and also it gives sufficient time for the experts to prepare.

AMIT BANSAL: See while I agree with his comment that -- earlier, the better. The early you employ an expert, the better it will be for the case for the output which you will get from the expert. And we are seeing, increasingly seeing that Indian clients realizing that and we are getting appointed, and we have more time at our hand rather than just 30 days before actual evidence filing date. And by that time, we really don't have time. Our hands are tied. Our hands are tied by whatever positions has been taken and the statement of claim and statement of defence and rejoinders. What importantly, what happens is there are times we have realized that when we come in the picture, there are certain aspects which may be critical from a commercial perspective, for which some legal argument actually needs to be made and that is what possibly missed out. And that's the value addition which can come in if experts come in early.

VYAPAK DESAI: Sure. Only point Amit, goes to a little contradictory in that sense, from a debate perspective, because at the time when if claim is already not been filed and there is no counterclaim, I think the facts presented to you would be very different and therefore the other side expert will have a completely different view. So I think while there is obviously and I agree completely that you have to be brought in as early as possible. But I think from an overall perspective if both side facts and both side law, whatever they want, parties want to take positions, right? They have considered it fully. So when you come in, you know the real facts on the table as well. So it depends. But yeah generally I would agree. So coming back to the panel, maybe what we can do is, while we have seen the two scenarios and more specific

responses from each of the panellists. But maybe if I can start with Sneha, on three general do's and don'ts of pleading right? And maybe very quick and short ones. But if you can give some idea on how you look at it? Maybe three do's and three don'ts.

SNEHA JAISINGH: So I think number one, clear, simple, precise, tell the story as it is. Make the Tribunal's job as easy as possible and make sure that it's reasonable. And don't forget three principles, which is the but-for principles, the reliance on expectation loss and the mitigation.

VYAPAK DESAI: Any don'ts?

SNEHA JAISINGH: Don't jumble up your facts. Make sure that you have enough documentation to support your actual pleading . And I think for the experts specifically, try and be as objective as possible while keeping in mind your mandate.

VYAPAK DESAI: Quickly, Amit and Alok. Maybe three dos and three don'ts.

AMIT BANSAL: Do whatever Sneha said.

VYAPAK DESAI: Okay one is good enough. So, then definitely you are not independent.

AMIT BANSAL: I think these are the most important principles in terms of being clear, whether accountants, whether finance guys, whether lawyers, we are all passionate about our respective fields, and we end up talking start using lot of jargon. Keep it simple. Keep it precise. Make talk as if you are explaining finance to a layman. That's how I tell my team, when we are talking about explaining anything, preparing reports, that's the approach, that's the mindset with which one needs approach, because there is lots of jargon to confuse everyone.

VYAPAK DESAI: Alok, do you differ or agree?

ALOK DAS: Yeah I completely agree.

VYAPAK DESAI: Differ or agree?

ALOK DAS: I completely agree. As someone in my team says, that the report should be such that if you give it to your Mama they should be able to understand.

VYAPAK DESAI: Very good.

ALOK DAS: But some of the things that the expert report should keep in mind is that all the supporting documents should be referenced. And lot of times experts makes certain assumptions in their report, and they forget to mention about it. That's why the expert's reports differ. So if expert is making some assumption, that needs to be clearly stated.

VYAPAK DESAI: Last words, Steven, what do Tribunals like to see, the do's and don'ts.

STEVEN LIM: A lot of them have been stated. Let me reiterate them. One is, be concise and to the point. Tribunals are time starved. So, we would appreciate to understand the case as quickly as simply as possible. Don't think that or don't make the mistake that the Tribunal would associate quantity with quality. It's not the case. We're not going to be impressed with thick pleadings if it doesn't get to the point, that's one. The other thing if you want to persuade the Tribunal's structure, your pleadings to persuade the Tribunal and the way to do that would be the tribunal needs to work through a case according to certain analysis. Whatever the legal issue is, there'll be certain analysis. You need to have the facts and certain elements that you have to prove, structure your pleadings in the way so that you lead the Tribunal from the starting point. Here are the facts, this is what we see in the elements. Lead the Tribunal to the conclusion that you want them to get to. So that's one. So don't put in something that's completely unstructured. That lets the Tribunal try and figure out what it is you're trying to get them to understand. And the final point is associated with all of those, identify the issues which the Tribunal needs to determine. As most people say, if you can help the Tribunal write the award, the Tribunal is going to appreciate it. And the way you can do that is to identify these are the issues you need to determine the Tribunal, based on everything that's been said, and then state your case on what these are. That would be helpful in persuading the Tribunal.

VYAPAK DESAI: So thanks a lot and at least my phone says 06:00 P.M. So that's one thing Neeti has ensured at MCIA that nobody will extend their time, whether it is arbitration or a conference. But yeah, with that I know some of you could ask some questions and give some suggestions or their comments. But if there are anything more than maybe over drinks, you will get better answers from this panel. And, we should give a round of applause. And thank you, everyone, for joining this. Thank you.

~~~END OF SESSION 5~~~

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