



INDIA ADR WEEKDAY 2: MUMBAI

SESSION 2

What experts think of lawyers (and vice-versa)

10:00 AM To 12:00 PM IST

Opening and Closing Remarks

Rhia Marshall, Jerome Merchant & Partners

Moderator – Nishant Nath Singh, Stewarts Law, London

Speakers:

Amit Garg, Secretariat, Singapore

Nitesh Jain, Trilegal, India

Jed Savager, Pinsent Masons, Dubai

Kelvin Poon SC, Rajah & Tann, Singapore

Sanjeev Gemawat, Managing Director & Group General Counsel, Essar Group



1 **HOST:** I would now like to introduce the next session by Secretariat on, 'What experts think
2 of lawyers (and vice-versa)'. Can I request everyone to please remain seated for the next
3 session?. Thank you.

4

5 Can I request everyone to take the seats? We'll be starting with the next session very soon.

6

7 The next session we have is by Secretariat on, what experts think of lawyers and vice-versa.
8 Can I invite on stage Ms. Rhia Marshall to give the opening remarks?

9

10 **NISHANT NATH SINGH:** I am told that we're waiting for five minutes, so we'll start in five
11 minutes. Good morning, everyone can I just check if everyone's able to hear me clearly? Some
12 nods. Okay. Thank you. My name is Nishant Nath Singh. I am a lawyer in the International
13 Arbitration Department at Stewart's in London which is the largest disputes-only law firm in
14 the UK. A very warm welcome to all of you and a big thank you to the Secretariat team,
15 particularly Mrunal and the MCIA team for giving me this opportunity.

16

17 Our session today is titled "What experts think of lawyers (and vice versa)." And we have a
18 great mix of panellists here today who I will introduce shortly on both the legal side as well as
19 the expert side. So, we can hope that by the end of the session, we will have a well-rounded
20 understanding of what lawyers actually think of experts and vice versa. And I can tell you, it's
21 not all good things. Before we delve into the panel session, I want to take this opportunity to
22 introduce the India Promise, given this is discussion on arbitrations in India and this is India
23 ADR Week, I thought it was an opportune moment to do so. So, the India Promise is a diversity
24 initiative driven by Stewart's and Sherina Petit who is the head of international arbitration at
25 Stewarts. And the aim of the initiative is to boost the visibility and recognition of Indian
26 arbitrators. And as someone who has been working on arbitration matters for a number of
27 years, it's become more and more apparent that Indians are not getting the same level of
28 representation on international arbitration tribunals. And the goal of the India Promise is to
29 make that the thing of the past. How we intend to do that is to actually start by getting the
30 word out there. And for starters, you would have seen on your tables, there are some business
31 cards. If you haven't seen them, they look like this, and they have QR codes at the back of them.
32 And what do I want to say about the initiative is that it's not just an initiative by Indians and
33 for Indians. And it would not work if it was just that. It's success is very much dependent on
34 all arbitration practitioners and users of arbitration to come together to spread the word. So
35 please do look at it, sign up to the India Promise, spread the word amongst your colleagues
36 and clients, and let's try to make sure that arbitration is seen as a diverse and inclusive
37 community.



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I'm now going to move on to introducing a fantastic panel and this is not in any order of preference. It's just what my cheat sheet says. First, I'd like to introduce Amit Garg. Amit is the Managing Director and Founder of Secretariat's Asia Operations. He's also an adjunct assistant professor at the National University of Singapore. Amit has over 25 years of construction experience and has worked as a delay expert on disputes involving some of the largest projects in the Americas, Middle East, Asia and Australia, with a particular focus in oil and gas, energy and transport. As part of these engagements, Amit has testified in arbitrations across various jurisdictions under all major international arbitration rules. He's consistently recommended by Industry Publications as one of the leading construction delay experts globally.

Second person I'd like to introduce is Mr. Sanjeev Gemawat. Mr. Gemawat is the Managing Director and General Counsel for the Essar Group. He has over three decades of experience as head of legal, risk and corporate functions of top multinational corporations across various industries. He's recognized as one of India's finest In-House Counsels and is accredited by the Law Society of England and Wales for his outstanding contribution to the in-house legal community. Mr. Gemawat is also one of the founding members of the General Counsel Association of India.

Next, I'd like to introduce Kelvin Poon SC. Kelvin is the Deputy Managing Partner of Rajah & Tann in Singapore and heads the firm's international arbitration practice. He was appointed Senior Counsel in January last year. Described as a standout arbitration practitioner and a deep thinker with the solution-oriented approach, Kelvin has represented clients in a broad range of high stakes commercial, construction and investment disputes. He's consistently ranked in the legal journals with his expertise in commercial litigation and international arbitration. Kelvin is a fellow of the Chartered Institute of Arbitrators and a panel arbitrator of the Singapore International Arbitration Centre and the Delhi International Arbitration Centre. He's also a member of the ICC commission for arbitration in ADR and a track leader of the ICC task force for ADR and arbitration.

Next, we have Nitesh Jain. Nitesh is a partner in the dispute resolution practice at Trilegal with a focused and court litigation, international domestic arbitration and insolvency matters. He has significant experience working on both complex commercial and transactional disputes. He's represented large conglomerates, banking and financial institutions, foreign investors, Indian and multinational corporations on a wide range of domestic as well as cross



1 border disputes. Nitesh is featured in India Business law journal's A-List, and has been
2 recognized as one of the top ten influential dispute resolution lawyers in Mumbai.

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4 I'd now like to introduce Jed Savager. Jed is a partner in Pinsent Masons Construction
5 disputes team in Dubai. Having been beast in the Middle east and North Africa region for over
6 15 years, Jed advises on high value and complex construction and engineering disputes in the
7 energy and infrastructures sectors. He has significant experience of leading large arbitrations
8 across the Middle East and North Africa with a particular expertise in oil and gas and
9 renewable disputes, as well as having advised on a number of the region's most notable
10 infrastructure projects, including some of the region's most significant airport projects. Jed is
11 routinely ranked as a leading construction lawyer in the major legal directories. I won't do this
12 introduction myself, but I'd like to invite Rhia Marshall who is a partner at Jerome Merchant
13 & Partners to give a few introductory remarks.

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15 **RHIA MARSHALL:** Thank you, Nishant. Good morning, ladies and gentlemen. A big thank
16 you to MCIA and to Secretariat for organizing this event. The topic for today's discussion:
17 "What lawyers think of experts (and vice-versa)." Interesting. I think the use of expert
18 testimony is still at a very nascent stage in arbitration in India. I say this because often when
19 we as lawyers propose appointment of experts, independent experts. The client will tell you
20 that, is it really required? Why not have the losses calculated in-house and put that person up
21 as a fact witness before the tribunal? This said, I think we can all agree that the practice of
22 appointing independent experts in arbitration is certainly picking up steam. We are all seeing
23 the benefit of using experts in arbitration and this practice has proved extremely useful not
24 only to clients and lawyers, but also to arbitrators. So today my colleagues will be talking about
25 what is the role of an independent expert, benefits of expert testimony. What are the challenges
26 that arise? At what stage of the dispute should an expert be brought in? From an arbitrator's
27 perspective. Is there any value add to having an independent expert prove a set of facts as
28 compared to, say, an employee of a company? And finally can a party appointed expert be
29 considered truly independent? With that, I will hand over to Nishant to start the discussion.

30
31 **NISHANT NATH SINGH:** Thanks very much, Rhia. Right. Without further ado, I want to
32 move on to our panel session, and I'd like to start by asking the panellists an open question
33 which is this. At what stage of the arbitration proceedings do you think it is most ideal to
34 appoint or engage an external expert witness? Open to views from anyone.

35
36 **NITESH JAIN:** Hi, Nishant. Morning to everyone. I think, when you start getting legal
37 notices, you can see where this is going, you know, in terms of what sort of claim is coming



1 against you. It's best to get start interviewing experts and get someone on board, so that you
2 start getting their thoughts. If not at that stage, but surely at a stage where you get notice for
3 arbitration, right? I don't think you should wait where all pleadings are over and. Then you are
4 thinking, oh, let's get an expert, right? Because then that expert will come up with some expert
5 opinions which may not match with what you have pleaded cases. So, I think best is at the
6 notice stage, if not before.

7

8 **NISHANT NATH SINGH:** Go on. Amit, do you have any countering views as an expert?

9

10 **AMIT GARG:** Definitely not, I think obviously goes without saying. I think earlier the better
11 is the short answer. There have been occasions that we've been reached out by counsel when
12 the rebuttal expert reports are due. And that's the first time they engage an expert because
13 they've seen somebody else engaging an expert. And again, as Rhia mentioned, we've seen that
14 happening in India quite a few times. I sit in Singapore and we'll receive requests quite late in
15 the game. I think look at, obviously, there are certain expert disciplines in which experts can
16 come in later, so it depends on specific expertise. But certain other disciplines you definitely
17 need experts to come in much, much earlier. In fact, I would say even before formal dispute
18 has been filed. Because there are three or four reasons. Reason one is the experts can actually
19 give guidance to not just the client, but obviously the instructing solicitor as to what are the
20 areas to focus on. And I'll give you a very small example. We were instructed on a matter in
21 China, which was a \$6 billion sour gas exploration and processing plant. And this is a plan that
22 spread across 20 km numerous extraction plants and processing units. And the project was
23 supposed to be finished in two years. Took seven years to finish. Was three times over budget.
24 When the solicitors were involved and there were a big team of international solicitors
25 involved, the project team gave them a lot of feedback as to what had happened, but it was
26 very difficult for them to understand where to focus on such a big project. So, when you bring
27 on an expert at that stage, the experts can actually help you focus the efforts in the right
28 direction, and I think that's usually quite useful. So earlier the better is the short answer.

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30 **JED SAVAGER:** I agree with all of that, Amit....I mean, I think I'd just, come on, just in my
31 experience, at least a lot of parties in my jurisdiction, Middle East, seem to view the notice of
32 arbitration as being the thing that will unlock settlement, there's often the notice of arbitration,
33 request for arbitration is filed in, in the hope that that will unlock the position. Often in my
34 experience, it has the reverse effect. But in doing that, they've not really invested the time and
35 effort in understanding their dispute. And so we were hearing earlier about mediation and
36 when to use mediation, well, settling disputes, understanding what your true sort of exposure
37 is. You only can really do that when you engage experts and to come back to Amit's point on



1 construction engineering disputes, certainly getting involved before the notice of arbitration.
2 It's quite important. It's quite important also because of jurisdictional challenges. So, coming
3 to Amit's point on that project in China if you've got a fitted contract where you've got to put
4 your disputes through to an engineer who's got to determine the delay claim. For example, if
5 you've put your case in on a set of delay events that are completely different to what maybe
6 Amit or another expert might come in and say, well, I've done the analysis. I don't think it's
7 those vents. It's these. You possibly could. Have the wrong dispute that's gone to arbitration
8 and series of jurisdictional challenges that then come on during the arbitration process, which
9 drives up time and costs. So, they were just a couple of points from me.

10

11 **KELVIN POON:** Thank you. Like all the other panellists here, I think it is correct that it is
12 used suitable experts on board early I would just draw a distinction between consulting expert
13 and a testifying expert I think it makes a lot of sense to get an expert as early as possible to
14 guide you on your case but whether you want to get your expert witness in or not at an early
15 stage. I think that's something that we should all bear in mind carefully there have been some
16 decisions in various arbitration awards where Tribunals have noted that an expert has been
17 involved in the case for a long time. That could open the expert to some questioning at a cross
18 as to whether there is unconscious bias or not in taking certain positions they have on the
19 opinions shared. So that's the first point. The second point is at least Amit's point, whether
20 you get an expert early or not. Also depends on the discipline involved. I mean, in the context
21 of construction, I think that usually is a sort of area which makes a lot of sense to get an expert
22 in early if you're looking at damages, if you're a Claimant, naturally on expression earlier as
23 well. So, you have some sense to what the mound is going to be when you succeed in the claim
24 by the other disciplines might make sense for the case to develop a bit more. Because
25 ultimately, whether the expert evidence is going to be useful, helpful to the tribunal, depends
26 on how the issues are framed. So, it's been a balancing exercise. So generally, I agree, as early
27 as possible but be cautious.

28

29 **SANJEEV GEMAWAT:** Thanks for having me here I would say that handling litigation is
30 not a simple thing. Litigation is a strategy. So as a GC, the way in which I look at it is that our
31 role is to build a collaborative team and collaborative team of internal as well as external
32 experts, which include these experts. Quantum experts as well. So, once you build a
33 collaborative team, essentially it means that from the very start and very start when I say
34 perhaps even if you don't have the formal engagement with the expert. But before your filing
35 of the claim, you need to bounce off your idea in terms of how you are proceeding. And I think
36 that is the start of the process. Perhaps not the formal one. But then it starts should happen at
37 that point of time, and thereafter you take it forward accordingly. So as far as the specific



1 question is concerned, at what stage? I would say certainly informally, before filing of the
2 claim, but then you will have to formalize it somewhere. Thank you.

3

4 **NISHANT NATH SINGH:** Thank you. I think there's definitely a theme arising over there
5 that early engagement of experts is seen is quite beneficial. I'd like to turn to our resident
6 expert of the panel, Amit, and ask you some questions and your views as an expert, what you
7 think of lawyers? My first question is, what are your expectations as an expert from instructing
8 counsel and/or the client?

9

10 **AMIT GARG:** I think the first expectation is something that we just touched upon earlier,
11 which is get us in earlier it allows experts to really dive into the detail rather than pressurized
12 on the time, so that goes without saying. I think provision of information on big, complex
13 projects is always a daunting task, and the manner that information is provided allows experts
14 to do their job better if it's done nicely. And so I think there are probably two or three aspects
15 that we suggest counsel and clients to pay particular attention to. One is, obviously don't think
16 of us as repository of documents where you can just dump everything that happened on a
17 project, and then we are supposed to go through it. We can, but it takes a lot of effort. So,
18 progressive explanation with documents that is being provided is very useful. I think one of
19 the things that is I'm talking from a construction delay experts point of view is we walk in on
20 projects, sometimes two or three years after the project is over and the matter is in dispute.
21 Frequently the fact witnesses on that project have moved on to other projects, and it's difficult
22 to get their input, but as experts we need to understand what happened on a particular project.
23 So, it's important for clients and counsel to make sure the team that actually worked on that
24 project is available to provide just factual guidance that might otherwise not be available.

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26 I think that is kind of a touchy subject, which is obviously the expectation in terms of what
27 clients and counsel think about fees. I think there's no doubt what I would say always. Yes,
28 that's the general refrain, and particularly for delay experts, even more so that we are the most
29 expensive experts but look a good amount of work does take some amount of effort by good
30 people. And I don't want to belabour this point, but if you pay peanuts, you'll get monkeys.
31 And if you try and find the right expert and then you need to engage with that expert, in terms
32 of just don't select experts purely on the basis of the lowest bidder, is a short suggestion that I
33 would make.

34

35 There are maybe a couple of other suggestions for instructing solicitors, and again, no
36 particular order. One is, we obviously see sometimes clients who are first time litigants or first
37 time into an arbitration and their understanding of what an expert does and their expectations



1 from an expert might be a little bit different. And I think it's always useful if a counsellor
2 instructing solicitor guides the client saying that look, this is what the boundaries of what an
3 expert can say in terms of the technical discipline. So, for example, a delay expert may not
4 venture into what you would call items that are beyond the Arb-Med, such as causation related
5 to design issues, etc.

6

7 So, it's extremely useful if you have a solicitor who's working together with the client and
8 explaining the client that this is what this expert can do. And because there are certain aspects
9 of the dispute that might not be hand labelled by that particular expert, then you try and find
10 others. So that comes in into realizing the value of individual technical discipline experts. So,
11 the tendency, and again as in different jurisdictions as there's a more maturity in relation to
12 arbitration we find that in mature jurisdictions, you will have a multitude of experts, each one
13 dealing with a different aspect of the works, whereas on occasion, you would run into a
14 jurisdiction. And it has happened in India, where the client would say, look obviously, cost is
15 a concern. I would also like you to handle delay quantum geotechnical and why not? Some
16 damages as well. And so I think that's really an extreme. But it's very useful again to get
17 different technical experts on board. It doesn't necessarily increase the cost it actually gets the
18 client immense benefit in terms of the Tribunal knowing and trusting what the technical
19 experts are saying.

20

21 And then lastly, I think again we find it tremendously useful if during cross examination, for
22 example in the hearings that I've been involved in it's obviously gratifying, but it's also very
23 useful that sometimes counsel would seek our assistance in identifying the key questions that
24 certain experts should be asked. Sometimes certain fact, witnesses should be asked, and
25 obviously based on the responses particularly provided by the experts, what would be the
26 counter questions. Because sometimes particularly professional experts are adept at testifying.
27 They know how to manoeuvre around a counsel's questions. They know what to say to kind of
28 confuse the tribunal. So it's always very useful to have kind of, if the expert says this, then
29 what's the next question. So again hopefully more and more assistance is asked of us in that
30 respect, and I think that goes same way. Thank you.

31

32 **NISHANT NATH SINGH:** Thank you. That's very helpful. I want to touch on the duty of an
33 expert to give impartial and independent evidence towards the tribunal, which is, of course, of
34 paramount importance and just sticking with the theme of managing expectations. How would
35 you see you find it balancing and managing expectations of instruction? Counsel for the client
36 against your duty to give impartial, independent evidence to the tribunal?

37



1 **AMIT GARG:** I think that's a tough question. And, but on the face of it, this sounds like giving
2 independent evidence versus trying to balance the expectation. These are mutually exclusive
3 propositions I think in practice, and certainly in good practice they're not. I think as an expert,
4 my duty always remains towards a tribunal, irrespective of the party that is footing the bill. I
5 think this is not a binary question in the sense that is the expert, my expert versus is the expert,
6 an independent expert? I think it's a question of when it becomes a binary question. That's
7 where it's an issue. So, we have on. Okay we've had clients and sometimes, very rarely, counsel,
8 thinking of the expert as their hired gun. And I do think that's a short game because one is
9 bound to lose. And the reason is very simple, and I've been in front of Tribunals
10 internationally. It is very easy to lose a Tribunal's confidence in one's testimony if the expert
11 starts to be a bit too biased. And think of whatever the expert is proposing, say there would be
12 elements of the findings that are pretty clear and are likely to fall on the expert side. There
13 would be some findings which are sort of in the middle ground and then there's some findings
14 which are the stretch. And I feel like expert tries to win them all and tries to push the third
15 category. Frequently, we see it's the other way around. The Tribunal realizes that this expert
16 is pushing the limit. And not only would you not get the extreme, position, the middle position,
17 where it's either there or either this way or that way, you would certainly lose that. And you
18 might actually lose some that might have anyways fallen into your pocket.

19

20 So, it's a zero sum game in that way, and I think that the whole modus operandi, arbitration is
21 when experts start to become part of the team and collaborating progressively more and more.
22 As Kevin was saying, starting earlier on there is this tendency to be a bit too exuberant about
23 it, and I think one should be careful about it. I think the best way to do this is to manage
24 expectations of the client's and council, even when there's no doubt there's certain
25 expectations. But how do you manage it? It goes back to that point that I mentioned earlier,
26 which is if you bring in experts at an earlier stage as Jed mentioned, even sometimes prior to
27 the notice of arbitration. Good expert can carry out an analysis, an objective analysis, an
28 independent analysis instructed by the counsel which gives the client and the solicitors a true
29 idea of the potential exposure and the entitlement. And when that happens that can result in
30 significant benefits.

31

32 I'll give one example. I was involved in a matter in Australia. This was iron ore processing plant
33 in Western Australia. A substantive project \$10 billion and we were engaged on matter, on the
34 matter by the contractor for the dispute upwards. The claim values were around \$700 million.
35 The matter was construction of the iron ore processing plant, and the project was just three
36 months late. And the contractor, very sophisticated contractor working across the globe, felt
37 that three months is a very small delay, that it can recover in terms of an Extension of Time.



1 And as we did that analysis, we were able to explain to them the issues in their position. And
2 once the pleadings were filed halfway through the process of pleading the client and the
3 counsel, recognized that the case was not as good as it thought, and they eventually reached
4 out to the other side for settlement. So extremely useful. I think if you do your job as an expert
5 properly, I think it will go much further than just being a hired gun who's just shooting one
6 side position.

7
8 **NISHANT NATH SINGH:** I think I'll say that a good expert is always independent,
9 impartial. I want to talk to you Amit about hot tubbing and joint expert reports, but I'm going
10 to come back to that question. But I'd like to turn to you, Mr. Gemawat, and as a prominent
11 In-House Counsel, and given your experience of having to balance the needs of internal
12 stakeholders as well as external stakeholders, cost is obviously a big factor in your decision
13 making of instructing experts. So, thinking about the cost benefit analysis do you agree that
14 independent experts bring significant value add as compared to your own in-house sort of
15 finance teams or people who can advise on delay matters?

16
17 **SANJEEV GEMAWAT:** Well, I would say not significant advantage. I would say it's needed.
18 It's essential. On all complex disputes you can't afford to have your litigation strategy without
19 an expert. You would be faltering, and in fact, you would be losing your case. So, you need to
20 have an expert. So, it depends largely in which industry you are working, which kind of
21 disputes that is, and if suppose by all parameters, you need an expert to be involved in a
22 litigation in which, assuming that that's a complex dispute then I think it's needed.

23
24 Now, coming to your specific question on cost part of it, I think you need to as clients or as
25 General Counsels, we do rationalize as well, because at times, and particularly when cross
26 border disputes are there. You need to have some expert testimony, some expert analysis,
27 which would establish the impartial ability, independence of the whole project. And I think
28 from that standpoint, cost doesn't matter because if you can pay to your Senior Counsel a
29 significant amount, I think expert is making, it's a make or mark kind of position. So you need
30 to have an expert in those kinds of transactions. Now, one comment which I would like to
31 maintain which you asked Amit as well that the expectations of the clients, and I think that is
32 one of the most important and critical factor in the whole issue. Because the way in which I
33 see disputes are, disputes are largely arising out of three situations. One is because of the
34 commercial changes in terms of quality or pricing or time delivery or delay in services,
35 something of that nature. Another dispute criteria is basically contextual in nature, whereas
36 you are interpreting the contracts in a certain fashion. And somebody else is interpreting
37 differently. It's a second part of it. But then there's a third part of disputes in which is largely,



1 significantly dominating the minds of lawyers and clients as well, which is behavioural in
2 nature. And that behaviour is that I would teach you a lesson. Now, this particular thought of
3 teaching you a lesson would result into number of thoughts in the minds of people, and then
4 the dispute happens. Now, in that construct, the expert needs to balance it out, because I have
5 seen those kinds of reports of experts as well, when they are filing some reports, it's all
6 nonsensical with those kind of figures, whether they can invite that kind of confidence in
7 conviction of the Tribunal. In fact, that is a losing proposition at all. Even at the first instance.
8 So I think that needs to be kept in mind.

9

10 **NISHANT NATH SINGH:** No, you did. That's very interesting. Thank you. And you've
11 touched on costs. If I can ask this, what are some of the other key factors that you would
12 consider or evaluate an expert on when you are considering appointing that expert?

13

14 **SANJEEV GEMAWAT:** The very purpose of appointing an expert are largely two reasons.
15 One is there is somebody who is having the global knowledge. Who is knowing the industry,
16 who is knowing the nuances of the industry. So, this is one large part. The second part is that
17 he is a trained expert. Trained in the sense that he can present before the arbitral Tribunal. He
18 can give testimony on my case and also he has that credibility, credentials whereby the
19 Tribunal is also believing that this is an, you know, he can't falter, you know, or he will not be
20 giving me a nonsensical kind of report. It's like, it's basically a credibility issue. I think these
21 factors do matter. So, if you ask me that which kind of expert? Of course, these are the basic
22 credentials. But then, besides these basic credentials, the experts should be meeting our
23 expectations as well. And our expectations are, he cannot be because ultimately it's all said and
24 done. All litigations are views and counterinterviews. There are certain views where we have always
25 strong views. Now he needs to understand our views, our concerns, because ultimately, we are
26 business organizations and that is very, very important, because unless he understands our
27 concerns, he can't be doing justice to our work. I think that is the major differentiator as far as
28 engagement of experts.

29

30 **NISHANT NATH SINGH:** And just on that theme of instructing experts, would you see you
31 have a preference of approaching experts directly or would you sort of defer more to your
32 instructing counsel?. The reason I asked this is because what we see a lot of times is that when
33 our clients are quite comfortable with deferring to us when instructing specialist legal advisors
34 or barristers or senior counsel. When it comes to experts, we're seeing that now the client is
35 quite invested in having that choice and actually being the voice of that decision making. To
36 do some thoughts on that, be quite interesting.

37



1 **SANJEEV GEMAWAT:** Well, it's both ways. And as I said in my opening comments, that
2 ultimately our role is to form a collaborative team. And collaborative team essentially means
3 that all our internal and external experts should be together with the same meeting of minds.
4 And I think even if at times we directly engage or we just bounce off our idea with the expert
5 before we engage with the external lawyers. Ultimately there would be at certain point stage
6 where the external lawyers as well as experts, they should have that alignment also. So that is
7 very, very important. Because at times it's very difficult if the external lawyer, the law firms or
8 the lawyers, they are not aligned with the expert's thoughts and all that, so it becomes very
9 difficult. So normally I would say that it's a collaborative effort. We also bounce off our ideas
10 that we are going with this particular person. At times, experts are not even knowing that we
11 are, in fact, contacting them through a law firm, etcetera because we want to make that also
12 distance needs to be maintained to that extent. So, we do all that stuff, but then we largely
13 know, and most of the organizations, I think wherever the GC's function is a strong function,
14 they know that to whom to engage and whom not to engage here. Thank you.

15

16 **NISHANT NATH SINGH:** Thank you. I want to move on to discussing with you, Kelvin,
17 and with your sort of barristerial hat on. What would you see are the sort of different styles of
18 cross examination that Senior Counsellor or barristers would employ when cross examining
19 expert witnesses. And would you say you have a sort of preferred style yourself?

20

21 **KELVIN POON:** No, I don't have a preferred style to cross Amit, or any individual expert. I
22 think. It's fair to say that when you are talking about cross examination it is not a conversation
23 between you and the expert. There's a conversation between you and Tribunal through the
24 questions you put to the expert. So, I don't think there is a different style. But what invariably
25 happens when I'm cross examining an expert is that I tend to find myself working much harder
26 to get a questions out because you just have to get it to a point where first of all, you are dealing
27 with someone who knows the subject much better than you. You need to simplify to a point so
28 that the Tribunal understands and make it interesting enough for the Tribunal to realize why
29 it's important to listen to the question. So, it's quite many facets to the job. And so I'm back to
30 the point, which I think Amit mentioned earlier. I think it's important, therefore, to have an
31 expert on your side that you can work with to work through, I think some of the ways of
32 presenting the point clearly.

33

34 I always come back to the example that I encountered now, maybe 12 years ago. We were trying
35 to explain to the Tribunal whether the bridge that was being constructed above the tunnelling
36 works, the subject matter of the arbitration was stable or not. And there were a number of
37 different concepts that we had to share with the Tribunal. One was tension, and there was



1 stress at the foot of the pow. So, it sounds simple enough to most of us in this room, but for
2 some reason, the tribunal couldn't quite get it. So, my expert then came along and all he did
3 was to show a picture of a woman's high heel shoes and he said, look it is a load bearing. That's
4 where the heel is touching the ground. There's load bearing and this tension is where the strap
5 is at a heel tugging away at the heel. And that tension and through that very simple
6 photograph, I think it's easier for us to explain and then lead on to a series of questions to
7 attack the other side.

8

9 Back to your question. Is there a specific style? No. It's probably more a style that's catered to
10 the particular Tribunal in question but always assisted by having able experts next to you who
11 are able to present a view that's fair, impartial and accurate.

12

13 **NISHANT NATH SINGH:** Thank you. You mentioned it's harder when cross examining
14 expert witnesses. Do you think harder the context of doing it against a fact witness and is there
15 a kind of different approach that you would take with an expert witness versus a fact witness?

16

17 **KELVIN POON:** Yeah. So, when I say it's harder, it's not because of the characters involved.
18 I'm not saying because when I cross some or the Secretariat they are very tenacious and they
19 were not given. I think we've all seen fact witnesses. They are equally tenacious and they don't
20 give in. The difference is the subject matter. When it comes to facts, they are facts. All of us
21 live lives through facts. And we can tell when a fact is believable and not believable. We're
22 dealing with technical question that becomes a bit more tricky and so a bit more effort
23 honestly, a lot more effort is probably needed to craft a sequence of questions that can make
24 the point clear and persuasive.

25

26 **NISHANT NATH SINGH:** Thank you. I want to ask you, do you think there's a difference
27 in how an arbitrator views an expert report versus in the context of litigation proceedings and
28 court proceedings how that would be perceived by the judge? That could be in the context of a
29 civil suit or a challenge to an arbitration award just that kind of different perspectives.

30

31 **KELVIN POON:** The question of the court and arbitrator dichotomy... First of all, we need
32 to draw some lines as to what sort of court are you talking about. In terms of my experience,
33 it's largely in a Singapore court. And if you're looking at a Singapore court, I think the approach
34 between a Tribunal and the court are largely similar. The judges and arbitrators do want to try
35 their best to get to the nub of what the technical question is and to see they can reach a fair
36 resolution to the problem. But between an arbitrator and the court, there are some advantages
37 still, I think in the arbitral process, not arbitrator, but arbitral process. Particularly the



1 arbitrator or the Tribunal gets involved in the formulation of the issues at the early stage. I
2 think that really helps not just me as counsel, but the parties understand what needs to be
3 done to focus the questions.

4

5 The most challenging problems that you face as counsel is when you are asking questions,
6 you're looking at the judge and you're not sure why there is no reaction. Is it because the judge
7 doesn't think that the question is important to the case? Is it because the judge doesn't
8 understand my question? What is it? Right? And I suppose the regular interactions that you
9 may have in the Arbitral Tribunal in the lead up to hearing can help address, I think, some of
10 those concerns and then mix the arbitral process in that way more comfortable when dealing
11 with expert questions. But ultimately, if you're talking about whether you want to ensure that
12 the Tribunal or the court takes active interest in the expert discipline for the question, it comes
13 down to how you formulate the issue. And how you can make it clear to the judge or arbitrator
14 why this point needs to be decided.

15

16 I was just having a chat with a partner yesterday before I left and there was an issue that was
17 being put to trial that's going on in court today actually in Singapore where I couldn't
18 understand why it was even an issue. And it's no surprise that the judge is also asking that
19 same question of the parties and is there any surprise then, when you get to the cross
20 examination, the judge takes no interest. So I think, I think it's really a combination of many
21 factors. And as Sanjeev mentioned, it's really a collaborative effort on the entire legal team to
22 make sure whatever is being put forward is relevant and the points that I made land and make
23 an impact.

24

25 **NISHANT NATH SINGH:** Thank you. Any further views from the panellists from that point
26 in any different court perspective or...?

27

28 **JED SAVAGER:** I just was going to come in on the point about early engagement, and it's
29 something Amit touched upon, but Kelvin really brought out, which is we're all familiar with
30 expert joint statements and using that as the method to narrow the issues or bring the issues
31 out ahead of the hearing. In fact, when I see very little of is early expert engagement right at
32 the beginning of the process. So first, CMC having the experts along from each side to talk
33 about how they're going to engage. Are we going to agree a joint data set? Are we going to agree
34 methodology? A lot of these things are actually left quite a long way back. So almost the dice
35 cast because you've got expert report opposing views, et cetera. A lot can be done by engaging
36 with the Tribunal and that comes down to really counsel's role, I think, in encouraging that



1 process through its engagement with the Tribunal and then helping the experts along that
2 journey, so, yeah.

3

4 **NISHANT NATH SINGH:** Thank you. Sorry Nitesh, yeah.

5

6 **NITESH JAIN:** So, from the Indian court perspective, right? We don't see lawyers instructing
7 experts, right? I mean, we file cases claiming damages of millions and billions. But when you
8 see the underlying report, there is none. There'll be some sort of the internal CFO, the
9 chartered accountant, he would base the balance sheet would do some calculation and that
10 will be part of the witness statement. But we should take this seriously, right? When it comes
11 to the Indian court system and for that matter, domestic arbitrations. And I'm very glad that
12 sort of MCIA has selected this particular topic. And thanks to Secretariat for sort of setting up
13 a panel on this, because we keep talking about arbitrations, various issues in relation to
14 arbitration, but I think experts is a very critical part when you deal with an arbitration, not
15 limited only to international arbitration, right? Just because it's seated outside India that you
16 get serious and you get some big experts. But it applies very well, whether it's domestic
17 arbitration, I mean, you can have various institutions sitting in India. There may be
18 international parties. So, you will have an expert, right? So therefore, you should have serious
19 thought when it comes to domestic and also the court, because the assistance you have to give
20 it to court and it becomes fairly easy when you are in court.

21

22 **NISHANT NATH SINGH:** No. You're completely right, I think there is some serious
23 transferable benefits of the use of experts in international arbitration that is now being actively
24 considered by the Indian Courts and domestic arbitrations. Just, we were touching on expert
25 reports. And I want to come back to you, Amit. Over the years, we've seen growing use of joint
26 expert meetings, joint expert reports and also hot tubbing, which is now quite actively being
27 considered by Tribunals and being ordered by Tribunals in your view, what would you identify
28 as the sort of constructive approaches to joint expert meetings, joint expert reports and hot
29 tubbing?

30

31 **AMIT GARG:** I think Jed mentioned something very important, which was talking about
32 early engagement of experts. And certainly, I can speak from a delay expert point of view is
33 that there's a commonly used phrase of, 'how two ships passing by in the night', like two delay
34 experts on a complex matter can be exactly like that. They would have proceeded without a
35 joint statement in their own methods of analysis and sources of data and reached a conclusion
36 which, when the Tribunal compares to the other expert, it's very difficult for the Tribunal to
37 understand and distinguish where are the real points of agreement and disagreement. So early



1 engagement is the key. I think in terms of certain best practices and this is more speaking in
2 terms of engaging with other experts, I think I like to personally explore what I call explore the
3 agreeability. This sounds a bit scandalous. It doesn't mean that I'm trying to figure out how
4 much the other expert is going to agree on, it's actually the other way around. I find good
5 experts, sophisticated experts are more interested in figuring out areas of agreement. And it's
6 actually the less sophisticated expert who will put up a wall and just not agree to anything at
7 all. So, agreeability early on in the process is very useful sometimes we find people again,
8 sometimes driven by the Tribunal but saying that if you can agree certain issues in the joint
9 expert report, that'll be great. But again, it depends on the discipline. But taking delay experts,
10 I would say delay experts coming together on a project of certain magnitude which has taken
11 over a good period of time to finish is like having two storylines of the project being completely
12 aligned. It's a very difficult task to achieve.

13

14 So, what I suggest is agree on foundational principles. What does that mean? Method of
15 analysis, a common data set to work with, which is like sources of progress data for example
16 or baseline programs. And then as you go forward, you can kind of start to whittle down to the
17 key areas of agreement and disagreement such that every joint expert report, I think becomes,
18 moves the process a bit further along. The other things that I've seen, which have kind of been
19 very helpful as I've seen, sometimes the expert process, the joint expert process, go off the
20 rails. Experts don't agree with each other at all. The joint statements are small and are of no
21 particular value and I've seen an approach being taken, particularly in Australia, where this
22 was a litigation headed to the Supreme Court of Western Australia. It was a matter related to
23 a healthcare facility which was, and the dispute was between the state of Western Australia
24 and a contractor. And we were appointed by the state of Western Australia on that matter and
25 difficult project. A lot of issues in dispute. And interestingly, to oversee the joint expert
26 process, the sitting judge appointed a retired judge to be sitting as part of the expert meetings.
27 So, we essentially had a kind of a mediator sitting as part of our expert meetings, talking to the
28 two experts so that we didn't go ballistic at each other. And that was, I thought a very
29 interesting approach, and I wonder if that's something that would be copied elsewhere, but
30 that's sort of a few thoughts...

31

32 **NISHANT NATH SINGH:** Thank you. I want to now move on to getting views on the second
33 part of what this topic is, which is what the lawyers views on the experts are. And I'm turning
34 to Jed and Nitesh in this final segment, and you've obviously represented various clients, both
35 from sort of the Claimant perspective and the Respondent perspective. So just to make things
36 a little bit interesting the question that I ask you can consider them with your Claimant
37 representative hat on. And Jed, if you can think of it from a Respondent perspective. My first



1 question is what are the key attributes that you would evaluate when you're interviewing
2 potential candidates? So Nitesh what would you say are your expectations from the Claimant's
3 expert?

4

5 **NITESH JAIN:** So, I think the most critical is the honest assessment of the case, right?
6 Because you are interviewing a potential independent expert. You would want your expert to
7 get into details of the facts, use their experience tell us, what are the strengths, what are the
8 weaknesses. And I'll be more interested in the weaknesses, which is where sort of. Because
9 those weaknesses, if they don't point out, the other expert will, right? So, it's better to get those
10 details and, of course, the solution to it. And somebody like Amit, who even for this, comes so
11 well prepared, with his marking and everything. So that pitch becomes very, very important,
12 because at the pitch stage you give them very limited information. There'll be limited facts,
13 numbers, the actual claim will not be there, right? So, basis their experience their past
14 experiences, if they have handled dissimilar situations based on that, how that they can
15 present. So, it's like lawyers pitching to their clients, right? I would expect the same sort of the
16 pitch from the experts to us. What also becomes important, of course, at some stage, cost is
17 equally important in terms of, and it's not because they are very costly or they are not in terms
18 of the clarity. So, from the, so client is happy to pay, but whether it's clear in terms of what the
19 total damage would be to the client. Is it sort of the number is there, not there? What are the
20 various permutation combinations. So clarity from that perspective becomes very, very
21 important.

22

23 Also, I've seen, so let's say there is a big organization, and you know a particular person. But
24 your dispute involves that you need a particular expert. So, it's important in that pitch that
25 they get the right expert. It's not about the key person that you know who's coming and sort of
26 pitching. It may not be his or her domain, but to get the right expert who sort of suits my
27 requirement, the case requirement becomes very critical. So overall, I think the honest
28 assessment is what at least I look for.

29

30 **NISHANT NATH SINGH:** Jed, would you say that there's a difference in how you are
31 approaching it as the Respondent party, because you obviously have a more well advanced
32 case to consider?

33

34 **JED SAVAGER:** Thanks, Nishant. It's hard to say I disagree with the honest appraisal points.
35 I think we're aligned, even if I was for Respondent or Claimant. On that point, I think you're
36 absolutely right, timing, when you're acting for the Respondent. And often you'll know one,
37 often know the expert that you're up against that's really important when you're looking at



1 your expert, because ultimately you're looking at parity a little bit. So, what you don't want is
2 David Goliath. You want bearing in mind, back to Kelvin's point earlier your audience is the
3 Tribunal. What you're trying to do is get your case across in the most persuasive way possible.
4 Therefore, how is your expert going to measure up against the other expert. We talked about
5 hot tubbing briefly earlier. If that was to eventuate how would your expert handle that? That
6 then brings on to some fairly mundane but important points experience testifying and report
7 writing. When you've got very experienced experts like Amit, that's not an issue. Often it comes
8 up where you've got a very niche technical issue, let's say it's a turbine failure, something very
9 niche painted technology, something like that, where you actually have to go to the industry to
10 get expert input, but the expert you get may be a leading expert in the field, but they've not
11 written a report or been in an arbitration scenario.

12

13 And then the really important thing comes back to how counsel manages that situation
14 is...Often engineers, technical experts in that context are solutions driven. Their whole
15 professional life as being coming up with an outcome, but working out whether something was
16 negligent or not or was good enough for the purpose is an entirely different question. So those
17 are the sorts of challenges, I think, that come up particularly both for Respondent and
18 Claimant. But when you're looking at your expert as Respondent, knowing who you're against.
19 Also, you would often have the Tribunal form, so you'll know your audience. So those are two
20 important distinguishing factors when you're looking at appointing from a Respondent's point
21 of view.

22

23 One last point, because I think it's come up across the discussion is being team fit. So that I
24 couldn't stress highly enough. Your client, legal team and expert team have got to gel. It's a
25 defence team that you're building, and the client and their fact witnesses need to feel confident
26 that your expert is open to their position. That doesn't mean they have to adopt it but there is
27 a risk, sometimes with independent experts that they come on board, form very independent
28 view, but it's kind of disassociated with what actually happened on the project. And so there is
29 a little. And often this is where one has to be quite careful about managing those expectations.
30 It's having an expert that's open to those positions that's open to what the fact witnesses might
31 say that put across on what the documents say, do you want.

32

33 **NITESH JAIN:** Can I just respond to one point, so, while I agree with Jed on the experience
34 side. So recently I did an arbitration where we were sort of interviewing a lot of experts and
35 one of the experts came, and he was very, very good in terms of his technical knowledge, right?
36 But we asked him if you have sort of testified in the past. He said, no, this will be the first one
37 if you give me an opportunity. And I was in a fix whether should we give this opportunity or



1 not, but that person was absolutely convincing in his work. And we decided to take him. He
2 was opposing an expert and I think she has more than 30 years of experience, okay, and the
3 counsel that was cross examining my expert he has more than 30-35 years of experience. So,
4 my expert called me to say, I mean, I'm against him. I said, see, this is what you sign up for,
5 right? So just be confident, just stay with your work, what you've done. And he performed so
6 well, right? And I was very glad on the decision that I took. So, I agree, while the experience
7 certainly matters. But I think you also have to give opportunity. So, it all depends upon the
8 ultimate work. And which is where, I think, the joint experts sort of plays very well. That's
9 where junior, senior. These two people sort of work together. You get more sort of inputs on
10 the work. And that's how sort of, they get trained.

11

12 **NISHANT NATH SINGH:** Amit, do you want to add anything to that?

13

14 **AMIT GARG:** Maybe just a couple of quick comments. One, on what Nitesh just said, which
15 is actually, I've seen as well, I think sometimes experts who've done this for a very long period
16 of time can come across as just manoeuvring around the questions and certain Tribunals
17 appreciate the candour and just freshness that technical expert brings who's not done this as
18 a professional. So, I think there is value to that. Having said that, I'll go back to also what
19 Kelvin and Jed said earlier, which is a good expert is somebody who can explain complex
20 concepts simply. And I think that's a tremendous, and that should be the criteria of select one
21 of the criteria of selecting experts and I remember that this is just a case from a long time back.
22 This was a how plant in Quetta, Pakistan, and we were engaged by an American power plant
23 designer and constructor against the power company. And opposite us was, an expert who was
24 a professor from the Princeton University. Clearly a very, very accomplished individual. And
25 he had prepared this amazing database that, I mean, a surprise to us had accumulated all the
26 progress information and compared it to what was supposed to be carried out in terms of plan
27 and it was a massive endeavour. As part of his direct presentation, which was meant to last 30
28 minutes, he was going to explain the analysis that he had carried out. He had 300 slides. And
29 roughly around slide 47 or so, I vaguely recollect, the Tribunal said, and he was already 25
30 minutes into the 30 minutes allotted period. And the Tribunal said, well, Mr. So and so, how
31 much time do you need? And he was at loss and so obviously he had his testimony of the deck
32 had to be cut short and he was left. That's a very crude example, but the point is it's not just
33 the background and the technical qualifications. It is the ability to simplify concepts.

34

35 And I think one last quick point, and I know I'm hammering this point again and again but
36 particularly when we are facing disputes and appointments in the Indian jurisdiction sector,
37 fees is a touchy subject. I think, as I said before that's not the only criterion, but also one has



1 to recognize that what you pay to the expert is a miniscule proportion of the overall damages
2 that your client is seeking against other party or trying to defend. And in fact, you are going to
3 appoint one expert versus the other expert. So, the only money that you're paying extra is the
4 delta between one expert versus the other expert. So how small is that delta compared to the
5 overall grand scheme of the money that you're earning? So that's sort of my closing point on
6 that thing.

7

8 **NISHANT NATH SINGH:** Thanks, Amit. I want to ask one more question, and then I'm
9 going to hand over to Rhia to bring this all together and give some closing remarks. But it's a
10 slightly controversial, but it's a pertinent question is, how independent or unbiased do you
11 think that an expert actually is and this is unitarian Jed? And that's a more general question,
12 not sort of limited to being Claimant or Respondent.

13

14 **NITESH JAIN:** So, I think good experts are independent. And it's in our interest, interest of
15 our clients and interest of the arbitration that they are independent and unbiased. The
16 Tribunal is very, very smart. They are able to sort of read, understand where this is going. What
17 is that the expert is doing right and ultimately you win on merits, right? It depends upon what
18 your witness is testifying. Because the other side will cross them. So, I think my experience has
19 been that they are independent. And there was a survey last year, 2023 where sort of 50% of
20 the Respondents said that 55% they said that they gave favourable report to what the counsel
21 say, and there was around 48% say that they were actually bullied by lawyers, by their
22 instructing counsel to sort of change it. But my experience has been they largely remain
23 independent.

24

25 **JED SAVAGER:** I will say I agree entirely with that. The situations I have seen that have
26 come up where issues of independence have been a problem or credibility has been issued is
27 one something Kelvin touched on at the outset, where you've had the expert involved for a very
28 long time, but their role hasn't been carefully managed. So, in my experience there's no
29 problem bringing on an independent expert during the project to provide their preliminary
30 views. But setting up that appointment is really important. They're appointed independent
31 expert advisor and there's no point, no problem then in the arbitration that being disclosed.
32 In my experience, Tribunals accept that. It becomes a problem where that role has become a
33 bit blurred and then the experts asked, oh, did you help write the claim etcetera. That's where
34 it gets more difficult.

35

36 So again, back to how do counsel manage that interface. Really important point. Other areas
37 had an arbitration. Now, 18 months ago, where it turned out the experts on the other side have



1 been engaged on a fixed fee arrangement. Now, it wasn't a success fee arrangement or anything
2 like that but when that came out, the line of questioning went along the lines of what if you'd
3 had a bit more time and money, would you actually have done a bit more work and come to a
4 different view? The consensus was, yes, that might be the case, et cetera, et cetera. Again, that's
5 back to credibility. So they've not so much around independence. It's all about credibility, as
6 everyone on the panel has said your audience is the Tribunal. You're trying, as Amit touched
7 on, trying to gain their trust and therefore giving your expert those tools is absolutely
8 paramount. So, yeah, that's all I'd add to Nitesh. Thanks.

9

10 **NISHANT NATH SINGH:** Thank you I'm going to hand over to Rhia, who has been waiting
11 patiently but any further thoughts and final thoughts for me, please?

12

13 **RHIA MARSHALL:** Okay, so we've heard from the lawyers, we've heard from the barristers,
14 we've heard from the ultimate beneficiaries who are the clients, and, of course, we've heard
15 from the experts themselves. And so what do lawyers and clients really think about experts? I
16 think we think they are expensive. Just joking. I think with experience we've learned that it's
17 money well spent. We've used experts now. Like I said, it's a more recent development in India.
18 But having used experts for various matters, we see the benefits. We see how the Tribunal
19 responds and I think we all agree that it's not ideal or important, but it's necessary to have an
20 expert on your team.

21

22 So now, to sum up as a lawyer, I'm just going to speak a little bit about just a minute. Don't
23 worry. What a lawyer really thinks of an expert? So, I believe that as lawyers we need to ensure
24 that expert testimony remains objective while still aligning it with the narrative of the client's
25 case. It's a fine balance, but that balance is crucial. The testimony of an expert will only
26 enhance the credibility of a case if lawyers and clients appoint them as genuine truth tellers
27 whose job it is to assist the Tribunal and not as hired guns as Amit said, because that only
28 compromises the integrity of the arbitration process and ultimately benefits nobody. So, in my
29 practice, I have seen first-hand, the impact that a well prepared expert can have. Expert
30 evidence can shape the Tribunal's understanding of critical issues and influence the outcome
31 of the dispute.

32

33 I've recently worked with Secretariat and with Mrunal on a couple of matters. And it was a
34 fantastic experience and also a very good result. I think a kind of in-depth understanding and
35 the ability to understand the client's business that experts bring is something that we as
36 lawyers can't do, and we definitely need them on our team. So, I think that's all from me. Thank
37 you.



1

2 **NISHANT NATH SINGH:** Excellent. Well, thank you very much, everyone for coming here
3 today. I hope you found it interesting and engaging. Big thank you to all our panellists. Could
4 we please get a round of applause for them? And thank you again to the Secretariat and MCI
5 teams for organizing this and all our sponsors which without the money, we can't do anything.
6 Thank you, everyone.

7

8

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

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10