



INDIA ADR WEEKDAY 2: MUMBAI

SESSION 5

Experts as arbitrators or arbitrator appointed experts?

5:00 PM To 06:00 PM IST

Moderator:

Janak Dwarkadas, Senior Advocate

Speakers:

Justice (Retd.) RD Dhanuka, Former Chief Justice, High Court of Bombay

Hiroo Advani, Senior Partner, Bharucha & Partners

Montek Mayal, Partner; Practice Head - Asia & Middle East, Osborne Partners

Kirtan Prasad, Senior Counsel, RPC

Hannah Fry, Barrister, 39 Essex Chambers



1 **HOST:** Hi, can I request everyone, please be seated. We'll be starting with our next session
2 very soon. A very good evening, everyone. The next session that we have is by MCIA on
3 "Experts as arbitrators or arbitrators appointed expert." I would like to invite on stage the
4 panellists for this session, Mr. Janak Dwarkadas. Senior Advocate will be moderating the
5 session. Justice RD Dhanuka, former Chief Justice, High Court of Bombay. Mr. Hiroo Advani,
6 Senior Partner at Bharucha & Partners. Mr. Montek Mayal, Partner Practice Head Asia &
7 Middle East at Osborne Partners. Ms. Kirtan Prasad, Counsel at RPC and Ms. Hannah Fry,
8 Barrister at 39 Essex Chambers.

9

10 **JANAK DWARKADAS:** Good evening, everybody. Thank you, MCIA, first of all, for inviting
11 me to moderate this session. Thank you, ladies and gentlemen, for being here. I believe you've
12 been here since 8:30 in the morning. I admire your patience. I hope we don't test it anymore
13 and don't get some brick bats, but we'll try to make it as interesting as we can. And we've got
14 a wonderful panel, very distinguished.

15

16 To my left, you have Justice RD Dhanuka, who has been a judge of the Bombay High Court for
17 many years and retired as a Chief Justice of the Bombay High Court in 2023. Since then, you
18 never look back. He has the flourishing arbitration practice. He's authored a book on
19 arbitration. His knowledge of arbitration law is encyclopaedic and the speed at which he can
20 deliver judgments would shame even a jet plane. I always admired his tenors for trying to keep
21 pace with him then.

22

23 Then we have Mr. Hiroo Advani, who has had 50 years of experience in the legal profession,
24 and he has at the distinction of participating in arbitrations all over the world in ICC, SIAC,
25 Zurich Chamber of Commerce, LCIA, Swedish Arbitration Association and what have you.

26

27 So, I move on to Mr. Montek, who has been an expert and who is set up FTI Consulting across
28 the globe, which operates all over and even has an Indian chapter they provide expert evidence
29 in matters where expert evidence is required. And he has himself testified before numerous
30 Tribunals and rendered expert testimony.

31

32 Then we have Kirtan. She is an experienced commercial and financial disputes lawyer, and she
33 too, has had a varied experience of having appeared before various international
34 institutionalized arbitration centres like LCIA, ICC, SIAC SEMA, DIAC, ICSID and et cetera.
35 And last but not the least, we have Hannah who belongs to 39 Essex Chambers. And she



1 introduced herself to me as being a colleague of one of my ex interns, Karishma Vohra, and
2 who unfortunately is not here today. But Hannah is herself specialized in domestic and
3 international practice in commercial company law. And she has also appeared in the Supreme
4 Court and the High Court. And again, like Kirtan, has had a wide experience of appearing in
5 international commercial arbitrations in all the institutions that I have referred to earlier.

6

7 So, I think we have a very distinguished panel unlike the moderator, who will be struggling to
8 ask questions. And I hope to be enlightened by the distinguished members to my left. Before I
9 get to the topic of the day and pose my questions, let me for those who, like me, who didn't
10 know much about this topic of, 'arbitrators appointing experts and experts acting as
11 arbitrators', let me nevertheless make an attempt, a modest attempt, to tell you what I think
12 we should know before the questions are posed. Many of you, of course, must be very familiar,
13 but nevertheless, it's my duty to point out that on account of rise in international trade all over
14 the world today, disputes of very highly complex technical nature have become the order of
15 the day and often go to different Tribunal institutions by view of arbitration.

16

17 The American lawyers have called this a war. And they think that today's adversarial process
18 is almost to be fought on a war footing. But that does not mean that it cannot be a civilized war
19 and it cannot be elucidating. And that's where, if you ask me very often the views and opinions
20 of experts often help to decide very complex cases which arise out of parties from different
21 jurisdictions who may be governed by different jurisdictions, different laws and therefore,
22 have to battle with so many questions which arise.

23

24 In India, the power given to the arbitrators, or the discretion given to the arbitrators to call for
25 expert testimonies found in Section 26 of the Indian Arbitration Act. I was quite surprised to
26 find that this section is very similar to several such sections which exist in laws of other
27 countries, including the rules which are framed by LCIA, ICC and IBA and whatever. So, in a
28 sense it's probably nothing new, but nevertheless, it confers a discretion. What is interesting
29 about Section 26 of the Indian Arbitration Act is, it opens with what I would call words which
30 are non obstante in character because it says, unless otherwise agreed between the parties
31 which would indicate that it's a derogable provision. So, it's open to the parties to say, we will
32 not allow the arbitrator to call for expert testimony if the parties so agree. But in the absence
33 of an agreement between the parties, the arbitrator or arbitrators of the panel would have full
34 discretion to summon expert evidence where required. And when such an expert evidence is
35 called for, obviously the Act then provides that the arbitrators can require a party to make
36 available to the expert any documents or any property or any goods which are involved in the
37 matter. And then, of course, you have the provision in the section itself, which then again, is



1 based on a non derogable provision which says unless parties otherwise agree the expert
2 himself can be called upon to submit to the parties and to the Tribunal the basis on which he
3 has rendered he or she has rendered the opinion which is the subject matter and which is on
4 a specific issue, which the arbitrators may require expert testimony on. So that's basically what
5 26 is all about.

6

7 Incidentally, I may also mention that in a sense Section 26, whereas it authorizes or impose
8 the arbitral Tribunal to call for expert testimony, the law with regard to expert testimony is of
9 course found in Section 45 of the Indian Evidence Act of 1872, which is now 39(1), of the
10 unpronounceable 2023 Acts. And so, it is in *pari materia*. So, it basically, what it tells us is
11 that expert testimony can be with regard to foreign law or science or art or identification of
12 handwriting or finger impression. But what is more interesting is the fact that judicial
13 pronouncements have told us that ultimately, expert testimony is only a matter of opinion.
14 And therefore, both courts, as well as Arbitral Tribunals have the discretion either to accept or
15 reject the entirety of the expert testimony and rely on the evidence let in by the parties or
16 otherwise.

17

18 Now there are two... Today's question is actually in two parts. One is, the appointment of an
19 expert by the Tribunal, as I indicated that is governed by, at least as far as the Indian
20 Arbitration Act is concerned, by 26 and as I said, in other jurisdictions, similar provisions
21 exist. The purpose of the Arbitral Tribunal appointing experts is obviously to get assistance on
22 any specific issue which arises for consideration. But it may also help the Tribunal to reconcile
23 different approaches which may have been appointed, which may have come about by reason
24 of party appointed experts. So, it may bring about, in that sense a balance. The other advantage
25 of the experts being appointed by the Tribunal would be that not advantage but I would say
26 when the Arbitral Tribunal calls for expert testimony the Tribunal must be careful to ensure
27 that it does not delegate his decision making process or function to the expert. On the other
28 hand, we have a situation where the arbitrator whose appointed, may himself or herself be an
29 expert. Now, very often it happens that you may find it in matters of, say, like the Cotton
30 Exchange used to have in Bombay. This goes with regard to cotton trade going to experts,
31 where they could themselves, in that sense, use their expertise for the purpose of bringing
32 about a resolution. It could also arise where the party appoints an expert because the person
33 is so well versed in the subject. Like, you have stock exchange arbitrations where the
34 arbitrators themselves are stockbrokers and people experienced in the trade. The New Zealand
35 High Court has laid down some words of caution. I'm not going to trouble you with all of them.
36 My friends here will probably tell you more about it. But I may just touch upon them that when
37 the expert is an arbitrator or the arbitrator himself is an expert, and if he's going to rely on any



1 documentary or other evidence he has to share it with the parties in order to comply with the
2 principles of natural justice. And he should not, in other words, gather any evidence behind
3 the back of the party. At the same time, if what he is aware of is a matter which is generally
4 known or generally the practice which is available and to the trade or otherwise obviously, he
5 can utilize that knowledge and that would not be considered a violation of the principles of
6 natural justice.

7

8 So, with this background, I would like to move on to the topic for the day, and I would request
9 Justice Dhanuka, who has had much more experience than all of us in dealing with arbitration
10 and matters pertaining to arbitration to help us answer the questions which we have. I propose
11 to ask two questions, if time permits, to each of the panellists. So, my request would be that
12 since time is short, I know I've taken up a lot of your time, but if you can keep your answers
13 brief and to the point, it will help us navigate the evening better. My first question to Justice
14 Dhanuka is that when we talk about Tribunal appointed experts, why do you say this is
15 different from the practice of party appointed experts?

16

17 **JUSTICE RD DHANUKA:** Before I answer this question, I want to tell you the distinction
18 between a sitting judge and a retired judge. For 11 years I was asking question to Mr.
19 Dwarkadas, now after my retirement he's asking a question. This is the change of position.

20

21 **JANAK DWARKADAS:** I cannot tell you what a pleasure it is.

22

23 **JUSTICE RD DHANUKA:** I know that. So, coming back to the topic, what is the difference?
24 Party appointed experts, it is their option whether to appoint an expert to assist them. Experts
25 can be appointed even at the stage of drafting of agreement. Because there may be different
26 types of agreements. There may be construction contract. There may be partnership dispute.
27 There may be relating to valuation of property. You are dealing in estate. From that stage and
28 also at the stage of drafting the pleadings before the arbitrator, experts' assistance are taken
29 by the parties most of the time. Not only that, when the matter goes to arbitration. I'm saying
30 because I was appearing for Municipal Corporation for last 15 years before my elevation. And
31 all construction contracts, our engineers were assisting me because I was not supposed to be
32 familiar with the drawings, designs, extra items and what not. So, I was assisted by engineers.
33 Sometimes it was happening that arbitrator is either engineer or is from legal fraternity. He is
34 from engineering faculty, then there is no problem. I will assist him with the assistance of my
35 engineer expert.

36



1 As far as court appointed arbitrator, appointed expert is concerned Dwarkadas, has already
2 told you about Section 26. Unless there is a prohibition under the contract between the parties
3 or that prohibition, they agree at the stage of entering into the arbitration agreement that we
4 don't want any expert. Only in that event, arbitrator is precluded from appointing an expert.
5 Otherwise, arbitrator has power to appoint an expert on a specific issue. Now take for example,
6 arbitrator is a retired judge like me. Most of the time you will find there are allegations of
7 forgery of signature. So, what do you do? There may be some questions. Can a person from
8 legal fraternity throw some light or render any finding whether the signature is forged or not?
9 So hand writing expert is examined. It may be that parties may not examine any interim
10 expert. Then what do you do? Then you take the task upon yourself and appoint a handwriting
11 expert with a specific issue. Of course, once court and this arbitrator appoints an expert, there
12 are parameters prescribed under Section 26 itself. Those parameters according to that specific
13 reference is made to the expert that on this point, you have to render your assistance. You have
14 to give your opinion to the Arbitral Tribunal for consideration. And then at the same time,
15 parties are directed to assist the expert to give all data as material. If you have to visit some
16 property it has to be permitted to visit the property. And then he gives an opinion. Once he
17 gives an opinion, on the basis of that opinion, he can be called upon by the Arbitral Tribunal
18 to remain present before the Tribunal and he can direct the parties also to remain present.
19 Parties will be given the documents and details on the basis of which report is rendered by the
20 expert. And before the arbitrator parties can ask questions to the expert appointed by the
21 arbitrator.

22
23 Now, there is some grey area I must share with you at this stage, that questioning an expert
24 before the Arbitral Tribunal does it amounts to cross examining the expert or this is only to
25 find out on what basis has come to a particular opinion? If it is only for asking questions and
26 he replies and there at the end of the day, what is the evidentiary value of such expert opinion,
27 whether it is binding on the arbitrator, whether it is binding on the parties or not. That is,
28 again, a grey area. Arbitrator is seeking assistance for his own benefit to come to a particular
29 conclusion on which he himself has no expertise. In that event he may rely upon that opinion
30 he may not rely upon because parties are not precluded from raising an independent technical
31 evidence of an independent witness. They can examine still their own witness. So, this is the
32 difference between the two.

33
34 **JANAK DWARKADAS:** Thank you. Thank you, Justice Dhanuka. Turning to Mr. Advani,
35 since you had such a wide and varied experience, having appeared in arbitrations across the
36 globe. I would like to jump to the second part of the topic today. In your opinion do you think



1 that experts should be appointed as arbitrators? You think is there some advantage of not or
2 an advantage?

3

4 **HIROO ADVANI:** Let me start off by saying that I've dealt with a lot of experts, and I have a
5 high regard for several of them, who've done an absolutely excellent job as expert witnesses.
6 And the advantage of having an expert witness is you have expert witnesses on both sides. So,
7 you have the advantage of having two experts with contradictory views so that they can be
8 examined closely, and assist the Tribunal in coming to the correct decision whether to accept
9 one expert, whether to accept the other expert 2 or to expect none of them and come to the
10 right decision. They have the right. Expert as arbitrators I'm completely negative to. And the
11 reason is that, why are the experts there? Because there's a particular issue and this gentleman,
12 who, being selected as an arbitrator, has experience in that particular issue, and he's an expert
13 in that. And frankly, my own view is that take as an arbitrator, he thinks he knows more than
14 everybody else. In any case, he's probably right. He might well know more than anything else.
15 But he will tend to rely more on his opinion on any other experts or what the other arbitrators
16 feel because that's what he is. He's an expert in the subject, so he has confidence in his own
17 views.

18

19 On a second note, and a note that is very pressing right now in the Supreme Court of India.
20 The Government of India for some time has been trying to press having a panel of experts. So,
21 each PSU, you will have a panel of five or six experts and say to the parties, all right, you
22 appoint one from that panel. I'll appoint one. The two will appoint one more. All five will be
23 from the same panel. The government has been pushing this idea very, very hard. And why are
24 they pushing it? And who are those experts they're using? All retired government servants
25 from other, different other PSUs. So, they're pushing this concept of a panel and trying to
26 thrust what should be autonomy of parties. Each one should have a right to do what you think
27 is best, choose who you think is the best. But they are trying to force the panel on. I heard the
28 matter before the Supreme Court was going on for some time. I hope they strike that down
29 quite strongly, because experience shows that the retired government servants were appointed
30 part of the panel are very very pro-government. And you are highly unlikely to get a fair
31 decision. So, I think that idea should be struck down. I hope the Supreme Court does, but we're
32 going to have to wait and watch. Firstly, for these two reasons, I'm not in favour of appointing
33 experts as arbitrators. But I'm very much in favour of using experts, and I think very highly of
34 them. Thank you.

35

36 **JANAK DWARKADAS:** Thank you so much.

37



1 **JUSTICE RD DHANUKA:** About experts being appointed as arbitrator, I agree with Sri
2 Advani. I want to share with you on my experience. I'll just take half a minute only. I was
3 appearing for Municipal Corporation in some heavy construction contract matter, and there
4 was a clause that XYZ from the legal fraternity will be arbitrator and my opponent was on
5 techno-legal. I had raised a plea of limitation before the fraternity arbitrator. Not from the
6 legal fraternity, some other fraternity. I won't tell you the fraternity. So, I cited one judgment
7 of Justice DK Deshmukh, before him. It was on issue of limitation. My techno-legal opponent,
8 he raised strong objection to me, citing that judgment of Justice Deshmukh. He said that this
9 judgement is not applicable. You can't rely upon this. It is not binding on the arbitration. I said
10 why it is not binding? This is High Court judgment. First of all, Justice Deshmukh has
11 mentioned in the judgment three times that, in his opinion, it is like this. His opinion cannot
12 be binding on anybody. And second objection, I said what is second objection? Second
13 objection is that this is not about of an arbitrator. It is order of court. So, court order does not
14 apply to arbitration. I told that the arbitrator, told me. Yes, he's right. What do you say? I said,
15 please accept his argument. And after ten years, I was a judge, it was recently set aside by one
16 of our High Court judgement.

17

18 **JANAK DWARKADAS:** Thank you. Thank you. Yeah, I just want to turn to you, in fact,
19 Montek. You can add something and then I'll ask you my question.

20

21 **MONTEK MAYAL:** I feel like I must defend the experts here a little bit. I also must say the
22 pounds are short on my second career choice, so I can't be an arbitrator anymore. I think
23 there's bit of truth in all of that, obviously, but I also feel there are two points here. One is, not
24 every matter will require an expert as an arbitrator. Certain matters will benefit from it. So,
25 construction is a classic example, which I don't personally do, but I know lot of these often
26 relate to delays. They're having technical expert I think can add value to the decision making
27 process. Sometimes the questions are straightforwardly inside like oppression cases or similar
28 type of cases, a valuation of shares. Again, I would imagine the tribal might benefit from having
29 an expert who understands those concepts deeply. So, I think the point is can all cases absorb
30 an expert as an arbitrator? The answer is clearly no. I think some matters might benefit from...

31

32 **JANAK DWARKADAS:** May I may add to that, if you don't mind?

33

34 **MONTEK MAYAL:** Please. Of course.

35

36 **JANAK DWARKADAS:** What Montek is saying is, I would agree with him because the
37 appointment of an arbitrator is part of the autonomy of the alternative dispute resolution



1 process. So, one would have to take it that both parties, when they choose a particular
2 arbitrator who may be an expert would be doing so with full knowledge of the fact that if there
3 are legal issues which require a legal expert or which are mixed issues of act and law. Then
4 they probably would not choose an expert as an arbitrator. I think that's what you're saying.

5

6 **MONTEK MAYAL:** Yes, precisely. And I think if it's a three member Tribunal, yes, the chair
7 should not be an expert probably. I think just a second point which I think Justice Dhanuka
8 just touched upon. I think there's also a question about the right form of training for an expert
9 versus an arbitrator. You have course from Ciarb etc. which help you, help people like us who
10 like us don't have necessarily the legal background to get the requisite training to the
11 arbitrators. So, I think the combination of two would often mean that there will be cases where
12 I do believe an expert could be helpful to decision making process.

13

14 **JANAK DWARKADAS:** Thank you. The question I had for you, Montek, in fact was that
15 what, according to you, would be the circumstances which would justify an Arbitral Tribunal
16 exercising its own discretion, like under Section 26 to call for expert evidence? What would
17 you say? What are the circumstances that you think would justify?

18

19 **MONTEK MAYAL:** Yes, thank you. So, Section 26 of partly mirrors or MCI A Rule 28 partly
20 mirrors Section 26. So, I must first confess I've only seen in very limited circumstances
21 where Tribunals have exercised its power to appoint their own expert. In 15, 16 odd years now,
22 perhaps seen it four or five times personally. I think it sort of stood, from my perspective, two
23 circumstances where Tribunals might benefit from appointing their own experts. One
24 obviously, it's clear cut when the parties themselves have not appointed experts. And there are
25 technical issues that must be dealt with, and the tribunal might benefit from having their own
26 expert look at those issues. The second, I think you mentioned in your opening remarks is the
27 conflict. Now that's perhaps a beast of party appointed experts. One of the biggest criticisms,
28 as we know is we're often labelled as hired guns. I don't think that's necessarily always true.
29 There are some bad apples. There always are. I think most of us who do this for a living don't
30 want to have a reputation of a hired gun because we won't be hired again. Frankly. If you can't
31 convince a Tribunal of our analysis, there are no use to the parties and the counsel. So, I think
32 when there are large differences like you said, to help reconcile those differences a Tribunal
33 appointed expert could be quite beneficial. The third, I would say, is I guess it's a mix of the
34 two when the issues themselves are beyond the expertise of the Tribunal itself, and they might
35 benefit from just a third party providing those inputs. So, I think those are the circumstances
36 that I have seen. But I've rarely seen a Tribunal appoint an expert in a circumstance that
37 parties already have experts. I think one of the biggest pushbacks to party to Tribunal



1 appointed experts is that they add to costs. So, while I appreciate one of the main reasons for
2 using Tribunal appointed experts is the concept that makes the process more efficient. But I
3 think that's just wrong, because in that circumstance, you'll have parties, in any case, have
4 their own experts, like shadow experts or dirty experts, as they're often called and it only adds
5 to the cost actually, it doesn't reduce it. So, I think I would say in the major circumstance where
6 you do see Tribunal appointed expert is when there's no other expert involved in the matter.
7 Thank you.

8

9 **JANAK DWARKADAS:** Thank you.

10

11 **HIROO ADVANI:** Just add one moment to that. You'll find by experience again when there
12 are no party appointed experts and the Tribunal feel like they should have an expert, they're
13 more or less passing on the decision making power to the expert rather than the arbitrator,
14 and that happens far too often by way of experience.

15

16 **JANAK DWARKADAS:** All that you have to do is wait ten years for it to be set aside.

17

18 **MONTEK MAYAL:** Just one thing on that. I think that's a very important point. One of the
19 major pushbacks for Tribunal appointed experts is that very issue is the Tribunal outsourcing
20 the decision making of somebody else. I think that's where also the fact that regardless of a
21 Tribunal appointed, the expert, the fact that that person should be challenged, should be cross
22 examined is quite critical to the process. It can't be just accepted on face value. And I think
23 there must be a due process given to the evidence submitted by the Tribunal appointed expert.

24

25 **JANAK DWARKADAS:** Thank you. Turning to Kirtan now. In your experience, I'm giving
26 you, I'm asking a very generalized question, but if you could educate the audience and all the
27 panellists here. What are the cases where you think what kind of cases do you think... I think
28 some of them have already been touched upon. But what kind of cases do you think would
29 deserve experts serving as arbitrators and how should the parties go about choosing the expert
30 because they have the freedom to choose?

31

32 **KIRTAN PRASAD:** I think the slight risk of sitting on an illustrious panel like this is that
33 quite often you've got nothing left to add after everyone has said. And certainly, when you sit
34 beside someone who's so impassioned about the cause, like Montek, he sort of says most of
35 what it is to say. I mean, needless to say, the sort of disputes that are best suited for experts
36 sitting as arbitrators are disputes which require a huge amount of technical expertise. I think
37 Janak sir, very correctly mentioned there are trade bodies like Stock Exchange Boards, there's



1 construction, which Montek has already raised. Then there's commodities and trade. I mean,
2 as perhaps standing up for the experts ever so slightly. I think we have an element of audience
3 bias here because the disputes that we as lawyers tend to receive or see inevitably tend to have
4 a legal element, and so, rightly so, for the vast majority of disputes that come across our desks
5 experts aren't appropriate, but for extremely technical ones perhaps there still is a case for
6 them. The one case in which I had an expert sit as arbitrator was a Gafta dispute, which again,
7 is a trade body, very small set of rules, documents only process. I mean it may be a facet of the
8 Gafta Rules. But equally, I think there was something to be said for the expert or the layperson,
9 arbitrator, as we lawyers like to say, cutting through a lot of the noise in terms of the procedural
10 rules. It was very much rounds of submissions from each party. Let me hear them. This is the
11 decision there was no over lawyering of the process so perhaps, and in fact, not perhaps, I'm
12 pretty sure that there is room for experts in a very narrow set of disputes.

13

14 Another interesting set of disputes where I think there is room for experts in addition to what
15 Montek already explained is, we're now seeing parties enter into very complex financial
16 arrangements and derivatives. Quite often the dispute is not about how you construe the
17 contract in those sorts of disputes. It's about how you... Whether it was, whether the
18 termination price was valued correctly, effectively. And in those cases, you benefit massively
19 from an expert sitting as the arbitrator, because quite often in those matters, the lawyers have
20 very little additional legal expertise to add, if you will. And the second part of the question was
21 really, how do you select an expert to sit as arbitrator? In some respects, not very differently
22 to how you would select an expert to be your expert in the arbitration? You would obviously
23 look at technical expertise. You would look to see if the individual has the relevant expertise
24 in that particular technical area. But one additional facet is assessing if the individual is
25 capable of explaining matters in simple, clear legal English language.

26

27 Several courts, the Singapore courts in particular in recent times have come up with quite a
28 few judges, sorry, quite a few judgments rather, criticizing the comprehensibility of arbitral
29 awards. And I think with a lay witness or with an expert sitting as arbitrator, there's ever so
30 slightly the risk that if the subject matter is very technical, the award runs the risk of becoming
31 or appearing to be even more incomprehensible when it's drafted. So, it's important to speak
32 to the expert that you are choosing to appoint as arbitrator and to see if they are capable of
33 understanding, sorry, explaining the matter in a way that lay people can understand. And the
34 other aspect, it's not so much experience, but I think it's also to look to see what sort of
35 academic writing the expert has been publishing. Because with experts, there is the risk of
36 having, the risk of having prejudged an issue really coming out as a result of their academic
37 writing. So, I think that requires a lot more scrutiny than you would in the case of an arbitrator.



1

2 **JANAK DWARKADAS:** If I could add to what you're saying on the comprehensive ability
3 to comprehend what the expert arbitrator is saying. I can share a personal experience where
4 not that the arbitrator was an expert, but I had to gather some expert evidence in connection
5 with a patent case, infringement or patent. And what I found very often was that the experts
6 who we were interviewing and whose evidence we wanted to place before the court, got so
7 technical and got so carried away with the subject, that we had to keep cautioning them and
8 saying that look, the judge is not an expert. You may be. So, dumb it down, as you say, and
9 bring it to the level where it can be understood. So, would you think, giving that, given that
10 position, do you think the expert arbitrator could outsource this part of the job, the part which
11 requires him to render an award which is easily understood?

12

13 **KIRTAN PRASAD:** I suppose the question is, who is your ultimate target audience for the
14 award or who is the ultimate reader of the award?

15

16 **JANAK DWARKADAS:** Keeping in mind that it will go ultimately one party or the other
17 might challenge, is would be read by judges who are not experts. Hypothetical case.

18

19 **KIRTAN PRASAD:** I think that's exactly right, which is, I think the ultimate target audience
20 for the award is not even the parties. It is the judge who is going to hear, who is going to hear
21 the challenge and with that in mind, I think barring trade cases like Gafta cases or very
22 technical construction contracts, where quite often the parties have such a long term
23 relationship that they choose not to be as acrimonious and challenge every award. For the vast
24 majority of larger commercial disputes that come across our desks. I think you're probably
25 better off just appointing someone who mirrors what the judge is going to be like, i.e. a lawyer,
26 as the arbitrator and then having two experts fight it out as between themselves.

27

28 **JANAK DWARKADAS:** Thank you. Now, turning to Hannah, who's been waiting very
29 patiently. And I apologize, if you got to wait all this time. But in your experience having had
30 the wide experience of appearing in all these different Tribunals. What do you think is more
31 effective and why? Party appointed or Tribunal appointed expert witnesses in arbitrations?

32

33 **HANNAH FRY:** Thank you. And thank you, MCIA, for having me on the panel today. I'll
34 start by saying that I often find that my job as counsel is translator between the expert and the
35 arbitrator. So, it very much aligns with what's been said today. I think generally the current
36 state of play of arbitration is the expert evidence has now become the norm. There's such an
37 increased use of it. And that aligns with the more technical and high value nature of



1 arbitrations that we're seeing. In particular, I specialize in commercial and construction
2 arbitration, and I'm currently involved in a case where we have five different disciplines of
3 experts, including delay, quantum, and three different types of technical experts, which just
4 goes to show the increased use of experts, in my opinion, in international arbitration. And I
5 was looking at the statistics of this, and there was a BCLP 2021 International Arbitration
6 Survey on expert evidence. And 96% of the Respondents believe that they had a right to party-
7 nominated experts which just goes to show that this is very much becoming the norm.

8

9 In terms of what I have seen and what I think is more effective, I agree with Montek that
10 generally I have seen party-appointed experts and it's only in a handful of cases that I've seen,
11 the Tribunal-appointed experts. And I think often that is because in the Commonwealth and
12 particularly the English system, is that often experts are party-nominated, or at least the
13 parties believe that that means that they have more control over their experts and therefore,
14 they can put their case forward more efficiently.

15

16 I think where there may be perhaps more room for Tribunal-appointed experts is, as we were
17 saying in cases where there aren't party-appointed experts. Perhaps they're lower value and in
18 that type of case, I think there could be more of a room to appoint, Tribunal-appointed experts
19 in order to keep costs down. Or if there's a concern about independence for any particular
20 reason, again that may be a place for a Tribunal-appointed expert. I think a concern that was
21 echoed earlier is that perhaps that gives more room for the Tribunal to delegate their decision-
22 making function. And generally, my concern would be that it would be more susceptible the
23 award to challenge by the parties in that case. So, that's something I think, to be wary of.

24

25 A general trend that I have seen is experts being used earlier in the arbitration process rather
26 than later on. So, recently I was drafting a Procedural Order No. 1. And in terms of tracks, we
27 had the pleading track, and then we had a separate expert track. So, experts were already being
28 assigned to different roles and encouraged to engage in discussion at the same time as the
29 Statement of Claim. And various research and papers have shown that this leads to encouraged
30 earlier settlement. So, I am definitely seeing a trend of more experts and being used earlier in
31 the process, albeit perhaps not sitting as Tribunal members.

32

33 **JANAK DWARKADAS:** Thank you. Thank you, Hannah. Coming to my second question
34 Justice Dhanuka, do you think the system of appointing, parties appointing experts has really
35 worked? Or you think because it's only a matter of opinions, which the Tribunal ultimately has
36 a discretion to completely jettison and render an award on their own understanding or based



1 on the evidence let in by the party's minus the expert evidence. What is your experience? Has
2 it really worked? Does it really help?

3

4 **JUSTICE RD DHANUKA:** Parties can seek assistance of some expert or system. That expert
5 opinion is available to the party not for the assistance of the arbitrator. But sometimes it is
6 seen that arbitrator also may be guided by the engineer or chartered accountant present in the
7 arbitral forum and he can guide the arbitrator. But it is not binding. It is for the arbitrator to
8 decide whether to take assistance of the expert appointed by a party to assist him. Otherwise,
9 arbitrator can himself appoint. But it is again a matter of cost. Because even if a party appoints
10 an expert, at the end of the day, he's going to claim the cost incurred by him to appoint his
11 expert as cost of arbitration. And in addition to that, if arbitrator appoints expert again and
12 there will be double jeopardy, because that will be again to be shared by both the parties. It
13 depends, if parties have already appointed as expert, I personally feel that arbitrator should
14 not again appoint an expert. Otherwise, it will multiply the cost. Because I have seen that our
15 judges, or whether arbitrators from legal fraternity, they are able to write good judgments with
16 the assistance of experts without difficulty. There may be evidence. There may be cross
17 examination and even handwriting expert or suppose medical issue is there. So, advocates
18 prepare overnight, with the assistance of some other expert, to cross examine expert witness.
19 Once expert is appointed by a party arbitrator himself should not appoint again, otherwise it
20 will multiply unnecessary.

21

22 **JANAK DWARKADAS:** Thank you. Hiroo, you mentioned earlier that you are not in favour
23 of experts acting as arbitrators. But what do you think, how far should a Tribunal go in your
24 opinion to direct the work of an expert since he's not the expert himself? How much can he, in
25 fact, participate in that and if he feels that he needs assistance, for instance, when he is not
26 getting it. Can he then direct the expert to render assistance? And if so, how far can he go?

27

28 **HIROO ADVANI:** Let me start on...Take one step backwards. More or less now in
29 international arbitration it's almost become a rule that each party will have their own expert.
30 Whether you like it or not, it's very likely to happen. And how do they actually function? Most
31 sensible Tribunals will tell two of the experts, first, you two experts sit together. Look at each
32 other's reports, tell us which points you agree with each other and where you disagree. So, you
33 can eliminate a lot of cross examination by your find. A lot of the experts are agreeing to a very
34 large part of each other's, that coming to different conclusions. So you narrow the difference
35 down. So, in almost every international arbitration now expert evidence will become a matter
36 of rule or as a matter of cost, should I say very, very seldom unnecessary, very straightforward
37 arbitration you find you're doing without experts. And then as arbitrators you can actually play



1 a quite a role because the difference on our narrow down, you understood what the problems
2 are, and the arbitrators ask quite a lot of questions of both the experts to try and come up with
3 what they think is the right answer. You're finding more and more arbitrators in fact, taking a
4 very, very activist role. Not leaving the cross exam mission only to counsel, but asking
5 questions that are bothering them and frankly, in those circumstances where the arbitrator
6 that read the paper as well have understood, you will be finding the best quality awards, in my
7 experience.

8

9 **JANAK DWARKADAS:** So, you don't think it amounts to entering the arena? That the
10 arbitrator has entered the arena because judgments say that he should be dispassionate and
11 keep his distance. And you don't think that's the problem?

12

13 **HIROO ADVANI:** I think it is important for the arbitrators to play an extremely active role
14 and get to the bottom of the answer that they think are the right answers, then sit together
15 amongst themselves, discuss the expert's view, et cetera, and then come up with the
16 conclusion. And I think that what happens in most international arbitrations today, and that's
17 why some of the quality of the awards are absolutely first rate.

18

19 **JANAK DWARKADAS:** Thank you. Thank you. So, Montek coming back to you. What
20 Hiroo mentioned about experts sitting together and trying to iron out the difference. You're
21 more than familiar with the expression "hot-tubbing." So, would you, for the benefit of the
22 audience here, describe what "hot-tubbing" means. Please don't get carried away, young guys.
23 And educate us about what your views about this form of expert evidence whether it helps or
24 doesn't help?

25

26 **MONTEK MAYAL:** Yes. I think the less controversial word is "witness conferencing." Just
27 before I answer that, someone would say one thing because you asked a question about, does
28 the system work? I think it does. There are a bunch of us who do this for a living, so it's
29 working. I think just the one point, which is I have seen the change in my 15 years of working
30 in this is there's a general self-regulation of the work we do. Partly because like I said, if we
31 can't convince the Tribunal our evidence is useless. And the second is, I think increasingly we
32 are finding tribunals being quite considerate/also careful in how they describe our work in the
33 awards. And the last thing we want is an award that tells how bad we were. And I think that
34 obviously affects repeat appointments. So, I think the mechanism of that self-regulation is
35 making the system work.

36



1 Now to your actual question, what is hot-tubbing or witness conferencing. In normal language,
2 the experts giving evidence at the same time. Right? They sit together and answering the same
3 question one after the other. I'm a big fan...

4

5 **JANAK DWARKADAS:** Sorry to break your thought process, but just as I've understood it,
6 hot-tubbing really means that the experts will sit across from each other and virtually have a
7 dialogue with each other. They will question each other's answers and wisdom and it will not
8 be... There will be no interference in that sense from the parties. In other words, there'll be no
9 cross-questioning or cross examination by the parties when the witnesses are engaged in this
10 process. So, the idea is that between the two experts they will try to narrow down what are the
11 issues and what is it that what is the which they either agree or they don't agree, am I right?

12

13 **MONTEK MAYAL:** It depends. Lawyer's answer. I think it's not very regulated. There are
14 many forms of hot-tubbing. The most natural one that I have seen is slightly different than
15 that where we sit next to each other but the Tribunal will lead the conversation. So, the
16 Tribunal is sort of let's identify five or six issues they want to discuss. They'll put those
17 questions to one of the two experts. The other expert gets a chance to respond. Often is then
18 followed up with the counsel asking questions as well, following from that issue. That's one
19 way. I have seen what you have said before. What you just said before as well that's, in my
20 personal experience, more rare. It's more sort of Tribunal lead followed by question, by
21 counsel. But the idea is the intention is exactly what you said, intention is to discuss the issues
22 in a conversation. It's supposed to be civil but sometimes it is not. But it meant to be civil, to
23 have a conversation about these issues.

24

25 **JANAK DWARKADAS:** You mean they won't come to blows.

26

27 **MONTEK MAYAL:** It gets worse than that. Gets much worse than that. But I think the
28 intention is to narrow down the issues. And I think just before you get there. The reason you
29 can do that is, and that's something Hiroo mentioned before, that you've had, hopefully, what
30 we call a joint expert report. So, you've tried to list out the areas of agreement and
31 disagreement, and therefore the disagreement areas are very clear, and therefore the cross
32 examination or hot-tubbing is very clear and very focused on the disagreements, and that makes
33 for an easier hot-tubbing process because the Tribunal then knows which assumptions are
34 really turning the needle here, which assumption are really material to the outcome. And it
35 pre-supposes, the Tribunal being very well prepared, and that's debatable. But if the Tribunal
36 was very well prepared, the issues are well set out, then the idea is you sort of ask those issues,
37 those questions in turn to the two experts.



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JANAK DWARKADAS: Thank you, Montek. We are running out of time. So now I have one question left, which I'm going to put to both to Kirtan and thereafter to Hannah. And I want your independent respective views. What do you all think about use of generative AI in place of expert evidence?

KIRTAN PRASAD: Thank you. Before that, could I just make one pitch? I think Montek presented a very rose-tinted view of the process of joint expert reports and hot-tubbing. I mean, there are processes where I've seen joint expert reports where people just regurgitate chunks of whatever has already been written in the expert reports to the joint expert report turning into a 300 page document where you may as well get the parties to do an extra bit. Hot-tubbing can actually be slightly better at narrowing the issues in dispute, particularly if you've got a switched on Tribunal because there's an element of control over the process. You can wield the experts back in. So, sorry for deviating from that.

On AI, I think all of the experts that we use in today's day and age come with huge teams that sit behind them, that assist them in the process of doing their research. That assist them sometimes in drafting the first drafts of their reports, etc. So, my personal view is why not resort to Generative AI for that first round of research? And that first round of producing at least the introductory sections of your expert opinion, provided, of course, that the expert himself or herself exercises independent judgment in much the same way that you would if you were supervising a junior to review the material that is being presented before you.

JANAK DWARKADAS: And what happens if the Generative AI goes into hallucination?

KIRTAN PRASAD: Well as the lawyer who had the make-believe cases come up before the New York Courts, I think that's where it's important.

JANAK DWARKADAS: That is why I was referring to that.

KIRTAN PRASAD: I think that's where it's important that you exercise independent judgment. No different to these days if you give a trainee a task to go off and then run and do research. You still need to double check and make sure that the cases haven't come out of ChatGPT and that they're legitimate law reports. Thank you.

JANAK DWARKADAS: Hannah, what would you like to say?



1 **HANNAH FRY:** Yes. Just to add, I think, and a good way to summarize this session is what
2 is the main role of the expert? And it is to assist the Tribunal. And I think it is important to
3 sort of come back to that. And in terms of joint statements, again, as I was saying, I've seen
4 early involvement of experts from the beginning. And my experience is that they're being used
5 early on and you're having sort of joint statement three and four post pleadings. So, I think
6 actually seeing the increased use of joint statements can narrow down expert issues which the
7 case can often turn on and give to earlier settlement rates. In terms of AI, I think it will be
8 similar to how it's being used by counsel in that it's a tool, not a replacement. And that's what
9 we're going to see going forward, and I think it will often be used in the disclosure process of
10 reviewing information to get to a finalized report. And hopefully in five years' time, we won't
11 all be replaced by robots at the next session.

12

13 **JANAK DWARKADAS:** Thank you so much. Thank you, all of you, for being here. I think
14 we've been successful in concluding the session on time. The organizers will be very happy to
15 see our backs. Thank you very much. I don't know whether there is time for questions and
16 answers, but that's for the organizers to...Okay, go ahead. If anybody would like to ask?

17

18 **AUDIENCE1:** In your experience in different jurisdictions...

19

20 **JANAK DWARKADAS:** Can you identify which of the panellists you're asking?

21

22 **AUDIENCE1:** [INAUDIBLE] [JUSTICE RD DHANUKA] In your experience, in different
23 jurisdictions, how often do you.....experts as arbitrators, how often do awards by experts who
24 are acting as arbitrators stand up to judicial scrutiny?

25

26 **JUSTICE RD DHANUKA:** One example I already given when I was speaking. What is
27 happening is that if you are not having legal background in that situation, now, everything has
28 to be argued before the arbitrator. And if a lawyer is appearing before an engineer, arbitrator
29 or some other arbitrator expert, without having legal background, issue of jurisdiction and
30 arbitrability, existence of arbitration agreement, res judicata, and what not. And then you have
31 to evaluate evidence. You are going to commit some mistake. And such awards are liable to be
32 set aside, either on the first instance or after ten years. Whatever time it takes.

33

34 **HIROO ADVANI:** A little different experience because I've been involved with SIAC and with
35 now the Dubai International Arbitration Centre. And there has been an intense debate within
36 the committee whether we should have experts at all at all on our panel. And by and large, the
37 answer has come that let's avoid experts on the arbitral panel, as our panel, so that the



1 institution will not appoint an expert as a presiding arbitrator. If parties choose to do so that
2 is their choice. We're not going to stop it unless he's not seriously an expert in that particular
3 field we're not going to stop it. But it's a thoroughly discouraged at an institution level to
4 appoint experts as an arbitrator.

5

6 **JANAK DWARKADAS:** One more question. We have time for one more question. Yes?

7

8 **AUDIENCE2:** Thank you. James Nicholson, STI Consulting. Closely adjacent to what the
9 panel has been discussing is expert determination. And that's not what something one sees, at
10 least in the kind of valuation oriented cases that I get involved with very often. Do parties and
11 Tribunals make enough use of expert determination? And I'll ask that to whoever grabs it first
12 off the panel.

13

14 **HANNAH FRY:** I've actually been seeing an increased use of expert determination and
15 particularly I don't know if it's just present in the UK at the moment, but I've seen it on both
16 construction specific industry issues and also on points of law. And perhaps it's related to the
17 increased cost and length of proceedings of arbitration. So, I think often, if you need an urgent
18 resolution, expert determination, can be extremely useful, and I'm seeing more and more of
19 it, in that both industry issues, but also legal issues.

20

21 **MONTEK MAYAL:** Even here, actually. So, you're seeing a lot of that in our valuation of
22 shares on ICSID, and you've seen a lot of that in M&A disputes that are relating to purchase
23 price adjustments.

24

25 **AUDIENCE3:** Sushil Shankar. So, Montek mentioned something about getting reappointed.
26 So, that got me thinking, when it comes to appointment of arbitrators, we have the IBA
27 guidelines and things, and we have the orange list and the red list which is hardcoded into our
28 statute also in the Indian Arbitration Act. But when it comes to appointment of experts.
29 Although we have the CIArb protocol and we also have the IBA guidelines on appointment of
30 experts, but these are more of suggestions, and there is no absolute bar on reappointing an
31 expert, although they do mention that the experts should be neutral. So, is it time to have
32 something like this? Like the way there is a bar on appointment of an arbitrator beyond a
33 certain number of cases, the party appointing the same expert over and over again?

34

35 **JUSTICE RD DHANUKA:** The bar is already there under Seventh Schedule of Arbitration
36 Act. How many matters one party can be one arbitrator can be appointed by the same party?

37



1 **AUDIENCE3:** No, I meant the expert.

2

3 **JANAK DWARKADAS:** The question was whether there can be a cap on the number of
4 matters in which he can give expert testimony?

5

6 **JUSTICE RD DHANUKA:** No, there is no such bar.

7

8 **AUDIENCE3:** No, I know there isn't. I'm saying isn't it time for something like that to ensure
9 neutrality of the experts.

10

11 **KIRTAN PRASAD:** May I pitch in on that?

12

13 **AUDIENCE3:** Yes, sure.

14

15 **KIRTAN PRASAD:** I think most experts, in fact all experts, do produce copies of their CV.
16 And the system has an inherent check and balance on experts repeatedly appearing for the
17 same party, which is that an arbitrator is going to give their evidence less weight. So unlike in
18 the case of an arbitrator, I think there's an inherent check and balance in the system. Could we
19 come up with a protocol on, perhaps, but I think there's an inherent checks and balance in the
20 system, so it's not as necessary.

21

22 **AUDIENCE3:** But that would vary from arbitrator to arbitrator?

23

24 **JANAK DWARKADAS:** Because it presupposes that even the arbitrators are common in
25 the successive disputes. See, there are two parts to it. If the testimony of a particular expert
26 has been accepted by a Tribunal and has been found in that sense has been not been disturbed
27 later on in the challenge, which may have been mounted then his credibility has been, in fact,
28 established and his reputation would probably require that. And he's earned the reputation to
29 be called as an expert once again, and there's nothing wrong. I personally feel if the same party
30 were to use his services again giving the track record that he has established. I think I would
31 like to hear from Montek, what he has to say on it.

32

33 **MONTEK MAYAL:** I hope there's no bar. Sorry. But there is Case Law on this. I'm happy to
34 pass to you. Some Tribunals have looked at, lack of disclosure on professional relationships of
35 experts, lack of disclosure of previous work. Some courts also require to disclose previous
36 work. I think all firms, and I was part of a big firm before this. All firms have internal guidelines
37 because they are very live for some of these issues. But the reasons you said, I think it's very



1 difficult to have a particular number, especially when I get these even in hardened markets
2 like India with the practice is less to a lot. So, it might confine the use of experts if you put bars
3 which are very narrowly defined.

4

5 **KIRTAN PRASAD:** Sorry and also, fundamentally, if the expert has been challenged and
6 someone else has had the opportunity to question everything, then, really is there a need for a
7 party appointed expert to be held to that level of independence and impartiality?

8

9 **AUDIENCES:** Yeah, That's awesome. Thank you. Sorry Montek, nothing against you
10 personally.

11

12 **MONTEK MAYAL:** I am getting worried a little bit.

13

14 ~~~END OF SESSION 5~~~

15

16