

INDIA ADR WEEK DAY 3: MUMBAI

Are You Interviewing Your Arbitrator? Changing Mindset in the Indian Landscape.

09:00 AM To 10:00 AM IST

MODERATOR

Mr. Nusrat Hassan, Managing Partner, Dentons Link Legal

SPEAKERS

Mr. Kunal Vajani - Joint Managing Partner, Fox Mandal

Ms. Sushmita Gandhi - Partner, Trilegal

Mr. Samir Hussain - General Counsel, Aditya Birla Capital

TERES

1

2 **NUSRAT HASSAN:** Thank you, thank you Judge. I must say we are very happy to hear these
3 views from you and I think your today's talk will go a long way in now developing this new
4 practice, which will go in creating and adopting international practices. I think this will
5 definitely assist in creating a platform where, as we move forward as a 5 trillion economy and
6 also as an international arbitration hub. Thank you very much for taking the time out today.
7 We really appreciate it. Thank you very much. Please give His Lordship a big applause for
8 taking that time out and coming. Thank you.

9 So we'll dive straight away today in the discussion of today's topic. Before that I will just take
10 a few minutes to introduce the panellists. First, let me introduce you to Irvinder Bakshi. Thank
11 you very much for taking place last minute because our earlier speaker there was a
12 bereavement in the family and had to step down. Irvinder is a barrister and Chartered
13 Arbitrator, Principal Consultant, KSB Law Consultants Limited. London. Irvinder brings deep
14 expertise in both domestic and international litigation and arbitration across a diverse range
15 of sectors, including energy, construction, JV disputes, etc.. She has advised Parties, Solicitors
16 and local authorities and held the position of external consultant to Kent County Council for
17 construction arbitration and ADR from 2012 to 2020. She has served as the Chairman of
18 CIArb, London branch from 2015 to 2018, I think that's the first time we met Irvinder. And
19 she is a member of the CIArb presidential panel of Arbitrators. Welcome and thank you for
20 being here.

21 Mr. Samir Hussain, General Counsel of Aditya Birla Capital Limited with over 20 years of
22 experience in corporate law, commercial litigation, regulatory matters and FinTech Solutions.
23 He provides strategic legal leadership with AB Capital's corporate functions, business
24 verticals. Samir has been instrumental in developing legal framework of emerging FinTech
25 Solutions, IP safeguards and data protection. His accolades includes top 100 GCs, GC of the
26 year in Aditya Birla Group, best individual lawyer in Aditya Birla Group. He holds LLB degree
27 from Calcutta University and has graduated first class first. Thank you very much for being
28 here, Samir.

29 Sushmita Gandhi, who's a fellow of Chartered Institute of Arbitrators, Partner at Trilegal with
30 extensive experience advising clients in a range of corporate and commercial matters. She has
31 successfully handled numerous domestic and international arbitration which includes under
32 institutional rules, which includes SIAC, ICC, LCIA, DIAC, etc. Sushmita is empanelled as an
33 Arbitrator with several institutional arbitration centres, she's member of the YC Act Council,
34 APAC India. She has been consistently ranked as a top dispute resolution professional by

TERES

1 chambers. Legal 500 top hundred women in litigation APAC by benchmark litigation and
 2 recognized as a future legal leader by Indian IBLJ. Welcome Sushmita. Thank you very much
 3 for being here. Now with this stellar panel of experts, we start the panel discussion. So I'm
 4 going to take off where the judge left, he mentioned in his speech is don't ask, don't tell, still
 5 the default approach to Arbitrator appointments in India? Samir, maybe you can start with
 6 this question.

7 **SAMIR HUSSAIN:** Yes, am I audible?

8 **NUSRAT HASSAN:** Yes, very much.

9 **SAMIR HUSSAIN:** So, I'll start with an example and then get into the point because it is a
 10 very, very interesting point in itself. So this is pre-2015, we had a dispute where, as you know,
 11 we are a lender of over 200 crores. We had to appoint an Arbitrator, we got excited and chose
 12 a legal luminary, a very famous retired Supreme Court judge without naming whom many of
 13 us would have seen in television for various news items and all. Once the arbitration started,
 14 he was a man of impeccable integrity and all, but once the arbitration started, we realized that
 15 he sent for justice and equity overweighs the commercial terms. During the course of the
 16 arbitration, multiple times his equity side rose in a way that used to call us that you are worse
 17 than Shylock. How can you ask for interest when the borrower is already in difficulty? So, it is
 18 nothing to do with the issue of his capability or integrity, but how he perceives the matter. So
 19 they don't ask, don't tell issue made us cost there a lot in terms of the overall resolution. And
 20 this is purely cultural because in India, if you see, if you go back in time, In India, there is a
 21 Panchayati Raj System where decisions were taken by Panchayat who are people of experience,
 22 not necessarily expertise, so that culture of respecting the seniors or somebody who has a lot
 23 of experience is prevailing. And that is why "don't ask, don't tell" is prevailing heavily. Now, a
 24 lot of time we see law moves ahead of the society. So that is what happened in 2015 as we were
 25 just hearing regarding Schedule 5 and Schedule 7 of the Arbitration Act, which made it
 26 necessary not only to ask, but to tell, otherwise as a Party, we will suffer later because the
 27 question will come up, and even the Arbitrator may get into difficulty. Another important
 28 point, which a lot of time we undermine, is how Section 34 is. If you go wrong with your
 29 Arbitrator there is very limited you can do later. So it is extremely critical to ask and it is
 30 extremely critical that we are told. So in this regard, I think I love using acronyms. I will call it
 31 the wise formula WISE, four important parameters into this.

32 First, "W" is wisdom in experience not only age. Very important that your Arbitrator has
 33 wisdom and experience. Second is regarding knowledge, information and knowledge on the

TERES

1 subject matter, a general knowledge in law the way arbitration is perceived to help us won't
2 help.

3 Third, is Case Management extremely important we need efficient handling of Case
4 Management. And lastly 'time', okay, efficiency in time management. Thoroughness is
5 important, but so is time management. So that's how I would like to answer the question of
6 don't ask, don't tell. Extremely critical that we are both told, and we ask.

7 **NUSRAT HASSAN:** Excellent. That's a very good answer and a guidance, and maybe WISE
8 is something which I should also make note of for the future. Thank you. Maybe I can come to
9 you, Sushmita, if institutions already vet Arbitrators do Parties still need interviews doesn't
10 normal disclosure suffice?

11 **SUSHMITA GANDHI:** Before I answer the question, I think I want to say a very important
12 thing, which I think a lot of people sitting in this room will agree. I think lawyers get
13 interviewed by Arbitrators, and Arbitrators getting interviewed by lawyers in most of the cases
14 at least, I have been interviewed a lot of times when I have approached a person to act as an
15 Arbitrator, and lots of questions are asked by the Arbitrator instead of we asking them
16 questions. I think that's generally been the norm for a very long time. But having said that, I
17 think institutions are doing a great job, first of all, to start with in vetting Arbitrators because
18 they not only look at the past appointments or conflicts of interest or issues relating to
19 relationships, but they also see if a particular Arbitrator is practice-wise, efficient, and
20 sufficient for a particular arbitration. However, having said that, I think it is very important
21 for Parties to know their Arbitrator more than an institution. So, I think the institutions do
22 have a bit of a limitation when it comes to vetting an Arbitrator for a particular matter. Given
23 that an Arbitrator may have given his or her CV and it says a lot of things. So institutions go
24 by, obviously, what the reputation of the Arbitrator has been and what's written in the CV. But
25 when it comes to a particular matter, it is very important for a Party, for Parties to really
26 interview the Arbitrator and to know what Samir just mentioned, that one should know, what
27 is that Arbitrator capable of, because in today's day and age, it is very important for an
28 Arbitrator to really have expertise in the field of that particular dispute. For example, let's take
29 IP. Intellectual Property is not something that everybody does. It's a practice which is very
30 niche to some people. For example, a construction arbitration. It has technical elements to it.
31 It needs some kind of expertise. So a Party is the best person to know what exactly an
32 Arbitrator should have as an expertise, for that matter. So, I think institutions are doing a great
33 job and I have nothing against them, and I don't know if Neeti is here, she might just kill me
34 for it, that why do we need interviews, and we are doing all the hard work.

TERES

1 **NUSRAT HASSAN:** You're lucky she's not here.

2 **SUSHMITA GANDHI:** Thank God for that. But it is really, really important, because what
3 institutions can do is a baseline safeguard. But if that is to be complemented by a little more
4 information about the Arbitrator, that can only be done by Parties.

5 **NUSRAT HASSAN:** Agree with you Sushmita, I think you're absolutely right. I think say
6 that Party should know because ultimately they will be left holding the baby, as they say. Great
7 when I bring in Irvinder, I bring in a lot of international experience. And Irvinder maybe you
8 can help us to understand what are some key questions that can make or break an Arbitrator
9 appointment? Because this is something new in India we are discussing. It may be something
10 of more familiarity in your jurisdiction. But in India, this is a new subject matter.

11 **IRVINDER BAKSHI:** Thank you very much for having me on the panel today, unexpectedly.
12 I think I would like to start by just conducting a very short poll. We heard from the Learned
13 Judge this morning that in India, the interviewing of Arbitrators is not a very common
14 practice. And I think we're here today to debate should it be a common practice and we've
15 heard from some of the panellists today that it's very important that we know our Arbitrator.
16 So, in terms of the poll, I'd like to ask, is there anyone in the room who actually practices as an
17 Arbitrator or aspires to be one who has actually been interviewed? One, happy days. So, has
18 anyone been asked to be interviewed and refused it? Anyone in the room who thinks it would
19 help them get Arbitral appointments if they were interviewed? That's a lot more hands are
20 going up. So, of those of you who are or aspire to be Arbitrators, if you were asked for an
21 interview in advance of any appointment, how many of you would agree? Lots of you.

22 So, the topic we're discussing today is something I was first asked to talk about 20 years ago
23 for the American Bar Association. And during that interview, what came across, and it's
24 apparent that it's still the case today, is that there is a huge difference in the way the
25 preparation for an arbitration is conducted, in what we would call the advanced arbitration
26 countries and those who are still developing their arbitration practices and procedures. And
27 the concept, as we used to call it all those years ago, was that of a 'beauty parade'. And in the
28 developing countries, the thought of having a 'beauty parade' did not mean looking at various
29 Arbitrators and shopping around to see who you liked, it meant something like 'Miss World',
30 there was no concept of it in the arbitration sphere. So, what I think is important to remember
31 here is what is the starting point? What is the starting point when you want to look for an
32 Arbitrator? And we've heard it today, and we've heard from the Learned Judge and Nusrat has
33 spoken about it as well, and my colleagues on the panel have touched upon the importance of
34 knowing your Arbitrator. So, what are the questions you can ask during an interview? We've

TERES

1 already heard merits are a no-no. You do not discuss the merits of the case. But what can you
 2 discuss? What are you trying to assess? You're trying to assess the expertise, the experience,
 3 the ability, the availability, the willingness to serve, and importantly, is your proposed
 4 Arbitrator free from conflict? How can you ascertain that? Do you actually need to interview
 5 your Arbitrator? Has your Arbitrator written books, articles, spoken at engagements? Do you
 6 know from other activities that your Arbitrator has been involved in or his firm, as to whether
 7 he's partial towards a particular point of view? Those are things that are usually in the public
 8 domain. They're apparent on a CV. Do you need to speak to your Arbitrator about that? What
 9 can you also speak to him about, which is more particular to what you're looking for? It's the
 10 general nature of the dispute. You want to make sure they're up to the task. They understand
 11 the subject matter, get that. Terms of the Arbitration Agreement, the seat, the language, the
 12 law, the rules, qualifications that are required or any bar.

13 Now, sometimes an Arbitration Agreement within a contract specifies for a particular type of
 14 Arbitrator, does your Arbitrator meet that criteria? Because if they don't, you'll be in breach of
 15 the Arbitration Agreement. If that kind of Arbitrator who's brilliant at interview but doesn't
 16 actually comply with your Arbitration Agreement. It's not a great look. So you can identify the
 17 Parties, the party reps, the experts, witnesses, other interested parties. Why? Because you're
 18 trying to ascertain that your proposed Arbitrator is free from conflict. Timetable, general
 19 conduct, that's already been discussed. So I think in terms of the questions that you would put
 20 to an Arbitrator if you go beyond that in any way you're on a very slippery slope. So, at this
 21 ABA Conference, 20 years ago, we had a mock interview between two very senior lawyers. One
 22 was being the Arbitrator, the other the Interviewer, and what became very apparent is that it's
 23 a very slippery slope. Can I just ask you this from what you've just said, I have a follow up
 24 question. Could you just clarify and what happens is the Arbitrator is drawn into giving more
 25 and more information, answering more and more questions. Now, what's happening? There's
 26 attention here, isn't there? There is a Party who's looking for an Arbitrator. What are they
 27 looking for? Are they just looking for ability? No, what they're looking for is somebody who
 28 they think will find in their favour. That's what you want, you want an Arbitrator who suits
 29 you and your case. What does the Arbitrator want? The aspiring Arbitrators in the room who
 30 would agree to be interviewed. What are you looking for? You're looking for work. Are you
 31 looking for repeat appointments? Again, another slippery slope perhaps, and it seems to me
 32 that tension is a difficult one to find a balance in. Because the minute you're on that slippery
 33 slope, and you've answered one question too many or you decide you're going to halt the
 34 interview because you're suddenly uncomfortable with the way the questions are going, either
 35 way, you're in trouble I think, either you won't get the appointment, or if you do, especially
 36 bearing in mind that interviews are often conducted *ex parte*. The other Party isn't even in the

TERES

1 room, if you are in that situation you are compromising not only yourself but even if you are
2 appointed and you take the matter through to the end, potentially you're compromising your
3 award. And the issue is not about, is it a question that makes or breaks the appointment, It's a
4 question of whether it makes or breaks the award, but that's how I would answer that question.
5 I'm sorry, it's a little lengthy.

6 **NUSRAT HASSAN:** Thank you Irvinder, that was very useful thoughts from you. Thank you.
7 Maybe I can come back to you Sushmita, where do you draw the line on confidentiality?
8 Picking up from where we left, what are the questions that should never be asked during an
9 interview?

10 **SUSHMITA GANDHI:** It's one of the most difficult questions because I think we often cross
11 the line, don't we? So, I'll give you an example and I'll start with that. I was and to answer
12 Irvinder's question, I also was asked once for an interview and in that interview someone asked
13 me that these are two claims, do you think we should just combine them? And the question
14 which came at the last of the interview, pretty much all the other questions are asked. And that
15 question came to me, and it was almost the last question, and I looked at that person and I
16 said, you rather engage me as your Counsel and not as an Arbitrator because that's not the
17 question that I can answer to you when you're asking me about my suitability to be an
18 Arbitrator for a matter. So, I think it's very, very important for lawyers to know, for all of us to
19 know that you can only and only ask questions to an Arbitrator which relate to how much the
20 Arbitrator can do for the mandate as an Arbitrator and not as a Lawyer. That is a very, very
21 important element that we all kind of miss out, because when we are having a chat with an
22 Arbitrator, we tend to get into the merits of the matter, and that I think becomes the most
23 important thing to keep a note of that you must not ask. You must not get into the substance,
24 the merit, the quantum or the release that one is really asking in the arbitration. What is only
25 required for us to interview is to know that the reason that we need to interview is to know
26 whether the Arbitrator can give us time, whether the Arbitrator has enough competence,
27 whether the Arbitrator has sectoral practice, a sectoral experience, whether the Arbitrator
28 thinks that he or she can really run the procedure, run the arbitration in the procedure that is
29 laid down by the Parties or by the institution.

30 I think we tend to, and as lawyers, we often tend to do that, and I think in those interviews
31 what also happens is sometimes even Arbitrators tend to do that. We all ask each other so
32 many questions about the merits and the substance of the matter that that interview becomes
33 more of a one which is of leaning of an Arbitrator than suitability of an Arbitrator. So what's
34 important for us to know is how suitable an Arbitrator is instead of knowing what the
35 Arbitrator's leanings are. And that's a line that we all need to draw. We all need to know we

TERES

1 cannot cross. But it's a very thin line. I sometimes don't blame people for really crossing that
 2 line sometimes because we, as human beings, do have this tendency to know more and more,
 3 we are curious people, we want to know more about an Arbitrator. We want to know more
 4 about what he thinks about a matter, or she thinks about a matter, and that's when we
 5 definitely cross the line. So it's a structured, professional interview that one should really know
 6 how to do. In fact, I think there should be a course of the CI Arb to teach how to interview an
 7 Arbitrator instead of an Arbitrator knowing what to want. So it's very important to know what
 8 to ask an Arbitrator, and for an Arbitrator also to know what not to ask in that interview to a
 9 Party and how much to answer to a Party when you say what should we never ask? I think we
 10 should never touch upon the merits and substance of the matter or what should one really do
 11 to get a better outcome? Or does the Arbitrator think that the outcome of the matter is going
 12 to be favourable? So these are a few things which one should really never ask. All other
 13 questions, we are lawyers with fertile minds, we can manoeuvre around it and ask some of
 14 those questions and try and get a better result of it.

15 **NUSRAT HASSAN:** Thank you. Irvinder, you wanted to?

16 **IRVINDER BAKSHI:** I did. I think one of the things that we ought to also throw into the
 17 equation is that when a Party is interviewing an Arbitrator for the purposes of appointing a
 18 party-nominated Arbitrator, I think there can be a level of expectation on the part of that Party
 19 that somehow that Arbitrator will act as their Advocate. Now, it's a misconception in most
 20 parts of the world that there are some states in America that do allow a non-neutral wingman
 21 or Party nominated Arbitrator. So again, there's a tension there. And also if you have been
 22 interviewed by a Party on your own *ex parte*, do you feel some weight of expectation that
 23 having succeeded where all the other contestants in the 'beauty parade' have not succeeded?
 24 Do you feel some pull, some weight that you ought to deliver somehow? How difficult is it for
 25 you in those situations to maintain your impartiality and your independence and not give rise
 26 to any perception of bias? And I think the biggest problem that I foresee in all of this is that
 27 when you interview an Arbitrator, the longer that interview goes on the greater the risk of the
 28 appearance of bias and that's ski slope, that slippery slope turns into a black run before you
 29 know it.

30 **SUSHMITA GANDHI:** Can I just add one line to what you said, because I think it's very
 31 important? There is a tendency in Arbitrators sometimes when they're getting interviewed, to
 32 feel that, okay, let me answer this and I get their appointment. I think that is a mentality that
 33 a lot of Arbitrators do have, and therefore, they answer pretty much questions which are not
 34 to be answered in the interview.

TERES

1 **NUSRAT HASSAN:** I think it's interesting Irvinder, that you brought, bring up this aspect
 2 when an Arbitrator, the Party's feel, because in India, we have at least personal experience
 3 where the Party feels cheated when the nominee, his nominee Arbitrator, tends to rule against.
 4 So there is a cultural aspect of this, and it's very difficult for you to then explain that that
 5 nominee Arbitrator was just about party autonomy and not about the fact that he was going to
 6 guarantee you an award in your favour. So, it's also a huge cultural thing. In India, we have
 7 evolved substantially over a period where earlier it was always understood by the Party that if
 8 he nominated an Arbitrator he was going to be an Advocate for that Party. So there's a lot of
 9 change that has happened over the years, but yes that's both I think excellent points. And that
 10 leads to maybe Irvinder you can also take, because you come from another jurisdiction where
 11 it's more formal, should India formalize Arbitrator Interview as a best practice? And what are
 12 the International...? You mentioned about the international practices maybe you can answer
 13 the first part of it that may be more interesting for us.

14 **IRVINDER BAKSHI:** So, we've already heard that there are the CIArb guidelines on the
 15 interviewing of Arbitrators. They are worth the read. And one of the things that they say an
 16 Arbitrator should do is actually either record the interview or take copious notes. Some take a
 17 view, well, they ask the question of whether the fact of an interview or the contents of an
 18 interview should be disclosed? My own view is, disclose, disclose, disclose, always disclose.
 19 And it's so much easier to be in a position where somebody is asking a Party upon that
 20 disclosure from the Arbitrator why didn't you challenge rather than being the Arbitrator of
 21 whom the question is being asked why didn't you disclose? I just think it's safer, I think it
 22 shows your integrity, and it preserves your independence. It's up to a Party to decide what they
 23 do with the disclosure you made. But once you've made that disclosure, then a Party is in a
 24 position of they have to elect what they do with it. So, that's one thing. The other thing you
 25 have are the IBA guidelines on Party representation that actually deal with how you may
 26 communicate *ex parte* with an Arbitrator for the purposes of appointment and presiding
 27 Arbitrators also. If you're wingman and if you're the wingman and you're looking for the
 28 appointment of a presiding Arbitrator, there are limited circumstances in which a Party can
 29 do it, but it seems to me that if you're looking to appoint a presiding Arbitrator, and if you're
 30 going to have to disclose as a matter of good practice, why not jointly interview? It removes
 31 any perception of bias. Of course, the Parties are usually looking for different things, but it
 32 might make the interview a lot more interesting. So, the other guideline is the IBA Rules of
 33 Ethics for Arbitrators and that talks about what an Arbitrator should and shouldn't do. So,
 34 they're all worth a look at but again, that tension between the guidelines and the rules, the IBA
 35 Rules and Guidelines, they're all guidelines. People act differently in different circumstances.

TERES

1 So I, personally, am not a favourer of interviews because I think there is so much out there you
 2 can already find. One of the exceptions or two exceptions, and it was something that the
 3 Learned Judge raised in his keynote is the question of communication skills. So if you've never
 4 met or heard your Arbitrator speak in a public situation and you interview them, I think you
 5 can get a gut feel. Do I like this guy? Do I think he's a good guy? Now that matters. I think it
 6 matters. It's just that instinct as a lawyer, can I trust this person with my Party's case? And if
 7 an Arbitrator cannot communicate orally then you have to look at their written work. I mean,
 8 a lot of the questions that we've raised about what you can ask of an Arbitrator in terms of
 9 availability, procedural matters, rules, etc. all of that you can do in writing. So to me, it's a
 10 question of what additional thing do you achieve by interviewing someone rather than
 11 communicating with them in writing and then disclosing those communications.

12 **NUSRAT HASSAN:** Thank you, thank you, Irvinder. I think maybe what I can add from an
 13 India context is that why this interview process maybe something which we can think of,
 14 primarily being that we have a very small set of Arbitrators in India. I think because we are in
 15 the process of building the capacity. So as the capacity increases, we have a lot of new
 16 Arbitrators coming with lots of experience, and therefore, this interview process may play a
 17 very critical part. But keeping in mind all the points which you have pointed Irvinder or
 18 Sushmita, that may have to be kept in mind. So then I can probably come to you, Sushmita
 19 because it's a related questions. Does the CIArb guidelines help bridge the gap between party
 20 expectations and Arbitrators readiness? Do you think that is something which the guidelines
 21 help? Or the IBA guidelines which Irvinder mentioned?

22 **SUSHMITA GANDHI:** I think so and I will tell you why I feel this. So I think CIArb really
 23 turns a Party wish list and must haves of an Arbitrator through proper training, ethics, and
 24 structured appointments. The guidelines, the practice notes that CIArb has, they are actually
 25 an aid to selecting an Arbitrator, which is really helpful for a Party, for a user, because what
 26 happens is that we, as Parties, often go by instincts, we often go by relationships in India,
 27 which is a key in choosing an Arbitrator, is your relationship with a certain Arbitrator unless
 28 it's an institutional appointment. So, these guidelines, these practice notes, do become a
 29 foundation for a Party to really ensure that what it wishes to have in its Arbitrator, it has. And
 30 they are guidelines which one, I think for one, I follow them. And, for example, the CIArb
 31 guidelines on interviewing an Arbitrator. It's a fantastic piece of thing where if one really goes
 32 through it properly and one really invites them, I think we can do a fantastic job by knowing
 33 what the Arbitrator is and who he or she is. So guidelines and practice notes like those are very
 34 important in this ever-growing arbitration fraternity that we are in now with so many
 35 Arbitrators, so many arbitrations that we are doing in India. So, I think what it does is it creates
 36 a common floor for the users to come and look at things that they otherwise can't find

TERES

1 generally, and then basis of that they are more able to decide as to how they should choose an
2 Arbitrator or how a process is run?

3 For example, guidelines on how... Sorry. I mean, a code of professional and ethical conduct
4 with the practice guidelines on case management, witness handling. They actually standardize
5 behaviours across the stream of arbitrations that we are doing. So that standardization is what
6 is required and what CI Arb guidelines and practice notes really do. But I think more than me,
7 you will be more entitled and suitable to say what they do and how they bridge the gap.

8 **NUSRAT HASSAN:** Thank you. I'll come to you, Samir, I think, let me come back from a
9 GC's perspective. Do you feel that there should be more information about the Arbitrators
10 available and also the fact that the more information that is available that will come with,
11 maybe crossing the line of confidentiality? But what do the GCs would like, because in that
12 sense, the end user, a large stakeholder?

13 **SAMIR HUSSAIN:** So again, a very important aspect, as you all know, in this era of data
14 digital analytics, a lot of predictive analytics is also done by people trying to predict what is
15 going to be the outcome basis the data available. So, from a GC's point of view, from a party
16 point of view, a data always helps me to appoint somebody, having a sense of what I thought,
17 what his past judgments are and all, but it comes with a downside. You don't want the trip
18 advisor effect, okay? If there is a public forum where people are giving reviews the Arbitrator
19 will try to be more popular than correct. You don't want a split baby verdict. Everybody who
20 loses will post a negative review. So, there are downsides also to the way data is available. Data
21 is extremely important, but the way it is available is also important. In that I will split it
22 between approach for *ad hoc* arbitrations versus institutional arbitrations, *vis-a-vis ad hoc*
23 arbitrations, I think the compass more... again, I have this bad habit of using acronyms. So I
24 call it the "compass model." So C stands for data confidentiality, extremely important then you
25 talk about objective parameters, okay, when you're testing, it has to be done. This is objective
26 parameters. Third party is the extremely critical one. This data has to be available to selected
27 set of members. Otherwise, it will completely prejudice the process. So that's why I was saying
28 this data available with institutions who will use it will be far more effective than on an *ad hoc*
29 basis. Then it is about performance, it has to be metrics driven, anonymity of data as you are
30 pointing out is again extremely critical and last, a standardized approach. So that's basically
31 the answer. Data is extremely critical, but for sanctity of the process, I feel it should be a
32 member only approach, largely used by institution and not for *ad hoc* arbitration.

33 **NUSRAT HASSAN:** Okay, so no trip advisor for you. Good. I'll just follow up with another
34 question. As a GC, what is the must ask question from your end to ensure that the Arbitrators

TERES

1 fully qualified and suitable to decide the matter? Of course, it changes from matter to matter,
2 but would there be a standard thing, which you'd expect from your Arbitrator?

3 **SAMIR HUSSAIN:** So, I split this into two parts. Obviously, on one part there is a bias.

4 **NUSRAT HASSAN:** You can use an acronym here also.

5 **SAMIR HUSSAIN:** So, on one part there is a bias. I'll start with the other part and then come
6 with the bias part. So, when we look into an Arbitration and have this conversation regarding
7 appointment, see the competence part broadly is divided into three parts, as we all know. One
8 is obviously, the general core competence of a legal professional. But there are two more things
9 which are extremely important. One is the industry aspect, you must know the industry. That's
10 the benefit of an arbitration. You want a subject matter expert. And third is the unique
11 competency. Now, for example, I have an experience where we again appointed a very reputed
12 Arbitrator, in a Contract where we had taken some software tool from somebody, and the
13 dispute was relating to the source code. So once that matter went into arbitration there was
14 extreme reluctance from the Arbitrator to get into trial because he did not want to go through
15 this complexity of software and technology and tech. And we faced, again, a huge amount of
16 challenge, okay? So, while choosing an Arbitrator, all three aspects, as I told you, core
17 competence, the industry expertise and the unique competence, all three are to be taken into
18 account and are to be questioned.

19 And the second part is since we are a financial institution largely nine out of ten times the
20 matter would be decided in my favour. I will want the Contract to be respected and not equity.
21 So, while discussing or interviewing an Arbitrator, I will try to figure out that whether his sense
22 of justice is more critical than sense of honouring the Contract. And because I'm in finance, I
23 will go in favour of the Contract over the sense of justice.

24 **NUSRAT HASSAN:** That may be the justice.

25 **SAMIR HUSSAIN:** For me, exactly.

26 **NUSRAT HASSAN:** Thank you. The last question before we open it to the floor. Irvinder,
27 how important do you think diversity is in an arbitral panel? Which is not, I did not mean only
28 from a gender perspective.

29 **IRVINDER BAKSHI:** Thank you, Nusrat. And I'm very, very glad that you qualified your
30 question by saying, I don't mean only by a gender perspective because I think all too often
31 when people talk about diversity, they only talk about gender, they talk about more women

TERES

1 being appointed. I think it's really important that we widen the pool. I think the diversity of
 2 Parties, requires the diversity of Arbitrators. But very importantly, not at the cost of merit.
 3 This reservation system you have in India, sometimes with your schools, I don't think it works
 4 in arbitration. I think, Arbitrators apart from independent and impartial, as we've heard today,
 5 they need to be competent. Now, I know you can't get experience overnight, but it's a question
 6 of where do you start? I have very young people coming up to me saying, "I want to be an
 7 Arbitrator, where do I start?" And I always say start by being a good lawyer first. If you're a
 8 lawyer, be good in your primary discipline first. So, I think there's a timing to the diversity
 9 question. And certainly, there's a very well-known institution that prides itself on its diversity
 10 appointments, on its numbers, on being the ground breakers and I chaired a debate on
 11 diversity and one of the questions that was asked was, when you say 'X' percentage of the
 12 appointments from your institution are to women, is it a large number of different women
 13 getting appointments or is it a small number of women getting lots of appointments? And my
 14 concern is that the answer is the latter, just from the figures and from conversations and the
 15 way it works. And I think the best way for the diversity stakes to improve for all of those who
 16 aren't amongst the core International Arbitrators who seem to get a lot of the work, is to hone
 17 your skills be visible but don't expect an appointment because you tick the boxes of diversity.
 18 I think it's hugely important because what you bring in terms of cultural knowledge and
 19 understanding.

20 May I just give an anecdote? It was a book I was reading about the Maharajas and Maharanis
 21 who had come to England, to attend a state banquet and to attend various events in England.
 22 And the Indians and the Brits were absolutely horrified by each other. The Brits were
 23 astounded that Indian people came in and the women exposed their midriff, and they were
 24 horrified that people took their shoes off when they went into church and that they covered
 25 their heads, whereas the Indians thought what are the Brits doing? They keep their shoes on
 26 when they go into a holy place. The women wear these low cut tops and they don't cover their
 27 head. Where's their respect? And this cultural divide would if there had been somebody who
 28 was able to explain it to each other. Wouldn't it have been a better place to say, actually this is
 29 perfect in this situation? It's fitting for us. Its fine for them and for people to just understand,
 30 and with that knowledge widening of diversity, I think you get a greater harmony as well as
 31 understanding. So that's my view on diversity.

32 **NUSRAT HASSAN:** What a lovely way to explain it, Irvinder, that was fantastic. So, if there
 33 are any questions? Yes, please. There are many, please.

34 **AUDIENCE:** Let me say, thank you very much to the panel. My name is Professor Kenneth
 35 Wayne. I am the Chair of the Chartered Institute in the Kenya branch. I have a question for

TERES

1 Irvinder, as you can imagine. I wonder whether the discussion here is resolved by the
 2 institutions. So, everyone's talked about the tension that plays out between Arbitrator
 3 expectations and Party expectations. And we've talked about their minimal information that
 4 Parties may need to meet those contractual expectations that they want in a dispute resolver.
 5 But you have the big capital "N" of a third-Party neutral preserving the essence of neutrality
 6 and making sure that the perception of biases is not designed in any way, should the
 7 institutions play a greater role in not just the general data that they have, but in an
 8 intermediary position that they can play? And of course, we know by default CIArb does put
 9 in a lot of work before they appoint an Arbitrator as a default, appointing authority. And
 10 second, should the institutions, and here I'm speaking about membership, institutions like
 11 CIArb play an even greater role in designing the quality of their members and of course the
 12 kind of work that they do in regulating the practice of arbitration? Thank you very much.

13 **NUSRAT HASSAN:** Thank you. Thank you very much for it.

14 **IRVINDER BAKSHI:** Oh, two nice, easy questions. The first question, thank you, they're
 15 very interesting questions. The first one, institutions playing a greater role. I think it's a very
 16 difficult situation because the way institutions operate in different parts of the world.
 17 Everyone's had a different starting point. As we've heard, where you are today in India, in
 18 Britain, we were there 20 odd years ago. So the institutions have to I think play the hand
 19 they're dealt with. I think it has to be down to the integrity of the Arbitrator. I don't see how
 20 the institutions can do other than look at the Arbitrators, look at their qualifications and when
 21 they're appointing, make sure that the provisions of any Arbitration Agreements or anything
 22 on the application forms as to qualifications, experience etc., whether that's fulfilled. I think
 23 it's very difficult to place that responsibility on an institution.

24 The second point which you raise, which is linked to vetting but the regulatory aspect is what
 25 happens when it all goes wrong, and I think certainly the CIArb does have a disciplinary panel,
 26 and complaints are referred to it from dissatisfied Parties, and they are looked into. And I
 27 suspect other institutions have the same. In terms of regulation of quality of Arbitrators and
 28 the institutions playing a hand in that if I am correct, in India, the majority of arbitrations are
 29 actually *ad hoc*, they're not institutional?

30 **NUSRAT HASSAN:** You're right. You're right.

31 **IRVINDER BAKSHI:** So how can an institution play a part in that? People who are
 32 Arbitrators who don't want to be regulated in any way are just going to accept *ad hoc*
 33 appointments, your problem remains the same. Again, regulatory, if there are going to be

TERES

1 regulations, they have to apply across the board in different jurisdictions, in different cultures.
 2 I don't think we're ready for that and who are the regulators and to what standards? What's
 3 acceptable in one country is not acceptable in another, and culturally not acceptable. So how
 4 do you...? Who regulates the regulators, who sets the standards? I mean, CIArb has it's
 5 Chartered Arbitrator status, and it's a very vigorous process you have to show. I mean, I sit on
 6 panels where you interview Chartered Arbitrators and they have to provide copies of their
 7 awards, they have to turn up for an interview, and the interview process is quite robust and I
 8 can tell you without naming any names, there have been candidates whose names you instantly
 9 recognize. And I am so excited to be interviewing them because you feel it's an honour to see
 10 the work of such a person, and then you get their work and you think, wow, they've got an
 11 amazing reputation but on paper they don't deserve it. And then you get other people who
 12 aren't known who send in their documents, and you think, wow, this is what an Arbitrator
 13 should be like. I don't know how you regulate it, and I don't know how you set the standard,
 14 and I don't know who would be the Regulator? Because unless there's one worldwide
 15 institution that all Arbitrators are members of, I just don't see it working in practice. I hope
 16 that answers your question.

17 **NUSRAT HASSAN:** Thank you. Take the next question.

18 **AUDIENCE:** Good morning, I'm Chand. I'm a professor from a university from Andhra
 19 Pradesh, Visakhapatnam. The Speakers and the Moderator had made this topic quite
 20 interesting by their discussion and first of all, I'm going to give some opinion on this particular
 21 topic. The Arbitrator, of course, needs to be interviewed but then the appointing authority or
 22 the institute is the main party who should be interviewing them, not at the time of taking for
 23 any conflict resolution, but much before that and keep them listed. And then, as they know,
 24 they have already interviewed and they know the credibility, credentials of those Arbitrators
 25 and their experience, expertise and the past history, everything is known. So as for that, they'll
 26 be choosing who is to be taken for that particular conflict, okay?

27 And the second point is that Parties, of course, I feel that Parties are not necessary to be given
 28 because there's always an element of influencing when Parties come into picture with the
 29 Arbitrator this is quite but obvious. But otherwise, Ms. Sushmita was saying that there was a
 30 case which what you should not ask an Arbitrator. She was telling about two cases they wanted
 31 to address her and both whether it is to be combined or not to be combined. As such, if you
 32 are taking two cases that is not, I feel that the right way of going it should be one at a time and
 33 if at all, there are taking both the things, whether you combine or you don't combine, you are
 34 going to deal with both the things. And also as an Arbitrator if such question is asked, if I am
 35 the one over there, I'll say it's your call, that's it.

TERES

1 **SUSHMITA GANDHI:** I just said they should appoint me as their lawyer and not an
2 Arbitrator. I would have made more money.

3 **NUSRAT HASSAN:** So that's the second part is probably Sushmita would be running a risk
4 if she answered that regarding the risk of nullifying the award at a later stage if she had
5 answered that question. Samir, the first one is maybe something which is interesting, which I
6 guess you touched upon. If the institution has already vetted, why do you want to interview?

7 **SAMIR HUSSAIN:** As I was pointing on the data point on your second question that
8 institutions having data is an extremely important aspect. And as we see their point, in some
9 cases there is a panel, some cases, the precedent appoints. There can be an efficient
10 appointment of the Arbitrator. *Per se* I don't see an issue in *ad hoc* arbitrations, also to ask
11 questions or interview simply because, as I was pointing out, there are three aspects. Just being
12 reputed is not sufficient. You want to understand whether there is sector and unique
13 competence, understanding, and largely because we have a 34 to deal with. If you go wrong
14 with your Arbitrator, it is very difficult to get it set aside. Even if you set aside, you restart and
15 waste so much of your time. So I think though there is a risk of some degree of influence,
16 regulated mechanism can be efficient for everybody.

17 **NUSRAT HASSAN:** So, you would still want, to the answer would be, you'd still want to
18 prefer to interview even a vetted Arbitrator from the institution?

19 **SAMIR HUSSAIN:** Yes.

20 **NUSRAT HASSAN:** Right, with that...

21 **AUDIENCE:** The acronyms which you said, the first one is WICE, which is not WISE. It is
22 W-I-C-E, because 'C' stands for case.

23 **NUSRAT HASSAN:** Thank you. Thank you, maybe now, before we close and I call Oindrila,
24 who is the young member's Chair of the Charity Institute of Arbitrator. I just like to talk about
25 two minutes before CIARB. I don't know, many of you may be members but just to help you
26 understand what CIARB is and why you should become members, because it's a great
27 institution. I have my colleagues, Vyapak Desai who is a Counsel and our Registrar from MCIA,
28 Neeti Sachdeva, who is heavily involved in delivering the courses, we call her *masterini* because
29 she herself delivers and takes classes. So just to let you know, CIARB many would not know is
30 a globally recognized professional body established by the Royal Charter of the United
31 Kingdom in 1915. We have 18,000 plus members worldwide. They have amazing monthly, e-
32 resolver magazines, the members in India, over 400. Many are fellows, and it provides a vital

TERES

1 role in providing training, professional development and accreditation to arbitration
2 practitioners across the world, which is recognized in the arbitration world. The three well
3 known accreditations are associate member, member and as a fellow. And of course, we have
4 Irvinder, who's a Charter Arbitrator which is a very, very rigorous accreditation to get and
5 highly recognized worldwide. So I would urge you to explore and of course take up
6 membership. It is really helpful if you're also aspiring to be an Arbitrator because it is a very
7 well recognized institution which is also used for empanelment to institutions as an Arbitrator
8 worldwide. With that, I'll just call on Oindrila for vote of thanks and of course, please look up
9 the guidelines which is quite an extensive and provides you a fantastic window to how to
10 interview an Arbitrator within those four corners where you will not breach any aspect that
11 could ultimately nullify the award or be held to be any way tainted. Over to you, Oindrila.

12 Thank you very much for the attention and please give a big hand to the panels.

13 **OINDRILA:** Thank you Nusrat. Thank you, Irvinder, Samir and Sushmita for the very
14 insightful session today. I've been warned by Neeti that we have exactly two minutes to close
15 this so that we all can enjoy the breakfast. So, as Indian arbitration landscape is evolving and
16 we are rapidly moving beyond the traditional practice of appointing retired Judges, Senior
17 Counsels as our Arbitrators and recognizing subject matter experts from engineers, finance,
18 construction and technology, Interviewing Arbitrators play a vital role in the transition of
19 offering Parties a chance to assess both, the legal and industry experts and to prevent
20 overburdening a small group of well-known Arbitrators and promotes diversity and efficiency
21 in appointments. So this is where Chartered Institute of Arbitrators comes in, be it a lawyer,
22 be it an engineer, finance, construction. In whichever field you are, CIArb organizes courses
23 for accreditation such as ACIArb, MCIArb and FCIArb which is these accreditations are given
24 based on your experience and through training program CIArb India regularly organizes.
25 Along with MCIA, we have Dinah, we have Neeti here who can give you more details on the
26 courses of CIArb training courses of CIArb, which can help you train and become an Arbitrator
27 even if you're not a lawyer. So with that, I want to end this session and thank everyone for your
28 patient attention, and have a wonderful rest of the conference.

29 **HOST:** Thank you for this insightful session. Our next session will begin at 10:30. Thank you.

30

31

32

~~~END OF SESSION 1~~~

# TERES

1

2