

INDIA ADR WEEK 2026 – 11 SEP 2026

SESSION 4

**ADVOCATE, CLIENT, ARBITRATOR: REDRAWING THE ETHICAL LINES IN
INTERNATIONAL ARBITRATION**

SPEAKERS:

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ANUSHKA MANSHARAMANI: I request everyone to kindly be seated. We will be beginning the next session in the next two minutes. Thank you. I welcome you all once again. I hope you had a fulfilling lunch. We now move on to our next session of the day hosted jointly by the IBA Arbitration and Professional Ethics Committee and Jurisphere. As international arbitration continues to grow in scale and diversity, the ethical boundaries governing the roles of advocates, clients and Arbitrators are being tested in new and evolving ways, which include from conflicting interests to questions of independence and the shifting expectations placed on each participant in the process. These are the questions that go to the very integrity of the arbitral process itself. It is this evolving landscape that our next session sets out to examine, which is titled: " Advocate, Client, Arbitrator: Redrawing the Ethical Lines in International Arbitration." The session will be moderated by Alipak Banerjee, the Secretary of the IBA Profession and Ethics Committee. He will be joined by Ajay Pratap Singh, Gaurav Pachnanda, Sae Youn Kim and Yoshie Midorikawa. I would now request the panel to kindly come up on stage. Thank you.

ALIPAK BANERJEE: Good afternoon everyone. I hope you've had a good lunch. Time for some thought provoking discussions. We have a very interesting topic that we are going to debate today, "Advocate, Client, Arbitrator: Redrawing the Ethical Lines in International Arbitration." The panel is being organised by the IBA Arbitration and Professional Ethics Committee and has been very kindly sponsored by Jurisphere. Towards the end of the session we'll also have Jurisphere demonstrate their platform for a couple of minutes. So I have a very diverse panel members over here, I'll take a quick minute to introduce them and then we'll jump on to the topic.

First, Mr. Gaurav Pachnanda. He's a senior advocate and barrister, Fountain Court Chambers. Besides India, he also practices in Singapore and London. He's also registered foreign lawyer at Singapore International Commercial Court. Second, Ms. Sae Youn Kim, Partner at Kim & Chang, Korea. She's also a Council member at MCIA. She has also served as a judge at various Korean District Courts and practised in several Korean law firms. She's also the past Vice-Chair of the IBA Arbitration Committee. Next speaker is Yoshie. Yoshie San is also a Council member at MCIA. She has had a wide, she has represented clients in a wide range of matters involving ICC, SIAC, LCIA cases. And finally Mr. Ajay Singh. He's a General Counsel at Ashok Leyland, a Hinduja company. He's a veteran, he has been in the in-house role for more than 25 years in many large Indian companies.

So, we have four sub-topics that we'll be covering today. First would be aggressive Counsel representation: who's instructions, who's limit, where is the fine balance. Second, witness an expert preparation coaching or corrupting the evidence. Third, use of AI third-Party funding

1 in international arbitration and the ethical issues around it and finally the Arbitrator as the
2 gatekeeper of ethics. So, let's start with the first topic aggressive advocacy: who's instruction
3 whose limits. So, Gaurav, Mr. Pachnanda, first question to you. In your experience as a
4 Counsel, what's your view on the topic and more specifically on directory jurisdictional
5 challenges, extended discovery request, selective document reduction tactical recusal
6 applications. I very carefully identified couple of sub-topics which we see in common parlance
7 in the current context, where arbitration is today, where is the fine balance?

8 **GAURAV PACHNANDA:** Thank you, Alipak. Of course when it comes to resorting to
9 dilatory tactics, the entire arena would be governed by three broad considerations in my view.
10 One of course, will be client instructions. The other perhaps would be either the rules of
11 arbitration that govern you or a Procedural Order that govern you. And the third would of
12 course, be the rules of professional conduct that that govern the behaviour of a lawyer who's
13 resorting to such tactics. I think one of the most important aspects in concluding whether a
14 particular tactic is just dilatory or a genuine exercise of reaching the facts or a genuine legal
15 objection is early engagement with the dispute by the Arbitrators. And in my experience, I
16 would often see that some of the requests for, let's say, document production or requests or
17 revisiting the issue of document production would often be a consequence of not a well thought
18 through order on ordering document requests. At the same time, there would be others where
19 it is being resorted to for the purpose of delay, and yet the Tribunal is not able to make an
20 order of, you know, a nature, an order that has sufficient censure associated with it.

21 Primarily, I think that is a problem with the animal of arbitration because I think Tribunals
22 are reluctant to decide cases based on adverse inferences purely based on bad conduct of the
23 Parties. And I think there is a lot to be said in terms of... in terms of Tribunals having greater
24 flexibility in relying upon conduct of the Parties, making certain conclusions at the time of
25 final adjudication and imposition of costs. At least certainly in the domestic arbitration
26 context, there is greater scope for Tribunals being a little more proactive on those issues.

27 And the second, of course is a matter of professional conduct and I think there is again, in
28 obvious case of dilatory tactics. You would see the Tribunals would not come out so heavily on
29 the conduct of a lawyer who's resorting to such tactics, even if they are *ex facie* contrary to
30 rules of professional conduct, but you resort to the same tactic before an Indian court for
31 example, if you try to file a challenge or an order which is otherwise seek an order in a civil
32 action with respect to arbitration which is otherwise impermissible. You would see that courts
33 would come down more heavily than Tribunals. So, two points, I think greater reliance on
34 adverse inferences in final adjudication based on bad conduct, and I think greater censure

1 associated with bad conduct of lawyers would, in my view, go a long way in improving the
2 ecosystem.

3 **ALIPAK BANERJEE:** Thank you. Let me now quickly bring Sae Youn on the discussion. So
4 she has two hats, as we all know as a Counsel and as well as an Arbitrator. This question is
5 more from the Counsel perspective. How do you balance duty towards the Tribunal versus
6 client instruction, especially if you have a Respondent's brief and if you have to pursue delay
7 or aggressive procedural tactics, where is the balance? And if you have any potential war
8 stories, we would love to hear.

9 **SAE YOUN KIM:** Thank you. Good afternoon everyone. It's so nice to be here and being a
10 part of the Indian ADR Week. I thought about what to say regarding that question and actually
11 I think, I'm always in a position where I have to fight between my obligation to the Tribunal
12 and obligation to the client. And Korean clients, as you might know, are no easy clients. They
13 want us to be very, very aggressive. So, what I need to do is to figure out what is my client. Is
14 my client the company or is my client a particular person in that company who gives me actual
15 instructions, who does not know the consequences of such bad behaviour that would go
16 against his company's interests? So, that is one of the lines that I draw.

17 And the second line would be what is the purpose? Is there a genuine purpose that we need to
18 delay these proceedings because of something really genuine or is it just delay tactics? So, one
19 sad story which happened to one of our clients was that the client had to really change the
20 Counsel and that happened in the eve of the hearing, and that was because of the dispute that
21 they had with former Counsel. So, they had to change the Counsel. Of course, that did not get
22 really well absorbed by the Tribunal, and the other Party was very happy saying that this is like
23 the worst delay tactic that you see. So, we ended up... our client ended up paying for the hearing
24 costs as a sanctionary, you know, the disposition by the Tribunal, but in that case there really
25 was a reason but I think the client was not well advised enough to tell them... tell the Tribunal
26 what the reason was. So, those might be the two lines that I think I would draw between what's
27 not allowed and what's still allowed.

28 **ALIPAK BANERJEE:** Thank you. I think we have seen, I mean in the recent past, early
29 determination, summary judgment, summary trial judgments, bifurcation of claim, and the
30 list goes on. So, I think where is the fine balance is always a question. But moving on Yoshie
31 San. So we all know of IBA guidelines on Party representation. It's a little old, it was formulated
32 in 2013 and broadly, it covers communication with Arbitrators, document production witness
33 and experts conduct and remedying the misconduct. But in the current context, my first
34 question would be: is there a need for a harmonised conduct or are we better off being
35 governed by the jurisdiction where the lawyer or the Counsel is qualified? And if we are looking

1 at a harmonised conduct, is there a need for revamping the system? Because a lot has changed
2 since 2013, especially in the context of threshold to pre-plead fraud, corruption, electronic
3 evidence, evidence generated by AI and the truthfulness of it or in fact, use of technology.
4 Happy to hear your perspective.

5 **YOSHIE MIDORIKAWA:** Thank you, Alipak. Thank you very much for having me today.
6 I'm so glad to be here as part of India ADR Week. I practice mainly in Japan doing litigation
7 and international arbitration, so I'd like to add some perspective from civil law, particularly
8 Japanese lawyer. About the law of IBA Party representation, I wonder whether the guideline
9 could follow the similar path, like the guideline of taking evidence or conflict of interest.
10 Almost every time I'm representing a client, at least taking the evidence or conflict of interest
11 rules, at least to be implemented in the particular arbitration. But IBA Party representation
12 guidelines, I, yeah, sort of at least agreed between the Parties, probably because it is old, but I
13 don't know the exact reason, but other maybe the rules should be updated as Alipak said that
14 now, we are using AI technologies and third-Party fundings are coming in. Some of the
15 corruption issues, fraud and also, I want to give some difference between Japanese Ethical
16 Rules and International Arbitration Rules. So, these kind of things should be considered again
17 probably because it's already spent more than 10 years once the IBA Party Representation
18 Guidelines were implemented.

19 And I want to add a little bit about the delay tactics that we are in Japan, the Parties do not so
20 much use delay tactics by submitting extension of deadlines or providing so much evidence,
21 but they want to make arguments again and again until the court prohibit to it. So, in Japanese
22 proceedings, of course the judges has the authority to control the proceedings, but the
23 arbitration is based on Parties agreements and they are from the... Parties are from all over
24 the world. So, we need to find the really difficult position, but we need to find the harmonised
25 position between Civil law tradition and International... sorry Common law tradition. So, this
26 is... yeah, my thought.

27 **SAE YOUN KIM:** If I may. As I said, I was a member of the IBA Arbitration Committee and
28 when the Party Representation Guideline came out in 2013, in 2014, the 17th Arbitration Day,
29 IBA Arbitration Day was held in Paris. And it was held on a Friday which was a Valentine's
30 Day and we had the last session that discussed this very guidelines and I think some of you
31 may have been there and we called it 'Valentine Massacre' because there was a lot of fight
32 between Civil law lawyers and Common law lawyers and a lot of Swiss lawyers who are my
33 friends ended up, you know, really putting a very, very strong oppositions. Because some of
34 the notions in there are just too alien to Civil law traditions. And as a result of that or at the
35 same time, the Civil law lawyers ended up making the Prague Rules regarding document

production and that didn't work either. So, the Party Representation Guidelines and Prague Rules, although they were there at the similar time and then people were discussing it a lot, we do not really see them, we did not really see them launch. So, I think it's about time that we add new real problems that do not differentiate the treatment either in Common law and Civil law and make a new Party Representation Guidelines that would really help the big, big problems that we are facing these days.

ALIPAK BANERJEE: Thank you. Now let me bring the client in the picture. So, Mr. Singh, how do you balance it? So, more specifically, I mean when there are issues before you, how much of it is guided by the management expectation and what is the role of a lawyer? Because surely you would be advised by a lawyer, how do you sort of draw a fine line?

AJAY PRATAP SINGH: Thank you, Alipak. So, my view is more from the industry perspective. Being a General Counsel, this role is very critical, it acts as a bridge between the external Counsel and the management. It is not the only external Counsel. Their view is important. In a corporate, the view of the Risk Management Committee, many times the Audit Committee and the Board is also important. So, as a General Counsel, it is important that they should connect with the external Counsel, take their view what are the various options available, which is the right strategy, what are the consequences also attached and then present it before the Board or maybe the Risk Management Committee. Many times I have seen that if there are more than one external Counsel in a particular matter. There may be diverse view even or they will not be on the same page. So, as a General Counsel it is important that they select one of the right strategy and then take the management into the confidence. This is more important from the risk management perspective like if so, if there are any inherent risks in a particular strategy, obviously the Risk Management Committee also need to be are kept in the loop. This should be properly documented from the governance standpoint.

Now I have seen many times the Counsel like in a particular situation, they can suggest some strategy that may involve some delaying maybe they would like to see what the... maybe or they may be like to gather more evidence, this is the written submission filed by the other side. So, I think if the Counsel is suggesting that strategy, as a corporate, if you are acting within the framework of the law and the ethical principles, there is no harm in delaying that because many times, it happens like I can give the example of the shaadi.com where the Arbitration Agreement talks about the particular jurisdiction. There are certain issues are not are not arbitrable that is subject to the NCLT jurisdiction . So, even if your Arbitration Agreement talks about something and if as a corporate you need to take the call, that call should be taken as long as it is within the framework of the law. So, as a General Counsel, I think this is important that the General Counsel should evaluate all the risks. At the call, whatever the call

1 is taken, that is an informed call, it is properly documented within the organization and also
2 the risk Management Committee kept in the loop.

3 **ALIPAK BANERJEE:** Thank you. So, moving on to our second topic, Witness and expert
4 preparation, coaching or corrupting the evidence. So, first let me get the perspective from
5 Yoshie San, especially from a civil law jurisdiction, so the blurred line between legitimate
6 preparation, which is sort of to familiarize someone with the witness testimony process or
7 procedure and coaching, which would be shaping the substantive testimony, where is the line?
8 Where is the drawing line? What have been your experience in the vast majority of the cases
9 that you have done in your career?

10 **YOSHIE MIDORIKAWA:** Thank you. I think that the practice of domestic civil litigation in
11 different jurisdictions can have a significant influence on the Counsel in international
12 arbitration. So, I'd like to share some observations about witness examination and witness
13 preparation in Japan first. The first one is that the witness examination in Japanese litigation
14 is generally very short, very-very short. The Japanese judges tend to determine the case
15 primarily on the basis of documentary evidence and it's really poor; from my experience, it's
16 really rare that the judge change their mind through the cross-examination. So, their view is
17 already determined before the cross-examinations. And it is therefore, it is unusual for the
18 examination of a single witness to take like a single day, full day. In Japan, it's usually limited
19 only a few hours.

20 The second thing is that the using expert witness is uncommon in Japan. So the experts, the
21 quantum expert or those kind of expert is not so established as a profession in Japan yet
22 because Japanese litigation do not require quantum damage expired. But now, many Japanese
23 companies are using arbitration and they now understand the importance of witness, expert
24 witness. But in Japan, we don't have that kind of process. So, sometimes Parties, Japanese
25 Parties have concern why we need to appoint in addition to a Counsel in Japan and
26 international Counsel, then expert and those kind of things happen.

27 The third feature is that witness preparation is in Japan generally accepted, maybe in Common
28 law jurisdiction, the witness coaching is a little bit more flexible, I understand. If I'm not
29 correct, please correct me. But in Japan, it's a civil law country; generally witness preparation
30 is permitted. I observe the this is because the witness... a witness examinations time is very
31 limited and most witness has no prior experience sitting as a witness. So, if we don't have a
32 preparation for the witness, probably the very limited witness hearing will not be done
33 efficiently. So, to the sake of the efficient and a proper examination, the potential witness
34 should be prepared for the novice atmosphere or the expected opposing Counsel's brutal
35 questions. So, from these backgrounds in Japan, it is considered that Counsels are expected to

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1 prepare for the witness. So, if you... we don't do that, it would cause some problem as a Counsel
2 of ethical duty. This is my experience.

3 **ALIPAK BANERJEE:** Thank you. Mr. Pachnanda, let me bring you to the discussion. You
4 have appeared in multiple cases across various jurisdiction. So first, what's your perspective
5 on coaching versus corrupting evidence, and how do you go about preparing the witness? And
6 more importantly, would you have a different approach to cross-examination if, for example,
7 you are opposing a large firm from the US where there is a certain likelihood that the witnesses
8 would have been prepared in a particular way, how do you go about strategizing for those
9 matters?

10 **GAURAV PACHNANDA:** Thank you, Alipak. Of course, I will speak more from a Common
11 law perspective, and within the Common law view on witness preparation, there is this one
12 extreme of the US where it is not only permissible but in some situations might be a breach of
13 professional duty on the part of a lawyer to not have prepared a lawyer or prepared a witness
14 or coached a witness or trained a witness for an evidentiary hearing. And then there is this
15 other extreme which is closer to the view that, I take as an Indian lawyer, which is the English
16 law perspective, where other than assisting the witness by making the witness familiar about
17 the process of cross-examination or of the evidentiary hearing, there is nothing further that is
18 permitted and in some situations might be professional misconduct, in terms of coaching a
19 witness while giving oral evidence. See, unlike Criminal law in matters of commercial disputes,
20 as it is, there is greater weight attached to documentary evidence and oral evidence is of limited
21 value. In some situations, it can be significant value but generally, it is of limited value and
22 whenever it is assessed, it is assessed in the context of the documentary matrix of facts that
23 have emerged. In such a situation, personally, I believe that it is imperative for oral evidence
24 to be sanitized and not be coloured by any form of preparation and because at least when I'm
25 before a an English lawyer or a Common law Arbitrator, I feel that there is a certain degree of
26 suspicion when Tribunals pick up that the fact that the witness is coached and the evidence is
27 not entirely sanitized, you know.

28 So, from my perspective, both ethical and in terms of reaching the truth, I think there is limited
29 value that is associated with coaching a witness or preparation of a witness, to the extent it
30 involves familiarizing a witness about the process of an evidentiary hearing, it should be okay.
31 From an Indian law perspective, I don't know how many foreign lawyers here are aware. Senior
32 advocates are required to conform to an old English regulatory position of Senior advocates
33 not being permitted any advice on evidence. So, other than receiving assistance with cross-
34 examination through a Solicitor, senior advocates are not supposed to express a view or be
35 involved in preparation of evidence that is going to be placed before a Tribunal, which makes

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1 it much more difficult for a senior advocate to be involved in any kind of witness preparation.
2 And to be honest, even in terms of familiarizing a witness, it may not be permissible as a matter
3 of Indian law and practice for a senior advocate to be involved in that aspect.

4 There is of course, the other sort of specific species of evidence which is expert witnesses that
5 we deal with and in most situations, experts who are giving evidence on a certain technical
6 aspect of a dispute, including quantum, would have been involved right from the beginning at
7 the stage of preparation of a case. And I think most Tribunals are likely to view them as experts,
8 but yet a blend of an expert and a fact witness, a witness who's actually been a consultant in in
9 preparation of the case and in those cases it is, again of in my view, it is again very important
10 for lawyers both under English law and under Indian law, to restrict their role to only assisting
11 the witness with clarifying what they are trying to say and steering them away from irrelevant
12 issues if those are being dealt with in the report.

13 I feel there is one more aspect that could perhaps assist us more, and I think that is greater
14 clarity about how the Tribunal would want witnesses to be dealt with in terms of how they
15 should be prepared for evidentiary hearings. And I feel that there is a trend now, of a lot of
16 domestic Tribunals in India, at least former Supreme Court judges, I've seen this in at least
17 three big arbitrations, where they would give detailed instructions as to how much of a role
18 that they would expect Counsel to play in preparation of a witness. Some of them make it
19 clearer that they would they are willing to be a little more flexible and some of them would
20 draw their lines very, very clearly. But I don't sit very much as an Arbitrator, but whenever I
21 do occasionally, I feel that because of the background where I come from and my training, I
22 would look at a witness who's been prepared with a lot more suspicion. So, therefore, if I am
23 against a US law firm and I can bring it out in cross-examination that the witness has had the
24 help of his lawyers in preparing for evidentiary hearing, I'm able to make the best use of that
25 during cross-examination.

26 **ALIPAK BANERJEE:** I have a follow up question. So, we are also seeing a trend in many
27 international cases where there's an extended line of cross-examination which may not be very
28 relevant to the matter, but they are being asked so that the Arbitrator reads the file. So, where
29 is the fine balance? I mean sometimes you object saying that this is not relevant, but given that
30 it's already part of the record, they take that opportunity to educate the Tribunal. Yeah, I was
31 wondering if you had any views on that?

32 **GAURAV PACHNANDA:** I have a very clear view on it and I'm very glad that you did ask
33 me that question. Traditionally, as a rule of cross-examination, perhaps it is not a good idea to
34 draw attention to your case through a series of questions which are making the Arbitrator go
35 through the case and understand what your case is. Traditionally, that was not the way and it

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1 was always focused on extracting specific admissions and then trying to make submissions at
2 the time of final hearing. The difficulty, as I said, is that over the last one decade, I have seen
3 the Tribunals would be so busy, would not have had an early engagement with the dispute.
4 Therefore, if I was to turn up at a hearing where I know that the Tribunal has read up all the
5 papers, I know that I would be irritating the Tribunal if I was going to ask questions for the
6 purpose of drawing attention to relevant documents during the course of cross-examination.
7 But I know of several excellent Arbitrators, some of them English judges, some of them from
8 Singapore, where it is fairly accepted that you could not or that it is quite possible that the
9 Tribunal has not engaged with the entire case or all the documents placed before them to a
10 significant level, and they would allow you fairly decent flexibility in arguing your case through
11 cross-examination. So, as I said, a purist view would be that that is not what cross-examination
12 is for, but I think it all depends on what kind of a Tribunal one is before and whether there is
13 a need for drawing attention to relevant documents and assisting the Tribunal with drawing
14 attention to your case and the relevant documents through cross-examination. If there is a
15 mismatch between how well prepared the Tribunal is and what you're doing, you're going to
16 have a horrible time, and if there is no mismatch and you've understood how the Tribunal,
17 how well the Tribunal is prepared at the time of evidentiary hearing, it will be a breeze. That's
18 my view.

19 **ALIPAK BANERJEE:** Let me turn to Sae Youn. There are many expert friends in the room,
20 please don't get disappointed. I mean, this is just a question. So, what is the trend now? I mean
21 Party-appointed experts, is it genuine independence or an extension of the Counsel advocacy?
22 And second, what's your view on Tribunal-appointed experts, how commonly is it used?

23 **SAE YOUN KIM:** Okay, before I go into the expert issue, let me just add one more thing
24 regarding cross-examination you should. What we tell the lawyers who are beginning when we
25 are training them how to cross-examine, examine a witness what we tell them is always think
26 about your audience. So, in international arbitration, your Tribunal may be all Civil law
27 lawyers or Common lawyers or a mix of them, that is very important. I still remember an
28 anecdote told by a very renowned Arbitrator in a big conference some years ago, he said there
29 was an experience where an English KC was really, really artfully cross-examining a witness
30 and the witness fell into what he called a cobweb and so, the whole thing went very
31 successfully. And so he was really looking at that performance and was very deeply touched.
32 Do, during recess he asked his Civil law, Co-Arbitrator, what did you think of that and the Civil
33 law co-Arbitrator said, what was that? You know that man was telling a lie all along. So, it's
34 the concept of who is accepting that performance in front of being made in front of the
35 Tribunal that is important.

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1 And I think, it also applies to expert evidence regarding experts, Party-appointed experts. It is
2 no secret that they cannot be neutral, truly neutral. If you are truly neutral, no Party is going
3 to really get your help. But there is some safeguard that is put into place because experts are
4 experts, and they are not your factual witnesses or Party or your advocate. So, experts help you
5 in building your case, like just mentioned, and they also help you these days in forming the
6 document requests because Counsel or Parties are not experts in that field of expertise. But
7 they do abide the Tribunal's mandate, they do sign a declaration that they will be impartial;
8 they will their job is to help the Tribunal and not the Parties. And I think that professional
9 obligation actually makes the expert stay within the arena of expertise rather than become an
10 advocate. But that is also a very fine line, and I think in doing... in getting expert evidence, you
11 also have to think about the Tribunal who is looking at that expert testimony, to think about
12 what they would take out of the expert report as well as the testimony.

13 When it comes to Tribunal-appointed experts, we see them in Investment Treaty arbitrations,
14 but in commercial, I personally haven't seen any in International Commercial Arbitration yet,
15 maybe because my experience is not that long, or maybe in the region where I practice we don't
16 do that. But I heard that it's very different in Indian arbitrations regarding the use of Tribunal-
17 appointed experts, maybe.

18 **GAURAV PACHNANDA:** I mean, I see less... I'm sorry I'm interrupting. I see less of
19 Tribunal-appointed experts, and I think we are leading to a situation where we'll see more and
20 more being appointed by the Tribunal because while the Tribunals in India are looking at
21 expert evidence as a view on a certain technical aspect that is being placed before them, I think
22 there is increasing consciousness and awareness about the fact that these are Party-appointed
23 experts and there is a blend of a role of a consultant and an expert that they are discharging.
24 So, in at least one case recently, which was of immense like significant value financially, I saw
25 that the Tribunal was disbelieving the experts placed before them by both Parties and
26 eventually they appointed their own expert who they thought would be very independent.

27 So, yeah, I think there is limited value for expert evidence adduced by the Parties and a word
28 of advice to my friends who have come here and who have a sort of a professional practice of
29 appearing as expert witnesses. I think it is also very, very important in terms of a reputation
30 that an expert witness enjoys in a market. So, a witness who's perhaps appearing as an expert
31 on matters of quantum, if Tribunals over a series of arbitrations have concluded that this is a
32 fairly independent person and is not necessarily toeing one Party's line in all situations, that
33 reputational advantage eventually translates into greater credibility as well.

34 **ALIPAK BANERJEE:** Thank you. Now let me get the client in the discussion. So, this is a
35 very debatable topic, right? So typically, the fact witnesses would be from the company. How

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do you... again, I mean create the balance. So, let me start from the basic, right? How do you go about deciding who will be the right witness? Of course, familiarity with the subject and personal knowledge is of course, very important but in terms of strategic importance, so, how is the finding done? And number two, again the role of the Counsel, how are you guided in that process because the deposition, the testimony will ultimately have a huge impact on the overall assessment of the case?

AJAY PRATAP SINGH: So, thank you, Alipak. As you rightly said, for a corporate, the stake is very high. So generally, without getting into the technicalities of educating a Witness or coaching a Witness, I think in a company or maybe in a manufacturing setup like the company of our size, the role of witness or the expert is very much important. So, generally our approach in any dispute will be not to create or fabricate the witness, rather the people who are involved into that particular transaction, if anything goes wrong, there is a breach of the contract, I think those people will be the right person to depose as a witness. Now in many cases, we have seen in these type of... like the where the a lot of technical things are involved. The people are the technical, they know their subject matter better, but they don't know the legal processes. So, here comes the role of the legal Counsel and maybe the external Counsel also. So, whenever the occasion comes, like when you need to prepare the witness, it is important the witness understand the legal processes, how they need to articulate before the Arbitrator or be the courts also.

And similarly in case of experts also because in a commercial transaction the role of the expert, the expert witness is very, very much important, apart from the witness because those people know the technicalities. So, it is important for a General Counsel that to explain, maybe the entire case what is their role, what they are supposed to contribute as an expert, and no doubt because for an organization, the stake is very high. So, one should not create the witness or the expert; the people who are reliable, who are credible or maybe the people who are independent. I think the organization should prepare them as a witness and then the General Counsel can coordinate with the external Counsels and take the matter for what I think. This will be my take.

ALIPAK BANERJEE: Thank you. Now let's move on to our third subtopic; use of a third-Party funding and third-Party funding in international arbitration and the ethical issues around it. First we'll talk about third-Party funding and then we'll move on to AI. Yoshie San, my question to you would be what are the ethical issues in third-Party funding, in particular, should funding be disclosed before the Arbitral Tribunal? I know several institutions have now codified some part of it, and I'll draw a reference to the MCIA Rules in a minute. Second, does funding lead to an unfair advantage in the arbitral process? So, before I request you to respond,

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1 Rule 37 of the MCIA Rules, it categorically says that if you are funded, then you must disclose
2 before the Arbitral Tribunal or if you get funded in the process of arbitration, within seven
3 days from the date of the funding, you will have to disclose and this is a mandatory
4 requirement under Rule 37. Over to you, Yoshie San.

5 **YOSHIE MIDORIKAWA:** Yeah, thank you, Alipak. So, let me start with the Japanese
6 situation. There is no requirement for a Party to disclose the use of third-Party funding in
7 arbitration. And I understand that Singapore or Hong Kong, those countries have legislation
8 which Parties require to disclose the use of third-party funding in arbitration. And as Alipak
9 said, there's arbitration rules like MCIA and ICC have other provisions on disclosure. And I
10 support this direction generally because there will be potential issues regarding the use of
11 third-Party funding, including conflict of interest issues or the Counsel may consciously or
12 unconsciously think about the interest of funders, if they are working together again and again.
13 Those kind of things may happen, but without disclosure rules, no one can identify whether
14 they need to consider the ethical issues in that particular arbitration or not.

15 So, and as Alipak said that but the disclosure may create another issue; the using of the funding
16 may send the signal to the Tribunal that, oh, this is a good claim because yeah, it's dependent
17 on the funders, but their scrutiny is a very, very intensive, maybe only a few percent of cases
18 can be funded and for example, the listed third-party funders are disclosing their track records.
19 And for example, some companies have a great track record like 90%, over 90%percent of their
20 claim, funded-claims were successful. If Tribunal see that kind of numbers obviously, yeah,
21 it's a strong signal to the Tribunal. So, this is difficult problem between sending the message
22 and if it's disclosed. And if it's not disclosed, no one can handle the ethical issues. But I believe
23 that disclosure is the healthy way to identify the issues around third-Party funding.

24 And I'd like to add the current situation in Japan. In Japan, third-Party funding is a booming.
25 Many international players are doing marketing and many large Japanese companies started
26 using instant, sorry, using third-Party funding in international arbitration, usually offshore,
27 outside of Japan. But the problem is that no legislation is made and no support or... no support
28 or non-support of Bar Association is made. So, it's is vague situation that what kind of
29 arrangement are permissible under Japanese law and what kind of arrangement are not. And
30 some existing rules like ethical rules for practicing lawyers in Japan have some relevant rules
31 like lawyers cannot share their fees with third-parties or the Party's Counsel should consider
32 the legitimate interest of the Parties, not funders. Those relevant rules are existing but we
33 need, we, including me, strongly waiting for the clear legislative solution for this case. This
34 issue because more Parties are using third-Party funding and if the government deny the

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1 permissibility of third-Party funding, maybe the Japanese companies have less access to
2 international arbitration. Yeah, this is the situation in Japan.

3 **ALIPAK BANERJEE:** Thank you so much. Mr. Singh, from a client perspective, you had a
4 very interesting perspective on disclosures insofar as third-Party funding is concerned or
5 informing the relevant stakeholders. Your perspective?

6 **AJAY PRATAP SINGH:** So, I think for a corporate, the third-Party funding is very much
7 important. You take a instance of infrastructure company, for example. There are a lot of
8 money may be stuck in the awards, they need the money for the award they have already
9 provided in their Books of Accounts. Now if really they have the merit in their case, they need
10 the funds. So, I think the third-Party funding should be there, and it is very much important
11 from the economy perspective also. I think you will bring the investor into the company or
12 maybe the Forex into the country.

13 But there is another side of it also like: I think there is no law specifically dealing in India with
14 the third-party funding, but there are certain legal nuances also because the awards that may
15 be in your books as a current asset and that may be hypothecated to already to some bank. So,
16 if you wanted to create or get some third-Party funding to fight the litigation, maybe you need
17 to take the consent of the creditors. And similarly, maybe if you cross certain threshold, then
18 maybe under the Companies Act, you need the approval of the shareholders also for the
19 purpose of third-Party funding. So, these are certain nuances, but I think third-Party funding
20 is a good idea and rather the government should make the law on this particular subject.

21 **ALIPAK BANERJEE:** Thank you. Moving on, let's discuss a little bit of AI because the panel
22 is sponsored by Jurisphere and then we'll see the demonstration towards the end of the
23 discussion. Do you expect your lawyers to tell you that they are using AI? Do you... is there the
24 expectation that in the engagement letters that you sign with them, they categorically explain
25 that they will use AI? Number two, what is the sanity check that you're looking from lawyers,
26 so that they are not creating documents or not creating evidence because ultimately, if there
27 is a wrong instance besides the lawyer, the company's reputation is also at stake? So, how do
28 you sort of balance it as an in-house Counsel?

29 **AJAY PRATAP SINGH:** Me?

30 **ALIPAK BANERJEE:** Yes.

31 **AJAY PRATAP SINGH:** So, use of AI, I think we use the AI like for us it is very much
32 important like. So, whenever you get some award obviously you need to brief your
33 management, your Audit Committee, so be you because like it's very difficult if you got the 200

or 300 page award and in the evening only you need to brief your maybe the Board members, you need to use AI. Now that this is the important question, there are some case laws also in this subject whether the use of AI many times, it may be unethical also. And there have been I think there has been one case law also where some Counsel gave the some wrong citation or some facts that was not existing. So, I think it is very much important that AI should be used, no doubt about it. AI, the technology is going to facilitate, be your in-house function or maybe while dealing with the Counsels but it should be the fair use of AI, there should be proper disclosure and AI should not replace the human judgment or maybe the judgment of the Arbitrator while passing any award, so yeah, that's all.

ALIPAK BANERJEE: So before I come to Gaurav sir, whether to disclose or not to disclose is a larger debate, So, we have had Singapore the Silicon Valley Arbitration Institution, the guide which says disclose we currently have an IBA task force on use of AI in international arbitration, we're looking at... I'm part of that task force. We are looking at a soft law. In couple of the months, it they have been working for a year, we'll see ultimately what is the recommendation. But disclosure may always not be a solution, that's one. Number two yes you're right across the world there have been umpty number of cases where lawyers have been sanctioned. I'm told that someone in the UK, they maintain a blog of all these fictitious cases where lawyers have been reprimanded. Some of the jurisdictions have also created soft law like for example, Singapore High Court has come up with a very nice rules where they say that ultimately the buck stops at the lawyer. They will have to be the custodian to ensure that what gets filed through use of AI, that is proper and you cannot create evidence using AI. So, that's where the trend is but Mr. Pachnanda, if you had a view?

GAURAV PACHNANDA: You know, there are two aspects which as particularly as Indian lawyers, we should always be mindful of. One of course, I mean you've mentioned several issues that are related to the use of AI and disclosure, but I think one aspect that as lawyers, one must always be mindful of is the aspect of confidentiality. So, in the sense that use of AI, as a lawyer, they would be broadly, in my thought, they would be broadly four stages: you absorb facts, you reflect on them, then you apply the law and you come up with legal propositions. To the extent one is using AI for the first two stages absorption of facts, processing the facts, I don't see any ethical and jurisprudential concerns other than issues of confidentiality. On the other two stages, there are concerns because does that overlap into the very aspect of lawyering: is it right, not right? I'm not commenting on these two issues, but on the first two issues there will always be concerns regarding confidentiality.

But there is a more interesting issue that has emerged out of some recent US litigation and US decisions, where the very use of AI by even in-house Counsel, for the purpose of processing

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1 facts has resulted in depriving the cover of privilege. So, I think that is an additional concern
2 as to what would happen to documents that should otherwise be treated as covered by
3 litigation privilege or lawyer's professional client privilege, if they are... if there is use of AI and
4 an AI platform has had access to all of those documents and has used those documents. I think
5 those are two additional concerns that will have to be looked at. But in the Indian context, I
6 think we are a stage behind the rest of the world, including the US, and I think the primary
7 concern would be out of these four stages, which are the stages in which you should be okay in
8 using AI and what are the sufficient safeguards that one should deploy, so that either the client
9 is a you know, either the client is not misled or a Tribunal or court is not misled.

10 **SAE YOUN KIM:** One more, aspect to think about AI that is being discussed now is the use
11 of AI by Arbitrators; how much of that will the Parties be able to accept and how much of that
12 the Arbitrators should not do. So, we are... all institutions are currently discussing that issue
13 and the disclosure of the Arbitrator about what AI he or she is using and for what purposes.
14 And there's actually even discussion about whether the Parties and Arbitrators should all be
15 using the same AI. So, that they will not be... they will have the equal opportunity and equal
16 weapons, but that that is also something that is being discussed, I just wanted to raise that.

17 **ALIPAK BANERJEE:** So, there are... in my view, there are two other larger issues one is
18 bias by the LLMs which crawl the information and we can talk about it for a day. I mean this
19 is a very interesting topic. The second in my view, is also access if you have a law firm with
20 5000 lawyers which is 50 years old, the data which they have and if AI model is to be mirrored
21 on that, they will have sophisticated information as compared to a smaller law firms, it's all
22 about data, right? So, from an ethical perspective, that's also a debate. There's no clear answer
23 which way this will move but people are discussing that. But in the interest of time, let me
24 move to the fourth subtopic; the Arbitrator as gatekeeper of ethics. So, Sae Youn, my question
25 to you would be, we know it that there are many Arbitrators who get appointed because of
26 known views expressed in prior awards or scholarship; is that Party autonomy at work or a
27 conflict dressed up as expertise? What's your experience from a commercial arbitration as well
28 as investment treaty arbitration because we see this more a clear demarcation between
29 investor nominee and a state nominee?

30 **SAE YOUN KIM:** I would say both notions are correct, but there is a careful distinction that
31 needs to be drawn. It is not that the Arbitrator have a known view. Almost every experienced
32 Arbitrator would have a view. And if we start disqualifying the Arbitrator because of a known
33 view, then we won't have the arbitration ecosystem anymore. So, there has to be a line that
34 needs to be drawn. And the real question is whether that view is actually tied to the particular
35 case that he or she is working on, meaning if the view is not tied to a particular case or the facts

of that particular case then it's generally accepted that a view academic or otherwise legal, you know, conceptual views are fine. And actually that is the reason we are going after... going to choose that Arbitrator for this particular case. Is it black letter law or is it more to the... you know, you know, the equal equity type of decision? That's something that you look for in an arbitration. But if it's tied to a particular case, repeat appointments on the same one or a symmetry of information, that is going to raise issues.

But when it comes to commercial arbitration, the trend is to really see it towards or decide in the favour of Party autonomy. There is a very famous case, *Halliburton vs Chubb*, where the English Supreme Court said, you know, there was this repeat appointment of this particular Arbitrator in that field which involved Respondent's repeat appointments. But because it was a reinsurance market which was so small and there were only a number of people who would be well respected in that field. So, even if some of the later appointments were not disclosed by the Chairperson, then the court found that that would not really raise the concerns of a fair-minded observer. So, that was a very unique case and a lot of institutions filed their ideas because of the importance of that decision. But that was a commercial case and that involved a very small particular area of law.

Although a small number of people do the arbitration when it comes to investment arbitration, the case is really different. If you have a sheer number of same cases about same treaty, same for example, the Energy Charter Treaty because you were counselling so many cases regarding that treaty, you do not get to be the Arbitrator. So, when it comes to Investment Treaty arbitrations, the rule is more strict and I think it's right that it should be more strict because it really concerns the public welfare of a state as well as the investors legitimate rights. But why is it so different, if we get into that discussion it's going to take a whole day, so let's stop here.

ALIPAK BANERJEE: Thank you. So, at this point, I'll refer to Rule 12.4 of the MCIA Rules where irrespective of the Parties agreement, in a three-member Tribunal, MCIA always appoints the Presiding Arbitrator, in my view, I think there is no other institution which has a similar framework, but this is something to I mean, this is the uniqueness of MCIA in that sense. So next Mr. Pachnanda, my last question to you would be sitting as an Arbitrator and I'm asking this question in the context of the *Nigeria* case, which happened a couple of years back where the English courts have passed a landmark judgment. Sitting as an Arbitrator, what is the duty to raise corruption, illegality or sanctions issue even when none of the Parties they plead or where one Parties under-represented knowingly, how do you balance Party autonomy against the risk of issuing an unenforceable or a complicit award?

GAURAV PACHNANDA: Alipak, I mean, I don't sit very much as an Arbitrator, but and as a Counsel, perhaps my view might vary from case to case. But just as an arbitration practitioner

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1 who's been observing the theoretical foundations of arbitration evolving in the last two and a
2 half decades, one cannot overstate the fact that there is an overwhelming view that arbitral
3 awards must result in finality, in terms of resolving the dispute between the Parties and finally
4 deciding it. And because there is minimum intervention in arbitration, I think the obligation
5 to render an enforceable award is perhaps greater than just the will of the Parties to restrict
6 the role of an Arbitrator to certain issues and keeping the Arbitrator away from certain issues
7 that have a bearing on the final adjudication of a dispute. So, in matters where there are red
8 flags that are visible to an Arbitrator, I believe that the obligation to render an enforceable
9 award and taking due cognizance of issues of illegality, corruption and the like, including
10 sanctions, should be given primacy and greater value.

11 The underlying fact is, I believe that from what arbitration was a few decades ago, it is evolving
12 into almost a slightly different species than it might have been a few decades ago. And I think
13 there is overwhelming expectation that it should not be an exercise that is eventually rendered
14 useless and frustrated because it is an expensive exercise of going through high-value
15 arbitrations to decide matters. It is time-consuming. And if there were visible red flags that a
16 Tribunal has ignored in taking note of issues of legality, corruption and fraud, it is very likely
17 that a court would interfere in that kind of an award, even though ordinarily it wouldn't have.

18 **ALIPAK BANERJEE:** Thank you. So, we have about ten minutes for Q&A. I would like to
19 open the floor, if anyone has any questions. Yes.

20 **DR. CARSTEN VAN DE SANDE:** Let me start again. Thank you very much to everyone for
21 very interesting panel. My name is Carsten Van De Sande from Hengeler Mueller in Frankfurt
22 and London. And I wanted to come back to a question that you raised about Counsel using
23 cross-examination as a tool to present documents to the Tribunal, and I fully agree Gaurav
24 with your answer that you obviously need to be prepared for a situation where the Tribunal is
25 not sufficiently prepared. But I've also encountered this tactic in situations where Counsel
26 actually believed that the witness did not have anything relevant to say but didn't dare waive
27 cross-examination of the witness, so by default to play it safe, you turn to presenting
28 documents to the witness and trying to tell your story through the documents to the Tribunal.
29 Now that I think everybody would acknowledge is ultimately a waste of time of the Tribunal's
30 time, of the Parties' time, of Counsel's time and therefore of valuable resources, right? And
31 that brings me to my question. Do you believe that Tribunals should play a more active role in
32 helping Parties and Counsel make the decision which witnesses are truly relevant and should
33 be cross-examined and, you know, encourage them to waive cross-examination of witnesses
34 that the Tribunal does not ultimately count consider relevant?

GAURAV PACHNANDA: I agree with you. And I think that there is to be honest, not only do I think that there is greater role for Tribunals in engaging with the Parties to make cross-examination relevant. I see that happening quite a lot now in the last few years. One of the easiest solutions that arbitration lawyers had come up with was the chess-clock that we will decide on what time you we will be allocated. You waste it, it's your time and you make the best use of it, it's your time. The costs are yours, the time is yours; it is less than ideal and I do believe that there is greater scope for innovation in how to encourage Parties to restrict cross-examination only to situations where cross-examination has a primary purpose of eliciting admissions and is not purely a situation of arguing your case. That I agree with. Thank you.

ALIPAK BANERJEE: Any more questions? Okay. Okay, you have another question.

DR. CARSTEN VAN DE SANDE: If I may, one more question that came to my mind when you talked about third-Party funding. So, I mean, even in situations where a funder remains lightly involved and you know, I mean, the degree of their involvement may vary from jurisdiction to jurisdiction and proceeding to proceeding, there will be an expectation by the funder to receive some information about what's going on in the proceedings that it is funding. Does that not create an inherent tension with the confidential nature of arbitration proceedings? And how do we deal with that and should the rules, institutional rules be amended to allow an information sharing by a Party and its funder, or do we want to restrict that information sharing?

ALIPAK BANERJEE: So, I think from a confidentiality perspective, the issue would be whether you're sharing that information in your right to a fair representation or not. Because in some of the institutional rules, the exception to confidentiality is, of course, court process or sovereign process or mostly if that information is required to represent your case. So, that is the fine balance. I don't think there's a right answer, but as the institutions have picked this up very recently and trying to codify some rules around it, we'll see how it evolves but say Yoshie, if you had a view.

YOSHIE MIDORIKAWA: It's even the Korean Institution Rules KC International Rules also say that the fact that there's a third-Party funder should be disclosed. And if it is properly disclosed, then I think it will actually do away with some of those concerns because, you know, it will be clear who is the one in the next Party in the room that is actually paying for what's going on. And because of that reason, I think if there is any involvement of the funder, to what extent it may be, that extent together should be disclosed, so that the award later will not be challenged on the basis of interested person not being disclosed.

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1 **ALIPAK BANERJEE:** Thank you. On that note, I would like to thank my brilliant panellists
2 for such an interesting discussion, and I'll now request the Jurisphere team to sort of come up
3 on the stage and give a demonstration of the platform. We can exit, right? Okay, thank you so
4 much to all the attendees for giving us a patient listening. Thank you.

5 **ANUSHKA MANSHARAMANI:** Thank you, Mr. Banerjee, and thank you to the panellists
6 for a reflective discussion. May I now request you to kindly take a step ahead for the group
7 picture and then we can begin the session.

8