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## **India Arbitration Week 2022**

### **Session: How Business Financial and Technical Experts add value in commercial disputes and Arbitration**

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#### **SPEAKERS NAMES:**

1. **Aditya Singh** : Partner, White & Case
2. **Amanda Lees** : Partner, King & Wood Mallesons
3. **Darshan Patel** : Partner, PWC
4. **Geetu Singh** : Partner, PWC
5. **Sumit Makhija** : Partner, PWC
6. **Tomas Furlong** : Partner, Herbert Smith Freehills



## **Darshan Patel**

A very good morning, good afternoon depending on where you are to everyone who has joined us today for this session on How Business, Financial and Technical Experts add value in Commercial Disputes and Arbitrations. We appreciate you making time on a Monday to join us in this discussion. By way of introduction, I am Darshan Patel, a Partner at PWC and have assisted clients and expert witness services at the ICC in London, the AAA and arbitrations in India.

I've joined in this discussion with five additional speakers who have come together today to bring out multiple dimensional view on the topic, which has been emerging in international as well as Indian arbitrations regarding the use of experts in the resolution of disputes and during the arbitration proceeding. Our aim was to come forward with views from different parts of the globe and I'm sure you'll be getting a flavour of this as I introduce you to the co-speakers.

The list of speakers for this session in alphabetical order is Aditya Singh, a Partner at White & Case in Singapore, Amanda Lees, Partner at King and Wood Mallesons Singapore, Geetu Singh, Partner at PWC India Forensic Services, Nicholas Peacock, goes by Nick, Partner and Head of International Arbitrations Practice at Bird & Bird UK, Sumit Makhija, Partner, PWC India Forensic Services PWC India Forensic Services, and Tomas Furlong, Partner, Herbert Smith Freehills.

A slightly more detailed introduction of each of the speakers.

Nicholas is a Partner and Head of the International Arbitrations Practice at Bird & Bird in London. He has also previously been in the Southeast Asia, where he has headed his previous firm Singapore Arbitration Practice for a number of years, and he has enjoyed a 20 plus year career in international dispute resolution. He has been heavily involved acting on India related commercial disputes for the last 15 years. Nick has also acted for and against State Governments on commercial disputes and sits as an arbitrator on India related disputes under various institutional rules.



A quick introduction to Sumit Makhija, I am pleased to introduce him. He is a colleague Partner at PWC. Sumit will be moderating the discussion today. He is experienced in forensic services and based in New Delhi. He has over 25 years of professional experience in the areas of anti-bribery reviews and investigations, as well as assisting clients on disputes. He has handled a few of the largest anti-bribery investigations in the country, as well as representing clients in front of Government authorities both in India and US. He has also acted as an expert in cross border dispute matters.

The next I would like to introduce is Amanda Lees. Amanda is a partner at King and Wood Mallesons, who is based in Singapore and specializes in international arbitration. She acts as counsel in large complex disputes, including an investor state arbitration, brought by an Indian investor over an investment in Indonesia. Amanda sits as an arbitrator regularly and has 22 appointments as arbitrator, including an emergency arbitrator and presiding arbitrator.

And introduction to Tomas, Tomas is a member of the India team and partner at Herbert Smith Freehills in Singapore. He focuses on commercial arbitrations, and Singapore court proceedings related to arbitrations, particularly in tech and private capital sector. Much of his work involves disputes in or parties from India, as well as China and Philippines.

The next I would like to introduce is Aditya Singh, who is a Partner at White & Case, where he focuses on international arbitration matters and white-collar investigations, as well as acts as counsel in high stakes commercial and investment treaty arbitrations and has extensive experience in the Indian market. He has represented Indian companies and foreign investors in commercial arbitration over the last two years.

Next and lastly, I would like to introduce my fellow colleague partner Geetu Singh. She is a seasoned expert witness and comes with extensive experience in damage quantification in international and domestic arbitrations, valuations in litigation situations, several shareholders and joint venture disputes, and large and complex infrastructure disputes. Geetu's opinions have been tested from time to time by arbitral tribunals, regulatory authorities and enforcement



agencies. Geetu has also been recognized in the Who's Who Legal as a leading expert for arbitrations from India in our GAR.

I would like to now invite Nick to share an overview with you on the emerging landscape in disputes and arbitrations. Over to you Nick.

### **Nicholas Peacock**

Thank you, Darshan for that welcome and thank you to PWC and MCIA for the invitation to join this august panel to discuss what is a very important topic. And I would like to congratulate MCIA on convening another India ADR Week. A busy day already, I think, and a busy and full program ahead. And I understand the Chief Justice himself gave a welcome to the Week ahead. So, it's great to see this event and this Week really getting on the program and raising his profile. I think also a hybrid program, of necessity in the last few years and of choice this year. I think enables those of us who are based in Europe, as currently I am, to join albeit rather early in our day. But I hope those gathering in person will have fun and enjoy reconnecting and look forward to seeing you all at an MCIA Annual Conference before too much longer.

So, I have been asked to give some comments on the changing landscape for arbitration in India, which I have witnessed over the 15 plus years, that I have been involved in dispute resolution in relation to the jurisdiction. I think some things remain, the predominance of ad hoc arbitration, for example, which is not a problem of itself. London and Hong Kong, for instance, also have very busy and thriving ad hoc arbitration markets, but I do think the growth of institutional arbitration, which we have been talking about for many, many years in India, has been encouraging and is great news for the options available for dispute resolution for parties in India. Many institutions, of course, are making contribution, not just the MCIA, although I am pleased and proud to be connected with MCIA as a Council Member.

Many of the largest corporates in India are making use of institutional arbitration, and we also see the courts supporting it increasingly. The Bombay and Supreme Court, for example of both use

the MCIA as an appointing authority on matters in India. But other institutions should not be ignored. Of course, SIAC has done a great job of making itself an embedded part of the market in India. And I think interestingly there, in terms of recent trends, in the last few years, we have seen such overseas institutions appearing not just as seats outside India, but also to administer arbitrations within India.

And I myself have the pleasure to be an arbitrator for the SIAC on two matters recently, which had a Bangalore seat, and a Mumbai seat, which I think shows again, the growth of institutional arbitration in India and its increasing acceptability as a dispute resolution mechanism for both onshore and offshore arbitrations and besides those institutions, of course, the ICC, LCIA and many others should also be given thanks for that.

So how has arbitration changed for clients in India? Well, I have been privileged, as has already been mentioned, to act for Indian clients, while based outside India, being based in Singapore for several years, and based in London for many years now. India has always been an important component of the dispute landscape in both those jurisdictions. I think there's been progress and development over that time. It has not always been linear, but then progress very rarely is. I think it is a story of increasing familiarity of parties, counsel, and courts with the international arbitration process, and an increased trust in that process and support of that process.

Recognizing of course as we do, that international arbitration works best when courts support the process but resist invitations from parties to interfere with it. It seems a long time now, since those of us who draft arbitration clauses in relation to Indian transactions used to exclude Part 1 of the 96 Act, save for Sections 9 and 27, in an effort to try and prevent Indian courts from accepting jurisdiction to supervise arbitrations, which were seated outside India.

Of course, the 2012 decision in BALCO overruled Bhatia International, to confirm that Indian courts would not accept such invitations to exercise jurisdiction over arbitration seated outside India, but then left parties with the difficult choice of not being able to seek interim relief and

access Indian courts in relation to arbitrations taking place outside India, which of course, happily, has since been restored through the 2015 arbitration ordinance.

Now, for a while, of course, the 2015 ordinance gave India probably the fastest arbitration timetable of any jurisdiction in the world, which was a challenge, and I think, a shock to the system, but perhaps also a good one. And also in 2015, removing the automatic stay on enforcement of arbitration awards that had appeared under Section 36 of the 96 Act, I think was a sea change for arbitration in India, and something I myself had been calling for, for quite some time.

And the courts have supported the growth of the arbitrator's jurisdiction, there was a question over whether fraud was arbitrable in India, for many years, and that I think has been more or less resolved by the 2015 Swiss Timing decision which overturned Maestro Engineering. And more recently, we have seen Indian courts really taking a lead in the use of emergency arbitration, by confirming that emergency arbitration awards are enforceable in India, which I think has really given that institution and that device within arbitration, a real support.

More about expert use in international arbitration, that's the topic we are on today. It's an important component of any arbitration process. I think one thing I would say about the way this market has developed over my time in practice, is that the market for experts' assistance is increasingly global, you do not just look in your own jurisdiction. Of course, it's helpful if your expert can be down the road or in the same time zone. But I've certainly had the experience of looking around on a global basis for experts and coming up with people, the right people in the wrong time zone and making that work.

And I remember a case in Singapore, where we cast far and wide for appropriate IP expertise on a matter, and ended up finding some of it in the US, and some of it more locally. And that was in the day when people actually flew for hearings rather than appearing online. But of course, these days, it is even more convenient to look for your experts globally. And I think Indian experts therefore are a part of that global talent pool. India contains many world class experts appearing



in proceedings not just in India, but globally, and the Tribunals value that expertise. I sit myself as an arbitrator, as I mentioned, and I appear as a counsel.

And I can tell you that as a tribunal, you value the straight-talking expert help, that experts are well instructed and well positioned expert is able to bring to the process. And there are many disputes, which would be quite impossible without good expert assistance. Of course, valuation in matters, tribunals, who are more or less numerous, rely upon experts to assist them with that valuation process. But other types of disputes, I had a long running matter in relation to what is now termed negotiation damages under English law used to be called Wrotham Park, where a tribunal is asked to come up with a number that would have been reached through a hypothetical negotiation. Now that, of course requires somebody with an independent and unbiased mind to apply their expertise to the situation in question.

And also, of course, competition damages, another increasing area for expert assistance, to help tribunals or courts come up with a counterfactual in cartel damages cases. I am sure we will get onto the topic of Hot-Tubbing. In this debate, I look forward to those contributions, incredibly valuable, I think it works well. But I think it also requires a degree of energy and assistance and lead from the Tribunal to do so. And of course, also, I am sure we'll get onto the topic of virtual hearings and how that has changed the experts' role in the process. So overall, I very much look forward to the panel discussion. Thank you again for the opportunity to introduce the panel and I look forward to giving some comments later on. For now, I think Geetu I am going to hand over to you to take us forward.

### **Darshan Patel**

So, thank you Nick for setting the tone for the panel discussion. I now invite Sumit to kindly open the discussion with other speakers today.

## **Sumit Makhija**

Thank you, thank you Nick, for those opening and very relevant comments from a perspective of international arbitration. Good afternoon participants once again, good morning to those who are in a different time zone behind India and thank you for joining this session with some of the finest experts in the room. I am privileged to moderate this session, and we have over 200 participants, so really, really fortunate to be moderating this. As Nick mentioned, there has been a regular practice of engaging experts in arbitration in India and globally. It's at various stages, one uses the experts to strengthen the arbitration process.

And the experts can be financial, even technical - architects, engineers, or scientists and researchers. Let me start by posing a question to Tom and then I'll move on to the other participants on what do you believe are the attributes for which an expert is appointed, which can actually define how effective the person is? So, over to you Tom to bring those attributes which require the effectiveness, which actually displays what is how effective an expert is?

## **Tomas Furlong**

Thank you, Sumit. Well, I think this is a very interesting question. And it's always one of those quite intense stages at the beginning of an arbitration, when you need an expert and start to get the question who your expert should be, so everything gets to be quite a consequential decision. So, we feel a responsibility as counsel to get it right. And so, to think about how do I approach this as counsel. And you'll also hear in my responses, the motivations sitting as an arbitrator and so, seeing how experts come across, at the end of the day. It seems to me that there will be four different categories of quality, that we assess experts on when we do so, thinking that we're doing this or just at the back of our minds. And so, I'm going to quickly run through those.

The first, and this might sound cliched, but the first factor we look at is integrity, because an expert who doesn't have integrity is just no use at all to have in your case, a lack of integrity shows up very quickly at a hearing. And those are the experts that tribunals just don't find useful. And so

that's something that we do look out for that at the selection stage, because, there are opportunities to show your integrity during that selection process, mostly with respect somebody who was clear with us about what they thought were the problems in the case or were clear about how aspects of the evidence might be outside of their expertise.

And of course, as an expert, your reputation in the market is incredibly important. So that's the first factor. And I suppose that's a gateway factor. If you don't meet that basic integrity test, then there's no point keeping going. The second factor is obviously expertise, it's in the name of the role, but that's not an easy factor to assess always, obviously, with a quantum or valuation experts or accounting standards expert, that's a very well defined, and we have expertise. And it's quite well understood what that expertise means. And it's reasonably straightforward to work out whether somebody has the expertise that they claim to, in those areas.

But in relation to when we're going to talk about technical and commercial experts, I think that is harder to assess, whether somebody really has the right expertise. And that requires some thought, sometimes we just don't have as much choice as we would like in selecting that other category of expert. The third category is what I might call tribunal facing qualities. Now, how is this person going to appear in lighting? How clear will they be? How vigorous are they in the wake of the lights? And how well are they going to be able to ask questions in the tribunal and ultimately be cross-examined. And then the fourth category is what are called teamwork qualities.

We're always very aware that when you work with an expert, we're being on a team that's much like a law firm. A Partner is somebody who is at the head of that team, and they're an incredibly important member of the team. But I have a practice that I'd always want what I would think of senior associates on the expert side, to also be involved in the pitch process. And I'd love to understand who that person is, because I know that's what people over there will be dealing with a lot and I want my own associates to have interacted with their peers on the expert side, because we know that's an important part of that process. So, I hope that's a useful framework. It is a really important thing to get right. And it's something that Sumit can continue with.

## **Sumit Makhija**

Thanks, Thomas and absolutely, the first point which you made - integrity, which for me also for any expertise or in any cases is paramount. So, with that, let me let me ask Geetu who is, you know, who works as an expert herself. What do you believe Geetu, are attributes which make an expert effective in the arbitration. Let me also add one more dimension to the question, if you can add to that, how are these attributes changing over the years, if you can point to both the questions, for the audience.

## **Geetu Singh**

Thank you, Sumit. And I must say, I think, a very testing question for me to start the discussion on. But, Tom, thanks and I think you've really sort of simplified my job on this one. Very well said, I completely resonate, a large part with Tom, what you mentioned. So on the first part, Sumit what you're saying is, what are the key attributes. If I were to go by my personal experience, and you know, the experience of, you know, the fellow experts I've seen over a time span, I would say that taking forward from integrity, which is, of course, core.

Independence is crucial, which I think also independence and integrity, really go hand in hand, and therefore you know that's where it brings about the neutrality in the expert. So, I would say that the most successful expert, or the most impactful expert is somebody who's neutral, and governed by a very fact based, very objective approach based opinion he or she forms, and not necessarily by, one side of the story, which has been produced to him or her.

I think the second very crucial part, which has always been there, and I think even here to stay, and even as the role of experts evolve is, what is critical is the ability of the expert to understand what is the role that she or he is actually playing in the entire dispute proceedings? There are situations where, because a lot of the experts are Subject Matter Experts, I would say that, I would want to take the liberty of saying that the Subject Matter Experts, in a lot of situations, have the habit of getting say overwhelmed, you know, where opinions are being sought. And I think that

poses a threat, in the sense that, the expert may actually transcend beyond the scope of work. And I think, not really putting back the opinion to what he or she is supposed to deliver, what is relevance to context in that dispute, etc.

The last part of the question Sumit, where you said that how these attributes are changing, I think one of the key change that I have personally seen over the years, and I'm sure that my fellow testifying experts may also agree with me is that, if I were to see the selection of experts, which used to take place about two decades back, or 15 years back, or let's say decade back, there was a lot of emphasis on not so much of, as one would say, seasoned experts, but on subject matter experts, technical competence was key.

Technical competence still remains key, because I think that's really the foundation of why at the first place, you want an expert there, because you want a very technically sound opinion. But I think over a period of time, what's become very, very crucial also, brings out the difference between a seasoned expert and let's say, a subject matter expert is, where an expert who's able to strike a very fine balance between the technical competence, and at the same time carrying a very sharp ability to clearly communicate, clearly well articulate his or her opinion, high quality opinion, both in writing, as well as what they verbally deliver in a cross examination. So that would be my take Sumit, back to you.

### **Sumit Makhija**

Thank you for those comments, Geetu. And let me now, come to Amanda, to ask one the question about the evolving role of experts. Amanda, what do you believe, is, in your experience, how this role has been evolving in case of cross border disputes? And also, are you seeing any differences in the trends in Asia, versus some of the other seats of arbitration where you operate and more specifically, with the context when I say Asia to India? Over to you, Amanda.

## Amanda Lees

Thanks very much Sumit. So, I think one of the key things which has perhaps already come out a little bit in this webinar is in terms of integrity and independence. And one way in which I think our appreciation of the role of the expert has evolved is the appreciation that the expert's duty is to assist the tribunal, rather than being an advocate for the party. And the very best experts, that comes across. That they're trying to actually assist the tribunal, when they're delivering their expert report. And in terms of the way they answer the questions, and not acting as an advocate for the party. And that's why the independence, impartiality and integrity is so important for an expert. As Nick already mentioned, the other way in which it's evolving is the fact that there are a growing number of global specialist expert practices, particularly in the construction and quantum fields.

In fact, I struggled to keep up, thank goodness that Geetu has stayed with PWC, because I've struggled to keep up with how experts have moved around between a number of practices. And there's a number of new expert practices. So really, it has become a much bigger field of practice being an expert itself, compared to what it was like, even 15 years ago, and that includes in Asia, I mean, there's increasingly number of experts based in Asia, there's a number of firms set up in Singapore and doing work across Asia and globally. As Nick mentioned, experts based in Asia are appearing in courts in Australia, in the courts in the UK, not just appearing on matters in Asia. So really, Asian experts are being recognized for their expertise, and it is becoming a global practice.

I think one of the things that I've noticed both as arbitrator and counsel, is that in very large matters with sophisticated counsel, involving Asian parties, you see parties instructing experts on both technical and quantum issues. What's interesting is that for medium sized disputes, with Asian respondents, you sometimes see that the claimant has instructed an expert and the respondent doesn't instruct an expert in response. And I think this is perhaps because they're represented by this sophisticated counsel, I've seen this in some Indian matters. I've seen it in matters involving parties from other Asian jurisdictions as well.

And I think it then becomes very hard for that respondent to actually challenge the expert evidence when they haven't instructed their own expert. And really, they're missing a trick. Usually there is a basis for trying to reduce the quantum, even if you know you're going to lose at the end, there's often a basis for trying to challenge the quantum. And I think especially when you sit as arbitrator, it's sometimes a little bit frustrating when you're not so sure of that. But there's no one actually challenging that evidence. And I think that's something which it will be interesting to see how that develops in medium size disputes. Obviously, in large disputes, Asian parties are using experts just the same as everyone else in the world. But there's more medium disputes, perhaps still not so much familiarity with the value of expert evidence.

### **Tomas Furlong**

Can I add something back, I think that's a really important point. I also look at it from a slightly different angle, which is although we're kind of focusing on the experts, and the qualities of an expert, there's also the question of the instruction that they're given and the role that the experts are given by the lawyers while framing a case. We can go back to the age-old question about efficiency and the conduct of arbitrations. I think something that can happen, is that they may call the experts, they get asked to develop the case, which, as it turns out, doesn't really make much difference to the findings of the events you can make.

Because it's based on example sets of instructions, that make the opinions so narrow, that don't get into that set of instructions and opinions not so relevant, but it's important like Amanda said, that one side starts developing expert evidence. They cannot read in your own expert to respond to them. Make sure that you are taking that expert on their own terms. Even if in reality, that series of assumptions, for example, builds into what the experts saying that there'll be other ways of actually attacking it. So, we go back to that question of efficiency, and there's a real responsibility on lawyers to use experts well.

## **Sumit Makhija**

Absolutely, bang on Thomas and I think you said it right that while expertise, experience, everything is important, but also the right instructions. I think just to probably wrap this part of the discussions over the increased complexity, the cross-border transactions, and now, virtual environment are making the role of expert also relevant, and in some cases complex. I think these changing trends would necessarily help in making dispute resolution process, effective, efficient, and in some cases cost effective too.

While I'm moving to another theme, I also invite participants to please post any questions, comments, which you may have, we definitely would like to keep some time towards the end of the discussion for addressing your questions, comments.

Let me now shift the gears a little bit and move on to Aditya to ask about, what do you think are your key determines or advice from a perspective of technical quantum experts in large disputes which require far more sharper focus? How can technical and quantum experts be more collaborative? So, where you have multiple experts coming together, how do they work together? Aditya, over to you.

## **Aditya Singh**

Thanks Sumit. So, look I think Amanda and Tomas have already spoken about the onus on the experts, and counsel, in terms of providing the right instructions. But I do think that there is this inherent tension, the pressure that experts feel to sometimes go out on a limb to please the client that has engaged them. And there is therefore, a risk of coming across as a hired gun. And so, my view is that a lot of the onus also falls on the arbitrators, and there are procedural mechanisms available to them, to the tribunal, to ensure that expert testimony at the end of the day is more productive and cooperative.

And there are three things at least that come to mind, largely driven by the tribunal, which can happen at the initial stage of the arbitration, at the midpoint or before the hearing and after the hearing. The first of course, is what is called the Sacks protocol, which was proposed in a paper by Dr. Claude Sacks at the 2010 ICA Congress that happened in Rio. And the idea here is that each party essentially proposes a list of potential experts and the tribunal chooses one person from each party's list and what ends up becoming is an expert team, which is answerable to the tribunal. So that's something that can happen at the start of the arbitration.

It also takes away the hired gun concern, that people have with experts, while ensuring that parties have some control on the identity of the expert. The second way of doing this is through a mid-arbitration procedural hearing, where once the first round of submissions is complete, instructions can be given to experts to narrow the disputed issues. And specific questions can be asked by the tribunal, that they want addressed in the next round. And this reminds me a little bit of Lucy Reed's idea of a Reed retreat, which she identifies as a gathering of tribunal members before the start of the hearing, to discuss the impending hearing and to consolidate the issues. So, if there was to be a Reed retreat of some sort, then the experts could be given more targeted questions.

And the final thing that can happen after the hearing, and indeed, I do believe, anecdotally that it's done in some by some tribunals, and in some cases, is this technique of targeted homework, where once the hearing is over, and the Tribunal has appreciated the issues in dispute, and what are the separating points between the experts, the Tribunal can then ask the experts to submit an additional short targeted opinion on the specific questions, along with the post hearing brief, and even have a short additional hearing, at which the experts are cross examined again, on their new submissions. So, these are just some of the ways in which I think, the tribunal and the arbitrators can ensure that experts are working in a more cooperative fashion and are being more effective.

**Sumit Makhija**

Thanks, Aditya. So, let me also pose a follow up question to that to Amanda, that in case of large and complex disputes, particularly in the infrastructure and construction or real estate type of a sector, is there a different approach, which you as a counsel would be adopting to select and brief technical or quantum experts? Amanda to you.

**Amanda Lees**

Well, I think it's much easier to select some experts than others. Nick already mentioned this, in his opening remarks, is sometimes you need expertise in a very technical and niche area. And that becomes much more difficult. Whereas for a lot of construction disputes, as I already mentioned, there's some global firms that have expertise on the quantum side, the delay side, the programming side, and so you have a wider range of experts to choose from, who have testifying experience and are more seasoned, and so it's a little bit easier to select them. And then some of the considerations, you might want to think about whether or not there's going to be any conflicts of interests.

And there's been a couple of hops in that case, in the last few years. And, whether or not the experts, you then go to the next level, okay, they've got the expertise or the quantum expertise, do they have expertise as well, in the particular sector you're looking at? Like, for instance, if it's to do with a particular type of civil infrastructure, has that person been involved in that particular area before? And you can really drill down to find someone who is ideal both in terms of the expertise, the sector, the jurisdiction, etc. With technical experts, it can be really hard. As Nick said, they're difficult to find that. One of the questions actually that one of the attendees has asked, is whether or not there's a readily available database, from where experts can be selected and approached.

For some areas, but not all others. There are a couple of firms that have now set up, I know there's organization in the UK that can help with finding experts. I know there's an organization in Australia, it's also got an office in Singapore that can help with finding experts. There are actually people setting themselves up to do exactly this job. Because in really niche areas, it can be



extremely difficult to find, you need to throw the net often wide, look in multiple jurisdictions, because you need someone and because often, you're not going to find someone with testifying experience. So therefore, you need someone who's really got that expertise that you need, who's got the sort of deep experience in the area.

And you know that you're going to have to spend a lot of time assisting them in terms of briefing them, assisting them with how the report is presented, and how technical issues are explained to the tribunal, which I think is something we're going to talk about a little bit more later on in this webinar, and then how they go about testifying. I mean, I've had the experience in one proceeding, where we needed expertise in fire safety. And this was quite a niche area, there weren't that many experts available. And we realized partway through the proceeding, I hadn't been involved in selecting the original expert, had come on board as a bit of a change internally, and realized partway through that our expert was the wrong person. They didn't have the right expertise.

They weren't as knowledgeable as the expert that had been brought on by the other side. And we were able to fortunately, by means of a required report getting another fire safety expert, who had been identified. I think, as has already been mentioned, the importance of getting the right expert at the beginning, because changing expert mid-course is quite difficult, involves kind of procedurally working it out. But sometimes happens in these niche areas because there aren't people with testifying experience. There aren't very many people to talk about who you've seen before. And so, you really need to very thoroughly examine the person at the beginning to make sure that they're going to be able to do the job when it comes to the actual hearing.

### **Sumit Makhija**

Thanks, Amanda. That's really helpful remarks there. Tom, let me come to you with a related topic about use of professional or seasoned experts, versus occasional experts who have deeper knowledge of the subject. So, there's always a debate or question in the mind of the counsel or the companies who are appointing, that whether to use a expert who's familiar with the process versus an expert who has a deeper knowledge but may not be very familiar with the arbitration

process, who is called an occasional expert? What is your experience, where to go and what is the best way to approach this dilemma?

### **Tomas Furlong**

I think it can be really difficult, as Amanda was saying, and Nick has said, when you're looking for quite a specialist area, finding people who have that particular experience and are not involved or related to the parties, can already be quite hard. And so, finding someone who not only has that, but is a very accomplished testifier is particularly hard. So, the starting point is, we can't really design a perfect world often, when it comes to this category of experts. My personal practice is to place quite a lot of weight on whether somebody has testified at least once before, because I do think there's something really different about being cross examined, compared to dealing with other robust environments.

And I have had commercial and technical experts who have held quite senior positions so, they can be presented in robust environments, in Boards and other venues, but ultimately, when it came to being cross examined by a skilled cross examiner, weren't able to hold their own. And in a way, I think it was quite disappointing, because I feel like they really did know what they were talking about and believe what they were talking about, but they couldn't find a way of communicating that in the context of the cross examination, partly because they're louder, one example I'm thinking of, they're louder, possibly on that kind of **[inaudible 00:42:12]**.

And so, the expert became quite unlikable, which was not his personality at all. And I've seen other sort of variations of that, because ultimately, you have this challenge of not only communicating information, but doing it in a way that the tribunal finds believable and compelling. So, you do place a lot of weight on having testified at least once before, but ultimately, you have to take what's available.

**Sumit Makhija**

I think very, very relevant, I guess many times it is a challenging thing to choose an expert, but I think those are helpful remarks that to take a approach where a person has a far more experience of dealing with the process can help.

**Tomas Furlong**

I think this is also very related to this question. Amanda was talking about the example of when she'd had an expert and then when it came to, it wasn't the right expert. And I think that can happen in specific two reasons. One is sometimes we make a mistake when we appoint the experts, that was kind of lawyers. But what I've seen and this kind of pairs up to whether someone's going to be able to withstand cross examination, is sort of a creep in what's required of the expert over the course of the arbitration. So, what they end up testifying on is not really what they were holding themselves out as being an expert on in the first place.

And that's a really dangerous combination, because and often this is the expert trying to be helpful, in kind of not giving you the view they want, but sort of doing their best answer the revised question or issue that they're now dealing with. And it's one of these boiling the frog situations, where the changes have been quite incremental over time, that you kind of wake up before the hearing and realize this expert is not really an expert in their area, or certainly not an expert in the sense of being able to talk about it in a compelling way, even on a piece of paper, they still allow this kind of industry.

**Sumit Makhija**

Thanks for that. Tom this was really, really helpful. Aditya, you want to quickly provide any additional comments, or one of the topics I had in my mind was productive use of experts in case of investment treaty arbitration, and how's the maturity level of some of the states in these matters, so that we can close this one and then move to the next?

## **Aditya Singh**

Yes, Sumit I will address that very quickly. I'm conscious we're running out of time. There are some studies, no hard data to suggest that the use of experts is even greater in investment arbitration as compared to commercial arbitration. And on your second question about maturity, in terms of how states use experts, the reality is that often times it has much to do with the counsel that are involved. So, if a state has sophisticated international arbitration counsel involved, then one would hope that the right kind of expert would also get selected.

But when we're talking about treaty arbitration, one has to be conscious that in developing states, when they are involved, there are serious access to justice issues. And a number of states have frequently struggled to fund their legal defense. And that often means that they don't have the resources to engage the best experts like you, because you're more expensive.

## **Sumit Makhija**

Helpful, thank you. We are not that expensive by the way. But, once again, thank you, participants for posting the questions. Few of them, we'll try and cover in the topics as we move along. And the balance, we'll try and address within this forum, if not later through a emailer. So, moving to a little bit different topic. Geetu let me come to you and ask that, many a times the expert reports are actually based on available evidence, or what we call as a limitation. So, do you think that such reliance on limited information may pose a risk for the opinion or the report to be more theoretical in nature than actually aligned to what the real requirements of the arbitration are? So, Geetu over to you.

## **Geetu Singh**

Sure. Thanks Sumit. So, Sumit this, I've seen this has always been a very controversial area of discussions. And I think the very straight answer to this, and I will just keep it short in interest of

time is that, there is no shying away from the available evidence. And I think one has to as an expert rely on it. But what is crucial here is that it is not just the evidence, which has to be seen in isolation.

There is also the approach methodology. And experts always encouraged to apply proven approach methodologies, because a combination of the available evidence, the way you've examined the evidence, how relevant it is to the matter or case in hand, and what kind of robust and proven approach methodologies is what you apply, will actually determine how good is the quality of the evidence that is produced. So, having said that, I would say that not to look at the available evidence in isolation, of course it's the key, and there's no shying away from it. There are different ways that an expert can actually put a stress test on their opinion, which they derive in the work product, versus the evidence they've relied upon.

One has to pick cues from the practical business world, and apply back and let's say, the baseline assumptions that you take, in the procedures we adopt, one can build so many sensitivities and scenarios. So, there are several options. So, I would say that experts are always encouraged, to take it as a bundle of wisdom, and application of these multiple things, so that the ultimate work product is something that serves the purpose of why the tribunal at the first place, would have seen the relevance of an expert, and not delivering an expert report or work product, which is just merely theoretical in nature. So that's my take Sumit. Back to you.

## **Sumit Makhija**

Thanks, Geetu and now to a topic which has also been asked as a question by Mr. Prasanna. So, Aditya let me let me ask you this one. And then I'll come to Amanda for her comments. Hot-Tubbing. This is a procedure which has long been debated as to whether it's effective or not, in the tribunals to assess between different experts and complex matters, where there are different opinions. How do you see this as evolving and is it really effective?

## **Aditya Singh**

So, Sumit, for the uninitiated and to clear any doubt, the Hot-Tubbing we are talking about, is a technique where witnesses are questioned together by the tribunal and possibly by counsel, as opposed to being cross examined. And in terms of trends and how it's developed, the headline for me Sumit is that the use of the hot tub is not as prevalent as one might imagine. It's been now over 20 years since Wolfgang Peter wrote his famous piece in Arbitration International, which was called witness conferencing, which in some sense really brought the idea home to international arbitration practitioners, even though Hot-Tubbing has been used from the mid-1980s in Australia, where I believe it was first started.

But despite of some of its advantages, the reality is that the technique has not taken off in a big way, because of some of the fundamental weaknesses. The first one being that unprepared experts can get off the hook in a Hot-Tubbing situation sometimes, because they are not subjected to a searching cross examination. Second, for the process to work, it can really only work if the tribunal and the President are very well prepared in advance of the hearing, have understood the key issues and are ready to ask targeted questions. And as we all know, unfortunately, that is often not the case. And even if they are prepared, sometimes arbitrators only realize what issues most trouble them, once they've seen the two experts being cross examined.

And finally, the other problem is that witness conferencing tends to favour the expert who has a stronger personality or has better oral presentation skills, and that is often not the determining factor and that is another problem. So, I don't think it's taken off in a big way. It's not been adopted, as much as it should have. And perhaps these are some of the reasons.

## **Sumit Makhija**

Yes, thanks Aditya. I think the way I look at it and I'll let Amanda add that various jurisdictions are also looking at it differently. In some it is a little bit more accepted, like Australia versus some of

the others. Amanda, over to you to add to the concept of Hot-Tubbing and how you see it evolving and helping.

### **Amanda Lees**

Well, I suppose I have a bit of a different view to do perhaps because I am an Australian. We actually see it being adopted in international arbitrations; it's been adopted in a number of arbitrations in which I've appeared as counsel. I've also used it myself as arbitrator. I do think it's not always adopted but I do think it can be extremely useful. There are different ways of going about it, which address some of the issues that this posed. So, for instance, the Singapore branch of the Chartered Institute of Arbitrators actually came up with quite nice little guidelines and draft procedural orders in relation to concurrent witness evidence, which go through some of the different ways you can do it. So, it's not always necessary for the Tribunal to take the lead.

Often, actually, it's counsel that take the lead in questioning and this way, you can actually get those deep and searching questions that Aditya was suggesting. And I find the reason I think it's helpful, and I found it helpful as arbitrator is because you have both experts there at the same time. So not only do you get the response from one expert to the question, you can then have the opposing expert respond to that. And sometimes you even can have the experts ask each other questions as well as part of that. But it means you get an immediate response. And so, it means that you don't have that issue, where you have an issue that's only been addressed by one expert and not addressed by the other.

And immediately as tribunal, you can see the position that both parties are putting. So personally, I find it very helpful. I do think that it does require people who have experience, it requires counsels who have had experience to get the most value out of it, it requires the experts that have had experience of it and requires the Tribunal to have an experience on it. And if they do have experience of it, I do think it's a valuable tool that can be used, in order to one bring the parties experts perhaps a little bit closer together, but also get a real exposure of where the differences are, and what the different views are.

## **Sumit Makhija**

Thanks for that, Amanda, the situation where I was put in a hot tub, I was very, very nervous, because you're not prepared to be in that situation. But now, very helpful remarks. So, with that, let me get to the last topic, and very quickly, I'll probably ask each of the experts to take a minute to talk about where you see the future of arbitration. And, Tom, I'll start with you. And I also want you to cover the subject which Nick mentioned, and which I thought I'll also cover, the virtual courts. How do you see that evolving in the near future?

Do you think virtual courts are going to be the way and also do you think in the new, evolving economic and geopolitical situation, how it will have the impact on the experts? So, two parts one, how virtual courts will evolve over the years? How do you see them evolving and second, in the new environment, the role of experts. With you Tom, and I can request for each of the panelists to take a minute, to summarize their thoughts on this.

## **Tomas Furlong**

On the virtual hearing, I think we would probably all agree that they are here to stay. They're not usually my preferred way of having a more substantive hearing, where I would want to at least be with my own team, all in one place. And I quite like to also be able to look the tribunal in the eye and set the body language, but we can certainly accommodate the virtual hearings, and they'll often be required, at least for short hearings, that compromises that's fine by me.

In terms of the future of expertise, I think something we haven't really touched on is, the kind of new areas of expertise that will be required in the future, which I'm now starting to see more and more, particularly comes out of my tech practice, having people who can speak fluently about the types of issues that arise and tech related disputes, which often involves understanding the underlying technology, or code or commercial logic of a product, can require quite specialist expertise. And there isn't a lot of infrastructure setup around helping us find those types of experts.



So we can contrast that example where fuel and gas industry was a big sub industry. And at the time, people used to work with Shell or BP and are now consultants and quite keen to be experts. But try and find somebody who can really explain to you how this piece of Google Ads technology works, or what the trading parts in the crypto currency are and how you should look at that in terms of valuation of an asset or any of these other areas. It's really quite hard to find people who have the expertise to testify, but I think that's going to become an increasingly big automation buzz.

### **Sumit Makhija**

Thanks, Tom. Amanda, let me ask you the same questions and your comments and remarks on that.

### **Amanda Lees**

Well, I agree with Tom, I think that the area of technology disputes is only going to get bigger, but in terms of arbitration, and one of the challenges there. And I mean, I was fortunate enough to work on Apple and Samsung proceedings many years ago, and one of the challenges there was finding someone who was acceptable to the parties, given the confidentiality of the code that needs to be examined, and also making sure that they're actually able to work in the industry after the matter finished, given that they'd seen the code. So, there's all these sorts of considerations to do the extreme confidentiality, especially with their new products and the new code involved in terms of allowing people actually access to the technical nature of the technology and the products themselves, which makes it a real challenge.

One of the things we haven't talked about is the use of tech, is tribunal appointed experts. That's something where I do agree with Aditya, it's not something that we actually do see, and I suspect that will continue in the future. I think we still will see parties using party appointed experts into the future. I think expert evidence is here to stay. What I do think is that we'll get better at how we

use expert evidence, and explore new possible ways of ensuring that we get the most best bang for the experts, in terms of both as tribunal as counsel and as parties.

**Sumit Makhija**

Thank you. Thank you, Amanda. Aditya any further additions to this?

**Aditya Singh**

Well, I agree with Amanda and Thomas that technology disputes certainly will require more expert involvement, but Sumit now I've been what in Asia for around five years, having previously practiced in the US and Europe. And 10-12 years ago, Europe saw a big boom of gas price review arbitrations, arbitration in the LNG markets and if I could identify one trend that I have noticed in Asia in the last 5 years, is this tremendous growth of LNG price review arbitrations. And because price review arbitrations, more than I think any other types of disputes I have done, rely so heavily on expert evidence, you need solid experts from the industry, you need gas economists, I think that is definitely an area where we'll see an evolving and an increasingly important role of the Asian expert, or an expert who sort of specializes in this area in the region going forward.

**Sumit Makhija**

Thanks for that Aditya, Geetu coming last to you. Where do you see future of arbitration as an expert here?

**Geetu Singh**

So, thank you so much Sumit. And I'm extremely delighted and I have to say that thankful to all my co panelists, for bringing out such a tremendous, bright future for the increase in the use of experts in future. I completely resonate, I think, the broad spectrum of the kind of expertise one requires, I think the use of domain experts will definitely increase. Technology, IP, etc., I think is

one big area, I do see the whole area of construction infrastructure anyways, has gained a lot of sophistication around the use of experts, and even fields like pharma, where core specialist could be brought forward, etc. So, I think the list is long.

And therefore, I think a big shout out that, any subject matter expert looking to pursue something like this as a career is a very safe bet. Now, the second question was on the virtual courts Summit, and I would say that, in the event that the virtual court scenario is here to stay. I think experts have recognized that that's a way they will have to adopt towards. The duty of care of the expert practically remains the same. So, virtual court or not, the work product anyways, that goes in writing, what we call as the expert evidence is, that format remains the same. And even the onus on the experts to deliver very, very clear opinions in cross examinations, whether it's a virtual court or in person remains the same.

I think experts will have to gain their comfort in this new format. And that's where it is. And the third, I do recall that you brought about that in the entire evolving economic and geopolitical situation, that's really prevailing across the globe. Yes, I think it puts a huge onus on the experts, experts will have to factor in all the uncertainties which are developing, and they'll have to amply and appropriately demonstrate, how the impact of the same has been factored in any sort of quantification damages, even in in the technical advice that's given henceforth. So that's my take Summit, and back to you.

## **Sumit Makhija**

Thank you so much. And thanks to all the panelists for an engaging discussion, and I see many attendees or most of them still there with us. So, thank you, for all the attendees to be attentive as well as participating in this discussion. With that, let me hand over back to you Darshan for concluding this discussion.

## **Darshan Patel**

So, thanks, thanks to all the participants. Thanks to all the speakers and great thanks to MCIA for organizing this session. Just one word of advice as I hear from all the counsels here is, as an expert, independence, integrity is a given. The topic is technical, the topic is complex. But that's why you've been appointed as an expert. Make your reports, make your opinions, easy for the tribunal to understand. Any last-minute last points, Nick from you.

## **Nicholas Peacock**

Thank you, Darshan that's been a very interesting discussion. Thank you, everyone. Thanks, Sumit, for chairing so adeptly. And thank you for all those very interesting and insightful thoughts. Yes, I think I'd echo the themes that have come out really, I think one early comment that struck me is that experts must be communicators. You must be able to get the ideas across to the tribunal. I think it therefore helps if you're a professional expert, if you've got that practice, but of course, good communicators can come from anywhere. It's important you will be given space by tribunals to explain because, as I mentioned, tribunals are hungry for your expertise, they want the help, they want the expert help. So, you must use that space.

And then we educate the tribunal, you must communicate and also educate and especially in areas as a dimension of high technical subject matters. I mean, frankly, evaluation is a highly technical subject matter. But we will be dealing with some interesting disputes in the years ahead in the realms of tech, in particular in the realms of cyber verse, where those of us who are a little bit older might struggle to get ahead, sometimes around some of the aspects and we might even think the tribunals could struggle to get their heads around them. So, it's important that experts really assist that. And when you're working with experts, just bring them on early.

Have early conversations with your expert, make them part of a team, as has been said, experts can help you look in the right places. Nobody can help you create facts, but they can help you to find the right facts. And then to have a candid conversation about the strength of your case, I think



has been mentioned by a teacher. No one is helped by an expert who is asked to overextend on an opinion and who accepts that invitation and puts themselves at risk of having their credibility damaged and actually harming their party's case at a final hearing. So, it's important to have honest and candid conversations as well. But a great learning experience today. Thank you very much to PWC and to MCIA for putting this on.