INDIA ADR WEEK 2023 DAY 3 - MUMBAI

SESSION 3

PRAGMATISM, PITFALLS AND PRACTICAL IMPLICATIONS IN ARBITRAL APPOINTMENTS: A 360 DEGREE VIEW

12:00 PM to 01:30 PM IST

SPEAKERS:

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Jed Savager, Partner, Pinsent Masons (Dubai)
Ankit Goyal, Partner, Allen & Gledhill
Patrick Taylor, Partner, Debevoise & Plimpton
Amba Prasad G. Vice President and Legal head, Larsen & Toubro Construction

HOST: The next session is organized by Trilegal on Pragmatism, Pitfalls and Practical Implications in Arbitral Appointments - A 360 Degree View. On the panel we have Mr. Andrew Cannon, Partner at Herbert Smith Freehills, Mr. Jed Savager, Partner at Pinsent Masons in Dubai, Mr. Ankit Goyal, Partner at Allen & Gledhill, Mr. Patrick Taylor, Partner at Debevoise & Plimpton, and Mr. Amba Prasad, Vice President and Legal Head Larsen & Toubro Construction. The moderators for this panel are Shalaka Patil and Siddharth Ranade, both partners at Trilegal.

SHALAKA PATIL: Thanks very much, Charvi. And if I could invite everyone who's having coffee outside to get their coffees, and please come in so that we can start this panel off. Thanks very much to all of the esteemed panellists for joining us at this Trilegal lunch session on what we very sagely titled Pragmatism, Pitfalls and Practical Implications in Arbitral Appointments - A 360 Degree View. So an ambitious title and we hope that with panellists from UK, Singapore and UAE as also India, of course there is somewhat of a 360 degree view by the end of this panel. So without any further ado, I will kick this panel off with the first question, a common question for all of the panellists and perhaps Ankit can begin, and then everyone in a row can respond on what are the key issues that we think about and we keep in mind when

nominating arbitrators and in particular, do arbitral institutions play an important role in this? What happens in ad hoc situations? So maybe quick thoughts on this one from each one of you. Thank you.

ANKIT GOYAL: Thank you. Shalaka. I think they say that your arbitration is only as good as your arbitrator. So the choice of arbitrator is one of the most important choices that any party can sort of make. And what is very funny is that despite the fact of how important the arbitrator is, there's absolutely no public information about arbitrators and their performance. So I think the decision on choice of arbitrators often taken on the basis of information, which is anecdotal, which is based on hearsay. So it's always tricky to find out. I think I can tell you the two main considerations that people should have is fairness and efficiency. So people should try and look out for arbitrators who are fair and efficient. Obviously, that information is not in the public domain. So, you'd have to generally go by information that you'll get from other people. But I think two things that are happening and people should look out for. One is the Professor Kathryn Rogers has introduced this: Arbitrator Intelligence Database, which is intended towards creating that database about arbitrators and their performance. I think it's still very early days for that. People should look out for it. The second thing that's happening is that the Singapore courts have decided to name arbitrators in their decisions in relation to setting aside of arbitral awards. So, those two developments are creating what I would call some element of transparency in the performance of arbitrators. There is enough to be said about appointment of arbitrators in the Indian context, but I'll hold off on that.

In relation to institutional appointments, of course it really depends if the parties can agree on an arbitrator in the sole arbitrator context, that's obviously good. If they cannot, or if the two nominated arbitrators cannot agree on the presiding arbitrators, then the institution will appoint. I think on that question what's obviously interesting is that the institutions do play a very key role in appointment of arbitrators. They are the ones who are the gatekeepers in identifying the right kind of arbitrators. And in fact, I would say in honest disclosure, I was at the SIAC about ten years ago, although on an MCIA platform, institutions don't matter, but I would say institutional arbitration is generally good. But having said that institutions play a key role. Just two or three key points. SIAC, for example, has a default mechanism of appointing a sole arbitrator with the arbitration clauses silent on the number of arbitrators. That's one thing to note. The second is, if it's a multi-party arbitration and for example, there's one Claimant and two Respondents. And if the Respondent or the two Respondents are unable to jointly nominate an arbitrator under the SIAC Rules, the President of the SIAC Court appoints all three arbitrators. So that's the second point. Finally, the SIAC rules are undergoing change. The draft rules are out. There are a few interesting topics that have been

introduced in the new rules. I will not talk about all of them, but I think one of the things that the party should take note is that the SIAC is bringing into the rules the list procedure, which is there in the UNCITRAL Rules. The list procedure essentially entails that the SIAC will give a list of five arbitrators to both parties and the parties can strike out one name and order in preference four and give it back to the SIAC, and the SIAC will appoint one of them. So those are just some developments, things to look out for, but happy to talk about the new innovations in the proposed rules, whether they will happen or not we will see. So, yeah, just slightly long opening comments.

SHALAKA PATIL: All great comments. Thank you. Patrick if we could also hear from you.

PATRICK TAYLOR: Yes my one, the one key point I thought I would make is that you should absolutely not appoint an advocate as party appointed arbitrator; an advocate for your case that is. You want someone that is going to have credibility with their co-panellists. And you often get this from clients who say I would like to appoint so and so. I know that they'd be really receptive to my point of view. And you have to really teach your clients that's not in their best interest. Ultimately what you're trying to sort of read the tea leaves on is what's the relationship going to be like between your party appointed arbitrator and the rest of the Tribunal. Who do you think is going to be the party appointed on the other side? Who do you think is going to be the chair of the Tribunal? And what will the chemistry be between those individuals? If your person doesn't have credibility and the ability to build trust and rapport with the other members of the Tribunal, they won't actually be able to do the role that you've appointed them for, which is to listen to and understand your case and make sure that the Tribunal understands the case and is able to consider it fully. And so I think I would say that the rule of thumb is the IICC, the independence, impartiality, capability, and chemistry. As far as the roles of the institutions, yes, of course, they play fundamental roles. And just to pick up one point from the LCIA, which is a bit different to other institutions, the LCIA is ultimately responsible for the appointment of all members of the Tribunal. They distinguish the selection of potential candidates from the appointment. So they do all the appointing, but they will consider any proposals on candidates. So nominations of candidates from the parties where that's been an agreed process, but they essentially retain a right to veto if they think that any of the absolute things like partiality, independence are not going to be supported if the candidate you selected is not appropriate.

SHALAKA PATIL: Thank you. Mr. Prasad if we could hear from you.

AMBA PRASAD: Good afternoon everybody. Yeah, I want to continue from where Ankit and Patrick were talking about with respect to selection of an arbitrator. Yes, as a user of arbitration, I have a very clarity in front of having an arbitrator who is fitting into the four bullet points what Patrick said, II&CC. The last C becomes very important in terms of having the clarity about how to navigate among the other two members as well. And when we do a selection process, we have a large discussion with the counsel, who is advising us as well as also other stakeholders in the matter. And then depending on the dispute that is involved and the technicalities or the complications that are there, we are going to identify it according to us the right fit to be our nominee arbitrator. But at the same time we also are very mindful of the fact that the arbitrator is not our spokesperson in the panel. Therefore, he has to be very clear about how he is going to play around his role among the three in the whole process. And I also had this experience of selecting the right arbitrator when Jed and I were in an arbitration in the recent past and that was a very exhilarating experience of going through the plethora of CVs of the potential arbitrators and then zeroing in on one and then thereafter doing things about it. Yeah, when it comes to the institution, institution plays according to me, a lesser role when the parties are actually having clarity about nominating their persons unless and until there is, as was mentioned, the shadow about the person's impartiality or some kind of understanding about the whole process. But I do not know how far the institutions are maintaining a roster about each individual arbitrator that has been appointed and then the award has been rendered and their ranking or gradation that has been made with respect to Class A, Class B, Class C or whatever it is. So in that case, it becomes difficult perhaps for the institutions to really have a view about a person being fit or not fit for the purpose. I think I'll stop at that.

JED SAVAGER: Thank you, Amba. And I'm glad the experience you had with me was exhilarating. Let's hope the next few minutes are too. So, just listening to all of that, where I come at it from is actually knowing what the dispute is at the time, you're making your request for arbitration. A lot of my experience has been that people see arbitration as the issuance of the notices that bringing the other party to the table. Don't worry, we'll issue the notice. It'll settle and we don't need to think anymore. The difficulty with that is that not enough time is put into actually analysing the underlying dispute. And that is so important in terms of them thinking about who your arbitrator should be. Is it a black... Do you want a black letter lawyer? Someone who's going to really apply the contract to its letter, or actually do you really need some flexibility around those terms. Is a civil lawyer better? You're only really going to understand that once you've understood, really understood the dispute, you're referring to arbitration. So that would kind of be my starting point. And then really moving on from that when you're selecting your arbitrator, picking up on what Patrick said, and Amba picked up

on too, what are the characteristics that you're looking for? More importantly, how have they performed before? What has your experience been of that Arbitrator? So really, drawing on your counsel's experience to identify how certain are you that that arbitrator will perform in a certain way. And when you're trying to crystal ball gaze how that Tribunal will come together if it's a three party Tribunal, and that's so important, because your nominee is the one that you should have the most certainty over. And then when you're thinking about what the other side might do, you know to a reasonable degree the sort of perspective your nominee might come from and that's really important in them getting that chairman in place so that you feel you've got both a say in terms of who the chairman is, but also in terms of the likely approach of the whole process. So they're really the things I would be looking at in terms of factors for selection. In terms of the institutions absolutely. They're there to really support the position when things don't go so well where you have issues over the agreement of the chair, etc. But really, certainly from the Middle East where I'm based, there's a sort of key issue. You have varying degrees of quality of institution across the region. And one of the really important points that comes out of that is the pool of arbitrators that are on the lists of those institutions. So that's a really important consideration at the outset, when you're looking at the institution. What are the qualities of the arbitrators on those lists and that to me is a really important consideration as well. I'll pass on to Andrew.

SHALAKA PATIL: Thanks Jed. Andrew.

ANDREW CANNON: That's a really interesting and essential stuff. I mean just to go back to the core principles what is arbitration? It's a choice. Parties are choosing to arbitrate their dispute. They want a fair, a neutral process. They want a just outcome. It's a private hearing. It's not public. It's even more important therefore that your choice of arbitrators is right. There's no right of appeal and usually no right to appeal on the basis of merit. Certainly it can be very difficult, with any sort of challenge on the basis of regularity or whatever it might be. So the behaviour of the arbitrators, and indeed, our confidence in those arbitrators, the party's confidence in those arbitrators more importantly is essential. It's absolutely critical. And so impartiality, we're going to come on to discuss a lot of these points, is an absolutely vital part of that, and the neutrality of the process. We talked a bit about institutions, as Jed was saying, particularly at the beginning, when you don't have a Tribunal, the role of institutions is hugely important and can save parties an enormous amount of time where the alternative is, of course, the only alternative would be shuttling back and forth to the courts. So the institutions can help the parties secure their bargain, get the Tribunal up and running. And they do it in slightly different ways. And we'll discuss one or two of them. Patrick, mentioned the LCIA and the veto they have over appointments. Of course the LCIA also have in their as a default in

their rules. They're the ones who set who choose the arbitrators. Of course, if you don't specify how arbitrators are appointed well, the institution fills in that gap and the ICC will say, well, each co-partner is a Tribunal of three. Party nominates one and then the two co-arbitrators appoint the chair. With the LCIA, the LCIA appoints all three, and it takes confidence in its appointment process and therefore the rigor of that appointment process is also very important and they do seem to be getting it right. The LCIA last year, of course had no successful challenges at all to arbitral appointments. And one point we'll come on to as well is disclosures. That's also an essential cornerstone of this process. We'll talk about that a lot more later. There is a real trend in increasing the amount, the volume of disclosures that arbitrators are making. So parties go into it with open eyes. We've seen the UNCITRAL Code of Conduct, which has just been adopted, which has a market trend about the need for arbitrators to make disclosures. Indeed, we can also discuss how much is too much. I was at recent conference where a very prominent arbitrator in fact said that one thing he does to avoid the risk of challenge is make disclosures of everything that he hasn't investigated in order to find out whether or not he has a potential conflict. And that's obviously a very long list. And he says every time there's any discussion at the conference like this, that list gets a bit longer.

SIDDHARTH RANADE: So thanks everyone for your valuable insights on this. So we have basically tried to bifurcate this panel discussion in two parts. In the first part we'll try to cover some themes around appointment of arbitrators and the second part, we'll touch upon some themes around more contentious issues, around challenges to arbitral appointments, conflict of interest, etc. So starting off with the first section, so to speak, and Jed, I wanted to start off with you. Now, obviously when it comes to appointments, the subject matter of the dispute, like you touched upon in the initial section, is obviously the central aspects that you take into account. So say, talking of a construction dispute, we just want to hear your insights on what sort of factors would you keep in mind while choosing the right fit? And one of the themes that often we tend to discuss when it comes to some technically intricate disputes is whether you would want an arbitrator who is technically qualified to be able to deal with that, those sort of issues? Or would you rather prefer to have an expert, a party appointed expert to do the same, perform the same role? So just want to have your insights on some of these points.

JED SAVAGER: Thanks very much. I think it's really interesting the technical aspect and that actually came up on a panel session yesterday. I guess I think where I start is looking at familiarity with the construction industry. And when I say that I don't mean a construction professional. That could well be a lawyer that specialized in construction. But why I think that's really important in terms of your Tribunal is, those professionals whether they're technical experts, construction lawyers, will really understand the genesis of some of these disputes,

then understand how they come about what causes them, the realities of delivering on a project, building a project. They would have seen these issues time and time again. And so come at it with a familiarity that's really important in terms of some of the technical issues that arise. Importantly that might include the construction of the contract, specific contract terms those sorts of things. And once you've kind of set yourself that framework in terms of looking at people with that construction industry background, what's the next factor you want in terms of your Tribunal it's obviously familiarity with the main relevant law. So when you're looking at and I touched upon this just a moment ago, you might be looking at different modes of law. So civil law versus common law and which one of those might suit you best in your particular dispute. For example, civil lawyers may look at issues such as disclosure on a more narrow and limited basis. Does your case really need disclosure? Is that something you're after? If it is, should you be looking at a common lawyer? Someone who's more familiar with those sorts of procedural issues. So familiarity of law is really important. Also someone with the region experience. So going back to experience in construction industry, if you've got a project again, going back to where I practice in the Middle East, you're really looking for a Tribunal that understands the local and cultural nuances of building projects in the Middle East. How do employers behave? How does the engineer administering that process? What are the sort of cultural nuances that underpin the performance of the party's obligations. Again, you're looking at sympathy and understanding and context for the resolution of the dispute. And then really looking at construction disputes more generally, they're very fact intensive, document heavy. We touched upon technical issues both in terms of programming issues, defects, technical issues, in that sense, complicated quantum issues. So you're really looking as well on that Tribunal for someone who's got really strong case management experience. And ideally, I would say certainly for the bigger construction cases, you really want certainly when, you're looking at your nominee, someone who's done that before, who's gone through the construction, arbitration process. Who understands the issues and has seen those through. I just want to touch on availability, most of the institutions pick up on that and deal with that very well. But when you're looking at your nominee, that's something you really need to probe carefully. Certainly in the construction arbitration space, you really need a Tribunal that's engaged and available because it's so fact heavy. So those are the sorts of broad things. I just want to come back to the point on should we have a technical person in as opposed to a lawyer. The answer is in an ideal world, you would want a construction professional on that Tribunal. I think they bring to that diversity of thought really important perspectives. The tricky bit being frank about it, is that if your Claimant in starting the process, then you don't know who the other side is going to appoint. And so you may well think a technical person would be really good on this Tribunal. But I don't know there's a range of things the other side could do, how that technical person will sit with who they appoint. It's a difficult balance at that stage to say

whether or not that's the right thing to do. But I'd absolutely agree that a technical person, a construction professional, should absolutely be something one is thinking about in the construction arbitration, context. So, I'll pause there.

SHALAKA PATIL: Thanks, Jed. You're quite right that it's a matter of fine balance, often. Moving on, sort of to look further into cross jurisdictional perspective, Andrew, I was hoping to get your thoughts on matters of how English law has evolved around arbitral appointments over the last, let's say five years or a decade. In fact, this issue has become very contentious and one that's raised often before our Supreme Court as well here in India. But we'd love to hear the English law perspective of this as well.

ANDREW CANNON: Thank you Shalaka. And yes, all the best pillars are comparative and particularly in our field of international arbitration, where we're drawing the threads from all the different jurisdictions and trying to find that international best practice. And thank you for asking the question on home turf. Anyway as an English qualified lawyer, but in terms of the UK position the English Arbitration Act enshrines some of those principles we were talking about earlier that arbitrators must act fairly and impartially as between the parties. It's a duty set out in Section 33 of the Act. And then under Section 24 of the Act, parties to English seated arbitrations have the right to apply to the court to remove an arbitrator where circumstances arise that give rise to justifiable doubts as to the arbitrators' impartiality. Now the current state of law, and you referred to the Supreme Court, was examined in the famous decision in the UK of ***Halliburton and Chubb***. I was going to mention it, but it is one of the most important decisions in English Arbitration Law in recent times so much so that a number of the arbitral institutions were indeed given permission to intervene in that case in argument. So submissions were made by the LCIA, the ICC, CIArb, LMAA, Gafta. And I don't want to talk about any great detail. A lot's been said, and I expect most people in the room know about it. But it did set down the common law test for arbitrated disclosures and impartiality. And in short, the test that it set down was arbitrators must disclose any circumstances which might reasonably give rise to justifiable doubts to the arbitrators' impartiality. So this was then the common law test for apparent bias. Would a fair minded and informed observer having considered the fact, conclude that there was a real possibility that the Tribunal was biased. And this was made clear it was a continuing duty like the duty of impartiality itself. It didn't require that actual bias be proved. Just simply the appearance of bias. And there was a lot of discussion about the precise wording of the test. In the Court of Appeal, the Court of Appeal had used the formulation would or might give rise to justifiable doubts. But the Supreme Court thought that would was too high of a threshold, too high test. And that might perhaps was too low. So it instead adopted might reasonably, suggesting a more objective test. So what's

happened since? Well, a brief word on the Law Commission Report on the revisions of the Arbitration Act, which you may have heard about this. The Arbitration Act's been in force since 1996. There has been over the last couple of years a wide ranging consultation process about revisions to the Arbitration Act. There's a general consensus within the English arbitration community that it didn't need a route in branch reform. This was a process to try to improve in certain areas and it involved consultation with a very, very large number of stakeholders. And the Law Commission has now published its report. Last month this was published. It will go to Parliament hopefully by the end of this year and indeed it could be enacted in law early next year. We recently held an event with the Law Commission representative Nathan Tamblyn on this field and very wide ranging debate around the topics. I think it's fair to say some are still the subject of debate. Of course, it has to go through Parliament. That's Parliament's role. But this, I think the Law Commission has set out a very, very thorough, detailed report on why it is proposed amendments. So, I commend that to you if you're interested in the subject matter. But on this point, what the Law Commission has proposed is to effectively codify the common law test in ***Halliburton***. So, there will now be a statutory duty, a continuing duty on arbitrators to disclose circumstances, which might reasonably give rise to justify their doubts as to their impartiality. There's no prescription as to what needs to be disclosed and interestingly they also include a new state of knowledge criteria. Now ***Halliburton*** didn't include this. Though, it was discussed at some level in the judgment. But the Law Commissioner has recommended that arbitrators should be under duty to disclose not only circumstances of which they are aware, but circumstances of which they ought to be aware. So a higher standard constructive knowledge has been proposed, and it's also proposed to be a mandatory rule in the Act. So some of the current rules of arbitration that exist, which refer only to disclosures matters that are currently known to arbitrators, will need to [UNCLEAR] in arbitration, at least be interpreted in this light, if this Act, of course, is adopted. And again gives rise to all these questions about what sort of inquiries should an arbitrator make in order to be able to discharge that duty of what that arbitrator ought to know. So it's a potential for future disputes. The Law Commission said, well, it will be resolved through case law and we will see what will happen on that. Thank you.

SHALAKA PATIL: Very interesting. And speaking about a codified duty to disclose, Ankit I wanted to move to you and ask you your thoughts on arbitrator selection and appointment and some challenges in that process as well, particularly from an Indian perspective. You mentioned something very interesting when you were speaking about Singapore Courts, naming the arbitrator in challenge proceedings and things like that. So, any thoughts on this?

ANKIT GOYAL: I think Shalaka, you cannot have a session on arbitrator appointments in India and not talk about retired judges. I am told that this is all transcribed. I will be honest, yet slightly cautious. I think retired judges get a slight bit of a negative rap. Some of it justified some of it not. At the end of the day, an arbitral award can be challenged predominantly on grounds of having a wrong process. So, therefore it's good to have judges who are legally trained and understand the process. But I think at the end of the day, particularly if you're an Indian party and if you're involved in a cross border arbitration, you should most definitely reconsider your choice of arbitrator and not go with someone who you've just been told or you're most familiar with, and that would be a retired judge. I think one of the most important themes that people should be aware of, is the dynamics or the dynamics of how a three member Tribunal works. I mean, I make my comments especially in the context of cross border international arbitration involving an Indian party. The dynamics of a three member Tribunal have to be and should be taken into account by any party who's nominating an arbitrator. A scenario that we've seen play out multiple times, is where the Indian party would nominate a retired judge. The opposing party, perhaps from another country, would appoint an arbitrator who is an arbitrator, an international arbitrator, very familiar with the process. It's likely that the two would not agree on the third arbitrator. The institution is going to appoint and coming back to the point about institutional role. SIAC, up until now has a mechanism which is not codified, but will be codified or likely to be codified in the 2023 rules is that where two parties are from different nationalities, they will appoint an arbitrator, presiding arbitrator, who is from a neutral nationality. Which then means you'll have a neutral nationality arbitrator. And to the point that Patrick you made about choose an arbitrator who's not your advocate. And if the Indian parties' retired judge is going to be an advocate in a three member Tribunal, which is constituted of two other arbitrators who are more sort of akin to the concept of international arbitration, then you're going to have problems. And those problems have happened multiple times. What is the point of having an arbitrator who's going to give you a dissenting opinion, which is not worth much to you as a party. I'm not saying do not appoint a retired judge. I'm just saying be conscious of the dynamics. There are, of course, a lot of retired judges who are as active in international arbitration, understand the process. One other point that I will make, which I think is important is that most retired judges when they retire from the bench have, to a great extent have had one, two decades, three decades of judicial experience sitting in appellate courts. International Arbitration is a trial. I think it's imperative that retired judges should be asked to undergo training particularly in the context of international arbitration, because we are talking about nuanced topics here. We're talking about deciding multimillion dollar, billion dollar disputes involving complex issues of evidence and trial on a cross border context. There is much value to be derived, and I think I am not. But if I were a retired judge, I'd be more than happy to undergo a training, to make sure that I can be part of the process

and without bringing along the baggage of sitting as a judge in Appeal Court for a long period of time. Just a couple of thoughts.

SIDDHARTH RANADE: Thanks for those insights. So moving on to more in-house counsel perspective on some of these issues Mr. Prasad, I wanted to ask you about your thoughts on basically what sort of factors from a client's perspective, are at the forefront in making these choices? Obviously, there are some common conundrums or choices at play, I mean, whether it's a retired arbitrator or a QC, or for example any previous engagements, past experiences you've had with working with a particular individual. Also, familiarity with the jurisdictional sort of issues in a particular system or familiarity with the business environment, especially, say, for a dispute emanating out of an Indian context. So what sort of things really go into the mix of your decision making as a client when making these decisions?

AMBA PRASAD: Thanks for this. As Jed and Patrick and Ankita have already spoken about the process of how do we identify an arbitrator to represent or to be nominated into the Tribunal. I don't want to repeat them, and I would rather say that in our setup it is going to be a rigorous funnelling process where we have lot of choices of names which are going to come about and keeping the dispute in perspective, the other side in perspective, and the kind of timeline that we may look at, whether it is institutional or ad hoc in terms of process being completed, we go on to a process of identifying shortlisting few of the people, which again, we do a synthesis of and then probably zero in on one person. There is no set formula that we need to have for the purpose of identification of a person to be a nominee arbitrator. But at the same time it is desirable that the person who we nominate has got a clear hang of the contract that we are executing on the dispute that is arising there from. The law that is governing the contract and the legal legalities that are involved therein and also some kind of a commercial savviness as to how this entire dispute that can be visualized from one perspective and then find whether one party is wronged or the other party is right in probably denying certain entitlements. And as we move on in the whole process, I'll come back to the C and the D what these two gentlemen spoke about, is there is a chemistry, and there is a dynamic, what Patrick and Ankit was talking about. They play a pivotal role in the whole process. And to facilitate that chemistry and dynamics among the members of the Tribunal, we need to have very clear pleadings and experts that give their reports to be placed before the Tribunal, so that their life and their work becomes easier for the purpose of adjudication of the dispute. So therefore, I would rather say that I would like to have a blend of an individual who has got all the three expertise and need not necessarily be a former judge or a technocrat. If it is possible, like how Jed used the word, an ideal world I would like to have one person, but then that is not available. Therefore we need to make available with the person's or the choice that we are going to make.

And the other black, dark side of the whole process is that we don't know who the other side is going to nominate. So therefore the whole process will again get into a churn when the nominee from the other side is appointed, and therefore the question of who the presiding of the Tribunal is going to be made and how they are going to make about it. So, many oftentimes it happens that there could be disagreement between the two, and therefore the institution comes into the play, and then as a nomination of the chair. And I'm a little sceptical about the method what Ankit was talking about the proposed guidelines that are likely to come where they are going to propose five names and out of which we need to choose four in order of priority. That practice was already here in India in the recent past by the public corporations. And I think that has been frowned upon by the court that you can't narrow down the choice of parties because that independence is lost. So I may not be sure that whether that is going to be applied in an Indian condition if it is possible. I think I will stop here.

SHALAKA PATIL: Thank you, Mr. Prasad. Just changing it up a little bit and speaking about when it comes to actually appointing arbitrators Patrick, I wanted to hear your views on if the arbitral community has a duty to ensure diversity and appointments and the key trends around this over the past five years, we've seen things like ArbitralWomen pledge. But are we doing enough for diversity and appointments? Could we do more? And whose duty that is? Maybe a little bit about that.

PATRICK TAYLOR: Thank you, Shalaka. Well, we can definitely always do more. I think the story of the last five years is a generally positive one. I'll come to a few statistics in a minute, but undoubtedly we've still got a ways to go on this journey. I think all stakeholders in arbitration and in the arbitration community bear a responsibility and have a part to play in this. Parties, counsel, institution, governments, and the judiciary, all play a role in the appointment of arbitrators and all play a role in the general diversity that we see in the arbitration community. Gender diversity is probably the one area where we've got the most measurable success. As in, a lot of people report on gender diversity in the appointments and so we can see that we've made genuine progress in that respect. There are, of course, other types of diversity, age, racial and geographic I think are the three most important ones because they're the most visual. And certainly speaking anecdotally in London, you see that the institutions are pushing very hard on the age part. I think gender and age are the two areas where the LCIA, for example has really made a strong commitment and when you get appointed now onto Tribunals it's striking how often you will be on a Tribunal with members that will be even younger than me and it's also striking how often a chair will be younger than some of the co-arbitrators. So there's definitely progress There too. Racial or geographic is a bit harder to measure, but in many senses on the former one what we've seen is that law firms

have made great strides in increasing diversity, both gender and racial and as more and more people are coming through the ranks. That's having a beneficial impact on the diversity that you see, and arbitral appointments generally. I've got a few statistics, but I thought I'd come to it and I'll touch on geographic diversity because I think one of the big complaints and I'm focusing very much on London here. But one of the big complaints that you do hear still about London as compared to other jurisdictions, is it hasn't made quite as much or the perception is at least. But it hasn't made quite as much progress in having arbitrators from different geographies and Counsel from different geographies appearing in front of those Tribunals. I think one of the things that you still hear is that Singapore, you're more likely to find teams of Counsel acting as advocates who are from outside of Singapore appearing in front of a Bench for the people that are from outside of Singapore. And London, you still have a preponderance, I think of English qualified Lawyers on Tribunals and a preponderance of English qualified lawyers acting as advocates. The Cross Institutional Task Force in Gender Diversity published a report in 2022 that highlighted how between 2015 and 2021 the appointment of women to Tribunals when up from 12.6% to 26.1% on institutional, amongst institutions that answered, the participated in the survey. So a very significant increase. The 26% is obviously still a long way short of where we would like it to be. So it's still a ways to go. Interestingly, the proportion of women arbitrator appointments made by parties also approximately doubled from 2015 to 2020. From a much lower starting point. Only 8% of appointments were women in 2015, where the appointments were made by the parties and that went up to 20% in 2020, but unfortunately dipped in 2021. So I think parties and Counsel because counsel and parties are obviously acting on the advice of Counsel still play a very fundamental role here. In fact, the most progress, the most room for progress remains amongst those two groups. The LCIA figures really back up what I just said as the general trend, although they have pushed it forwards even more, I think, than those general averages. In 2015 they had 16% of women on Tribunals and by 2021 that number was up to 31.6%. So really good progress again still a bit of a ways to go. And just to finish in terms of diversity, in terms of nationality. And there are some interesting figures from the LCIA on this. So the LCIA appointed arbitrators from 49 different countries in 2022. And I think the most interesting statistic is that although 85% of the cases that were being heard by the LCIA are governed by English law, only 60% of all the appointments were British and 40% were non-British. So there are more non-British appointees than there are non-English law governing disputes. I suppose that's not that surprising in one way, because you can imagine a Tribunal with two English qualified lawyers and one not or even two, not as long as there's one. So it gives you a bit more flex in that respect. But I think there is still some progress there. However, Africa remains a region that is underrepresented in those groups. And so it comes back to the role of parties and Counsel to really be thinking outside the box and pushing forwards on the diversity issue. There are many

reasons why that's worthwhile because it's having people with different slightly different perspectives or people that you think will have excellent chemistry with the members of the Tribunal is a very good reason for appointing someone.

SHALAKA PATIL: Thanks, Patrick. And one thing you said just reminded me of an anecdote that I will very quickly share. You spoke about age diversity. And I remember I had once written an article about some institutions rules. And I had commented on how in terms of age diversity, I think that institution had rules saying 35 at the lower end, then 70 at the higher end. So I commented, perhaps they could consider instead of 35, make it like 20 or 25 because there are lots of Counsels in courts who appear as arbitrators, and it would encourage younger lawyers. And then a very irate European arbitrator wrote me an email saying that I noticed that you've commented on the younger side of things, but not the older side of things. Do you think that people who are 70 plus can't act as arbitrators. He was absolutely right, because like you said, Patrick, we don't think about diversity in all its forms. We think about it in terms of how it may impact us or how it may be convenient for us. But many great points made. Ankit you want to add something?

ANKIT GOYAL: Sorry, just a couple of thoughts. The concept of diversity is really, really critical. I think we've seen to the point that Patrick was making sometimes younger arbitrators are actually more conscientious and in fact, better. We've had arbitrations where young arbitrators have been appointed, and the process has done really, really well. Rules of Appointment of the 2023 Draft Rules of the SIAC actually under 19.5 now says that the President of the SIAC Court shall take into account aspects of diversity and inclusion in making appointments. So I think that's an interesting development. The rules are draft from Mr. Prasad, so they are still being discussed. I will take your point on the list procedure and relay it back to the SIAC.

AMBA PRASAD: While we speak about diversity, I want to talk about an upskilling situation of an arbitrator, because today we are having complex arbitrations which are having a large volume of work and huge monies involved and shorter time frame for execution and therefore it gets prolonged for reasons not known to every party. But then it just gets prolonged. But the documentation that are maintained. There are beams that are used for the performance and the monitoring of records and stuff like that and there are a lot of programs that are analysed. How equipped is an arbitrator to really have look into all these things and then make an informed decision as to how he can do. Probably that also may be one point that the institution should look at when probably they are talking about either empanelment or nomination because we look at them as one of the criteria as to how good it is because first thing is many

former judges and other arbitrators. They want hard copies of things so that they can note down. And the number of volumes and the number of things. And then we start doing convenience compilation. Then it becomes shorter convenience compilations, and the list goes on of the compilations. But if they are savvy with respect to PDF related documentation, maybe there is some space left in their whole system. But then I'm not sure how many of them are there. And of course, all these technical paradigms that they need to look at.

SIDDHARTH RANADE: Yeah, thanks some very interesting points there. So moving on to a slightly more related theme is one area where the whole freedom to appoint arbitrators, or the choice of arbitrators becomes limited, or perhaps even non-existent, is in statutory arbitrations. And that's where and we see that say, for example, in the infrastructure a lot. So that's where Mr. Prasad, I wanted to get your thoughts on what's your experience generally been when it comes to arbitrations under statute or dispute advisory boards or specialized boards, and generally, any insights or recommendations that you have in terms of optimizing outcomes in those situations?

AMBA PRASAD: It's quite controversial I think because the whole process of dispute resolution, if they make it statute driven, it becomes a little difficult for the parties to really have a clear go about it because of the bias that is inherently enshrined into it. And we have had experiences where in a statutory arbitration we have not been able to drive because of the point that the Tribunal members will say that this is what is written in the contract, we can't travel beyond this or we cannot interpret anything beyond this. Therefore take your recourse in the courts of law for the next step. Second thing is on the dispute advisory or resolution boards that are there, which are minus one to the contract related disputes. Oftentimes it so happens that these dispute boards will perform their role as a core. They don't really involve themselves in anything. Rather, they'll try to keep things open and they never complete any of these activities within the time that is stipulated. And that puts the entire process of realizing, or at least going forward with respect to claim management in a jeopardy. And as I said in a contract of complex nature and huge sums involved, cash flow becomes a real issue for the management to really know. And then there is a lot of expectations that are made on these DAB processes and arbitration processes which becomes at times very hard to manage. So we are looking at ways and means how to really make it effective. But if it is not effective, we thought we should actually truncate the process for next time.

SIDDHARTH RANADE: Thanks, thanks. That's really helpful.

SHALAKA PATIL: Next one again for you, Patrick. I was wondering if you could speak a little bit about appointment of arbitrators basis experience of adjudication. There's always a lot of talk on retired judges in any panel that has something to do with Indian arbitration. And I don't think there's anything wrong with that at all; versus appointing on the basis of expertise, as Mr. Prasad was also commenting. Is there a better sort of approach? Certainly not a one size fits all.

PATRICK TAYLOR: Certainly not one size fits all. I think we're very lucky in the arbitral community to have so many experience and talented former members of the judiciary willing to act as arbitrators. They bring a lot of experience, but as we've heard that it's not always without its pitfalls. I should preface my further comments on the basis that not all former members of the judiciary are the same and there are many who have risen to the very, very top of the international arbitrator crop and that you would have no hesitation in saying, do all of the things that you want to see of an international arbitrator. In fact, there are many that fall into that category. But with that caveat, I will venture into one generalization. One of the concerns that you do hear sometimes and get touched on, is the risk of judicialization of the process. People are just very familiar with the processes from the courts and they bring a lot of that into as sort of their default or their reflexes in arbitration. And that reduces the flexibility of arbitration. And I think if you come across candidates that do that, you should be wary about appointing because it's not ultimately usually that helpful in your proceedings. And the other is another point we heard about which is whether or not the person is technologically savvy. And I think that on average, you would say that as a group, retired judges tend to be less technologically savvy than other groups that have maybe come up through arbitration or Counsel teams. And that can be really problematic. I heard an anecdote recently about someone not having an email address. And that can be very hard to deal with. Incredibly hard to deal with. So the other thing is that cyber protection and cyber security are increasingly important. And so you want people to have that. In fact, I am sitting as an arbitrator at the moment where the parties both asked for procedural order number one to contain rules about cyber protection, and Debevoise & Plimpton has a protocol on cybersecurity that we adhere to in our arbitration. So you do have to have those things in mind as well. But I think the real point here is that as you come from all the panellists, you need to think about that the right way to go about your appointment process is to think about the characteristics you're looking for. Availability, conscientiousness, the ability to persuade. Absolutely key, what's the chemistry, what's the trust, what's the experience of that person? If a person is very experienced on a point that is key in an arbitration, the other members of the Tribunal are likely to look to that person for their views on that particular issue and the appetite for detail and the robustness of their analysis. What's the ability, the capacity of the person you've

appointed to understand the case that you're going to be putting forward to, Jed's point earlier. Understand what your case is about and be able to relay that to the other members of the Tribunal or ensure that there's a good discussion about that and the deliberations. And I think when you look at the characteristics from that end, it may lead you to selecting a retired judge. Maybe the retired judge is absolutely right based on all the characteristics of the case. But what it's guard against is saying that the pool that you're going to consider is only retired judges. And then which from that pool is the right person to choose. In my view, that's not the right way to go about it.

SHALAKA PATIL: Thank you. And now we'll move to the second sort of section of this panel, which is we'll talk about contentious issues and we also speak about conflicts of interest. And speaking of conflicts Jed and all of you in fact, are wearing the hat of law firm partners, for example. Could you speak a little bit about what you may be seeing often on arbitral appointments and conflict of interest issues, particularly amongst law firm partners, or in other roles as well?

JED SAVAGER: No Very happy to do that. I thought I'd start with you on that point. Picking up on something Andrew mentioned a bit earlier on around the rise in disclosure and extent of disclosure in the conflict of interest context. And when you mentioned law firms, international law firms approaching them to act as arbitrator, the two big things that have changed over the last few years are that the rules governing or the guidance governing conflicts of interest is recognized. The law firms are growing. Number two, they've recognized the corporate structures are changing and expanding. And those two things I think has had a really big impact in terms of the obligation to disclose and how that impacts in particular arbitrators sitting in international law firms. Probably the best starting point for that is the IBA Guidelines on conflicts of interest that was updated in 2014 and dealt with those two points specifically. In those guidelines, which used broadly by those arbitrators when they're looking at conflicts of interest, also referred to by many institutions when looking at it and also by Counsel representing the party. So often a touch point in terms of gauging, where you are on the conflict of interest go, and whether you should make a disclosure. The first important change to the arbitrator IBA Guidelines was it treated the arbitrator of having the identity of his or her firm. And what that meant is that when we're approached to sit as arbitrators, we are having to treat ourselves as our firm and look at it through that context. And then when the IBA developed a list approach or the application approach to Green, Orange and transfer again Red, Orange and Green. So the code system, a lot of those tests refer very much to the law firm. So, in the non-waivable Red list where you clearly shouldn't take on the appointment, quite obviously significant financial income from a party. The law firms getting that that obviously should

mean that you don't take the appointment on a waivable Red is significant commercial relationship with a party. So the law firm, not the arbitrator, the law firm, has significant commercial relationship. And then moving down into Orange, that's where you've got to make a decision, whether you disclose where either of the parties may conclude, there are justifiable grounds to conclude that they wouldn't be impartial or independent. Then in there again, we've got a number of grounds involved the law firms. So active for against the party in the last three years. Has that law firm acted against the party in last three years. Has the law firm acted for a party on a regular basis or is the law firm currently acting adverse to one of the parties. So, those sorts of issues mean that when you're looking at the disclosure, what you're going to have to disclose that's quite a big exercise. Number one. So due diligence is an issue for us as arbitrators within our law firms, but it also just gives rise disclosure both at this time of appointment but importantly, just coming back. So I think again both the points that Andrew and Patrick made, the ongoing duty of disclosure so that disclosure point is going to continue through the arbitration and therefore you need to bear that in mind both as the arbitrator and also the party appointing. So, really I think there if it was for me, I think that's a real issue that needs to be borne in mind just from that disclosure point of view. I'll let others maybe speak about what they're seeing in terms of the conflicts or challenges that then come about from these disclosures. But I'll probably leave it there for now.

SIDDHARTH RANADE: Thanks, Jed, for that. Like Jed like you mentioned the IBA Guidelines. So, Andrew, I wanted to get your thoughts on the IBA Guidelines and I think the key, key issue really is how much to legislate and how much to leave to the good sense and judgment of the arbitrator and the parties. And obviously there is merit in legislating in terms of ensuring a standardized approach, ensuring some basic guideline tests are met by all concerned across the board. So just want to do and that's where the balancing act is required. Right. So just want to get your thoughts on how you see the IBA Guidelines from that standpoint.

ANDREW CANNON: Thank you, Siddharth. It's a very interesting question. Of course, it's come up in the Law Commission's Review. And I talked earlier about the fact that law commissioners decided to set down this general principle and then leave it to the case law to apply all of these different tests. And things like the IBA Guidelines are hugely helpful and important as we all consider these issues. Whether or not it should be a law is a question of course for every jurisdiction. And I know here in India, of course, you have your own answers to that in a very innovative step by making it part of the law. I think still in most other jurisdictions it is remain guidance. But of course we can and frequently do include the IBA Guidelines expressly in procedural orders by party agreement when they're drafting, or the

Tribunal may oppose it. Still, I think mainly as guidance rather than as an absolute rule. But of course we say, that will depend on the case and the facts and circumstances and so on. Generally, the IBA Guidelines are very positive. They have been very helpful as I said. They're supposed to be indicative of a trade practice that we all recognize but of course there are disagreements with them as well and particular aspects of them. Many courts are unwilling to add this additional layer of analysis to their own developed position on disclosure and conflicts. And the test, indeed being applied in relation to independence and partiality may also be different. The IBA Guidelines and many institutional rules use the word independence. The English Arbitration Act doesn't. It only talks about impartiality. And again, that was another point that was discussed in the Law Commission discussion. Do we need to talk about independence as well as impartiality or do we just talk about impartiality. In fact, the Law Commission recommends just to leave the word impartiality without including independence. And we've had some arbitral institutions, in fact expressly say we will not adopt the IBA Guidance. The ICDR in the US, for example, said the guidelines do not establish a duty to disclose in all the circumstances that they themselves think disclosures should be made. In terms of the list themselves, Jed mentioned a number of points. Are they overly prescriptive, are they not? I mean, it's a very rigorous product of work from the committee at the time. It's been revised once. I think it was first adopted in 2004, revised in 2014 as Jed mentioned And there is currently a task force looking again at revising guidelines, which we understand should be then published and released next year. You can certainly quibble with some of them. The point Jed has made about including this point in a non-waivable Red list, that the arbitrator or his/her firm regularly by the party or an affiliate of the party and there needs to be a derivation of significant financial income therefrom. But that's been scrutinized in a number of cases. One English law case in particular declined to follow this and to effectively require an arbitrator to resign in a particular case in 2016, it was an anonymized case, W against S. But it is published. The arbitrator is named. But there the firm was involved, was instructed by an affiliate of one of the parties. The arbitrator, who actually was connected to the firm, was employed by the firm, was a partner of the firm. But didn't know anything about this case completely outside his knowledge. And it was an affiliate and it seemed to be unconnected. So the English Court there said this shouldn't be non-waivable Red list. We are not going to require the arbitrator to resign. So that is one example. That arbitrator has now left the firm and set up their own practice however. And there are some situations where it could be argued they're not prescriptive enough. On the other side of things on the Green list there is no disclosure required to be made in the context where the arbitrator had previously expressed a legal opinion, such as in an article or in a public lecture concerning an issue that also arises in the arbitration. And this is a really tricky issue we've been discussing. Do you pick, do you want an arbitrator who's an advocate for your case? Do you not? Martin Hunter, who we will all be

familiar with, said in one of his articles, “when I'm representing a client in an arbitration, what I'm really looking for in a party nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias”. When you're looking to appoint in arbitrator, of course, you're not doing your job properly. If you're not looking up for articles or publications that that arbitrator has written. And of course, we talked about retired judges. Judgments are public. I mean, this is all out there in the open. It's an important part of the process. But nevertheless that Green list about views, issue conflict as it’s called, views expressed in public articles, has been the basis for many challenges. Not, not that many have been successful, but nevertheless quite a few have led arbitrators to resign on the basis it's put them in a difficult position. So, we will see. I mean there are these areas of specific criticism, but the guidelines remain, extremely helpful.

SIDDHARTH RANADE: Thanks. Thanks Andrew. That's very, very interesting. Moving on to a very related theme here and something that's been sort of tested here in Indian courts quite a bit is the unilateral appointment of arbitrators that we often see in contracts, especially government contracts, et cetera. So in India, obviously, we have had judgments in the last two or three years where that's clearly been frowned upon by the courts, including the Supreme Court. So, Patrick, I wanted to ask you how has this area of law really developed before the English courts. And how have the English courts really perceived this? Is there a per se invalidity test or is there a more subjective assessment that courts would go into?

PATRICK TAYLOR: So, in the interest of time, I'll keep this very brief. But I mean, the short answer is that there's no absolute prohibition in English Law. The parties are free to agree on the procedure for the appointment of arbitrators and that's enshrined in Section 16(1) of the Arbitration Act. In fact, Section 17 of the English Arbitration Act has an interesting provision, which is if you've agreed that if in an ad hoc arbitration with no appointing authority, if you'd agreed that the party would each to appoint an arbitrator, and the second party fails to make that appointment, there's a procedure under English Law where the first party can apply for their appointee to become the sole arbitrator. And that apparently has been used quite frequently in maritime arbitrations, which obviously are very specific kind. But in most instances now you're unlikely to find yourself in this situation. You can get some imbalances still. I think it's still the case that in a number of instances, even institutional rules, if you nominate your arbitrator and the other side fails to nominate theirs, that appointment can be made by the institution, and in a sense, then you've got an advantage and the influence you've had over the appointments of your Tribunal. There are other instances, for example, under the LCIA rules, which is where you have more than two parties. If the parties can't agree to put themselves into two sides, then irrespective of the agreement they have reached on the

appointment, the LCIA will step in and select and appoint all of the arbitrators. I think in practice it's very rare to see in any event, because apart from a default where someone's just failed to avail themselves of the right that they had, it's very hard to conceive of a circumstance where a party would agree essentially on some form of unilateral appointment of the Tribunal, and you would no doubt want to be very careful of that fact that if it ever was agreed, that it had been done on full advice, et cetera, because it's likely to be heavily scrutinized. And I think one thing that you should also expect is that in a case where there has been any form of imbalance, there's going to be additional scrutiny placed on that Tribunal to make sure that people are adhering to the obligations they have of impartiality and the obligations to treat all parties fairly and give each party an opportunity to present their case. And I think Tribunals are always wise to have that in mind, but especially in those circumstances. And I don't know how it is in other jurisdictions and it sounds like in India, you've got a very developed system on this. But in some ways you can see the argument for Paulson has famously put out an article saying that he thinks that the party's participation in the appointment of arbitrators is something that should be done away with because it ultimately undermines the validity and credit of arbitrational rule. But I think for as long as party autonomy is key to arbitration, which maybe it always will be, it will remain an important part.

SHALAKA PATIL: Thank you. And then very briefly Ankit, if I could also request you to tell us about the Singapore approach to conflict and challenge process. And maybe if you have any stats that is also going to be of help.

ANKIT GOYAL: Sure I can see the clock ticking. I will keep this brief. In preparation for this, I just went through the annual reports of the SIAC, and I found out that in the last five years SIAC has received eleven challenges to arbitrators under the rules. Unfortunately, the decisions and challenges are confidential and are not published at least up till now. There is a proposal to make it public out of the eleven, nine failed. Two were allowed. I tried really hard to get some information about it. I have gotten anecdotal evidence which I think are two themes. One is that the sooner you challenge your arbitrator in the arbitral process, the better success you have of getting them removed. Because if the challenge is very delayed, then the Court of Arbitration of the SIAC is unlikely to hold that challenge up because it's going to be disruptive with the arbitration process. That is one comment. The second is, and this is interesting to the point that I made earlier about the dynamics within the Arbitral Tribunal. It was very, very interesting because the challenge arose from one of the arbitrator's letter to the to the SIAC court about the two other co-arbitrators and their behaviour. I'll pause here. Because this is anecdotal don't quote me on it. This is just based on hearsay. Maybe incorrect. I will, however, take this opportunity because some of the second case that I've spoken about

actually was in public domain and I will talk about that. So there are two cases of note from Singapore. One is ***BYL versus BYN***. This is a 2020 case. By then, this sort of silent policy consideration of Singapore courts to name arbitrators had not kicked in. So, unfortunately, I cannot tell you who the arbitrator was. But if you will read the decision, you will very easily find out who it was. It was a well-known Indian senior advocate who was one of the nominees of the successful party in the arbitration. The party who was unsuccessful challenged the award on the basis of breach of natural justice, apparent bias of delayed and partial disclosure by that senior advocate who was the nominee on the basis that that senior advocate was acting with the successful party's law firm and the lead advocate. The award was not set aside. The challenge was rejected by the court to say that they did not see enough merit in that sort of basis, so that's one. Second one, not directly related with challenges, but very interesting nonetheless. I request you all to look at. That is the case of ***CZT versus CZU***. This is hot off the press June 2023, where one of the parties challenged the award on the basis that the dissenting opinion or the dissenting award had laid down a list of things talking about the bias that the two co-arbitrators had, and the fact that they changed the ratio and the fact that there was procedural impropriety. They made an application to the court to request for the Tribunal deliberations to be made public. The Court rejected the application, saying that there are good policy considerations to keep the Tribunal deliberations confidential unless there are very, very specific in the rarest of rare cases. They said there has to be serious allegations of procedural misconduct, and there has to be a reasonably good chance of success on that. So yeah, the dynamics within an arbitral Tribunal is critical. And I do request you to read that decision. Arbitrator names are given, although not in the Indian context.

SIDDHARTH RANADE: Thanks Ankit. Very, very interesting. I know. I can see we are closing in on time. So this is a question, really to all of you on the panel. Can you tell us some actual real instances right, where you have faced these issues around conflicts or challenge to appointments of arbitrators, and how have they actually played out in terms of the outcome of the overall dispute? So anyone on the panel. Who is going to take this up?

JED SAVAGER: I'll go first. I'm sure I'm not the only one on the panel. I've actually got one at the moment where we're acting on an infrastructure project for the Claimant. The two parties have appointed, they've nominated their respective co-arbitrators. That's been confirmed by the relevant institution. There was no agreement between the parties to appoint the Chairperson, so the relevant rules came in, kicked into force there, and the two co-arbitrators quite quickly nominated a chair. The chair then wrote, saying that this is the selected person and that nominated person made a disclosure. And the disclosure was that they had acted as arbitrator, co-arbitrator on another arbitration involving our party that had

lasted three years, and they had just issued a final award. Our party informed as well, we weren't particularly happy with the outcome of that arbitration and there were various issues that came out in terms of the project et cetera in relation to arbitration. I should hasten to add that other arbitration was in a different country, different part of the world. So it had no relation to this arbitration, but nonetheless gave our clients a lot of concern that they were embarking on a new arbitration. A lot of money at stake. How will we resolve this? And that has brought really into sharp, sharp focus really looking at some of the things that Andrew was touching upon about the prescriptiveness of the IBA Guidelines. It looks as though it would be difficult on the facts we've got to say there was true any justifiable grounds finding impartiality or on the facts. But nonetheless, if this person is being put forward as the President of the Tribunal, so not a co-arbitrator, they will have the presiding vote. And really what it did for me, just reflecting on that over the last week or so was really looking back at this and thinking, well, where we start from with arbitration is trust and confidence in the process and what this issue has brought really into sharp focus is what now do we do with the institution and how will they deal with it? So we've been asked for our comments on the disclosure. But what will be really interesting is what the centre does with this. Does the centre exercise its discretion, and say look, whilst there may not be grounds to say or justifiable grounds to say there's issues with independence or impartiality, nonetheless, it is the chairperson. It is very proximate. We're going to ask the two co-arbitrators to go away and come up with an alternative. And that's kind of where we are but it really brings into focus where I think Shalaka you started with at the beginning about the role of the institution because the next step will be if the institution says we've heard what you say but are going to proceed to now confirm the appointment, then the next step for us will be and a difficult step will be do we then make a formal challenge to the appointment but of course, the other bit is that this is all being played out before the co-arbitrator potentially if our client lost, the President would know about it, too. So it's a bit like between the devil and the deep blue sea in terms of whether you make the challenge at all. So it really raises more questions than it answers. But I think kind of summarizes some of the issues that one faces and important to have the right institution in place and so on. I will pause there.

PATRICK TAYLOR: Can I just pick up on something you mentioned there, because I was about to say that I think before making a challenge, you really need to think, one about how like it is to succeed, but also what the procedure says about who's going to decide it. We have one recently where it was an investment treaty case under the ICSID Rules. And in the ICSID process, if you challenge one of the arbitrators, it's the other two arbitrators that first get to decide whether or not the challenge is valid. And if they can't decide, then it goes to Secretary General of ICSID. And in the case created a very interesting dynamic and one that ultimately

we felt very happy about the outcome on because we ultimately won the challenge. But the dynamic was that the two party appointed split on whether or not the challenge should be allowed and then ICSID supported -- rejected the challenge. So our party appointed was back in and immediately because we suspected it was the chair that was in favour of keeping that person in. We figured that our party appointed in the chair would have a better rapport than the person that voted against.

SHALAKA PATIL: Quick comments from anyone else? Andrew?

ANDREW CANNON: Yes. Patrick's talked there about the challenge. And when you're appointing, it's absolutely essential that you get as many disclosures from the arbitrator you are going to nominate as well. Of course you want to take a very cautious approach to that. Only once has an arbitrator I have nominated been challenged even. And in that case it was in fact a successful challenge. And that was due to some information that the arbitrators had not given us at the time, but that the other party found out. And it's an important part of the process to do that. Whether or not the case I refer to working with is in fact a set aside application rather than a challenge. Of course maybe different points are applied to the consideration at the point of challenge because of course it's easier in a way to stop and to change an arbitrator than it might be to set aside an entire award further down the line. So challenges do happen. We've had others where one of the big considerations we have and we have in all law firms is when former members of the law firms would often go and become arbitrators themselves. We would generally ourselves, then nominate somebody. But perhaps an institution does. And that can give rise to interesting questions as well. And how far does this process go? Again I was at another conference where we have an arbitrator who said that she's been challenged on the basis that one of the associates in her firm had been lectured by somebody who turned up as an expert witness on the side of the arbitrator. So the need to get into all this is very important.

SHALAKA PATIL: Really, really great examples here, and I think we only have time for this much. Thank you very much to all of our esteemed panellists. I think this is a great discussion. Lots of things to think about. Thanks very much to all of you for attending. And lunch is also served. So do please make your way to lunch. Thanks again.

~~~END OF SESSION 3~~~