VII. EXPERT WITNESSES AND QUANTIFICATION OF DAMAGES IN DOMESTIC ARBITRATION: CAN HOT-TUBBING SERVE AS A POTENTIAL PANACEA?

- Krati Gupta and Raj Shekhar[*]

ABSTRACT

Quantification of damages is considered as an essential aspect of arbitration, with the parties employing all their resources to prove breach of contract and making a strong case for themselves. Even in cases of where contractual clause for liquidated damages exist, the exact nature of damages which include other subjective losses are difficult to be proved before the arbitral tribunal due to lack of documented evidence to support quantification of damages. Presently, to arrive at a reasonable quantum of compensation, the arbitrators have to rely upon the principle of honest guesswork. However, the same has proved to be problematic and there have been cases where such quantification have been overturned by courts due to them being "perverse". The panacea to the problem seems to lie in implementation of an effective regime for utilisation of expert witness and evidences in domestic arbitration. Unfortunately, owing to the legislative vacuum surrounding the expert witness based quantification of damages, the resolution of the conundrum at hand seems to be a distant dream. The foregoing paper attempts to analyse the various existing approaches to expert witness by a comparative analysis of the current trends and developments in this area. Further, it pitches forth an alternative and a more streamlined approach to implementing expert witness in domestic arbitration, which to till this date suffers and fails to get the benefit of expert witnesses.

[*] Krati Gupta is a first year student of B.B.A. LL.B. (Hons.) at National Law University, Jodhpur, and Raj Shekhar is a third-year student of B.A.LL.B. (Hons.) at National University of Study and Research in Law, Ranchi.

I. INTRODUCTION

Arbitration is a private dispute resolution mechanism which has proved to be an efficacious alternative to the regular litigation route. However, India is considered a non-arbitration-friendly jurisdiction owing, *inter alia,* to the length, costs and inefficiency of arbitration proceedings. In light of these considerations, efforts and regular amendments are being made to ameliorate the arbitral framework of the country by incorporating international best practices and procedures. It needs to be emphasised that in order to transform India into a global hub for arbitration, we need to introduce reforms to attract foreign arbitrations in the country and prevent Indian parties from choosing foreign seats of arbitration. For this to happen, India needs to deliver "effective arbitration work at lower cost"[1] and adopt time-efficient and cost-effective procedures.

Quantum of the arbitration award constitutes a fundamental part of any claim for damages as well as the most important aspect of arbitration for the disputing parties. The Oxford English Dictionary defines damages as "a

[1] Bibek Debroy & Suparna Jain, *Strengthening Arbitration and its Enforcement in India – Resolve in India*, NITI AAYOG, 17 (2016), http://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf.

sum of money claimed or awarded in compensation for a loss or an injury."[2] According to Black's Law Dictionary, damages include "money claimed by, or ordered to be paid to, a person as compensation for loss or injury."[3] In simple words, damages represent monetary compensation that an aggrieved claimant party is entitled to receive from the respondent party. As often noted, disputing parties employ all their resources to prove breach of contract but fail to make a strong case for quantification of damages. Even if there is a contractual clause for liquidated damages, the exact nature of damages such as loss of profits, loss of business value, loss arising from damage to goodwill, interest cover on damages and such other subjective losses are difficult to be proved before the arbitral tribunal due to the lack of documented evidence to support their case for quantification of damages. To address this conundrum in domestic arbitration practice, the best bet for arbitral tribunals to arrive at a reasonable quantum of compensation has been to rely upon the principle of honest guesswork that has been accepted by the Indian courts.

However, it is a settled fact that correct estimation of damages in technical matters would inevitably require expert witness testimony. Though the practice of expert witnesses is followed in domestic arbitration yet given the lengthy, traditional procedure of taking expert testimony, the exorbitant fee charged by professional experts and allegations of adversarial bias often discourage parties to utilise the benefits of expert witnesses in domestic arbitrations.

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[2] *Damage*, Oxford English Dictionary (24th ed. 2011).
[3] *Damage*, Black's Law Dictionary (10th ed. 2014).

II. THE PRINCIPLE OF HONEST GUESSWORK IN ASSESSMENT OF DAMAGES: ORIGIN, APPLICATION AND EVOLUTION

The roots of the honest guesswork principle were laid as early as 1977 in *Mohd. Salamatullah v. State of Andhra Pradesh*,[4] wherein it was held by the Supreme Court of India that the estimation arrived at by the trial court based on facts and presented evidence cannot be substituted by an alternate guess of the appellate court. In *A.T. Brij Paul Singh v. State of Gujarat*,[5] the Supreme Court dismissed the necessity of evaluating minute details while estimating the loss of profits. In *A.K. Sinha*v *v. MTNL*,[6] the Delhi High Court adjudicated upon a plea challenging the arbitral award under Section 34[7] of the Arbitration and Conciliation Act, 1996 (hereinafter "the Arbitration Act"), wherein the arbitral tribunal had not awarded loss of profits for breach of contract. The Court while relying upon *Mohd. Salamatullah* and *A.T. Brij*, affirmed that honest guesswork can be made to assess the damages; however, such estimation should be based on substantial evidence adduced by the parties.

A domestic arbitral award based on the estimation skills of the arbitrator can be set aside only under Section 34(2A)[8] of the Arbitration Act, if it is found to be 'patently illegal.'[9] In absence of any definite mechanism for computation of damages, the arbitrators have been entrusted with a

[4] Mohd. Salamatullah v. State of Andhra Pradesh, AIR 1977 SC 1481.
[5] A.T. Brij Paul Singh v. State of Gujarat, AIR 1984 SC 1703.
[6] A.K. Sinha v. MTNL, OMP No.457/2008 (DEL HC).
[7] Arbitration and Conciliation Act, 1996, § 34, No. 26, Acts of Parliament, 1996 (India).
[8] Arbitration and Conciliation Act, 1996, § 34 (2A), No. 26, Acts of Parliament, 1996 (India).

responsibility to arrive at the closest approximation of the quantum of damages to be awarded through meticulous application of their estimation skills and knowledge of the dispute at hand.[10]

However, due to the lack of reliable data and limited industry knowledge of the arbitral tribunal, a rational and fair estimate of the quantum of damages can often be elusive. This can lead to gross divergence from industry practices and perverse arbitral awards as noted in *M/s. SMS Ltd. v. Konkan Railway Corporation Ltd.*[11] In this case, the Court while setting aside the arbitral award held that the notional proportionate loss formula arrived at by the arbitral tribunal for quantification of damages imputed incorrect variables to its parameters and such a formula was 'unknown' and 'perverse.'[12]

With reference to the indefiniteness inherent in the process of quantification of damages through honest guesswork principle, the words of Prof. Jan Paulsson, the President of International Council for Commercial Arbitration, about the arbitral practice on indirect expropriation are aptly relevant and highlight the elusive nature of correct prediction.

> There is no magical formula, susceptible to mechanical application that will guarantee that the same case will be decided the same way irrespective of how it is presented and irrespective of who decided it. Nor is it possible to guarantee that a particular analysis will endure overtime; the law evolves and so do patterns of economic activity

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[9] Oil & Natural Gas Corporation v. SAW Pipes, (2003) 5 SCC 705.
[10] J. LOOKOFSKY & K. HERTZ, TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION: AN ANALYSIS OF AMERICAN, EUROPEAN, AND INTERNATIONAL LAW 392 (DJF PUB, 2 ED., 2004).
[11] M/s Sms Ltd v. Konkan Railway Corporation Ltd, O.M.P. (COMM) 279/2017.
[12] *Id.*

> and public regulation. In a phrase, perfect predictability is an illusion.[13]

Thus, the main objective behind domestic arbitration is to arrive at a fair and rational approximation of damages incurred by the claimant, even though it might inevitably entail hypothesis and speculation.[14] The lack of exactitude inherent in the quantification of damages is the prime reason that arbitrators should actively engage qualified expert witnesses in the arbitration process who are well versed with the evolving industry practices and paradigms.

III. EXPERT WITNESS IN ARBITRATION

Arbitral tribunals require expert assistance to help them in computation and determination of quantum of damages especially in complex and technical issues, where arbitrators lack the relevant expertise. The crucial role of damage experts in dispute resolution is aptly elaborated in *G. L. Sultania v. Securities and Exchange Board of India*:[15]

> It appears to us that the appellant expects this Court to act as an expert itself. This, we are forbidden from doing […] As noticed in Miheer H. Mafatlal [v. Mafatlal Industries Limited[16]][…], valuation of shares is a technical and complex problem which can be appropriately left to the consideration of experts in the field of accountancy. So

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[13] J Paulsson, *Indirect Expropriation: Is the Right to Regulate at Risk?*, 3 TRAN. DIS. MGMT. (2006).

[14] Derek A. Soller, *New York Appellate Division, First Department, reverses Supreme Court decision vacating ICC arbitration award for "Manifest Disregard of the Law"*, WOLTERS KLUWER(May 30, 2021, 09:56 PM), http://arbitrationblog.practicallaw.com/new-york-appellate-division-first-department-reverses-supreme-court-decision-vacating-icc-arbitration-award-for-manifest-disregard-of-the-law/.

[15] G. L. Sultania v. Securities and Exchange Board of India, Appeal (Civil) 1672 of 2006.

[16] Mafatlal v. Mafatlal Industries Limited, (1997) 1 SCC 579.

> many imponderables enter the exercise of valuation of shares.[17]

The substantial complexity of the industries involved in today's commercial disputes requires an expert to ensure maximum possible certainty when estimating the quantum of damages and present the findings before the arbitral tribunal. The evaluation of economic harm requires an expert to perform a wide array of economic analysis on various industry parameters to address the interplay of such parameters. Later, these case-specific facts and findings are expressed in the form of an expert report which is subject to cross-examination by the parties to the dispute. Experts are often called upon as witnesses to give their opinion on technical subjects and thereby assist the tribunal in settling the dispute. It is pertinent to note that examination of witnesses is a permissible arbitration practice and includes the cross-examination of expert witnesses. Even though the Arbitration Act excludes the applicability of the Indian Evidence Act, 1872[18] (hereinafter 'the Evidence Act'), its principles related to expert evidence are still applicable to arbitration proceedings as held in *Pradyuman Kumar Sharma and Ors. v. Jaysagar M. Sancheti and Ors.*[19] Therefore, the admissibility of expert testimony in arbitration proceedings is conventionally analogous to the practice of taking expert opinion as given under Section 45[20] to Section 51[21] of the Evidence Act.

[17] Duncans Industries Ltd. v. State of U.P. and Ors., (2000) 1 SCC 633.
[18] Arbitration and Conciliation Act, 1996, § 19(1), No. 26, Acts of Parliament, 1996 (India).
[19] Pradyuman Kumar Sharma and Ors. v. Jaysagar M. Sancheti and Ors., Arbitration Petition No. 300 of 2012.
[20] Arbitration and Conciliation Act, 1996, § 45, No. 26, Acts of Parliament, 1996 (India).
[21] Arbitration and Conciliation Act, 1996, § 51, No. 26, Acts of Parliament, 1996 (India).

It is a settled law that the opinion of the expert is considered a statement of fact and cannot be relied upon unless the expert is examined. As per the provisions of Section 26[22] of the Arbitration Act, the opportunity to cross-examine the expert is given to all the parties to the dispute. The two ways of invoking expert witnesses in domestic arbitration are through (a) party-appointed expert witnesses and (b) tribunal-appointed expert witnesses.[23]

IV. PARTY APPOINTED EXPERT WITNESS VERSUS TRIBUNAL APPOINTED EXPERT WITNESS: BATTLE OF EXPERTS AND THE QUEST FOR QUANTIFICATION OF DAMAGES

It is a settled understanding in law that it is permissible for an arbitrator to take the assistance of experts in technical matters, in so far as such assistance is necessary for the discharge of his duties.[24] The arbitral tribunal appoints an expert witness when the parties to the dispute so request or when the circumstances make it absolutely indispensable in the opinion of the tribunal. However, a potential drawback is too much reliance by the arbitral tribunal on the assessment of the quantum of damages presented by the sole appointed expert.

As per Dr. Pablo Spiller, who has testified as an expert in more than 150 arbitrations over more than two decades, the presence of the counterparty expert places a degree of pressure on each expert to ensure that

[22] Arbitration and Conciliation Act, 1996, § 26, No. 26, Acts of Parliament, 1996 (India).
[23] Xu Zihihe, *The Use of Expert Witness in Arbitration*, KLUWER ARB. BLOG (May 30, 2021, 10:12 PM), http://arbitrationblog.kluwerarbitration.com/2020/04/29/the-use-of-expert-witness-in-arbitration-from-the-perspective-of-shiac/.
[24] *Juggoboundhu Saha* v. *Chand Mohan Saha*, AIR 1916 Cal 806 (DB).

their damages analysis is sound and impervious to criticism.[25] The incentive to prove the other expert wrong leads each side to undertake considerable efforts to produce credible supporting or countering evidence, thereby adding value to the overall damage assessment process. As a matter of fact, in the absence of any other contrasting/corroborating opinion, the credibility of the sole tribunal-appointed expert is significantly low. Therefore, the use of tribunal appointed-expert is an unpopular practice in arbitration and the trend is towards party-appointed experts.[26]

In a majority of arbitration cases, parties want to retain their autonomy over the presentation of their cases. Therefore, parties usually appoint their own experts who, though expected to retain independence, often representing the case of their respective appointing parties tend to function as their "hired guns"[27] (given that they are paid by the respective appointing parties). In cases where the arbitrator has little or no knowledge about industry practice, differing (or, sometimes, contrasting) reports of equally competent party-appointed experts, especially with regards to the mechanism for quantification of damages, can lead to uncertainty and confusion for arbitrators while presenting the arbitral award.

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[25] Alexander Barnes, *Tricky Technical and Quantum Matters for Rising Arbitrators: RAI's Conversation with Dr. Pablo T. Spiller*, KLUWER ARB. BLOG (May 30, 2021, 10:12 PM), http://arbitrationblog.kluwerarbitration.com/2021/05/15/tricky-technical-and-quantum-matters-for-rising-arbitrators-rais-conversation-with-dr-pablo-t-spiller/.

[26] Victoria Clark, *Walking the Line: Independence and the Party-Appointed Expert*, THOMSON REUTERS ARB. BLOG (May 30, 2021, 10:19 PM), http://arbitrationblog.practicallaw.com/walking-the-line-independence-and-the-party-appointed-expert/.

[27] Douglas Thompson, *Are Party-Appointed Experts a Waste of Time?*, GLOBAL ARBITRATION REVIEW, https://globalarbitrationreview.com/article/1033933/are-party-appointed-experts-a-waste-of-time.

Impartiality is another major consideration that is broached by the opposing party each time an expert is appointed by another party. Even though party-appointed experts are expected to practise utmost independence and impartiality,[28] there are no guidelines as to whether an expert who is or has been in any relationship with the appointing parties or their counsels can be appointed or not. Further, the re-appointment of the same expert by the appointing party is also an unaddressed issue. Conclusively, the adversarial allegiance of the experts towards their appointing party is always suspected.

In international arbitration, the International Bar Association's Rules on Taking of Evidence[29] (hereinafter "IBA's Rules on Taking of Evidence") and the Chartered Institute of Arbitration Protocol[30] (hereinafter "CIArb Protocol") are the primary guidelines to ensure the independence of party-appointed experts. However, in domestic arbitration regime, the independence and impartiality of party-appointed experts is further compromised due to the absence of clear guidelines regarding the procedure for introducing expert witness and enforceable code of ethics for experts. The partisanship of 'adversarial' party-appointed experts and the traditional, time-consuming one-by-one procedure for taking expert evidence defeats the prime purposes of arbitration i.e., impartiality and speedy settlement of disputes. As a result, even in matters of crucial importance, parties often refrain from invoking the services of expert witnesses that often leads to a

[28] Victoria Clark, *Walking the Line: Independence and the Party-Appointed Expert*, THOMSON REUTERS ARB. BLOG (May 30, 2021, 10:19 PM), http://arbitrationblog.practicallaw.com/walking-the-line-independence-and-the-party-appointed-expert/.

[29] PETER ASHFORD, THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (CAMBRIDGE UNIVERSITY PRESS 2013).

lack of utilisation of complete benefits of the party-appointed expert witnesses in domestic arbitration.

V. WITNESS CONFERENCING/HOT TUBBING: A NOVEL APPROACH

Despite concerns of independence and impartiality, party-appointed experts are considered to be of seminal importance in the process of assessment of the quantum of damages. Thorough cross-examination of the opposing experts is the best way for arbitrators to gauge the divergence in opinions of the opposing experts and to come to an amicable mechanism for assessment of damages, often through "joint expert reports" as the case maybe.

The traditional mechanism of cross-examination of experts by a legal counsel does not highlight the weak premises or any flawed reasoning in the expert's opinion owing to the lack of industry knowledge by the counsels themselves. As a result, it becomes a daunting task for the tribunal to fully appreciate the nuances of the diverging opinions or inherent biases under the traditional mechanism of expert witness examination. Further, the prolonged time period involved in taking expert testimonies during arbitral proceedings makes it difficult for the tribunal to follow. The turn-by-turn cross-examination of the opposing experts on the same technical points requires

[30] Chartered Institute of Arbitrators, *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration*, CHA. INST. ARB. 1, 4-9 (May 30, 2021, 10:22 PM), https://www.ciarb.org/media/6824/partyappointedexpertsinternationalarbitration.pdf.

multiple sessions. Such a procedure is lengthy, time-consuming and costly for the parties who are often unwilling to even resort to it in the first place.[31]

In order to alleviate the inherent bias and to correct any misinformation provided by the opposing experts that might be missed during cross-examination, evidence of the two opposing experts are taken concurrently in a procedure known as witness conferencing colloquially referred to as the 'hot-tubbing.'[32] This novel procedure of witness examination provides an opportunity to the arbitral tribunal to hear and juxtapose the testimonies of both the experts while allowing the experts of one party to examine the testimony of the opposing expert.[33] This issue-by-issue confrontation of the experts helps the arbitrator to evaluate the opposing claims and critically ascertain the inherent bias of the "hired gun" expert that could have escaped due to the traditional method of cross-examination. This process considerably relieves the arbitrators of the tension of evidence gathering and allows the experts to effectively assist them in arriving at the closest estimation of the quantum of damages taking into due consideration the industry standards and acceptable practices. It is further aided by the fact that most of the concerns and opposing interests are expected to be addressed during the brain-storming process of concurrent expert evidence taking.

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[31] Lord Justice Jackson, *Concurrent Expert Evidence: A Gift from Australia*, UK JUDICIARY (June 24, 2021, 11:00 AM), https://www.judiciary.uk/wp-content/uploads/2016/06/lj-jackson-concurrent-expert-evidence.pdf.

[32] Manish Aryan & Varun Sharma, *The Advent of Hot-Tubbing in India*, MONDAQ (June 24, 2021, 11:20 AM), https://www.mondaq.com/india/disclosure-electronic-discovery-privilege/825870/the-advent-of-hot-tubbing-in-india.

[33] Li Tingwe, *The Use of Expert Witness in Arbitration from the Perspective of SHIAC*, KLUWER ARB. BLOG (May 30, 2021, 10:24 PM), http://arbitrationblog.kluwerarbitration.com/2020/04/29/the-use-of-expert-witness-in-arbitration-from-the-perspective-of-shiac/.

VI. WITNESS CONFERENCING: AN INTERNATIONAL PERSPECTIVE

Recognising the inefficiency of traditional methods of expert witness examination, several legal systems have adopted the hot-tubbing method[34] in order to examine expert testimony more inquisitorial and less adversarial. The procedure of hot-tubbing was first introduced in the Australian Trade Practices Tribunal[35] in the 1990s and eventually achieved enough popularity to be included in the revised Federal Court Rules of 1998 ("FCR").[36] Justice Peter McClellan has been the driving force behind bringing the practice of concurrent expert evidence into the mainstream.[37] This practice has since then been adopted in several legal systems. Some of the international practices in hot-tubbing are discussed below.

A. United Kingdom

The 1996 report presented by Lord Woolf highlighted that the traditional method of expert evidence led to unnecessarily high cost and lengthy litigatory process and suggested plugging the loopholes of expert partisanship and inherent bias.[38] Resultantly, reforms were incorporated in

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[34] Alasdair McPaline, *Hot-tubbing in International Arbitration: Do We Need a Protocol?*, THOMSON REUTERS ARB. BLOG (May 30, 2021, 10:35 PM), http://arbitrationblog.practicallaw.com/hot-tubbing-in-international-arbitration-do-we-need-a-protocol/.

[35] Jublee Guha, *Hot–Tubbing: A Concurrent Evidence Procedure in Intellectual Property Suits*, MONDAQ (May 30, 2021, 10:35 PM), https://www.mondaq.com/india/patent/868040/hot-tubbing-a-concurrent-evidence-procedure-in-intellectual-property-suits.

[36] Federal Courts Rules SOR /98-106 Federal Courts Act (Austl.).

[37] *Id.*at 32.

[38] STA Law Firm, *Lord Woolf's Reforms and Civil Procedure Rules 1998*, MONDAQ (May 30, 2021, 10:35 PM), https://www.mondaq.com/uk/civil-law/705694/lord-woolf39s-reforms-and-civil-procedure-rules-1998.

the shape of the Protocol for the Instruction of Experts to Give Evidence in Civil Claims prepared by Civil Justice Council.[39] The protocol is silent on concurrent expert evidence but encourages the use of "single joint experts"[40] and joint reports.

B. Canada

Canada has introduced expert hot-tubbing through its Competition Tribunal Rules[41] (hereinafter "CCT") for use in antitrust proceedings. The CCT rules contemplate concurrent presentation of expert testimony. They specify that tribunals' discretion to have multiple experts who may "comment on the views of other experts on the panel [and] pose questions to [those] other expert witnesses."[42]

C. United States of America

Similar to Canada, the United States of America has explored the hot tub in antitrust suits. The Task Force on Economic Evidence appointed by the American Bar Association's Section of Antitrust Law in its 2006 Report,[43] deliberated upon concurrent expert evidence procedure. Despite a distinctly adversarial legal system wherein expert testimony is mostly court imposed, the U.S practitioners have turned their gaze towards the hot tub

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[39] *Protocol for the Instruction of Experts to give Evidence in Civil Claims 2005*, (Eng.), http://www.justice.gov.uk/courts/procedure-rules/civil/pdf/practice_directions/pd_part35.pdf.
[40] *Id.* at § 17.
[41] Competition Tribunal Rules, SOR/2008-141 (Can.).
[42] *Id.* at Rule 48.2.
[43] American Bar Association, Final Report of Economic Evidence Task Force 10 (Aug. 1, 2006), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v8/report_01_c_ii.pdf.

realising the benefits of concurrent expert testimony in reconciling the differences in expert opinions.

The practise of hot tubbing is widely used in international arbitrations. IBA's Rules on Taking of Evidence and the CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration too envisage witness-conferencing.[44] Despite recognised popularity in international arbitrations, hot tubbing in the Indian arbitration regime is still in nascent stages, if not completely alien to the domestic legal system. Rule 6 of the Delhi High Court Rules[45] incorporates hot-tubbing for commercial suits. Highlighting the benefits of hot-tubbing procedure over the traditional sequential examination of witnesses, Justice Ravindra Bhat while deciding *Micromax Informatics Ltd. v. Telefonaktiebolget Lm Ericsson*,[46] stated that disputes involving "examination of expert evidence should adopt the hot-tubbing procedure."[47]After the 2015 Amendment to the Arbitration Act,[48] requiring time-bound disposal of arbitration disputes, hot-tubbing is of critical importance in resolving divergent expert opinion on quantification damages in an efficient manner. Incorporation of hot-tubbing procedure in arbitration law of the country can even be of seminal importance in making India a preferred choice of seat for international arbitration disputes.

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[44] PETER ASHFORD, THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (CAMBRIDGE UNIVERSITY PRESS 2013), *Protocol for The Use of Party-Appointed Expert Witnesses in International Arbitration*, CHARTERED INST. OF ARBITRATORS (May 30,2021, 10:58 PM), http://www.ciarb.org/information-and-resources/The use of party-appointed experts.pdf.

[45] Delhi High Court (Original Side) Rules, 2018 (India).

[46] Micromax Informatics Ltd. v. Telefonaktiebolget Lm Ericsson, FAO (OS) (Comm) 169/2017 & C.M. Appl.4963/2018.

[47] *Id.*

[48] Arbitration and Conciliation (Amendment) Act, 2015, § 29A, No. 3, Acts of Parliament, 2016 (India).

VII. ADDITIONAL SUGGESTIONS: TOWARDS A MORE EFFICIENT RESOLUTION

In a traditional common law system, each opposing party expert works independently to produce an expert report highlighting *inter alia* the mechanism and estimated quantum of damages. Witness conferencing or hot tubbing allows the arbitral tribunal to precisely understand the points of disagreement between the expert witnesses and work towards their reconciliation to secure an amicable resolution of the dispute at hand. However, in cases where the opposing experts are so biased that they are fundamentally incompatible and disagree on the complete mechanism of damage quantification, hot-tubbing might not be sufficient to resolve these patent differences.

Moreover, the neutrality of expert witnesses, which is the central pillar of fair and reasonable estimation of the amount of damages, is often jeopardised due to the involvement of party selected quantum experts leading to an increased burden on arbitrators to search for the truth and arrive at the closest estimation of the compensation amount. In light of these issues, additional suggestions for addressing them are discussed below.

A. Rules/Protocol/Code of Ethics for Party Appointed Expert Witnesses

Given that party-selected experts are paid by the appointing party, they tend to represent its interest in the arbitration procedure. Appropriate rules/code of conduct for selection of party-appointed experts ensuring complete disclosure requirements with regards to previous association with the appointing party and submission of a statement of independence by the respective expert witnesses can help in alleviating impartiality concerns.

B. Tribunal appointed expert/Advisor/Expert-Arbitrator in addition to party-appointed expert witness

In certain disputes, joint expert reports are not possible as a result of complete incompatibility of party-appointed experts (due to adversarial bias) or non-reconciliation of quantum of damages. Arbitrators with limited knowledge of industry practices are often torn apart between the divergent opinions of the equally competent party-appointed experts so much so that the quest for closest approximation becomes elusive. In such cases, the tribunal-appointed expert or advisor or expert-arbitrator can assist in providing a neutral perspective to the issue in conflict.

C. Specialist Arbitration Centres

Lack of industry knowledge is one of the key reasons for incorrect quantification of damages by arbitrators. Therefore, in the longer run, arbitrators need to gain industry knowledge in order to be better capable of arbitrating such disputes. This process is facilitated by specialist arbitration centres that provide a roster of specialist experts well versed with industry practices. For example, the Court of Arbitration for Sports (CAS) administers sport-related arbitrations, the *Chambre Arbitrale Maritime de Paris* administers maritime arbitrations, and the WIPO Arbitration and Mediation Centre caters to intellectual property disputes. Another example of such a bar is the International Bar Association Arbitration Committee which focuses on laws, practices and procedures relating to arbitration of transnational disputes. In the Indian context, the recently enacted Insolvency and Bankruptcy Code, 2016 also provides for specialised “Insolvency Professionals” and “Insolvency Professional Agencies” who are enrolled

with the Board. Conclusively, similar to these illustrations, "specialist arbitrators" are necessary to handle specific industry-related domestic arbitration disputes.

VIII. CONCLUSION AND THE WAY FORWARD

The Indian arbitration regime needs to keep at pace with international standards to transform its image into an arbitration friendly country. Given the importance of expert witnesses in the estimation of damages especially through the novel approach of hot-tubbing in taking expert testimony, the government needs to formulate detailed guidelines for the inclusion of witness conferencing procedure in domestic arbitration practices similar to those in the United Kingdom[49] and Canada.[50] In addition to this, a formalised code of professional ethics for expert witnesses is essential for the independence of party-appointed expert witnesses. Tribunal-appointed experts often assist in harmonising the divergent opinions of party-appointed experts; however, the limited availability of qualified experts who charge an exorbitant fee for each session, might pose potential challenges for domestic arbitrations. Therefore, in the longer run, the creation of expert arbitrators trained in industry practices would be helpful in resolving this issue.

While incorporating the aforementioned suggestions, it is pertinent to ensure that blind reliance on expert witnesses is avoided through the introduction of the *Daubert* standard– as established in the 1993 US Supreme Court decision, *Daubert v. Merrell Dow Pharmaceuticals Inc.*[51]

[49] Amendment to Civil Procedure Rules (CPR), 1998,Practice Direction (PD) 35, ¶ 11 (Eng.), https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35/pd_part35.
[50] Competition Tribunal Rules, SOR/2008-141, Rule 48.2 (Can.).
[51] Daubert v. Merrell Dow PharmaceuticalsInc.,509 U.S. 579 (1993).

that lays down general factors for scientific evidences. Thus, arbitrators can benefit from the practice of being explicit and can reject expert evidence on the grounds that they lack a scientific basis. Incorporation of the *Daubert* standard in domestic arbitration would ensure that arbitrators do not shy away from giving their opinion regarding the expert witness and his scheme for quantification of damages. This stands true even when the tribunal has lost faith in an expert and is required to state its observation explicitly.

In conclusion, it is to be understood that it is ultimately for the court of law to decide as to how much weightage should be given to the expert's opinion for final quantification of damages, given that it is the prerogative as well as the duty of the arbitrator to take all possible steps in order to arrive at the closest correct estimation of quantification of damages. Arbitration is a dynamic field and India is constantly striving to become a globally credited arbitration-friendly country as reflected in 2015[52] and 2021[53] amendments to the Arbitration Act. Realisation of this objective would require a thorough examination of the highlighted issues and their effective redressal to keep pace with the evolving dimensions of domestic arbitration.

[52] Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2016 (India).
[53] Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021 (India).