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IN CONVERSATION WITH DR. RISHAB GUPTA

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Editor's Note: Dr. Rishab Gupta is an expert in international arbitration, commercial litigation and public international law. With over 15 years of experience, Dr. Gupta has handled arbitrations across London, Singapore, New York, Stockholm, and more under LCIA, ICC, SIAC, and UNCITRAL Rules. Before joining Twenty Essex, he worked with esteemed firms like Allen & Overy, Debevoise & Plimpton, and led Shardul Amarchand Mangaldas' arbitration practice in Mumbai. He holds a distinguished academic background, including a B.A. in Mathematics from St. Stephen's College, an LL.B. from the London School of Economics, a J.D. from Columbia Law School (Harlan Fiske Stone Scholar), and a DPhil from the University of Oxford as a Rhodes Scholar. Dr. Gupta has also contributed to leading publications, including the Kluwer Arbitration Blog and Dispute Resolution International (of the International Bard Association). Recognized by Who's Who Legal and the 2023 "45 under 45" list by Global Arbitration Review, he is currently a practicing advocate before the Bombay High Court and a Barrister at Twenty Essex.

Editorial Board ["**EB**"]: **You have excelled in all fields and in multiple roles – as an academic, as a partner at law firms and now as an independent practitioner. How do the operational dynamics in each of these professional environments differ, what are the pros and cons of each, and how do you go about addressing them?**

Rishab Gupta ["**RG**"]**:** That is a good question, so the three parts that you mentioned are basically educational pursuits, being in a law firm, and then lastly, counsel practice. Now, as far as educational pursuits are concerned, in my case, I never felt that I wanted to be a full time academic. I was always interested in the practice of law, but I have also found the academic side of law very interesting. I genuinely felt, and I still feel, that I was lucky to find law as a subject because there are few such pursuits where both the theory of it and the practice of it are really interesting. For me, an ideal mix has always been one where I am engaging with the subject both professionally

and academically. The upside of it is that it engages you at multiple levels, because what you do in practice is quite narrow. While practicing, you are looking at one particular question for a client and you're advocating a 'position.' You are not really dealing with the question in an objective fashion; whereas, in academia you deal with questions at a more general level, and in a fairly objective manner. When you are writing as an academic, it is possible to advocate for change. However, as a practitioner, you cannot really stand before an arbitration tribunal or a Court and say that I would like the law to develop in this direction. You just have to state what the law is at the moment and how your facts fit that current disposition and how that favors your client's position. As an academic, you are not bound by all those things and you can advocate for a position where you think the law should be.

For me, personally, the disadvantage of being in academia was always was that I found it to be a fairly lonely existence. While you have students and the larger faculty but ultimately the work that really satisfies you, which is the research and the writing, that is a very lonely job. You have to just do it by yourself and that was not the right fit for me, for my own personality. So, for me the correct mix therefore, was to practice law while maintaining some elements of academic pursuits. Unfortunately, finding the right balance is really difficult, particularly in India, because the volume of disputes we deal with as disputes lawyers in this country is huge and the demands on your time are very significant. The system is such that you get instructed on matters on very short notice, so to be able to plan things is much harder. It is easier in the context of international arbitration, it is easier in the English court context, but less so in the Indian context. As you don't have that luxury of time, you're unable to plan your day such that you can block out a few hours for academic pursuits.

The other disadvantage or difficulty, in the Indian context, is that our universities are still not as 'mature' in terms of dealing with adjunct professors as they are outside of India. It is very common for law firm partners and counsel in the US or England to go and teach in universities. These universities encourage adjunct professors; they allow for seminars which are more practice oriented, they allow for the overall curriculum to be planned in such a way that you can teach for few hours and not deal with the various administrative issues. That, unfortunately, is not necessarily true for Indian universities.

Now coming to the law firm versus independent counsel part, those again are fairly different pursuits but the good thing is that, especially in the area which I specialize in, they are not that distinct. Because, even as an international arbitration lawyer, when I was a partner at a law firm, I

used to argue most of my cases on my own. Therefore, when I moved to the counsel side, it was not necessarily that big of a shift.

The biggest shift is one that I now have more time to do pure advocacy, which is something that always got a bit diluted in the law firm by all the other administrative responsibilities that I had. The second difference is that there is more variety in what I do today, because what typically would happen in law firm is that you get siloed in certain kinds of practice areas, whereas as a counsel, you have the ability to take on whatever you want to take on. Those are all the upsides. The downside is that it is a more 'lonely existence,' the counsel practice, because you're not working in a large firm, you're not seeing that many people, though of course you get instructed by other lawyers who you meet in conferences, work with chamber juniors etc. In England, I have large chambers (Twenty Essex) that I am a part of, so that helps. But ultimately the act of preparing and arguing a case you have to do by yourself and that's lonely as well. So, there are upsides and downsides to both.

EB: You're a recipient of the prestigious Rhodes Scholarship, which a lot of people in GNLU apply for every year and a few have also received it. So, for those applying and for those interested, the personal statement asks candidates to address "humanity's pressing challenges." Do you think arbitration can be a tool to tackle such challenges and would you recommend it?

RG: I do not think so to be honest. See, the reality is that a lot of work that we end up doing as lawyers, especially in international arbitration, is just representing corporates or individuals in their commercial disputes. To classify that as addressing 'humanity's problems' would put our work at a pedestal that it does not deserve.

I think the bigger contribution that we can make as commercial disputes lawyers in India is not necessarily by being lawyers in arbitration tribunals or courts, because that is just *status quo* being pushed further; the real contribution we can make is by helping the system improve. For example, bringing best practices from other jurisdictions to India, being able to find solutions to resolve disputes in an efficient and cost-friendly manner, suggesting changes at policy level on how to deal with those issues; I think those are contributions which each one of us can make which would genuinely have some impact.

Personally, I always thought that the biggest contribution I could make was to practice abroad for some time, learn what I believe would be the best practices in my chosen pursuit and then deploy them in India. That was the driving force behind my decision to come back to India from England in 2016.

EB: With the reforms proposed by the Draft Arbitration and Conciliation (Amendment) Bill, 2024 ["**Draft Bill**"] **such as redefining arbitral institutions, granting them enhanced powers, enforcing emergency arbitrator awards, and introducing appellate arbitral tribunals, do you think these amendments would effectively address the evolving needs of contemporary India? Are there any suggestions that you have?**

RG: I have never believed that the way you bring about change in the Indian ecosystem is by continuously amending statutes. I have always felt that it is a very 'lazy' way to bring change because, in practice, it doesn't achieve much. Amending statutes is the easiest thing to do, because all that requires is for a few academics or a few policy makers to sit across a table, look at statutes from other jurisdictions, pick up a few pieces from here and there, amend the statute and then it put it through the legislative process. In order to bring lasting change, investment should instead be made in our institutions, by improving our court systems, our bar, training our judges, improving our jurisprudence and so on. Amendment of statutes can happen very quickly, but bringing improvement in institutions and preparing them for the better future, that is really hard and takes a lot of time and effort. I have, therefore, always feared that too many amendments to the Arbitration Act can be a distraction because you can stand up and say that "we have just amended our arbitration laws and therefore, we are closer to that ultimate dream of becoming a hub of international arbitration," but that is not true at all. India would not never become an arbitration friendly destination just because it has amended its arbitration laws. That is a part, but it is a very small part of the overall project. The bigger part of it is that our Courts must be capable of and willing to enforce those statutory amendments properly, that the delay which is there in the Court system reduces, judges are better trained, there are better arbitrators in the country, and better lawyers in the country who understand the best practices and then follow those best practices in a disciplined fashion.

Indeed, if you look at leading jurisdictions in the world, take England for example, the English arbitration act has not been amended since 1996, while in India we have gone through multiple amendments since 1996. But no one is saying that England is not a favourable arbitration destination because its arbitration act is outdated.

Coming to your specific question, frankly, I haven't looked at the Draft Bill very carefully. I did notice, however, that there are some welcome changes such as the introduction of the 'emergency arbitrator regime' for even ad hoc arbitrations, which is likely to reduce pressure on Courts, because even today a very large portion of arbitration related application before courts are 'S.9' applications and those could now go before emergency arbitrators, if this was to be given effect

to. There were other edits is relation to timelines and other things which (if enforced) would be welcome changes.

EB: Many believe that the culture in India leads to an overlap between the Court and arbitration procedures, subsequently discouraging foreign investors. Further, this would also include former judges being appointed as arbitrators. Based on your varied experience across civil and common law jurisdictions, do you agree with this view, and what changes would you suggest to make India a more attractive venue for arbitration?

RG: There is a lot to unpack there. Starting with the overlap between the judiciary and arbitration. I do not think that's a bad thing, you'll always have that in every jurisdiction –both from a counsels' and arbitrators' standpoint. While some jurisdictions may have a more specialised arbitration bar than we do in India, ultimately, you will find that counsels who regularly appear in Courts will also appear in arbitration and that retired judges in different jurisdictions would sit as arbitrators. In England, for example, I am appearing before multiple former English judges who are sitting as arbitrators. I appear before English Courts and London-seated arbitrations and the same is the case in India. I do not think that such overlap itself is the problem. The problem arises, as it does in the Indian context, where volume of litigation is so large, that counsel appearing in courts can take out time for arbitration in evenings or over weekends only.

The second problem comes up when you rely heavily on former judges as arbitrators. So, in England, as I said earlier; former judges do it as arbitrators. But, if you look at the overall pool of arbitrators in England, majority of them would not be judges, instead they would be solicitors or barristers. In India, on the other hand, if you look at the arbitrator pool for high value matters, it will almost exclusively consist of former judges.

The other disadvantage of appointing former judges as arbitrators is that those judges bring to arbitration their learnings and experiences from the court system. That is true in India, but it is also true elsewhere. For example, when I appear before even former English judges, I do not find them to be as attuned to international arbitration, as say a senior partner at a large law who regularly advises clients on international arbitrations.

The other thing you asked me about is the cultural differences between common law and civil law systems. The common law world, and particularly England, has had a very large impact on development of international arbitration practices. A lot of the things we do in international arbitration such as disclosure, pre-trial reviews, skeleton filings etc, these are practices which come from English commercial litigation. In fact, today's international arbitration procedure looks a lot like a truncated form of litigation before the English Commercial Court. Therefore, common law

has had a greater influence on international arbitration. But, I think, some of that is changing and is being influenced by practitioners who are more deeply involved in the civil law side of things. For example, the scope of disclosure in international arbitration is very limited. This is a civil law approach. In common law courts, extensive disclosure is quite common, but not so much in civil law courts.

EB: Considering the recent judgment of the Supreme Court of India, popularly regarded as *CORE II*, on unilateral appointment clauses in an arbitration agreement, do you feel that the doctrine of unconscionability, under the principles of Contract, can be a good ground for striking down such clauses?

RG: You know, these unilateral clauses is a very timely topic for me. Yesterday, I was arguing a Singapore seated arbitration before a Hong Kong based arbitrator where the arbitration clause provided for unilateral appointment by the opposite side. That party appointed the sole arbitrator and one of the questions to be decided in yesterday's hearing was whether such appointment was valid. Now there were multiple questions to be answered here. The first is which body of law determines the validity of such appointments. Is it a question to be determined by the governing law of the contract, by the law of the seat or by the law of the arbitration agreement? We do not ever have to answer that question in India because all of this has happened in the context of purely Indian law contracts with Indian seats. But in the context of this case, where the seat was Singapore and the arbitrator was sitting in Hong Kong, you must first ask which law applies to this question. I argued it is the law of the arbitration agreement which governs, whereas the opposite side argued that it is the law of the seat. Let us see what the tribunal decides.

Then comes the second question that, in case a foreign law applies to this question, what is the position of unilateral appointments outside of India? Before the hearing, we did a lot of research on Singapore law and on this particular point, and you will all be surprised, that outside of India, there is virtually no law on this issue, because these questions have rarely, if ever come up before foreign courts. In fact, most probably the answer to unilateral clauses in these jurisdictions is that they are valid. The concerns that are raised in the Indian context, those are quite peculiar to India where public sector undertakings have often abused the significant bargaining power, they have at the time of contracting by insisting on one-sided clauses such as clauses for unilateral appointments.

Coming more specifically to my views on unilateral appointments in the Indian context, I have always had some difficulty with striking them down. Contract law is premised on the principle of 'freedom to contract.' Arbitration law is premised on the principle that arbitration is a 'creature of

consent.' That must mean that a commercial party can choose to enter into an arbitration agreement which gives one party the exclusive right to appoint an arbitrator. The only way you get out of that, I have always felt, is by arguing that the entire contract or the arbitration agreement should be struck down on the ground of 'unconscionability.' But the test of unconscionability would be very hard to meet in these contracts because there are commercial and sophisticated parties on both sides.

EB: Is it difficult for foreign parties to appoint Indian legal professionals as arbitrators in Investor-State Disputes System ["ISDS"], considering only a handful of Indian scholars have been appointed as an arbitrator in ISDS? If so, why?

RG: There are a variety of reasons for this. One is, of course, pure experience. You would generally not appoint someone to your tribunal who you do not think has sufficient experience in that body of law. In India, there is not much experience because the Indian Government often chooses to instruct lawyers outside of India, which has meant that the local Bar has not developed in the same way as it has developed in other jurisdictions. For example, if you look at countries like Mexico or Argentina, which have been very common respondents, the governments there insist on using the local Bar. They may instruct foreign lawyers too, but the local lawyers are always present.

Secondly, the Indian Government should try to appoints arbitrators from India – whether former judges, practising lawyers or academics. At the moment, they don't necessarily do that.

The third reason is that India is not a member of International Centre for Settlement of Investment Disputes ["**ICSID**"]. As a result, ICSID appointments do not normally come to Indian nationals. Many arbitrators in this field received their first appointment from ICSID, either as Chair of the tribunal or as a member of the Annulment Committee. Since India is not a signatory to ICSID Convention, Indian nationals are not considered for such appointments. Consequently, there are fewer opportunities for Indian nationals to be appointed in investor-state cases.

EB: How do you view India's departure from its Model Bilateral Investment Treaty ["BIT"] in the recent India-UAE BIT, particularly regarding the new investment definition and the shortened three-year timeline for exhausting local remedies before ISDS? What do you think can be the consequences of such measures?

RG: The Model BIT is obviously a disaster. The India-UAE BIT is a good document. It still departs from what many of us would think are fundamental principles of investor-state arbitration,

such as no requirement to exhaust local remedies. But it is still better than the Model BIT. It also has a wider definition of investment and so on.

As for the repercussions of this, looking at my own practice, I often act for foreign investors who are either suing the UAE under various investment treaties or UAE based investors who are thinking of bringing claims against India. All of that, in my view, is healthy because ultimately you do want countries and their instrumentalities to realise that their actions can be scrutinized at an international level.

EB: The ICC Young Arbitration and ADR Forum (YAAF) Workshop on "Navigating the Frontiers of Artificial Intelligence in Arbitration," held in Zurich on October 19, 2023, highlighted key areas where Artificial Intelligence ["AI"] could impact arbitration, such as document review, arbitrator selection, and decision-making. Do you think AI will have a major impact on the practice of arbitration? What do you see as the most practical and impactful application of AI in arbitration today?

RG: Maybe, yes. I do not really have a straight answer to that question because I've not really used AI much myself. But whenever I have encountered AI in practice – for example, in the context of document review, preparing chronologies, summarising documents etc – it has been very impressive. I think that ultimately, AI will make our practice more efficient and may take away the need for lawyers to perform certain laborious tasks. But certain keys tasks, like identifying key issues in a dispute, taking judgment calls, devising strategy and arguing cases before courts/ tribunals, that would remain a human pursuit, I think.