Bar and Bench

In conversation with Kshama Loya, Nishith Desai Associates

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Kshama A. Loya is Leader in the International Dispute Resolution & Investor State Arbitration practice at Nishith Desai Associates. She specializes in international commercial and investment arbitration, litigation and pre-litigation strategies.

She holds an LL.M. in International Commercial Laws from King's College, London, and has studied Negotiation and Dispute Resolution at Harvard Law School. In this interview conducted by **Utkarsh Khandelwal**, a final-year student at RMLNLU, Kshama discusses careers in international arbitration, a foreign master's, and a whole lot more.

According to you, what are the additional skills required of a lawyer practicing international investment treaty arbitration as opposed to commercial arbitration?

The skills required for practicing commercial and investment arbitration remain the same. A close scrutiny of facts and issues, utmost precision in assessing impact on your client, ability to sift through volumes of information to formulate clear thought; along-with passion to delve deep into the law, critically analyse and interpret it in more than one way, and above all, the ability to convey clear thought through good advocacy.

The skill-set fundamentally remains the same.

However, what makes the practice of investment treaty arbitration different and special is the wider spectrum of law it covers. Investor State disputes form at the intersection of policy and business, State sovereignty and individual or commercial interests.

Whereas commercial arbitration is confined to private international law, one needs to closely understand international investment law and public international law, alongside private international law, to have a successful practice in investment treaty arbitration.

Further, the impact of an investor State dispute goes beyond purely commercial interests. Unlike commercial parties, foreign investor and the State favour synergies. One therefore needs to develop a skills that are more inclined to achieving an outcome that ensures continuing relationship between the foreign investor and the State.

That is what makes the practice of investment treaty arbitration different and highly specialized.

You have a master's degree from King's College, London. To what extent did King's help you grow? What are the ways in which one can optimise their learning process while pursuing an LL.M. and after an LL.M.?

I graduated from King's nearly a decade ago. I enjoyed, and decided to pursue, commercial and investment arbitration because of the interest inspired by distinguished practitioners and faculty members - Late V.V. Veeder QC, Toby Landau QC, Salim Moollan QC, Ricky Diwan QC, Dr. Federico Ortino, and my passionate FDI Moot coaches and intelligent team members.

I mention this to highlight that at college, traditional classroom learning, research resources, and practice-based workshops often lay the foundation for one's interest and understanding of a particular area of law.

To make the most out of an LL.M., stay focused, make judicious use of time, and leverage practical knowledge & experience from professors.

After an LL.M., the learning process not only continues but gets more rigorous. The difference is you now learn on the job – from your colleagues, competitors, and clients.

The place of work plays a great role in this process. Organisations that focus on continuing education for stakeholders, creating value for their clients and being ahead of the curve help their members excel in the profession.

A gradual global shift can be seen in the intent of the BITs from mere facilitation to regulation of Investments. This broadens the scope of police powers vested in the host state. What possible reactions can be seen to such a change and how will it affect the contours of Investor-State disputes?

We no longer live in a world that can draw clear lines between capital importing and capital exporting countries, or where foreign investment was solely dependent on political relations between countries.

We live in an era of liberalised economies, innovations, thinning lines between developed and developing nations, and increased cross-border trade & commerce.

In the current circumstances, the shift from mere facilitation of investment to regulation of investment appears to be natural and indispensable.

A huge amount of time, capital, and effort is spent in planning & operating investments and in compliance with regulations. Foreign investors are generally appreciative of 'balanced' State regulation.

However, acute State-centricity and unbridled powers to regulate could foster imbalance. Non-transparent, arbitrary or discriminatory regulation of foreign investment by States is likely to breed adversarial situations and disputes.

BITs that allow States to widely exercise police powers on one hand and restrict investment protection guarantees on the other, could seriously affect the contours of investor-State disputes by creating jurisdictional hurdles to initiate claims under BITs or precluding the right to seek necessary protections for lack of adequate guarantees.

Disputes regarding retrospective applicability of tax has been a major issue for India. Having lost the Vodafone case at the Permanent Court of Arbitration, India may potentially face more disputes on the same issue (including one against Cairn Energy). What do you think can be the best course of action for India to reduce such liabilities?

Careful, reasonable and proportionate measures would be the best course of action. We need to be careful while adopting measures that may not stand the test of international standards and our sovereign commitments.

India's measures need to be reasonable and legitimate to achieve her objectives, and must not be disproportionate to the impact on foreign investors.

It is important to maintain an environment that fosters investor confidence, honours legitimate expectations of foreign investors, and respects international law guarantees.

With Brazil signing various BITs in pursuance of its CFIA, focus has shifted to dispute prevention as opposed to resolution. What impact do you think this will have on the global ISDS practice in the longer run? Could the ISDS practice become redundant?

The CFIA model is one model co-existing with several others in a large ISDS universe. Arbitration continues to remain the final mode of resolution even in a CFIA model.

Even if the CFIA model is successful in prevention of disputes and is adopted by more countries, this could at best result in evolution of the ISDS practice but may not make it redundant.

In addition to conduct of arbitration, the practice has considerably expanded to include advising investors and States on planning, structuring, or receiving investments in a way so as to benefit from treaty protections in the event of disputes or to ensure admission of investment in accordance with State laws to prevent certain disputes.

It also includes advising foreign investors on maintaining the legality of investment during operations; pre-empting disputes; advising the Government on legality of the measures it proposes to adopt or regulations it seeks to change that could result in disputes; informally resolving issues before they affect the investor State relationship, formally attempting to resolve disputes through alternate non-adversarial means.

If we haven't been examining the width and depth of the Investor State landscape and preventing disputes already, then the ISDS practice will need to shift its focus. Law is constantly evolving; there is no choice for ISDS practitioners but to evolve and grow.