INDIA ADR WEEKDAY 2: MUMBAI

SESSION 6

The Next Edition of the MCIA Rules - Key Features

06:00 PM To 07:00 PM IST

Moderator:

Shaneen Parikh, Partner and Head - International Arbitration, Cyril Amarchand Mangaldas

Speakers:

Andrew Pullen, Barrister, Fountain Court Chambers

Christoph Kauffmann, Counsel, Osborne Clarke

Fatema Kachwalla, Partner, JSA Advocates & Solicitors

Vikram Nankani, Senior Advocate

Ranjit Shetty, Senior Partner, Argus Partners

1 **HOST:** The next session by MCIA is on, 'the next edition of the MCIA Rules - Key features.'
2 On the panel, we have Ms. Shaneen Parikh, MCIA Council member and Partner and Head
3 international arbitration, Cyril Amarchand Mangaldas. Moderating the panel. We have
4 Andrew Pullen, Barrister at Fountain Court Chambers. Christoph Kauffmann, Counsel at
5 Osborne Clarke, Fatema Kachwalla, Partner at JSA Advocates and Solicitors. Mr. Vikram
6 Nankani, MCIA Council member and Senior Advocate and Mr. Ranjit Shetty, Senior Partner
7 at Argus Partners.
8
9 **SHANEEN PARIKH:** Well, hi, everyone. And those who are not grabbing a cup of coffee,
10 come and sit down. Welcome to the last session of the day. They say the best is saved for last.
11 I like to think so, or maybe it's just that we're loathe to let you go. Either way, we're going to
12 try and make sure that this session is worth your time. Today's panel will discuss the key
13 features of the proposed revisions to the MCIA Rules. As a member of the MCIA Council and
14 the Rules Revision Committee, I'm delighted to be able to moderate this panel. Work on the
15 revision started almost two years ago and have gone through several iterations and heated
16 discussions. But as MCIA hits its hundredth plus case, they are right now for public
17 consultation, and we're looking to hear from all of you, the actual users and stakeholders in
18 the arbitration process. MCIA was founded in 2016 and is now in its 8th year. And during this
19 time I can think of at least five developments that have led us to this point. Number one, India's
20 Arbitration Act was amended twice in 2018 and 2021. Institutional arbitration has become the
21 norm with private parties, and there is a concerted move from the Government to adopt
22 institutional mechanisms, even in Government contracts. And no, I'm not going to answer any
23 questions about the June 3 Circular. Please reserve those comments for another day.
24
25 Thirdly our legal infrastructure has undergone considerable sophistication, for instance, with
26 transcription and TERES that you see today being available in courts as also regular online
27 hearings. And arbitral institutions across the Asia Pacific region have also elected to revise and
28 relook at their arbitration rules. Though most institutions wait a decade or so before even
29 considering a revision, given the progress of India as a whole, not just in terms of ADR, but
30 also in terms of the business and the regulatory regime, we felt the time was right for MCIA to
31 double down on its efforts to be a truly robust, reliable and independent arbitral institution.
32 Having a Counsel with expert arbitration practitioners, both Counsel and retired judges from
33 several jurisdictions means that we were able to look at, consider best practices and consider
34 tweaking the rules using both hindsight and foresight. We also have to keep in mind the unique
35 position you have in arbitration in India which is almost a dual regime, and it differs quite

substantially from the way international arbitration is conducted. That said, we also had to keep an eye on MCIA's ethos, which is not that it is an Indian arbitral institution, it is, and we hope it will be a truly international institution, agnostic of its place of incorporation. The experts on our panel, who include Council Members and other users of the rules, will keep you riveted, I hope, as we discuss some of the headline changes proposed. And I'm looking forward to their rules, so that they may inform some further revisions.

So, I'm going to start off with Rule 6 on consolidation and start with Ranjit. Now, the current Rules already contain provisions for consolidation. What is different in the new draft and how is it better? Is it better?

RANJIT SHETTY: Well, it's definitely better. I don't think that needs a lot of discussion. When we discuss the rules, it will become evident. The proposed amendments actually capture what is expected from an arbitral institute of MCIA standards and is at par with the Rules which other institutions also offer. Do we have a....we are not having the rules on the screen, right, Shaneen?

SHANEEN PARIKH: No, we are not.

RANJIT SHETTY: Right. No problem. So, I'll just go through this. Don't worry. So, some rules which I think is of relevance, which shows how MCIA has approached this. The Rule 5.1, which is existing today allow us consolidation of two or more arbitration proceedings, which provided that all the Parties to the... all the Parties agree to the consolidation. Or all claims in the arbitration are made under the same arbitration agreement. Well, the proposed amendment now widens the scope of MCIA to consolidate. It says... it talks of a concept of arbitration agreements being compatible, and the Rule reads as thus. It says, that the Arbitration Agreements are compatible and at least one of the conditions are met. Disputes arise of the same legal relationship. Disputes arising of contracts comprising of a principal contract and ancillary contracts. Or disputes arise of the same transaction of a series of transactions. Now, it's obvious that the addition of this Sub-rule C, substantially widens the scope of MCIA Council. This will also allow parties to consider consolidation for larger category of arbitrations. The benefits of consolidation remain the same. It's saving on time, cost and, of course inconsistent arbitrator awards. Some of the examples for consolidation, which everyone should know, is shareholders disputes, principal contracts, executed by parent companies and subsidiary companies. It could also be useful for related party transactions.

1 Another interesting rule is 6.12. But the rule, as it reads today, is Rule 5, that only MCIA
2 Council is empowered to order consolidation. Now, under the proposed amendments, MCIA
3 still has the power. However, after a Tribunal is appointed under Rule 6.12, a Party has to
4 approach the Tribunal for consolidation of all or any of the arbitrations. Now the Tribunal will
5 factor obviously the following, that one is, all parties agree to the consolidation. All claims are
6 under the same agreement. Same Tribunal is appointed. And three is that, say, Arbitration
7 Agreements are compatible. Now under compatibility, just to recapture what we discussed
8 earlier, three categories were there initially. The disputes arise out of the same legal
9 relationship, disputes arising out of contracts comprising of principal contracts and ancillary
10 contracts, disputes arise out of the same transaction or series of transactions. Now, this is the
11 fourth one. When it comes to a Tribunal. the Tribunal can also has this to consider a common
12 question of law of fact arises. Sorry. A common question of law or fact arising out of or in
13 connection with all the arbitrations. Now, this is something in addition which the Tribunal can
14 consider. Again, the proposed amendment seeks to permit Parties to make a request for
15 consolidation even after the appointment of a Tribunal. Just to give an example, there could
16 be an arbitration which is ongoing between two Parties and the claim made is for monies which
17 are otherwise due. Whilst that arbitration is going on, one of the Parties has terminated the
18 agreement. And this is an example, where both the Parties can consolidate… agree for
19 consolidation of the arbitration.
20
21 Rule 6.15 is important. It has the power to revoke appointments already made. Now, this is
22 important because some other institutions cannot consolidate different arbitrations after a
23 Tribunal is formed because the institutions do not have the power to revoke earlier… Now,
24 MCIA has done this. The proposed amendments gives it that power. Rule 6.9, 6.14 and 6.16.
25 This talks of the decision of Counsel or the Tribunal to consolidate proceedings. And it says
26 that the same is without prejudice to the Tribunal's power to decide on its own jurisdiction.
27 Thus the party can challenge the jurisdiction of a Tribunal is not barred or precluded on the
28 ground of MCIA's decision of consolidation. Just to repeat, just because you agree to a
29 consolidation doesn't mean that you cannot challenge the constitution or the jurisdiction. That
30 said, a Party who has otherwise not had an opportunity or otherwise did not participate in the
31 constitution of the Tribunal or consolidation of proceedings shall be deemed to have waived
32 his rights under proposed Rule 6.19. But this Party is not barred from challenging the
33 Tribunal's jurisdiction.
34
35 Two points, which are worth discussion, not necessarily of a concern is that Rule 6.2 and 6.12,
36 reading of these rules, it appears that the consent of all parties are not necessary or not
37 mandatory for consolidation of proceedings. Now, in a case where a request for consolidation

1 is made on fulfilment of conditions which are other than a consent in a challenge to an award,
2 there is always a potential risk of a court adjudicating on whether the consolidation was
3 appropriate. This is some aspect which I couldn't find any judicial precedence, and I think
4 since it's an amendment, this is something that will need to be seen as the law develops. Now
5 interestingly, on this very aspect, the amendment to...amendment to the rules which is
6 proposed Rule 6.7 the MCIA Council may grant or deny an order of consolidation without
7 having to furnish reasons in support of a decision. This proposed amendment, in my view, can
8 have some consequences, and the award could be vulnerable to a challenge, especially when
9 the Party's consent is not a mandatory precondition under the proposed rules. So, this is my
10 bit on the proposed amendment.
11
12 **SHANEEN PARIKH:** Thanks, Ranjit. So, Andy, I'm going to ask you a question on a
13 different rule, but before that, I wanted your thoughts quickly, on the difference in the
14 evaluation process between consolidation, where an application is made to the Counsel or to
15 the Tribunal.
16
17 **ANDREW PULLEN:** Sure. So, just a couple of quick points on that, I think. It's interesting
18 that the MCIA have made this change. So now, once the Tribunal or once a Tribunal is
19 appointed and if the arbitrations that are subject to the consolidation application it's the
20 Tribunal that decides that and it's interesting if you do an international comparison, some
21 rules reserve the power of consolidation to the institution, the ICC and the HKIAC do that.
22 SIAC does it the same way that the MCIA is proposing to do. And I think that is probably
23 sensible, actually, the way that the MCIA is doing it. Because the Tribunal will, by this point,
24 know more about the dispute in many cases than the institution will itself. And I think that
25 flows on into the second point that I had to make about this, which Ranjit mentioned, the fact
26 that there is an additional ground which the common question of law or fact arises in both of
27 the proceedings. That's an additional ground for consolidation where you've got compatible
28 Arbitration Agreements. And I think that is a sensible thing to add in. I think in many cases
29 it's not going to add a great deal, but it seems to me that it is useful to include it. And my
30 observation is that at first it may seem anomalous that that's a ground for the Tribunal, but
31 not a ground for the Council in a pre-Tribunal, in a pre-constitutional Tribunal situation. But
32 again, perhaps that's explicable by the fact that judging whether there's a common issue of fact
33 or law, is going to be easier for the Tribunal than for the institution. The other sort of grounds,
34 same legal relationship, principle and ancillary contract, same transaction. Those are a little
35 bit more mechanistic and easy to judge for the institution, whereas common issue of fact of
36 law. How important is that? Is that really something that deserves consolidation of the two

1 proceedings? That is going to be something which a Tribunal is probably going to be better
2 placed to judge.
3
4 **SHANEEN PARIKH:** Thanks, Andy. I'm going to come to Rule 7 now, which is concurrent
5 proceedings. Now this is a new rule. It seems to track some proposed revisions that other
6 institutional rules are considering. What is the purpose or the benefit? And what are these
7 concurrent proceedings?
8
9 **ANDREW PULLEN:** So I think the thing to do is to think about concurrent proceedings and
10 consolidation together and to then think about the difference. So, in a consolidation, you take
11 two arbitrations they are essentially merged. You have then have one proceeding in which all
12 of the Parties to the previous arbitrations are now Parties to a single arbitration, the Tribunal
13 can make an award binding all of the relevant parties. All of the evidence, all of the submissions
14 is then in that single arbitration. Concurrent arbitrations or concurrent proceedings is where
15 the arbitrations technically stay separate, they are separate arbitrations. But the way that the
16 rule works is it allows to have concurrent proceedings where you've got the same Tribunal
17 appointed in all of the separate arbitrations. You might have two or three separate arbitrations,
18 same Tribunal, the Parties remain just... they may be different Parties in each of the different
19 arbitrations founded under different Arbitration Agreements. So, the evidence, the
20 submissions will all be common across all of the, say, two or three arbitrations but they
21 technically remain separate. The Tribunal will have to make separate awards in each of the
22 different arbitrations.
23
24 And it seems to me this is useful in situations where it may not be appropriate to consolidate
25 for whatever reason. And I think this is something just looking at the grounds. So, you have to
26 have the same Tribunal and then the grounds allow you to have concurrent proceedings where
27 there's the same Arbitration Agreement is the basis for all of the arbitrations. All the
28 Arbitration Agreements are compatible, the dispute arises out a similar legal relationships,
29 which is perhaps slightly broader than the same transaction or same legal relationship that
30 you have in the consolidation rule, where it says out of the same transactional series of
31 transactions, which is a similar sort of thing.
32
33 I suppose my questions about this are twofold. One is, why doesn't it include the principal and
34 ancillary contract situation? And so that is something that I think perhaps MCIA should think
35 about, whether that should be added in as well. And the other thing is the requirement for the
36 Arbitration Agreements to be compatible. And really, this goes back to a case called ***Duro***
37 ***Felguera***, which was a 2017 case here in India, which was about a construction project and

1 to cut it short, many of you, I'm sure will be familiar with this, but there was essentially there
2 was a foreign party juror that had been awarded a construction project. For convenience, it
3 was divided up into a series of different contracts, some of which had the international Party
4 Duro as the contracting entity. And in other cases, it was a local Indian subsidiary that was the
5 contracting party. Now, then ended up with a theory of arbitrations, one under each of the
6 contracts and the Supreme Court refused to order a consolidated reference, because where the
7 international party was concerned, the arbitration was international whereas the domestic
8 Indian counterparty, it was a domestic arbitration. And therefore, as you all know, the grounds
9 for setting aside are slightly different. And so that seems to me a situation where they are
10 incompatible arbitration agreements. But in the ***Duro*** case, the same Tribunal was appointed.
11 And so, it does seem to me that that is a situation where concurrent proceedings could well be
12 sensible. And so I think this is, again, something, a slight tweak to slightly broaden out the
13 scope of the consult of the concurrent proceedings rule might be worth considering.
14
15 **SHANEEN PARIKH:** Thanks, Andy. I have just one question I wanted to ask in concurrent
16 proceedings. So, does it mean that the evidence led in one proceeding can be adopted and
17 treated as evidence led in all the others?
18
19 **ANDREW PULLEN:** Exactly. So, I think this would be up to the Tribunal to give a detailed
20 order as to exactly how it works, but that's the way in which you can do it. And typically, a big
21 time saving, and cost savings can come from that, both on the written evidence and the
22 submissions and also having a concurrent hearing.
23
24 **SHANEEN PARIKH:** Thank you. Okay, now for the audience, the good folks at MCIA have
25 told me that you should, and please do check out the rules@mcia.org.in. I can see zero people
26 having picked out their phones, which means that you obviously already have the Rules with
27 you. Okay. Thank you. All right, Fatema coming to you now. As Counsel, how would you
28 differentiate between consolidation and concurrent hearings? We've heard from both Ranjit
29 and Andy. And what are the different implications? When would you choose one over the
30 other? Very quickly.
31
32 **FATEMA KACHWALLA:** Okay. So, it's been very set out in a detailed manner by Ranjit and
33 Andy. So, I'm not going to repeat it. But briefly, consolidation is where two arbitration
34 proceedings are conjoined in a single arbitration. And it's joined to the one which had
35 commenced first. So, all subsequent arbitrations will join to the first one, with either the
36 consent of the Parties or based on the hearing, which will not require the consent of the Parties.
37 Now, concurrent proceedings, on the other hand, is conducted parallelly by the same Arbitral

Tribunal. It may not include... it may include, sorry, those proceedings where the plea for consolidation was rejected, in which case you then have the chance to go for concurrent proceedings. Now as Andy had rightly pointed out, there are some differences between concurrent and consolidation in terms of the parameters why you will start concurrent proceedings. The advantage of both is going to be decided by the same arbitration panel. So, the concurrent proceeding also sets out that the arbitration panel remains the same. So, that advantage remains the same. The difference is whether it will be heard in a conjoined manner or differently. Now that has its advantages and disadvantages, but whether you can prefer one over the other is as good as saying that in a litigation will you go for a writ over another remedy? You can't decide. It will be decided in a facts of the case. For example, in a shareholder dispute where all the shareholders have a common dispute against the company, I would say consolidation will bolster your evidence against the company. Go for consolidation. Whereas, say, in the case of an EPC Contract where there are various contractors against a state owned entity, there may be chances of counterclaim enforcement issues. In that case, you may want to control your independent proceedings where you have the advantage of a single or similar Arbitration Tribunal but at the same time, you want to control your proceedings. So, in that case, maybe concurrent would be better.

SHANEEN PARIKH: Very interesting. Okay, Vikram, I'm going to come to you. Now, listen attentively, because I have a long question for you. So, we go to Rule 8 Joinder. The Rule 8.1 allows a party or non-party or an additional party to be joined in an arbitration. Now, the term "non-party" does not feature in our act. So my first question is, what meaning can we ascribe to these terminologies? Are they different? But I'm not stopping that. I'm asking this question, particularly in the light of the Supreme Court's decision in ***Cox & Kings***, where the Supreme Court ruled on the Group of Companies Doctrine and consider it useful in the context of complex multiparty multi agreement transactions. And Justice Chandrachud observed the term 'non-signatories' instead of the traditional 'third-party' seems to be the most suitable to describe situations where consent to arbitration is expressed through means other than signature. Therefore, can non-party be likened to third-party? Do you have to look at consent when you look at non-party? Do you look at the alter ego doctrine. Do you pierce the corporate veil? And really, my question now is just, a broad brush. How do you marry all of these together?

VIKRAM NANKANI: It's not fair that you intimidate somebody who is not a party to the panel and has been asked to join. So what your ladies and gentlemen...

SHANEEN PARIKH: I apologise profusely to Vikram for last minute and taking on the toughest question.

VIKRAM NANKANI: What you ladies and gentlemen have just seen or experienced is how a non-party is added to the panel. So that answers it all. Shaneen, can I get away with that? Probably no, because you're vigorously shaking your head, saying no. Okay. I think it's more a matter of semantics once you compare it with the ratio of ***Cox & Kings***. Whether you call it non-party, non-signatory or third party. Essentially, if I were to use a colloquial expression. Sorry, my friends who are not from India. The *"mool mantra"* of all this is that, do you satisfy the test in ***Cox & Kings***? And therefore, any discussion on these topics means that you cannot avoid discussing ***Cox & Kings*** because that's the latest judge made law in India. And I think we are blessed with that law because at least to my limited knowledge, this is the only Supreme Court in the world which has expounded on this theory of non-signatories and third-parties. So, what is it that ***Cox & Kings*** say in that? I think it's still a mystery which people are trying to unravel. What I can discern from there are the following points: Number one, that the group of companies doctrine, which in India held the field since ***Chloro Control***, which was 2012 has been largely misunderstood. And that doctrine is like the elephant being felt by the seven blind men. Whatever your experiences are, you would rope in and say, this is a necessary party or a proper party. You, virtually under the garb of Group of Companies Doctrine, were bringing in the baggage of civil court test of necessary and proper parties because you were getting into various other factors which completely destroyed the corporate identity or individual entity status of different companies. So therefore, I think this has been now well explained, that there is no magic in the words "Group of Companies." Group of Companies cannot be just a simplicitor ground for adding a non-party, and henceforth this expression shall include third-parties and non-signatories. So, that's one clear ratio emerging from ***Cox & Kings,*** that group of companies by itself is not any test to join a non-party.

The second is that you have to look at the participation conduct of any person. It may not be a group company, it may be a rank outsider, unrelated party and as popularly understood as a third-party. If you are able to demonstrate, and that's a matter of evidence that another party who is not party to the arbitration agreement has conducted itself in a manner that, for example, it has participated in the performance of the contract and if you can justify that, therefore, they had an implied consent to the Arbitration Agreement, I think then you can join a third-party or a non-signatory. Which brings us to the fundamental principle of arbitration that it is by consent. So, ultimately in ***Cox & Kings*** what the court has held that you look for consent in some form or some manner. It may not be expressed consent. It may not be in black and white. It could be by conduct, it could be by participation. And as long as your able to drive

1 the point that there is an implied consent of a third party being bound by the dispute resolution
2 mechanism chosen by the signing Party, then you can bring in that Party in arbitration for a
3 holistic determination of the dispute.
4
5 So, that is, I think the ratio, ultimate ratio of ***Cox & Kings*** that you look for implied concern
6 and some of the factors that are relevant to determine whether there is an implied consent or
7 not, as I said, is participation or conduct. So, you can't lift the corporate veil. You can't get into
8 the alter-ego doctrine, which are all facets of Group of Company Doctrine. So you, those old
9 thoughts have to be given a go-by. Where it gets a bit confusing, and, you know, you sometimes
10 tend to think that there is a grey area is because the Constitutional Bench has upheld the
11 validity of ***Cherian Properties***. Now, ***Cherian Properties*** was a very unique. In a sense,
12 it's a *sui generis* case. ***Cherian Properties*** arose out of proceedings under the Companies
13 Act and the parties had gone to the National Company Law Tribunal for execution of the award
14 because the award was for transfer of shares by A to B held in a Company C. C refused to
15 transfer the shares and said that we are not going to transfer the shares in the name of the
16 judgment holder or decree holder. And it is from there that the matter went up to the Supreme
17 Court. And in ***Cherian Properties*** while saying that a third-party will be bound by the
18 arbitral award, what really the Supreme Court held was that in execution proceedings, a Party
19 which claims through the judgment debtor cannot avoid the consequences of the award. Now
20 that is very, very different from the issue which they decided in ***Cox & Kings*** of a third-party.
21 This was... ***Cox & Kings*** is the stage of Section 8, which we know in India is where you refer
22 parties to dispute something where you avoid in an anti-arbitration injunctions that you get
23 elsewhere in other jurisdictions. So, Section 8 is something like that. And Section 11 is the
24 power of the courts to appoint an Arbitrator. So, that was the critical issue or the key issue in
25 ***Cox & Kings***. But by upholding ***Cherian Properties***, which was in a completely different
26 factual matrix and arose post award in an execution proceeding there is sometimes some
27 confusion in some minds as to really, as you travel beyond the implied consent test the ***Cox***
28 ***and King's*** judgment or has it gone back to Group of Companies Doctrine in a very indirect
29 fashion? I would not think so. I think it as buried the Group of Companies Doctrine, once and
30 for all, and said it in so many words that you can't get into alter ego or pierce the corporate
31 veil. So, ***Cox & Kings*** is, I think, our rules which are proposed, Rule 8, would ultimately play
32 a role, and depending on the governing law of the Contract or the Arbitration Agreement, I
33 think Rule 8 will definitely have ***Cox & Kings*** will have a bearing on the interpretation of
34 Rule 8 either by the Tribunal or the Counsel.
35
36 **SHANEEN PARIKH:** Thanks, Vikram. Christoph, so, one of the conditions for joinder
37 includes a party or non-party being prima facie bound by the arbitration agreement. How do

1 you see this test playing out in practice? And can you give me a sense on how you've seen it
2 compared to other institutional rules?
3
4 **CHRISTOPH KAUFFMANN:** Yes, thank you. I've read ***Cox & Kings***. And what kept in
5 mind, what I kept in my mind is consent as the cornerstone of arbitration, and I think that also
6 applies to other institutions as well. And I think the MCIA did a great job to include these
7 Joinder Rules. What I find really interesting is that a non-party has the right to apply for
8 Joinder. And comparing that, especially, for example, to the German GAI's rules, the German
9 Arbitration Institute that is unknown there and also compared to Article 7 of the ICC Rules.
10 So, a third-party. And the interesting question on that initiation, I discussed this beforehand.
11 How does the party know? Right? Sometimes third-parties are not aware of an ongoing
12 arbitration. And so, I think it's an interesting point to include that here in an interesting idea.
13 I think it's a good idea. And we have a similar approach in German Courts and German Civil
14 Procedure, where a party which is not a party to proceeding can ask for Joinder. So, yeah I can
15 just say that it's an increasing efficiency and flexibility, so, yeah.
16
17 **SHANEEN PARIKH:** Thanks, Christoph. So, we move on now from these multiple
18 arbitrations and multiple contracts. Now, disputes in the last several years have almost
19 become their own asset class and the new breed of funders more common. And as this has
20 increased several institutions have also revised their rules to take into account third-party
21 funding of a Party, usually a Claimant. Now, as there are different stakeholders and
22 consequences in the process, this funding needs to be disclosed. And that is what new Rule 37
23 provides. So, Fatema, what are your thoughts on the Rule? Is it necessary? Does the Rule need
24 to go further? How do you see it being played out?
25
26 **FATEMA KACHWALLA:** Thank you, Shaneen. So, Rule 37 deals with third-party funding,
27 which is an emerging topic in the litigation sector. We see a rise in third-party funding
28 agreements in litigations or arbitrations. While historically third-parties were prohibited from
29 funding unconnected party litigations under the doctrine of maintenance or champerty. But
30 in the current era of encouraging access to justice, many jurisdictions have opened that road,
31 including international arbitrations. Particularly international and domestic arbitration given
32 the nature of party autonomy and addressing commercial disputes of private Parties, have
33 naturally become a more lucrative forum for third-party funding. But we do see the trend is
34 emerging in the international market and various other rules. However, in India, there is no
35 such legislation as of now. Therefore, the rule is quite a welcoming rule in the Indian
36 jurisdiction, especially in the arbitration regime. Although India lacks a formal legislation,
37 there has been a positive trend in the way courts have seen third-party funding since many

1 years. And we'll be surprised that the first time, the court had taken note of third-party funding
2 was the privy council in the year 1876. That's in the case of ***Ramkumar Kundu***, where it
3 said that such kind of agreements are fine, but they need to be carefully watched so that they're
4 not unreasonable, unethical, and not against public policy. Recently, in the case of ***AK Balaji***,
5 the Supreme Court has said that while there are restrictions on lawyers funding the litigation
6 there are no restrictions on third party funding them. However, the third party funding has
7 really gained recognition in the recent judgment of ***Tomorrow Sales***, and it's important to
8 analyse this judgment before we get into the rules, because really I feel that the sequitur to the
9 rules.
10
11 So, in this matte the Claimants SBS Transport Logistics Private Limited had initiated
12 arbitration against SBS Holding. Now the Claimants had availed funding from this entity
13 called Tomorrow Sales Agency for the arbitration. The Tribunal rejected the claim of the
14 Claimant and imposed cost, including penalty. The Respondents filed a petition before the
15 Delhi High Court seeking such an interim release injunction and details of the assets not only
16 of the Claimants, but also of the third party funder. The single judge, interestingly, granted the
17 relief in favour against the Claimant and the third party funder on the ground that the third
18 party funder had a vested interest in the outcome of the litigation, and therefore they will have
19 to bear the cost. On appeal, the Division Bench of the Delhi High Court has reversed the single
20 judge order on the ground that the third-party funder was not liable because under the
21 Funding Agreement, the third-party funder was not under any obligation to fund an adverse
22 order. Also, as per the Funding Agreement, in the event the claim was not successful, the third-
23 party funder would not be liable to take financial recourse from the lawyers or the Claimants.
24 So, it was not any way working on the other side. So, it could not have worked in the reverse.
25 Further the Division Bench said that third-party funder really is not a Party to the arbitration
26 and therefore, you cannot go against them.
27
28 In this judgment the court laid emphasis for formal rules, including the norms for disclosure
29 for third-party funding. Although the matter is now before the Supreme Court, and there's a
30 hearing chalked out recently. But in light of this, Rule 37 is quite a pleasant introduction in
31 this regime which calls upon the Parties to make several disclosures during the arbitration
32 process. One is on existence of third-party funding. Second, the identity of such a funder. I feel
33 that is important to govern conflict of interest issues *qua* the arbitrator or even the lawyers.
34 Third, whether the funder has undertaken to bear any adverse cost liability. This will assist the
35 Tribunal while deciding the cost or even the application for security of cost. So, the
36 introduction of Rule 37 is quite a welcoming move in the regime of TPF arbitrations. And
37 especially in the light of what is going on, we've also seen in the case of ***Go Air***, the COC of Go

1 Air has taken third-party funding in its ongoing international arbitration, which is going on.
2 So, the trend is changing. It's emerging. Even in insolvency cases people are going for third
3 party funding. So the rules are a must. It's also in sync with the proposed draft amendment.
4 So, the language or the concept of disclosure is also in sync with that. Of course, there are areas
5 where we need to be careful. Or maybe the rules can be further thought of, such as the amount
6 of control, a third party funder may have in an arbitration, who's really going to run the
7 process. There may even be conflict of interest between the funder, the lawyer and the
8 Claimant. And this conflict may become more acute in case of a negotiation or settlement
9 because a third party funder is really a repeat player and has different goals as opposed to the
10 Claimant who is a one-time player and may have different goals from the outcome of the case.
11 Similarly, enforcement issues are not really tested as of now so these are things we need to be
12 careful while even drafting the third-party funding contract, which will effectively govern the
13 process because the disclosures are from your contract and govern the process going forward
14 in arbitration.
15
16 **SHANEEN PARIKH:** Thanks Fatema. So, the rules really require disclosure, disclosure by
17 a party. Of course we act in the 5th and 7th Schedule also requires disclosure if an arbitrator
18 has a relationship with a funder in an arbitration. But, Ranjit, do you think Rule 37 goes far
19 enough? And do you think there should be consequences prescribed in these rules for
20 nondisclosure?
21
22 **RANJIT SHETTY:** I am not sure whether I have a straight answer, whether there should be
23 consequences for non-disclosure. The reason being is, one should really assess that if any
24 advantage has been derived from the fact that he's not disclosed the fact that he's funded. I
25 mean, the idea of a disclosure is what? I mean the way I look at it is the Arbitrator needs to see
26 whether he's conflicted. There could be another theory that there needs to be an assessment
27 to see if the party was funded, whether there should be some kind of security of cost that needs
28 to be covered by him. Now, these are the two things. Having said that, again, just because a
29 Party has sought to be funded doesn't necessarily mean that he is in a position that an order
30 of cost should be an order securing cost should come against him. Maybe the standards of an
31 attachment for judgment or our own MCI Rules, Rule 21, or I think 39 also speaks of cost.
32 Maybe those standards needs to be met.
33
34 Again, coming back to the question. Like I said, I don't have an answer. In terms of an example
35 what if a party has been funded, he has not disclosed and there's been order against him. So, I
36 don't see what has happened in such a scenario, he has not benefited that there's an order
37 against him. But that said, if a party has been funded, he has not disclosed. And there's an

order in his favour, then I don't know what the consequences are. This needs possibility to see on a case to case basis. It sounds harsh, but maybe setting aside of an award. That's something that maybe we'll have to consider.

SHANEEN PARIKH: Thanks, Ranjit. We looked at, one of the things that has to be disclosed is whether the funder has undertaken to bear any adverse costs liability. And so, Christoph, I'm going to ask you a question on another rule, but that flows perhaps from here. And that is Rule 21 on security for costs. This is a new rule that's been inserted but it is a power that the Tribunal already enjoys both under our Arbitration Act and also existing Rule 39(e). So, do you think this provision is necessary? Does it amplify the existing power? Was it required? And how does this provision compare with your experience with other arbitrary rules?

CHRISTOPH KAUFFMANN: I do appreciate that provision very much because I can tell you why. I'm currently from Germany. Please don't tell the German Institute of Arbitration that I'm going to say this here. When we heard in the market that the opposing Party has troubles, financial troubles, and we are not sure what to do now, because the German Arbitration Rules do neither, that there's no section in there requiring disclosure of a third-party funding. Which is, I think, combined to Rule 21. Because if you know that there's a funder, you can be sure that there's financial security. But what the German Rules also do not provide is security for cost provision. So, we now have to come up with some sort of application. And so, I appreciate the security for cost section very much. What is important, which is not what is not in there yet is also to maybe give the Tribunal an idea of what it can do, shall it render Procedural Order or maybe a partial award, but in my opinion, it has to be something which is enforceable. So, I think an award would be the way to go. But, yeah, I do appreciate that. Thank you very much.

SHANEEN PARIKH: Thanks. Andy, Rule 37 and Rule 21. How does the fact that a party is funded interact with Rule 21 and security for costs?

ANDREW PULLEN: Well, I think this is a really interesting question. I think he's obviously very sensible to require the disclosure of the presence of a funder. And also whether the funder is undertaking to bear an adverse costs liability in case the funded party loses and costs are awarded against it. And I was interested in... Fatema mentioned the ***Tomorrow Sales*** case, in that case in the Division Bench mentioned the fact that funding and the terms on which funding is given could well be relevant. Relevant security costs. And I think they were right to do so. Interesting you said that. This bit now being appealed to the Supreme Court because I read the judgment and thought it was absolutely unimpeachable. I thought it was absolutely

1 bang on and not really any basis for anyone to disagree with it. But coming back to the Rules
2 and in particular, this point about how could the funder undertake to bear an adverse cost
3 liability? Because I think that would be the next question, that if you're the Respondent to the
4 claim, you might be asking, having learned that there's a funder involved and that they are or
5 are not undertaking to bear that cost liability. So, one possibility is that there's a contractual
6 liability from the funder to the funded party, for its adverse costs risk. Secondly, the funder
7 might be willing to provide a direct contractual undertaking, perhaps by way of a deed to the
8 opposing party to say if costs are awarded against the party who I'm funding, the Claimant, we
9 agree that we will pay the Respondent those costs. That could be a possibility, and I know some
10 funders are willing to do that. And the third possibility, which goes somewhat further, and I'd
11 be interested to hear Indian lawyers' views as to whether or not this would work under Indian
12 law. But again, this is something that I've heard some funders indicate that they are prepared
13 to do and that is to actually give a submission whereby the funder agrees to submit to the
14 jurisdiction of the Tribunal. And I think this would probably be, have to be in the form of
15 essentially a Deed of Adherence to the Arbitration Agreement in order to become part of the
16 Arbitration Agreement, Party to the arbitration subject to the Tribunal's jurisdiction. And
17 therefore, a cost order could be made directly against the funder itself, which would then put
18 it in a different position from the funder and the ***Tomorrow Sales*** case.
19
20 And so, I think those are things I think don't need to be in the rules. But those are things that
21 Tribunals... Well, opposing Parties could ask about. Tribunals could take into account in
22 deciding whether to exercise their jurisdiction to order security for costs. I mean, it seems to
23 me that there's a few things that come out of security for costs. And the first one is that some
24 arbitrators are very reluctant to order it and I think it's something alien in arbitration. I
25 disagree, and I think it's sensible to have it in the rules. Second thing is it's usually ordered
26 where the Claimant is impecunious, but the Tribunal has to take into account a balance
27 between fairness to the Respondents who might succeed and then not be able to recover costs
28 versus the potential to stifle the Claimant's claim if it's bringing that claim. And so the fact as
29 to whether or not you have a funder, whether that be a professional funder or some other third-
30 party, could be a shareholder, could be a promoter, could be an affiliate funding that claim on
31 behalf of the impecunious Party, those I think are relevant factors for the Tribunal to take into
32 account when deciding on the facts of that case, whether it's sensible to award security for
33 costs. And so, having 37(1)(c), the obligation where a funder is involved to disclose the position
34 as to whether or not the funder is going to bear an adverse cost liability, opens up the ability
35 for opposing Parties to ask these questions and then depending on the answers, to make an
36 application for security, for costs.
37

1 **SHANEEN PARIKH:** Thanks, Andy. It always warms the cockles of my heart when someone
2 says an Indian court decision was bang on. Okay, we're going to roll back up the Rules to Rule
3 16 and I am going to ask Vikram on early dismissal and summary procedure. That's another
4 new provision which already finds its place in some other arbitral institutional rules and also
5 potentially in one of the proposed revisions to the English Arbitration Act. Have you ever seen
6 these provisions rule used, of early dismissal or summary procedure? And do you think there
7 are worthwhile inclusion?
8
9 **VIKRAM NANKANI:** It certainly is a welcome measure and a huge step forward, because
10 one of the criticisms today against arbitration, at least in India, is that it is as time consuming
11 and as not cost-effective as it should be. And therefore, I think this is a welcome provision. It
12 remains to be seen how many make use of this provision. And it also remains to be seen how
13 the Tribunals proactively respond to this, such applications for early termination or disposal.
14 As the title suggests, it's a summary procedure. So, it really fits into with our legal framework,
15 which is Section 19, that the Tribunal is the ultimate master of the procedure and how it
16 governs or controls the arbitration. And I think, in matters where you don't need oral evidence
17 or it can be a documents only arbitration or if you can cull out an admission and something
18 similar to your 31, Section 31(6) of the Arbitration Act. So, this sort of gives us, the Parties or
19 the Tribunal further wings to take those provisions forward like a Section 31(6). And if you can
20 make out a case of an admitted liability and that all the defence is a moonshine defence, which
21 is a popular expression used in India, you could probably end the arbitration early. And I think
22 I see a lot of merit in it. I think the MCIA must be commended for putting this on the basis of
23 other global best practices.
24
25 **SHANEEN PARIKH:** Thanks. Christoph, how do you view this provision in comparison to
26 other institutional rules?
27
28 **CHRISTOPH KAUFFMANN:** Well, compared to the ICC or the GIS? The German Institute,
29 we don't have that. We don't have a similar... we don't have it. I think it's a common law thing.
30 At least in civil law, we do not have a summary judgment. I do appreciate it because I think it's
31 a matter of efficiency and if you can apply for it and to be frank, we have, even internationally,
32 arbitration is not always the quickest and most efficient way to resolve disputes. So, I think it's
33 a good idea. In my opinion, all of the changes kind of try to make it, make the arbitration more
34 efficient, more flexible and with a particular emphasis on ending the arbitrations as efficiently
35 as possible, and I think that's a good approach. I hope that would play out as planned.
36

SHANEEN PARIKH: Thank you, Christoph. That was actually a perfect ending to our panel. And I could stop, right there, but I see we have a little time. So, I'm going to ask each of you to give me a 30-second quick sound bite and tell me whether you have any other observations. Good, bad. Avoid the bad. Tell us the good ones. Or any other comparisons or highlights to these rules. I'll start, maybe with Andy.

ANDREW PULLEN: Well, I think just a general comment, is reading through the consultation draft. It seemed to me that these are, essentially, you have already a good set of rules, and these are good incremental changes as Christoph says, that are going to increase the efficiency and the procedural tools available. I think one specific point I was just going to mention just because it's interesting is the Expedited Procedure Rule, which is Rule 17. So, the existing grounds for the expedited procedure is being under the monetary threshold all the Parties have agreed to the expedited procedure. There's a slight increase in the monetary threshold, but that's really non-controversial altogether. What I think is interesting is there's a new ground of exceptional urgency, which is being added into the rule, which I think is sensible, given the purpose of the rule, is to speed up the proceedings where you've got exceptional urgency. That is obviously a situation which it seems to me, one should be considering applying it. And that wording actually mirrors what's in the current SIAC rules. Now, the SIAC are considering amending their rules and changing it to, say, circumstances warrant the application of the expedited procedure and I... and it's interesting that the MCIA has chosen not to follow what the SIAC is proposing. And I think they're absolutely right not to do so, because I think that circumstances warrant languages so vague, it's almost impossible to advise on. So, I think the MCIA's proposal is very sensible on that one.

SHANEEN PARIKH: Christoph?

CHRISTOPH KAUFFMANN: I think I've rounded up my impression of the rules and changes. So, I had to give it over to you.

FATEMA KACHWALLA: So, Shaneen, what I find really interesting is how these rules are really tied up together, like third-party funding is tied up with security for cost, concurrent and consolidation is, although concurrent is now introduced, it kind of gives that distinction of what should be chosen and when and how it goes hand-in-hand. Similarly expedited and emergency arbitration early dismissal or expedited procedures., how the two have been introduced for different scenarios. So, I really like how the rules are, trying to tie in the different concepts to work hand-in-hand. So, that's my take.

1 **VIKRAM NANKANI:** I think despite my being part of the Council, I would still go ahead
2 after my disclosure that I must complement the entire Governing Council with super value
3 additions by global experts on arbitration. So, Nish, Vyapak and all others on the Council
4 persevering actions of the... Madhukeshwar, Neeti. Ultimately, I think all the global best
5 practices have been, at least a sincere attempt has been made. Shaneen, you have been part of
6 that team to bring them into the MCIA Rules. I think change is the only constant, and I think
7 we will continue to be encouraged by that.
8
9 **RANJIT SHETTY:** I don't think I have anything to add. Just one thing. Andrew mentioned
10 that proposed rule, where the Tribunal has to consider a consolidation and with an additional
11 point where he can consider the questions of facts and law. I think, unless I'm mistaken, you
12 mentioned that it's not something very important, but if there is an additional factor. In fact,
13 I would think that he's in a better position given the fact he sees of the matter, he's in a better
14 position to understand whether the question of facts and law are similar. And if I'm not wrong,
15 I think SIAC in its consultation is considered this, but I think in the new amendment, I think
16 even SIAC should have it.
17
18 **ANDREW PULLEN:** I think you're right that the SIAC are considering adding it in. I think
19 my point on how important is. I think it's sensible to add it in. I think it's a useful point. I think
20 in most cases you will probably also satisfy one of the other grounds series of transactions, et
21 cetera. But it seems to me it's useful to have it in as a factor that the Tribunal can take into
22 account.
23
24 **SHANEEN PARIKH:** Okay. Now you're probably thinking that I'm going to open it up to
25 audience questions but I am not. Because the rules are open for public consultation and I
26 would really like anyone who has a question or a suggestion to write in with your thoughts.
27 Neeti, where should they write in? Does everyone know?
28
29 **NEETI SACHDEVA:** It is on LinkedIn and on our website.
30
31 **SHANEEN PARIKH:** So, please do that. Okay? No questions. And we look forward to the
32 next Keynote address. Thank you very much. Thank you all.

33

34 **~~~END OF SESSION 6~~~**

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