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INDIA ADR WEEKDAY 5: DELHI

SESSION 6

The Next Edition of the MCIA Rules - Key Features

6:00 PM To 7:00 PM IST

Moderator:

Nish Shetty, Partner, Litigation & Dispute Resolution (Asia-Pacific), Clifford Chance

Speakers:

Aditya Sondhi, Senior Advocate

Gautam Bhattacharyya, Partner, Reedsmith LLP

Sneha Jaisingh, Partner, Bharucha & Partners

Vijay Purohit, Partner, P&A Law Offices

Udit Mendiratta, Partner, Argus Partners

HOST: The next session by MCIA is on the next edition of the MCIA Rules, key features. I would like to invite on stage the panellists for this session Nish Shetty, Partner, Litigation & Dispute Resolution (Asia-Pacific), Clifford Chance, will be moderating the session. Mr. Aditya Sondhi, Senior Advocate and MCIA Council Member, Mr. Gautam Bhattacharyya, Partner, Reed Smith LLP, Ms. Sneha Jaisingh, Partner, Bharucha & Partners, Mr. Vijay Purohit, Partner at P&A Law Offices and Udit Mendiratta, Partner at Argus Partners.

NISH SHETTY: Okay. Good evening, ladies and gentlemen. We're missing one panellist, but we will crack on so that we're not late. The panel that you're going to now hear from is going to deal with. There we are. Panel that we're going to hear from is going to deal with the Next edition of the MCIA rules. Now, the first edition came out roughly 2015, 2016, when MCIA itself was first set up. When we came up with the rules, there was a drafting committee and that drafting committee comprised of leading arbitration practitioners both from India and from outside of India. At the time that those rules were drafted we considered what the state of the art was in terms of arbitration law. practice, both within India and outside of India. And those rules, frankly reflected what the general consensus was within India as to what would be acceptable on the ground. Really, there were aspects that we could have introduced into the first edition of the rules that we deliberately did not do so. And we didn't do so because the feedback on the ground from very senior practitioners, from some of the judges in India was that the market just was not ready for some aspects of what one would have within procedural rules in other parts of the world. So it was really tuned to what was viewed as needed for the Indian market at that time. Now, today, eight years on the rules and when we're going to be going into some of these features. The rules that you're going to see coming out of the MCIA, and this is a consultation draft. So I have to sort of there's a health warning associated with that, which is that there will be some changes. I don't expect material changes, but the intention is to start this consultation process and this consultation process starts during ADR week and our sort of job as the panel is to introduce some of these features and invite comments from the broader arbitration community. But these rules now reflect what is considered to be the state of the art in terms of International Arbitration around the world. meaning that it's not watered down. It has all of the key features and it is heartening to note that the Indian practitioners, the Indian judges that we've consulted in coming up with these rules are all confident that the Indian market now is able to deal with arbitration that reflect the best international practices in the world. So that's the intention. That's what these rules will now contain.

And over the course of next 57 minutes, as that clock tells me. We're going to be doing a quick canter through the key aspects of the changes that are going to come about in these new rules

and to assist us all in this journey. I've got in no particular order of priority, I've got Aditya Sondhi on my left. Senior advocate. I've got Gautam Bhattacharya, Partner, Reed Smith. I've got Sneha Jaisingh Partner, Bharucha Partners. Vijay Purohit, Partner of P&A law offices and Udit Mendiratta from Argus. Partners to help with this particular discussion in keeping with the MCIA approach. I'm not going to be describing what each of them has achieved in their career. Trust me. They are the best people to have this discussion, and we're going to launch straight. Into the discussion proper the way this is going to work is each of the panellists will introduce a particular change we will have a discussion around that change. And to the extent that there are questions, please feel free to put your hand up and we can broaden the discussion beyond the panel and we'll then move on to the next change. So let's start first with consolidation and I'm going to ask Vijay to start with the commentary on the new consolidation provisions in Rules 5 and 6. Can I hand over to you, Vijay?

VIJAY PUROHIT: Thank you, Nish. Good evening, everyone. So you have a new set of roles that the MCIA has come up with, and as a preface remark, I would like to state that the rules are, in that sense, in sync with what the sentiment of the arbitration community is and also in sync with where the judicial trend has been heading in the last couple of years, including something like joinder, which, I mean, Sneha will be speaking about. So let's quickly take a look at what are these key features and how are they going to help in some of the complex issues that ordinarily arise.

NISH SHETTY: Vijay, before you continue. If anyone can't see what's on the screen. You can actually pull these rules up on the MCIA website. It's mcia.org.in. The draft rules are up there. Sorry. Go ahead, Vijay.

VIJAY PUROHIT: Thanks. So consolidation is something which has been a subject matter of a lot of debate. When there are common parties, contracts are, in that sense they arise out of a common transaction. We keep saying this phrase, single economic reality or a single integrated transaction. So, what typically happens is that parties do enter into multiple contracts in a single transaction, purely out of commercial efficacy. And if those arbitrations were to run in different directions, then it would cause a lot of chaos and that is why there is a need to at least consolidate those arbitrations which have certain common factors. So you have Rule 5. The new Rule 5, which speaks about combined requests for arbitration where a Claimant wishes to commence more than one arbitration under these rules. So you have a provision in Rule 5 where one can apply for a combined request for arbitration. And it is in that sense spread prior to an arbitration and subsequent to an arbitration. One can make a

request even before the arbitration commences and even during currency of certain multiple arbitrations.

So 6 talks about consolidation and there are certain requirements for consolidation. So if the arbitration agreements are compatible, one is, of course, that if the party is consent, which was the case earlier as well, but what if the parties do not consent? So there is room for consolidation even in case where parties do not agree. So you have a threshold when this rule would kick in, when parties do not agree. So that threshold basically is that at least one of the following conditions should be met and it is set out in the new 6.1. The dispute arises arise out of the same legal relationships or the dispute arise out of contracts, consisting of a principal contract and its ancillary contracts, or the disputes arise out of the same transaction or series of transaction. So, as I was mentioning we have also seen this doctrine of a mother contract. There could be a principal contract and there could be work orders, subsequent contracts flowing out of it. So this is what the rule speaks about that in case there are contracts arising out of the same relationship, same legal relationship, where the parties are also common, the contracts are ancillary in nature. In that case, a request for consolidation may be considered. And, of course, there are procedural requirements for making this request. A written request has to be submitted to the Registrar, with the requisite fee, et cetera. And then there can be a ruling on the consolidation request based on these factors that I've just spoken about. Then you have this is in case where an arbitration has not begun. Of course, the MCIA will have to factor in who are the arbitrators in different arbitrations et cetera and that precisely comes in when arbitrations are ongoing. So, consolidation request may be made even in a situation where arbitrations are pending. The first condition again in this is that the parties, if they agree, they can, of course, by consent request to consolidate. Second, all of the claims in the arbitration are made under the same arbitration agreement and the same Arbitral Tribunal has been appointed in each of the arbitration or no Arbitral Tribunal has been appointed in the other arbitration or then again, the test of compatibility and the four things are same. Legal relationship, disputes arise out of contracts consisting of a principal contract and its ancillary contract, disputes arise out of the same transaction or a series of transaction. A common question of law or fact arises out of or in connection with all arbitrations. So this is what the situation is as far as Rule 6 is concerned, which is quite comprehensive. As you can see, I've just briefly set the context as to how consolidation will operate under the new rules.

Then you have Rule 7, which talks about concurrent proceedings. In a scenario where it's not practically possible to consolidate but there are certain common factors in certain ongoing arbitrations. So Rule 7 has been introduced, which is concurrent proceedings on the written application of a party and after consulting with all the parties, the Tribunals shall have the

power to conduct two or more arbitration under these rules, concurrently, provided that the same Arbitral Tribunal is appointed in each arbitration and either the arbitrations were commenced. And in the same Arbitration Agreement, or the Arbitration Agreements are compatible and the disputes arise out of similar legal relationships. So in addition to consolidation, you have an option of having concurrent arbitration proceedings depending on, of course, the nature of the Arbitration Agreement, who the parties are, who the arbitrators are and what is the nature of the legal relationship? So this is broadly what Rules 5, 6 and 7 cover. And the rules are quite comprehensive in the manner as they stand. Of course there'll be consultation, et cetera, but this is in sync with some of the best practices in international arbitration. And this will, of course help domestic arbitration as well. And there have been judgments by courts where courts have recognized the importance of consolidation when there are common factors, like what we've just spoken about. So Nish, that's broadly about what consolidation and concurrence is.

NISH SHETTY: Thank you, Vijay. A lot of this is an attempt to try and make the arbitral process efficient and cost efficient. Now, just for the benefit of the audience, who perhaps haven't sort of looked at the rules as closely as the panel has. In broad terms, what is the difference between consolidation and concurrency? Maybe Vijay, you want to just touch or on any of the other panellists if you want to just touch on that so that we leave the, before we leave this topic.

VIJAY PUROHIT: Consolidation is when all arbitrations that are going between two parties are consolidated into a single sort of proceeding. And concurrent proceedings are, of course, when it's not possible to consolidate several arbitrations into one for various reasons. They can go on simultaneously. One arbitration along with the other arbitration can go on simultaneously. So that what you just spoke about, cost efficiency is also in short, and the parties have a sense that they are not going to lose on time on cost and at the same time, they have a bird's eye view of all the proceedings that are going on at the same time. So that's broadly what the difference is.

NISH SHETTY: And one of the practical factor is avoiding decisions in separate arbitrations when really the issues are compatible and those decisions are viewed by the users, by the parties as so dramatically different that actually it gives arbitration a bad name. This enables the Tribunal to look at things holistically, come up with consistent decisions based on a compatible set of facts even if consolidation itself is impossible because of certain legal constraints. Okay. We've got a lot of ground to cover. Thank you, Vijay. That was very clear. Sneha, can I trouble you to deal with joinder, which is Rule 8.

SNEHA JAISINGH: So Joinder, obviously, in the Indian context, has been increasingly important, and we've had the group of Companies Doctrine that has recently been upheld by Indian courts. But Joinder obviously is not just the Group of Companies Doctrine and I like to echo bridges statements when he says that the MCIA draft rules do speak of the best international practices as well as the peculiarities in the Indian context. And I'll come to that very shortly. Coming to what the rule say. The rule say that a party or non- party may apply to the counsel or the Tribunal for Joinder in the arbitration and the counsel or the Tribunal, when it comes to that decision, must look at two things. One is that the party to be bound is *prima facie* bound by the arbitration agreement and the second is obviously consent. So it's either *prima facie* bound by the Arbitration Agreement or if the party consents to that. I think the *prima facie* phrase is of particular importance because issues on joinder of parties necessarily may include disputed questions of fact. For example, and we actually saw this in the Indian context when you had the ***ONGC versus Discovery*** case where there was a tender given by ONGC to Discovery on the basis that it was backed by a larger conglomerate. And when the dispute went into arbitration, ONGC contended that the larger conglomerate should have been made party to the arbitration and that it had documentary evidence which it had sought to apply for through discovery, to demonstrate that the larger conglomerate was, in fact, *prima facie* part of the Arbitration Agreement. The Tribunal did not permit that request, and ultimately the matter went up to the Supreme Court. When the Supreme Court did say that the Tribunal should have, on the basis of a *prima facie* decision determined this and then left matters to be resolved after ONGC's Discovery application had been heard. So I think that the phrase *prima facie* is a very well inclusion, very good inclusion into the draft rules.

In the Indian context, it also has a larger use, and that's because particularly in India, businesses are often run by families. So often even family settlements end up having a commercial angle to that. And we saw that even recently in ***Ajay Patel versus Jyotrindra Patel*** in the Supreme Court matter where the Supreme Court was at the question of Section 11, which is the appointment of arbitrator had to decide whether or not a third group, which held about 40% in one of the entities, which was in the... subject matter of which was a family settlement had to be made party to the arbitration. And in that case, again, the Supreme Court took a non-interventionist approach and said that *prima facie* from the document, the family settlement itself, which referred to certain actions and steps that the third party had to take held that there is *prima facie* view that the party did subject itself to the Arbitration Agreement and the underlying contract and left it to the Tribunal with the direction that it must decide the disputed questions of fact, when coming to this issue as well. Then of course you have the Group of Companies Doctrine which the Supreme Court did the tests of, which did the

Supreme Court applied in each of these cases. And those tests, is that is the party, a veritable party to the underlying contract or the Arbitration Agreement and did it really consent? So I think when you look at it from a first principle, it is really implied consent. But in the ***Cox and King's*** judgment. Interestingly, what the Supreme Court also said that this does not exclude the application of other doctrines. So Joinder could also mean including doctrines like alter ego lifting the Corporate veil. So those are other circumstances in which these rules could be used to include a non-party.

NISH SHETTY: So, thank you for that. If I look at this particular provision and just think of a practical scenario, right. And it throws up a few issues which you can't completely deal with. Let me explain. You have an arbitration between Party A and Party B, Party C says for this issue or the issues in that arbitration to be completely determined, I should be involved in that particular matter. If you don't have this provision, then that Party C has no alternative but to start an arbitration of his own. Additional costs, additional time. You have a new Tribunal that might decide in a different way. All of the work that the first Tribunal is doing is completely lost. This gives a party, that Party C an opportunity to say, "hey I satisfied the test. I should be part of this. I should be joined to this arbitration." But to the extent that there are jurisdictional or other issues that need to be determined by the Tribunal. Those avenues remain well open down the piece, but at least the Tribunal is then looking at it in the round with all three parties before it, with the ability to make the arguments that the parties need to make. And from my perspective, that is a huge improvement on the current situation. Would you agree with that, Sneha?

SNEHA JAISINGH: Oh absolutely. I think, like, you said, it sort of reduces the issue of multiplicity of proceedings and conflicting decisions. But there is one question that I had, which is that we go now post arbitration stage of enforcement. Now, obviously, in the Indian context as I said, it is very much a recognized concept. But the Group of Companies Doctrine, I know is not recognized, in say, England so on the aspect of enforcement, there are issues, which is why I think Tribunals do need to be cautious so these provisions are not abused. But I would be interested in how enforcement would play out because it's very possible. And I know in India we would certainly use this defence that it would be opposed to public policy.

NISH SHETTY: But again, I think you pointed. There may be other panellists who may want to address this. But you looked at me, so I'm going to do it. So I think the *prima facie* threshold may assist in an argument down the line. If at enforcement, the argument is the joinder shouldn't have taken place the threshold that complainant will have to then establish is there

is not even a *prima facie*. Basis on which joinder takes place which I think is a fairly high threshold to meet at the enforcement level of course. Please comment. I think it's on.

GAUTAM BHATTACHARYA: I'm so sorry yeah. No, I think the point that Sneha has mentioned, Nish, is a very interesting one. We haven't got the answer to it, but let's assume in this context that you have an Indian award and based on the Group of Companies Doctrine, which is not a position in English Law, because English Law does not recognize that you could have a very potentially very interesting question, which would likely go all the way to the Supreme Court in the UK as to whether the English Courts should recognize and enforce an award which arguably might render the performance of a contract illegal because English Law would not, on the basis of conflicts of laws principles. That could be a very interesting legal question and so, I think that would definitely be a Supreme Court issue, a matter of significant public importance.

NISH SHETTY: Okay, shall we move now on to early dismissal, which is another interesting change let me preface it before I'm going to invite Aditya to deal with this particular issue. Preface it by saying in 2016. 2015, 2016. When the first set of rules were introduced, SIAC was the first to introduce this provision of early dismissal, and we considered it, whether we should introduce it into the MCIA rules because it's sort of. Aditya will describe this process in a bit more detail in a minute, and the view taken then was no it's one step too far. and it will likely result in a challenge. So, Aditya, with that preface, I'm looking forward to hearing your thoughts on this particular provision.

ADITYA SONDHI: Yeah. Thank you, Nish. Practicing before the Supreme Court I'm all too accustomed to the concept of early dismissals, especially on Mondays and Fridays. I do think it's a bold step to provide for early dismissals, not just of claims, but even of defences under the rules. The point that struck me first is, how far does this go beyond Section 16 of the Arbitration Act? You already have a substantive provision that deals with determination of questions of jurisdiction, including the existence of validity of the agreement by the Tribunal, and that's set in the statute. By borrowing from the SIAC and also the Hong Kong rules to provide three additional grounds for early dismissal, I think is an interesting experiment. Now, these three additional grounds that are now in the draft Rule 16 are for an party to apply for an early dismissal of a claim or defence that is manifestly without legal merit. One that is manifestly outside the jurisdiction. I think that goes in sync with Section 16. I won't dwell much on that. Where a party has been wrongly joined to the proceedings, which is an offshoot of what Sneha discussed, where pre-emptively a party has been arranged as a Respondent. Let's say and seek striking off or striking out as a Respondent and 'd', which reads even in the

facts alleged by the other parties are assumed to be true. No award could be rendered in favour of that party under the applicable law. Now, this last provision 'd', I think is interesting in some ways, it correlates to the principles underlying order seven of the CPC which enable a party to apply for dismissal or rejection of a plaint, and in a case before the Singapore International Commercial Court this particular provision, Rule 29 therein was discussed, and it was interesting because that was a case where a party had sought a claim on the basis of frustration. It was one of those COVID related disputes where a loan financial agreement was in place and a contention was taken in the claim that the obligation to repay that loan arose only out of revenues of the project. That was the subject matter of the finance. Now, that was not strictly forthcoming from the agreement and the Respondent made an application to reject that claim as being one that was both manifestly without legal merit. And correspondingly, one that could not be granted under the applicable law. And the Tribunal in that case in fact held and they used the words that the case of the Claimant, taken even at the highest, would not make it possible for the Tribunal to render an award in that case, and that award was, in fact, sustained by the court by holding that there was an open and shut provision under Rule 29 and that such claims merited being filtered out on that score. But what strikes me here is that how will the courts look at such sort of cursory adjudication? And I don't think we can as practicing arbitrators or counsel in arbitration lose sight of the corresponding CPC. That is the Code of Civil Procedure Provisions because courts by instinct are going to judge these awards basis, those principles, and as much as the Arbitration Act may say that the Tribunal is not bound by the Court of Civil Procedure. I have no doubt that when it comes to sharp provisions like this, there is a greater need for the Tribunal to be conscious of corresponding procedural provisions, especially in domestic arbitration. And by that I mean, for example, this provision to strike off a defence. In a way, it is akin to the provision under Order 37 of the CPC, which deals with leave to grant defence in a summary suit. Now, those principles are well settled, and I think the Bombay High Court had ages ago, used the phrase, "is it a moonshine defence"? And if it's a "moonshine defence" in a matter of payment of money don't grant leave, grant a summary decree, but that Order 7, Rejection of plane courts are by instinct, not attuned to pass orders which are summary, which are deciding matters at the threshold. By and large, there is a tendency to say, let the matter go for trial, and one of the related questions would be whether these applications under Rule 16 require evidence to be lit, right. The logic behind the rule is, in a way, to short step the entire process of evidence or trial in an arbitration and make an early adjudication and filter out what is a frivolous claim. But all the same, determination of something as vague as whether a claim or defence has legal merit or not, I think necessarily entails evidence to be led in some cases. And there again, if we return to the CPC, you have provisions dealing with the framing of a preliminary issue on which a court can lead evidence and then pass judgment. So I think these will be some of the issues that the Tribunal will deal

with to the extent that it goes beyond the remit of Section 16. I am in fact, arguing a matter presently wherein the cost of a hearing of over 30 sittings. The Tribunal made an award, ultimately, that a particular cancellation deed was void. But there was one sitting at which the counsel made a request to adduce further evidence through a witness. The Tribunal said no nothing doing. This witness was never part of your original list. This is going to protract proceedings, no question. There was no protest thereafter from the counsel or from the party on that, proceedings went on. But ultimately, the court under Section 34 set aside that award on the ground of natural justice. Now, I think that's a far-fetched application of that principle. I do think Tribunals, while dealing with Rule 16 applications, would necessarily have to be conscious of the fact that the review again such orders. And look, these orders could either be final orders in the nature of 16, rejecting a claim in eliminate or could be partial awards, and either way, they are then going to be subjected either under 34 or 37 to review before the courts. And that's where I think this consciousness would be, I think, greater because the threshold according to me, is not lighter, but it's higher while dealing with Rule 16. And the last point, if I may, is that these applications, once the provision is there, it's going to be used. In fact, the moment I saw it, I could think of multiple arbitrations. I mean, where this could be great fun, either way. And Tribunal rules, I think have to be conscious here as to the scope for misuse. Are you going to be filtering litigation or are you going to be fermenting more litigation while dealing with these applications, and there's going to be scope then for these applications to become sort of.... In every case, an application to reject a claim as being manifestly without legal merit. That phrase troubles me. The law is never manifestly clear. Certainly not Arbitration Law in India, right as the Delhi Metro case reminds us. And if that's the case, to ask or invite a Tribunal to go into this, really a merits question at the threshold is something that can cut both ways. There must be a corresponding cost regime. I don't know if you would like to build that into Rule 16 or elsewhere into the revised rules, which is to say that applications which are found to be really fishing or flippant in nature, then must necessarily attract corresponding and exceptional costs, because arbitration by itself is meant to be expeditious. You have provisions within the rules also for expedited hearing. The act deals with expedited hearing. So then, in what cases is there this outstanding scenario which merits a Rule 16 application to be entertained as opposed to going through with the process. So those are my responses to this provision.

NISH SHETTY: Thank you, Aditya. So our first instinct in 2015 and '16 did not include this was probably is correct. Now, our current instinct too included with the benefit of our consultation, that's taken place literally over two years now. We'll have to test that on the back of what Aditya said. I have some thoughts, but I think Udit wants to make some points.

UDIT MENDIRATTA: Mr. Sondhi, to this provision to me also struck as a bit of a departure. Of course, summary judgment is something we're all used to before courts, whether it's commercial courts, SAC, CPC have both grounds for it, but the grounds on which early dismissal could be sought under this provision departure from what we've seen in CPC and in the Commercial Courts Act. So to my mind honest to Mr. Sondhi's point, that enforceability of that award, if at all, let's say defence is rejected at the threshold, in summary, becomes a challenge. So what is I think also what I was mindful of when I was reading this provision is that this is not a *suo moto* power of the Tribunal to decide something on its own as that. This does not merit a full trial, but on an application by one of the parties. So, I think before making that application itself as counsel, one would have to check whether okay, if I succeed in this application, am I then, will I be able to take that award, take it to the jurisdiction that I need to enforce it in and be successful there as well? Because in the absence of that determination if it's one just moves this application for the fun of it. I think there's. Potential for trouble later.

ADITYA SONDHI: Yeah, I totally agree with that. The only thing is here is both claim and defence.

NISH SHETTY: Absolutely. So it's both sides. Right. So it's not just Claimant. And I was just going to touch on two things based on what Aditya said. The first is let me just illustrate how this would be viewed, perhaps outside of India, right. Your arbitral rules get incorporated by reference into your Arbitration Agreement. So this is effectively an agreement by the parties to give the Tribunal this power. So it's not... Again, I'm talking about the international view of this. It is not something out of the ordinary because you have signed up for this and therefore you'll be held to it. So to the extent that there is a consequence that follows that arbitration agreement as completed by the rules, then you're bound by it. I totally accept that the Indian context may be maybe different, which is why we've consulted so heavily and I'm glad that we're going to have more opportunities to have other debate this within counsel shortly and why we're doing this consultation process now.

The second is really around Aditya's point about the difference between an expedited process and summary dismissal. The expedited process is intended to cover a situation where the case is so simple that you don't need to go through a lengthy equivalent of a trial in an arbitration context. So they're dealing with slightly different things. Here you're talking about manifestly poor claims or defences that you want to get out of the way because it's just going to waste the Tribunal's time and everybody's costs. I knew that this particular topic would engender a fair amount of debate. Of course Sneha.

SNEHA JAISINGH: May I please say something in favour of these rules, I do think that very often. I know. I've made applications to sort of dismiss a very obviously bad claim and manifestly claim that it's manifestly without merit and I have actually succeeded in some of them. But very often I do see the Tribunals being a little hesitant to actually go ahead and pass it, but I do think that these rules may give Tribunal that teeth to actually go ahead and take that sort of strong stance. And like Nish said, that once parties have agreed to arbitrate under these rules, I do hope that our courts are mature enough to recognize that and realize that. And I think that's where some of the other provisions, such as the provision that parties must act in good f faith and to do everything in the spirit and intent of these tools as they are intended will also help at the enforcement stage.

NISH SHETTY: Absolutely.

VIJAY PUROHIT: Just a small point. Maybe it would be better to try and define what manifestly without legal merit is maybe something like limitation. If the claims are time bar at the outset, and it's very much evident that they are time barred. And maybe the Tribunal need not go into the entire trial.

NISH SHETTY: Again, we're not going to sort of descend into the drafting points just yet. We want to sort of bring the big jet thing, but it's a very, it's an important point. The one caution that I would administer is this, especially in the context of arbitration rules, that we want to be in keeping with international best practices. Now this language is now sort of gaining ground. We start with SIAC. We see it in the HKIC Rules and a few other amendments to the rules that we've seen drafts of are now beginning to introduce similar language, which then means you will have a body of case law in time to come that will start to interpret these provisions. Now, obviously, no court in India is necessarily bound by this, but I think departing from what is maybe, sort of becoming universally accepted language, might lead to more problems than needed. And perhaps we should stick to that

UDIT MENDIRATTA: Don't get me wrong. I'm not against this role. I feel this is much needed, especially in the Indian context. I think we would all agree that Indian Dispute Resolution tends to go on and on and on. So this is a welcome move. It's just perhaps what would help. I mean that's not necessarily part of the MCIA courts to put but Statutory recognition of a judgment like this and its enforcement would perhaps help. And, of course, if such rules are inserted, and if more and more parties. I was listening to the earlier panel. Justice Sikri said that about 80% of Indian arbitrations are still ad hoc. It is domestic arbitration. So if more arbitrations move to institutional setups and these kinds of rules are

sort of agreed upon between parties, we will of course be jurisprudence develop around it, but I think at the initial stages, it would definitely be a risk, at least as far as the Indian context is concerned, when enforcement is the ultimate goal.

NISH SHETTY: Yeah, look, MCIA is set out to make many changes, but we know what we can control. And what we can't control the statutory aspects we can't control. So we're going to have to put out rules that will sort of conform to the accepted norms within the environment in which they're going to be used. I thought Aditya's point around costs was a very good one. And something that I think we may want to look at as we're looking at this a bit more. I think it is covered by our current cost provisions within the rules, but we can certainly look at that a bit more closely. I'm again conscious of time and we've got a few more quite innovative provisions that I do want to go through and for that, shall we move then to third party funding? All the rage at every sort of arbitration conference. So let's see how we're providing for this in the rules.

UDIT MENDIRATTA: So third party funding, I think it's not a normal concept. We're all quite familiar with things. It's of course, more established in jurisdictions like Singapore, UK, US, not so much in India. But of course, that ecosystem is slowly developing and coming in. So the role that the MCIA now introduce is a necessary disclosure obligation on a party that has an arrangement for the third party funder. Now what this does is bring in some form of transparency because there is a lot of concern around this being done behind closed doors, and then the funder having some sort of nexus with the Arbitral Tribunal and therefore, some conflict of interest issues arising. So one rule that now is being sought to introduce is that the party must disclose at the very beginning, prior to constitution of Tribunal, if there is this arrangement in place. And also, if this happens during the course of the arbitration, then within seven days, and I think it's what the role says. So I think this is a welcome move there are, of course I would say there are some. This may help to mitigate some ethical dilemmas, some potential conflict of interest. Issues like I mentioned, but I think overall it's a welcome move that the MCIA is seeking to introduce.

NISH SHETTY: Do you see any issues with it? Do you see anything that would stand in the way of that?

UDIT MENDIRATTA: So I think, potentially third party funders may not be too happy with this because they may not want this kind of disclosure to be coming from a party. There is also, of course, third party funding as it is, is seen that party autonomy is slightly diluted because the funder has some form of control over the arbitration, at least as far as costs are concerned.

Which counsel to go for, which firm to engage etcetera, which dilutes a party's autonomy, which is, of course, the bedrock of arbitration. So those issues. But I think the rule that is incorporated is certainly a welcome move.

NISH SHETTY: I have a question for you on this, Udit. What are the consequences of nondisclosure?

UDIT MENDIRATTA: I don't think that there are consequences of non-disclosure?

NISH SHETTY: Which is why the question.

UDIT MENDIRATTA: No, I didn't see that either then it becomes directory and not mandatory.

GAUTAM BHATTACHARYA: I would think so, yes. But that's something that the rules need to address them. Yeah, at the moment no it demands that it be disclosed it doesn't stipulate what failure means. But I guess if there is failure and therefore the arbitration agreement is breached that is a method that you can raise with the Tribunal, and the Tribunal will then have to consider what the consequences of that reach would be that's how it ordinarily flows.

UDIT MENDIRATTA: Another clarity that could be introduced by way of rules. And I think there's differing views on this. Delhi High court took a view that the funder does not become a party to the arbitration. Whether Singapore Court arbitration if my memory serves me right. Said that the definition of the party could very well include a third party funder. I think perhaps clarity on those aspects from the rules also could come. But of course, I think this would also depend on the jurisdiction that you're in and the law of the jurisdiction that you're dealing with.

NISH SHETTY: Yeah. It also has a feature when it comes to security for cost applications, right. So if you comply and you do disclose that will necessarily be a feature, because if not a Claimant that is funder can simply step away from obligations if the claim is found to be frivolous subsequently. So I think these are things that are playing up outside of India as well. While you have the mic, as it were, do you want to deal with publication of awards before we get to topics fantastic

UDIT MENDIRATTA: I think this is a simple one. The MCIA is taking a pro publication approach. So the new rule that's being introduced is that unless a party pops out there is deemed consent that the parties are giving to the MCIA that the award can be published after six months of it being rendered. The cavity is that there's going to be a redacted version of the award that's put out in the public domain, which removes personal identifiers, party names, perhaps even arbitrator's names. Once again if my memory serves me right, this is akin to something that ICC had introduced back in 2019. But there the timeline was two years and I think there was active multiple opportunities given two parties within the arbitration to actually exercise that right to opt out, which I see missing here also. The timeline, of course, is six months compared to two years which was in the ICC rules. I think this would help understand whether arbitration ecosystem is when you're as a practitioner, but as a litigant, as a party, who's before these rules? I mean, subject to these rules there are perhaps issues around confidentiality. I mean, what is redacted information? What is a personal identifier that tomorrow somebody could come back and say that this I did not agree to. Perhaps this should have been redacted. So I think there's need for more clarity on what all aspects of an award would be redacted. And therefore water, all will be put in the public domain.

NISH SHETTY: Yeah, I mean, the whole idea of this, so let me back up. There is at least a school of thought out there that says arbitrations are becoming too prevalent in the commercial landscape. You have seen very senior judges, including the aw chancellor in the UK, suggesting that the development of English Commercial Law has been stratified by the growth of arbitration because it's all private. You don't get to see the judgments in relation to Commercial Law and the development of the law is therefore standard. My own personal view is, there's probably some truth in that and if you look around particularly in terms of the higher value commercial contracts out there, I'd say more than 90% of those contracts globally now have an arbitration provision. If this continues, then almost mathematically, you're going to have fewer and fewer commercial matters in court that we can look at jurisprudence is not developed, and there will be a backlash. So part of this, I think, is the arbitral community's reaction to this, to say we want to see what the jurisprudence looks like. And we have this, for example in the Investor's State World, where the jurisprudence, although everyone says it's not binding. If anyone has done an ISDS case, you will know that you cite the other awards as you would any other court case, right. So, I personally think this is a good development. I totally take your point Udit that although you can remove the names. And you see this, for example, in the Singapore Court judgments, when something goes to court that involves an arbitration, they make it sort of ABC and DEF. The problem for us today is there's an Alphabet soup of cases which are also the ABCs that all of this stuff, and you're trying to cite these cases

and it becomes a bit difficult. But it does preserve confidentiality, and you can at least use that as jurisprudence, that you can make.

VIJAY PUROHIT: I echo your sentiment as practitioners it's a welcome move because you'd be able to read those decisions and understand what logic has gone into a particular decision. And of course, more and more commercial disputes are moving to arbitration. So all of that, if it is shielded behind confidentiality, then we're all left in the dark.

NISH SHETTY: I take your point, and I agree with that. There's one other aspect that Singapore has introduced. We haven't sort of built this to the rules here in MCIA yet but they will remove the identifiers of the parties, but they won't remove the identifier of the Tribunal. Now one of the challenges that we have again in the arbitration world is you've had some excellent arbitrators out there delivering some amazing awards, and then you have some less good ones. And parties are unable to sort of form a view as to who they want to appoint and who they don't. Some of these steps may go some way towards addressing that concern

ADITYA SONDHI: And to prove Nish's point in the Singapore for judgment that I referred. The Tribunal is fully named, but the parties are ***DVQ vs versus DBP and DBT*** indeed.

NISH SHETTY: Indeed. I'm glad I'm not a law student anymore, because I think I would really struggle to remember what these cases are. Okay, we've got a bit of time. Left, and I really want to move to Gautam. Gautam, there are some other quite important additions as well to the MCIA rules, and I'm afraid I'm going to have to make you, Gautam, go through some of this, but let us address them.

GAUTAM BHATTACHARYA: I'll very happily candid. I'm very mindful that I'm the last bastion between everyone. The drinks reception so let me deal with four points very briefly. Sure. The underpinning thing that applies to all of these four things is that these, and I've only picked four from the other editions. It's really good to make these changes express these rules need to evolve, and this is part of the evolution. The first one is what is the proposed Rule 10(4). Which is that in appointing arbitrators, the MCIA counsel will, as appropriate, take into account diversity and inclusion. Now, we all in this room know how critically important the true and best diversity, equality and inclusion is in all aspects of what we do. And what others do. And it's only proper that we make this clear and indeed, and again, I'm very mindful of time, but there is an absolute paucity, a regrettable paucity of female arbitrators, especially in India, since we're here. And we have to ensure that culturally, that mind shift takes place. So that's the first one. I'm being brief and I will gallop through these Nish, for you. The second

one is making express at new Rule 21 that the Tribunal will have the ability after having heard the parties and thought about things very carefully to consider where it should make one of the parties provide security for costs, be it by a Bank Guarantee or a form of security. Now again, it's a good thing to make this express. These applications do tend to be a rare thing not least because...I'm not aware of any in the Indian context but I humbly, I'm not an Indian lawyer, but from what I understand, these are very, very rare. And in England and in Singapore, where I practice for a wildish but primarily England security of cost applications are rare because Tribunals don't want to make them unless the evidence to do so is overwhelming there needs to be real evidence that one of the parties is, has got no money, got no asset and as an indulgence to continue the claim or counterclaim. It should put up security of costs. So I think the rule should be in, but I think these applications will still be a rare species.

The third one I'd like to make is that and this goes to points that has made and which Sneha has made and you too Nish, which is the concept of arbitrating in good faith. And this is contained in proposed new Rule 27.2. Now a number of us will have seen over the years in terms of reference in Procedural Order Number 1 in an arbitration. Not always, but sometimes the Tribunal will put in applause somewhere in the depths of the order that the parties will arbitrate must arbitrate shall arbitrate in good faith. Now. That, in my view, is a very good thing to make clear for all the reasons that have already been touched upon by the panel, but also from a practical point of view, you don't want to have someone doing things that are rogue. And just very briefly, I had a case. I'm not going to mention the part, of course. It was an ICC arbitration where after we had had a hearing before the 3 Member Tribunal and agreed a very long Procedural Order. The other side went to a New York Court and got a 1782 order and we challenged that to seek antisuit injunction from the Tribunal. We succeeded, and one of the things that flowed from that. These are points that have been picked up by Aditya as well on cost consequences, the Tribunal gave our client in its favour an indemnity Cost Order to ensure that it was fair fairly compensated for the other side's rogue conduct in that case. The last one that I'll mention is preliminary issues. Now this really touches upon things that Aditya has already mentioned. Because that really, I mean, there's a big overlap. There's a Venn diagram with early dismissal but the Tribunal would be empowered under proposed Rule 28 to agree to review preliminary issue applications to nip things in the bud where it's appropriate. Now, this all depends on what's appropriate, because we all know that every case is different. There might be an issue of contractual interpretation that's discrete. There might be something that you could deal with, but I think these will be difficult, not least because of the acronym which manoeuvres all of us will be aware of DPP, Due Process Paranoia. Tribunals don't want to be overturned at the market knows what happens. They don't want to nip cases in the bud where

it could be regarded as an irregularity, unfair. It goes against the ability of a party to conduct a case fairly. So again, I agree that this should be in, but I do think that we won't see that many of these applications unless it's absolutely clear that it should be done.

NISH SHETTY: Well done. You covered a long ground very, very quickly. Thank you, Gautam. Look, we've got two minutes left. Are there questions? There is a gentleman at the back. I hope someone is able to pass him a mic. If not, sir, you're going to have to shout.

BHAVIK RAJANI: Good evening. My name is Bhavik Rajani. I have two questions on joinder. Number one, is that the jointer provisions allows a non-party to make an application for joinder to the counsel or to the Tribunal. How does the non-party know if the Tribunal has been constituted? That's the first question. The second question is where a party to the arbitration makes an application to the Tribunal to join a non-party? There's no express consent required of the non-party to be joined to the arbitration to the arbitration. It's the Tribunal which it has not appointed, which decides on the joint application and he doesn't have a chance in appointing the Tribunal. So how is this addressed? Where especially the Tribunal is decided on the joinder application made by a party in respect of a non-party?

NISH SHETTY: Good question. Sneha, do you want to address this?

SNEHA JAISINGH: So, on your first question as to how a non-party knows that. I think that's a good question. But just to give you an illustration and this actually happened in an ad hoc arbitration where two family. Two sides of one boring family were fighting and obviously one of the relatives in the legal then sought to be impeded and applied to the Arbitral Tribunal to be impleaded because they were aware, because of the larger family dispute. So I think that's one example. The other is possibly when orders are passed where indirectly impacts the third party, who is not a party to the arbitration. So, for example, disclosure orders. One of the things that we've seen is in data theft arbitrations, when parties are actually asked to disclose. Very often the beneficiary of the data health is not a party to the Arbitration Agreement. And that's when the beneficiary sometimes may come forward to say, I need to be party to this, and I'm not a party. Very often, the party itself will try and make the beneficiary a party to the avigation. Coming to your second question, the rules actually do provide where the counsel is making the decision, the party who is sought to be included may actually be, may actually have its say in the actual appointment and where it's the Tribunal, the rules do provide that they have waived their right and they can't raise the issue of jurisdiction.

ADITYA SONDHI: On first principles. I think a third party must get notice of such an application. An order made by the Tribunal without hearing a proposed impleaded Respondent, I think, would be difficult to sustain, especially where that party is not possibly a party to the agreement and the question of having signed up then to be bound by such rules also is a long shot. I think in those cases, notice to the third party is a must they do provide for notice.

SNEHA JAISINGH: I think that rules provide so. I think it all boils down to first principles of implied consent, right? Where there's no express. Consent the issue of prima facie being bound by the arbitration agreement indicates that it's implied consent.

NISH SHETTY: Thank you, Sneha, that's exactly right. Bhavik, I'm sorry. I know you want a follow on question, but unfortunately, in red times is what's flashing in front of us but we're not going anywhere. Please do come up and ask your follow up question when we have the break. I believe we're going to have another presentation before drinks. So it's not just you, Gautam, that's standing in the way. Will you join me in the usual way in thanking this wonderful panel for their views. Thanks. Hold on, take a picture.

~~~END OF SESSION 6~~~