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The new 2021 ICC Rules of Arbitration and their implications on Indian Parties

Transcription of Proceedings

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Mr. Rohit Bhat: Good afternoon, everyone. Welcome to day two, session two of the MCIA India ADR Week 2021. The session this afternoon is hosted by the ICC and it's on a topic that is extremely relevant for all arbitration practitioners. The new 2021 ICC Rules of arbitration and its implication for Indian parties. Our host and moderator for this session is Abhinav Bhushan, someone who needs no introduction, I think. Abhinav is the Director of ICC arbitration and ADR for South Asia. Joining Abhinav is his colleague from the ICC, Alexander Fessas, who is the Secretary General of the ICC International Court of Arbitration. Joining them, Betsy Hellmann, who is a counsel at Skadden and is based in New York. Thank you so much for joining us so early. Along with Betsy, we also have Pooja Bedi, who is General Counsel for Phillips, India. And last, but definitely not the least Akshay Kishore, who is a counsel at Bird & Bird, who joins us from Singapore. With that introduction, let me hand over to Abhinav to take this forward. Abhinav over to you.

Mr. Abhinav Bhushan: Thank you Rohit. For those who don't know Rohit, Rohit is with Freshfields in Singapore. Thank you for that lovely introduction Rohit. Ladies and Gentlemen, thank you for joining us today. We have a stellar panel as Rohit briefly introduced. And without further ado and the shortage of time that we have with just about one hour to discuss a comprehensive topic that we will have with us today. I'm going

to jump right in and give you a brief as to how we're going to do this. Just before that, if you have any questions, please feel free to type it in the Q&A box, and we will monitor the Q&A, the questions as we go along with the webinar. We are first going to have Alexander. Who's going to give us a brief introduction as to what the key changes in the Rules have been. As you all know, the ICC changed last that I know it's Rules, in 1998 and then in 2012 and then in 2017. And then we now have the 2021 edition of the Rules and a lot has been changed. A lot has been done and Alex is going to talk about those, some of the key changes, and then after Alex gives us that background, we will delve deeper into some of those key changes. Alex, over to you.

Alexander Fessas: Thanks very much Abhinav. Thank you, Rohit, for his, for his very kind introduction. Ladies and Gentlemen, a warm, good day from Paris. Sunlit springtime in Paris, for a change, it was snowing here yesterday. I am, very pleased to be joining the ADR Week. And I am very grateful to the Mumbai Centre for the invitation and of course for hosting us as part of the ADR Week, ICC focused event. Now in the 10 minutes or so, that have been allocated to me, I wanted to quickly run through the revisional process of the ICC or the new ICC Rules as Abhinav has just mentioned. In terms of reform, usually, ladies and gentlemen we speak of process, we speak of product and we speak of people if one wants to sought of like, to

follow more business-like approach. And I think that any good revision process when one looks at institutional Rules and dispute settlement has a double mission. On the one hand, a good revision process aims to crystallize practices that have been formed in the operation of whatever institutional settings were already in existence. I think that is one of the elements that drove the revision process of the ICC Rules that led to the adoption of the 2021 Rules. So one that have been, that have entered into force as of January, this year. At the same time, there was a second element, which is equally if not, even more important. And that is the ability of reputable institutions to push, if you like the envelope just a little bit forward by providing additional solutions or making advances with regards to arbitral process. And the solutions that can be explored and implemented in order to ensure efficiency, fairness and ultimately legitimate, legitimacy in the arbitral process as we all know it, and as we all want to participate in it. Those are the two basics, if you like, as I said, missions that a good revision process aims to fulfil and this is basically what we set out to do, more than two years ago. The revision process started rather discretely, as an internal project at the Secretariat of the court in February 2021, sorry, February 2019. And very quickly it developed into a larger scale project, which involved members of the Secretariat, members of my core team, the President of the Court and the body of vice-presidents of the ICC court. And

ultimately after having had the opportunity of discussing some key provisions and putting together a first draft as the ICC Rules required, the draft was put before the ICC Commission on arbitration in ADR, which is in a way a think tank within the ICC structure. With a number of comments, of course, that had been very helpful comments, that have been made by the members of the commission, including colleagues from India and Southeast Asia. And to and fro that lasted more or less for about a year before a final set of Rules with amendments was adopted by the ICC executive board end of last year. As I mentioned, the Rules came into effect on January 1st. And there are perhaps three or maybe four main chapters that can be very summarily explored to illustrate the changes that have been put into effect. Some of them speak more on architectural reform some are more procedural in nature. And then of course, as I mentioned earlier, there are some practice impacts as well. The first pillar speaks towards the general efficiency of arbitration and some of those changes may not seem to be, the two changes actually that are the main changes that came under this chapter are not necessarily ground-breaking, if one sees them today. Yet the fact that they were not necessarily spelled out with the same clarity, I think that we now have them in these Rules as also, I think in other institutional settings come to be, since the beginning of the pandemic, I think is quite telling. The first one is basically an implementation of a principle of soft copy of a paper. And,

obviously this does not speak only towards the greener arbitrations or the general efficiency and rapidity of communications but also speaks towards the better organization of the work of the Secretariat on the one hand. And then ultimately the communications between members of the arbitral tribunal, the parties and the Secretariat on the other. It is quite telling for instance, that when the world shut down in March last year the ICC Secretariat issued an urgent communication to all stakeholders in pending proceedings and in proceedings that would start, asking everyone to communicate with the Secretariat only by email. It was quite impressive to see how a process that was very much reliant on paper, completely transformed itself virtually overnight. Unfortunately, that it's true that as soon as the situation, the working conditions during the pandemic, it changed over time. A number of law firms ultimately decided to start filing again, request for arbitration on paper and perhaps there's something we can do well to convince them to switch back to a more electronic setting. But be that as it may the current Rules, the 2021 Rules do not require parties to file submissions on paper and communicating with us. They can do that by email and they can, of course allow the Secretariat to proceed with notifying requests and notifying answers also, ahead of the constitution of the arbitral tribunal only by electronic means. That is something that we are committed to doing so long as the parties want us to do so. The second one,

again, speaking on efficiency is the ability of the tribunal or the discretion of the tribunal, rather to decide, how it wants to construct and organize hearings. And again, this is something that I think has come, an issue that arose in prominence because of the pandemic. But it was also already something that was regulated under the ICC Rules in their previous situations. And Abhinav mentioned what the previous amendments have been. What we felt was probably more important in light of the experiences that we've all encountered during the pandemic is to make sure that procedural discretion that tribunals have is actually spelled out in black and white, so as to leave no room for doubt, that it is indeed incumbent upon the arbitrators to decide these issues, to the accept that participants settled upon them. Now the basic tenet which is that a hearing needs to be held so long as a party requests it in the context of normal ICC proceedings, non-expedited proceedings remains, there is no change there. However, whether that hearing will be done in a physical form or in virtual format or in a hybrid format is quite clearly now a matter that falls within the discretion again of the arbitral tribunal by weighing the circumstances or relevant circumstances in the case. I think there are very helpful examples and conclusions that have been reached in that regard again over the past year or so. The second pillar is one that speaks more broadly towards the conduct of arbitration. I mentioned just now expedited arbitration proceedings, which is

a feature that has been incorporated into the ICC Rules as of 2017, the previous amendment to the Rules. We have decided to expand the use of expedited arbitration by increasing the monetary threshold that allows for expedited arbitration to proceed. And that threshold as of January 1st is set at 3 million US dollars. Now, again, all other conditions of course need to be fulfilled. There is no retroactive effect into this provision, so it only applies for arbitrations that begin on the basis of arbitration agreements that have been concluded as of January 1st. Again, all due process concerns are being addressed in the context of the 2021 Rules, as they have been in previous revision of the Rules. Emergency arbitration, which is something that has been used quite a bit, of course, during pandemic times, as before, also see a specific easement of the applicability conditions. Again, that is something that draws upon the experience of the institution after conducting more than 150 emergency proceedings, in a course of nine years. Additional elements included in the new Rules, speaking again towards efficiency of conduct, include the ability of the tribunal to take measures to protect its impartiality in situations where parties decide to introduce new counsel in already pending proceedings. This again may be something that some of you may be familiar with in the context of situations that have arisen not only in the investor state dispute but also in purely commercial disputes. Something that I think both the IBA through its guidelines on counsel conduct and the

LCIA Rules in its annex have also tried to address. We decided to follow this approach. Importantly, parties are also now under obligation to disclose the existence and identity of a funder. Again, to allow the tribunals to discharge their obligations towards disclosing elements that may affect or may be seen as affecting their impartiality. Ultimately the tribunal is, the tribunals are also asked to encourage parties to consider a settlement and mediation to the extent of course if that is possible. Very quickly, on the last remaining two pillars. The first one speaks towards complex arbitrations, which is a feature of the ICC Rules and indeed something that replies to the specific needs of a good part of its caseload. Given that we do have a number of multi-party arbitrations that we administer, at any given time. First of all, there is more explanation with regards to how a party could be joined, once the arbitral tribunal has been constituted. I won't go into details. I'm sure we'll probably get questions there. There is a tweak with regards to consolidation in situations where claims are being made in rather where cases, the cases to be consolidated rest on the same arbitration agreement or arbitration agreements clause. And then finally, a new provision in Article 12(9) of the Rules that allows the ICC Court in very exceptional circumstances and I should emphasize that, to proceed with fully constituting, the arbitral tribunal when there is a risk of the arbitration agreement being seen as being unconscionable and for those who may have

been following this issue in terms of case flow, I can refer you to the PD Ventures versus Vitadel jurisprudence that came out of the BVI High Courts, last year, end of last year and the Paris Court of Appeal in the beginning of this year. Very last world, a word rather, on transparency. Obviously, the practice of the court to communicate reasons for certain of its decisions on challenges, on consolidations, on prima facia jurisdictional points, on replacement of arbitrators is something that has already been developed over the past years. It is now clearly set out in the Rules themselves and that ability, that possibility is open to parties and arbitrators and in proceedings administered under the 2021 Rules. Of course, transparency also needs to speak with regards to or also needs to play with regard to the operations of the institution itself. And what we have tried of course, to enunciate in much more and describing with as much clarity as possible in the recast first and second appendixes to the Rules is the way that the ICC Court is structured. The way that it operates, the way that its Presidents, Vice-Presidents and members are selected. And of course, the way that the Secretariat also structures that work, its work and operates. Again, we consider that transparency is something that should not just apply in the context of the proceedings we administer but also in the way that we administer ourselves, our cases. So, I have abused my time by 1 minute and 20 seconds. I hope I

can be forgiven for that. Thank you very, very much for your attention. Abhinav over to you.

Mr. Abhinav Bhushan: Thank you so much, Alex. Thank you for giving that very comprehensive summary in a recorded 12 minutes. You are absolutely excused for taking that additional one minute and few more seconds. So now that we've heard about various key changes that have been brought about in the 2021 Rules, I'm going to kick off going deeper into some of these changes. I'm going to first invite Betsy. I know it's really early in the morning in New York city. Thank you again for joining us, Betsy's. Its 5. 30 in the morning, may be 5. 47. Alex also spoke about the disclosure requirements, the new Article 11(7), which establishes a duty on parties to disclose the existence and identity of any third-party funding. And third-party funding is a hot topic in India. These days with a lot of funders trying to come to the market and talk about. Why do you think Betsy is this disclosure in your views required? And why did you think, why do people need know about this disclosure requirement?

Betsy Hellmann: Thank you Abhinav. And, and thank you MCIA, I'm very honoured to be a part of the panel. Having worked arm in arm with Indian lawyers for the past 10 years. This is a great pleasure for me. Yeah, so, funding is I am sure a hot topic in India. It of course has been around for quite some

time in Australia, then in the UK, after that and in the US after that and continues to grow in the US, more recently. And so, we may have more recently than the UK and Australia experience some of the issues that may come along with funding. So, I think the, the trends that you see in funding now with the, with the increase in the number of funders along with that comes extra creativity. A lot of the funders now have, have new products. For example, some people may not be familiar with the fact that some funders will actually fund portfolios of cases. So, they'll actually, with a, they'll go to a law firm and the law firm will actually say I have a, I have a basket of cases that I think I might want funding on and the funder will set up a relationship with the firm to fund a basket of cases. So, if you think about products like that you could see, you could see a circumstance whereby you have an arbitrator from that law firm who is or a practitioner from that law firm who is sitting as an arbitrator. And one of the parties gets funded by the same funder. In such a circumstance, it may be of interest to the parties in the case that the arbitrator, his or her firm has that relationship with the funder already. So, think about that example and then think about possible others that they could come about. You could have a circumstance where a particular funder has funded cases for a particular, in which a particular arbitrator is involved multiple times. That may be another circumstance in which parties want, would want to know that circumstance has

arisen. So, so I think that the new Rule from the ICC, I think is a welcome one, because I think it will help the arbitrators to build their disclosure obligations, to let everyone in the arbitration know about these potential situations. And I would note, I think the ICC struck the right note here in this Rule change. In that it talks about disclosing the identity, the fact in the identity of funding, but does not require the parties to disclose the terms of the funding. So, I think the ICC struck just the right note there.

Mr. Abhinav Bhushan: Thanks. Thanks Betsy. Also, sometimes we find senior arbitrators on the boards of these third-party funders. I think that sometimes it's also important for everybody to know because that also causes questions of independence and impartiality. Moving onto the next one, Akshay. You've been an Indian practitioner. You've been in London, you are now in Singapore, you have worked on many Indian cases. And obviously the topic today that we're discussing is the implication of these Rules vis-a-vis the Indian parties. One such rule that Alex also mentioned is the joinder of parties after the appointment of the tribunal. In what way do you think this situation might arise in the various thing, various cases that you've seen in the context of Indian parties and multi parties, multi contract scenario?

Akshay Kishore: Thank you so much, Abhinav for the question

and thanks for the invitation once again. And congratulations to all the arbitration institutions for organizing the India ADR Week, which has been a call for a long time. Now moving on from the niceties. I would just like to, before I go on to answer your question, I'd just like to make a point about, the Betsy, the question you put to Betsy, actually. A very interesting point that comes to mind and something for future revision of Rules to consider is, you know, the requirement currently is for disclosure of third-party funder or any interested party who is funding the proceeding. It is very interesting because the situation that Betsy described, if there is a bouquet of claims being funded and if there is an arbitrator who is sitting in another case from the same firm. If there should be a requirement not to just disclose the identity but along with the identity the person to disclose whether they are, they are funding any other related claim with any of the arbitrators sitting. So, expanding the scope of disclosure, because you won't be able to get to the end of it otherwise. So that's a point that came to mind immediately listening to Betsy's example. I thought I'd make a point of that. So now in terms of joinder of parties after the appointment of the tribunal. I mean it's a very good move, for ICC to clarify in its Rules. And it's, it also gives a further wide, a little wider scope. Because it unlike some other Rules which require agreement by all parties there is no specific requirement of agreement by all parties. It's only the

joinder. The party being joined and the party introducing the third party and the discretion then sits with the tribunal to consider. There are definitely a lot of cases where you see an additional party being added and in more so, I won't say the Indian context, but you see that a lot in South Asia and Southeast Asia projects related disputes, where shell companies are set up for execution of projects. And why it might not always be clear at the start of the arbitration proceeding itself, at the stage of filing the notice of arbitration the claimant might not be confident fully if the respondent has the assets but knows that the entire project was driven by a parent company sitting behind. So, there are a lot of instances where you see non-signatory party specifically trying to add the parent companies. You do see a lot of that. And I think, therefore ICC in a way is broadening the scope of arbitration and making it more user-friendly by people not having to run to court to get these things done.

Mr. Abhinav Bhushan: Thanks. Thanks, Akshay. And actually, that's sort of a good segue into my next question. But I'm to skip a couple of questions that we discussed earlier, because I also see a question from Sunita, which goes to the heart of what we've been discussing. From Sunita Advani, which is virtual hearings. Now, as we know that, now Article 26 makes an explicit provision, about the tribunals ability to conduct the virtual hearing. That's that always existed before but now

it's more sort of clear in the Rules. I think the question is which is, I think a very good one, is that, do parties have a right and inherent right to an in-person hearing? And what does the ICCs experience been with virtual hearings? What happens when one party wants an in-person hearing and the other party wants a virtual hearing at the tribunal under the COVID scenario? Things that are virtual hearings, perhaps more feasible? And I invite actually all panelists to answer this question, Alex, from the ICC perspective and everybody else as counsel or in-house counsel perspective. So that's, yeah, sure. Akshay. All right.

Akshay Kishore: So, what I was just going to say, I mean, in terms of whether there is a right for an in-person hearing really would depend from rule to rule. There are some Rules which make it an inherent right. And there is a recent Swiss case on that, which created a huge issue. But it is not for the purposes of ICC Rules, one has to keep in mind that a tribunal's overarching duty and a party's right to be heard in-person will be dictated by Article 22(2) as well, which is efficacy of the procedure that the tribunal has to keep in mind under the ICC Rules. So if having an in-person hearing does not make the process efficacious then the tribunal does have a right to seek an alternative. As long as, the main thing to consider between virtual hearings and party's demand for in-person hearing, is the tribunal must keep in mind that

and even the claimant from a claimant's perspective, specifically, if they're looking to enforce the award or the counter claimant, if they're looking to enforce the award, is to make sure that the process of natural justice and the ability to present one's case is not lost. As long as that is taken care of. And honestly, in the last eight months we've come up with strange solutions. We were doing an arbitration with a party sitting in a remote in a country, where they complained that they didn't have very good equipment for hearing a virtual hearing. The claimant was so adamant that he wanted to proceed with the hearing. They had the equipment shipped. They said, we'll do it at our own cost. So, so things like that are happening. As long as you take care of the natural justice and the ability to present one's case.

Mr. Abhinav Bhushan: Alex, would you like to add on to what ICCs experience has been so far?

Alexander Fessas: Sure, of course. And I fully agree of course, to the point that Akshay just made. The first thing is access to justice. I think, the, we need to remember that first and foremost in an ICC proceeding the parties have a right to request for hearing and the tribunal needs to, must grant it. If there is such a request, either unilaterally or by agreement. The only exception there is under the expedited procedure provisions where the, because of the specific, so

like the specific framework, specific framework of the process, the tribunal may decide to dispense with the hearing. But normally if you like setting, obviously the parties have a right to request or a party has a right to request a hearing. I think that should be, that is the rule. Probably that is a rule across the board as well. There is no right, I think in having, in requesting a specific format for those hearings. And that means to request or see performed a request for in-person hearings or virtual or hybrid. That has actually said does fall under the general provisions already in existence. With regards to the conduct of the proceedings and the joint obligation of tribunal and parties to ensure that the proceedings are run efficiently. Also taking into account amount in dispute and the complexities of the case. And ultimately the new provision in Article 26, basically amplifies that general rule by inviting tribunals to consider in exercising the discretion and in deciding in which format to actually organize the hearings, by taking into account the circumstances of the case. One of the things that we heard during the revision process was a concern by particularly corporates that in-house counsel, therefore, that tribunals may take that decision on the basis of the way that arbitrators may want to structure their own calendars and their availability. Now that is perhaps a legitimate concern and one that as a community, we also need to reflect upon. That is why this rule actually speaks of the circumstances of

the case and no other considerations. Now, what has our experience been. As I said, the rule is clarified but it's not new. This is something that already existed in previous situations of the Rules and the guidance note that was issued by the ICC at the very beginning of the pandemic to allow an informed discussion between parties and tribunals in this regard made that clear, made it clear that there needs to be a balance to be struck on the basis of the different considerations. We have not seen challenges against arbitral awards on the basis of decisions that have been made by tribunals in this regard. It's probably still a matter in development. We will need to see exactly whether there will be such challenges and whether there will be case law that will develop in this regard. In my, to my understanding currently there are perhaps one or two cases that speak peripherally on the subject but not centrally to it. And ultimately, we need to be reminded, I think that the same challenges that arbitral tribunals and parties face in arbitral proceedings were faced, and to a certain extent continue to be faced by courts of law. And ultimately, I think that's telling and giving it that it will be courts of law, that will have to decide this matter if ever it comes into the context of a setting aside or an enforcement proceeding as well.

Mr. Abhinav Bhushan: Thanks, Alex. Just before I invite Betsy for a quick comment, allow me to bring in Pooja. Pooja, you've

been a general counsel of a big corporation, the Indian sub-continent for Phillips. What has your experience been with the whole virtualness of being able to conduct business and briefing lawyers and taking part in arbitration and et cetera? It just changed overnight from your usual what you used to do as a general counsel to what you now do as general counsel.

Ms. Pooja Bedi: Well, thank you so much Abhinav and thank you for the opportunity. I think, you know, just to bring in a perspective from an in-house probably it's a great opportunity here given the people that we are talking here about. One of the most important parties and the biggest stakeholders in an arbitration are the companies involved. You know whether we like it or not. Generally, they are represented by their in-house counsel. And obviously Covid did present a big challenge to all of us, you know, to change our ways of working. But the way the courts in India and the counsels in India adapted to the situation, now I think approximately 75 to 80%, if not more, hearings are happening virtually and people are kind of, you know, nobody could ever imagine two years back that anything and everything will happen online and it is happening right now. It has been an adaptability perspective. But, before we talk about the virtual piece and, I just want to take a few minutes on arbitration for an in-house counsel and what's the role that in-house counsel plays. I think we discussed it a little bit that it starts from the contract

itself. And, you know, if you don't have a robust, you know well drafted clear contract, that's where the challenge starts. And, you know with ICC coming up with new Rules, I think there's also one follow-up action for all the in-house counsel to take right now, is to see how well the new contracts are being drafted. Whether it reflects the positions that the ICC is now taking, vis-à-vis virtual hearings, vis-a-vis flexibility, vis-a-vis the funding requirements and the disclosures, et cetera. And how does that fit in? And, I'm a big supporter of legal tech and standardization of contracts. However, that's sad, I think some of your long-term strategic partnerships or a business proposition do really need to have a clarity of thought when it comes to of these arbitration procedures for it to become effective. And, we always have two sides of the story. Where we say in India, there's so much potential for arbitration to grow and become like the most important alternate dispute resolution methodology. However, then we get challenged because it's much easier to get a court, suit injunction or get a stay order or an interim stay, as opposed to going and getting a full relief out there. So, I think there's a balance required and there's a lot to learn for us. And I keep following up the ICC and these new Rules, that keep coming in for us to adapt in our contracts going forward.

Mr. Abhinav Bhushan: Thanks. Thank you, Pooja for that helpful comment. Betsy, I'm going to invite you for a quick comment on the virtual hearing and then I'm going to ask you a follow-up question that was originally intended. So please go ahead.

Betsy Hellmann: Sure. Yeah, just two quick comments on virtual hearings. One is I think, at the beginning of the pandemic, I think we saw the, this issue being a little bit weaponized by parties. So, if there was a party that wanted to delay, they said I absolutely needed an in-person hearing. If there was a party you wanted to be pushing the arbitration forward, they said no, we can do it virtually. I think that probably has to moved out a little bit, given how long the pandemic has gone on. But you know we, maybe that's a question for Alex. The next time he speaks to see, how often he's seen that kind of weaponization on this issue? The other thing and Alex mentioned that, we'll perhaps have to see how this issue plays out in court, whether there is any ground for a party to challenge based on the fact that they wanted a virtual hearing and didn't get it. I can say that it's interesting, at least from the US perspective that our Federal Bench can skew older. So, you can have older judges on the bench and they probably wouldn't have been as familiar with technology. But this, since the pandemic has gone on long enough, you'll have all of the federal judges, would have themselves been quite acquainted, become quite acquainted with using technology to

conduct hearings and so forth. So, for example, I have a hearing on involving Indian parties on both sides, actually in the US, within the past couple of months before US Judge and it was done virtually of course. I think you'll have, the judges who are going to be considering the kinds of cases that Alex mentioned, are themselves going to be informed by their own experience with having conducted virtual hearings and seeing the success of them. So, I think, I think that will very much inform the judge's views of how well this can be done virtually.

Mr. Abhinav Bhushan: Thank you.

Mr. Akshay Kishore: I mean just to add to the American experience you have had virtual hearings in not just the high court and Supreme court of India, you've had some virtual hearings, even in the smaller courts in India, which has been the biggest surprise for me coming out of this pandemic and the biggest positive.

Mr. Abhinav Bhushan: Speaking of, speaking of these surprises arising out of exceptional circumstances, allow me to sort of have asked this question and we'll start with Akshay, but again, everybody's invited to comment on this question. At this particular change was I think Alex one of the more debated changes that a lot of deliberation went into it, which

is the court's power to appoint the tribunal to avoid unfairness. And a lot of debate between party autonomy versus unfairness and unequal treatment. Now, the Rules now has a new Article 12(9), which says that notwithstanding any agreement on the method of the constitution of the tribunal. in exceptional circumstances the court may appoint each member of the tribunal to avoid a significant risk and unequal treatment and unfairness to the parties. Now what these exceptional circumstances are, time will tell, of course. We at the court has seen various different arbitration agreements, which has later risen a situation given a situation where one party felt that it wasn't a good arbitration agreement and there have been challenges in the court against that arbitration agreements. I'm going to invite first Akshay and then perhaps Alex and then Betsy and Pooja to comment on why do you think such or when can such exceptional circumstance may arise under the Indian context? And I think there's a specific example, which I hope Akshay may be able to bring out. So, go ahead with it.

Mr. Akshay Kishore: I mean, to be very honest, in the Indian context, sadly though, there have been cases where you will most often see unfair constitution of tribunal clauses, probably might not be on the ICC Rules. So, we won't be able to utilize these amendments they will be in the Government contracts. You see them so often, and there are umpteen number

of cases in India on this now. Especially with the amendment of the Arbitration Act in India and, and you know, the disclosure requirements for conflict of interest of an arbitrator, previous employees of the government being asked not to be appointed as an arbitrator. In those kinds of government contracts is where you would most often see it, right? As far as other examples, I mean, they can be very varying, right? A party having a unilateral option to appoint, that could be seen as one being unfair. And that is a perfectly good reason I think where ICC could step in and utilize this amendment and say, no it would be the ICC that could appoint someone rather than a party having a unilateral right to appoint. And obviously this goes follows also the case law which many case laws in different jurisdictions which have said that such unilateral appointment rights are not in consonance with the spirit of arbitration agreement.

Mr. Abhinav Bhushan: So, thank you. And Betsy, in your experience as a counsel, perhaps in more developed jurisdictions have you seen these exceptional circumstances that in your mind are exceptional circumstances?

Ms. Betsy Hellmann: Yeah, it actually has. So, I do quite a, in addition to it India do quite a better work in Brazil. There was a time in Brazil also where there was a great disparity between the Brazilian parties bargaining power and

another counter parties. And you actually would see these contracts where there was a great disparity between who was going to, the disparity in the balance of who was going to be able to appoint the arbitrators. So I am, I have actually seen them. That being said, I have also one of the worst I've seen was completely US. A contract as well where there was just a where the bargaining power between the two parties and was so great. And one of the parties just pushed and pushed and pushed wherever they could. And they came up with a really unequal arbitration clause. So I do think you will actually, you do see these, these kinds of clauses with not great frequency but you do see them.

Mr. Abhinav Bhushan: Thanks. Thanks Betsy. Alex, is this a Brazilian-Indian problem? Or do you see it, do we see it in other developed jurisdictions or some of the things that you might want to tell us the court has seen, which the court might consider as exceptional circumstances?

Mr. Alexander Fessas: Sure. I fully agree with Betsy. This should not be seen or premised as a developed and developing jurisdictions issue. I think you have excellent drafting, excellently drafted arbitration agreements on either side and you have very problematic arbitration agreements on either side as well. Very often I think the considerations that drive the choice of the place of arbitration and ultimately the

manner in which a tribunal may be constituted are vastly different. So a case that could be seated in New Delhi could also be a New York seat or a Paris seat or seated elsewhere in the world. So I don't think we need to see it under that line. I fully agree. What we have seen is close to the examples that Akshay said. Obviously, we have that level of unfairness that may ultimately lead to endangering the validity of the award. The example that I mentioned, earlier, is one that has already, that comes as a life. It's a live example coming from an, a real example came out of an ICC case. Where both the Paris Court of Appeal, which is the controlling court at the place of arbitration and the BVI High Court, which was called in the context of enforcement proceedings had to decide whether a five-member tribunal that was constituted by the ICC not following the arbitration agreement was validly constituted. Ultimately the arbitration agreement there provided which was included in the shareholders agreement provider that each shareholder could nominate yet you had less of them. If I remember correctly participating in the arbitration and ultimately more nominees coming from one side than the other. That issue together with the issue of ultimate validation of the arbitral tribunal by one side or another or the fact that a single side may actually nominate the full tribunal. Another such examples are the extreme examples. Again, not the standard forms of constitution methods that we see that could potentially fall for review under the new

provision of Article 12(9). I should mention Abhinav of course, that again, this is a highly exceptional realm of practice. And obviously the court will be cautious in exercising a discretion to fully constitute the tribunal in those situations. It's, for the moment we have very few examples. We have had enough, I think, to know that we may, we needed to regulate this and thankfully courts have validated that approach that we have taken in the Rules but obviously it comes with a lot of responsibility and we are very conscious of that.

Ms. Pooja Bedi: Yeah Abhinav, I'd like to add here from an in-house counsel perspective, you know, some of the legal counsels that I've worked with in the past have mentioned that in an arbitration is as good as the arbitrator himself, right? And there is a strategic decision involved when you're writing the commercial contract. One of the commercial arguments is to go with, you know, the kind of setup or kind of, you know the structure or the framework that is going to most effectively solve the dispute that can arise in a particular contract. So, I think it's a bit of a challenge when ICC comes up with this requirement of putting the tribunal when there's unfair. I think if you look at it from a corporate standpoint what everybody is trying to do in that contract is get to a place where the dispute can be resolved at the parties' level. And the effort is to actually get out of that problem. So, I don't

know, I hear you Alexander and I think it is important for us to balance it out. Like you've said the last sentence. I think it's important that we balance it out. Because ultimately the aim is that the parties resolve it through arbitration and not get stuck in where this arbitrator should be or the tribunal etc, I think.

Mr. Abhinav Bhushan: Thanks Pooja. But Pooja, what about and that's also a question that Malvika Mohiley has asked. What about one party agreeing to this clause can it not be considered as consent at the time of signing the contract? What about unequal bargaining power? So, the question that Malvika has asked is, that in an arbitral proceeding where in a particular clause is contended to be unfair or unjust by one party can this contention be rejected on the grounds of consent to such a clause once signed in the said agreement?

Ms. Pooja Bedi: And actually I have the same question, honestly Abhinav. Because when two parties and it's a private contract between two parties a commercial consideration there is a remuneration there is a product or delivery or whatever it is and people are getting into that agreement consciously and consenting to a clause. When the dispute arises, take advantage of the same clause. And I'll go back to what Betsy tried to say in the beginning, weaponizing the whole concept of unfair and impartial. I think we move away from the whole

alternate dispute resolution mechanism and we get back into the litigation mode where we kind of challenge the whole paradox or hold the pretext of why we are having that dispute in the first place. Right? So, it's a great question. I think, I'm a bit of an aggressive in-house counsel and I would take that out to say that if you consented you walked in with your eyes open. Yes! It's something that is debatable on merits at the at a court of law. Again, I, that is where I also kind of challenge a bit to say that I want the arbitration to work. I want it to work, right? It should not go to the litigation stage at all. So, agree on these clauses at the beginning.

Mr. Abhinav Bhushan: Imagine this scenario, Betsy against you on the other side. Betsy what would you like to advise your clients?

Ms. Pooja Bedi: Take advantage of the clause.

Ms. Betsy Hellmann: Are we at the drafting stage or we are did I inherit the draft? Because if it's the drafting? Yeah. I mean, if you're at the drafting stage, look this is where you need to, this is where you need to give good advice to your clients, right? And there may be circumstances in which you do have more bargaining power than the other. But you do have to step back and say, okay. But some, at some point we may have to enforce this award and do we know exactly where we're going

to enforce this award? You may not know the countries that you need to enforce that award at the drafting stage. And so, I think it does help the parties to take a more conservative approach and more balanced approach at the drafting stage. Because you never know what's going to happen down the road. Where you need to enforce the award? How you'll need to enforce the award? And so, you are best, I think, taking a more balanced approach at the drafting stage.

Mr. Abhinav Bhushan: Thanks, Betsy.

Mr. Alexander Fessas: I fully, I fully agree. If I may just jump in very quickly. And this would be an excellent case for a moot, for a moot practice thing. Maybe, may be for next year for the next ADR Week. But I think the problem is that the issue arises at so many different or rather the impact of the decision that will be made on whether to follow the letter of the arbitration agreement or disregard in one way or another has impacts on so many and ultimately all the way to, collection. I think that is a real issue. So, what we normally see in most situations is either that the parties agree that there's a problem in the clause and they work it out or that they disagree as to the way to work it out. And therefore, you have a constant objection from one side or multiple sides that basically accompanies the life of the case until the very end. And the one who decides, the ultimate decision maker is

neither the parties nor the tribunal, nor the institution. I think it is obviously the enforcement court or courts or the court of place of arbitration or all of them. I think that is really the big problem here. That's the catch 22.

Mr. Akshay Kishore: Yeah. If I may just add to that thought as well, in terms of especially what Pooja said and I totally agree with that. Parties have commercially taken a decision and entered with fully aware situation and eyes wide open then they must live by it. But there are exceptional circumstances, especially in government contracts where you've seen judgements where courts have side stepped and said there is essentially no bargaining leave it or take it or leave it situation. While you may be able to bargain on certain broader issues. For the longest standing time, Government of India had a standard template. You couldn't touch, you could do, you couldn't touch it. Particularly like highway projects and stuff like that. There are judgements where courts have said that makes no sense. Because this is not something that the parties actually agreed on when this is right at the back at some annexure and it was just signed blindly. And there might be those exceptional circumstances. So, I mean, if essentially what ICC through this rule change is doing is taking care of those exceptional circumstance. I mean it is going to be very interesting to see and this is something a question for Alexander and Abhinav to answer; how much does ICC foresee

that it would, the court would intervene and change the bargain of the parties in terms of unfair clauses. That is something we'll only find out in the years to come.

Mr. Alexander Fessas: That's very true, Akshay. But if I may just add one last word here, it will be exceptional. Because those are not situations, of course, I understand why we're fascinated by the discussion. Because it is so irregular that, of course it is the stuff that scholars love writing about and we all love discussing. And we want to stay away from it as far as much as possible because it's risks to the parties, it's risk to the award. It does, it will arise at some point but it is an exceptional function that the ICC court will have to be called to perform there. Again, the number of instances where we have seen this happen are really numbered to get it's a very, very small amount. Ultimately, it's a question of waiver perhaps to add to what Pooja said before and the way that courts of law will decide whether that waiver exists or not. And there we need to be reminded of the institutional setting. The institutional setting is on the one hand that in so far as the parties have not agreed, otherwise, this is how the constitution of the tribunal will go. And that includes this provision. Ultimately there is a penultimate provision in the ICC often, often neglected that says; well, in all matters, not explicitly regulated under the Rules, the tribunal and the institution will need to make every best

efforts basically, to ensure that the award is enforceable at law. This is the provision that both the BVI court and if I remember correctly, Tribunal de grande court in Paris, had to interpret in order to decide whether what we did was the right thing or not. Here, I think, they, as I said earlier, they upheld that the decision that the court took.

Mr. Abhinav Bhushan: Thanks Alex. We still have about eight minutes and I think we're going to discuss, and we've answered a lot of questions that have, that the participants have asked, but another, perhaps a very important change. That again addresses the Indian problem in some way, is there is now an express power of the tribunal in Article 17 to exclude new party representatives from participating in situations of conflict. And from the Indian context, perhaps Akshay I would start with you. I know it's the best, perhaps I would have originally asked this question to Betsy, but I'm going to give a spin and ask you, as to why this may be very relevant in the Indian context? How these, this ICC rule addresses an Indian issue that we see? How will an arbitration be benefit from this rule in the Indian context?

Mr. Akshay Kishore: Which rule are we talking about? Sorry. For a minute your voice dropped.

Mr. Abhinav Bhushan: Sorry. Change in party representation

where the tribunal now has an express power under Article 17 to exclude new party representatives from participating in situations of conflict. While you gather your thoughts on that, let me bring Betsy in first.

Mr. Akshay Kishore: Yep. Yep.

Ms. Betsy Hellmann: Sure. Yeah. I mean, I think this is a, another example of the tug and the push and pull that we just discussed in our last issue where you have party autonomy versus party abuse. Okay. So you want parties, here in this case you want parties to be able to choose their representatives and if they feel the need to change out their representatives, they should be able to do so. At the same, on the other side, you have parties that have used this. And to be quite frank, it is often sovereigns and sovereign owned entities that this is part of their playbook, were, there'll be well into an arbitration. And then they'll say, well, we need to change counsel out. And so as might follows, then they say to the tribunal, so what we'll need, that new counsel will need six months to get up to speed. And they'll ask her for an adjournment of the proceedings. The other thing that is sometimes done is, when that change in representation happens, it causes a conflict in the arbitration or can and sometimes, quite frankly, can be designed to cause a conflict with one of the arbitrators. And so, I think that is the that dynamic, I

think is what the ICC was looking to avoid was circumstances in which you may be well into an arbitration and one of the parties makes this change in representation that causes potentially a big problem for the tribunal. I do think there is this balance that is going to need to be struck. And Alex can probably speak to that. I think it will be interesting to see how does this play out over time. And will tribunal's when they're met with the tribunals who are notified that there is a change in representation, and they're considering what to do about it. Will tribunals take into account whether in advance of that, the party that wanted to change representation came to the tribunal and said we'd actually like to check the conflicts on this or does the tribunal have any problem with us making this change in representation. It'll be interesting to see whether what tribunal said, will they do that. Or did they just go ahead and do it, which might, which might suggest that there was something else going on there. So, yeah, I mean, it's another one of those, I think probably a delicate balance to be struck here by the ICC.

Mr. Abhinav Bhushan: Thanks. Sorry. Sorry. I'm going to interrupt. We have four minutes and we have one question which I would like to have Alex comment on it. It's slightly technical, but before I invite Alex, we've had to get at three minutes for that. There any last quick comment from Pooja or Akshay on the question that we are discussing?

Mr. Akshay Kishore: Yeah, sure. I mean, to be very honest, I agree with Betsy. It can be again as I said weaponised as a strategy to replace counsels. In my experience, I have not in my close to 12-13 years of practice seen it being weaponized. I've been, I have myself been on a replacement counsel and unfortunately or fortunately, one of the presiding arbitrators was my ex-boss. Thankfully though the tribunal took the view that this needs to be disclosed immediately. It was disclosed. Luckily, colleagues on the other side did not object to it. They said it's a professional relationship. And we went on. So, ICC making this can definitely help to scrutinize the weaponization of this strategy.

Mr. Abhinav Bhushan: Pooja, before I invite Alex for the last question.

Ms. Pooja Bedi: Actually Abhinav, I'll would just like to close by saying this one thing that for in-house. I'll give you a perspective of how businesses think and I think they are one of the biggest stakeholders, like I mentioned. Is, if arbitration has to be a successful outcome or methodology and to be adopted widely it is important that some amount of flexibility is allowed, right? Because otherwise, if it becomes as hardcore as litigation, as expensive as time consuming, then why would anybody prefer to go this route. I

think that balance that we've been talking about, I think ICC is making some very fair and justifiable changes. But I really have to see in letter and spirit how they turn out to be when they're challenged in the court of law. How enforceable they are. If arbitration becomes such a tricky one then I also have a strong resistance or a strong feeling that it might result in people pushing back and not choosing that as an alternative which we don't want. Right. Because it's supposed to do something else.

Mr. Abhinav Bhushan: Thank you so much. Alex, last question, perhaps an important one. You have got two minutes. The question is about, getting reasons about the appointment of tribunal. And Vinayak Kapur asks the question, what role do you see institutes play in getting a well-reasoned decision, especially in case of appointment of an arbitrator, because in many occasions it has been institutions prefer just to either appoint or reject the nomination without supporting it with a well-reasoned decision. And also considering the issue it may become a ground for challenge post award. So conclude.

Mr. Alexander Fessas: Sure. I think when and thanks Vinayak for the question, of course, I think we need to make a distinction between a decision to allow a nominee to become an arbitrator. That is to confirm an arbitrator nominated by the parties or to appoint an arbitrator from the institutional

appointing. Then on deciding on a challenge against someone who is already acting in the case. On those first two institutions enjoy discretion. And I think they need to enjoy discretion and that discretion needs to be safeguarded in a way that will not in a way spill too many beans, with regard to what happens internally. Somebody needs to make a call early on in the case. And I think it, to the extent that the parties take issue with it then, of course, that is transferred to the overseeing institution. And I believe that the current state of affairs, not just within the ICC Rules, but across whole institutional settings which is not to provide reasons for those decisions is good practice. Now with regard to everything that goes into a challenge, deciding a challenge against an arbitrator or a challenge or a decision on whether to replace an acting arbitrator there, yes! Parties under the ICC Rules have the procedural rights to request that reasons be communicated for that decision of the ICC court. I do believe that institutions have a lot to play, a big role to play in that regard. That's why that is now clearly set out in the Rules. First of all, because it gives parties and tribunals clarity with regards to what constitutes a potential conflict or not in the, the full circumstance to solve that present case. There was some concern when we were thinking about establishing that practice a while back, that we might be actually giving too much ammunition to weaponize. Again, that part of the process to the party that may wish to

challenge the award, that has not been the case so far. We have been doing this now for four or five years. We have not really seen that happen. You may have seen a couple of the decisions leak, having leaked on the, on the leak go press. I think you can actually perhaps judge for yourselves, if those decisions are well-reasoned and to what extent they are indeed, well-reasoned. So, I think that is good practice. Ultimately, I'll be even outside the confines of a specific case. To those parties and arbitrators that we say the communicated reasons. I think it instils further trust and legitimate in the legitimacy of the process. And this is really what we're aiming for here.

Mr. Abhinav Bhushan: Thank you so much. That was very helpful. Thank you for being such an engaging panelist, but also thank you everyone is audience for being an engaging audience and asking so many questions. I must say that I'm very happy that we've addressed all the questions that have been asked. There were 12 in total and with that thank you once again. I'm going to hand it back to Rohit.

Mr. Rohit Bhat: Thanks. Thanks, Abhinav. And thank you everyone for such an engaging session. And thank you Abhinav for so efficiently moderating this session and answering all the questions in the Q&A. I hope everyone enjoyed the session, for those who missed it or joined late, these sessions are all

being transcribed. Please do make it a point to go back and look at what you've missed or re-watch these sessions. We have two sessions pending for the day, both on investment treaty arbitration, a hot topic in India right now, the first hosted by Allen & Overy and the second hosted by ICSID. The first is at 4:30 PM, India time and the second at 6:00 PM India time. I hope you can join us then. Thanks everyone.