INDIA ADR WEEK DAY 2: MUMBAI

Multi-Party, Multi-Contract Disputes in Construction Projects: An Indian Perspective

02:30 AM To 04:00 PM IST

MODERATOR

Ms. Gunjan Chhabra, Partner, MRP Advisory

PARTICIPANTS:

Mr. Daniel Cai, Director - Dispute Resolution, Drew & Napier

Mr. Lakshmanan Ramaiah, General Manager & Head (Contracts) L&T HCIC

Ms. Sadaff Habib, Independent Arbitrator & Founder of Equanimity Arbitration

Mr. Rishabh Jogani, Partner, MRP Advisory

Mr. Vivek Malviya, Director, Claims & Contracts Masin

HOST: Hello, everyone. I kindly request everyone to get seated. We will start in the next five minutes. Thank you. Good afternoon, everyone. May I please request everyone to please be seated? The next session is being hosted by MRP Advisory. The topic of the session is "Multi-Party, Multi-Contract Disputes in Construction Projects: An Indian Perspective." The session will be moderated by Ms. Gunjan Chhabra. The speakers of the session are Mr. Daniel Cai, Mr. Lakshmanan Ramaiah, Ms. Sadaff Habib, Mr. Rishabh Jogani and Mr. Vivek Malviya. Request the speakers to kindly take the stage. Thank you.

GUNJAN CHHABRA: Good afternoon, everyone, and welcome to this panel discussion on multi-party, multi-contract disputes in construction projects - an Indian perspective. I am Gunjan and I am from MRP Advisory and I'm going to be the Moderator for this session. India's construction sector is valued at over USD 1.3 trillion today, contributing to about 13% of India's GDP, and it's more complex than ever. Without going into much about the introduction of this topic, in essence, one can say that multi-party, multi-contract construction projects are like Indian weddings. Everyone's invited, nobody quite knows who's paying for what. There are multiple ceremonies happening simultaneously with back-to-back obligations, and by then, at least three people aren't talking to each other. So, with that, let's go into the speaker introduction. We have a stellar cast of speakers with us today. First is Mr. Lakshmanan Ramaiah. He is the General Manager and Head Contracts Administration, Claims Management Heavy Civil IC, with Larsen and Toubro graduating as a rank holding Civil Engineer from Madras University in 1994. Mr. Lakshmanan has had an illustrious career in project management and dispute resolution. Soon after graduation, he moved to Malaysia and delivered a wide range of projects, including power stations, ADB funded irrigation works, water and sewage treatment plants, offshore works, and technically challenging road projects such as the second East-West Highway where he served as the Project Director. He specializes in surveying, holds PMP-RMP and Six Sigma Green Belt certifications and has earned an MBA from the University of Strathclyde, Scotland. Pursuing his interest in disputes and law, he completed a business law programme from WBNUJS, an LLB from Yogi Vimana Government College and an LLM from O.P. Jindal University. He is a member of the CIArb and a board member of the SCL India. Since 2015, Mr. Lakshmanan has been with L&T heavy civil infrastructure IC and since 2020, he has been hearing its contract department, which he himself has developed, and he currently serves as a General Manager Head Contracts with the same department where he's developing and nurturing new age contract management practices. So welcome, Mr. Lakshmanan to the panel.

Next, we have Ms. Sadaff Habib. Sadaff is an independent Arbitrator based in Dubai. She was born and raised in Kenya with Indian roots. She's a New York qualified attorney with extensive experience in international arbitration particularly in construction, infrastructure, property and commercial disputes. Before going independent, she's worked with leading international law firms, recognized as a future leader and global elite thought leader by Who's Who Legal and she's also ranked by the Legal 500 middle east construction for her growing reputation as an Arbitrator. Welcome Sadaff to the panel.

Next, we have Daniel. Daniel Cai is the Director of Dispute Resolution at Drew & Napier, Singapore. He practices civil litigation and international arbitration with a particular expertise in complex disputes involving construction, shareholder matters, and a wide range of commercial issues. Daniel brings with him the deep experience from Singapore and international arbitration offering insights into how jurisdictions have approached consolidation and multiparty disputes. Welcome, Daniel.

DANIEL CAI: Thank you.

GUNJAN CHHABRA: Next, we have Mr. Vivek Malviya, Director, Claims & Contracts at Masin with 13 years of experience in contractual disputes, delay analysis and construction claims. Vivek is a recommended expert by Lexology for his expertise in forensic delay analysis, quantum assessment and dispute resolution. In his role at Masin Project, he has been combining technical know-how with contractual insight, making him a trusted expert in complex infrastructure disputes. Welcome, Vivek.

And last but not the least, we have our very own Rishabh Jogani, who is also a partner with MRP Advisory. He is an India qualified lawyer with a wide experience in both domestic and international disputes. He has represented clients in both *ad hoc* and institutional arbitrations across jurisdictions, and we hope to hear from him an Indian arbitration lends to the issues of contract management and claim strategy. Welcome, Rishabh.

Okay, so, moving on. I believe we have a 360-degree view to the discussion today, and I'll now begin with my questions. So, my first question is actually directed to Mr. Lakshmanan Ramaiah. From a Contactor standpoint what are the biggest pain points in managing multiple contracts and stakeholders on a large infrastructure project?

LAKSHMANAN RAMAIAH: Thanks, Gunjan. Before addressing this particular question, one needs to understand what is a large infrastructure project. At least in my company Larsen & Toubro, anything about 10,000 crore Indian rupees, we call it as a mega project or large infrastructure project. So, when we talk about large infrastructure project, obviously JV Partner was a requirement. We have about 18 to 30 JV Partners internationally. So, why we require JV Partners is one requirement is pre-qualification because we bring new technology inside the country. So, pre-qualification then, obviously, cultural issues comes in. Then specialize the need for specialized works will be there. And obviously, you get Original Equipment Manufacturers. And then again, foreign intervention will be there. And we call something as core competency works like very, very specialized niche area of works, like geotextiles, piling and all those stuff. We need a specialized contractor where we call them as nominated subcontractors. And we also bring in some Financing Partners. So, look at the mix. It's very, very big mix, very fine mix. And it's a sophisticated mix. Everybody is intelligent, everybody has wide knowledge in contracts. So, managing them together with the Employer is a complex issue. So, in my experience, in large mega projects that I have done, I was able to see 50 to 60 Contracts playing simultaneously at the same time. So therefore, what I mean to say here is the first pain point is Contract Administration. It's extremely difficult joint venture with the Employer, between joint venture Partners, between nominated subcontractors and the Employer, nominated Subcontractors and the JV, individual member of JV with their Subcontractors. So, it's extremely complex phenomena. So, doing the Contracts administration is itself as pain point according to my experience and my wisdom that I have.

Now, getting into further, cumbersome issues, you will see, every Contract is governed by different governing law, different frameworks, like FIDIC, NEC, JCT, bespoke Contract, different terms and conditions, different change management procedures, different currencies involved. Compliance framework, different compliance framework, different performance requirements, different claims management procedures, notice period procedures, seat of arbitration will be different. Multi-stage, multi-tier dispute resolution clauses everywhere. So, this alone is a nightmare usually. This is what I think.

Now, second is claims management complexity, leave aside Contracts administration. The second point I wish to take up is the claims management complexity. Recently I was involved in a Navy project. The condition in the main contract says "whenever there is a patrol in the sea, they will give us a 4 hours window so that the dredging operation should be stopped." To simplify what is dredging, we just take out the sand from the sea; that's called dredging. We use mammoth vessels, which will have a higher cost of $100,000 per day. So, one day stoppage, the Contractor loses $100,000. But the compensation clause says 50,000 will be compensated per day. And they stop four days, we have paid 2 lakhs. The loss is 400,000. So, this is how the Contract works. Then how do you do a claims management? There's nothing to manage. Somebody should lose, and nobody is willing to lose in this game. So, just managing claims itself is going to be extremely complex despite the condition.

Now, again, when we go to the Employer, the substantiation requirement, notice period, onerous conditions is going to be another big pain point. How to manage that is again a problem. The third pain point that we face is risk management complexity. The risk

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management philosophy is a secret black box with all the companies. Nowadays, majority of the people does in lumpsum turnkey design and build and we roll out also to our nominated subcontractors as a lumpsum turnkey design and build Contracts. Therefore, the risk profile is kept in a secret black box. Nobody knows how to manage it. So, risk allocation never gets aligned. As I just told you, we get 2 lakh and we are supposed to pay 400,000 USD. The risk proposition never gets aligned. So, these are the major three pain points I would like to talk about. Thank you.

GUNJAN CHHABRA: Thank you so much. Moving on, now, we've heard from the industry perspective. Let's move on a bit to the lawyers now. So, Daniel, my next question is actually directed towards you. What are some of the practical challenges that you face in handling multi-party and multi-contract disputes? And how do Tribunals and Parties mitigate risks?

DANIEL CAI: Thank you, Gunjan. So, where there are multi-Party and multi-Contract disputes, one of the key challenges is the risk of inconsistent awards and conflicting findings between different Tribunals. So, where there are multi-Parties involved in construction disputes, for example, there could be maybe three Parties involved, and there could be parallel agreements which are substantially identical, but they have different underlying Contracts. So, in a substantial big construction project, for example, there could be multi-Contracts at multiple levels between the Employer and the Main Contractor, between the Employer and the Consultants, and between the Main Contractor and the Sub-consultants. In this case, a Contractor, for example, could have problems dealing with upstream claim against the Employer as well as downstream claims against his Sub-contractor and where there are multi-Contracts, multi-Party disputes in this manner, there's a risk of inconsistent awards and conflicting findings between various Tribunals upstream and downstream. For example, a Contractor could be found liable for the Employer's complaints of defects, and he may want to pass on that to the Subcontractor. And he may fail, he may not succeed, and there's risk there involved. So, the Main Contractor could be caught in a situation where he has to defend upstream and pursue downstream. And the main challenge here is if the Subcontractor is not a Party to the Main Contract, it's going to be difficult to add him as a Party to the arbitration there.

GUNJAN CHHABRA: Thank you, Daniel. Thank you so much. So, coming from where you left off, that it can be a challenge where sometimes the Sub-contractors are not signatories to the Main Contract, and I'll start with Rishabh first from the Indian law perspective, and then maybe come back to you. So, Rishabh, what's your perspective on non-signatories being joined into the arbitration and maybe you could touch upon the Group Companies doctrine as well.

RISHABH JOGANI: Thanks, Gunjan. I think anyone based out of India knows this issue, went up to the Supreme Court a few times and you had ***Chloro Controls***. And then you had ***Cox and Kings***, and that's the last judgement from the Indian Supreme Court, which basically says the Tribunal rather can allow non-signatories within applying the Group of Company Doctrine but it lays down a standard which is looking at consent and looking at whether if it's related agreements, it's the same transaction, what is the relationship between the Parties? And I think the Court says something like, it should be either sister companies or parent and subsidiaries. So, it's pretty complex. And I think the way the law gives the flexibility, of course is, India changed the view from this being decided by the Courts, to this being decided by the Tribunals. And this is something that's quite interesting.

GUNJAN CHHABRA: Thank you, Rishabh. Daniel, do you want to add to that to tell us how the rest of the world is doing it better?

DANIEL CAI: Thanks, Gunjan. Thanks, Rishabh. I wouldn't say doing it better, but I find the Indian approach very interesting. So, you mentioned ***Chloro Controls***, Rishabh?

RISHABH JOGANI: Then ***Cox and Kings***.

DANIEL CAI: Right. And I think that it's based on a finding that the Parties had constantly consented to arbitrate, and that concept doesn't quite exist in Singapore. So, in Singapore, the Court of Appeal in a case ***PT First Media vs Astro*** did not recognize parts of an award that was made in favour of third parties who were joined to the arbitration, and that decision has been the subject of some criticism and some discussions, but that's interesting to note that we do it a little bit differently from the Indian Supreme Court approach. But there is the concept of an Alter Ego Doctrine under Singapore Law, and that's been endorsed in the Singapore Courts. And it basically says that a non-signatory to an Arbitration Agreement can be compelled to participate in the arbitration proceedings if he's found to be the alter ego of a Party to the Arbitration Agreement. So, I've seen this workout in practice. I've been involved in a matter where dispute arose out of an agreement that we had, and we argued that the Founder of a company is essentially the alter ego of the company that he have founded, and on that basis, we were able to add him as a Party to the arbitration even though he did not personally sign off in the contracts. I'll pass it back to you, Rishabh.

RISHABH JOGANI: I just wanted to point out, actually, I disagree that I don't think India is not doing it better. We're probably taking a few steps ahead. But it also solves, in my view, the Dala problem that came up before the English Supreme Court, which was, and for all, the French Courts actually held that, this was a dispute between I think a Trust created under an ordinance which lapsed, and was effectively a dispute against the state. The government of a non-friendly country to India, I won't name it, but eventually the French Courts say, no, the government is liable. It must pay up. This award goes to the English Courts for enforcement, and English Courts take the absolutely opposite view. So, I think if it came to India, we know how the law would go.

GUNJAN CHHABRA: Thank you, Daniel and Rishabh. Without the risk of the lawyers taking over the discussion, the ***Cox and Kings*** judgement of the Supreme Court actually deals with the Alter Ego concept as well. And they, in fact, don't do it on the basis of corporate veil or Alter Ego, and it's a consent-based doctrine, and that's where I believe the difference in adding the non-signatories to the arbitration lies. They don't lift the corporate veil. So, it's purely a consent based, meaning the Party would have to be there in the arbitration. It's just the formal signature is missing, so it's quite interesting. Okay, moving on. So, now we've heard from the industry expert and the lawyers. Moving on to the Arbitrator on the panel, to give sense of it all, how you handle it. So, Sadaff, how do you ensure consistency in decision-making when you deal with overlapping issues in these kinds of contracts, especially, say, if it's a cross related contracts, but maybe different Tribunals, how do you deal with that?

SADAFF HABIB: Thanks, Gunjan. And it's wonderful to be here with everyone today. And of course, on such a knowledgeable panel as well. So, it's a tricky position, to be honest. There are no two words to say about it because what we're looking at is a situation where we have different Arbitrators. Yes, there are related arbitrations, and especially in a situation where the Parties have not agreed to consolidate the disputes. Now, in such a situation, as an Arbitrator, if the Parties are submitting... I think it's best to look at it in a practical example, come to think of it. Because if you have an arbitration where the Employer has filed claims against the Contractor, and then you have in parallel, another arbitration where the Contractor is obviously claiming against a Sub-contractor, Employer would likely be claiming delays against the Contract in the main arbitration and then the Contract is carrying on those claims against the Sub-contractor. Now you have two different Tribunals in play in Arbitration A and in Arbitration B. Now, can the two Tribunals, if you really think about it, can they actually confer, knowing what we know about the arbitration process? I don't think so. And that's where the tricky situation arises more for the Parties from a commercial perspective as well. Now, in reality, what would happen is that yes, the Parties have an option to try to consolidate the disputes, but if the Parties do not agree to consolidation, then you're left in that same situation. Now say, for example, that the inconsistencies that might arise, especially would be in relation to evidence. But again, because of the confidentiality aspect of arbitration, how do you expect the Tribunals to now confer between themselves? It's just not possible. There might be a situation where one of the Parties say, for example, the Contractor who's common to both arbitrations might decide to raise evidentiary issues in one case, and that could potentially open up a situation for the Arbitrator to ask questions, but still in relation to the evidence that has been put before it in that dispute. So, you have a situation where unless there is some sort of consolidation or unless the Parties agree for the Arbitrators to speak to each other, then you're just in the situation where the Arbitrator needs to decide based on what's been put before it and ask questions, evidentiary-related based on what it has before it.

GUNJAN CHHABRA: Thanks, Sadaff, that's very interesting indeed. Now I want to hear also an Expert's perspective on how they deal with the challenges which arise in these kind of Contracts. So, Vivek, please.

VIVEK MALVIYA: Thank you for not ignoring the Expert fraternity, Gunjan. So, yeah, as rightly said by Mr. Ramaiah, with too many stakeholders involved, it's a complex scenario. And when it comes to dispute, it's really one smoking gun. It's like a crossfire when every Party is pointing fingers in every direction, and I am the one who's brought up into the picture to identify who pulled up the trigger first on time and cost. So, certainly the onus is on the Expert, and how? Coming to the next question, how I deal with it? So, Tribunal doesn't want chaos. Tribunal wants clarity. In such huge construction disputes, there are a lot of interdependencies involved when work of one Party is dependent on the other Party. For example, due to design delays, there could be delays by the Civil Contractor, which ultimately affects the Mechanical Contractor. So, then, I am the one who tries to figure out whose delay was on the critical path. And how I can extract out the entitlement from exaggeration. There I try to make things simpler by presenting a simpler picture to the Tribunal, refining the data which is running into thousands and lakhs of pages. The other thing is concurrency. Now again, when there are multiple Parties involved, there are multiple delays from every Party, the challenge is to identify which delay was on critical path, which Party is liable for the compensation? And that's how we need to simplify the things. We need to present a clear picture. It's like rebuilding the timeline, rebuilding a coherent timeline, considering the whole scenario and presenting in front of the Tribunal with a clarity. That's what the Expert can do.

GUNJAN CHHABRA: Thanks, Vivek. Thank you. Coming back to the industry perspective, to hear from a veteran Contract, Mr. Lakshmanan, do you ever see situations where, because Vivek spoke about clarity rather than chaos. But do you ever see situations where Contractors are unfairly caught in the crossfire of disputes between Employers and Sub-contractors?

LAKSHMANAN RAMAIAH: It's a fact, Gunjan. So, no need to ask this question. It is because as Vivek explained these Contracts are complex in nature, so you can't align the risk and therefore disputes are inherent. It's packed inside that. It comes as a package. So, as I said in many of our Contracts, we suffer this, because primarily if I could take, easier to explain it's majority on the type of the works we do. Like, we always get dredging Contractors on board, like DEME, big groups. So, they work on CapEx and a heavy machines. So according to them, it's a machine hire. One day you use this machine, you pay me so much. Whatever you want to pump the entire sea, I'll pump and give. That's how they do. And for us, the land development is the measure. So, the measures itself vary between contracts to contract. So, what we expect and what they sell will never match. So, we are trying to tie wide a Contract, then obviously disputes are there and it's perpetual. It exists and it has to be handled in a nicer way. So, we tend to tidy up the contractual discrepancy, nicer terms, but it usually doesn't work in the industry perspective, it will exist. So, we normally do risk profiling. That's the best we do. We take a financial risk, and that's how we handle it. So, obviously we put a risk cap of until this much I can withstand, beyond this, we can't.

And the second one is, we have conflicting positions between two Contracts. If it is a JV Contract, one Party comes in. We come in basically for different purpose, different objectives, but there is a common objective. So, there is a risk. So, that's the Contractor's dilemma. And we have, interface risk allocation is one big area where we suffer. Especially in the kind of tunnelling and Metro contracts where 30 to 40 interfacing Contractors are working in a same shared-access space. What do you expect? It's like a joint family; you naturally have disputes. Obviously, you get into disputes and there will be some extent of unfairness because somebody has to bear the responsibility, because there is no concept of apportionment here. It's not that there is a piece of cake; you cut and take it. No, it's a Contract. So, conditions will be onerous and one Party will obviously get affected and that's how it happens in the industry. And the burden of claims administration is going to be extremely difficult here. So, what happens in practice is not in paper. So, that's what I can say. So, it is. We are caught in between, and these are some instances.

GUNJAN CHHABRA: Thank you so much, Mr. Lakshmanan for sharing that perspective and especially for sharing how often Contracts with Sub-contractors might not have the same provisions as the Main Contractor; so, that would become quite complex. So, my next question is directed towards Sadaff. Sadaff, in a lot of cases, I'm sure you come across, especially in these kind of Contracts, construction projects where there are multiple Contractors and multiple Parties involved and multiple Experts probably. You would be faced with conflicting expert testimony and overlapping factual evidence as well, which could be across different proceedings. So, as an Arbitrator, how do you handle these situations where you come across the same Expert giving sort of different testimonies in different cases? Have you ever come across something like that? And how would you possibly deal with that?

SADAFF HABIB: Thanks, Gunjan. You pretty much put me on the spot there, because I haven't experienced such a situation before. So, it'd be interesting to speculate how to approach such a scenario. I mean, where the Expert is giving... I'm just thinking about what tools as an Arbitrator do I have at hand in order to address or respond to such a situation in a way that still maintains an even playing field as best as possible between the Parties, because ultimately, you do need to keep in mind the neutrality of the process and credibility as well. Now, the first thing that comes to mind is, of course, thinking about how much? Okay, if I am the Arbitrator in these related arbitrations, I also need to think about how the Parties are approaching the evidence. Are they cross-referring if they're the same Parties in both arbitrations? Are they cross-referring the Expert evidence in their submissions? And if they are, does that sort of give me an outlet to ask questions, raise clarifications on any potential inconsistencies that I see and to what extent can I actually do that within the ambits of the process? So, that's one way that I would look at it. The other thing, of course, is to be really mindful and perhaps, even, another process, of course, with the Experts is if there is a provision for hot-tubbing of the experts, then perhaps those inconsistencies would come out between the Experts as well. So, that would be another situation where that could create an opening for me as an Arbitrator.

GUNJAN CHHABRA: Thank you, Sadaff. Thank you for giving us some of the very important tools, such as hot-tubbing and thank you also for answering the very speculative question, but yes. So, moving on, Rishabh, my next question is to you and then Daniel, I'll come to you post that on the Singapore perspective. So, Rishabh, what strategic considerations go into deciding whether you want to pursue consolidated proceedings or parallel arbitration proceedings under the Indian law, especially in these kind of matters?

RISHABH JOGANI: You know, I think, in my view the most important one is the risk of a conflicting award. And I think we're working on some ourselves where we've got two Tribunals, which are very different, and their approach to the question itself is very different. And the fear is, Tribunal A looks at it in a particular manner, Tribunal B looks at the same thing in a completely different manner. The problem is, if they gave conflicting awards, you don't know which interpretation is correct, but it should only be one. And the way the Indian law stands, you can't nullify it because it's a possible plausible view. So, both are probably right, even though one is not. In fact, I've come across a case like that as well, where Tribunal A accepted Methodology A for... I can't give in more details, but it was a methodology to look at how costs are calculated for prolongation. It looked at future costs. The same Contract went on, Tribunal B comes in and it rejects that methodology and says, no, we won't accept that. It says another methodology applies. Both awards get challenged in the Court. I honestly don't know what to do because I'm now doing a dispute involving Tribunal 3. So, it's going to be interesting. And

I think the other strategic consideration is really running it in parallel also could be extremely difficult. I mean, it's one thing to have it all heard and finished off before the same Tribunal because then they understand the same concepts, especially if they're technical, but if you are running it in parallel, that means more work for you as well. As lawyers, then you are forced to really deal with double the amount of data, all of that. So, it really depends on those factors. Of course, the most important one for the Client is money. So, wherever they can save money, or wherever they think that they're going to be able to avoid spending some money, I think the Client will probably look at that as well. So, I think these are in my mind, the most important considerations.

GUNJAN CHHABRA: Thank you, Rishabh, some very important considerations rightly said. Daniel, do you want to add to that as well? What are some of the considerations which you would take into account?

DANIEL CAI: Thank you, Gunjan and thank you, Rishabh. So, for me, if I see a Contract or multiple Contracts involve the same construction project, same factual matrix, same delay analysis, same issues and if the result of the multiple arbitrations that were commenced would turn on the same issues, I would think that that makes perfect sense to consolidate. There will definitely be cost savings. The Tribunal will be able to look at the evidence in its totality, instead of having multiple proceedings running side-by-side. And, of course, as Rishabh mentioned, there will be significant cost savings and not having duplicated work. So, I think that makes sense. I wonder whether in some situations, it could be contractually provided for. So, there are some standard form Contracts in Singapore, which obliges Parties to use their best efforts to consolidate what would otherwise be multiple proceedings and there's been case law interpreting this standard to use your best efforts to consolidate, and that might be a useful solution to encourage or even compel Parties to consolidate where possible.

GUNJAN CHHABRA: Thank you, Daniel.

LAKSHMANAN RAMAIAH: I just have something to add, as Contractor's problem or Employer's problem, because these disputes happen in different timelines. So, it sometimes wouldn't be possible. For example, in an infrastructure Contracts, I'm doing one project in Bhutan. It's going on for 19 years. Still, the project is not completed. So, the JV issues, the specialized Contractor issues occurs in different timelines. So, it's a claim strategy that as Contractors, we will decide to go on good faith and put the claims on a different timeline, whereas the other Party kicks in immediately when he loses money. So, it's extremely difficult to consolidate the proceedings in my experience, unless you have seen that happening in the world, or at least in Indian perspective, I think, Indian perspective, I have not seen it yet. Unless you can give me some examples of it.

SADAFF HABIB: Can I just make a point on consolidation? Because I had a couple of applications from the Parties and I had to decide on consolidation. And it was very interesting, because in one particular case, and this is just on this principle of consolidation, because I just wondered what was going on in the Claimant's Counsel mind, when they were looking or when they were going through their due diligence process? Because when they filed their arbitration, their Request for Arbitration, and this is under the DIAC Rules. And again, they made an application for consolidation. And under the DIAC Rules, it first goes to the arbitration court to look at if it fits the criteria under the rules, and if consolidation is possible. The arbitration court, *prima facie* decided that, no, there's no consolidation and obviously deferred it then to the Tribunal's jurisdiction. Now, the Claimant then decided again to bring the consolidation application. You're well within your right, of course, to bring in an application to the Tribunal, but I do think commercially, you need to really evaluate where you're coming from, because if your application does not meet the criteria, then why are you bringing it up again? So, I think as Parties, you just need to be mindful. Do you tick the checklist? In the absence of Parties' consent to consolidation, are the Arbitration Agreements the same? Look at the considerations within the rules that are applicable to your arbitration before deciding to raise it again. Because then what happened was, of course, I had to invite the Parties to respond to the consolidation application… to the joinder rather application and then I had to decide on it. But that caused a delay in the procedural timetable. And mind you, this is the Claimants who have filed the case. So, I would say just be mindful. Mindful of where you're spending your time and costs in relation to your claims.

GUNJAN CHHABRA: Thank you, Sadaff, that's a very interesting perspective. And thank you for sharing that war story as well. So, now I'll just briefly step towards the Expert. And, Vivek, what do you feel is the role of Experts in assisting Tribunals to navigate these kind of disputes? And what practical steps or remedies could you adopt to manage these kind of disputes more effectively?

VIVEK MALVIYA: Thank you, Gunjan. So, as I earlier said, it's all about converting chaos into clarity, and that's what Tribunal expects from an Expert and the challenge isn't just technical, it's human as well. Because when you are dealing with a multi-Party dispute, every Party has their own story, has their own version of delays, and I am the one who has this onus to develop a coherent timeline in front of Tribunal and accordingly, to identify what delays were critical. So, definitely the first step comes out as building a core and timeline, then I need to identify what delays were critical and what cost entitlement could be there if there are on any, either of the Parties. And the Tribunal don't really rely on us for advocacy; it's rather a clarification, a clarity, a transparency and independence, what is expected from an Expert.

And coming to the next question, that what remedies could be adopted. So again, rather than legal or technical remedies, it's more about the culture. Usually, Experts are engaged at a very later stage. At times, even after the arbitration has started. And then Expert engagement is being processed. So, if an Expert is part of an arbitration at early stages, even before arbitration it could help to resolve a dispute even without arbitration. There could be an alternate dispute resolution procedures as well.

Secondly, the biggest challenge we face, especially in Indian scenario, is documents. Documents are like Oxygen to any dispute, to any project. And somehow, the document management system is not as perfect in Indian scenario. So, if the documents are developed throughout the project, it could really help an Expert to come up with a clear picture, to have a better opinion on any delay, to have a better opinion on what critical delays were in the project. To sum up my position, it's all about early engagement of the Expert, proper documentation and developing a culture where Expert opinion is acknowledged.

GUNJAN CHHABRA: Thanks, Vivek. Thank you for that interesting perspective. And to some extent I do agree with that, because I feel early engagement of Counsels and Experts is very important. Otherwise, you end up sort of trying to douse a fire with half a hose and it's better to have the Counsels and the Experts onboard at the strategy stage itself, so that they guide the dispute. So, now, coming to Rishabh. Rishabh, do you feel that institutional rules are better equipped to deal with these multi-Party, multi-Contract disputes and how willing do you feel are Indian Parties to adopt institutional rules versus *ad hoc*?

RISHABH JOGANI: In my view, and I think I've always had this view. Institutional rules are, I think, the basic problem solver in India. We spend way too much time in India about litigating over what we should arbitrate about. It's exhausting. I am dealing with *ad hoc* arbitrations where we are dealing with absolutely, I'd say, illogical arguments, about what is the form, what are the fees? I mean, this issue has actually gone up to the Indian Supreme Court; what should be the fees of the Tribunal? If it was an institution, there's a standard that's applied and no one questions it. There's no debate. So, in my view, I think it solves almost half the problems, if not more. And unfortunately, a Contractor or a Claimant is very often very keen on something that moves fast, but a Respondent would enjoy the vagaries of an *ad hoc* arbitration. Let things just run loose and deal with the chaos. It's a Respondent's heaven to have an *ad hoc* arbitration. Of course, institutions sometimes I'm saying low value disputes can end up being expensive, but again, it's not a straitjacket formula. So, if you're drafting your arbitration clause, you have a sizable project or dispute in mind. It's really illogical to think that there will be a problem to adopt an institutional rule, because it's a few thousand or a few, I don't know, lakhs worth of fees that you'll pay to an institution, but at least it'll bring the sense of clarity. It'll have someone external administer things. I see this very often, and I'm doing arbitrations myself where in India, unfortunately, where we're only dealing with how the arbitration should have started or what are the Parties that should have been involved, or things like consolidation. I mean, Indian law doesn't very clearly provide it, and you can defeat consolidation in a way. So, yeah, I think institutional rules push it. I mean, if you are a Contractor, especially, it should be mandatory. Of course, this is an event organized by the MCIA; so, I'm sure they'd be very happy to hear about this one.

GUNJAN CHHABRA: Yes. Thank you, Rishabh, thank you so much. Daniel, do you have a different view on that? Or do you agree to that?

DANIEL CAI: I generally agree to that. Yes.

GUNJAN CHHABRA: Yes. Okay, I think there’s time for one last question, and then maybe we can open the floor to the audience. So, Sadaff, my last question is to you. In multiparty construction disputes with international elements, you would often face requests for interim reliefs. That could possibly affect Parties in multiple jurisdictions have domino effects. So, what sort of considerations do you take into account for making decisions on this issue in such a complex scenario?

SADAFF HABIB: Thanks, Gunjan. Well, interim measures, those are the really high pressure points I feel in an arbitration, and especially when there are complexities involved just the way Gunjan mentioned and what we've been discussing as well over here today. Now, when we look at interim measures, the point of an interim measure is to... So, I would say, first of all, regardless of the complex, of course there are complexities involved, but I think we also need to keep in mind and touch base on the basics as well. Now, the idea of an interim measure is to maintain the *status quo* of the Parties. That's the reason why it has been brought up. Perhaps a Party feels that there's a threat of assets being dissipated, which is why they're asking for that freezing order, or that attachment of the assets. Now, as an Arbitrator, my first point of call, I would look at what is my power? What is the seat of arbitration? What is my scope of granting interim measures in terms of the seat, in terms of the institutional rules where they are applicable? And that would be sort of my starting point. And then I would look at, okay, of course, why is the Party making this application? What is the basis for this application? And is it that if I was, or if the Arbitrator was not to grant the interim measure, would the consequence that the Party faces, would that be irreparable by an award of damages? How necessary is this interim measure to the Party? What would be the likely impact if it is not granted? The other thing I would consider is that, and this, of course, also depends on the institutional rules, because some of the institutional rules do specify what are the sort of criteria that you would look at? And one of them would be, is there a reasonable possibility of this particular Party succeeding on their merits? Now, of course, this does not mean, as the Tribunal, that's the basis for your later determination on the Party's claims, but just in the context of the interim measure. Now, I don't see that these criteria... I feel that these criteria are still as important, if not more, when their complexity is involved. So, that would be my point of call.

GUNJAN CHHABRA: Thanks, Sadaff. Thank you so much. That was very helpful indeed. So, now I think we have a little bit of time left. So, anyone from the audience wants to put any question? No question. I think the stellar panel has already explained everything in great detail; so, we have no questions for the panel. Maybe we can close with some closing remarks. So, Vivek, we'll start with you. Final closing remarks. Maybe we could talk a little about how you could improve things in this particular area or generally?

VIVEK MALVIYA: Yeah, certainly. So, Gunjan, as, like we discussed during the session also, that there needs to be a clarity, clarity in terms of dispute, clarity in terms of what are the matters involved and what is the position of each Party? And certainly, the earliest involvement of Expert can certainly facilitate to resolve the dispute even before arbitration. It could be mediation measures, it could be Alternate Dispute Resolution processes. So, just to sum it up, early involvement of Expert, good documentation and clarity in terms of dispute.

GUNJAN CHHABRA: Thanks, Vivek. Sadaff, on to you.

SADAFF HABIB: Thank you. I love Vivek's tagline. I feel that should be adopted in every arbitration at the outset that Tribunals like clarity, not chaos. So, that would be my number one thing. But just on a more practical perspective. So, in my professional life, I've worn many hats. I worked in-house with a construction company, I worked in construction disputes as Counsel, and now I'm working as an independent Arbitrator. But the one thing I would say is that, and really emphasize is that parties really need to do, especially like Claimants. You're bringing a claim, please do your due diligence in terms of the quality of the claims, which ones you can really support and which ones you can really bring forward. And especially when you have complex infrastructure disputes, you have multiple Parties involved, why are you filing claims against X, Y, Z? Look at the Contract. Understand what you're doing before you actually go ahead and file it.

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GUNJAN CHHABRA: Thank you so much. Rishabh?

RISHABH JOGANI: Well, I think I'm going to make a pitch that I said this while ago as well. Two things. One, please put an institutional arbitration clause; any institution is fine. Honestly, it avoids half the problems. And the other one is, get sensible Experts. Get them on board. I know Vivek said this multiple times, but it's absolutely chaotic when you see, it's called the ships passing in the night sort of a problem. And when you're reading pleadings where people are just arguing whatever they want, and then Experts come in, completely different analysis, it's absolute chaos, so yeah, Tribunals like clarity, not chaos.

GUNJAN CHHABRA: Thanks Rishabh. Mr. Lakshmanan on to you.

LAKSHMANAN RAMAIAH: I have a slightly off side view. Contractor side. See, we contract to deliver the product or a project. We don't contract to create disputes. That's the reality. So, no Contractor wants to contract to create a dispute. So why an Expert at initial stages are questioned the time, cost of money? There are practical difficulties. If I get injected an Expert with the faith that I will be filing a claim, then it spoils the customer relation. We lose repeat orders. So, there are practical difficulties in the industry. So, the moment I bring in Expert, instead of doing the work, so isn't it a bad faith? It will develop a bad faith. So, this is Contractor's problem. So, we don't get any strategist or Experts involved at early stages of Contract because it is the time to build the product, not to build disputes or claims. So, that's the industry perspective that I can give. But I don't deny with Vivek. We need Experts at some stage, unless it's integrated into the Contract, then in such cases, change the condition. The problem what we face is a risk problem. We have a variety of risk known-knowns, known-unknowns and unknown-unknowns. For example. Covid was an unknown-unknown. Nobody knew Covid. It suddenly popped up. Now we know Covid. So, it becomes known unknown. But if we start provisioning every known unknown, then everybody will be H1. Nobody will be able to do the project. So, this is a dilemma. I don't think anyone is going to bring an Expert beginning of the project, so this is my take, actually.

GUNJAN CHHABRA: Thank you so much. A very important take as well, to remind us about the sensibilities other than the ground realities. So, Daniel, on to you. Closing remarks?

DANIEL CAI: Sure. Thank you, Gunjan. So, in these sort of multi-Party, multi-Contract sort of situations, I think the key takeaway is the Clients should try to be sensible and collaborative where possible and not take positions purely just to cause the other side harm or to inflict additional cost on the other side. From what I've seen in the cases I've handled, when Parties tend to take this sort of combative approaches that really nobody benefits, costs get run up, and we have multiple skirmishes over every small little thing, and I think that ultimately doesn't serve the arbitral process or the proceedings. And to echo what Lakshmanan and Rishabh said, I do think it's important to get Experts on early. I have seen situations in which one party delays in getting on Experts, there's unequal arms. One side clearly has got the Expert on and prepared the Notice of Arbitration and the Statement of Claim with the benefit of Experts and then the other side doesn't, and it's very obvious, and I think that clients sometimes should maybe consider take the bigger picture and try to consider bringing on Experts early on in the proceedings, rather than later.

GUNJAN CHHABRA: Thank you so much. That wraps up our discussion, and I think we've heard wonderful perspectives from all areas. We have a 360-degree perfect view on the issue now. And I'm hoping that if there are any questions left from the audience, if you're shy, please meet the speakers outside on the floor. And thank you once again for being a wonderful audience. And thank you so much for the panellists to join us today for this discussion. Thank you.

~~~END OF SESSION 4~~~