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SESSION 4

ARCHITECTURE OF AN ARBITRATION: WHAT YOU SHOULD THINK OF AS A CLAIMANT OR A RESPONDENT DURING THE LIFECYCLE OF AN ARBITRATION- STRATEGIES AND PRACTICAL REALITIES

SPEAKERS:

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ANUSHKA MANSHARAMANI: We request everyone to please take your seats. We will begin in the next two minutes. Thank you. Welcome back, ladies and gentlemen. We resume the afternoon with the session hosted by Trilegal. Every arbitration has a life cycle from the first notice to the final award, and at each stage the Claimants and Respondents face very distinct strategic choices. Understanding that architecture and the decisions embedded with it can often be the difference between a well-run case and a difficult one. This session is titled "Architecture of an Arbitration: What you should think as a Claimant or Respondent during the life cycle of an arbitration- strategies and practical realities." Moderating the session we have Ms. Shalaka Patel, the partner of Trilegal, she's joined by Abhishek Tanvi, senior director at BNY, Janine Haesler, Managing Associate, Vischer, Richard Haeley, the head of disputes partner legal UK and Zal Andhyaarujina, Senior advocate, Bombay High Court over to you, Ms. Patel thank you

SHALAKA PATIL: Thanks very much. Hi, good afternoon everyone. Thank you so much for joining us on this panel and we hope to through this panel, speak of some practical experiences and talk about strategies and perspectives both from the Claimant and the Respondent side, which I often find is discussed lesser on these kind of panels. I'm joined by some very stellar colleagues and I hope that this is an interesting discussion and feel free to jump in and ask us questions, of course, at the end of this.

ABHISHEK THANVI: Maybe I'll begin with the very first stage in a dispute which is pre-dispute when you're sort of, looking at an agreement and deciding what you put there depending on the kind of agreement. And maybe I'll begin this question with the GC on the panel; we have Abhishek with us from BNY. Abhishek, have you in the last few years in particular, noticed that there is a lot of emphasis on the kind of dispute resolution clause that's chosen? And whether it's court or arbitration, and is that... does that response change depending on, you know, the industry in question, for example, in your case, the financial services industry, but you have experience in other areas as well?

ABHISHEK THANVI: No, thanks, thanks, Shalaka for that. And I think it's fair to say and in any industry and in any area of practice, evolution is it's a given right, and so, the same applies for dispute resolution as well. It's a clichéd saying that okay, it's no longer a boilerplate clause, so on and so forth. But I think a lot of that also has to do with how sophisticated practice generally and legal delivery being one of them has really evolved over the last 20 years, last 20, 25 years. Now of course, Indian jurisprudence is fairly old, but if you look at the Indian corporate setup so to say, that sophistication has only arrived in the last 20- 25 years. And so therefore, the understanding that any dispute resolution clause, so to say, is essentially a... it's essentially a risk allocation matter, right? And so, therefore, there are different parameters of risk. So, as the understanding of that risk has evolved amongst lawyers specifically and as the nuances of the legal proceedings also and the awareness around it has also increased on the business side of things. It's a natural progression that the dispute resolution clauses now definitely deserve a lot more time. They do get a lot more time and so therefore it's not just the legal signing off on it, there are a lot of commercial considerations that are then taken into account. You sit with the business folks and you try and understand that what are the risks that we are trying to protect, you know. Is an interim injunction that I'd be looking at? Is the speed of recovery of assets is what I'll be looking at? Depending on that, you would sort of fashion and you'll sort of draft a clause. So, that's the evolution that we have seen.

SHALAKA PATIL: And does the answer change on the kind of clause whether arbitration or court depending on the on the contract, or that is less relevant to this decision?

ABHISHEK THANVI: I think that's... especially in the Indian context that is that is absolutely important. And so therefore, again, as I said, at its heart, it's a risk allocation question.

SHALAKA PATIL: Correct.

ABHISHEK THANVI: And so, you need to identify what are the risks that you're protecting against and it's also a sort of an obvious take away that there'll be certain risks which are in case of dispute resolution, which are better protected by way of arbitration. And I'll speak of to give you an example, I'll speak of an issue, Isha was supposed to join us, I think that would have been a great example, because if I'm entering into a data centre agreement, the cross-border agreement. So, to say I'll probably tilt towards arbitration, I'm not saying that, you know, that's the nature of services, the only parameter that defines it. But at its heart, what are the risks that I'm trying to protect against and what are the reliefs that I'd be most interested in that will greatly shape what are the dispute resolution mechanisms that I'd be tilting towards.

SHALAKA PATIL: Thank you. And Janine, sort of, you know, turning this over to you as a practitioner when someone will approach you with an arbitration clause and this routinely happens, what are the two or three recommendations that you would insist that a clause should have so that, you know, this doesn't turn into a dispute? Well, we would, you know, be happy to represent someone on that what can one do to prevent a dispute?

JANINE HAESLER: Yeah, sure. So, I'm happy to speak on that and thank you so much for the invitation Shalaka. So, in my view, the arbitration clause and Abhishek, you may agree, the best arbitration clause is often a boring clause. But when we look at such a boring clause and when we draft such a clause, there are, as you say, a few points that we should consider. And in my view, but other people are of course happy to jump in, I think the first issue is always the seat; so, where should the arbitration be seated. That governs a whole host of questions. So, for example, overriding principle principles that can play into your arbitration the court intervention. So, how active are the courts interfering with the arbitration and then also the appeal levels. Is there just one appeal? Are there several appeals? And also the enforcement which is often key.

The second point that is very important is the appointment mechanism of Arbitrators. You don't want your arbitration to already face issues at this early stage of the proceedings. So, I know that's different in India, but in continental Europe and other parts of the world, often, institutional arbitration is the... is the go-to mechanism or at least choosing an institution as an appointing authority; so, you have that obstacle out of the way. The third point is the...

SHALAKA PATIL: Shout out to MCIA here. Sorry, please continue.

JANINE HAESLER: Absolutely. And the third point is the wording. So, it should be unambiguous. And often you can if you have an institution you can resort to the as you say, the MCIA Model clause or every other institution that also offers a model clause. And don't choose an institution that's no longer existing because that eventually also puts you into troubles. And the last point and that's probably often overlooked, is the coherency. So, if you are, for example, advising on a framework agreement or a Purchase Order or an agreement that that just ties in with other agreements, it's always very helpful if they all provide and if the Parties agree, if they all provide for the same arbitration clause, because otherwise, in my experience, you also run into risks and into issues of delay... delaying the proceedings.

SHALAKA PATIL: Thank you. Zal, I want to sort of move this to sort of, the next stage where a Party is assessing what they should do when it comes to approaching a court, say, for an interim relief application in a Section 9, and often clients will approach you and ask you to give them a case assessment, do they have a case to succeed in court. What are the few things that you know end up being important in that analysis and particularly looking at things like, you know, is there an admission in any communication or, you know, a waiver of a right or it could be something like, does this Section 9 eventually lead you to something more in the in the eventual arbitration? So, what are the sort of things that you know, you advise on if there's a matter in your... that you've done, you know, whether this is played out, that would also be a great example?

ZAL ANDHYARUJINA: Thanks, Shalaka. And thanks for having me here and giving an opportunity to be on the panel with all of you. So, I think from an arbitration perspective, perhaps the most important decision to take early on in the context of interim relief is, what is the forum that you're going to choose for interim relief. You know, they're all arbitration experts here. So, we are aware that in the context of our domestic arbitration, we, broadly speaking, have three options, right? So, the first is to go to court, what we refer to loosely as our Section 9 relief, Section 9 of our Arbitration Act, which all of you have done a zillion times, sometimes with me. Then we of course have our Section 17 relief, which is the relief that we seek once the Tribunal is constituted, which I do less of, but arbitration specialists perhaps do a little more of. And then we have the interesting new emerging trend with regard to emergency arbitrations which MCIA has now also incorporated into its rules. And I notice lower down you're going to ask me some questions with regard to a proposal that has now emerged to incorporate that into our Act as well. My own personal experience of these three types of remedies is that I find going to court under Section 9 to be the most effective. I find it to be most effective for a variety of reasons. I think the first is that the judge is ready, he's sitting and he's available.

SHALAKA PATIL: Most important.

ZAL ANDHYARUJINA: The Bombay High Court for its many faults has some excellent judges and fortunately the arbitration assignment has been manned by some of these very, very good lawyers who are judges. We don't have a problem with third-Party Joinder because now it is settled under Indian law that you can join third-parties to interim applications. So, relief is fairly simple with regard to third-Parties. At the interim stage, you often have to reach out to third Parties to get effective relief. By contrast, I find the remedy before the Arbitrator to be rather slow and painful in the sense that there's not a great deal of cooperation in the Indian context between disputing sets of solicitors. It's normally an attempt to sort of obstruct the other person's attempt to start the arbitration. Also, of course, in the context of the fact that we don't have a very effective system of costs, which is all, you know, which takes into account conduct through arbitration. My own experience of 17 has been mixed. Even before the best of the Arbitrators, I find that it's a long hearing because we are now settled in before the Arbitrator. My own view also is that the Arbitrator under Section 17 often applies equitable considerations which he should not. The reason he should not is obviously, you have to specifically confer upon the Arbitrator the power to apply equity. Often it's not done; yet it influences the Arbitrator's decision. And you have a lot of problems with third-party joinder in arbitration, even in interim applications before the Arbitrators. So, between Section 17 and Section 9, my advice consistently is, let's go to court.

The emergency arbitration, I've used it several times. Once again I've had a mixed experience. I can't say I've always been happy with the result of the emergency arbitration or the way that the Emergency Arbitrator has dealt with the matter. Maybe a little later on I can give you some instances of what I have experienced in emergency arbitration. So, that's with regard to the domestic piece.

When we speak about international commercial arbitration, I think there is a general inclination where it is available to go with the Emergency Arbitrator. Most institutions are able to bring the Emergency Arbitrator into play very quickly. And as you know, there are some timelines, differing timelines, but in any event fairly effective timelines to ensure that you get a decision fairly quickly.

SHALAKA PATIL: Yeah.

ZAL ANDHYARUJINA: Once again, in the context of Indian arbitration practitioners, we are aware... some of our foreign friends may not know this, but we can still take recourse to our courts under Section 9 in the event of international commercial arbitration, where there is no express exclusion where Indian Parties are involved. I've often used that in combination. I found that to be quite effective when we've first gone immediately to the court to get immediate Section 9 relief because even the Emergency Arbitrator takes a day or two to be appointed.

SHALAKA PATIL: That's right.

ZAL ANDHYARUJINA: And he takes a day or two to warm up to the matter. And as I will tell you a little later, in one or two of my emergency arbitrations, they do a stage wise hearing, where he says, "I'll hear you on this today, I want some more data on that tomorrow", etc. So, in the meantime, if you need some urgent relief, the Section 9 relief is always available. And normally I would advise, if it is necessary combining the Section 9 relief with an application to the Emergency Arbitrator.

To your merits-based question about what are the factors which really sort of are important to take into account, once again, we are not dealing with the strict rules of procedure with interim relief in arbitrations. It's a little easier to get an interim measure of relief in arbitration than it is in a regular suit or regular court proceeding, But all the general principles and rules apply.

So, I think everything that you would do if you were to go to court, you've got to be alive to and you've got to take into account before you go to court. So, ...

SHALAKA PATIL: Thank you. Richard, moving this along in, sort of, the life cycle of an arbitration, you know, clients may often come to you and they're more optimistic about the value of their claim and how the claim, you know, what the number should look like, and you, you know, as the lawyer and your team assessing the papers may think that no, maybe this number looks far too inflated. So, how is it that, you know, what kind of discipline would you exercise in determining what claim to introduce in the Statement of Claim? Of course, there are some disincentivizing measures like a cost, you know, claim against you if you don't succeed in a portion of what you've claimed, but any other measures of how you advise clients on being realistic and the evidence at hand as well?

RICHARD HEALEY: Okay. Thank you Shalaka. And thank you everybody for affording us this opportunity to be here today and to speak with you; this is a great event. So, the starting point for me is the same guiding principle that I've used for the past 27 years when acting for clients throughout the entirety of my practice. I believe it's far better to have honest and straightforward, even if sometimes difficult, conversations with clients, at the outset. Frankly, although the client may not thank you in the short term, in the longer term, ultimately, they will really not thank you if they end up on the wrong end of a cost to order or actually, by taking the line that one has taken, it causes them to be ultimately heavily criticised or to have difficulties, for example, internally. So, if one thinks about acting for a corporate and one allows the GC to be a little bit overly carried away with how he proposes or she proposes to put forward the claim and subsequently, that leads to a very unhelpful award which leads to a huge amount of criticism, well, when that person ultimately goes before their Board, they're not going to be particularly appreciative when they've been heavily criticised for advancing what are possibly in some instances fanciful heads of damages.

So, the starting point is, one has to be straightforward and honest with the client and have the difficult conversations at the outset. Leading on from that, also, one has to think about the fact that this is a long career and ultimately, one may well come across the same Arbitrators moving forward, one may well go before the same panel, one may well appear before the same judges. So, reputation is important to all of us. So, and so, to credibility. So, from the outset it's important as I say, to have those conversations.

The next factor I need to think about is and this ties in with a theme that was in the first session this morning, who is my client here? So, one needs to establish who am I actually acting for?

Okay. If I'm... if I'm acting for ultimately the Claimant, that's one thing and then one simply has to persuade or frankly demonstrate to the client, the Claimant why certain heads of damages are not sustainable, but also from time-to-time I will be brought in by litigation funders to do due diligence or to advise upon a potential claim and to advise upon the viability. So, in that instance, I have a direct obligation to actually push back and say no, some of these heads of damages are simply not sustainable. So, it's important to think about who is my client here. Assuming my client is the Claimant and they are wanting to advance these heads of damages, then one has to have a very close look at these heads at the start, and as I say, have the direct conversation, or needs to engage with one's proposed expert, and in many instances that might mean you bring on board what we call a "dirty expert" at the outset, which is somebody who will informally advise on what those heads of damages will be before one will subsequently then appoint an independent expert in due course. But one needs to work closely with the expert in order to look at the correlation between the proposed claims and the proposed heads of damages, and actually what the loss is that one's seeking to advance. Am I going to sit here and say to you that I have never run some make wait claims, some claims that actually, because one will tend to have a menu of these things, some claims will be stronger and more nailed on than others? Perhaps as you get further down the pleading, some of the claims will be a little bit more remote, shall we say. That can have its uses, and it can have its uses for negotiation purposes. But equally, it can have its downsides as well in that ultimately, if you end up with a much inflated claim, not only do you risk reputation and credibility issues in front of the panel and the Tribunal, but you also potentially make any negotiation much more difficult and much more protracted and you risk, as you said earlier, Shalaka, the risk of adverse costs orders and adverse findings against you. So, the ultimate point here is, deconstruct the claim, look at the correlation between the actual heads of loss, the damages claimed, work closely with your expert and have the honest conversation with the client at the outset. If the client insists or the client really pushes for it, try and find a compromise, but yeah, be strong from the outset and continue to be strong, test it, this side of the Tribunal.

SHALAKA PATIL: Thank you. And in fact, Janine, speaking of difficult conversations, another difficult conversation is if someone's deciding to launch a claim, one has to look at the Respondent's ability to pay up if you're going to succeed. So, asset tracing and the timing for asset tracing, the need for asset tracing even before you send your first notice or is it better done at the stage of enforcement, the jurisdiction in which the Respondent is likely to be based, what are the considerations that that, you know, one would bear in mind when advising a client on this?

JANINE HAESLER: So, we probably all agree that the asset tracing at the outset in an ideal world would be ideal. And it's always helpful before advancing all these money, the cost, the advances on costs and also the costs for the Counsel to know whether, at the end of the day, there are actually assets that you can enforce the award against. However, in my or in our experience, especially in the last few years, clients have become increasingly cost aware and they are satisfied often with just a few Google researchers and then they don't want to spend more money on the asset-tracing side early on, and only later on during the arbitration or where we are currently working together towards the end of the arbitration, suddenly they are like, well, if we win, what happens then? In my view, and probably we all agree here as lawyers, that's often too late. Because you're already in the middle of the arbitration, you're waiting an award and now you're looking at assets, I mean, the money is already spent. But yeah, there's only so much we can do and that's another difficult conversation. We can only be honest and tell the clients that they should look for the assets early on and ideally, and we come to that later also see whether they can freeze these assets before they actually have an award in hand.

If asset-tracing is not an option or also in parallel to asset-tracing, I have two further things that clients could be made aware of. One is the freezing options or interim relief that I already mentioned. We often come across, especially from the UK, I think it's not possible in India to have a Worldwide Freezing Order. This is a good tool, we all agree on that. But we also have to be aware that this is not enforceable in many civil law jurisdictions. For example, in Switzerland, a worldwide asset order will just not have any effect. Another option, that's the second option that clients can look into, especially when they're under Respondent side or when there is a counterclaim is to request for a security for costs. We see that almost in every arbitration on both sides, or at least at least on the Respondent side, and at least that covers some of the arbitration costs that the clients need to advance.

SHALAKA PATIL: Thank you.

RICHARD HEALEY: Shalaka?

SHALAKA PATIL: Yes, please.

RICHARD HEALEY: Just add a little, because a huge part of my practice is involved in cross-border asset recovery and asked for asset tracing in that sense. And so, I completely agree with Janine about cost sensitivity. However, there are some asset tracing people out there that will sometimes look at things on a contingent basis. So, again, that can from time-to-time be a tool that ultimately, there will be a cost to the client, but it won't necessarily be a cost that's paid upfront and it will be back-ended on a successful outcome. So, again that's possibly just another tool in the box sometimes.

SHALAKA PATIL: Yeah, and sometimes I guess it can also be used as a combination with getting court orders for disclosures or getting at least some basic assets through someone tracing it and then getting the court to allow them to disclose beyond maybe the actual Respondents, which is a combination we've often used in India. Zal, you know, moving to you, and this is for me the interesting part of the discussion. On the Respondent side, when you're representing a Respondent and the strategies for a Respondent, because those I think, you know, it would be good to spend some time on. I wanted you know, you to tell us maybe some war stories from cases that you've dealt with, either preventing a disclosure order or an injunction order or any other kind of order is Respondent and what has succeeded.

ZAL ANDHYARUJINA: I take it as an implied term; I can't talk about war stories.

SHALAKA PATIL: Yeah, yeah.

ZAL ANDHYARUJINA: Right, but just the earlier point made by both Janine and Richard, I wanted to touch upon what you said Shalaka; that was a very good point. I want to make it myself, is that one of the useful parts about the Section 9 type of proceeding is that Indian courts have been very willing to order disclosures. And they have been fairly willing also to order an early deposit. The Bombay courts have developed now a jurisprudence to say that if you can't show a sustainable *prima facie* defence, there should be a deposit at the time of the Section 9 order itself, which as we know we have lots of problems in execution later on. So, it certainly helps to have the money in court early on. And to Janine's point with regard to the freezer, the Indian courts have recognised the freezer, but they don't issue it. In the sense that they will respect it but they don't issue it.

SHALAKA PATIL: Yeah, yeah.

ZAL ANDHYARUJINA: Turning to your point, Shalaka, from the Respondents point of view, right. So, we have some early defence type of tactics, right. So, we have the arbitrability type of defence which is often thrown out. We have the Party type of defence obviously, that we are not Parties to the Arbitration Agreement, so on and so forth. With regard to disclosures, it's become rather difficult actually to resist the disclosure. In fact, my colleague... is sitting there... we've just come a little late because we were resisting the other side's disclosure application in court. I think sort of a counterattack seems to be now one of the best ways to resist the disclosure order, in the sense our counter-attack here was suppression and a failure to bring on record the material facts as we know, which disentitles the Party to any relief, including the disclosure type.

SHALAKA PATIL: Correct. No courts like suppression.

ZAL ANDHYARUJINA: No, no courts like that. Otherwise the general sort of run of the injunction disclosure order you do have to make out a *prima facie* defence and you do have to establish the fact that you will have a strong case at defence to resist the injunction. Can't think really of anything else as a boilerplate.

SHALAKA PATIL: Yeah, correct.

ZAL ANDHYARUJINA: Of course it depends on a sort of merits consideration of each case.

ABHISHEK THANVI: Correct.

ZAL ANDHYARUJINA: I think what I would say by way of conclusion is that just as Indian courts have becoming increasingly wary of interfering with the process and the awards. They have become rightly, I think a more inclined to grant relief. So, it is a little becoming a little more difficult to resist the injunction and to resist the disclosure which is normally used in aid of arbitration. So, I think they're on the right track there as well. So, maybe it was a little better to be a Respondent ten years ago; maybe it's a little harder today, yeah.

SHALAKA PATIL: And maybe that's a good thing for arbitration.

ZAL ANDHYARUJINA: Yeah.

SHALAKA PATIL: Richard, Janine, this one's for both of you. You know, the Respondent may be on a back foot if you know the claim is in preparation for months; the Notice Of Arbitration arrives on a Friday evening, you know. You and your teams what are the first few things that you know you would want to have in place and build a defence where perhaps there hasn't been enough time or even perhaps you've not anticipated a claim, although usually the client does have an inkling that something should be coming?

RICHARD HEALEY: Okay, so, when I was... when I was looking at this question, Shalaka, the first thought that went through my head is, one almost needs to treat this in the same way that I would think about it if I get an email from an opponent or even a colleague that makes me cross. And what I mean by that is, I need to resist the temptation to want to immediately respond, to actually stop to think about it and actually sit down and plan, how one needs to deal with this.

SHALAKA PATIL: That's a great analogy.

RICHARD HEALEY: Yeah. So, I would be looking to deal with it on a staged basis and I would go through a number of stages in that process. So, the first thing is, obviously, one would need to establish has it been properly served? Has it... has it been served on the correct Parties? What are the procedural requirements? And ultimately, what are the Tribunal rules, you know, under which procedure, which set of rules is the arbitration being advanced? So, one, first of all, would need to do that.

The next thing to just think about, and this is particularly a facet for the UK these days given how highly regulated we are, is to just check that actually before we are in a position to start to deal with this, have we met all of our professional requirements? By which I mean literally, is our AML, KYC and everything up to date? Because here we are, on a Friday evening wanting to start to deal with this. Are we in a position, meaningfully, to move forward with this? And that can't be overlooked these days in the UK, because we have our internal compliance police who perform a very important role, but nonetheless, we do have to make sure that we have got everything in place.

Next thing. Having got that that done well, the next thing is to preserve our client's position. So, what are the issues? Are there any jurisdictional issues, for example, that have been thrown up? Are there any issues about whether or not, ultimately, the correct Party has been made the Respondent? Are there any issues surrounding whether or not it's met all of its proper procedural requirements? Have they respected the cooling-off period, for example. So, therefore, are there any challenges which we might want to advance to actually the entitlement to proceed with the arbitration, which then will give us an ability to advance that position and it's important not to compromise those and to think about them properly before one moves forward.

Having done that, the next thing then is to work out what's the team who's going to deal with this? By which I mean both the internal and the external team. So, for example, the internal team, who are the people who've got experience of this particular client and how they like to work, pull your team together internally, but also, who are the decision makers at the client? If the client's a corporate, who do we need to notify? Who do we need to talk to? Is it just the GC? Is it the CFO? Is this going to be quite an expensive arbitration? Do we need to think about what a budget might look like and do we need to get that signed off by the CFO before we're actually in a position to proceed? Having done that, who's potentially going to be our expert? Are we needing to identify somebody in order to look at what we're going to respond to by way of flipping around earlier my points on the various heads of damages and what we think the liability and exposure might be? Are there issues of foreign law? If there are, who are we looking to work with in the particular jurisdiction involved? Do we need to have Counsel involved? Always a good investment; I appreciate bringing in Counsel, yeah. But do we need to think about that? What's the client's tolerance for that?

The next thing then is to ensure that the client preserves the evidential position; so, we need to get a notice out to the client requiring them to preserve the documentation and the data sooner rather than later, and that needs to be done as a matter of some urgency, probably over our metaphorical weekend that we're all going to be working, make sure that that nothing is done or could be done, which could cause us subsequently a problem.

And then finally, Shalaka, we need to start to sit down and have a look at the merits. What are the... what are the merits of the claim as advanced? Who are likely to be the key individuals with knowledge this comes back to the team internally within, then the client who are likely to be able to tell us meaningfully about that? It's unlikely the GC will be able to give us chapter and verse although he/she should have had some involvement prior to this time, because it's unlikely that that the notice will have come just out of the blue, there's likely to have been some awareness at least. But who's likely to be able to give us the primary knowledge in order to enable us to start drafting and what conversations do we need to have with them in order to pull together our response and to defend the various heads of claim? So, those are the processes, Shalaka, that I would be looking to go through.

SHALAKA PATIL: Thank you. Janine, any anything else from you on this one?

JANINE HAESLER: Yes, I have a few points to add but that seems very, very conclusive in my view. But one point that we regularly look at is also whether there is insurance coverage, especially when you're on the Respondent side and then once you have the insurance policy, that should be pretty fast, whether there is a notice period. And speaking of notice periods, I mean there might be other notice periods under other contracts, be it to suppliers or somewhere along the supply chain. So, that's also very important in our view and experience to keep in mind. Is there a potential for counterclaims? If so for what and in what extent? Are there other necessary disclosures, for example towards the Stock Exchange, towards shareholders or annual statements?

Another point that we often see is the communications, especially if it's a dispute with a public interest or with media coverage. So, how do you handle the external communications? Would it make sense to bring in a specialised person to handle the communications? Again, as with the asset tracer, often clients do not really see the need at the outset, only then when there is media coverage, they suddenly cry for such a person, but also, the internal communication. Especially when it's a big company or a group of company, it's important to… if it's a sensitive case, it's important to contain the information to make sure that the right persons are informed, but also to make sure that the rest of the company or other employees, that they're not informed about the whole case or just specific circumstances or at a later point in time.

The last point is also to ensure or to analyse whether there are adverse interests within the company or within the whole group, and then potentially to advise them to take a separate Counsel. Often we see them throughout the arbitration that these adverse interests will really impact the arbitration and the representation of that client and we already in the past, faced cases where we could no longer represent the client because of these internal struggles.

SHALAKA PATIL: Thank you. And the same sort of question for you, Abhishek, as the as the internal legal Counsel when a notice arrives at your door, whether for an arbitration or an interim relief application and you're going to be on the Respondent side, you may have considerations like, okay, we have, you know, a great case on merit; so, you may have a consideration like we want to preserve the relationship and maybe there is a way that one can look beyond the dispute process. And then sort of added to this, what are the elements of advice that you would look for from your external Counsel in such situations and what you know, what sort of insight has helped you in dealing with these?

ABHISHEK THANVI: Thanks, Shalaka. And I think Janine touched upon a lot of important points which go beyond the pure practice of law or the pure legal advisory piece.

SHALAKA PATIL: Correct.

ABHISHEK THANVI: As I mentioned, if, you know the moment you're advising a company from an internal Counsel perspective, any dispute essentially becomes more about a preservation of assets, of course, and at the same time preservation, or at least an attempt to preserve the relationship, you know. I'm reminded of one of the… you know, a fairly interesting advice that I received very initially in the beginning of my in-house career and which was… forget the fact that you have to hammer the fact or hammer the law, you leave the hammer at home, you look at preserving the relationship first, because the reason there is a dispute is because there was a commercial relationship to begin with.

SHALAKA PATIL: That's right.

ABHISHEK THANVI: And business continuity trumps everything else. And so, commercial considerations, business continuity, reputational risk, these are the sort of things and these are the sort of factors that you would also have to look at. In addition to sort of just reaching out to the Counsel and getting the best legal advice possible, one of the most important things that you would have to do would be just try and triage the situation. What do I mean by that is, you get all the necessary internal stakeholders, and again, going back to what Janine said, there will be situations where there will be conflicting, not just views, but also interests internally, and so, those need to be weeded out fairly early on. If you need a separate Counsel for conflicting Parties internally, you try and get them. You try and get the communications specialist as early on as possible because a lot of things... And we've seen instances where the financial impact may not be as high, but at the same time, the reputational impact would be significantly higher.

And so, therefore, you try and get those individuals, those relevant professionals in at the earliest possible. So, those are the sort of factors which are, in addition to just pure play legal advice that you would be looking at and it's a holistic Counsel that someone would be looking at. So, ...

SHALAKA PATIL: Yeah, that makes sense, thank you. Richard, sort of switching this up to assuming the case has already begun, or is about to begin and third-party funding because I know that this is an area that, you know, you do specialise and you often advise on, considerations on third-party funding for clients, is third-party funding ever an option if you're a Respondent, some sort of practical guidance on this?

RICHARD HEALEY: Yeah. So, there's a common misconception that third-party funding can never work for either a Defendant in litigation or for a Party to arbitration as a Respondent; that's incorrect. So, it can work, and it can work on a number of bases. So, one obvious point is, is there a counterclaim? And if there is a counterclaim then obviously therefore, one is seeking a form of Redress and a form of monetary award from the Claimant. So, in that situation, there's an obvious, at least starting gate that third-party funding can apply.

The other thing is, how can it apply in situations where ultimately, if you're acting for the Respondent, assuming that the Claimant does not have some wholly unmeritorious case? But if the Claimant has some merit to their position then, there is at least a strong likelihood that ultimately your client is going to have to make some sort of financial payment to the Claimant at the end. In that sort of situation one may well ask, well how can funding apply? It can apply in this way. It's possible for law firms except not in India but certainly in the UK and in the States to enter into arrangements with clients on the defence side or the Respondent side whereby we effectively say, we think the claim is likely to be worth X and anything we are able to get you out of, less than X, is likely to carry a success fee.

So, let's assume... let's put some maths around this. Let's assume that the claim is for $1 billion and you say to the Respondent, look, we think we can get you out for $600 million. Then if we do that, then we save ultimately a significant proportion of the claim in favour. Now it's possible to enter into a success-based outcome with the client around that where we say to the client, look, you don't have to pay us anything at this stage; the funder will pay, and we will then share with the funder how we are remunerated. And so, those arrangements are relatively rare but they're increasingly common in the UK and they also happen in the States.

Coming back to my counterclaim point, first thing is, well, how much is the counterclaim? Is it fundable? Is actually the Claimant good for the money. If they're not good for the money then it's... then it's pointless actually a having the counterclaim except that actually you may well get set off in terms of their claim against you. But in terms of actually making a recovery, if they're not good for the money, then it's not fundable, and it's therefore, not something that one could look to put before a funder. If there is a counterclaim and the Claimant is good for the money, well, does the counterclaim have merits? How much would we... would one be looking to receive by way of funding? Broadly, funders work on a 1 to 10 metric, so that for every dollar one borrows from the funder, there needs to be 10 times that headroom in terms of the value of the... of the amount one is seeking as against the amount one is borrowing. So, do those metrics work? Thereafter, it comes down to pricing. Depending on how it's priced that then will come down to whether or not it's attractive to the CFO or the General Counsel. So, it is possible, Shalaka. It's not easy for in terms of a Respondent, but it's possible.

SHALAKA PATIL: Thank you. And closer home speaking of third-party funding and the reaction of Indian courts of course, Indian... there are judgements now where third-party funding has been recognised there's no embargo under Indian law. But do you perceive, you know, a challenge if someone's enforcing an award here and a third-party funding arrangement is disclosed and an element of the amount that is awarded is also going to the third-party funder, for example? Do you perceive any public policy or other issues that could come up or do you think that given the jurisprudence we now have, this should be fairly settled?

ZAL ANDHYARUJINA: Actually, absolutely not, Shalaka. Happy to give you a clear answer on Indian law. So, it's settled now, isn't it, that third-party funding is permissible even in India. And in fact, as many of the Indian lawyers will know, our rules of civil procedure actually now recognise third-party funding. I looked it up; it's in the context of security of costs where there is a Bombay amendment which expressly recognised third-party funding as well. So, I think the public policy defence is really fallen away, if there ever was one. Third-party funding has been recognised in India for a very, very long time. And in fact we found a Privy Council case going back to the 1870s, where it was perfectly fine to be funded by a third-party. The restriction was when the advocate funds the litigation, lawyer funds the litigation. And of course, the usual ... and so on and so forth.

So, I don't think third-party funding is a problem at all. I myself did an enforcement action where the only defence was a public policy defence based on the fact that the award was funded or rather one of the Parties to the award, the successful Party was funded. It failed miserably, the objection, and it was enforced. So, absolutely no problem. And actually during the course of that challenge I saw the benefits of third-party funding. Of course, we had a completely unequal contest between multinational company and a small ship owner. And the ship owner actually succeeded with the help of third-party funding received a very substantial order of costs, which I'm happy to say I was able to enforce. So, I think third-party funding, no problem at all and should be encouraged.

SHALAKA PATIL: Agreed.

ZAL ANDHYARUJINA: And the success fee part was argued as well and it was fine.

SHALAKA PATIL: Okay. Abhishek, when it comes to internally, if there is a third-party funder or an insurer, does that have any impact on if you are deciding to settle midway through, does that make settling more difficult in your experience?

ABHISHEK THANVI: May or may not. Again, you know, and being on a panel with all the lawyers, I think, just to say it depends doesn't really cut the ice, right. But it really depends.

SHALAKA PATIL: Right.

ABHISHEK THANVI: Because at the end of the day a financial services and so therefore you look at the nature of the dispute, if the if the dispute is already between two sophisticated counterparties, then probably yes. But again, going back to what the example which Zal gave. And so, therefore, if you are in a situation where the other the counterparty and there's some mismatch in terms of the (a), the capacity of the counterparty to argue or to defend. So, those

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are the kind of considerations that you would have to look at and I'll again go back to the same answer, unfortunately, that it really depends in certain sophisticated cases, yes, you would look at the ability of the counterparty to fund. And therefore your decision to defend. And whether in a jurisdiction like India, what are the chances of actually that succeeding, and so, therefore, once again you'll have to look at each case individually. But yes, it will be factored into while taking that decision.

ZAL ANDHYARUJINA: Shalaka, may I say something?

SHALAKA PATIL: Yes, of course.

ZAL ANDHYARUJINA: On Abhishek's point, I think my answer was incomplete because really the question for India is will we see third-party funding for Indian arbitrations and Indian litigation where I think there are many problems. I've spoken to many funders and of course the greatest problem is the long time that disputes take to work through our system and the difficulty of predicting the result. So, I wonder whether we're going to have an immediate uptake on third-party funding. It's all allowed and all facilitated, but as a practical reality in our Indian context, I'm not sure it's going to be picked up very soon. We need to iron out a few remaining problems I think before third-party funding can really take off as well.

RICHARD HEALEY: Can I just add one thing?

SHALAKA PATIL: Yes, of course.

RICHARD HEALEY: Yeah, there is a kind of a further development now in the UK. It's almost a kind of further iteration of third-party funding and it's a viable alternative at times now for corporates. And it's something called "capital protection insurance", and it's often a lot more... I hope I don't offend any funders in the room, but it's often a lot more cost effective than third-party funding. And it's this. If you have a large corporate that actually isn't short of financial means in order to pursue its dispute but wants to hedge against the risk of losing, then it's possible for it to ensure the capital it advances as against that dispute, and that's also possible certainly in the UK to do that on behalf of overseas clients. So, let's assume, for example, we pursue a piece of litigation and the budget is 10 million, then it's possible to ensure that 10 million, so that even if the corporate loses its claim, it's only loss in that situation will be the premium that it's paid in order to take out the insurance policy. So, it's a form of hedge, if you like, but it's just often a lot more cost effective, particularly for a well-funded corporate.

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SHALAKA PATIL: And I'm afraid that, you know, we'll have very little time for questions; so, I just want to maybe close this discussion with each panellist maybe spending a minute or so on, you know, telling everyone here some anecdotes from live cases or situations that you've dealt with, and maybe some learnings from there. This is a broad question. So, you know, feel free to take in any direction you want to. Maybe we start with you, Zal, and then we can move on.

ZAL ANDHYARUJINA: Okay, well, there are several stories that we could speak about, but perhaps the... the underlying thread between my experience as an arbitration lawyer dealing with both domestic and international arbitration is that despite the best preparation and despite anticipating almost everything that can be reasonably anticipated, once you go into the hearing, there is always something that comes at you which you have not really thought through and which you didn't expect.

SHALAKA PATIL: Yeah.

ZAL ANDHYARUJINA: Often it comes, in the Indian context, from the Judge. Because there are so many variable factors and the Judge has got so many boxes that he's looking to take time, make the matter simpler for himself, see if the Parties can settle, so on and so forth. I have experienced it, I think most recently in a SIAC dispute where we chose to actually combine the Section 9 prior to going to the emergency arbitration; we thought we had a very bad case and we thought it wouldn't go well for the client, but when we went to court actually the other side fumbled the point. The judge picked up on the fumble and eventually, we managed to settle the matter before going to SIAC arbitration because my clients had a serious problem funding the SIAC arbitration. So, sometimes it does work out well, and I think what I have learnt as a lawyer in disputes is that there is always a residual area of uncertainty which you've got to be willing to deal with. And there you draw on your background experience, your background knowledge. And I think that lawyers such as us have a real role to play in that area.

SHALAKA PATIL: Yeah, that's true. Right till the end, I mean you never know where the...

ZAL ANDHYARUJINA: You never quite know where it's going to fall so...

SHALAKA PATIL: That the fun and also sort of the stress of litigation.

ZAL ANDHYARUJINA: And time out of number, we come out of court thinking it'll go one way and it actually goes the other.

SHALAKA PATIL: Yeah, true. Richard?

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RICHARD HEALEY: Yeah, so, very briefly, I tried to think of the most colourful story I've got in this context, just picking up on something on Janine mentioned earlier, I was acting on an arbitration many years ago in relation to a client from the former Soviet Union, and I inherited the case that had been started by another firm of lawyers, and we were suing an offshore vehicle, and of course, we then got our award and the counterparty simply stepped away from the offshore vehicle as indeed they would when there were no assets behind it and there was no ability effectively to get recompense. I therefore, took over the case, knew who the ultimate Party was that sat behind the defaulting creditor and we started a very interesting campaign in the former Soviet Union country using special PR advisers basically to say that this very senior government-connected person doesn't pay their debts. And surprise, surprise, they came along with a big cheque after a very short period of time because it was starting to cause them some real career-defining moments. And so, it was just a different way to look to... attack the not normally in the legal playbook, but yeah, it was a way to get paid.

SHALAKA PATIL: Thank you. Janine?

JANINE HAESLER: Yeah, so my case is a little bit less colourful unfortunately, but I also sit as Arbitrator regularly and my first, very first case as an Arbitrator a couple of years ago, I was a sole Arbitrator and the first time basically out alone out in the open. And the Respondent at the time was based in Ukraine. And that's when the war just started in Ukraine and it was very difficult to actually get in touch with the Respondent and to courier all the documents at least once through a war zone. But once I succeeded, or we... the firm succeeded to do that, we just had to proceed with the arbitration also just so that the Claimant gets an enforceable award. And what I learned is, despite all these tragic circumstances, it's important that as an Arbitrator and also Arbitral Tribunals that they... that they make firm and clear decisions and that they are not in turning in the wind just because the situation is unfortunate.

SHALAKA PATIL: Thank you. Abhishek?

ABHISHEK THANVI: I can... you know, simple disclaimer, I'm not a disputes lawyer and so therefore, I would not really have any colourful anecdotes as my counterparts here. But the one thing that I've realised is... and we spend a lot of time just creating awareness around the Indian legal system, you know what, how long would it take so on and so forth. And you, sort of, you know, come across these instances when you leave everyone equally disappointed, whether the person is an optimist or a pessimist on the Indian legal system so to say. And a classic example that comes to my mind to sort of illustrate that point is, you write a very well-drafted email trying to explain how long this would take, so on and so forth, you send it to a

British counterpart because you know, the count the subsidiary is essentially a British subsidiary, and you get an email back saying that do you think it's a typo? Can it really take ten years? I would assume it's more like ten months. So, those are the sort of instances that you come across in-house but again, as I said and just going back to Zal's point, it just goes either way and so you find a way to disappoint everyone, so there's that.

SHALAKA PATIL: Hopefully, the takeaway isn't that it takes ten years in arbitration in India I mean hopefully certainly now things are looking quite different but I mean there are realities that I that you know one actually.

ZAL ANDHYARUJINA: I forgot I've got a great incident which is, about a year or two ago with a colleague of mine, we did a small arbitration involving a Venezuelan Party.

SHALAKA PATIL: You're allowed to say only MCIA here.

ZAL ANDHYARUJINA: Sorry, I'm sorry, my apologies, my apologies, but you may not want it to be MCIA if you hear the rest of the story. So, the sort of arbitration dragged on and we had the problems of dealing with the Party in person on the other side who, obviously, English was his second language and he struggled through many aspects of it. So, the Arbitrator who incidentally was also quite an interesting guy, he was a Scotsman out of Dubai and he had a strong sort of Scottish accent. And asked him a question and he obviously couldn't answer it. So, he said give me a minute. So, the screen went blank initially and then he came on and he lit up a big cigar in front of the screen, and he said, "You don't mind. I'm very stressed and I have to smoke to think." So, I looked at the Arbitrator was otherwise very strict on timeline and you know, said not a day's delay and all that. So, I think the Arbitrator was also flummoxed and he said, "Oh well, okay, you know, you know, do what it takes to think." He smoked the cigar for actually five minutes and he said, "I don't think I can answer the question."

SHALAKA PATIL: Thank you so much to all our panellists. If there are any we've just about four minutes for some questions if there are any questions then please raise your hand or you know you can stand up and ask them or if there are any other closing comments if there are no questions. I think the lessons from here are so sort of comprehensive that there are no questions that that we have. Any other closing comments? Otherwise, many thanks to all our panellists, Zal, Richard, Janine, Abhishek, thank you so much for taking the time, and I certainly learned quite a bit from this one. Thank you.

JANINE HAESLER: Thank you.

ANUSHKA MANSHARAMANI: Thank you to our Moderator and panellists for that comprehensive walk through the life of an arbitration. With this, I would now request the panellists to kindly step forward for a picture. We will commence our next session at 04:00. Thank you.

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