INDIA ADR WEEK 2023 – DAY 5 DELHI

SESSION 6

EARLY DISMISSAL IN ARBITRATION PROCEEDINGS - IS THE ARBITRATION WORLD READY?

6:00 PM To 7:00 PM

Speakers:

Mr. Nish Shetty, Partner, Clifford Chance
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Mr. Gourab Banerjee, Senior Advocate, Supreme Court of India
Ms Priya Mehra, General Counsel, Akasa Air
Ms Samantha Rowe, Partner, Debevoise & Plimpton
Mr Andrew Battisson, Partner, Linklaters

NISH SHETTY: Thank you for that interesting discussion. The next discussion that we have is an early dismissal in arbitration proceedings. Is the arbitration world ready? May I please invite on the stage the panellists for this session? Mr. Nish Shetty, Partner at Clifford Chance. Mr. Ankit Goyal, Partner at Allen & Gledhill LLP. Mr. Gourab Banerjee, Senior Advocate, Supreme Court of India, Ms. Priya Mehra, General Counsel at Akasa Air, and Ms. Samantha Rowe, partner at Debevoise & Plimpton, and Mr. Andrew Battison, partner at Linklaters. Oh my God, there's a stopwatch here. The biggest yeah, I think it's request everyone to take your seat that will ensure that you get your drinks on time. Great. The introductions have been made already. So, we're going to dispense with that and get straight to the meat of it. Like every sophisticated organization out there the MCIA has decided to leave the best for last. So, thank you all for staying for that, no pressure. Yeah exactly. So really the topic for this evening is really early dismissal in the context of arbitration. So, to set the stage for that, we have the esteemed panel right here. I'm going to basically talk a little bit about why this is relevant in the context of arbitration and then we'll get into the meat of the discussion itself. Now, I think it's pretty obvious to say that clients in general want to see a speedy, efficient process. Speedy, efficient, arbitral process, speedy, efficient litigation process. So that their dispute is dealt with as quickly as possible and as inexpensively as possible. Often one hears of a comparison between litigation and arbitration, which is better, which is more suited for the dispute at hand

and why? Now one of the differentiators of arbitration versus litigation and what litigations often referred to is this concept of summary judgment. Now that's available in many jurisdictions. You go to court, and you say to the court that this particular dispute itself is quite straightforward. There is really no defence to it, and therefore dear Judge, give me, give me judgment in a summary way. And the courts are empowered to do that and that's been there for a long time. We'll ask Gourab in a minute to talk about the Indian context and how that works, that certainly exists in Singapore, where I practice and where Ankit practices, and I'm sure it's there in the UK as well and elsewhere. So, it's not something that we're unfamiliar with. And by and large, no one says that there is a breach of natural justice. There is some other due process issue with summary determination in that manner. Arbitration, on the other hand, summary determination is a relatively new concept. So, we're going to be examining why there is a difference when it comes to arbitration. Is that difference a valid difference? Should there be a difference and some of the moves that have come about in the arbitral world that addresses this particular issue around early determination. So, let's start with India. So, Gourab, I could trouble you to just talk about summary judgement in the Indian context and we will set the stage for the broader discussion thereafter.

GOURAB BANERJEE: Thank you, Nish. Frankly when I looked at the topic, I had this moment of sort of complete despair, and I wondered what Niti Sachdev and MCIA had got me into and I sort of pictured myself sitting before an ad hoc panel inevitably of 3 Supreme Court judges trying to get the arbitration dismissed on day 3 on the merits. So, I had that moment, but I will come back to it. Let me not divert from the issue which Nish has flagged and I am very grateful to him that he's at least given me something to talk about as opposed to the Indian experience in the arbitration field. But certainly, in Delhi and in India after the Commercial Courts Act has been introduced, we have built up a significant amount of jurisprudence on summary dismissal. And there is a specific provision in the code of civil procedure as amended which is Order 13(A) and there are number of judgements particularly of the Delhi High Court which have gone into this and there has been some degree of success in commercial matters particularly in patent design IP matters in getting suits dismissed at a preliminary stage on the merit. Not a case of judgement on admission or summary judgement but in this particular case in the commercial field. And the test which the courts essentially what we've done is what we do best. We have copied, cut and pasted the English CPR, and we've taken the case law from there. And there are two very interesting judgments. One of Justice Jalan in Kamadhenu, and there's an earlier judgment of Justice Manmohan and Sukam, which are quite elaborate. And essentially what is required is that there has to be a reasonable or a realistic prospect of success. And also there has to be a sort of not a mini trial, but a judging of the documentary evidence and to take a call as to whether this is good enough to either decree the suit, or

alternatively for an early dismissal. So, there is something that I suppose one could show to an ad hoc or an institutional Indian Tribunal and say there is something in litigation which does support early dismissal. And there is some case law on that.

NISH SHETTY: Thank you, Gourab. Can I ask either Sam or Andrew to just talk about the UK experience? And then I'll ask Ankit, perhaps to talk about the Singapore one. Who wants to go?

SAMANTHA ROWE: I will go very, very briefly. But yes, we do have in litigation, no real prospects of success strikeout applications and they are used frequently by the parties. The same is true I am qualified in New York as well, and the same as is true there. And I'm sure we'll get into the sorts of pros and cons of the availability of these types of procedures. They're obviously incredibly helpful when you're not forced to go through a trial of a completely unmeritorious claim or defence. But they do create time and expense of their own and they are tools that are available to defendants to delay the process that may obviously move on expeditiously. So, I think, as we think about how to integrate them into arbitration that's something that we need to keep in mind.

NISH SHETTY: Thanks, Sam. Ankit?

ANKIT GOYAL: Thank you. Okay, do you want me to share the thoughts on...?

NISH SHETTY: Singapore. I mean yeah. Go ahead.

ANKIT GOYAL: Alright, okay. So, I think as most of us know, SIAC was probably one of the first institutions to introduce the early dismissal. I think one thing that I will say Nish, before I share the comments from the SIAC, early dismissal provision. I think it's important to understand the distinction between something what Gourab and Sam spoke about in early dismissal. In that this is not early determination, which is what some other institutional rules provide. This is early dismissal. And the difference will come through when I discuss what the early dismissal and the SIAC rules is. So SIAC responded in 2016 to the need for having a mechanism where the Tribunals are empowered to actually look at some claims and defences, which are without legal merit or outside the jurisdiction. So, they've introduced this provision on early dismissal. Now, what is the early dismissal provision? It basically says that a party can apply to the Tribunal where either of the two things or both are there. One is either a claim or defence is manifestly without legal merit or the claim or defence, or the claim is outside or claim or a counter claim is manifestly outside the jurisdiction of the Tribunal. This provision

has been incorporated, and there is no shying away from it from the exit rules. And I think we can discuss that later time. But it's important to understand that it is manifestly without legal merit. It's not manifestly without factual merit. Manifestly without legal merit. And so, you can make that application you have to justify how either the claim or the defence is manifesting without legal merit or it's manifestly outside the jurisdiction of the Tribunal. And then after that, there are two stages or two steps. Step one is where the Tribunal first decides whether to proceed ahead or to reject the application. So, there's a filtering mechanism. And then if the Tribunal does decide to proceed ahead. It has to decide the application on early dismissal within a period of 60 days from the date of the application. So that's the process, and eventually the outcome is a decision where the arbitrator has to issue an order or an award on the thing. So, I would just make the pause here and leave you to ask me about statistics probably later, but it is imperative to understand you could be in a position where you are a party who has raised a claim or a defence, and it may be outrightly dismissed without your having the ability of having an evidentiary hearing and having the evidence tested. So, it is fairly draconian. Therefore, the circumspection and the question.

NISH SHETTY: Thank you, Ankit. Very, very clear. So, let's see where we've gotten to right. In essence, we've talked about the litigation process in India, in Singapore, in the UK. And the net result of that litigation process is, if there's either a claim, if it's a claim, then one applies to strikeout that claim on the basis that the claim itself is frivolous, vexatious, et cetera. Or if there's a defence that is an unsustainable defence on any view. It is plainly not a true defence then you summarily end the process there. And it's a final determination of that particular dispute, either the claim or the defence. Now that's been brought into the early dismissal process by the SIAC in roughly 2015, 2016. Now is that a good thing? Now let's park that question of, is that a good thing for the moment. And just examine is SIAC alone in this? Is this a sort of a Lone Wolf Syndrome on the SIAC's part or are there other institutions that have either done the same thing in the arbitral world or something similar? So, for that I'm going to request Sam to deal with exit, and also with the LCIA.

SAMANTHA ROWE: Sure, yeah. So, I'll start with the LCIA. I mean, I think the broad answer to your question is that yes, most of them now have and there's almost this sort of peer pressure I think that exists between the arbitral institutions, where one is an adopter of something that they think, users are going to like, and they all follow suit. So just starting with the LCIA, and the LCIA was actually a little bit of a late adopter of this. So, their early determination provision was introduced in 2020. It's actually not a standalone provision. It's included in the list of powers that a Tribunal has under the LCIA Rules. And that really aligns with the perspective under English law that being able to dismiss a claim, or a defence early is

really one of the inherent powers that a Tribunal has without there needing to be an express provision. The substance of the rule is very similar to the substance that Ankit just described for the SIAC Rules. So, it's manifestly without merit, manifestly without jurisdiction standard. Couple of differences, the LCIA Rules are silent on the process or the procedure that needs to be followed if one of these applications is brought, leaving the Tribunal with a fair bit of discretion in terms of how to handle it, including whether you would need to schedule a hearing and how much evidence you're going to hear in relation to the application. Another distinctive feature, although, I'm frankly unclear as to whether it's been used yet, is that the LCIA actually allows the Tribunal to make an early determination on its own initiative. So, you don't actually need an application from the party. I think it would be a pretty bold Tribunal that would sort of go out there and do this on its own on a whim. But we'll see if anyone has experience with that. I'd love to hear about it. So, I think it's reasonable to assume that the LCIA, the LCIA Tribunals facing these applications will adopt a pretty rigorous standard. It's based on the exit standard, which I'll come to in a second. And, of course, the English Courts look at whether there's no real prospect of success for the claim or defence. So, both of those suggest that Tribunals are not going to be quick to employ this power. So, over the last three years, no applications made in 2020 I am surprised that's the year the provision was adopted. 2021 there were 15 applications, and actually 7 of them were granted. Only 2 were rejected, and 5 were not determined that year. 2022 same number of applications were made. 1 granted, 5 rejected and 6 remain pending. I'm not really sure what to read into those numbers and why there's been such a shift from sort of welcoming applications to potentially not so much. ICSID, so ICSID actually was the very first institution to adopt an early dismissal for unmeritorious claims process. It's in Rule 41(5) of the ICSID Arbitration rules. And there the standard that is set out in the rules is manifestly without legal merit, which is the wording that we see pop up in the SIAC Rule as well. We've seen 415 applications being filed in 40 proceedings as of March 2021. Data is not particularly up to date. But that's about 5% of the proceedings that were filed in that time period. 7 Awards upholding the objections in full and dismissing the case in its entirety, 4 decisions partially upholding the objections and 26 dismissing them, which really gives a sense of how difficult it is to make one of these applications out. And Tribunals have taken the word manifest, and they've sort of said that that means that the objection must be clear, obvious, easily established, unequivocal. So really very very rigorous test indeed. And then this question about legal and what that means in this context. It means the Tribunals really do have to accept the facts alleged as true for the purposes of the application with potentially some exception for very frivolous, vexatious, improbable, plainly without foundation factual allegations. And then if based upon those alleged facts, there is clearly no breach of the applicable treaty or contract laws made out, then

the Tribunal can proceed to dismiss the claim. But that's a very quick tour of those two sets of provisions.

NISH SHETTY: Thank you, Sam. So, we've got 7 granted under the LCIA Rule since 2020. We've got another 7 under 41(5) of ICSID. Do we have any stats for SIAC, Ankit?

ANKIT GOYAL: Yeah, we do. I think funnily enough I had not looked at the exit in the LCIA statistics, but the SIAC, as of 1st September 2023, has received 64 applications for early dismissal. 33 applications were allowed to proceed. Out of the 33 applications, 11 were granted either wholly or partially. 15 were rejected, 1 was withdrawn and 6 are pending. I think if the question is early dismissal, is the arbitration world ready? I mean if I were to venture out and looking at these numbers, one would say probably yes, and I would not be surprised. I think I can speak from personal experience, given the number of arbitrations that SIAC receives within Indian element, that a fair amount of these involve an Indian party in it, and that the Tribunal has probably allowed the application to proceed. I will again make the distinction about early dismissal versus early determination which is critical because early determination is essentially a truncated trial with the possibility of an evidentiary hearing. And early dismissal is taking that right away and therefore bringing in the questions that we are dealing with.

NISH SHETTY: Thank you, Ankit. And the determination by the Tribunal is in a sense, the first part of the story. We'll come to the second part of the story as to what happened to those awards once they were made on a summary basis. Which I think is also part of this analysis. But let's come to that in a minute. Effectively, therefore, that on my math at least 25 different Claimants or Defendants or Respondents have had their day in well, not quite court, but arbitration truncated. So certainly, that's happened. And we need to examine if this is something that India should now embrace as well. So, hold that thought. Gourab, I'm going to be coming back to you on that in a second. Let me quickly address MCIA and MCIA Rules. The current rules do not have a provision of that nature. And just as a bit of an insight into the thinking of the MCIA at the time when the 2016 Rules, the first set of rules that MCIA put out the current rules SIAC's provisions the amended rules providing for this were out. So, we considered as part of the drafting committee, whether or not we should introduce it into those Rules. And we took the view at the time that India was not ready for it or at least MCIA was not ready to bring it into India. So, let's again examine that in a minute. But for the moment, another issue came out in terms of procedure. How one goes about making this application? And for that I'd like, Andrew, if you could kindly just talk about when such an application should be made? Now, obviously we're talking about the context where parties want summary

determinations so as to have an efficient process, a quick process, and to basically get rid of an unmeritorious claim or defence. So, with that when should such an application be made, and what's the procedure?

ANDREW BATTISSON: Thanks very much. I think on that question just a couple of preliminary observations. It's important. Although we've heard some statistics, what is clear is that this is a fairly an extremist measure. I mean, there's thousands and thousands of arbitration cases filed and only 25 have ended up going through successfully on the stats we have. And partly I think that's so that people can consider that the cure is not worse than the disease. And so, when you're contemplating this sort of application, you have to think to yourself for a start, is it too early or is it too late. So obviously, it's available to you at any stage. But unlike saying interim relief application, it doesn't have a requirement of establishing urgency about it. So, what you are looking for is, particularly if you're the one bringing the application is a neat set of facts, legal issue which clearly lacks legal merit and where you aren't going to be derailed by the other side being able to say no it's a mixed question of fact and law. We haven't got through the facts yet and therefore it would be wholly premature to make such determination equally. And so that mitigates against your sort of first response when you've received a request for arbitration, and you're outraged by what you see. And then just immediately firing something off in this nature, at least when it comes to the legal merit ground. If it's a lack of jurisdiction point that might be more obvious from the beginning and something that could then be dealt with and obviously SIAC in earlier iteration of the rules have had 28.1 and you've been able to work through that. And there are similar provisions in other well-known sets of rules. Equally, if you get through various stages of the process and then it becomes clear there is at least an issue, maybe an important issue that is manifesting, which basically means plain or obvious, is the sort of ICSID kind of Tribunals have reached that definition of what manifests means. Then you might also want to bring it then, partly because it saves time and cost from your own perspective, partly because it highlights the weakness, perhaps to the Tribunal of a particular element of the other party's case, whether it's defence or counterclaim or claim. And it shouldn't matter that the process has been underway for a period of time. Now, if you're very close, though practically speaking to a merits hearing or you can see the merits hearing coming, then obviously there's a real risk the Tribunal turn around and say no, we're just going to get to the merits hearing as quickly as possible and minimum delay and deal with it then instead, and I'm not going to sort of hit it off. But those are the kind of factors you might consider around timing.

ANKIT GOYAL: I just wanted to add one of the other interesting statistics that came across during my research for this was that 75% of the applications allowed to proceed were made

within 5 months of the Constitution of the Tribunal, and 0% of the applications were allowed to proceed if they were made after 10 months from the date of constitution of the Tribunal. So that sort of builds into the point that you were making.

NISH SHETTY: Totally. I mean if you're sort of three quarters the way down an arbitral process to then say, you want an early determination, almost is a non sequitur because it's not early if nothing else, it's not early. And given the due process concerns and that's what I want to now come to. One would understand, if a Tribunal said, look, we've come this far. We might as well give the party the day in court or day in the hearing and let's determine the merits that way. Now, I said the award itself, the early determination is the first part, and the second part is what happens thereafter. So, I'd like to touch on that now. Sam, how have the English courts addressed any challenges based on such early determination?

SAMANTHA ROWE: Yeah. So, the English courts have actually addressed this question in two cases. And just as a little bit of background, as I said earlier under English law it is sort of an accepted that this is probably one of the inherent powers of the Tribunal to issue an early determination on a claim or defence. There's nothing explicitly set out in the Arbitration Act. But the general duty of the Tribunal, the way it's set out is that on the one hand, the Tribunal must act fairly and impartially as between the parties giving each a reasonable opportunity of putting their case and dealing with that of their opponent. But on the other hand, the Tribunal must also adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense so as to provide a fair means for the resolution of the matters falling to be determined. And most commentators sort of accept that that combination of duties will allow Tribunals to use summary judgment procedures where appropriate. We also have Section 47 of the Act, which allows Tribunals to issue multiple awards at different times on different aspects of the matter to be determined and to issue awards on sort of parts of the claims that are submitted to it. So very appropriately, for our panel tonight, the first case in which this was discussed was Governor, Singapore, and Utah McGovern Steels Limited. A case between a Singapore and an Indian party in which actually the arbitrator refused to issue an award equivalent to summary judgment in a London seated arbitration. Instead, he ordered the buyer to make an interim payment of a certain amount of money to the seller. And Governor actually commenced proceedings under Section 67 of the Act, which goes to jurisdiction to challenge that Order. But one of the issues raised before the Court was whether summary judgment was available in international arbitration, and the court found that concerns regarding the lack of availability of summary judgment were unfounded. It relied on Section 47, which is that provision that allows a court to issue multiple awards and orders within proceedings. And it said that it was incorrect to suggest that relief, similar to summary

judgment, would not be accessible in arbitration in an appropriate case. So that takes us on to really the main authority on this point, which is Travis Coal Restructured Holding and Essar recent case from the English High Court. It was an enforcement action under Section 103 of the Act. ICC Award Tribunal seated in New York and applying New York Law, which had granted the Claimant's request for summary judgment. The Respondent challenged enforcement, said there was no jurisdiction to do this under the arbitration agreement or under New York Law. And also went on to say not provided for in the ICC rules, and that summary judgment is strongly disfavoured in international arbitration because it amounts to a denial of due process. The High Court rejected this argument and said, look, whether the procedure adopted by the Tribunal was within its powers and was fair, is the question that must be asked and answered. This is not a matter of these procedures being a denial of due process or not you've got to look at it in context. Looked at the arbitration agreement it looked at the Tribunal's procedure that had been adopted, which perhaps importantly and I'm sure we'll talk about this, included a hearing with oral testimony from witnesses of each of the parties and it concluded that in that case the Tribunal had not exceeded its powers. Both parties had a fair opportunity to present their case and enforcement was granted

NISH SHETTY: Thank you, Sam. Now, when Gourab first started speaking, he said that he didn't think there was going... I'm summarizing here obviously; he didn't think there was going to be a lot to speak about in the Indian context. What we've done in the last sort of 20 odd minutes or so, we've presented what the international context looks like. We're now going to put Gourab back on the spot and see whether his view has changed. Because due process concerns are obviously ones that get amplified and in the Indian context, is that going to be the case moving forward? Given that there seems to at least be a fair amount of international authority that suggests that this isn't a due process issue. It is an issue as to whether or not the Tribunal has the jurisdiction to do so, and to the extent that institutional rules provide for it, then ordinarily the Tribunal would have the jurisdiction to do so. Gourab, over to you. What are your thoughts?

GOURAB BANERJEE: So, there was one case from Singapore, which was an early determination case, which came to the Delhi High Court, and we were seeking to enforce the award and the other side did take the due process defence, but miraculously it settled. It doesn't happen in the Delhi High Court very often, but it did. So otherwise, I would have had a judgment to cite. But looking at it on principle, I think in the last three or four years, there's been a massive shift. You have PASL which permits two Indian parties to arbitrate outside India. You will inevitably have more New York Convention enforcements. Interestingly, completely sort of since everybody is into statistics, we did a study of how many foreign award

enforcements are pending, or how many such cases are there in the courts? In Delhi High Court, which is possibly the most... the High Court for Commercial Matters now subject to whatever Bombay says. It's only the third petition, which has been filed this year. So that's all. There aren't more than maybe 15 or 20 such enforcements filed in a year. But be that as it may. Now, the Supreme Court has in a series of judgments starting from Vijay Karia, Amazon, taken a very pro enforcement view. And I just wonder if I was on the other side, what sort of defence you take. So obviously, you would go to the New York Convention, you'd go to Section 34. You would have those specified defences under Article 5, that's all you would have. And there you would take a natural justice defence. Maybe the other possibility is that it's not part of the rules what Sam mentioned, but that will also not work because in Amazon, though emergency awards were nowhere in the Act the fact that they were part of the SIAC rules was good enough for the Supreme Court to sustain the award. That was a domestic award by the way. That was not everybody thinks Amazon future is seated outside India. It's a domestic award. So anyway. So, I would think that the mood in the highest court would be to get around due process paranoia and grant the enforcement. But the fact is that depends on where the enforcement starts. If it starts in Delhi High Court or Bombay, maybe it's a different dynamic. If it starts in another High Court where you tell a judge look, well, I really haven't had a chance to meet the case. I think then it could be fitted into one of those Article 5, grounds, I think, denial of natural justice. So, yes, it's an open question. I think you might have to run the gamut, but I think ultimately going out on a limit. It will survive and it will be enforced.

NISH SHETTY: I can see that Niti, is taking this down quite deliberately. So, we've got at least one senior advocate saying that it should be okay. So, when we're considering the rules, we should certainly take that on Board. But look...

GOURAB BANERJEE: But on the rules, we've discussed LCIA. We've discussed all these were exit. These are all 2015, 2016, 2017. But we are an UNCITRAL model. So, we are... so our act is based on the UNCITRAL model law. The UNCITRAL working group is debating the language to be used in formulating such a rule, and I will read that out. And the reason that I mentioned this is since you are now in 2023, please don't just look to exit or the LCIA's format. The UNCITRAL rules are much more detailed, and I will read them out. And we and I'm incidentally part of a committee which is thinking of which is looking into the reform of the Arbitration Act here in India. And we are looking at the working group and we might use this language to some extent. We're thinking about it. I mean, it's very difficult to convince some of the committee members who are... shall we say a little conservative. So, I'm not going to say more about that. But I'll just read out the Rule, which is proposed, at the moment it's still under discussion. And interestingly India was a founder member of UNCITRAL, and we really

not participating. So draft Provision 18. Plea as to merits and preliminary rulings. A party may raise a plea that (a), a claim or defence is manifestly without legal merit. This is one possibility. (b) Issues of fact or law supporting a claim or defence are manifestly with merit. (c), Very clunky language and evidence is not admissible. (d), No award could be rendered in favour of the other party, even if issues of fact in law supporting a claim or defence are assumed to be correct. Something like our 7-11. Party shall raise the plea as promptly as possible, no later than 30 days. Then this is the most interesting part, the party raising the plea shall specify as precisely as possible the facts and the legal basis for the plea and demonstrate that a ruling on the plea will expedite the proceedings, considering all the circumstances of the case. After inviting the party's arbitral Tribunal to determine within 15 days whether it will rule as a preliminary question, and then within 30 days they will rule. So, this is one model which the MCIA might consider, and we are considering though I'm not sure how far we will get.

NISH SHETTY: Thank you for that Gourab. I think if the model law is introducing that and to the extent that that then results in amendments to domestic legislation, including the domestic legislation in India, that adopts the newer version of that. I think institutions and arbitrators arbitrating on the rules of institutions would feel comforted by the fact that the legislative framework gives them the power to do what is otherwise something that they can do pursuant to the rules themselves. So, I think that will be an incredibly powerful move and to the extent that I certainly would welcome that. But maybe that's the question that I want to pose. Now, for the members of the audience, we've deliberately decided that we're going to have our panel end with at least ten minutes left for questions. So that we can have a lively debate. So, I'm giving you due notice of that fact. But I'd like panellists to just chime in with your thoughts on whether this is a good development. Whether it should be moderated modulated, and we will go from that? Ankit, do you want to go first?

ANKIT GOYAL: So, I think it's definitely a good development, but I think caution needs to be. We all need to be cautious. And I think what's important over here is not to bite more than we can chew. I say this because and you spoke about the cure analogy. But the fact of the matter is that if there are too many elements available where you can make an application for early dismissal, where evidence is without merit of without facts or without merit. So then where are we stopping? You eventually have to look at balance the fairness and efficiency element and make sure that the application is not being used as a strategic tool to derail the arbitration process. So, I think that's probably really important. The second thing that I would say in the context of India and probably my suggestion to MCIA, probably a good idea, having not introduced it in the first version of the Rules. Certainly, a good idea to look at it now, but I would urge the MCIA to look at the scope of where it's available. But more importantly, do

more to train arbitrators. At the end of the day the awards that will come out on early dismissal will be enforced or will be looked at in a fair light if the arbitrator has applied itself, has looked at the provision, has assessed and said yes, this is without legal merit and then gave an award. So, I think it's probably part of what an institution must do. And I think MCIA is probably already doing it. But I think it's part of the growth of the ecosystem, which is not only to have the institutional Rules introduce a provision but have the supporting community around it also educated on early dismissal and how this sort of operates.

ANDREW BATTISSON: Maybe just three quick comments on that. I think the first is when the SIAC brought this in in 2016 in its form in its rules. And it wasn't so much the driver that well, it was something that was in ICSID rules. It was actually the user feedback, particularly for financial institutions in the Indo Pacific, was big users of arbitration, growing users of arbitration, but very much liked summary judgment available under the various court systems we've discussed. And so, this was an attempt to address that issue to encourage the use of arbitration. And so, it forms a very important niche for those elements and one that's of growing importance in India, as well. That's the first point. I think the second point, to echo Ankit, have to be very careful what's your enforcement strategy. Would I... even if I was facing let's say I was bringing a claim, and it was an Indonesian party on the other side and enforcement was going to be in Indonesia, even if it was no defence, let alone one manifestly lacking merit. Would I really want an early dismissal process? Probably not, because that would cause significant problems at the enforcement stage. And then finally on what Gourab, had said about sort of dealing with facts. There is a line of case law coming out of ICSID that deals with what's described as the plausibility exception, which is that a factual argument can be made that is just manifestly incredible. Because I think the phrase which just is either made in bad faith or is just designed to effectively align and there is a couple of cases that see through that and say, well, we're not going to get derailed by that. We're going to carry forward with our early dismissal. And I think that kind of rigor with proper training for a Tribunal would be helpful.

SAMANTHA ROWE: Yeah, I agree with absolutely everything that's just been said. I think if you take sort of an enormous step back and you think about arbitration and how it's supposed to work, we almost shouldn't need this. We shouldn't need to be talking about this. We shouldn't need these explicit provisions in Rules, because what you ideally have is an engaged Tribunal from day one that is devising the procedure that is most appropriate to resolve the claims and the defences and the issues before it. Whatever it is that that looks like but we're not there. And so there absolutely is value to explicitly authorize Tribunals to do something that probably in all of our jurisdictions they could do through their inherent

powers. And I can certainly say to my own experience of sitting as an arbitrator in some of the expedited proceedings that are allowed onto a number of institutional Rules, you do feel comfort from the fact that the rules explicitly say, “oh you don't have to have a hearing.” You do not have to order document production. It can be quite difficult to say no to those things in the English tradition. And having that explicit authorization is incredibly helpful. I think the SIAC filtering option, I think that is great. And I was really interested in the statistics actually as to how many hadn't made it through that initial gate. So, I think that's definitely something to keep in mind as a way of controlling this for the reasons that Ankit said. And then finally, I think if you look at the courts and how they deal with this, there's two gates, right. The strikeout and then the summary judgment. And where do you want to be. Do you want to have the ability to have either of those, both of those, just one of those? Do you need to have a hearing? Strikeout is usually on the papers. I think again it's a very bold Tribunal that would say absolutely no hearing at all, that whether or not you have evidence, whether or not you have witnesses, you have experts, that's a different question altogether. So, we've used this early dismissal terminology but that actually is a bit of a broad charge that can encompass a number of different things.

NISH SHETTY: Thank you very much all three of you. Now I'll just end with my perspective on this as well. Okay, if I may? I think I agree with all of that. I'm actually at the moment leaning in favour of introducing it in some shape or form. I think the cautions that have been administered are valid. The one personal concern I have is whether this becomes deriga, meaning it becomes the part of every arbitration. So, the client says, you know what, give it a go. What's the worst that will happen, it'll get dismissed. And if that happens, then the original objective of having a quick and speedy resolution may go out the window and what you end up is a mini trial. The early stage of proceedings before disclosure, before a lot of these things happen. So that's the slight concern I have, and I wonder whether the filtration process, if I call it that or the filter process is one way of addressing it. But certainly, overall, I am still leaning towards introducing that sort of a provision into the various rules, and in favour of that. But I will now open it up to questions from the floor. There's one right there gentleman. If I could just trouble everyone to just identify yourself very quickly and ask your question.

AUDIENCE 1: I am [UNCLEAR] from Goa. Two questions. One is, is a summary dismissal disposed of by way of an award or an order? One. And second is, does it go to admissibility issues for example, if there's a DB provision in a construction contract and party skips that and invokes arbitration? Would it go to manifestly without legal merit?

ANKIT GOYAL: Okay. So, to the first question, the SIAC rules give the discretion to the Tribunal on whether having an order or an award, probably on a request of a party. So, both are available. On the second question. That's a very good question. I have got information that there was one Tribunal that did in fact exercise its discretion under 29(1)(2), which is essentially manifested without jurisdiction on issues of admissibility. Personally, I'm not entirely sure and as some of us or all of us probably know, issues of jurisdiction are different than issues of admissibility. Issues of jurisdiction impact the Tribunal. Issues of admissibility impact the claim. So, non-compliance with preconditions to commencement of arbitration, I would be very circumspect about essentially passing an order under early dismissal. But under ICSID, I am told, ICSID Tribunals have taken a view of essentially passing orders on admissibility. I personally would be very wary of doing it under the SIAC rules, but that's my view.

SAMANTHA ROWE: Just to note that LCIA rules actually explicitly say that admissibility objections are covered, so manifestly inadmissible claims can be struck out. And on your first point, I would just ask if you need it to be an award because you want to go and take it to a court somewhere then I would just make sure my request for relief, I was very explicit about the form I wanted it to take.

NISH SHETTY: To some extent, you also want to take into account the enforcement of that particular award or order right in certain jurisdictions you can enforce awards, but you can't enforce orders.

ANDREW BATTISSON: Yeah, and the preclusive effect that it is.

NISH SHETTY: Yes exactly. I saw a hand right at the back, yes.

AUDIENCE 2: Hello, hi, everyone. Thank you to the panel for very enlightening discussion on this topic. My name is Ali. I'm an associate at Link Leaders in its London office. I think the panellists pointed out three key issues with early dismissal already. First being the filter, the second being that it's an antithesis to the whole process and the object of operation that is, speedy resolution. And third to the end Nish mentioned the enforcement. Given these very strong reasons for not having an early dismissal process at all. Do you think that including it would mean the complete death nail for arbitration? Because that would mean that no party would actually prefer any kind of rules that permit an early dismissal process.

ANKIT GOYAL: Okay maybe we can take this offline, but I think maybe we've been misunderstood. I think well... let me just say this from a very practical perspective. Early dismissal plays a very important practical role in that there are, in fact claims or defences which are... can be dismissed with ease and dispatch one of the languages used in ICSID, which are manifested without legal merit. So, if there is a certain element of manifesting without legal merit or manifested outside jurisdiction it is worthwhile to have that provision. The filtering process makes sure that unmeritorious applications don't proceed. I don't think it will be a death nail. I don't think it has impacted the I mean certainly from SIAC perspective, I would certainly be one of those people who was slightly unsure when they were introduced, but I think the rule has not faced any sort of pushback. There has been sort of acceptance. 64 application the last 7 years. So, I would say that it is a rule here to stay. And I think that parties want it, and they desire it. And I think the institutions should adhere to the parties.

NISH SHETTY: Let me just come to you, just 1 second. Let me just illustrate what Ankit just said about the desire of the parties and link it to what Andrew talked about from a financial institution perspective. Now what Andrew is referring to was banks, for example like summary judgment processes through litigation. Because if there is a loan and there's a non-payment of that loan, you can go to court and say, here is a loan. There's no debate about the fact that there is a loan. There's no debate about the fact that there is non-payment. We don't need it to go through a long trial. Give me summary judgment. And it's the end of the matter, right? Now, if we can replicate that in that sort of a scenario where there's clearly no defence and arbitration can do what litigation can do, then you're giving that user or that potential user an avenue that user has in the litigation process. So, I think that's really what we're talking about. The gentleman right in front. I suspect yours is going to be the last question, but could you identify yourself?

AUDIENCE 3: My name is Rupesh. I just wanted to understand can there be a dismissal of a particular claim out of multiple claims in an arbitration if something is apparently either beyond contract or it is beyond limitation? Is it permissible?

ANDREW BATTISSON: Yes, in short. So, you can certainly dismiss particular issues or particular claims and then let the balance run for reasons we touched on. You may wish to do just that to help improve the efficiency or to lead to a preliminary issue taken on something else. There are numerous, I think tactical reasons why I might want to do that.

ANKIT GOYAL: Unfortunately, this information that I'm going to give was not available in public domain. But I think one thing that's important to understand to the point that was made

earlier is that early dismissal and provisions like that in fact, often aid early settlement of disputes as well. Some party raises a counter claim of $250 million and if you can actually get 200 million of dollars of that counterclaim dismissed then parties get a fairly early opportunity to reassess their case. And that does, in fact, lead to settlement. When Emergency Arbitrator was appointed introduced in the SIAC Rules in 2010, people... Indian parties were the biggest users. Indian litigation is a fight for the interim order. How many emergency arbitrated cases have resulted in settlement. I would say that early dismissal does a similar sort of service to the commercial community to aid early settlement.

NISH SHETTY: Thank you, Ankit. And on that optimistic note we're going to end. Thank you. Please thank the panel in the usual way. Thank you all.

~~~END OF SESSION 6~~~